DR. JAUNIUS GUMBIS

# LEGAL REASONING:

## A REALISTIC APPROACH

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*Ecce homo*

DEPARTMENT OF PUBLIC LAW
VILNIUS UNIVERSITY FACULTY OF LAW

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# A REALISTIC APPROACH

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*For failure to grasp the boundaries of legal reasoning, or for want thereof,*
*we feel fear and experience the beauty of this discourse...*

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# CONTENTS

14 FOREWORD

17 UNDERSTANDING

18 The Conception of Legal Consciousness

21 The Structure of Legal Consciousness

22 Legal Consciousness and Ecology of Law

24 Dimensions of Understanding Law in Consciousness

26 Legal Consciousness and Boundaries of Law
28 The Connection between Attitudes and Behaviour
29 The Connection between Paternalism and Autonomy
32 Possible Restrictions of the Autonomy of the Human Being
34 Public Morality and Boundaries of Law
36 The Lawmaker's Importance in Adequately Entrenching Moral Beliefs
38 The Human Being's Freedom

41 Common Sense
43 The Conception of Common Sense
48 The Cognitive Process of the Human Being
53 Problem Aspects of Operation of Common Sense
55 Common Sense in Trials

60 Reasoning and Arguments in Law
60 Concepts
61 Arguments and Reasoning
62 Arguments
65 Reasoning in Court Judgment
66 False Reasoning
67 Legal Reasoning
69 Appropriate Reasoning
69 Analogy of Law and Argumentum e Contrario
71 Boundaries of Factual Reasoning
71 Artificial Intelligence and Legal Reasoning
74 Law as Factual Argument
75 Tangible Arguments and Sources of Law
75 The Importance of Reasoning in Court Judgment

77 Efficient Style and Principles of Legal Reasoning
80 Sources of Legal Reasoning and their Interaction with Principles
82 Models of Arguments and Enforcement of Principles

87 The Dilemma of Legal Reasoning: the Relationship between Knowledge and Truth
87 The Idea of Certainty
90 Legal Information: Relative Reliability
92 Legal Reasoning: between Coherence and Epistemology

98 LEGAL THINKING

101 Assumption of Phylogenetic Evolution of Legal Behaviour (Categories of Thinking)
101 General Conception, Qualities, and Significance of Thinking
103 Psychology of Thinking
105 Thinking processes
107 Components of Thinking
112 Thinking, Opinion, Conclusion, Understanding, Surprise
114 Individual Differences of Thinking
115 Legal Thinking and Analogy
116 Thinking and the Standard of Reasonable Man
118 Thinking with Desires
120 Causality and Imputation
122 Thinking, Motivation, Consciousness, and Will

124 Exercise of Logic
125 Opportunities and Boundaries of Exercise of Logic
127 Logic and Legal Reasoning
128 Syllogism in the Application of Legal Norm
133 Logic in the Application of Judicial Precedent
136 Logic and Abuse of Law
137 Logic and the Interpretation of Legal Norms

143 Sense of (in)Justice, a Condition for Social Effectiveness of Law?
144 Importance and Studies of the Sense of (in)Justice
146 Interpretations of the Content of the Concept of the Sense of Justice
150 Philosophical Analysis of the Sense of Justice
154 The Structure of the Sense of Justice
156 Psychological Analysis of the Sense of Justice
156 Factors Affecting Behaviour and Assessment of Phenomena
159 The Action Mechanism of the Sense of Justice
162 Implications of Injustice Subjectively Perceived
165 Interaction between the Sense of Justice and Application of Law
168 Sense of Justice – What is it Like?

170 LINGUISTIC EXPRESSION OF LAW

172 Three Approaches to Language of Law
172 H. L. A. Hart's Theory
173 L. L. Fuller's Criticism of H. L. A. Hart, and His Interpretation of the Legal Norm
174 L. Wittgenstein's Philosophy of Language
176 J. L. Austin's Theory of Speech Acts

177 Language of Law as a Creative Process

178 Emotional Significance of Words and Language of Law

179 Specifics of Language of Law

181 The Relationship between Law and Language
182 Law and Language: the Historical Motive
183 Rhetoric and Exegesis
187 Basics of Linguistic Philosophy
187 Hermeneutics
191 Connection between Linguistics, The Science of Law, and Legal Semiotics
197 Alternative Opinions: Sociolinguistics, Social Discourse, Law as Social Discourse
200 External Description of Legal Language

204 COURT JUDGMENT (LEGAL DISCRETION)

205 Legal Discretion: the Theoretical Approach
205 Conception of Discretion
208 Advantages of Discretion
212 Discretion and Rules
215 Restriction of Discretion

219 Legal Discretion: the Social Approach
219 Discretion and Social Factors
221 Significance of the Parties to a Case to Discretion in Administering Justice
225 Discretion in the Context of Human Sociability
229 Discretion in Terms of Behaviour

230 Psychology of Decision-Making: Psychological Elements of Decision
231 Rational Decision
236 Limits of Rationality

254 REFERENCES

# FOREWORD

Legal reasoning is an intellectual process that a Human Being engages in. It is considered to be a separate form of general reasoning[1]. The importance of reasoning in law is self-evident: the position of the legislator, judge, lawyer, researcher of law on a particular matter of law needs to be backed up with reason for it to be understood and recognised[2]. One form in which this process comes into existence is a judicial decision that cannot be right only because it was made by a judge. The judge makes the decision on the basis of law and the case file and the evidence and arguments that it provides, and the process of understanding and presenting these categories is what legal reasoning above includes.

Legal reasoning is but a notion and not the definition of the above process in its own right. Legal reasoning is justice supported with propositions, and this means that law is devoid of attitudes that are absolutely right or wrong at all times. That is why we should approach legal reasoning not just as an art of presenting legal facts, phenomena, categories, but as a science of understanding the essence of these things as well.

Legal reasoning aims to plumb the depths of the nature of law, that is why it is described as an ability and possibility to explain, persuade, grasp, validate law and the facts of life that relate to it. What matters is not only the rhetoric expression of legal reasoning, but its essence as well – the ability to understand, think, discuss, and decide. We imagine that law objectively contains a certain rational sequence of thought and words that is a key to validating law's 'theory of everything'. However, there is no uniform standard legal reasoning – every single real-life situation of our daily life, no matter how mundane, leads to a different reasoning.

1 FETERIS, E. T. Introduction. In FETERIS, E. T., *Fundamentals of Legal Argumentation. A Survey of Theories on the Justification of Judicial Decisions.* Springer Science + Business Media Dordrecht: Amsterdam, 1999, p. 2.

2 *Ibid.*, p. 1.



From a post-modernistic approach, modern law is not a value that exists on its own. Law, truth, and justice in many cases can constitute subjectively different and independent categories of law. In many cases, there is no such thing as the only solution, however judges sill have to come up with a particular verdict regarding a specific situation that is very likely to be questioned by the public later. Therefore law, uncertainty its natural state of being as likely as not lately, has to earn the trust, respect of and command authority among Human Beings – these things become inseparable from the need for a judge to adequately reason their decisions, i.e., to convince the parties to a dispute and the public of the equity and appropriateness of your decision. Both the decision and the choice have to be adequately reasoned by the judge.

We have to understand this axiom: there is no such thing as a non-negotiable non-arbitral principle, proposition, rule, or norm. The eclectic nature of modern law and the ever-increasing amount of legislation forces us into admitting that being knowledgeable in all the laws, the practices of their application, and putting it all into a consistent system is ceasing to be a possibility. As a result, law has to first of all follow the road of reasoning rather than that of setting up norms and regulations, and appropriate accentuation of the quality of law without succumbing to the reality of quality is a must. In terms of the latter, we have to be discussing the ecology of law as an objectively necessary and existing reality rather than a discourse of the science of law.

For the aspects covered above, law can be perceived as a complicated and complex intellectual entirety of legal, factual, philosophical, economical and other categories. This kind of situation reveals the fear and the beauty of the legal mystery, which finds embodiment in two parallel phenomena: the quest for clarity and the inability to grasp the boundaries of law. Thanks to the many elements of law, achieving absolute clarity in law (and hence in legal reasoning) is an impossibility. This is what reveals the true beauty of law and creates respect for it.

Considering the above, legal reasoning with its many elements does not exist in a singular form, but we can identify the following aspects of it:

*First,* legal reasoning is a Human activity expressed as the understanding of a particular situation by a particular Human Being, their way of thinking, linguistic expression, and making the decision. It means that even in law, objectivity takes a form of subjectivity. Legal reasoning in the process of law is understood as the linguistic activity of Human Beings in various situations. The inseparability of the objectiveness of legal reasoning from the Human Being is the reason why this latter term has to be capitalised, highlighting, at the same time, that within the meaning of legal reasoning the word 'court' is to be substituted with the word 'judge'. When it comes to legal reasoning, we have to see how many intellectual skills and abilities are covered by the phrase 'Human Being'.

*Second,* for law to earn the trust of and have authority among Human Beings, the need for the quality of legal reasoning objectively comes into existence. Therefore we have to abide by intellectual criteria, even in our daily legal reasoning.

*Third,* in the light of the increasing flows of information and the growing pace of processes, when it comes to making a decision, the time to process a certain amount of information and to make the decision is really short indeed. This situation with the modern law implies that legal reasoning is understanding, rather than knowing, how the decision-making strategy should be structured the right way.

*Fourth,* law exists in dispute, discussion, discourse[3], and therefore the field of legal reasoning must recognise and apply ethical norms.

Certain archetypes can be identified, stemming one from another and defining legal reasoning. The following categories should be identified in the synthesis of these archetypes: *understanding, thinking, linguistic expression, and decision.* These categories are starting points in tracing certain minimum boundaries of legal reasoning and discussing other aspects related to it.

The purpose of this work is to analyse legal reasoning in the structural context of these categories and to look for answers to the related underlying questions. That the analysis of the intellectual process in question is being done as a dissection of the categories that constitute the cognition of the Human Being is indicative of the enormous role the Human Being plays in legal reasoning. The Human Being is the fundamental starting point of the analysis of legal reasoning.

In some cases, it may appear that as it recites the realistic approach to legal reasoning, this work omits the definitions or explanations of some critical categories. Indeed, for the purposes of said analysis, one quite often has to abandon legal curtesy expressed through an objective presentation of all possible aspects of legal reasoning for the sake of pleasing the audience. This, however, is done on purpose because the understanding of these elements may be affected by the context, which would make describing or explaining them thoroughly a highly difficult task indeed. Still, the limited ability to perceive and explain certain aspects that are critical to the process of legal reasoning does not mean that they should not be investigated, going for a range of hard questions that this work really has plenty of. This work does not aim to achieve complete clarity: the theory that follows is primarily designed to spark a vast, rich, and meaningful discussion of legal reasoning.

3 Discourse is a dispute in its broad sense (e.g., see NEKRAŠAS, E., Pozityvizmo ir postpozityvizmo ginčas socialiniuose moksluose. *Politologija,* No. 1, pp. 76–97, p. 91).





# UNDERSTANDING

Legal reasoning begins with the category of understanding (perception). A thorough understanding of rich science is the basis of our expression and creative reasoning. Lawyers are moulded by the understanding of law since law is a science of understanding rather than knowing.

The Dictionary of the Modern Lithuanian Language defines consciousness as the 'understanding of the world and one's existence in it that is typical to the Human Being'[4]. The science of psychology indicates that consciousness, which is considered to be the higher form of the psyche, is only characteristic to the Human Being[5]: 'it is an open and real connection between the Human Being and the reality, one that allows getting to know the natural and social environment and to adjust one's behaviour.[6]'

Considering the above, both passive and active reaction to reality constitute our own consciousness-driven actions. 'I want to be happy inside' is not something we would say, but it is our ultimate goal. This goal is the basis of our original attitude[7]. What is the location of that original attitude inside us? How does this attitude affect my understanding of what law is? We could ask ourselves a question: What is the quality of my internal perception of law? However, we cannot understand the degree of our legal expertise until we know what the legal realm is, and *vice versa*.

4 *Dabartinės lietuvių kalbos žodynas.* KEINYS, S. (editor-in-chief), Vilnius: Mokslo ir enciklopedijų leidybos institutas, 2000, p. 673. Online access: <http://lkiis.lki.lt/dabartinis;jsessionid=1E51F7408B08AC95D8C2AE66C6335092>.

5 LAPĖ, J.; NAVIKAS, G. *Psichologijos įvadas.* Vilnius: Lietuvos teisės universitetas, 2003, p. 7.

6 *Ibid.*, p. 7.

7 For the purposes of this work, attitude is perceived as a 'conviction and feeling preparing us to react to things, people, and events in one way or the other' (MYERS, D. G. *Psichologija.* Kaunas: Poligrafija ir informatika, 2000, p. 633).

In order to understand something, we have to begin with recognition and identification. How do we recognise the categories of law? Where is the limit of law, and where is it not? Perception is the goal of thinking. We also think to be able to perceive things. Or does perception clash with thinking? Perception, thinking, the expression of these things (language), and making the decision – these are separate categories, but they all act as one whole.

Identification and cognition are very important in legal activity for us to be able to convey our thoughts or explain our position to others. How does this identification work, where does it begin? It is an extremely difficult question for there is no correct point of reference. We choose one every time. If our identification lacks in quality, the quality of our perception, thinking, linguistic expression, and decision will (most probably) be just as poor. There are many questions relevant to this topic. For instance: Is our consciousness a product of some external side-effect? Does our environment shape our legal consciousness in a quality way? Is consciousness something that is defined by an external element, a factor that is independent from us? How much can our consciousness predict? Do we presume how we will understand certain things in the future? Understanding co-exists with cognition. Which leads to a question: To what extent is our consciousness cognisable? This raises the question of objectivity as well.

Said questions and assumptions give relevance to the need to first address the category of understanding from the viewpoint of legal reasoning.

## THE CONCEPTION OF LEGAL CONSCIOUSNESS

In its broadest sense, legal consciousness can be perceived as encompassing all of the ideas of the nature, function, and action of law[8] that a member of the society may have at any given time. Analysis of legal consciousness may help one understand how individuals perceive and interpret law through involvement in or avoidance of or opposition to law[9]. Still, legal consciousness is often addressed in terms of conception, leaving the question of *What is the meaning, process, mode of operation, and possible consequences of legal consciousness?* unanswered.

As already mentioned, the Human Being's understanding that forms the basis of consciousness is not always objective. And therefore legal consciousness is a perception that, in addition to knowledge, it is also based on emotional attitudes and experience. From the viewpoint of the sociological school of law, legal consciousness can be construed in two ways[10]:

1. legal consciousness has to help answer the fundamental questions of law and to determine how people perceive the official law[11] (this has to do with the *law in action* stance developed by Roscoe Pound[12]); or
2. legal consciousness is that what people perceive as law, regardless of the official law[13] (this has to do with the *living law* stance developed by Eugene Ehrlich).

The two stances aim to repudiate the entirely positivistic conception of law and show that law is more than just a set of rules issued and interpreted by competent entities. According to Pound, there is a difference between rules geared towards regulating peoples' behaviour and those that actually affect said behaviour[14]. Said author claims that it is the latter rules rather than the entirety of norms of positivistic law that should be considered law, and therefore, in making judgments, courts should consider the norms and principles that the society recognises[15].

Whereas Ehrlich believes that positive law constitutes *norms for decisions* that enable the state to give instructions to its courts and other entities authorised to make judgements as to how they should handle their cases, as well as directions to administrative bodies of how cases should be heard[16], this author believes that, rather than rules imposed by competent authorities, law constitutes the provisions of the social order that gain 'cultural reception'[17].

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8 TRUBEK, D. Where the Action Is: Critical Legal Studies and Empiricism. *Stanford Law Review,* 1984, No. 53, pp. 575–622, p. 592.

9 SILBEY, S. S. Legal Culture and Legal Consciousness. In *International Encyclopedia of the Social & Behavioral Sciences.* New York: Elsevier, Pergamon Press, 2001, p. 8626. Taip pat žr.: TAMANAHA, B. Z.; SAGE, C.; WOOLCOCK, M. *Legal Pluralism and Development Scholars and Practitioners in Dialogue.* Cambridge: Cambridge University Press, 2012, p. 71.

10 HERTOGH, M. A. 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich. *Journal of Law and Society,* 2004, Vol. 31, No. 4, pp. 457–481, pp. 474–475.

11 *How do people experience (official) law?*

12 POUND, R. Law in Books and Law in Action. *American Law Review,* 1910, No. 44, pp. 12-36, p. 14.

13 *What do people experience as 'law'?* (HERTOGH, M. A. 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich, pp. 457–481, pp. 474–475).

14 POUND, R. Law in Books and Law in Action, pp. 12–36, p. 15.

15 *Ibid.,* pp. 35–36.

16 WALSH, J. Sociological Jurisprudence. In MURPHY, T. *Western Jurisprudence.* Dublin: Thomson. Round Hall, pp. 168–211, pp. 190–191 in E. Ehrlich, Fundamental Principles of the Sociology of Law (W.L. Moll trans., Harvard University Press, Cambridge, Mass., 1936).

17 *Ibid.,* p. 191.

The key difference between said positions is that in his definition of law, Pound considers the behaviour of the legislator, judge, lawyer, and other persons involved in the field of law. Whereas Ehrlich focuses his attention on the behaviour of people from social associations both inside and outside legal institutions[18]. In his opinion, trade organisations, ethnic and religious communities, families, and other groups possessed of an internal order that is not imposed on them by the authorities, exist next to said associations with their formal legal nature, just like that of trade unions and business entities[19].

After we have discussed the nature and action of the consciousness of law that may be perceived as every member of the society's ideas about the existing law, we come upon the question of what factors allow such ideas to be born. There are different positions in that regard.

One position is that legal consciousness consists of ideas and views of individual members of the society, providing a basis for institutions and legal practice to take shape[20]. Another stance describes legal consciousness not as a factor that allows institutions to be formed, but as a by-product of the interaction of social structures[21]. It is based on assumptions that legal consciousness is basically defined by other social factors and it takes shape as their consequence. Under yet another approach that merits an individual mention, legal consciousness is considered to be 'cultural experience', or rather its product. This approach implies that legal consciousness grows out of the cultural space of an individual in which he or she lives, but at the same time, it is driven by the personal experience of every man[22]. It means that subjects often perceive law through their own experience and that of other Human Beings around them: instead of engaging in a theoretical analysis of regulators and institutions, they get to know the legal reality in an empirical way, shaping their responses through that prism.

18 HERTOGH, M. A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich, pp. 457–481, p. 473 *in:* TAMANAHA, B. Z. An Analytical Map of Social Scientific Approaches to the Concept of Law. *Oxford Journal of Legal Studies,* 1995, Vol. 15, Iss. 4, p. 517.

19 WALSH, J. Sociological Jurisprudence, pp. 168–211, p. 191.

20 SILBEY, S. S. Legal Culture and Legal Consciousness, p. 8626.

21 *Ibid.*

22 TAMANAHA, B. Z.; SAGE, C.; WOOLCOCK, M. *Legal Pluralism and Development Scholars and Practitioners in Dialogue,* p. 71.





Legal consciousness is often approached from a qualitative angle based on the structure of the legal consciousness of a certain era and certain stakeholders. The exploratory approach to the structure of legal consciousness can be illustrated with the proposition that the structural elements of legal consciousness are 'cultural matters from which legal meanings are shaped, proliferated, absorbed'[23].

In this respect, the theory of the Estonian scientist Silvia Kaugia becomes relevant. It distinguishes three elements of consciousness[24]:

1. legal knowledge;
2. social legal attitudes, of which emotions play the biggest role for the legal consciousness of an individual;
3. behaviouristic habits, of which readiness for legal behaviour is identified as the most important for the legal consciousness of an individual.

This type of breakdown of consciousness allows one to understand that legal consciousness is not based on legal knowledge alone. Emotional attitudes and feelings play a very important role here. At the same time, our own experience, which substantially affects the way consciousness works, is yet another inseparable part of legal consciousness. This approach to legal consciousness could be seen as realistic, backed up by the personal experience of an individual, too.

Emotions, feelings, and experience are the subjective elements of legal consciousness. Emotions are often defined by impulsiveness, instinctive and short-lived response to the current legal environment[25]. Legal consciousness is passive by nature. In this context, the element of behaviour is used not as an external expression of some legal consciousness, but as an advance qualitative attitude of the Human Being to future behaviour. In other words, it is the Human Being's leaning towards one or another response to law.

Emotions as a subjective element of legal consciousness are affected by the available legal information, which can drive a change in said elements. Legal knowledge is broken into:

1. knowledge of legal regulation;
2. knowledge of methods of analysis and interpretation of legal regulation;
3. personal 'legal' experience.

23 FEIGENSON, N.; SHERWIN, R. K.; SPIESEL, CH. O. Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law. *NYLS Legal Studies Research Paper,* 2005, No. 05/06-6.

24 KAUGIA S. Structure of Legal Consciousness [interactive]. [accessed on 1 August 2017]. Online access: <http://www.juridicainternational.eu/index.php?id=12433>.

25 PALUJANSKIENĖ, A.; JONUŠIENĖ, D. *Psichologijos pagrindai.* Mokomoji knyga. Akademija, 2010, pp. 25–26.

Still, objective legal knowledge is often groundlessly perceived as an absolute factor, the key element of formation of legal consciousness, one that determines all the rest. Kaugia notes that offenders are exceptionally knowledgeable in law, but that does not put them off violations; quite the opposite, it is often even a kind of incentive to commit crime[26].

Contrary to how they may appear at first glance, the Human Being's emotions largely determine the development of legal knowledge. It is the primary attitude towards law in the consciousness of the Human Being – the attitude that determines how important and interesting law is – that results in a decision, whether to look for legal knowledge, to accept, ignore, store, analyse, or dismiss it. Behaviourist attitudes also define the motives to collect such legal information, which are to get to know the legal reality and to adapt to it (or adapt it to yourself), to get to know the legal reality to circumvent it, violate legal regulation in order to analyse it and perceive its nature, and so on.

Considering the above and contrary to popular belief, the meaning of the objective element (that of legal knowledge) and its influence on the self-resolve as a possible consequence of legal consciousness is rather less than the effects of the subjective element, emotions. When faced with the object of assessment, legal consciousness assesses it straight away on the basis of knowledge and emotion, thus passing a decision based on values. In this case, avoiding the 'pollution' of law is very important, too – and this is where ecology of law gains weight.

## LEGAL CONSCIOUSNESS AND ECOLOGY OF LAW

The state modern law stirs mixed feelings. On the one hand, law has made exceptional achievements that have a tremendous residual historical value, but at the same time, we have the pollution of legal value on an unprecedented scale, and the increasingly relevant trend of misunderstanding of modern law. It is our understanding and thinking that is affected by said pollution of law, because, just like a natural environment, law too can suffer from pollution with inappropriate norms, ignorance, etc. Therefore, the issue of purity of law becomes very important and we must use legal reasoning to objectively assess whether the legal act we are about to apply is not an agent of pollution in itself. In this case, we have to speak about the ecology of law that aims to preserve law with all of its multifaceted processes and phenomena, different tendencies, and so on, thus purging it from surplus elements.

After it achieves a certain degree of knowledge in a certain field, science tries to multiply that degree and to spread the achievements across the related branches of science. This internal 'self-developmental' potential of science as a specific field of the Human Being's activity drives a quest for the truth, which in turn is an important factor behind the formation of scientific knowledge about the ecology of law. The ecology of law aims to eliminate the *don'ts* rather than enforce the *dos*. The ecology of law always has to impede the processes of negative change in socio-culture, hamper trends that have a negative effect on the life of the Human Being and his environment (the society). A method of the ecology of law it can employ to exercise its judgemental role, can be a comparison of what ***is*** with what *should be*.

The usefulness of the Human Being's activity in implementing the most optimal forms of interaction with law depends on the perception of the issues of the ecology of law. Hence the need to shape the Human Being's internal demand to render his activities ecological, to design a set of ecological norms governing his behaviour. In other words, we are talking about developing an ecological consciousness of the society that would regulate the multiple processes of interaction between the Human Being and the legal environment. The growth of an ecological consciousness is one of the successful preconditions to maintain an ecological balance in the field of law.

The ecology of legal activity directly depends on whether we adhere to its origins or not. Legal activity is defined by the continuous pursuit of clarity and safety. Law cannot be unified or levelled out – every Human Being feels and thinks differently and looks at the world from his own individual angle. The diversity of law is a reflection of the complexity of the Human nature, a continuous dispute of the existence of the Human Being, an endless quest for forms of existential expression. Legal activity is not compatible with mere multiplication, replication of the old, adherence to obsolete canons. The creative character of legal activity determines the unpredictability of the result and the absence of any direct dependence between the 'costs' of legal activity and its outcomes.

The intensity of legal processes is defined by the Human Being whose intellectual and thinking abilities determine his contribution to the development of law. The Human Being is the central link in the ecologisation of law. The process of change he inspires always has to start with himself. Only a free person who has reached maturity in terms of values can assume responsibility and critically rethink the forms of his own interaction with law. The Human Being intellectualising activity is of primary nature: it builds a foundation of law, a push for it to pursue further development. The original ecology of potential depends on the intellectualisation of the Human Being. The Human Being always screens information and dismisses the one which is unnecessary or of low-value. Therefore, the Human Being plays a certain axiological role and law-assessment function.

26 KAUGIA, S. Structure of Legal Consciousness [interactive]. [accessed on 1 August 2017]. Online access: <http://www.juridicainternational.eu/index.php?id=12433>

## DIMENSIONS OF UNDERSTANDING LAW IN CONSCIOUSNESS

Legal consciousness addresses fundamental issues of law and it is extremely important not to make a mistake before you even begin to think. Thinking errors are very difficult to control. Existential, fundamental issues of law begin with what people understand as law. These issues are practical rather than theoretical by nature.

As already mentioned, both Pound and Ehrlich differentiate between the official law from law that actually operates – law in action, or living law. With this in mind, we can identify the following dimensions of the understanding of law into[27]:

1. the official law (law in books or norms for decision)[28];
2. operative law:
3. law in action;
4. living law;[29]

With this in mind, the question of whether our consciousness understands law in singular or in plural no longer seems to be so rhetorical. Law is a category for which we have several matches already, and our consciousness understands law in the form of plural.

A thorough knowledge and mastery of law in books is no guarantee that you will be able find your way around the legal reality properly. To do that, you will have to be able to scrutinise the available knowledge and duly identify it in appropriate situations. It is in this context that we should discuss the categories of 'law in books' and 'law in action'. Drawing on his own personal experience and that of other Human Beings, the Human Being gets to know law empirically in addition to merely studying it in theory. Based on experience, the attitude to legal regulation changes as well. When the gap between the two categories is huge, theoretical knowledge and the experience of empirical cognition will inevitably swap places. It is important not to overestimate the link between consciousness and behaviour: these are completely separate elements.

The action of legal consciousness can be split into several phases:

1. identification of law;
2. cognition of law;

27 HERTOGH, M. A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich, pp. 457–481, pp. 457-481.

28 R. Pound identifies the official law as 'law in books', which can be held identical to the official norms and rules, whereas E. Ehrlich thinks of it as 'norms for decision', which can be identified both with the official rules and norms, and the existing decision-making models of the legislator and the courts (HERTOGH, M. A „European" Conception of Legal Consciousness: Rediscovering Eugen Ehrlich, pp. 457–481, pp. 473–474).

29 *Ibid.*, pp. 457–481.



3. assessment of law; and
4. the understanding of, or forming an opinion about, law.

To begin with, the Human Being makes an overview of any new or altered environment. Recognition of the legal environment then takes place on the basis of existing knowledge, both of the legal and general variety. Identification and perception of an intangible legal environment is impossible without having at least a minimal amount of information and methods that could be applied to get to know it and to assess it.

Recognition should not be identified with assessment of law. Recognition and identification aim at objective perception of law for as much as it is possible based on the assessment of the effects of the subjective element of legal consciousness and the different abilities of Human Beings, as well as the informational foundations of this type of recognition. Whereas assessment of law constitutes the formation of an opinion about law that has been identified. For the purposes of identification, we apply the information that is available to us. The assessment takes on a different form, that of the understanding of information based on the action of subjective attitudes, feelings, internal attitudes. Consciousness also includes unconsciousness and the subconscious[30]. Assessment of law takes place on the basis of unconscious activity as well. Arguably, any assessment is grounded both on emotional attitudes of the Human Being, and rational, information-backed motives. Nonetheless, such an argument is to be deemed acceptable only to an extent, as for it to be accepted the idea of the possibility of absolute objectivity and the possibility for the Human Being to disassociate from any subjective factors in the process of assessment would need to be recognised.

When it comes to performing assessment of law in legal consciousness, it is equally important to make a judgement of the importance of certain circumstances or priorities. Sometimes we have to choose between two or more highly important values to make an assessment. At the moment of making a decision, values can rank in an order of priority that may be completely different in another situation. The judgement of importance helps us decide which one of the values is key, fundamental, and to be followed in a given situation – in other words, where do we need to focus our efforts.

So, following the phase of identification, cognition, and assessment, a certain opinion takes shape in legal consciousness – perception takes place. In summary, the different phases of activity of legal consciousness are attuned to its structural elements, which guarantee their smooth action and mutual ties.

30 ENGEL, D. How does law matter in the constitution of legal consciousness? In GARTH, B.; SARAT, A. (Eds.) *How Does Law Matter?* Evanston, Illinois: Northwestern University Press, 1998.

## LEGAL CONSCIOUSNESS AND BOUNDARIES OF LAW

As discussed above, there are different attitudes towards the conception of legal consciousness. The product of this type of difference is that every member of the society perceives law as it is and should be. In the meantime, dynamic development of law and its penetration into various fields of social life affect the perception of law in separate individuals and society alike, which definitely has an impact on the entire understanding of law. For this reason, to be able to get to know law better, it becomes important to analyse its boundaries. However, the complexity of law means that the analysis will be just as multifaceted.

Thanks to the diversity of legal consciousness, the issue of the Human Being's freedom gains weight, his autonomy, making it therefore critical to investigate the connection between law and personal autonomy. According to the Dictionary of the Modern Lithuanian Language, autonomy may be understood as self-sustained decision, independence from external norms[31]. Ergo, the autonomy of the Human Being may be perceived as the Human Being's ability to have independent control over their life. According to Immanuel Kant, autonomy is the quality of the Human Being not to abide by 'any law other than that it has set for itself'[32].

However, the works of the philosophy of morality state that when it comes to analysing autonomy, I. Kant's conception of autonomy (perceived as the ability of a sentient being – the Human Being – to act independent from its sensory nature or personal interests) has not been the focal point recently[33]. The spotlight is trained on the individualistic concept of this category, where the Human Being is considered autonomous in terms of his desires, actions, or characteristics when they stem from his motivational set[34]. This kind of conception of the Human Being's autonomy is to be seen as a reflection of the variety of conceptions of the category of legal consciousness.

The above conception of the autonomy of the Human Being implies that analysis of the boundaries of law calls for an understanding of the boundaries of autonomy as the Human Being's freedom and independence from external restraints, as well as an answer to the question of how we should match the inevitable restrictions with the essence of autonomy itself. It is important to investigate how the restrictions imposed by law interact

31 The Dictionary of the Modern Lithuanian Language [interactive]. [Accessed on 3 August 2017]. Online access: http://lkiis.lki.lt/dabartinis;jsessionid=1E51F7408B08AC95D8C2AE66C6335092.

32 KANTAS, I. *Dorovės metafizikos pagrindai.* Vilnius: Mintis, 1980, p. 70.

33 TAYLOR, J. S. Introduction. In TAYLOR, J. S. *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy.* Cambridge: Cambridge University Press, 2005, p. 1.

34 *Ibid.*



with the Human Being's autonomy, the instances where they match it closely, and where they go beyond the limits of the Human Being's autonomy. One of the goals of law is to regulate social behaviour in line with moral and other value-based attitudes, and therefore, when it comes to analysing the boundaries of law, it is important to find out the moral and value-based attitudes that can be considered global and binding even to those who do not recognise them. In this case, realising that the lawmaker has to assess the majority opinion is key.

This leads to several questions. We have to ask the questions: 'Can autonomy be expressed as complete freedom of the Human Being, his independence from the surroundings? Could this be freedom in certain fields only? How should the autonomy of individuals be matched, and what role does freedom play in this case? Does an individual perceive autonomy as limitless, and requirements set by time as restraints? Are restrictions prescribed by the laws stem from the Human Beings perception of the limits of their rights and freedoms (after all, legislation is the province of people who enjoy the same kind of rights and freedoms)?'

Autonomy as an ability signifies the possibility to control oneself, to make independent decisions and independent choice. It means that the Human Being who is, in one way or the other, dependant on the will, values, or attitudes of other persons, is not autonomous. Autonomy as a condition means that a person who has autonomy as an ability, must have the conditions to use it. Autonomy as an ideal is understood as a certain end-goal that Human Beings must seek, having the abilities and external conditions to use it. Autonomy as the Human Being's right is perceived as a certain position protected by morality and provisions of law. Ergo, autonomy is multifaceted. It can be a factor contributing to personal happiness, all kinds of development and 'blooming', hence requiring special social and legal recognition. At the same time, it can be a factor reducing the happiness of another person, requiring special social and legal recognition on that account alone.

To reveal the essence of autonomy as an ability, we could analyse how the Human Being perceives his autonomy, its limits, and how he perceives the boundaries of law, i.e., which areas of his autonomy are perceived by him as not to be touched even by a widespread social phenomenon such as law. Autonomy as an ability is perceived by philosopher Joel Feinberg as the independence of a person's desires and motives[35]. In this case it is important to separate the Human Being's freedom from autonomy. Freedom is the ability to act without any external restraints yet with sufficient resources to turn wishes into reality, while autonomy covers the independence of the same set of wishes and motives.

The autonomy of an individual is the idea that the Human Being is capable of living by his motives and goals that do not result from any external influence or manipulation. The concept of autonomy is used in various aspects, one of them being moral autonomy,

35 SHINER, R.A. *Freedom of Commercial Expression.* Oxford: Oxford University Press, 2003. pp. 164–165.

which means the ability to independently apply one's own moral attitudes in acting. Joseph Raz argues that for the Human Being to be considered an independent agent, (*i*) he must choose his own path in life, meaning that he cannot be controlled by anyone or anything; and (*ii*) the choices the Human Being makes must be true, i.e. based on a certain level of information[36].The underlying aspect of autonomy is that an individual may act, make choices, and think in relying on certain factors that can be seen as being his own.

When we approach autonomy as the ability to have one's own individual values and desires, it is important to stress that the Human Being's autonomy requires critical thinking, which includes rational evaluation of desires by defining their interior consistency, alignment with the true beliefs, and so on. However, this type of focusing on rational evaluation of desires overrates the value of intellect and forces us to view an autonomous person as a cold, reclusive evaluator. The relationship between desires, wishes, and personal qualities is based on emotional feelings that stem from our obligations, relations with other Human Beings. Therefore, the understanding of autonomy as the independence of desires is too narrow because the Human Being can exercise autonomy in an environment defined by a diversity of an individual's characteristics, such as values, personal qualities, relations with others, and so on. So, when it comes to autonomy, in addition to desires being authentic, other circumstances that allow the person to have autonomy in spite of affecting it at the same time, are also important.

## The Connection between Attitudes and Behaviour

Analysis of an individual's autonomy as the freedom of the Human Being's desires calls for an understanding of the psychological aspects of human behaviour, which is to say the extent to which the Human Being is capable of regulating his behaviour regardless of the environment. In this case, it is important to find out the model of the Human Being's thinking before he obeys the rules set by law, i.e., whether the Human Being realises it as an inevitable restriction of his autonomy, or there are other motives for this kind of obedience. Autonomy as an ability becomes evident when we can live by our attitudes, internal desires without any additional influence from the outside. Psychologists argue, however, that in nearly all cases our behaviour is driven both by internal attitudes and external social influences alike.[37] Still, there are clear instances when our behaviour is only attributable, to a lesser or greater extent, to our internal attitudes alone:

1. The external influence on what we do is minute: social pressure can influence our attitudes and actions, affecting our actions and the ideas that we speak[38].

   When speaking about social pressure, psychologist David G. Myers has given an example of how, four weeks before US Congress elections, members of the House of Representatives were asked to endorse a halfway reduced budget deficit. Many of the Congress members personally approved of that budget, yet votes in favour of taxes were only cast by people who would not run in the elections – that is, representatives who were exposed to low external pressure. Whereas other members who had intended to run in the elections, met with angry voters, and found it rather more difficult to vote according to their internal attitudes, all of them voting 'against'[39].
2. Attitude is important for certain behaviour. People often accept general attitudes that run counter to their behaviour. For instance, they treasure good health, yet smoke and drink to excess[40]. Still, the right attitude towards a certain action can prompt people to act[41].
3. We realise our attitudes. When we behave the way we are used to without thinking or when we satisfy our social expectations, our attitudes lie dormant, yet if something triggers our self-consciousness, we become more loyal to our beliefs[42]. Research has proven that an attitude that is often repeated comes to mind quicker and one that we can remember faster has a greater impact on our behaviour. When we know what we believe in, and realise the effect of this belief on our behaviour, we will most likely be loyal to ourselves[43].

With reference to the science of psychology, we have to agree that an individual's behaviour can be moulded by external factors, yet there are cases when the behaviour of a person can be the product of their internal attitudes alone.

## The Connection between Paternalism and Autonomy

After we analyse the conception of autonomy and its effect on the behaviour of Human Beings, it is important to consider the place of autonomy as a value in the system of other values, i.e., to dissect the relationship between law and autonomy, look into the instances when protection of autonomy can be achieved, determining legal regulation and legal restrictions of social relations.

36 BESSON S., TASIOULAS, J. *The Philosophy of International Law.* Oxford: Oxford University Press, 2010. p. 324.

37 MYERS, D.G. *Psichologija*, p. 634.

38 *Ibid.*

39 MYERS, D.G. *Psichologija*, p. 634.

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

43 *Ibid.*

Ideally, law can only establish values that are recognised by Human Beings because law is a certain phenomenon arising out of the very society. Which leads to the question of whether social values established by law will always be aligned with an individual's autonomy for, as we have already mentioned, autonomy is the ability of every individual to identify their own authentic values and desires.

The boundaries of law could be delineated by the relationship between autonomy and political liberalism grounded on the autonomy of an individual[44]. The advocates of this political theory claim that the state will only respect the autonomy of an individual when the values and principles established by law are endorsed and recognised by those who are targeted by them. However, then we have this question: Is autonomy one of the values to follow when establishing legal regulation of social behaviour, or is it rather an absolute and fundamental value that other values can be sacrificed in favour of? If autonomy is but one of the values that define legal regulation, then it may be so that the state might enforce protection of certain values at the expense of autonomy, which is what legal paternalism stands to illustrate.

Legal paternalism is a viewpoint postulating that law, for the sake of wellbeing of individuals themselves, it can sometimes force persons to act against their will thus protecting them from adverse consequences of their behaviour[45]. The traditional examples of paternalism include the ban on driving a motorcycle without a helmet as well as the prohibition or restriction of the use of drugs, gambling, and nudity on public beaches. Paternalism protects people from themselves by prioritising security rather than personal freedom and can govern a Human Being's actions when he objects. That is why it is important to analyse the cases when the protection of an individual against their own will is justifiable.

When we attempt to answer the question of when paternalism can be justified, it is critical we distinguish Robert Young's (i) occurrent and (ii) global autonomy. Occurrent autonomy has to do with a person's actions in certain situations, while global autonomy is linked with directing one's actions to achieve long-term real-life goals; it is the action of the Human Being, which matches his values[46]. So, paternalistic intervention of the state in the autonomy of a person can be twofold: it may affect occurrent autonomy, or it may impact global autonomy. This division of autonomy is illustrated by the following example: if a person is prevented from drinking contaminated water, it constitutes intervention in his occurrent autonomy. And if a person is involved in an incident due to reckless driving, and suffers a concussion, and becomes disabled, his global autonomy is breached. Paternalism

44 TAYLOR, J. S. Introduction. In TAYLOR, J. S. *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy*, p. 19.

45 HOSPERS, J. Libertarianism and Legal Paternalism, *The Journal of Libertarian Studies,* 1990, Vol. IV, No. 3, p. 255.

46 YOUNG, R. *Personal Autonomy–Beyond Negative and Positive Liberty.* London and New York: Routledge, 1986, p. 35.



is justifiable even if it means violating occurrent autonomy, when it aims to improve or protect global autonomy[47]; for instance, a person who is prevented from drinking contaminated water escapes potentially grievous consequences in the form of health disorders that would negatively affect the quality of his remaining life.

Considering the above, it is clear that two possible viewpoints exist. The first one is that autonomy must overpower all values that contradict it, taking predominance over them. Then we can say that preventing a person from drinking contaminated water was the wrong thing to do because it trampled their autonomy. On the other hand, avoidance of long-lasting health impairment and damage to the Human Being's life is more important than violating autonomy. It is this viewpoint that justifies paternalism and matches the goals that laws are made to achieve – to regulate social relations so that greater values are protected at the expense of those that are lesser. However, this leads to the question of who and why could determine which values are more important to a certain person, and which of them deserve a higher degree of protection.

Consent is another instance when paternalism can be justified[48]. Even though paternalism violates autonomy, when the person gives their consent to a certain type of intervention in their actions and choices, this information can be said to be justified. A person's consent to having their choice disregarded in order to protect a certain good or value may be granted in advance.

There is the question of how this consent would be expressed on the state scale. How can individuals express their consent to restrictions imposed by the state? We give our consent to the state legislation system when we elect representatives to legislative bodies, hoping they will ensure our wellbeing and interests. This, however, creates ambiguity: for all practical purposes, we give our consent to said representatives to establish general rules and protect our interests, but these interests vary from individual to individual and therefore the consent for elected representatives to govern us and to establish general rules is rather conditional because it is impossible to give consent to their specific acts or decisions in every individual case.

Paternalism can also be justifiable even when there is no consent, but nevertheless the intervention facilitates the achievement of the autonomously chosen good. Let us say that the Human Being has a certain scale of values or a well premediated life plan, and lives by it. In that case, the intervention of law to protect the values that the person has chosen in exercising their autonomy can be justified; what is more, the autonomy of a person is actually preserved then.

Also, speaking about paternalism, there is the question of whether anyone can decide what is best for an individual. At first glance, it would seem that nobody has a right

47 SHINER, R.A. *Freedom of commercial expression.* p. 245.

48 YOUNG, R. *Personal Autonomy– Beyond Negative and Positive Liberty.* p. 65.

to meddle with the Human Being's behaviour for as long as his actions do not cause harm to others. This would respect his autonomy and would allow him to act in line with his belief and aspirations for the good. However, as already mentioned, every person is closely connected with other members of society and it is quite often that both his attitudes and his behaviour is driven by external factors; therefore, a person cannot follow their exclusive beliefs at all times.

In real-life situations, the influence of the group can even have tragic consequences[49]. Considering a person's predilection to succumb to external influence, their conformity, we could say that in certain cases the individual should be protected from themselves to guarantee their wellbeing and to secure other values they have chosen in exercising their autonomy. Therefore, there are many situations where the state can decide to restrict the autonomy of a person.

## Possible Restrictions of the Autonomy of the Human Being

Law inhibits the autonomy of the Human Being: penal laws eliminate certain behavioural options by setting out punishments, while civil laws require that persons abide by certain precautions and restrict their actions at the same time lest the rights and freedoms of other persons should be violated. It was already mentioned that the autonomy of the Human Being deserves exclusive protection, which leads to a question: To what extent can the state restrict the Human Being's freedom, and what are the limits of the state's powers?

John Stuart Mill argued that the only objective that justifies restrictions of personal freedom and autonomy against the person's will is the possibility to avoid potential damage to other persons[50] – that is, protection of other persons' rights. Law is a most effective instrument that restricts or prohibits certain behaviour in individuals, which, for instance, contradicts the socially prevalent moral attitudes or poses a threat of potential harm. Therefore, even though liberalism cannot recognise a collective to have any priority over an individual, or one moral attitude to have authority with regard to moral pluralism[51], following the above damage principle set forth by Mill, the Human Being's freedom can be legally restricted if it can cause damage to other individuals, for example, when it is incompatible with the fundamental moral attitudes generally accepted in a particular society.

49 For instance, according to sociologist David Phillips, prominent stories of suicides are usually followed by a surge in the suicide rate, but only in the areas where the story is published: the number of deaths spikes in the catchment area of the media, and the victims are usually of a comparable age as the suicide victim featured (MYERS, D.G. *Psichologija*, pp. 638–639.).

50 MILL, J.S. *Apie laisvę*. Pradai. 1995. pp. 27–28.

51 JOKŪBAITIS, A. Liberalizmo ir demokratijos konfliktas. *Politologija*. 2009, vol. 1 (53), pp. 3–20, p. 7.



In this case, we face legal moralism, which postulates that the state is entitled to impose restrictions to ensure compliance with the generally accepted moral norms. Legal moralism constitutes a set of views grounded on the idea that the entire nation can be governed by the same morals and/or religion and disapproval of the prevalent moral attitudes must be punished[52]. Lord Patrick Devlin, a prominent figure in legal moralism, accentuates that ensuring compliance with moral attitudes is critical to the existence of society as such. He claims that if Human Beings lived in a society that did not have a unified perception of good and evil, life in a society like that would become impossible as no overarching or equitable regulation of behaviour could be achieved. After all, society is not shaped by some external forces; it consists of groups of people who are connected or hedged by common ideas and views. It is shared morality that constitutes one of the criteria that allow referring to certain groups of Human Beings as the society. So, according to Devlin, law can serve both as a guarantee of morality in the society, and the keeper of the existence of the society in its own right.

On the one hand, the opportunity to make decisions and express the prevalent attitudes in a particular society ensures a certain degree of predictability and stability of a social order. This opportunity extends to representative democracy as well. On the other hand, even the latter form of government may become a challenge to the freedom and equality of citizens[53] from the liberal standpoint. For instance, the outcome of an election as an expression of collective autonomy could restrict the autonomy of an individual Human Being.

All that points to an important aspect of the analysis of the restriction of the Human Being's autonomy: the role of society in this type of restriction. When speaking about the restriction of the Human Being's autonomy, there is yet another type of autonomy that needs to be mentioned, and that is collective autonomy. Collective autonomy is a highly significant instrument for the protection of the society as such; for the right of collective self-determination is one of the greatest values of democracy. To live in a democratic state is to live in a society where we, instead of some monarch or tyrant, are governed by our own collective autonomy.

52 HOSPERS, J. Libertarianism and Legal Paternalism, p. 255.

53 JOKŪBAITIS, A. Liberalizmo ir demokratijos konfliktas, pp. 3–20, pp. 7–8.

## Public Morality and Boundaries of Law

In the most general sense, morality consists of certain requirements that limit our selfish behaviour to pay due tribute to the interests of other individuals[54]. However, we often have to answer the question of whether morality is always right and if it constitutes a sufficient basis to impose limits on the Human Being, enforcing generally accepted – public – morality in doing so, and establishing a duty for rational consciousness. Of course, just like the morality of every Human Being, public morality is grounded on recognised values: personal morality, on values recognised by the Human Being, and public morality, on values recognised by society. Ideally, generally accepted values delineate the boundaries of public morality and define their content. Even though certain predominant values can be identified and defined, individuals who recognise the same values will always attach different weight and meaning to them. That is why public morality is undefined and obscure.

The undefined nature of public morality is illustrated by Mill's principle of harm. This theoretician introduces a criterion delineating situations when the Human Being's autonomy can be breached, which is the protection of another Human Being's rights. In that case, however, society has to be informed of the instances where the limits will be considered breached. In order to establish clearer limits, moral rights and obligations are codified.

Dworkin raised the issue of the extent of the significance of the fact that a part of society frowns upon homosexuality, pornography, and prostitution as is evident in passing a decision on the criminalisation of these behaviours[55]. Is public condemnation enough to justify the criminalisation of a specific behaviour? This would seem contrary to our traditions of individual freedom and the knowledge that no matter how big the crowd, its morality cannot be taken as a sure-fire truth; besides, legality does not always equal justice. So, if public condemnation is not enough, what else is there? Must there be any proof of harm done to specific persons? Would it be enough to simply prove some kind of impact, indirect or otherwise, on social customs? Or perhaps conclusive evidence that the majority of the existing community would condemn the changes would be enough?

Dworkin and Devlin diverged in their interpretation of these questions when addressing the phenomenon of homosexuality and its legal limitation. Lord Devlin argued that if most of society considered a particular phenomenon to be a an abominable vice, it cannot be deprived of the right to eliminate that phenomenon[56]. But then there is the question of whether law can really interfere with the private lives of citizens, wishing to implement a specific behavioural pattern in order to uphold public order and standards

54 BESSON, S., TASIOULAS, J., *The Philosophy of International Law*, p. 13.

55 DWORKIN, R. *A Matter of Principle.* Oxford: Clarendon Press, 1985, pp. 335–372.

56 DEVLIN, P. *The enforcement of morals.* Oxford: Oxford University Press, 1965, p. 17.



of decency. Here, we can return to Mill's opinion that the sphere of private morality and immorality, which is not the subject of law, must survive[57].

Devlin identified two arguments in favour of society's right to ban a controversial phenomenon like homosexuality. Argument number one being society's right to protect its existence, and argument number two, the majority's right to abide by its moral beliefs in protecting its social environment from adverse changes[58]. One of the defining characteristics of modern Western society is moral pluralism, there are a plethora of various moral standards that individuals follow to control their behaviour and do not try to impose on others. However, according to Dworkin, there are principles that the majority dumps on those who do not even recognise them[59]. Devlin argues that every society has a right to protect its existence, ergo a right to persistently live by the attitude that this type of adjustment is a must. Still, the majority's right to impose the prevalent moral attitudes on others cannot be absolute: autonomy means that in order to protect society's existence, individual freedom must be tolerated to the maximum extent possible.

Devlin maintains that if homosexuality is authentically construed as a repulsive sin, society's right to eradicate it cannot be denied. The author further accentuates that when it comes to solving matters of the survival of society, society has a right to preserve itself without having to provide proof for the morality it maintains[60]. Devlin's viewpoint suggests that even if no real harm is done, certain actions of Human Beings should be banned if the majority frowns upon them as being immoral. Still, in this case the fact that sometimes the majority's opinion may actually be wrong is disregarded. For instance, in some controversial situations, public opinion is often shaped not by the fear for survival or real harm, but by the media, which sometimes can be biased and inclined to serve the interests of separate individuals.

Devlin's ideas contradict the principle of harm to others as advocated by Mill. It is obvious, that the boundaries of law as both authors perceive them are in complete controversy. Devlin sees any threat to the cohesive existence of society as something to be rooted out, while Mill underlines the freedom of the individual, drawing rather tight boundaries of law and obligating it to respect individuality.

As we analyse the approach by Devlin, it is important we realise when the danger is clear and real enough to justify legal intervention. According to Devlin, the nature of all deviations from the common social morality is so that such deviations may undermine the existence of the society and therefore cannot be ignored by law. He backs up this proposition with the impact social environment has on the society: '/…/ If those who have

57 MILL, J.S. *Apie laisvę*, pp. 31–32. For details, see 1.5.6. Žmogaus laisvė.

58 DWORKIN, R. *Taking Rights Seriously,* Cambridge, Massachusetts: Harvard University Press, 1977. p. 242.

59 DWORKIN, R. *A Matter of Principle,* p. 190.

60 DWORKIN, R. *Taking Rights Seriously,* p. 241.

homosexual desires freely indulged them, our social environment would change. What the changes would be cannot be calculated with any precision, but it is plausible to suppose … that the position of the family /…/ would be undermined'[61].

We are too sophisticated to presume that the effects of a controversial phenomenon such as homosexuality would be confined to those who participate in the practice. The environment in which we live is determined by patterns and relationships formed privately by others than ourselves. Of course, this does not give the society a right to outlaw a particular phenomenon: 'No custom we want to preserve can be guarded by us if we imprison those who do not want to guard it'[62]. But the lawmaker must inevitably decide whether institutes who come under threat are valuable enough to be protected at the cost of the Human Being's life.

The decision of whether a certain phenomenon is moral or not is an immense one to make. However, as Devlin puts it, if the majority of the community agrees on an answer of which the minority of educated people may disapprove, the lawmaker has a duty to act on the agreement. He has this duty because its decision must be based on an attitude of moral belief, and democratic society calls for resolving this kind of question under democratic principles. The community must accept moral responsibility and therefore must act in line with the moral principles of its members.

### The Lawmaker's Importance in Adequately Entrenching Moral Beliefs

Speaking about the issue of the boundaries of law, one of the most important questions is that of whether the moral beliefs of the many offer a sufficient reason to restrict an individual and to make them obey the majority. In this case, Dworkin disagreed with the justification of moral beliefs the way Devlin perceived them. He argued that justifying society's right to restrict the Human Being's freedom based on moral beliefs such as certain emotions, superstitions, and so on, was the wrong thing to do[63]. According to Dworkin, it is moral beliefs in their discriminative sense alone, when contrasted to superstitions, rationalisations, matters of personal disfavour and taste, can justify a restriction of an individual's freedom. In his opinion, the purpose of the discriminative sense is to give limited yet necessary justification to an action when the moral questions that action raises are unclear or disputable[64].

61 DWORKIN, R. *Taking Rights Seriously,* p. 246.

62 *Ibid.*, p. 246.

63 *Ibid.,* p. 248.

64 *Ibid.*, p. 249.



In Dworkin's opinion, certain personal superstitions or predispositions towards a particular phenomenon cannot be taken as a basis for the lawmaker to ban or restrict it. In other words, it is not the majority of some antagonistic viewpoints that can move the lawmaker to take action. Even when most of the society believe that a particular phenomenon is a sin, this majority opinion can be a mixed bag of superstitions and emotions with no expression of a true belief. It is quite probable that an ordinary Human Being could not provide any justification for such beliefs and would simply parrot what he has heard from his neighbour – who, in turn, repeats something he has heard himself – or would offer a moral position much like an excuse, which he would not be able to claim as his own without any honesty and consistency[65]. When it comes to analysing the moral beliefs that are sufficient to impose restrictions on the rights of other Human Beings, and measuring whether a certain majority opinion in fact constitutes a moral belief grounded on certain general principles and a shared system of values or if it is just a set of spontaneous emotions, the emphasis has to be placed on the perception of public relationships of the lawmaker.

The lawmaker who understands that a moral agreement exists within the society has to check the elements of this agreement. The proposition that a moral agreement exists is based on the appeal to the lawmaker's perception of how the community reacts to certain behaviour. This perception involves understanding the grounds on which the community's reactions are based. In the case of an open debate that escalated through editorials in newspapers, public speeches, speeches from stakeholder groups, this would intensify his understanding of the arguments and positions on those matters that exist. He has to analyse these arguments and positions to be able to identify the ones that are superstitions and the ones that prescribed general principles or theories. Once he is done with this process, it could be that he will be able to understand that the proposition of moral agreement was a failed one[66].

According to Dworkin, the lawmaker should apply these texts with regard to himself as well. If he abides by the popular views, he is less likely to see them as imperfect; but if he possesses a degree of self-criticism, this kind of thinking might alter his views. In every case, the lawmaker's answer will depend on his own understanding of what is good for the common public morality. The lawmaker who refuses to accept the resentment, hatred, and disgust of the people as a moral belief of the community should not be accused of elitism. We cannot simply say that he is sticking to his own enlightened creed and has no regard for the stance of the public at large, which rejects his opinions. He is trying to enforce a clear-cut and fundamentally important part of the morality of his own community – the agreement, which has more relevance for the existence of the society in its form, which reflects particular general principles rather than emotions or superstitions[67].

65 *Ibid.,* p. 254.

66 *Ibid.*, pp. 249-251.

67 *Ibid.,* p. 255.

It would be difficult to scrutinise certain viewpoints of modern-day society to an extent that would allow us to recognise some of them as moral beliefs entitled to set forth restrictions of individual freedom, separating them from simple emotions or superstitions. In essence, no lawmakers can afford to ignore the outrage of society. If we look at modern law-making, it becomes evident that it follows the general opinion of the society, which implies emotions and superstitions alike. Often society's outrage defines the boundaries of what is politically possible and describes strategies of implementation within those boundaries. However, such methods of strategic implementation do not always equal justice, just like the society's outrage does not always reflect the true moral attitudes and beliefs of individuals.

With certain exceptions[68], the individual is largely affected by the external environment. One of the main reasons for that effect is that we do not want to be shunned or want to receive social approval. Then we surrender to the force also known as normal social influence. We are vulnerable to social norms – the understood rules of acceptable and expected behaviour – because the price we pay for differences in behaviour sometimes is very high. For this reason, one has to exercise extreme caution in assessing the beliefs of the majority, because they do not always mirror the moral beliefs of society[69]. The power that social influence has on our decisions and actions is evident in subservience and group behaviour – conformism, a form of matching our thinking and behaviour to a certain group norm[70]. As a result, the lawmaker has to remember that the Human Being's behaviour may be adaptable to the social environment, and public opinion only stands to express the opinion of some Human Beings on what is good or bad at best. When we consider the opinion of society, we have to take account of the fact that never before has the Human Being had such a wide arsenal of tools of communication at his disposal, or the possibility to spread and embed certain views and thinking stereotypes in the public space on such a large scale. Therefore, in establishing one type of legal regulation or the other and aiming to achieve justice in doing so, the lawmaker must be very careful in his assessment of public beliefs.

### The Human Being's Freedom

Mill, who placed strong emphasis on the independence of the individual and the personal domain of every Human Being not to be touched by law, argued that a person should own the part of life that interests the individual the most, while society should own the part that concerns society the most[71]. It is very important to analyse the relationship between the individual and society. In the broadest sense, society is construed as a historical body of human beings that is affected by place and time[72]. That is a very important element of our life, one that ensures and creates harmony, security, offers conditions for self-expression, yet imposing many obstacles and restraints on ourselves at the same time. The fact that we live in a society obligates every one of us to adhere to certain behaviour towards others: refrain from impairing the interests of one another, assume the duty to protect society, its members from harm. It is generally recognised that when a particular behaviour of a person becomes harmful to the interests of others, society has jurisdiction over such behaviour. The main problem arises when the Human Being's behaviour concerns no interests other than his own.

Distinguishing the part of the Human Being's life that only concerns himself and the part that has to do with others is very difficult, as the Human Being is not a creature that dwells in complete isolation. After all, no Human Being can do something that would only harm himself, without that harm affecting his relatives or a wider circle of other Human Beings. For instance, if he damages his property, it does harm to those who have been depending on its support and usually reduces the community's resources in general. If he does physical or mental harm to himself, he loses his ability to perform the duties to his close ones. If such behaviour of individuals were to occur frequently, it would reduce the overall amount of the good of society as much as an individual's actions that do direct harm to the society. Even if the Human Being does no direct harm to others with his follies, he sets a harmful example and therefore should be made control himself for the sake of those who may be misled by his behaviour.

The harm that the Human Being does to himself can have grievous consequences on the interests of the Human Beings personally related to him, and, indirectly, on society in general. Such actions deserve moral condemnation, but we must ask ourselves whether law can interfere with such relationships. Mill argued that the Human Being's extravagance as one of his qualities should not be regulated by law or society. However, when he is unable to repay his debts or support his family as a result of extravagance, he deserves to be condemned and can be even rightfully punished. Furthermore, no person should only be punished because he is drunk, but a police officer or any other kind of officer must be punished if he is drunk while performing his duty. It is therefore evident that whenever an individual or society suffers or is threatened with obvious harm, the question is transferred from the domain of the individual's freedom to the domain of law[73].

68 See 1.5.1. *The Connection between Attitudes and Behaviour.*

69 MYERS, D. G. *Psichologija*, pp. 640–641.

70 *Ibid.*, p. 638.

71 MILL, J. S. *Apie laisvę*, p. 127.

72 The Dictionary of the Lithuanian Language (vol. I–XX, 1941–2002): electronic version/editorial board: G. Naktinienė (editor in chief), J. Paulauskas, R. Petrokienė, V. Vitkauskas, J. Zabarskaitė [interactive] [accessed on 3 August 2017] Vilnius: The Institute of the Lithuanian Language, 2005. Online access: <http://www.lkz.lt/startas.htm>.

73 MILL, J.S. *Apie laisvę*, pp. 137–138.

Mill assigns a high priority to the domain of the Human Being's freedom. He argues that if the harm done by a person to society with his behaviour, which neither constitutes a breach of any particular duty to the society nor causes material harm to a particular individual other than himself, is incidental or indirect, society may endure this inconvenience for the sake of the greater benefit for the person's freedom. All matters related to thinking, attitudes, consciousness are beyond the limits of law-making, and all matters related to a social act, custom, relationship that the state itself and not the individual has the discretion to resolve by the rule of law fall into this domain.[74]

This viewpoint on Mill's part does not fully match actual social relationships. Based on said approach, only the domain of an individual's actions that relates to the individual in question could provide the answer to what is the boundary of law, and to what extent an individual can be subjected to restrictions. However, as we analyse the Human Being's psychology and his behaviour in a group and in society as a certain social phenomenon, we are bound to notice that all things are too interconnected for us to be able to distinguish a single domain that would concern just one specific individual. Society has become such an important element that we would be hard pressed to find domains that would belong only to the individual. It would be hard to imagine an action of the Human Being that would not affect others in any way. For instance, the legal duty to wear a helmet would seem to affect the domain of the individual alone. Under Mill's approach, in this case society could not establish the duty to wear a helmet, as here we have no direct harm either to other individuals or society in general. Society should tolerate this kind of behaviour that deviates from the generally recognised pattern to protect both the autonomy of the individual as an ability, and his freedom of action and independence[75]. However, this situation could be approached from a different angle if the Human Being who wants to ride his motorcycle without a helmet had a family, hence a duty to support it. In that case, we could justify legal restrictions of the individual's freedom with the necessity to protect other members of the society.

Considering the above, it should be stated that every Human Being is a part of an intricate and interconnected system of social relationships. In his legal consciousness, the Human Being assesses the boundaries of law subjectively as well, but in order to know the law, its boundaries simply have to be identified.

74 *Ibid.*

75 MILL, J.S. *Apie laisvę*, pp. 137–138.



## COMMON SENSE

As we look at the social processes that have been taking place recently, we have to admit that the technology and globalisation processes evolving at an unpreceded rate are gradually changing the rather homogenous community of Human Beings that has existed before. The mixing of nations, races, and cultures makes us rethink the established rules of co-existence of Human Beings. Such social transformations inevitably drive changes in law, which tends to be increasingly adjusted and unified, and becomes marked with an increasingly higher degree of eroding of boundaries and convergence of the continental and common legal systems[76].

This erosion of boundaries between the general and the continental legal systems is evident in Lithuania, too: lawyers and courts often support their position and make decisions with reference to judgments by the Lithuanian Supreme Court, the Supreme Administrative Court of Lithuania, the European Court of Human Rights, and the Court of Justice of the European Union[77]. It is a clear sign that principles of the general law tradition are making their way further and further into the legal system of Lithuania. Today, we cannot measure with any degree of ease the extent of their influence on Lithuanian law, however, when we consider the effect of globalisation, EU membership, and the erosion of boundaries between legal systems, we can expect that some of the elements of the general law tradition will surely affect the Lithuanian legal system to a greater or lesser extent. To avoid the unjustified fear of the general law tradition and to assume valuable experience of other countries, it is necessary to give the analysis of this tradition the attention that it merits.

When we analyse publications and science papers by Lithuanian legal scholars, we fall under an impression that any examination of the general law traditions is, for all practical purposes, limited to just basic elements of general law such as the institute of judicial precedent. Practical application of common sense in resolving legal casus – one of the most exciting elements of the general law system that has drawn the attention of many scholars of continental law – is left on the sidelines. Even though historically, the category of common sense has taken shape in countries that follow the tradition of general law, it does

76 WIEACKER, F.; BODENHEIMER, E. Foundations of European Legal Culture. *The American Journal of Comparative Law*, 1990, vol. 38, No. 1, pp. 1–29, pp. 6–7.

77 Among those worth mentioning, is the decision by the Constitutional Court of the Republic of Lithuania recognising the role of judicial precedent in the case-law of Lithuanian courts (Ruling of the Constitutional Court of the Republic of Lithuania dated 28 March 2006 On the Compliance of Item 2 of Paragraph 1 of Article 62, Paragraph 4 (wording of 11 July 1996) of Article 69 of the Republic of Lithuania's Law on the Constitutional Court and Paragraph 3 (wording of 24 January 2002) of Article 11, Paragraph 2 (wording of 24 January 2002) of Article 96 of the Republic of Lithuania's Law on Courts with the Constitution of the Republic of Lithuania. Official Gazette *Valstybės žinios*, 2006, No. 36–1292).

not necessarily mean that countries of the continental law tradition do not use common sense. Just like many other legal phenomena, the category of common sense can have different equivalents, conceptions, and forms in different legal systems. As a method of legal intellectualisation and reasoning, the category of common sense has been refined both in case-law, and in scientific work.

Practical application of common sense virtually shows in the assertion that some arguments do not need proving – they have to be perceived as a fact, because common sense dictates so. US research aiming to identify legal scholars that are the most quoted in judicial precedents and scientific articles has shown that in most cases, it is common sense rather than some authority figure that is relied upon. Compared to other sources, common sense is twice as prevalent. Despite the immense effect common sense has on enforceable justice, scholars of a general-law persuasion are still engaged in a discussion over whether common sense is a positive or negative thing. On the one hand, a well-trained and organised common sense helps discover solutions even in difficult situations. Only common sense can help pinpoint errors in logic and thinking and make decisions in extremely complicated real-life situations. Common sense gives the Human Being a certain kind of identity and originality, freedom of self-expression[78], builds a foundation for the courage to think, which is necessary if one is to make a difficult and complex decision. On the other hand, common sense may be subjected to a certain amount of criticism on the grounds that common sense does not always provide a quality solution to a problem, often oversimplifying the difficult aspects of the problem, turning them into something that is closer to and easier to understand for the socium[79]. In this kind of situation, the solution to a problem adapts itself to the understanding of the general public, which means that, for example, in making decisions in the field of constitutional law, the 'problem of [its] intellect, education becomes a problem of the successful development of a legal state'[80]. For this reason, even when a decision that comes from common sense is in line with one that is based on scientific doctrine, the latter is considered to have a far greater value[81].

Considering the above, it is obvious that common sense is to be considered an important legal phenomenon. Still, given the flaws and the strengths of said category, it becomes critical that the category of common sense be used appropriately in the process of making a judicial decision. Otherwise we may incur unrestrained manipulation of decision-making, grounded on the arguments of common sense.

78 MESONIS, G. Konstitucijos interpretavimo kokybės: *Common Sense* ir mokslinė doktrina. *LOGOS*, 2010, No. 63, pp. 68–79, p. 78.

79 MESONIS, G. Teisinio diskurso dialektika. *LOGOS,* 2011, No. 69, pp. 34–41, p. 36.

80 MESONIS, G. Konstitucijos interpretavimo kokybės: *Common Sense* ir mokslinė doktrina. *LOGOS*, 2010, No. 63, pp. 68–79, p. 76.

81 *Ibid.*, p. 77.



## The Conception of Common Sense

If we look at the source and development of the conception of common sense, we can say that the conception of Human Beings that the process of thinking involves some guiding source that helps us make the right decisions and is the real cause and guide of our actions is not a recent discovery. Historical sources indicate that the idea of common sense was already present in ancient Oriental civilisations and antiquity. Buddha's teachings are believed to have read back in 500 B.C.: 'Do not believe anything regardless of where you read it and whoever said it, unless it matches your own understanding and your own common sense'[82]. Aristotle, too, mentioned the involvement of common sense in the process of learning about the world. He understood common sense as the Human Being's ability to combine and interpret information obtained through his senses as a universal ability to perceive the unity of the image of the world even in the face of very controversial senses[83]. Some reverberations of the perception of common sense can be found in speeches by the Roman warlord Cicero, who back in the 1st century B.C. mentioned 'the common inherent inclinations of the human race'[84].

During the times of antiquity, there was a lot of talk about the existence of common sense and its influence on the thinking of the Human Being, a topic that rather seems to be forgotten in the medieval historical sources. Common sense was rediscovered in the 13th century, when it was given a new form and made a comeback in the late texts of St Thomas Aquinas[85]. He perceived common sense as an element of the Human Being's spirit. He argued that the 'so-called passive, active mind and common sense are intermingled qualities of the human spirit'[86]. Based on this stance, common sense was understood not as the Human Being's ability to learn about the world – a dynamic quality of the mind – but rather as an inherent understanding of the world which is dictated by the divine law and occupies the entire content of common sense.

In the wake of this radical transformation, the perception of common sense in the late Middle Ages was quick to make contact with the philosophy of birthrights, in which we can trace a further shift in the conception of common sense. Birthright philosophers adopted Thomas Aquinas' position that common sense is a spiritual quality that contains

82 GARFINKEL, P. Four Noble Buddha Quotes. [interactive]. [Accessed on 28 August 2017]. Online access: <http://www.huffingtonpost.com/perry-garfinkel/four-noble-buddha-quotes_b_86728.html>.

83 VAN HOLTHOON, F.; OLSON, D. R. Common Sense: an Introduction. In VAN HOLTHOON, F.; OLSON, D. R. *Common Sense: The Foundations for Social Science.* University Press of America, 1987.

84 BUGTER, S. E. W. Sensus Communis in the Works of M. Tullius Cicero. In VAN HOLTHOON, F.; OLSON, D. R. *Common sense: The Foundations for Social Science*, p. 83.

85 VAN HOLTHOON, F. Common Sense and Natural Law: From Thom Aquinas to Thomas Reid. In VAN HOLTHOON, F.; OLSON, D. R. *Common sense. The Foundations for Social Science,* p. 100.

86 *Ibid.*

knowledge of the world around the Human Being, but demystified the origin of the knowledge. During the Renaissance, the Human Being was again considered to be the benchmark for everything and an idea was born that the nature of common sense lies in the world of the Human Beings and takes form by virtue of empirical senses. The birthright, just like common sense, too, is nothing else but an expression of accumulated and systemised practical morality of the Human Being. Eventually, many thinkers accepted this idea as a basis for theories on the birthright as a self-contained system of norms independent from the divine law, as well as the idea of universal rights of the Human Being.

However, the development of the conception of common sense was not always this smooth: like every philosophical idea, it has received its share of severe criticism. The philosophical foundation of common sense took the biggest hit from David Hume and the radical scepticism that he represented. Stressing the gap between real-world phenomena and the information the Human Being collects about it through his senses, Hume argued that the Human Being's mind cannot get to know the real world as it is unable to verify the information about it that comes from senses. For that reason, the Human Being's mind 'is nothing but a collection of a variety of insights that is shifting at an unimaginable speed and forever in motion'[87]. In its essence this idea, just like any other idea sceptics put forth, denied any possibility to learn about the world, hence the ability of common sense to systemise information obtained through senses, and also denied that the perception of the world of every Human Being is based on the same common principles.

These ideas of radical sceptics forced people to doubt the cognitive powers of the Human Being and were critically aimed at any science. As a result, soon, there was feedback. Thomas Reid, a professor at Glasgow University, who was the first to use the term *common sense*, took up Hume's gauntlet[88]. He argued that there are things that we know to really exist and that we have to accept without the benefit of any proof. These first principles help us realise the world around us. In Reid's opinion, philosophers can identify the true grounds of human cognition by simply observing how Human Beings make their daily decisions, and by defining the common principles that they share. He admitted that we might not be able to learn about the world as accurately as René Descartes and the sceptics required us to, but at the same time he argued that this bar of cognition had been set too high[89]. This teaching on Reid's part soon earned wide recognition and provided the basis for the Scottish philosophical school of common sense that had tremendous influence on the general law system.

87 MILLER, P. *The Life in the Mind of America.* Cambridge: Cambridge University Press, 1965.

88 MESONIS, G. Konstitucijos interpretavimo kokybės: *Common Sense* ir mokslinė doktrina. *LOGOS,* 2010, No. 63, pp. 68–79, p. 73.

89 BARZUN, Ch. L. Common Sense and Legal Sense. *Virginia Law Review,* June 2004, pp. 1064–1066.



Historically, the Human Being's mind has always been believed to have a certain internal ability that helps it learn about the external world and allows every Human Being to perceive it in much the same way. Yet the biggest amount of disagreement would occur when people tried to explain the origins of this ability. Every philosopher tried interpreting the origin of common sense in his own way against the backdrop of the values of the era. For instance, during the times of antiquity, people believed this to be a trait of the mind, one that allows us to systemise and interpret information we obtain through our senses; in the Middle Ages, common sense was regarded as a collection of knowledge embedded in the spirit of the Human Being and defined by the divine law. As already mentioned, the Renaissance perception of common sense was that it was a set of structured rules for practical behaviour of the Human Beings.

The science of psychology provided deeper knowledge about common sense by focusing on the cognitive powers of the Human Being and the process of human cognition, in which common sense is involved as one of the key elements, and by setting the goal of designing artificial intelligence that could perform thinking operations on a par to the human brain and even automate enforcement of justice. Of course, the basic presumption of this scientific invention is the adequate and in-depth understanding of the mechanism of how common sense works, its absence rendering the thinking process of the Human Being completely impossible.

Academia admit that common sense is one of the key cognitive elements of the Human Being and argue that it would be difficult to imagine a Human Being who would not exercise it in his life[90]. Common sense enables us to systemise information we obtain through our senses and identify the relationships of different phenomena, as well as predict direct and indirect results of our actions[91]. Also, common sense collects information about social institutes that allow Human Beings to understand one another and to anticipate the behaviour of people around them in different real-life situations.

When it comes to the domain of law, common sense becomes highly relevant. One clear example is the judge's process of thinking in hearing cases. Being obliged to do so by law, the judge examines cases based on their internal belief, which is nothing but their structured lifelong experience, or common sense. The exercise of common sense becomes particularly evident in cases where the final decision exclusively depends on the opinion of the judge, which is to say, in the field of legal discretion.

But what is the common sense that Human Beings use in making their decisions? According to St Thomas Aquinas' philosophy on common sense, we might think that common

90 HORSBURGH, B.; CAPPEL, A. Cognition and Common Sense in Contract Law. *Touro Law Review*, 2016, Vol. 16, No. 4, Article 6, pp. 1092–1093.

91 *Ibid.*

sense is a huge repository of information full of readily prepared information about every possible phenomenon of the physical and social domain; therefore, when faced with a certain phenomenon, all the Human Being has to do is pick one of the solutions encoded in his mind. But this presumption is somehow weakened by the understanding that in some cases common sense forces us to focus more on reasoning – the external form of expression of common sense.

Common sense is not a whole of readily prepared solutions; instead, a certain attitude of the mind exists. Its influence on our cognitive process and the Human Being's decisions can only be described after we delve deeper into the mechanism of how common sense works.

What we understand to be 'common sense' is not a shapeless or ad-hoc phenomenon, but rather an incredibly structured method[92]. Using it, the mind is able to process and systemise the Human Being's experiences; it is very dependent on factors like the Human Being's cognitive powers, level of consciousness in making decisions, and recurrent daily interactions with the physical and social domain. Most of the Human Being's thinking procedures take place on the basis of *schemes* and *scenarios* – simplified images of the world that the Human Beings create while interacting with the external world[93]. In processing information about their surroundings, the Human Beings use two models of cognition. One of them is a consecutive, linear method of thinking, its action grounded on formal logic and the theory of probabilities, the other, a connectivistic method of thinking; it is organised as a system of parallel networks and works through associations and imagination and is illustrated best with the Human Being's ability to use metaphor[94]. This latter method of thinking is very different from the linear method, which obeys rules and is used for detailed analysis of phenomena. Ergo, common sense constitutes the processing of schemes and scenarios embedded in the Human Being's mind using the connectivistic method of thinking. After the processes that take place within the Human Being's mind as he learns about the world that surrounds him are scrutinised, it is important to find out how common sense is filled with information about real-world phenomena. Only when we know it can be rely on solutions that common sense offers.

Common sense can be perceived as a dynamic quality of the mind or as a static phenomenon. Some say that common sense is a tool which helps the Human Being classify and perceive information received from the surroundings. Others, that common sense is a certain whole of the knowledge of the world around the Human Being.

Static and dynamic definitions of common sense can be split into four rather independent groups:

92 *Ibid.*, p. 1092.

93 *Ibid.*, p. 1093.

94 HORSBURGH, B.; CAPPEL, A. Cognition and Common Sense in Contract Law, p. 1093.



1. In group one, common sense is defined as an internal quality of the mind, one that classifies information received through senses of sight, hearing, touch, taste, and smell and assigns it to the appropriate category of thinking and combines it into one common understanding.
2. In group two, common sense is described as using primary truths in understanding the truth or in controlling beliefs not through gradual reasoning but through a momentary, instinctive impulse which comes from nature rather than being formed by science or custom.
3. Group three suggests a collective definition of common sense: common sense is defined as a shared feeling, wisdom, or opinion of many Human Beings, sufficient to direct actions of the Human Beings to align them to the behaviour of ordinary Human Beings. In other words, this definition presupposes that common sense can be reflected quite accurately in surveys.
4. In group four, a practical mind is regarded as practical wisdom available to the normal, ordinary, or average Human Being; it is based on an ordinary understanding of a situation or facts and was obtained through real-life experience, not special sciences.

We can assume that common sense is part of the thinking process that assigns information obtained through senses to the appropriate thinking categories, measures the meaning of every phenomenon, and forms the Human Being's opinion on different real-world phenomena. As we assess the role of common sense, we can say that common sense equals clear thinking, practical wisdom, or knowledge that raises no doubt for anyone. However, we have to emphasise that all of the above definitions presuppose yet another trait of common sense – the limited nature of its cognitive powers. Common sense is said to be able to accumulate and process only information that has been obtained through real-life experience and is available to every normal, average Human Being.

The above limitations of common sense lead to a conclusion that it is devoid of any ability to process information and provide answers in areas relating to the application of specialist knowledge that go beyond the boundaries of understanding of the average Human Being. In the case of *Ornelas v. US*, the US Supreme Court points out that common sense is a 'non-technical understanding related to the factual and practice circumstances of daily life, providing a basis for a reasonable and honest Human Being, but not a specialist of law, to act'[95].

Ergo, common sense ensures that even solutions of specific problems consider clearly understandable human wisdom. Common sense helps us avoid purely mechanical and formal application of specialist (such as legal) knowledge in deviation from the ele-

95 The ruling of the US Supreme Court No. 95-5257 dated 28 May 1996 in the case of *Saul Ornelas, Ismael Ornelas-Ledesma, Petitioners v. United States.*

mentary and generally understood requirements of common sense. Common sense is not interchangeable with the principles of logic, justice, or integrity. It is an equally important method of reasoning to be used in parallel with those referred to above and allowing us to verify the application thereof.

### The Cognitive Process of the Human Being

Scholars dealing with the cognitive processes of the Human Being have long admitted that when it comes to processing data, the human mind does not always obey the rules of formal logic that sometimes demand that the underlying characteristics of all phenomena be scrutinised and their mutual relationships established[96]. In many cases, the mind uses simplified images of the world, the so-called *schemes* and *scenarios*. They act as systems for data processing and automated structuring, allowing us to assign phenomena that are known to us to the appropriate category so that every object of cognition is classed together with other objects in a separate group[97]. It is this kind of division and assignment of information that enables optimisation and acceleration of the cognitive process of the Human Being and helps him find the right information more easily.

#### *Schemes*

Schemes are abstract mental reflections that logically connect their elements into a single whole and describe a certain static state of related phenomena. A case in point is the scheme of writing which connects the elements of the writer, the pen, the text written, and other elements that we visualise once we hear the word 'writing'[98].

Schemes are not inherent in the human mind, they take shape gradually and shift as the Human Being acquires new experience. The first to take shape in the human mind are the schemes grounded on the realisation of signals from the body[99]. Later, they are surrounded by increasingly sophisticated schemes that unite several simpler schemes which help the Human Being perceive non-physical senses, interact with other Human Beings, and grasp complex processes. That way, the human mind is on a path of lifelong development and is capable of realising new information.

We should note that schemes are merely very simplified images of the world and do not cover information about special attributes of phenomena. Many of the elements of a scheme are not exactly defined and act as variables adaptable to different situations. The specific information to be assigned to a particular element of the scheme depends exclusively on the context in which the scheme applies. If a particular context does not clearly identify the information needs to be assigned to a specific variable or the information in question is unclear, that variable will be filled with the usual values based on the established assumptions. This automated filling of variables on the one hand offers some flexibility in applying a scheme and makes it possible to learn about things even when there are not enough data available, and on the other hand, constitutes one of the assumptions that result in errors in the thinking process.

#### *Scenarios*

In the process of thinking, Human Beings use not only schemes that combine static elements, but also *scenarios* that described certain typical real-life situations and tie individual events with chains of causality. Much like schemes, the scenarios occur in the human mind from birth and gradually take shape as the Human Being learns about the world surrounding him.

Scenarios born within the mind of each Human Being have their own beginning and an end, actors, motives of their behaviour, acts, thoughts, and wishes[100] that help the Human Being understand many daily phenomena and choose the appropriate behavioural models. Just like with schemes, many of the elements that comprise the content of a scenario are usually filled with abstract meanings that tell us, in general, 'how it usually is,' 'what are the usual causes,' 'what people normally feel.' When we apply a scenario to specific events, the content of the scenario is filled with real actors, their feelings and words.

Scenarios greatly simplify the Human Being's life. The Human Being is able to understand the further course of an event and adapt his behaviour accordingly in virtually every real-life situation, whether he is working out in a gym or answering a court summons. Scenarios are stored in the human mind and are recalled when an explanation of some events is needed. That way, scenarios help the Human Being recognise certain phenomena even when no empirical data are available on them; however, just like with schemes, filling scenarios up with standard meanings is one of the reasons why errors in the process of thinking occur.

#### *Cultural Models*

Schemes that take shape on the basis of the Human Being's personal experience, as well as their scenarios cannot be and are not the only source of knowledge. The content

96 HORSBURGH, B.; CAPPEL, A. Cognition and Common Sense in Contract Law, p. 1095.

97 HORSBURGH, B.; CAPPEL, A. Cognition and Common Sense in Contract Law, p. 1095. See D'ANDRADE, R., *The Development of Cognitive Anthropology* 136, 138–140, 143–45, 178 (1995); STRAUSS, C., QUINN, N., *A Cognitive Theory of Cultural Meaning*, Cambridge: Cambridge University Press, 1997, p. 53, 58.

98 *Ibid*., see D'ANDRADE, R., *The Development of Cognitive Anthropology*, 136, 138–140, 143–145, 178 (1995) at 123.

99 MONK, R. R. *The Great Philosophers*. Oxford: Routledge, 1999, p. 105, 111.

100 JUSTICKIS, V. *Bendroji ir teisės psichologija:* vadovėlis. 2-oji patais. ir papild. laida. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2004, p. 275.

of the schemes and scenarios that are embedded in the human mind and develop through experience is substantially augmented by *cultural models* that the Human Beings receive from the family, their close relatives, and the community at large.

Cultural models provide the Human Being with self-evident, standard explanations of physical and social phenomena that tell the human mind the meanings that the community attaches to certain elements of a scheme or a scenario[101]. As a result, we can recognise in the schemes and scenarios certain cultural values, rules and rituals of informal behaviour rendering every culture unique. Notably, cultural models can go beyond folk wisdom and the unconscious understanding of the world around the Human Being to include scientific knowledge as well. This knowledge can make its way into cultural models only if it is recognised within the community of the subject learning it.

Human Beings who were raised in a particular well-defined community will have similar cultural models. This is what gives the Human Being an opportunity to reach a mutual understanding of the standard meanings to be attached to individual elements of schemes and scenarios, and to understand and predict one another at the same time[102].

In a way, cultural models, schemes, and scenarios are similar categories, but they are not identical. Schemes and scenarios are characteristically abstract, many of their elements are not filled with specific information. This makes it possible to use schemes and scenarios in various situations and to assign desired information to their variables. On the other hand, when we use schemes and scenarios as a basis for cultural models filled with widely accepted cultural experience, we obtain standard results as often as not. That is because many of the scheme and scenario components are pre-filled with widely accepted and perceived assumptions of causality. All that allows us to understand and explain decisions we make in exercising common sense.

*The Meaning of Schemes, Scenarios, and Cultural Models*

People tend to go for the most popular problem-solving schemes, scenarios, and models, regardless of whether the decisions are right and useful in a particular situation. Besides, the decision is typically achieved the easiest way – given an opportunity to adopt a pragmatic scheme of thinking, the Human Being will not use scientific methods that can provide the most accurate results. Since thinking depends on the context in a pragmatic sort of way, a chosen method of thinking can be largely affected by the social environment in which the problem occurs.

101 HORSBURGH, B.; CAPPEL, A. Cognition and Common Sense in Contract Law, p. 1099.

102 STRAUSS, C.; QUINN, N. *A Cognitive Theory of Cultural Meaning*, pp. 6–8, 54, 59, 122–123.



*The Ability of Schemes, Scenarios, and Cultural Models to Change*

The possibilities to alter the content of schemes and scenarios in view of new facts are very variegated. The fundamental schemes and scenarios (especially those that the Human Being uses to systemise information obtained through empirical senses) are rather unconscious. The do not carry a lot of empty variables and are therefore not prone to change[103]. Whereas complex, higher-order schemes and scenarios are possessed of a higher degree of flexibility and can be modified as needed more easily[104].

The ability of cultural models to change is much more complicated than that of schemes and scenarios because they are authored not by an individual but by the entire community, which has been able to reach an agreement on certain values and desired behavioural models during its long period of co-existence and harmonisation of interests. Cultural models are and must be quite austere; they have to give precise values to scheme and scenario variables so that the information encoded in them is understandable to all members of the community, yet in order to ensure the universality of their application, they are capable of change.

The key factor determining the relative flexibility or austerity of higher-order schemes, scenarios, and cultural models, is the data processing method common sense employs in solving specific problems.

*Data Processing*

As repositories for information on the world surrounding the Human Being, schemes and scenarios also function as data processing tools – dynamic structures that systemise and structure information obtained through empirical senses[105]. This process involves two methods of thinking. In the first case, data are processed in a conscious, linear way that is grounded on rules, when the available information is broken down into abstract units that are processed under the roles of formal logic. The second method uses parallel information networks, analogies, imagination and does not follow the formal logic rules.

The linear method of thinking applies on different levels of thinking and its elements are connected with chains of causality under the principle of *'if… then'*[106]. The main advantages of the linear method of thinking are the huge cognitive power, the possibility to learn about an indefinite spectrum of objects, and the reliability of inferences made in the process of thinking[107].

103 PROFFITT, D. R. Inferential versus Ecological Approaches to Perception. In STERNBERG, R. J. *The Nature of Cognition.* Bradford: Bradford Book, 1999, pp. 447–474, p. 447.

104 STRAUSS, C.; QUINN, N. *A Cognitive Theory of Cultural Meaning*, pp. 52–53.

105 D'ANDRADE, R. *The Development Of Cognitive Anthropology,* p. 136.

106 HOLLAND, J. H., HOLYOAK, K. J., *et al. Induction: Processes of Interference, Learning, and Discovery.* Cambridge: Bradford Books, 1986, pp. 92–93.

107 THAGARD, P. R. *Mind: Introduction to Cognitive Science.* Cambridge: MIT Press, 1996, pp. 42–57.

However, we have to admit that this rule-based method of thinking is not and cannot be applied in every rea-life situation, it cannot reflect all thinking operations the Human Being performs. One of the key weaknesses of the linear method is the inability to explain how thinking is related to the cultural setting of the learning subject and their interaction with physical and social phenomena[108]. On top of that, this method of thinking does not have qualities that are considered to be essential elements of the thinking process. To be more specific, the linear method of thinking is quite slow. That is why this method cannot be used in fast-moving thinking operations as subconscious learning, memorisation, and recognition of thinking models[109].

Neither can the linear method be used to explain the Human Being's ability to learn. When we employ this method to think, we can learn on the basis of trial and error, yet if we want to turn this into a system, a lot of background data are required. Yet most of the knowledge is acquired by the Human Being subconsciously and not through trial and error.

A computer simulation done by scientists has revealed an essential problem with the linear method of thinking – its fragility[110]. The process of thinking was found to be liable to stall if the underlying data or task changed in any way[111]. This is not a typical property of human thought, because the Human Being is able to continue his thinking process even when he does not have sufficient or sufficiently accurate initial data[112].

The human thinking process involves yet another method of thinking – this one, connectivistic[113]. Notably, contrary to the linear method, thinking under the connectivistic method is organised in parallel networks, providing for more flexible and faster processing of the available information. The connectivistic method can be used to easily handle problems that are difficult to crack with the linear method of thinking. It offers an opportunity to explain how the Human Being can acquire cultural information and learn. The connectivistic method of thinking allows us to grasp and internalise cultural information through simple involvement in (and observation of) daily life. The experience we acquire and our reactions to different phenomena are used as initial data that the Human Being's mind processes in its own specific way. When we repeat the same method of operation with increasing frequency, we strengthen the ties among units that process the information, which helps understand situations and phenomena and make the appropriate decision almost instinctively.

108 D'ANDRADE, R. *The Development of Cognitive Anthropology*, pp. 246–247.

109 *Ibid.*, p. 144.

110 HORSBURGH, B.; CAPPEL, A. Cognition and Common Sense in Contract Law, p. 1105.

111 *Ibid.*, p. 1105.

112 *Ibid.*, see STRAUSS, C. & QUINN, N., *A Cognitive Theory of Cultural Meaning*, p. 66; M. R. W. DAWSON, *Understanding Cognitive Science*, Maiden, MA: Blackwell Publishing, Inc., 1998, pp. 37–38.

113 *Ibid.*



When the system works in this manner, it is capable of grasping the nature of different phenomena and to choose the right reaction to them without placing any demands for voluminous initial information[114]. It also works as a self-controlled system, as every successful application of a scheme or a scenario builds belief in it being true and reliable. Otherwise the system is forced to look for an error in the scheme or scenario[115].

We have to admit that despite all the advantages and weaknesses of every method of thinking, Human Beings apply them with proportionate consistency: abstract problems are usually resolved under the linear method of thinking, while problems that are more specific (and especially when several interrelated problems have to be resolved at once) are tackled using the connectivistic method.

Once we realise the above methods of human thinking, we can draw a conclusion that common sense manifests with the Human Being thinking with schemes, scenarios, cultural models, and using the connectivistic method of thinking. Moreover, common sense allows us to understand the reasons behind the Human Beings' decisions.

## Problem Aspects of Operation of Common Sense

For a lawyer, it is very important to perceive the problems relating to common sense that occur in the process of thinking. This can lead to mistakes in the application of law that will often have grievous and irreversible consequences. Therefore, when it comes to handling legal issues, one has to follow the formal rules of logic to the letter and also be critical in their assessment of the common sense conclusions. On the other hand, we must always consider the problem aspects of the operation of common sense that allow us to critically assess any conclusions that common sense may suggest.

### *The Problem of Filling the Missing Elements of Schemes and Scenarios*

A thinking process running on the basis of schemes and scenarios allows us to understand phenomena even when we do not have all of the necessary information about them as the missing elements of a scheme or scenario are filled with the usual values. This quality of the human thinking process allows us to understand the world as it is rather than its individual parts. On the other hand, it is this particular quality of thinking that may lead to a lot of errors in the thinking process, especially when the Human Being has limited information or the information in question is controversial and obscure.

114 D'ANDRADE, R. *The Development of Cognitive Anthropology*, pp. 75–76.

115 VAN ZANDT, D. E. Commonsense Reasoning, Social Change, and the Law. *Northwestern University Law Review*, Summer 1987, p. 926.

Information that common sense will use to fill in the missing elements of a scheme or scenario will not be found in the human mind *a priori* – its will always be sourced either in the Human Being's previous experience, or cultural models he has adopted from his community. It is this source of information that causes errors as common sense tries to fill in the missing elements of a scheme or scenario with subjective information that often has nothing to do with the object being recognised, which the Human Being has acquired through his personal experience or has adopted from his community.

Still, we must not forget that the community of Human Beings as the source of cultural information is often flooded with speculative information, which renders thinking processes difficult and distorted. Filling schemes and scenarios in this way constitutes the first fundamental error of common sense that is caused by a lack and uncertainty of objective information and can lead to many legal mistakes being made.

*The Problem of Choosing the Right Scheme or Scenario*

Conclusions that common sense may suggest can be misleading not only because individual elements of a scheme or scenario are filled with erroneous information, but also because in its assessment of the senses acquired, the mind applies the wrong scheme or scenario. When the Human Being is learning about the world, he is flushed with experiences and emotions. To be able to understand and explain them, the mind tries to choose the best overarching scheme for the experience already acquired, by using the linear or the connectivistic method of thinking. When trying to adopt the scheme to separate phenomena, it must answer the additional question of whether the scheme chosen is adequate in view of the phenomena that are known, and on that basis make a decision if the process of choosing the scheme can be completed. It is in this situation that the danger of common sense going wrong lies. Limited information, limited real-life experience, and hasty thinking are the main mistakes that prevent the Human Being from searching for the right solution.

*The Problem of the Tendency of Confirmation*

The third problem that common sense faces is the tendency of confirmation, which becomes evident both in choosing the right scheme or scenario, and in filling the missing elements of an individual scheme or scenario[116]. This tendency manifests as follows: after a scheme or scenario is chosen or its content is filled with certain information and the thinking process continues, common sense tends to focus upon the facts that support its choice while arguments that deny it receive a lot less attention[117].

116 HORSBURGH, B.; CAPPEL, A. Cognition and Common Sense in Contract Law, p. 1114.

117 *Ibid.*



Common sense works quite similarly when it tries to recall some information as well. During this process, common sense tends to screen the things that match its world-view and to go on 'strike' when it needs to remember something that is against it. This is how consistency of thinking is developed. If thinking is filled with incomplete or misleading information, the possibility that the thinking process and its result – the decision made – will be erroneous, is huge.

Human Beings are 'cognitive conservatives' – they do not want to change their ideas of the world and its objects. Such conservativism is much stronger than believed, and even as the Human Being himself thinks it to be. After the Human Being makes a decision, he finds it difficult to get back to the analysis of the information that has led to that decision. The Human Being desperately seeks the fastest ways to make a decision and tries to ignore the thinking process in all its forms. This mistake can be seen in the domain of law as well.

The corruption of the thinking process has been proven by a study done in an attempt to find out how a jury makes decisions. The results of the study showed that the tendency of confirmation is one of the key drivers behind the judgement of the defendant being found guilty or not: during the trial, the jury first of all try to construct what they believe to be a possible model of the events and only then do they try to obtain evidence to prove it[118].

## Common Sense in Trials

One of the main factors that affects the strength of our arguments and their impact on the addressee is the soundness of the story that links separate facts of an event into a single chain of events. Such stories are spun by every Human Being trying to piece the available facts into a coherent tale that would allow him to properly understand the event and its sequence. Just like every Human Being, lawyers, pre-trial investigators, and judges, too, create stories to determine the circumstances around an offence or the occurrence of legal amenability.

Thanks to this type of assessment of evidence, any dispute in court (especially when it comes to identifying and evaluating the circumstances of a case) is always a dispute over whose story is the more truthful. Every party in a trial relies on the available evidence to create the most convincing story and make the court and other parties believe that this story holds the most truth[119]. This phenomenon is illustrated perfectly by Patsy Weber, who argues that 'in court, whether a witness is telling the truth does not matter at all – what

118 KUHN, D.; WEINSTOCK, M.; FLATON, R. How Well do Jurors Reason? Competence Dimensions of Individual Variation in a Juror Reasoning Task. *Psychological Science*, 1994, Vol. 5, pp. 289–296.

119 *Ibid.*

matters is whether the court sees the witness as one who is telling the truth. If the court perceives that the witness is lying, whether he or she is telling the truth is completely irrelevant. When they pass their judgement, the jury in absolutely every case first follow their emotions, and only then do they find some rational reason to justify it'[120]. As a result of this kind of significance of the story in the process of legal reasoning, lawyers and scholars alike are extremely interested in its origins and qualities that determine whether the story will impress the audience as being truthful.

While analysing the origin of the story, scholars have reached a conclusion that every story rests on scenarios embedded in the Human Being's common sense, which in the process of creating the story are filled with the available information on how things normally are in life. By gaining more and more real-life experience, the Human Being at the same time becomes capable of filling the missing elements of a scenario with alternatives. Thus, his thinking slows down, he is able to recognise and assess more different situations and design increasingly plausible stories.

As he analyses alternative stories about a particular event, every Human Being can measure them in terms of proximity to the truth. What causes this type of choice and what criteria he follows are the questions that interest us the most.

In the process of thinking, common sense assigns to every scenario a particular tag that signifies that 'the events under this scenario are very plausible' or 'the events under this scenario are quite unlikely.'

The value of preconceived belief in one or another scenario is quite high in court business as well. Scientists W. Lance Bennett and Martha S. Feldman have conducted a study to investigate the properties that make a story appear reliable and truthful to the Human Being. In the process of simulating a trial, several jury members were asked what had caused them to believe one or another story. The results of the study allowed the scientists to identify the underlying elements of a reliable story. Apparently, a plausible story always has a clear main action, all of the circumstances referred to in the story must clearly support the causes of the actors' actions, and all elements mentioned in the story must have a connection with the main action.

Of course, in real life this is a very rare occurrence: every event comes with an abundance of unnecessary, ambiguous, and controversial details, but they have no place in a convincing story. Stories that contain a lot of details that are not related to the main action stir a feeling of mistrust in the Human Being straight away[121].

These examples only show the importance of common sense scenarios for legal reasoning and how easily they can be manipulated to create plausible stories that satisfy

120 SHEPARD, S. Consultant An Asset For Lawyers When Trial Case Goes Before Jury. *Memphis Business Journal*, December 14, 2001.

121 BENNETT, W. L.; FELDMAN, M. S. *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture.* The State University of New Jersey: Rutgers University Press, 1981.



every requirement, and to present them for the court verdict[122]. What is more important is that during the trial common sense, the factor that builds the judge's internal conviction in the truthfulness of the story, acts independent of his consciousness. The judge may feel he believes a certain story but he finds it difficult to understand how much of that trust is down to the consistency of the story, its imagery, or its connections with the postulates of common sense. It is therefore very important for the judge to be well positioned to visualise the factors that form conviction, be conversant with the way they work, and be able notice their effects. Only then will he be able to control the mechanism of their action[123].

For a lawyer, it is equally important to understand not only the principles of how common sense works in practice, but the relationship between common sense and law as the result of social creative work, too.

Notably, common sense and law as a social phenomenon share an extremely close bond. Law happens with Human Beings exercising common sense in their thinking and at the same time helps guide the further thinking processes of the Human Being. This helps Human Beings design schemes and scenarios, fill in their missing elements, and allows them to solve problems as they occur. Combined with coercion on the part of the state, law can be used to make other Human Beings modify the content of their schemes or scenarios.

Since law is a social phenomenon born out of a creative process that inevitably involves the Human Being, we can say that it will always be a certain form of expression of decisions offered by common sense, or a result of common sense in action. Law will continue to have this quality irrespective of whether we understand law as an expression of the sovereign's will or treat it as a specific expression of judicial will, as well as whether the mandatory rules of conduct will aim to serve the personal good of the lawmaker, or the interests of the public. On the other hand, as we discuss the relationship between law and common sense, we must remember that just like any other social phenomenon, law is defined by a certain degree of relativity. In any case, law will always have its source rooted in the lawmaker's common sense attitude towards the world and its phenomena[124].

Every time he adopts a mandatory rule of conduct, the lawmaker (consciously or unconsciously) transfers into it his own specific attitude towards the world and its elements. This specific attitude is grounded on common sense decisions on the effect that the new mandatory rule of conduct will have on the practical behaviour of individuals. Of course, we have to admit that when it comes to outlining the limits of individual behaviour, in some cases the lawmaker also refers to studies and the doctrine of the social sciences. Yet many scientists tend to agree that the main source of legislation lies in the common sense of

122 MACCRIMMON, M. What is 'Common' About Common Sense?: Cautionary Tales for Travelers Crossing Disciplinary Boundaries. *Cardozo Law Review*, July 2001, p. 1456.

123 JUSTICKIS, V. *Bendroji ir teisės psichologija,* 2nd revised edition, p. 287.

124 VAN ZANDT, D. E. Commonsense Reasoning, Social Change, and the Law, p. 935.

the lawmaker. Decisions that common sense dictates to the lawmaker are obtained much faster than the results of scientific investigations, plus they always appear quite correct and reliable.

If we look at the arguments that parties in litigation or courts use during the trial, we can see society's opinion that the law and common sense must embrace what is essentially identical perception of the world and separate justice from injustice. When they appeal to common sense, courts or parties in litigation do not disclose its content, yet claim that governmental decisions, legal regulations, or actions of the other party that are being appealed against deviate from common sense, transcend its boundaries, are not aligned with or contradict common sense. When they talk about a contradiction the 'law and common sense'[125], 'common sense and the principles of justice', 'principles of prudence, justice, and integrity and common sense'[126], parties in litigation assign equivalent values to the categories of law and common sense; that is, they believe that the law covers what is right and common sense (or does not contradict common sense or transcend its boundaries).

Certain actions of Human Beings that affect the rights and interests of others, as well as the causes and judicial assessment of such actions, are considered by parties in litigation as contradictory in terms of law because they entail unreasonable economic or social decisions. Human Beings who appeal such actions refer to them as conflicting with common sense and ask courts to recognise them as contrary to law. This gives common sense the meaning of pragmatism. Common sense decisions are thought to necessarily have economic justification, to benefit individuals and society, be based on optimal costs, and never undermine initiatives that are good for the community[127]. Notably, when we apply common sense decisions in law, we imagine how the mandatory rule of conduct will affect the practical behaviour of Human Beings and transfer the common sense attitude to what is best for society, that is the common sense attitude to the moral values of the community. Thanks to this function of common sense, phenomena such as a ban on drugs or prostitution reflecting the lawmaker's subjective view of how the world should be arranged have a place in law[128].

125 The ruling of the Supreme Administrative Court of Lithuania in administrative case No. A151043/2006 dated 11 October 2006.

126 The judgment by the Supreme Administrative Court of Lithuania in administrative case No AS6351/2006 dated 19 October 2006.

127 The judgment by the Lithuanian Court of Appeal in civil case No 2A-365/2014 dated 19 March 2014; the judgment by the Supreme Court of Lithuania in civil case No 3K3595/2008 dated 9 December 2008; the judgment by the Supreme Court of Lithuania in civil case No 3K-3-89/2006 dated 8 February 2006; the judgment of the Lithuanian Court of Appeal in civil case No 2A121/2002 dated 2 April 2002; and the judgment of the Lithuanian Court of Appeal in civil case No 2415/2003 dated 16 October 2003.

128 VAN ZANDT, D. E. Commonsense Reasoning, Social Change, and the Law, pp. 159–205, p. 935.



Even though society disagrees with some of the mandatory rules of conduct, it is admitted to tend to uphold them or at least have a neutral opinion about them in most cases. This phenomenon can only take place when the mandatory rules of conduct set by the lawmaker reflect the common sense decisions of individuals to whom they apply or are compatible with said decisions. A mandatory rule of conduct conflicting with common sense decisions of Human Beings will result in a completely different situation. In that case, Human Beings will not be inclined to approve it, rendering it unenforceable in the real world.

As previously mentioned, law and common sense share a mutual bond in the form that on the one hand, law develops on the basis of common sense decisions, and on the other, under certain circumstances law can begin to have its own effect on decisions that common sense dictates. In a situation like that, law becomes an ideological tool used to prevent individuals from certain actions and to alter their common sense beliefs.

By making individuals change their view of the world or include certain new information in their decision-making process, law at the same time tries to modify the institutional structure of the society and affects the decision-making process of individuals by affecting both the structure of schemes and scenarios, and the information that fills their elements[129].

In summary of the above, we can note that:

*First,* common sense is a structured method of thinking rooted in the psychology of every Human Being. It is a much wider category than that of law. It helps the mind process and systemise the Human Being's experiences by cognition, level of consciousness, and continued interaction with the surrounding world.

*Second,* common sense cannot be used interchangeably with logic, the principles of prudence, justice, integrity and such, as it is used in combination with other principles of legal reasoning. Common sense allows us to verify the application of other ways of argumentation s in terms of the wisdom of all Human Beings.

*Third,* the use of common sense in law means that essential and obvious qualities of thinking that are typical to every Human Being are considered even in complex situations in which we legal knowledge. Law and common sense must share a tight bond.

*Fourth,* the category of common sense is important for the purposes of legal reasoning. Common sense is a criterion that defines the plausibility of the story which combines separate facts into a solid chain of events.

*Fifth,* we must be critical in our assessment of the application of common sense in its own right because a lack of objective information, limited experience, and a desire to provide previous decisions may render legal application of common sense more difficult.

129 *Ibid.*, pp. 159–205, p. 939.

## Concepts

For all practical purposes, reasoning is all around us. Every time he wants to justify a decision, action, or deed, the Human Being resorts to reasoning and tries to prove that the decision, action, or deed is right. According to the dictionary of international words, 'to reason' is to provide arguments, to prove, to justify[130]. Still, reasoning does not imply mere validation of one's position. It also entails interpretation. Furthermore, reasoning should not always be construed as interchangeable with rhetoric, which in its broad sense is perceived as the science of the art of eloquence or the theory of eloquence[131] that usually accentuates the skill of speaking or the form of expression, leading to a suggestive presentation of thought[132]. Whereas reasoning also includes the category of perception, which is critical to finding things out, which means that to provide the right argument, one first has to perceive it.

Reasoning can take place in various fields, from politics to economy to biology to natural sciences etc. Still, reasoning in law has the highest significance. As a case in point, we can refer to the plethora of regulations that explicitly stipulate that certain decisions, resolutions, or other acts have to be well-reasoned[133]. Reasoning is important in every sphere of law: law-making, interpretation of law, or application of law. Still, its importance is highest when it comes to judicial activity, or passing judgment. Every judgment must be well-reasoned, which means that the choice the judge makes always has to be justified.

An argument is an element of reasoning. The entire process of reasoning is built on arguments, which makes it an entity of arguments. The dictionary of international words defines an 'argument' as a presumption of proof, also known as a basis of proof, a proposition that validates the evidentiary thesis, a whole of interrelated propositions[134]. Still, an argument can be any tool, any figure of speech geared towards convincing the audience of a perceived proposition that is being presented.

130 The Dictionary of International Words (A–K). By VAITKEVIČIŪTĖ, V. Vilnius: Žodynas, 1999, p. 115.

131 The Dictionary of the Lithuanian Language (vol. I–XX, 1941–2002): electronic version [interactive]. [accessed on 3 August 2017] Online access: < http://www.lkz.lt/startas.htm>.

132 TATOLYTĖ, I. *Praktinė retorika vertėjams žodžiu.* Vilnius: Vilnius University, 2014, pp. 23–24. Still, rhetoric can sometimes be perceived as the art of reasoning that includes both the ambition to persuade or affect the audience, present and defend one's position, and a certain ability to think (*Ibid.*, p. 24).

133 E.g., see The Code of Civil Procedure of the Republic of Lithuania. Official Gazette *Valstybės Žinios*, 2002, No IX-743, Article 270(4)(3); The Law on Jurisdiction of Administrative Cases of the Republic of Lithuania. Official Gazette *Valstybės Žinios*, 1999, No VIII-1029, Article 87.4.3.

134 The Dictionary of International Words (A–K). By VAITKEVIČIŪTĖ, V. Vilnius: Žodynas, 1999, p. 115.



The concept of law is difficult to define. We can say that nearly every definition will be inadequate as failing to cover certain aspects of law. The concept of law constitutes an eternal dilemma of the science of law[135]. Still we are not (and probably will not) be able to say with any degree of certainty what law is, what it includes, and what it regulates. The definition of the category in question depends on the tradition or paradigm of law that the defining Human Being follows: a complete positivist radical will have his own definition of law, while a scientist of law philosophy or sociology will define law in a completely different way. Ergo, law should be understood as a certain complicated dynamic organisation that merits a complex view, which makes understanding processes that take place in it, reasoning included, a difficult task. That is why legal reasoning should be perceived as a philosophical field that includes both the presentation of the whole set of propositions supporting a particular assessment of a situation, and the understanding of the factual, social, psychological, or emotional aspects relevant to that situation before the above assessment is presented.

## Arguments and Reasoning

Reasoning covers both perception and presentation. When we reason, we present arguments, which form a part of reasoning. As every argument is part of a whole, it is very important for it to be appropriate, or to match other arguments. Isolated arguments can be either appropriate or inappropriate, right or wrong. Whereas in the process of reasoning, arguments must also satisfy the requirement for compatibility. An argument that is not compatible with other arguments in a string of reasoning cannot be deemed appropriate, and the reasoning, rational. The same sort of thing can be said about controversial arguments. Prepositions that contradict one another cannot be considered appropriate.

Sometimes a question arises of whether legal arguments can be jumbled together with other kinds of arguments. Will presentation of certain economic arguments together with legal arguments breach the requirement for compatibility? In fact, a range of arguments is a good thing to use, however there must be some clarity. Will presentation of arguments from different fields violate the requirement for clarity? Presentation of arguments from different fields should maintain a certain form, identifying where one argument begins and where it ends. Could it be that an argument will not weigh as much if we present it in the wrong place? Can the placement of an argument in the process of reasoning be crucial to its potential of conviction? We should admit that arguments, as parts of a whole, should have their own place, and arguments from different spheres should be clearly segregated in the entire process of reasoning.

135 E.g., see: HART, H. L. A. *Teisės samprata.* Vilnius: Pradai, 1997, pp. 43–51.

Arguments

As already mentioned, arguments can vary a lot, and therefore on the following pages we will try to make a broader overview of some of them is provided.

1. *Argument from analogy.* This argument is particularly important in the Anglo-Saxon tradition of law, where law is based on precedent. A very appropriate argument is that a comparable situation was once resolved in one way or the other. This argument can only be applied when we come across a case that shares some material circumstances with the case at hand, while all the other circumstances can clearly differ[136]. This argument prioritises perception of what the material circumstances of a case are and whether the circumstances of two or more different cases are similar. Only when we have a clear understanding of these aspects can we apply argument from analogy.
2. *Argument from an established rule*[137]. In this case, the most important thing is that there must be an agreement to follow a certain rule, meaning that several Human Beings will reach a mutual understanding that at least one mandatory or prohibited action that is not covered by legal regulation will be construed as such in their regard. One case in point could be the establishing of a deadline for the fulfilment of a contract. Unless a Human Being fails to fulfil the contract by the established deadline, the other Human Being may present an argument that he is wrong in doing so: they have established a rule whereby the contract had to be fulfilled by the designated deadline. In this case, the Human Being failing to fulfil the contract may try to explain he has failed to do so due to some circumstances and, opposite to analogy, try to show that his case is different from every other similar case. Nonetheless, argument from rule is very important. An agreement is an agreement and exceptions may be made in unique cases only.
3. *Argument from sign*[138]. This argument is based on empirics. To begin with, the Human Being sees or recognises a particular sign, its general characteristics, and makes a conclusion from that by presenting the so-called argument from sign. This argument consists of a major and a minor premise. The major premise points to a certain general characteristic, the minor premise, to a characteristic of an individual case. The general and the individual characteristics are connected through conclusions. Argument from sign is very commonly used in medical research. For example, an indication of the cause of death requires some general signs. A deceased Human Being shows certain signs that allow doctors to make a conclusion about one and not another cause of his death. In essence, this argument is rather appropriate because it carries a certain degree of empirics. On the other hand, argument from sign provides very rich soil for speculation. Some individual cases are often not comparable to general cases because, as we know, there is an exception to every rule. Therefore, we have to admit that this argument should only be applied with caution as it can lead to legal manipulation.
4. *Argument from position to know*[139]. This argument is inseparable from the Human Being presenting it. An argument is considered to be right only because it is presented by an informed Human Being, i.e. a Human Being who knows about the situation at hand. In trial, this could mean witness testimony as witnesses are Human Beings who know some information that other Human Beings involved in the case want to know. There can also be expert or specialist opinions. Still, this argument does not have a lot of weight because it is connected to the Human Being presenting it. The position to know is highly relative, and the category of knowing per se is very abstract. Knowing associates with understanding, perceiving, and interpreting certain circumstances. It is a known fact that every Human Being understands different things differently due to the personal experience, attitudes, values (the so-called basic attitude) of every Human Being. Philosophically speaking, this argument is rather weak because even its name contains a flaw. 'Position to know' is an abstract category that calls for real analysis and interpretation, it is unable to clarify the arguments and describe the qualities of an argument. Besides, argument from position to know is comparable to *argumentum ad verecundiam,* which is discussed later as a false reasoning.
5. *Argument from commitment*[140]. This is a rather specific argument that cannot be applied in every case. It is very appropriate in certain discussions of values. For instance, a Human Being who objects to certain things will approve of them under a different set of circumstances. The essence of this argument is for the Human Being to say that he argued differently in the past and was committed to that, but now has adopted an opposite position. As a result, his opinion is unclear and not quite justified. Here is one more specific case in point: an 'arguer on the pro-choice side consistently denies that the foetus is a person who has human rights. But then suppose that when the issue of

136 WALTON, D. N. *Legal argumentation and evidence.* Pennsylvania: The Pennsylvania State University Press, 2002, p. 35.

137 WALTON, D. N. *Legal argumentation and evidence*, p. 39.

138 *Ibid.*, p. 41.

139 *Ibid.*, p. 45.

140 WALTON, D. N. *Legal argumentation and evidence,* p. 53.

fetal alcohol syndrome comes in for discussion, the same person claims that the mother is violating the human rights of the baby in the womb'[141]. In this case, argument from commitment can have great value by simply reminding the opponent, as if inadvertently, that this new commitment is different to his previous one.

6. *Argument from emotion.* This is an argument that appeals to an emotion, feeling, rather than rationality. This argument offers wide possibilities for manipulation because, as we know, every Human Being has his emotions. The difference is that some are very good at controlling them while others manage with more difficulty. An example of argument from emotion could be an appeal to the insignificance of an offence and reference to difficult living conditions. For instance, a Human Being with no place to live and source of income steals a chicken. In this case, even though penal laws would classify this as theft, argument from emotion could be applied considering the situation. Social relationships are regulated by law, which often leads to situations when different things may appear just from the position of the law and that of humanity. It is in cases like that that arguments from emotion are typically used. It is difficult to say when this type of argument is justified and when it merely constitutes a manipulation. Alas, the boundaries of using argument from emotion are rather vague.
7. *Argument from threat*[142]. With this argument, we indicate that unless a specific decision is made, negative consequences will occur. This argument aims to justify certain actions or deeds as entailing positive consequences. Failure to act/inactivity can be reasoned with arguments that a different course of action would bring negative consequences.

As we discuss arguments, we must mention the *true argument* as well. It cannot be explicitly referred to as an argument but rather any type of argument can be the true argument. The true argument is a proposition formulated with as many sources of reasoning as possible, which may include legal texts, the contents and meaning of a legal norm, the purpose of law, court judgments, the legal doctrine, the lawmaker's intentions, the social norms. The true argument constitutes a conclusion made on the basis of all of the above sources. An argument cannot be relevant if it only relies on a single source. Reliance on a single source may be described as poor. Of course, we can say that true arguments only exist in theory, but the opinion that practice and theory are two completely different spheres is flawed. The more practice tries to get close to theory (in terms of reasoning), the more true arguments testifying to solid legal consciousness of judges will be present in judgments.

141 *Ibid.*, p. 45.

142 WALTON D. N. *Argumentation Methods for Artificial Intelligence in Law.* Heidelberg: Springer, 2005, p. 10.



## Reasoning in Court Judgment

When it comes to judgements, we can identify the following reasoning:

1. *Judgment without motives.* Here, the judge grounds his judgment on meaningless theses about critical evaluation of evidence, inappropriate behaviour, and so on. He will not present any arguments, and true arguments in particular.
2. *Type of syllogism.* This is a type of reasoning that is based exceptionally on logic. In form, it resembles argument from sign. We have a major premise (a particular general norm), and a minor premise (an individual case). Using legal syllogism, the judge combines the major and the minor premise to make a conclusion. Everything would appear to be very logical and ordered; however, the science of logic has admitted that its propositions are often purely logical but not necessarily right. The weakness of syllogism is that it does not aim to cover a certain context and fails to consider many circumstances relevant to the case[143]. This method of reasoning merits a great deal of criticism.
3. *Type of statement of facts.* This is a type of reasoning when the judge covers all facts in his judgment, but fails to present any arguments as to the evaluation of these facts. The contents and meaning of legal norms are not addressed here. In this case, judges rely on empirics but totally ignore other sources of reasoning. This kind of reasoning has a flaw because it is rather one-sided.
4. *Type of dialogue.* This is an appropriate way of reasoning. In this case, the judge covers all arguments in his decision. With such reasoning, arguments both in favour and those against are analysed, and the contents and meaning of the legal norm are disclosed and facts are considered.
5. *Scientific type.* This method is comparable to the type of dialogue, but it brings theory closer to practice. The judge discusses not only the contents and meaning of a norm, but certain value-based aspects as well.

The above shows that the range of reasoning is quite vast. Still, only the dialogue and scientific type of reasoning can be considered appropriate. These types are applied to consider a sufficient amount of reasoning sources, which is the basis on which the true arguments rest.

143 E.g., see: HUHN, W. R. Use and Limits of Syllogistic Reasoning in Briefing Cases. *Akron Law Publications*, 2002, No 3. pp. 813–862.

### False Reasoning

There have been many false arguments, of which the following are worth mentioning:

1. *Argumentum ad crumenam* is reasoning that is grounded on the Human Being's good financial standing or absence of wealth, arguing that a rich Human Being will be the one who is right[144]. This argument follows an opinion that only a rich Human Being can be clever, insightful, or virtuous[145]. In other words, you cannot be clever and poor at the same time. It is difficult to say whether this argument is appropriate in modern times, but the relationships that often can be seen in a social setting show that money does not play a secondary role. A rich Human Being becomes more right than someone who is poor, and this is justified with objective circumstances. For instance, a rich Human Being will always be able to hire better legal help than someone who is less better off. Better legal help means stronger and heavier arguments, which in turn means that the court may possibly pass a judgment in favour of the rich Human Being on trial. Of course, this is a purely hypothetical situation, but it is not as rare as would appear. At the other end of the scale, we have another type of false reasoning, *argumentum ad lazarum*, when the argument of a poor Human Being is seen as the true argument, believing that poverty presumes exceptional insightfulness or virtue[146].
2. *Argumentum ex silentio* is a situation when the Human Being tries to justify his being right with the opponent's silence. This would seem absurd at a glance, but if we look at it from the perspective of civil law, we can find cases when silence means a certain act such as consent to agreement[147]. Therefore, this seemingly false argument can be very hefty and valuable in certain situations.
3. *Argumentum ad verecundiam* is a type of argument that appeals to authority, meaning that a certain proposition has to be correct if an authority figure says so[148]. Often this type of argument may be correct because the authority in question is chosen to be an appropriate Human Being (such as an expert). Therefore, regulations governing the burden of proof in a trial provide for an 'expert opinion' as well[149]. However, when we have a completely inappropriate Human Being, someone who has no knowledge of a particular field or specialisation, as the authority figure, this kind of reasoning loses its value. Still, it is not completely certain whether a person chosen as the authority figure in a particular situation is really right. For this reason, it is critical to maintain a balance between one's autonomous thinking based on non-specialist competence and an assessment of the situation produced by an authority in a particular field[150].
4. *Argumentum ad hominem* is an argument against the Human Being presenting it, and not the argument itself. The Human Being argues that an argument of another Human Being is false only because that other Human Being is unacceptable to himself or society for some reason[151], for instance, he belongs to a sexual minority, a different race, has a previous conviction, and so on. Nonetheless, this type of reasoning is clearly unjustified as the meaning of an argument can never depend on who presents it. Of course, the arguments presented are often related to the attitudes, values, experience, or education of the presenting Human Being. Yet even a Human Being who is lacking in education or who does not have any values may present an argument that does not reflect his personality. For instance, he may read the propositions of another Human Being. If that were the case, the presenter would be fully untied from the argument so presented.

Still, even if the arguments presented are essentially false, there are situations when they can be valuable, appropriate, and hefty. Reasoning is inseparable from context – the same arguments can have different weight and influence under different circumstances.

### Legal Reasoning

Law uses methods of clarification to explain and interpret law. The key methods are listed below.

1. The systemic method: one of the methods of legal reasoning whereby law is interpreted on the basis of other norms and principles of law. In this case, every legal norm is perceived as a part of the system of rules of conduct and has its own place in it, which is not incidental[152].
2. The logical method: its meaning is very debatable and questionable in legal reasoning. What is the logical method? Should the entire law not be logical?

144 HORWITZ, M.; FELLMETH, A. X. *Guide to Latin in International Law.* Oxford: Oxford University Press, 2009, p. 38.

145 *Ibid.*

146 *Ibid.*

147 E.g., see: The Civil Code of the Republic of Lithuania. *Valstybės žinios*, 2000, No. 74-2262, Article 6.757(2).

148 TINDALE, W. C. *Fallacies and Argument Appraisal*, pp. 128–129.

149 The Code of Civil Procedure of the Republic of Lithuania, Articles 212–219.

150 TINDALE, W. C. *Fallacies and Argument Appraisal.* Cambridge: Cambridge University Press, 2007, pp. 144–145.

151 TINDALE, W. C. *Fallacies and Argument Appraisal,* p. 81.

152 MIKELĖNAS, D.; MIKELĖNIENĖ, D. *Teismo procesas: teisės aiškinimo ir taikymo aspektai.* Vilnius: Justitia, 1999, pp. 194–195.

Or could it be that logic has too much value attached to it in law? They say that law must be logical, but scholars of law agree that some logical propositions are just not correct. Then we can conclude that law may be logical, but not correct. Still, logic is important to law, but not as much as some legal scholars or practitioners are trying to make it appear.

3. The linguistic method of interpretation is a must in any case, because we must first read the text of a norm or hear out unwritten law. Understanding requires language, therefore law is interpreted under this method in the first place; however, we cannot agree that it is the most important one. The interpretation of law cannot be limited to mere application of the linguistic method because very often this can produce a completely irrational result. The verbatim method of law interpretation must be applied in combination with other methods.
4. Teleological interpretation of law takes place when law is interpreted on the basis of its purpose, objectives[153]. Every norm, law, or principle has its own purpose. This is a critical method of interpretation, as norms cannot be purposeless. If this were the case, the norm would have no value. If a norm has a purpose, but the judge or another Human Being disregards it, the norm may be applied in a completely inappropriate or faulty manner.

There is the question of whether the above methods of the interpretation of law can be applied to legal reasoning as well. Are methods of interpretation of law comparable to methods of legal reasoning? As previously mentioned, reasoning includes both presentation and interpretation. In fact, methods of law interpretation are used to both interpret and clarify law. In terms of clarification, methods of law interpretation coincide with methods of legal reasoning. But then we have the question of perception, for reasoning is closely connected to perception. Which leads to another question, this one of whether perception can work with the systemic, logical, verbatim, or teleological method. Perception is a very abstract category, one that is difficult to explain. It is quite often that the Human Being perceives something but is unable to explain how a certain conclusion was reached. It is difficult to imagine that in perceiving something the Human Being should apply the systemic, logical, verbatim, or teleological method. We can only imagine that things perceived can be explained under the methods, meaning that the Human Being first perceives and then decides which method he could have applied. However, it is not possible to first choose a method and then begin to perceive. Perception has nothing to do with the intention to perceive or the application of a certain method.

The above methods of law interpretation can be applied to arguments. Every argument can be interpreted in a verbatim, systemic, logical (if it can be done separately), or

153 *Ibid,* p. 206.



teleological manner. Arguments constitute a certain whole and therefore each and every one of them has to be presented with the rest in mind. After all, for reasoning to be appropriate, arguments cannot contradict each other. Each argument has a purpose, or at least they have one overarching purpose as a whole, and to achieve that purpose arguments can be arranged in a particular order and must have a linguistic expression.

### Appropriate Reasoning

A norm is a certain rule of conduct that defines a particular mandatory or prohibited type of behaviour. Society has a lot of norms that are used to regulate the behaviour of its members. We can talk about legal norms as well as ethical, moral, religious, and other norms. Each one of them requires a particular type of behaviour, or abstinence from it. Human behaviour can be modelled. The behaviour of a particular Human Being is measured against the standards established in the norm. If the Human Being behaves in the way that a particular norm prescribes, his behaviour is considered appropriate.

That human behaviour must be measured as negative or inappropriate, should the Human Being depart from one norm or the other, is a solid argument. As far as norms established and explicitly set forth in the law are concerned, everything is most likely more or less clear. But society has a great many norms that are not legal but, nevertheless, have critical importance to a particular legal situation. When a case is affected by cultural, moral, or religious norms, we have a situation that the judge must analyse the contents of these norms and come up with arguments grounded on them. Yet such norms are understood very differently, their understanding completely dependent on the basic attitude, the values and other subjective qualities of the Human Being. So, can an argument based on a particular subjective understanding of a norm be considered relevant? Probably yes, because the entire law is rather subjective and regal reasoning that is only limited to mentioning the norm or explaining its contents is to be deemed inappropriate and flawed.

### Analogy of Law and *Argumentum e Contrario*

The analogy of law occurs when the solution from a similar situation is used as an argument in a particular situation[154].The analogy of the law following the Anglo-Saxon tradition is quite common in judicial business, because precedent plays a major part in many cases. It has been discussed above that analogy is a solid argument, but first, we must determine if it can be used. To that end, we must establish the following:

154 MIKELĖNAS, D.; MIKELĖNIENĖ, D. *Teismo procesas : teisės aiškinimo ir taikymo aspektai,* p. 230.

1. whether the circumstances of the case at hand are comparable to the underlying circumstances of another particular case;
2. whether the resolution of the case applied by analogy is appropriate, justified, and rational;
3. whether the resolution of the case applied by analogy is well-reasoned.

Only once we establish that the underlying circumstances of the cases are similar, and the decision made in an analogous case is rational and well-reasoned, can we apply analogy. We have to accentuate that the precedent does not include the entire resolution of a case – it is only the essential circumstances that can be considered an appropriate argument for the purposes of analogy.

*Argumentum e contrario* is legal argumentation based on contradiction. When one norm establishes a prohibition, a contradiction can be used as an argument stating that a particular type of behaviour is allowable because it is not prohibited. For instance, a norm establishes that only dogs without muzzles may not be taken into a store. Under *argumentum e contrario,* dogs wearing muzzles can be taken into a store. It needs to be emphasised that contrary reasoning is not always justified and appropriate because it could be that a certain situation that contradicts some regulation will also be prohibited.

We have to note that the analogy of law and *argumentum e contrario* are opposite methods of reasoning, meaning that the principles of their application work in different directions. The analogy of law establishes that certain comparable cases have to be measured similarly, and *argumentum e contrario*, that certain contrasting cases must be measured differently. It would seem that this is one and the same thing, only in one case we emphasis similarities, and in the other, differences. Interestingly, some situations can make it difficult to determine when a case is contradictory, and when it is comparable. Then we have the dilemma of which type of reasoning should be applied: analogy or *argumentum e contrario.* For instance, in the above case involving dogs, when we apply analogy as an argument, we will have a completely different conclusion. If only dogs wearing muzzles can enter the store, by analogy muzzles are required for other animals that may bite – for instance, crocodiles – too. Of course, speaking of crocodiles, this kind of argument would be completely irrational, but technically speaking it can be used as analogy.

The application of the analogy of law and *argumentum e contrario* relates to the category of rationality; that is, with the exercise of rational mind, one argument will be used in one case, and another in a different case. We can say that these two arguments have a very wide application: nearly every case involves the use of analogy or contradiction. Therefore, the use of these arguments entails a certain degree of manipulation or abuse of law.



## Boundaries of Factual Reasoning

The boundaries of reasoning is a very slippery issue because every Human Being presenting arguments has his own objective boundaries of reasoning. We may ask if reasoning is purely a legal idea, or can arguments other than those attributable to law be used as well. Besides, how far should the hunt for arguments go? Still, the level of sophistication, understanding, powers of perception, value-based or legal education differs from one Human Being to another, and therefore we have a boundary to reasoning that the person presenting arguments cannot overstep.

We can talk about factual reasoning, when every argument is supported with facts. Facts are particular events that can be verified empirically: footprints in the sand, a bloody instrument of a crime, participation in an event, and so on. To put it concisely, facts are a certain reality, current or past. Reasoning supported with facts is very solid, because a certain degree of empirics reinforces propositions that the mind has grasped. Nonetheless, we still have the question of whether reasoning can be done purely with facts, disregarding other things.

Factual reasoning alone would probably not be enough in any case. Facts tell us a lot, but combining and linking them takes some reasoning – intellectualisation and perception. Bare facts do not offer a rational decision; generally speaking, facts alone do not even presuppose any decision at all. Hence, we can see that factual reasoning per se is rather limited and is not enough to make an appropriate decision.

When we analyse the fact itself, we have to answer the question of whether it happened or not, and every time he examines a case the judge must make a particular decision based on values. He cannot reason his decision with facts. In that case, the boundaries of factual reasoning become clearly defined.

Another factor relevant to reasoning is the norm and the disclosure of its contents and purpose. No decision can be considered appropriate and rational if it merely states facts and fails to disclose the contents of the norm completely, or identify its purpose. Every norm has its purpose and failure to take this purpose into consideration will lead to an inappropriate, irrational, and flawed decision. This confirms the limited nature of factual reasoning once again.

## Artificial Intelligence and Legal Reasoning

Reasoning is often believed to be exclusively related to logic, i.e. that it is logic that provides a foundation for reasoning. Theoreticians and practitioners who praise logic tend to believe that a judgment can be passed simply through appropriate application of rules of logic. For instance, we can combine the major premise that describes the general situation and the minor premise that outlines the individual situation to reach a conclusion, which

is held to be the judgment. On the other hand, there is an almost universal agreement that every court judgment has to be supported with arguments. This therefore means that the application of a particular rule of logic is considered to be an appropriate and reasoned decision.

Still, as mentioned above, said ideas are not completely correct. First of all, this is because logic alone cannot produce an appropriate and reasoned decision. Logic is a science, but it is not absolute; it cannot even cover some of the circumstances that are extremely relevant to a case or some other legal situation. That means that seeing logic as an absolute issue prevents rational judgement.

Whatever opinion we may have about the science of logic, we have to admit that there is a discussion going on around the world that lawyers will soon be redundant[155]. Software is already being developed to allow choosing a judgment based on the input of the circumstances of a case. For instance, in 2016, scientists at the College of London University introduced a computer application that could predict the outcomes[156] of judgments of the European Court of Human Rights in cases relating to torture, inhuman behaviour, just procedure, and privacy[157]. Interestingly, in 79% of this type of cases, the judgment adopted by the artificial intelligence mirrored that of the European Court of Human Rights[158].

Thus, we can reasonably advance the idea of applying artificial intelligence in law to ensure some degree of objectivity. Unfortunately, there is a certain amount of doubt attached to this theory being true, first of all due to the reason that logic cannot be considered absolute. It alone can lead to a completely irrational decision. For instance, the developers of the above software doubt whether artificial intelligence would be able to step in for the judges. They say that the application can simply help predict patters of making judgments[159]. Furthermore, a study involving the application has revealed that in hearing

155 SUSSKIND, R., SUSSKIND, D. Technology Will Replace Many Doctors, Lawyers, and Other Professionals. *Harvard Business Review,* 2016 [interactive] [accessed on 28 August 2017] Online access: <https://hbr.org/2016/10/robots-will-replace-doctors-lawyers-and-other-professionals>.

156 ALETRAS, N.; TSARAPATSANIS, D.; PREOTIUC-PIETRO, D. *et al.* Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective. *PeerJ Computer Science,* 2016, pp. 1–19; JOHNSTON, C. Artificial intelligence 'judge' developed by UCL computer scientists [interactive]. Online access: <https://www.theguardian.com/technology/2016/oct/24/artificial-intelligence-judge-university-college-london-computer-scientists>, [accessed on 8 August 2017].

157 The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. *Valstybės žinios*, Article 3 *Prohibition of Torture,* Article 6 *Right to a Fair Trial,* and Article 8 *Right to Respect for Private and Family Life.*

158 ALETRAS, N., TSARAPATSANIS, D., PREOTIUC-PIETRO, D. *et al.* Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective, pp. 1–19, p. 2.

159 JOHNSTON, C. Artificial intelligence 'judge' developed by UCL computer scientists [interactive] [accessed on 8 August 2017] Online access: <https://www.theguardian.com/technology/2016/oct/24/artificial-intelligence-judge-university-college-london-computer-scientists>.



cases, judges of the European Court of Human Rights tend to be stronger in their response to non-legal, rather than legal, arguments[160]. Therefore, judges at the court are to be seen as realists rather than formalists of law[161]. This means that every judge who is deciding a case may not only rely on logic, but must consider an enormous number of circumstances that can affect his decision as well.

In this context, the human factor, which becomes particularly evident during the trial, is very important as well. In situations provided by the regulations, a particular type of case can be resolved by written procedure, yet a verbal is often preferred[162]. Whether he wants it or not, during the verbal trial the judge forms an opinion about the parties, about how they talk and what they say. On the one hand, this could be seen as subjectivity. On the other hand, it is one of the possibilities to ensure a rational trial: a Human Being who finds it hard to lay down his thoughts on paper can voice his opinions orally, and the judge can sometimes even help him. The artificial intelligence model would eliminate verbal trials because the computer cannot make a value-based decision, see the parties, and hear their real thoughts.

Another factor that is important in this context is that law is tied with culture. Different cultures cannot have the same kind of law, therefore employment of artificial intelligence would undermine the entire cultural nature of law. Really, law and culture are inseparable; besides, they work in both directions. For instance, the law may ban a certain activity that Human Beings used to approve of. After some time, the provisions of said law may become part of the culture and Human Beings would not even imagine how that activity could have been permitted in the past. A more specific example would be the ban on smoking in cafés. At first, society was against it, but now, with the passage of time, many Human Beings can no longer imagine how smoking could have been allowed in cafés. Another issue is that culture, too, affects law to a high degree. We can find manifestations of culture both in law-making, and in judicial business[163]. Artificial intelligence would be unable to measure the circumstances of a case against a cultural background, which would make a lot of decisions simply unenforceable and could eventually lead to utter rejection of law and collapse of the authority of law.

We have to remember that law is a dynamic combination that evolves constantly. Artificial intelligence is based on invariable rules of logic, which leads to the question of whether that which is static could be applied to something that is forever shifting due to

160 ALETRAS, N., TSARAPATSANIS, D., PREOTIUC-PIETRO, D. *et al.* Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective, pp. 1-19, p. 11.

161 *Ibid,* p. 12.

162 E.g., see: The Code of Civil Procedure of the Republic of Lithuania, Article 153.

163 VARNER, I. I.; VARNER, K. The Relationship Between Culture and Legal Systems and the Impact on Intercultural Business Communication. *Global Advances in Business Communication,* 2014, Vol. 3, Iss. 1, pp. 1–14.

the action of a number of factors. Law has existed for years, and so has logic, the only difference being that one of them is evolving continuously, and the other is not. An attempt to fit law into the frame of logic would only prove one thing: due to its highly dynamic nature, law cannot fit in logic or artificial intelligence.

As we discuss legal reasoning, we have to emphasise that reasoning must not necessarily be based on the principles of logic (or rather, this kind of reasoning is quite impossible). Reasoning is more than just presentation – it is also perception, which depends on a lot of things and on the basic attitude of the Human Being first and foremost. The basic attitude cannot be revealed with reasoning based on logic alone. Contrary to that done by artificial intelligence, the reasoning of the Human Being in reality is never the same. The idea of artificial intelligence in law means simplification of the way we see law, which is just not essentially possible due to its intricate nature.

### Law as Factual Argument

Quite often the understanding of law tends to be quite simple. Judges tend to believe that all it takes to resolve a case is to present some facts, point to an applicable norm, and that is it. Under this approach to law, fact has very heavy weight attached to it. If we relate law to fact alone, we could be facing a lot of misunderstanding, first of all because we will be forgetting the purpose of law. Factual arguments can be used to evaluate the Human Being's demands – their subjective rights, but this kind of evaluation is not enough. It is not enough to say that fact exists, that the Human Being has missed the deadline for the fulfilment of the contract – we also have to consider why he did it, and whether his reasons for doing so were valid. This sort of in-depth evaluation requires more than just factual reasoning. As we said in this chapter, factual reasoning is rather limited, meaning that it alone cannot be instrumental in resolving a case. Seeing law as factual reasoning simplifies and limits law. Law is vast and offers a great many possibilities, which is something that cannot be said about factual reasoning. Of course, we cannot maintain that law does not need factual reasoning at all, but we have to admit that it alone is not enough. And comparing law to factual argumentation is totally inconceivable, because it reduces law to some fully clear-cut formation.

Law contains a lot of categories of values, and every judgment is based on values. How can we measure what is 'major harm', 'cruelty', 'honesty' etc. if we do not follow our internal understanding, which is affected by various factors? Fact cannot explain these legal categories that are required for the purposes of passing judgment, therefore comparing law to fact is meaningless and inappropriate.

We must remember that legal norms have their purpose and we have to determine these before we apply a norm. This purpose cannot be revealed with facts because sometimes they tend to be highly abstract. Ergo, the application of a norm of law cannot be the product of factual reasoning.



### Tangible Arguments and Sources of Law

Many factors are believed to constitute sources of law[164]. First of all, a source of law is the text of law, which however should not be compared to the text of the law. Other sources are the contents and meaning of the legal norm. As well as the purpose of law, its absence most probably makes adequate application of legal norms impossible. Court judgments and the legal doctrine are also considered to be sources of law. Of course, an unreasoned judgment or a worthless scientific paper could hardly be taken as a source of law. Further sources of law include the intention of the lawmaker and social norms. The fact that these sources are identified as such confirms the immensely complicated nature of law. Therefore, we can only analyse law if we possess a broad understanding of it.

Analysis of reasoning poses the question of whether certain arguments can be considered a source of law. It would most likely be hard to classify factual arguments as sources of law because they originate in the real world, meaning that law does not stem from fact. Tangible arguments are a different story. A particular legal situation, the contents or essence of a legal norm as perceived by a specific Human Being, as well as the resultant argument could be a source of law because law often arises out of such an argument. For instance, the arguments of a well-reasoned judgment can be used not only as an analogy for the purposes of another judgment, but as a reference in a scientific article. Hence, rational argument can reflect law.

### The Importance of Reasoning in Court Judgment

Every judge must support his judgments with arguments. The better reasoned the judgment, the fewer questions there are to the parties in litigation. The judge should provide arguments not only for the propositions he thinks to be true, but for those that the parties consider to be correct yet have the disapproval of the court itself, as well. When we read court judgments, we often can see a lack of reasoning. The volume alone implies that judges are not very willing to provide arguments for rejected propositions of the parties. In judgments, arguments of the parties sometimes take up more space that the underlying arguments of the court judgment. Therefore, a simple factor like volume alone testifies to the lack of reasoning in modern-day trials.

When adopting a judgement in a case, the judge always relies on certain arguments. We have the question of whether the judge must only follow legal arguments or could he consider other arguments as well. This question is closely connected to the ques-

164 The conception of sources of law depends on the paradigm that is followed (e.g., see: SPRUOGIS, E. Teisės aiškinimo probleminiai aspektai. *Jurisprudencija*, 2006, No. 8 (86), pp. 56–62, pp. 57–58).

tion of the boundaries of examination. What are the boundaries of examination and the boundaries of reasoning in a case? Can we use ethical, humane arguments, or do they have to be exclusively legal? We know that judges do not make law, but is that really so? The judge makes a judgment based on values that he should provide arguments for in any case. Yet the judgment cannot always be supported with legal arguments alone; sometimes this will require other (such as economic) arguments. In that event, the judge should opt for an economic argument rather than leaving a proposition without any arguments whatsoever. It is important to mention that every judge has his or her own level of intellect, understanding, values, and basic attitudes. This makes it virtually impossible to pass an objective judgment. Every judgment is more or less subjective, but we must remember that a certain guarantee of objectivity lies within the purpose of legal norms. The purpose renders law more objective. After all, no judge would adopt a judgment that would clearly run counter to the purposes of law.

Resolving the matter of justice and efficiency poses an important dilemma for the judge. Does a court judgment have to be equitable or must it be effective? These two categories are not fully compatible, but neither are they totally different. Of course, the concept of justice is highly complicated and has a profound philosophical foundation. The category of efficiency is less complex, but it is not readily understandable either. Can a judgment be equitable if it is completely inefficient? Most likely not. Or can a judgment be inefficient if it is completely just? Probably not, either. These two categories share a certain necessary connection. Efficiency and justice do not always match each other, but they do have their common points. An equitable judgment that takes an enormous amount of time to make is valuable but will be totally inefficient due to its time cost. In that case, a judgment that is less equitable but carries a degree of efficiency will probably have more value. Just like an efficient judgment that is not equitable would contradict the nature of law.

Speaking about court judgment and the reasoning contained in it, we could say that the latter has a fierce adversary, criticism, and sometimes can be overpowered by it. Every argument can succumb to solid and rational criticism. For criticism to satisfy these criteria, criticism also has to be well-reasoned. It is easy and simple to object without any arguments but reasoned criticism is something completely different, a complex process that requires a lot of intellectual effort. As we can see, reasoning often comes second to stark criticism in modern-day court judgments. Judges are wont to say that the arguments of the parties should be criticised, but this is not supported with any type of arguments, meaning they do not say with any degree of clarity why they should be criticised, and why a particular case should be given a different assessment.

Considering the above, we should think that judges should be subjected to certain limitations of exercising criticism.

The judge carries immense responsibility because it is he who decides the outcome of a particular situation. For this reason, the court judgment must backed with arguments to a very high degree. A judgement that is not supported with arguments will always be considered inequitable and the parties will have their doubts – and so will the general public, as likely as not. This absence of proper reasoning behind a court judgement has to do with the diminishing of the authority of law. When faced with an unreasoned judgment, society questions the existence and necessity of law. Said lack of reasoning can often make us think that law is unnecessary, inefficient, and not just. In this context, the judges' perception of law becomes critical.

## EFFICIENT STYLE AND PRINCIPLES OF LEGAL REASONING

In the words of Zita Nauckūnaitė, the entire communicational activity of the Human Being – public discussions, political debates, scientific disputes, litigation, even daily conversations – are inevitably permeated by reasoning which actualises and integrates cognitive and emotional psychological processes, moral, worldview, and aesthetical attitudes[165]. Reasoning is an axis of communicational competence, and the final objective of reasoning is convincing the audience of the reality of certain problems of cultural, social, and the Human Being's life and/or the equity of the decisions suggested, which makes reasoning effective to the extent of the audience's approval of the arguments presented.

Based on the three main directions in which reasoning aims to appeal – the mind, the feelings, and the imagination – we can identify logical, emotional, and aesthetical arguments[166]. Logical arguments directly affect the mind, emotional the feelings, and aesthetical imagination[167]. Yet any argument will also have a stronger or weaker field of peripheral effect. The main element of conviction is the rational logical effect on the Human Being's mind – evidence. However, reasoning affects Human Beings' beliefs, attitudes based on values, and conduct only when it stirs a feeling – a link between the mind and will. That is why arguments that have emotional expression are the most effective.

Legal reasoning is a specific, individual part of general reasoning with its own definition and norms. Legal reasoning is not a mechanical process, it has to have a direction, and every judge must have a goal when providing arguments. The function of the judge in the process of reasoning is to offer legal reasoning, convince the audience that his judge-

165 NAUCKŪNAITĖ, Z. Argumentacija: įrodymo įtikinimo santykis. *Žmogus ir žodis*, 2007, vol. 9, No. 1, p. 94.

166 *Ibid.*, p. 95.

167 *Ibid.*

ment is equitable and justified. This type of conclusion is based on the principle of legal certainty, an essential principle of law. When in court, the Human Being must have a possibility to look forward to an adequate assessment of his or her situation. However, the Human Being is not required to have any legal savvy; it is the duty of the judge to reply and to explain. There are several reasons why the court judgment must be supported with arguments:

1. the court has the authority to enforce governmental coercion and must act legally. The imposition of any form of coercion must have its legal reasoning, which calls for the motives of the court to justify and clarify the essence;
2. the need for the judgment to be supported with arguments relies on the essence (bilateralism) of the dispute;
3. the normative law and case-law must be predictable;
4. the ambiguity of legal norms requires that arguments of the court be presented. Different variants of judgments exist due to errors in legal norms and loopholes in court cases.
5. in judging a case, the court both applies legal norms and administers justice, makes value-based and moral decisions, and therefore has to reason the values that are protected.
6. cases are often examined in open proceedings, the court must publicise its arguments, it has a duty to explain to the parties and society in general why a particular judgment was passed.

Considering the above, it can be said that legal reasoning has to be effective. The effectiveness of arguments is one of the few factors that constitute the institute of legal reasoning or define the success of a trial. This effectiveness is determined by adherence to certain principles.

The main principles of legal reasoning are: (i) clarity, (ii) figurativeness, (iii) conciseness, and (iv) suggestibility, which all fall under the term of 'efficient style'. This term defines the process of legal reasoning in its own right: how arguments have to be formulated and the rules to follow in doing so, things to consider when evaluating facts during trial, making legal conclusions, translating them into arguments, and pronouncing the final judgment. The main principles of legal reasoning are described in detail below:

1. *Clarity* is a specific principle of constructing reasoning that should not be confused with the general principle of legal clarity. The essence of clarity of reasoning is that reasoning should be used as an instrument to clarify law in the most objective way, without posing any questions. Clarity of reasoning will be discussed in detail later, so without going into much detail we should say that clarity is often defined the way it is understood by an 'average consumer'. If certain reasoning is understandable to the common Human Being who has no legal knowledge and does not show much inclination to plunge any deeper into the fine points of legal reasoning, this kind of reasoning will be considered clear. The purpose of this is to prevent the principle of clarity (just like the rest of the principles) of reasoning from becoming elitist and understandable to the chosen few lest it loses its relevance and importance.
2. *Figurativeness* is a rather subjective principle of reasoning, its contents are not fully defined. The principle of figurativeness means that in the process of reasoning, the judge should not use constructions of dry, long, empty sentences of reasoning but rather insightful comparisons, comments, a richer and non-specialist vocabulary. This principle is closely related to the linguistic aspect of reasoning. As legal reasoning at the final stage of passing a judgment is still laid down in writing, this inevitably leads to some linguistic issues that we should not dismiss as secondary.

   Right now the courts and judges of the Republic of Lithuania are yet to exhaust this principle of reasoning. The absolute majority of motivational parts of court judgments have complicated and clumsy formulations, they are difficult to read and lack in figurativeness. One rare exception is the judgement made on 20 October 2008 by Gintaras Seikalis, judge at the 2nd District Court of Vilnius in civil case No. 2-813/294/2008 under a claim from Alvydas Sadeckas as the claimant to UAB Šilo Bitė (publisher of the *Laisvas Laikraštis* weekly), Aurimas Drižius, and Vytautas Kabaila as the defendants regarding defence of honour and dignity and satisfaction of damages. In this controversial judgment that attracted a lot of attention from the public and the media, Judge G. Seikalis, outraged at the delay in the enforcement of the new Law on Courts (the 'Law on Courts') and the failure to raise judges' salaries, accused MPs of marginality and openly blamed the government for its lack of sophistication: 'To them, the phrase *Legal State* is just as extraordinary and incomprehensible as a can of preserves to the tribe of Mambu-Jambu'[168]. This is an example of radicalism not to be followed by other judges. Aiming at figurativeness and the freedom of self-expression, the judge had failed to calculate that a court judgment is a procedural document in which unreasonable and emotional arguments have no place.
3. *Conciseness* is another principle of legal reasoning that can be used to augment the principle of figurativeness in describing the topic under investigation. The above judgment from the 2nd District Court of Vilnius is the complete opposite of conciseness. The essence of this principle is the ability and necessity to present legal arguments in a concentrated manner, focusing only on key aspects, steering clear of unnecessary propositions that carry no information. The principle of conciseness is rival to clarity of reasoning

168 The judgment of the 2nd District Court of Vilnius in civil case No. 2-813-294/2008 dated 20 October 2008.

and the two principles need to be kept in balance lest clarity be sacrificed for the sake of conciseness. Often, for complicated cases, court reasoning can be written on dozens of pages. It is then that the principle of conciseness becomes critical, both to the Human Beings interested in the case and other judicial instances that may need to examine the arguments and evaluate precisely the opinion and goals of the judge.

4. *Suggestibility* can be said to be the synthesis of all of the above principles of reasoning. Clear, concise, yet inventive and figurative arguments are suggestible in their own right. Suggestibility is also important because in a legal state the judge has to properly justify his judgment, earn respect and confidence in the court system. If the judgment lacks suggestibility (by virtue of arguments inappropriately chosen or presented), he will fail to convince society and the parties in litigation. The case will often be referred to a court of higher instance that should pass a more suggestible judgment, presuming its higher level of competence. On the other hand, the principle of suggestibility is often very subjective in terms of the parties in litigation, failing to achieve the desired effect: thanks to its expectations and goals, the losing party is impervious to the most suggestible of arguments, and therefore the factor of suggestibility is not absolute.

## Sources of Legal Reasoning and their Interaction with Principles

The choice of the source of reasoning determines the strength, appropriateness, and relevance of arguments. Furthermore, sources of reasoning are related to the principles of reasoning. The main sources of reasoning are defined below.

1. *Text of a regulation.* With a normative legal system, the judge has to interpret every word separately: if a word exist in the legal norm, it has its legal meaning and certain legal implications. This source facilitates the use of the principles of clarity and conciseness, because they already exist in a legal text. When we rely on a legal text to formulate certain arguments, all we have to do is lift them to the surface.
2. *Lawmaker's intention and the contents and meaning of the legal norm.* In making a decision, the judge must thoroughly analyse the intentions of the lawmaker or the goals he pursued. This source can be used to easily formulate an argument that satisfies the principle of figurativeness. As often as not, when we analyse non-standard documents, we find different points of view on a particular situation that we can apply in structuring figurative arguments that can even provide more information than normative texts.
3. *Other judgments.* Judicial precedent is one of the most productive sources of legal reasoning. If precedents are adequately formulated, they can contain samples of all principles of reasoning. Nonetheless, one should not succumb to the impression of a comparable situation and all principles should be re-evaluated to see if they are sufficiently embedded or disclosed, if appropriate arguments are used that do not have any logical or semantic errors in that situation.
4. *Doctrine of law.* This is a universal source of legal reasoning, which helps fill in legal loopholes and address collisions of legal norms. Just like with the previous source, we may find all principles of legal reasoning in arguments deriving from this source. Of course, the principles of figurativeness and suggestibility dominate, but the reason is simple: the purpose of the doctrine is the same as that of legal reasoning and only the field of activity differs, with the doctrine of law aiming to convince with its propositions by providing certain comparisons, facts, arguments. For the doctrine to be effective, it is constructed on the basis of similar or even identical principles.

Every principle of reasoning as its external and internal meaning. The external meaning is what happens when we apply the principle, internal, how the principle will be related and will interact with other principles. The justice of a decision depends on the extent to which the judge will be able to apply arguments based on the case file and additional sources. Therefore reasoning as a key element of judgment has a huge role to play. For it to be successful its principles have to be followed both when analysing the case file and other sources appropriate and relevant to the decision.

The decision depends on the case and the rule. The case is a brief story of how the court behaves or should behave in resolving a relevant case[169]. The rule is an abstract or general proposition of what law demands from Human Beings under certain circumstances[170]. In this case, we have a problem caused by abstractedness and generality of rules. They do not ever represent all the ideas born within the mind, or the reality of life. That is why at the stage of formulating arguments, figurativeness and suggestibility become useful.

Our thoughts, consciousness, and mind are much more advanced that we are able to express. That is why legislators are forced to use as many general terms in the rules as possible. As a result of the differences in how we understand the realities of life, logic does not always provide the right answer. The judge must focus on understanding and criticality. Understanding means that the judge in evaluating facts must understand that his assessment can also be erroneous in certain cases.

169 BURTON, S. J. *An Introduction to Law and Legal Reasoning.* Boston, Toronto: Little, Brown and Company, 2007, Austin, Boston, Chicago, New York, The Netherlands: Wolters Kluwer, p. 11.

170 *Ibid.,* p. 13.

Arguments are always justifiable to some extent, but that of course does not mean that every instance of reasoning is valid. In practice, such arguments may be lacking a lot of different aspects to be seen as justified. The goal of reasoning is to determine the criteria of reliability to be followed for arguments to be considered prudent and practical. Many theoreticians of reasoning are inspired by the logic of reasoning and address arguments for normative purposes. However, some theoreticians only see it as a descriptive purpose. Linguistically minded scholars wonder how people can be convinced with the successful use of the linguistic aspect of reasoning. In this respect, the work of John Bir, Harvey Siegel, Williard Van Orman Quine, and Stephen Toulmin have particular relevance.

The Constitutional Court has stated that the requirement to examine the case that is embedded in the Constitution justly implies that every final judicial act must be grounded on legal arguments (motives); reasoning has to be rational; the requirement for legal clarity which arises out of the constitutional principle of the legal state means, among other things, that the final judicial act cannot omit any arguments or circumstances relevant to the making of an equitable final judicial act; final judicial acts have to be clear to the Human Beings involved in the case as well as other Human Beings.

### Models of Arguments and Enforcement of Principles

In order to determine how the most appropriate arguments should be formulated, we should distinguish certain phases. A convenient and comprehensible system has been offered by Peter Wahlgren, who pointed to the following steps[171]:

1. *Recognise suitable facts*[172]. In recognising suitable facts, it is important that the judge who is examining a particular case is often doing it for the first time with no knowledge of the elements of reasoning he needs to scrutinise. In this case, he may face difficulty in trying to recognise and formulate appropriate arguments to strengthen his position. However, when a judge has already examined a similar problem, he may recognise the necessary arguments straight away and duly enforce the principles of reasoning.
   Jon Bing accentuates that legal argument can be easily understood as a version of a paradox of which came first, the egg or the chicken[173]. Relevant arguments cannot be qualified without having some knowledge of the rules of law, and rules cannot be justified if appropriate arguments are lacking.
   When it comes appropriate arguments, problems are caused by several reasons. We may face difficulty, for instance, when the case is very complicated and includes many different elements.
   Further problems with reasoning may arise when the situation in question is vague and unclear. We then cannot predict the degree of effectiveness of the reasoning and whether the principles of reasoning are duly applied. It is even worse when we realise that the lawyer does not have any knowledge of the suitability of facts and reasoning from the beginning unless he is dealing with a highly formalised situation, one whose nature makes it possible to envisage questions to be raised.
2. *Use background knowledge*[174]. Absence of access to suitable sources of law in the initial stage of legal reasoning, when we identify the basic facts and articles, is not an obstacle that you cannot overcome. Assuming that the judge has typical professional experience, we may think he will understand what to do with the basic facts and articles even when the situation is rather uncertain. Then the professional knowledge of the judge acts as a classifier of facts and arguments. In other words, lawyers spontaneously know quite a few general criteria used in the reasoning process. So, if, for instance, the judge in the situation at hand sees that specific sources of law are insufficient to formulate a solid argument that would be suggestible and clear, he should rely on his background knowledge and proceed with reasoning.
   The relationship between the current situation and legal definition can carry a varying degree of detail. Particularisation to be enforced is, in essence, defined on the basis of the generality of the legal system. If the legal description of a case is very exhaustive, reasoning must be detailed, too. An experienced judge can normally remember many past situations and is well aware of how individual arguments interact. We can say that this is how the 'spontaneous' package of principle efficiency is triggered and the judge does not need to try to make the arguments strong. An unexperienced judge must resort to external sources of law (written material, consult his colleagues, and so on) to determine the degree of argument interaction and suitability. We can identify two approaches to the use of background knowledge:
   (a) The *positivist approach* is driven by legal dogmatics. The key goal of this approach is to systemise and explain legal concepts and norms. In this case, legal arguments are subjects that can be studied

171 WAHLGREN, P. Legal Reasoning: A Jurisprudential Model. *Scandinavian Studies in Law.* Stockholm Institute for Scandinavian Law, Vol. 40, 2000, p. 199.

172 *Ibid.*, pp. 208–209.

173 BING, J. Legal Decisions and Computerized Systems. In SEIPEL, P.; BING, J. From Data Protection to Knowledge Machines. The Study of Law and Informatics. *Computer/Law Series 5.* Kluwer Law and Taxation Publishers, 1990, p. 228.

174 WAHLGREN, P. Legal Reasoning; A Jurisprudential Model. *Scandinavian Studies in Law*, pp. 209–213.

on different levels, and legal order is perceived as a system of rules[175]. Therefore, under this approach, the use of background knowledge will depend on how the judge perceives the legal system and its norms.

(b) Under the *realistic approach*, there is a fair amount of criticism regarding mere reliance on norms of law, focusing a lot on cases and analysis of specific situations as a result. All that obviously affects legal reasoning. Michael G. Dyer and Margot Flowers point that our experience suggests that when a judge is presented with a case, he will immediately recall one or more prototype cases relating to similar matters[176]. Equally relevant is the interpretation by Peter O'Neil, a US theoretician, that judge behaviour in resolving cases and reasoning is based on a semantic model, i.e., developed on the grounds of prototype stories, past situations, expectations, and guesses, and supported with various contexts of the available experience[177]. When we use information gathered on the basis of this kind of experience with previous cases, we form an impression about the case, consider what usually meets our expectations, notice any anomalies, and model new forecasts of how a new case should be reasoned[178]. These models of legal thinking constitute generalised forms of 'stories' and 'legal theories' and reflect specific characteristics of a situation[179]. This is important as we try to perceive the assumptions of the principles of legal reasoning: an investigation may suggest that arguments call for an appropriate formulation (clarity, conciseness, figurativeness, and so on) per se because it is encoded in past experience and conscious modules that we have created.

Despite the same objective of recognising and selecting facts, the above approaches reveal different concepts of background knowledge, and their different usage in the process of legal reasoning[180]. For this reason, how the judge recognises and values facts and proceeds with reasoning depends on the approach he follows.

3. *Find additional facts*[181]. Since, in the process of legal reasoning, the reasoning activity progresses as we use or do not use external legal information, the perception of legal rules and facts that must be examined and identified in this case become increasingly clear. The question is no longer what we should look for, but what the most efficient way to find the missing elements is[182]. At this stage, the problem is to identify not the nature of the legal situations, but rather the existence of arguments pertaining to the rudiments of reasoning that we have already formulated. Methods of discovery of new additional arguments differ from situation to situation a lot. Knowing the kind of information that is required, the judge will choose the best way to find it. Coming face to face with the parties in litigation, the judge may freely question them and obtain the answers he needs. Besides, he can request additional information from various sources by email or over the phone. Of course, there are methods to quickly collect this type of fact with a higher or lesser degree of efficiency. The thing is to be able to process the information obtained promptly, and to make the right inferences. These inferences play a significant role in determining the efficiency of the arguments, an integral abstracted part of the inferences.
4. *Resolve the issue of vagueness*[183]. Another aspect of efficient reasoning that we are addressing in this chapter is related to the possibility of eliminating vagueness and uncertainty. Things that can cause vagueness may be related to identifying individual facts as well as the nature of complicated situations. Probably the most frequently occurring cause of vagueness is that the judge makes a mistake in recognising certain elements that are not defined correctly or cannot be used in reasoning from the legal point of view. For instance, this may happen as a result of the poor memory of a witness or an absence of facts in written material. In the process of legal reasoning, instances of legal vagueness have to be investigated with extreme care. That is a consequence of the prohibition imposed under the *non liquet* principle. The *non liquet* principle means that courts cannot refuse to make judgment on the grounds that a situation is not defined by the law or claim that a situation is vague or not adequately defined. A judge who does so is held guilty under the *déni de justice* doctrine, and that is a serious transgression.

175 WAHLGREN, P. Legal Reasoning; A Jurisprudential Model. *Scandinavian Studies in Law*, pp. 199–282, p. 210, see Aarnio, A, Alexy, R, Peczenik, A. The Foundation of Legal Reasoning, (1981), p. 423. "The legal order is the sum of legal norms which have been put together (systematized) on a certain basis."

176 DYER, M. G.; FLOWERS, M. Toward Automating Legal Expertise. In WALTER, C. *Computer Power and Legal Reasoning*. West Publishing Co., 1985, p. 57.

177 O'NEIL, D. P. A Process Specification of Expert Lawyer Reasoning. In *Proceedings of the First International Conference on Artificial Intelligence and Law*. Boston: The Center for Law and Computer Science, Northeastern University, 1987, p. 57.

178 *Ibid.*

179 *Ibid.*

180 WAHLGREN, P. Legal Reasoning; A Jurisprudential Model. *Scandinavian Studies in Law*, pp. 199–282, p. 213.

181 *Ibid.*, pp. 214–216.

182 *Ibid.*, p. 214.

183 *Ibid.*, pp. 216–217.

The *déni de justice* doctrine applies specifically to judges, yet a similar definition can be used outside the courtroom as well. Legal practitioners would hardly be able to aid their clients if they claimed they did not know how one or another situation can be resolved, or would simply say they are unable to make an appropriate decision and find efficient arguments.

5. *Formalised assistance*[184]. More or less formal methodical rules geared towards facilitating the process of reasoning (identification of facts, assessment of evidence, and so on) have existed for quite some time now. These rules aim to eliminate vagueness and strike a balance between reliability and the need to define and optimise every argument presented. Methods that were used to minimise the factor of vagueness in reasoning have been evolving constantly and, just like with many other cases, rules that have been found to be the most efficient are those that apply in the process of trial. Possibilities to look for an efficient solution to such problems are limited for obvious reasons, and attempts to design a more formalised process of reasoning can sometimes result in rather strange decisions and arguments as they are seen from the modern-day perspective. Still, despite of the difficulties that have been covered, such rules may be set forth in the regulations governing the trial[185].
6. *Expert behaviour*[186]. Regardless of the existence of methodological rules on the evaluation of reasoning, it is evident that behavioural models of how one or another case should be reasoned no longer exist and judges can only rely on their own expertise. This does not necessarily mean that in this case reasoning should be done by way of random selection. As they accumulate professional experience, judges design efficient tools of reasoning based on their experience of how they should act in vague situations or when faced with a lack of formal indications.

   There are at least three types of approach to eliminating vagueness in reasoning on the basis of expert experience[187]. First of all, vagueness has to be determined by conducting a contextual investigation. In performing it, the judge must ask himself if a particular situation has any meaning if taken as a whole. Such a contextual investigation should be considered to be the most effective when it applies to situations involving controversial facts. Arguably, the best way to determine reasoning in situations like that is to investigate which of the controversial situations has its elements dominating the sequence of contested events. Second, vagueness in reasoning must be eliminated under the definitional approach. This method is important in the way that it is normally used to determine not specific facts but rather proof of facts. This strategy is applied in an attempt to make a witness confirm an argument that is not relevant at the time which, as an element of a sophisticated chain of evidence that the judge controls, could be used in future. Third, elimination of vagueness in legal reasoning must continue by focusing the judge's efforts and attention on a search of regulations. Making active efforts to find legal ideas the most appropriate to reason the situation at hand. In this case, the same experience of the judge can be used to adapt principles of reasoning to make the arguments even more solid and reliable.

184 WAHLGREN, P. Legal Reasoning; A Jurisprudential Model. *Scandinavian Studies in Law,* pp. 218–220.

185 E.g., The Code of Civil Procedure of the Republic of Lithuania, Article 182 *Release from Burden of Proof.*

186 WAHLGREN, P. Legal Reasoning; A Jurisprudential Model. *Scandinavian Studies in Law,* pp. 199–282, pp. 220–221.

187 *Ibid.*, pp. 220–221.



## THE DILEMMA OF LEGAL REASONING: THE RELATIONSHIP BETWEEN KNOWLEDGE AND TRUTH

### The Idea of Certainty

According to Robert C. Berring, despite the impact of the legal culture through legal information, legal scholars have often been casual in their regard of studies of legal information[188], partly because the system of legal information has been working faultlessly. No one had any doubts about the reliability of legal information and therefore there was no objective reason to look into it further. Nearly the entire community of 20th-century lawyers recognised the reliability of sources essentially relying on their authority alone[189]. At the time, a specific collection of books was a sufficient and reliable source that could provide all of the necessary information. There was no presumption to distrust books and verify their value, and an opinion prevailed that they had been critically assessed a long time ago. Everyone was so fine with the topography of legal information that scientists would not even consider its functionality and results. The genesis of the postmodern thought has brought a lot of changes in the field of legal information.

188 BERRING, R. Ch. Legal Information and the Search for Cognitive Authority. *California Law Review,* 2000, Vol. 88, No. 6, pp. 1673–1708, p. 1676.

189 *Ibid.*, p. 1677.

Postmodernism is a modern school of art, literature, philosophy; its advocates criticise modern-day civilisation, which relies on the view that a solid order based on the mind exists in the world[190]. According to the advocates of postmodernism, this attitude is but an illusion[191]. Nonetheless, postmodernism is a social/philosophical/cultural idea that has been taking hold in the consciousness of society, lawyer community included, over the past few decades, and which would be extremely difficult to describe in a rounded way.

A homogenous definition of the school in question usually provides ground for extremities: postmodernism is defined either as an elaborate avant-garde or even arrogant anarchist but a still paradoxically liberating form of social idea, or as a philosophy of absolute relativism, negativism, and nihilism[192]. Postmodernism was born out of reaction to advocates of the modern rational worldview being unable to reflect on the new social conflicts and social critical phenomena with the traditional methods and categories. The postmodern state of existence is perceived as an aesthetical or social riot against the values and principles of the modern ear and the Age of Enlightenment. Scholars of this persuasion seek to critically reflect on and evaluate the values of the Age of Enlightenment and the positivist ideas stemming out of modernism. At the same time, a deconstruction of traditional hierarchies, symbols, and dominating cultural structures is taking place. A paradox, but an idea dating back to the time of the old movements of sophists and sceptics is being reborn in the new shape of relativity of phenomena[193].

Postmodernism is also an anarchist nihilistic movement that, once under the effect of epistemological relativism, would promote fragmentation, individualisation, anonymity and anomy of social life, as well as loss of personal identity. The postmodern Human Beings are those who always have to choose an identity[194], may succumb to their desires and impulses[195], and look for toehold. Epistemological relativism can be primarily described as a sceptical attitude towards cognition that, first of all, refuses to acknowledge the universality of concepts being defined. Secondly, it exercises criticism towards the possibility of cognition, validates the system of objective principles that is supposed to be present across social, historical, or cultural contexts with relevant scientific methods. The Age of

190 *Tarptautinių žodžių žodynas.* Vilnius: Alma litera, 2003, p. 593.

191 *Ibid.*

192 VALANTIEJUS, A. Postmodernizmas ir epistemologinio reliatyvizmo spąstai. *Sociologija. Mintis ir veiksmas,* 2003, vol. 2, pp. 5–49, p. 6.

193 NORKUS, Z. Postmodernizmas istorikoje: retorikos tradicija ir H. White'o istoriografinio stiliaus tradicija. *Problemos,* 1996, No 50, pp. 65–80, p. 65; VALANTIEJUS, A. Postmodernizmas ir epistemologinio reliatyvizmo spąstai, pp. 5–49, p. 6.

194 BAUMAN, Z. *Postmodern Religion?* In Heelas P., Martin D., Morris P. (eds.), *Religion, modernity and postmodernity.* Oxford: 1999, p. 68.

195 ČERNEVIČIŪTĖ, J. Kūnas vartojimo kultūroje: postmodernizmas, vartojimas, kūnas kaip prekė. *Problemos:* addendum, 2008, pp. 76–86, p. 77.



Enlightenment strengthened the belief in the René Descartes' indestructible ***ego***, lifted the power of the human mind above nature and fate, thus opening a door to rapid scientific and technological evolution and the prevalence of the individually minded primate over nature. Postmodernism demolishes these achievements in a structured way: the Great Individual (the Subject) which arises proudly (like Nature itself) is one of the key targets of postmodern criticism[196].

Among its other characteristics, postmodernism is most importantly defined by close historical connections to the philosophy of pragmatism and sociology. Indeed, we cannot establish objective and universal truths, and the combination of postmodern pluralism and pragmatism welcomes healthy scepticism with regard to any power or authority and enables the understanding of the objectiveness of phenomena unquestioned by realism, their alleged ontological correctness/falseness. The biggest problem with postmodern thinking is that it finds it difficult to draw a line between reality and make-belief, rationality and irrationality, marginality and content. Without a clear boundary of perception, adequate behaviour is just not possible.

It is epistemological relativism, which affects our way of thinking, creates grounds for crucial assessment of knowledge systems. The lawyer's thinking must dismiss the definition of truth as a useless vestige. This philosophy of relativity of knowledge and absence of truth in essence crushes any attempt to raise the question of reality of the 'objective of legal motivation' in legal discourse. Criticism of the major contextual narratives basically destroys all assumptions to look for knowledge and the criteria for determining if it matches the truth.

We could find an exit from this dead-end street if we follow the part of Ludwig Wittgenstein's theory of 'language games' which analyses the category of certainty. It is the theory of 'language games'[197] that suggests that the concept of ontological truth should be replaced with the definition of certainty that would allow us to step outside of the paradigm of artifice, a product of absolute epistemological relativism. Certainty as a category of thinking is the minimum that enables a constructive legal dialogue and the main premise for a successful process of legal discourse. A primitive understanding of this 'language game' could be summed up as follows: *If I think (or everyone thinks) that way it does not mean that it is so. But maybe we could ask ourselves if we can doubt it for a reason?*

196 BAGDANAVIČIŪTĖ, R. Klaidžiojame nesuvokdami, kaip paklydome? *Kultūros barai,* 2009, No. 10, p. 6.

197 ALEXY, R. *Teisinio argumentavimo teorija.* Vilnius: Teisinės informacijos centras, 2005, pp. 64–69.

## Legal Information: Relative Reliability

In addition to the changes of philosophical thought, there are also economic and technological reasons that cause tension in the relationship between the category of legal knowledge and that of the truth. These reasons cannot be ignored, for it is economic and technological processes that make it possible for the economy of scale to develop. This unbridled shift of information defines the quality of legal knowledge acquired and the relativity of its certainty.

The publishing industry was changed a lot by the advent of various corporations that control huge resources for obtaining, modifying, and distributing information. Currently, various distributors of information in this field are overlapping on many levels. Furthermore, just like every player on the market, companies controlling legal information are first of all concerned with the bottom line and the expansion of their influence. The requirement for quality and reliability of the knowledge being presented is said to be outweighed by a desire to maximise profit. This leads to a practice of providing/distributing only commercially useful information with the help of various tools of management and advertising. As a result, the quality of social knowledge shifts.

The above processes are clearly evident in the field of law as well: legal books of dubious quality are being published, strings are being pulled for some authors while others, for some reason, are being ignored, and so on. Thus a soil is prepared to affect the professional knowledge of lawyers and the quality thereof. Previously, in an environment of healthy competition, smaller businesses acted as a safeguard by stabilising the whole situation and assuring that legal information would be interpreted as specialist information that merits special attention[198]. However, now that only the major corporations have survived, the consequences shift to the negative, with legal information becoming a commodity. This diminishes both the diversity of this information, and legal discussions as well. With that in mind, we have the question of whether the lawyer should be concerned with the above processes and try to answer the question of who creates information.

Berring argues that law freshmen come face to face with a completely new and highly convoluted unit of ways of thinking, terms, and sources: university teaches them about the hierarchy of the sources of law yet in many cases zero thought is given to who moulds the contents of those sources and controls the entire flow of legal information[199]. Pursuant to Berring's position, one could claim that the process of legal reasoning (considering its ideal version) is failing at conception, i.e. with perception and reception of fundamental legal knowledge taking place, as control of legal information inhibits the development of intellectual legal consciousness. Berring also notes that many experienced lawyers who would normally act as architects of change and guides of the flow of legal information still do not realise that the world is changing at lightning speed, and therefore are unable to hamper these processes[200].

Many lawyers would disagree with this stance as in any case, certain safeguards of the quality and correctness of legal information presented do exist. For instance, we have the need for academia to maintain its prestige, the internal control of the scientific community, as well as the established standards that legal information must meet, and so on. However, Berring provides counterarguments, pointing out that traditional control of information has lost its functionality[201].

We can see that the system of legal information is prone to continuity, shifting models, and, of course, all-round change[202]. Nonetheless, continuity of sources is one of the most exciting topics. Previously, legal information could be controlled at all levels. Elements of origin and formation of legal information could be noted and examined[203]. The main media for presenting information were printed books, which would remain intact once published. Even though specialists in law were already complaining about the overabundance of information in the early 20$^{th}$ century, the system of legal information that was taking shape somehow managed to process it all[204]. Still, controversy between the production and control of information started to gradually build up[205], making it increasingly difficult to trace back the origin and formation of legal information or assess its reliability.

Berring notes that lawyers were taught not to critically evaluate the media offering legal knowledge, but merely to use them[206]. Most of the studies simply involved presentation of media and instructions on how to use them. There was no in-depth discussion of how information was created or why it had authority. This is based on the traditional and religious nature of law, which provides conditions for an absolute stagnation of the professional caste of lawyers that often prevents it from adequately adjusting to the rapidly shifting social conditions. On that basis, we can contrast the current situation and the scholastic criticism that was prevalent in the Renaissance because for as long as everyone believes that a particular source (for instance, 'the teacher (meaning Aristotle) says so'[207]) is the standard for verification, there can be no doubt regarding its reliability, or reasons to give it a critical assessment[208].

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198 KENDALL, F. S. *Member's Briefing, Legal Publishing on the Eve of the Millennium.* AALL Spectrum, 1999, p. 36.

199 BERRING, R. Ch. Legal Information and the Search for Cognitive Authority, pp. 1673–1708, p. 1678.

200 *Ibid,* p. 1679.

201 *Ibid,* pp. 1673–1708, p. 1679.

202 *Ibid.*

203 *Ibid.*

204 *Ibid.*

205 *Ibid,* p. 1680.

206 *Ibid*, p. 1681.

207 BERMAN, H. J. *Teisė ir revoliucija.* Vilnius: Pradai, 1999, p. 303.

208 BERRING, R. Ch. Legal Information and the Search for Cognitive Authority, pp. 1673–1708, p. 1681.

Currently, we are unable to determine any objective standards of how the correctness of information that provides knowledge for further motivation could be verified. In formulating the necessary motives, every judge may draw on various sources: judgments from other courts, the doctrine of law, databases, and so on, many of them now available in the electronic space[209]. This vast range of sources of law creates an opportunity, for want of proper external and internal control, to digress.

The above changes create many different threats to the quality of the lawyer's work. One of them constitutes the motivational dilemma: the singlemindedness of the correlation between the category of knowledge and the truth. Very easy access to all kinds of information using electronic communications with no criteria as to establishing its reliability allow for the lawyer to become apathetic (devoid of any natural inclination to delve into the situation, analyse the reliability of information) towards the legal problem at hand. The ease of accessibility to different information creates an artificial illusion that every question can be easily answered while completely ignoring the matters of knowledge being organic (growing, expanding) and their source, reliable[210]. Under the circumstances, the lawyer, even one who aims to make a singularly justified and generally acceptable decision, is faced with the problem of how much the knowledge available and accessible to him satisfies the requirements for validity. Unlimited availability of knowledge and its organic nature (which depends on social change) provide grounds for an exclusively 'real legal motivation' to exist.

## Legal Reasoning: between Coherence and Epistemology

One of the biggest issues with motivated reasoning being addressed in the theory of law is that behavioural psychologists are still unable to integrate motivated cognition into significant theories of decision-making[211]. Eileen Braman and Thomas E. Nelson point that currently two different concepts of motivated reasoning exists, which have been used to study legal behaviour[212].

We have the *top down* process, when final decisions (the so-called points of departure) are made in the first place, then moving to formulating legal conclusions that will not necessarily determine the pending decision. This concept shows that legal reasoning is an action of rationalisation rather than deliberation, which is basically devoid of elements of thinking, even though most judges are trying to convince themselves to the contrary[213]. Other researchers of human behaviour, analysts of processes of information processing, suggest a *bottom up* concept, which prioritises views that act as filters of information that expand their influence on micro-decisions that become evident at the time of legal motivation[214]. This method of information filters constitutes more of a justification of the classical theory of legal motivation in terms of the science of psychology.

The concept of *bottom up* assumes that judges use law in solving cases, even though their priorities may affect arguments and evidence that they will consider compelling[215]. Both the concept of *top down* and *bottom up* fall into the general whole of the processes of motivated cognition, but in fact affect the entire potential of legal motivation differently for it to work as a meaningful bond in the general process of thinking. These two concepts can also be taken as a basis to model an answer to the question of the relationship between knowledge and truth, and legal motivation. Still, they do not help us answer the question of how certain knowledge is chosen to be later used as a basis in legal thinking processes.

One way to answer this question is to follow Berring's concept of 'cognitive authority'[216]. It operates as a factor that determines the reliability of information from one source or another source, and hence the knowledge that the Human Being acquires, as well as its conformity to the internal ontological truth (or, giving the theory of 'language games' a broad interpretation, internal certainty). 'Cognitive authority' ought to be construed as the individual thinking qualities of each Human Being that define his preferences to trust a particular source. It is the category of 'cognitive authority' that can help us perceive the situation in which the lawyer is placed at a given time when he tries to select the legal knowledge necessary for legal motivation.

In life, we follow different levels of authority: professional, familial, and so on. In the field of law, we can identify levels of authority that we have to obey (such as the judgment) and ones that we choose as reliable, prioritising them over the rest[217]. The choice of authority may be conscious or subconscious. Each choice is individual and is based on a specific set of circumstances and internal preferences.

According to Berring, the main criterion in choosing authority is the internal preference of the individual Human Being, his level of education, experience, and other social

209 February 1990 saw the kick-off of a massive transfer of information to the electronic space, with the appearance and expansion of the Internet and development of various databases (including legal databases such as LITLEX in Lithuania).

210 BERRING, R. C. Legal Information and the Search for Cognitive Authority, pp. 1673–1708, p. 1695.

211 BRAMAN, E.; NELSON, Th. E. Mechanism of Motivated Reasoning? Analogical Perception in Discrimination Disputes. *American Journal of Political Science,* 2007, Vol. 51, No. 4, p. 942.

212 *Ibid.*

213 *Ibid.*

214 BERRING, R. C. Legal Information and the Search for Cognitive Authority, pp. 1673–1708.

215 *Ibid.*

216 *Ibid.*, p. 1692.

217 *Ibid.,* p. 1677.

criteria relevant to the formation of a personality[218]. Each of us choose Human Beings we can and cannot trust; it depends specifically on the criteria outlined above. Also, we must not forget that we all have our own views, knowledge that we follow in different situations (for instance, Human Being X can have absolute confidence in his knowledge of chemistry and be completely clueless about the processes of the market).

We must emphasise that this confidence in one's knowledge cannot be seen as related to it being reliable and correct, because this fact is basically distorted by the Human Being's subjective conviction in its conformity to the above criteria. A paradox, but Human Being X's knowledge of the field of chemistry may appear to correlate with every possible indicator of reliability. Also we should mention that we often, consciously or subconsciously, create our own levels of authority that inconspicuously become an organic party of our schemes of thinking. In the words of Berring – and his opinion is difficult to disagree with – we often view information presented to us by others (their knowledge of one object or the other) with disdain, but seldom do we give our own knowledge a critical appraisal. In fact, in real life we meet similar paradoxes almost every day: laymen often voice their discontent with religious dogmas but never stop to actually consider which of the ideologies of the relationship with the transcendental is closer to the truth. This type of thing is clearly present in the domain of law, too.

Every lawyer who is trying to justify his decision with motives of one kind or the other (depending on whether he begins with *top down* or *bottom up*) is looking for a 'cognitive authority' to help him pair the knowledge he has or obtains with the immanent thirst for truth. In fact, his search should be limited to human self-analysis in trying to purify one's thinking from unnecessary ballast that dampens our decision-making process.

Berring also talks about the so-called degeneration of the structure of cognitive authority[219], meaning cognitive authority that used to be at the core of legal information but is not degenerating and is unable to get back to the previous level as the old tools have been ousted, and new ones are still vying for prevalence. Such changes cannot be considered a process of organic growth. Now we should be careful in accepting this position of Berring's as 'cognitive authority' has not really failed. It is rather standing on a by-road of evolution because the modern thought has basically made it possible for it to be reconsidered.

There are scholars (such as Patrick Wilson) who argue that right now a legal practitioner should first look for 'cognitive authority' in law itself[220]. There, we indeed find the 'original sources', or propositions, which are a part of law in its own right. Indeed, the contemporary judge often has no solid base of 'cognitive authority' and formulates his motives by essentially simply relying on a mixed bag of various sources that can be altered as

218 *Ibid.*

219 BERRING, R. Ch. Legal Information and the Search for Cognitive Authority, pp. 1673–1708, p. 1678.

220 *Ibid.*, p. 1690.



needed to obtain the picture he is after. Still, thanks to the above degeneration of internal information of law, 'cognitive authority' that relies on 'original sources' is just a large bubble blown up by a Human Being who has ultimately succumbed to stagnation of thought.

In the theory of general legal discourse, we can distinguish the theory of epistemological responsibility, which basically allows us to look at how 'cognitive authority' is completed. This theory builds on criticism (inadequacy) of the coherence theory. Under this theory, the system of legal knowledge is coherent, meaning that some propositions of the system can be used to derive any others. This derivation is often cyclical and/or based on values.

Paul Thagard's conception of explanatory connection that brings some modification to the traditional theory of coherence seems rather interesting. This modification of the coherence theory allows us to include emotional images in the process of judgement. According to Thagard, the explanatory connection is a matter of satisfaction that has to do with positive pressure (arising out of the relationship between analogy and explanation) and negative pressure (arising out of the relationship between contradiction and competition)[221]. It is the relationship between positive and negative pressure that basically guides the formation of a coherent whole of knowledge. Thagard's theory of explanatory connection can have a successful application in the legal context as well. According to this theory, the hypothesis of circumstances contested in trial can be justified only if it is one that satisfies the (positive and negative) limitations of relationships, or matches the narrative of pressure, best. This means that the type of relationship that is directly related to the justification of evidentiary decisions may be based on the satisfaction of the requirements of positive and negative pressure.

Nonetheless, any system of knowledge may have reached its maximum degree of coherence attainable and still remain essentially unjustified. Amalia Amaya has identified the category of 'relationship bias'[222], which allows us to explain this paradox. The relationship bias is a process where the Human Being, in building a coherent system of knowledge, dismisses all attitudes that corrupt the coherence of the system and forces all other knowledge to match the ideal of the model he has designed. Here is a practical case in point: a scientist can maintain a stable scientific theory by systematically dismissing evidence that disrupts it only because the system is being designed on the basis of its relationship bias. Relationship bias can basically discredit any system of motives if we are to prioritise the imperative of organisation. Human Beings who pass judgements can simply construct an ultimately coherent system of motives that would impeccably string the judgement but would, for all practical purposes, be completely false. We can model a macabre situation

221 AMAYA, A. Justification, coherence, and Epistemic Responsibility in Legal Fact-Finding. *Episteme: A Journal of Social Epistemology*, 2008, Vol. 5, Iss. 3, p. 307.

222 *Ibid.*, p. 309.

when the judge in a civil case, while relying on false evidence from the very beginning, decides that a particular party in litigation is right. This judge connects all evidence, all arguments of the parties to the hypotheses of the rightness of the party: he dismisses witness testimony as unreliable and controversial and having no evidentiary power, interprets ambiguous evidence, without analysing it any deeper, as supporting the stance of the 'right' party, and so on. At the end of the trial, the judge will have developed a theory that will have a very high level of coherence of case content, which will in any case maintain the judge's original attitude regarding the right party in litigation and will determine the motivation of the judgment without transcending the boundaries of that system. It should be emphasised that various mutually conflicting deliberations, legal knowledge that fails to fall within the scope of the system of 'coherent truth' being built, even to an extent, is dismissed.

The conception of the construction of a 'coherent truth' system is augmented by two concepts of coherence of text that are identified in the theory of discourse, *a parte objecti* and *a parte subjecti*[223]. These concepts point to the difference between the coherence of the text itself and the coherence that is giving to it by the Human Being who analyses it; in other words, the coherence as the product of the analysis of the text as interpreted by the reader.

In terms of the legal discourse, *a parte subjecti* is a scheme of conveying the process of knowledge. This scheme does not work as an independent indicator but is derived in the process of textual interpretation. Ergo, coherence of knowledge can only be obtained as a product of intense interpretation. The success of the product of interpretation is inseparable from the success of the development of the relationship between the text and the basis of the system of knowledge.

The theory of epistemological responsibility helps us fill in the gaps of the coherence theory, if only to an extent. This theory subordinates the unconditional requirement for organisation and coherence with the epistemological qualities/values of the *reliabist* and the *responsibilist.* A. Amaya points that the epistemological values of the reliabist version are grounded on cognitive abilities such as memory, mind, intuition, wit. The intellectual values of the responsibilist are the personal traits such as open-mindedness, persistence, and intellectual modesty, which are analogues of moral virtues[224]. Here, we have a pretentious ideal that legal fact-finders will be epistemologically responsible only when they are virtuous enough on an epistemic level[225]. Lawyers must live by top standards of epistemological responsibility in terms of the extent of consequences that the wrong decision may bring. The court embodies the causes of epistemological responsibility. Amaya argues that epistemologically responsible behaviour is concerned with the dimension of morality as the judicial context is very closely related to the possibility to affect a large group of Human Beings[226]. These circumstances make us think of a way to include a category of morality and ethics in the schemes of legal motivation. Therefore, interpretation of propositions of the theory of epistemological responsibility allows us to say that common moral values are the filter that obligates every lawyer who has to motivate his decisions to act in a highly responsible manner and to make ultimate effort to achieve a truth of the maximum 'attainable' level.

Considering the above, it can be said that the only way to resolve the inherent dilemma of knowledge and truth in legal reasoning is to rephrase Karl Popper's ideas[227] and to employ the method of guess and denial: to suggest bold hypotheses and put every system of knowledge to a critical test. The values of thinking, objectivity, intellectual moderation, and intellectual courage, help us be responsible in our assessment of legal knowledge. Intellectual courage should be viewed as the most important thing, one that is necessary to search for internal certainty when you need to find some internal resources to reasonably doubt the system of knowledge you are building and acquiring.

223 AMAYA, A. Justification, coherence, and Epistemic Responsibility in Legal Fact-Finding. Episteme: A Journal of Social Epistemology, 2008, Vol. 5, Iss. 3, p. 310.

224 *Ibid*, p. 312.

225 *Ibid.*

226 *Ibid.*, p. 315.

227 NEKRAŠAS, E. *Filosofijos įvadas.* Vilnius: Mokslo ir enciklopedijų leidybos institutas, 2004, p. 166.

# LEGAL THINKING

*Thinking is the top of bliss and joy in human life; it's the best thing a human being can do.*
Aristotle

Law is the Human Being's thought, product of thinking, or the process itself. Law begins with the Human Being and ends with a human being (a specific Human Being), so as we analyse legal reasoning we have to understand and plumb the depths of human thinking. As already mentioned, logic does not play the first fiddle in law, because it is the simplest method of thinking. Whereas there is nothing simple about law, it is an intellectual process and therefore we must understand the thinking of the Human Being.

Thinking is a generalised and indirect process of reflecting the reality in the consciousness that allows us to recognise both real-world objects, events, and other phenomena, and their interactions and causal relationships[228]. To think is to make conclusions and to argue. Thinking is a certain kind of discursive information that arises out of intuition. If we derive thinking from intuition, we have to realise that the first motivation has to be grounded on humaneness. Good reasoning is inadequate unless it has enough symbols. Symbols can constitute beauty, feelings, music, art, and so on. Every element of thinking has to be real.

Thinking is a sequence of particular interrelated propositions. When we think, it is important for us not to fathom a particular category as much as to see how that category relates to another category. How we transit from one category to the next, from one element of reality to another.

If we plunge deeper into the philosophy and categories of thinking, will we be able to experience the leap of thinking; will we be able to understand law better?

228 LAPĖ, J., NAVIKAS, G. *Psichologijos įvadas*, 2003, p. 137.



To think legally means to define certain criteria that allow us to make a decision – a conclusion on some proposition that has already been established. Yet thinking per se does not offer us any system. Thinking involves more than just words; it encompasses emotions, feelings, images, sounds, the weather, friends, and so on, too. All that we are trying to put into certain forms as we think. This is where formalisation in terms of a certain degree of clarity comes into existence.

Legal thinking and legal decision constitute two separate categories. A legal decision can be a tangible thing, while legal thinking is much more variegated. They are two separate institutes that take a lot of effort to emerge. Legal thinking is an intellectual rather than tangible phenomenon. Law does not aim to merely state and interpret the facts. The purpose of law is to make a decision to administer justice based on interpretation and explanation of established facts. Legal reasoning is grounded on the correctness of conclusions from thinking. The judge's decision is the conclusion from the judge's thinking. Thinking is a unity and sequence of elements of integrated thinking.

The problems that occur in making decisions relate not to law in its own right, but to reasoning with thinking as one of its categories. If the qualitative aspects of law lie with legal thinking, we have to realise what legal thinking is. We have to control our thinking lest it becomes an involuntary reflex. The whole process of judgement is a complex procedural and thinking activity. Process codes are but technical rules that do not play a vital part in thinking activity. These rules define the process of how the judge makes his judgment:

1. identification of facts relevant to the case;
2. adoption of an applicable legal norm;
3. determining the meaning of the legal norm;
4. relating the applicable legal norm to the factual circumstances.

In making a legal decision, it is not just the procedure or the norms that matter, but their relationships as well. Therefore, the quest for simplicity is not and should not be a direction in which legal thinking should go. Law is complicated and difficult per se: '[l]egal discourse has its own specific language that involves legal concepts, specialist terms, and references made to scientific categories for the sake of reasoning'[229]. Thanks to this type of inherent dialectal uncertainty of law[230], complexity must be construed as the state of law *per se*.

All the arguments used in a discussion are based on dialectics. The dialectic method means that every principle or proposition can be approved of or rejected only if a contrary proposition is assessed at the same time. The doctrine of law states that the defining feature of the dialectical nature of the legal discourse is that the 'legal discourse is

229 MESONIS, G. Teisinio diskurso dialektika. *LOGOS.* 2011, No. 67, pp. 16–22, p. 16.
230 *Ibid.*, p. 17

open-ended.'[231] Thinking is not solid either – it is a process that has no definition by shape, quantity, and content. Still, we can see certain required preconditions: first of all, it is the aim to solve the problem; second, it is the focus on social phenomena in life; third, focus on legal norms.

*First,* legal thinking is different from plain thinking in a way that legal thinking, just like law in general, requires a result/conclusion[232]. *Second,* when we choose axioms for legal thinking, we have to preserve a link with the social value and reality, which can be seen as a major challenge of legal thinking. Law cannot be limited to just efforts of legal thinking, legal thinking has to be tied both with reality and the needs of social life, yet in some cases the correctness of the conclusions of legal thinking can be attained in the absence of any social value. This leads to the question of what is more important: is it legal thinking and the correct conclusion, or chaos of thought and a decision that is just in the social sense.

*Third,* in the process of legal thinking, it is important to identify legal norms that are relevant to a particular situation or to state absence thereof.

Still, we need to recognise certain flaws in our thinking. We are not machines able to exercise absolute control over ourselves. Involuntary reflexes are a part of our personality; we cannot control them. The Human Being will always have a certain grain of imperfection. Just like that grain of imperfection will be present in the judge. Legal activity also becomes complicated as it provides an arena where things that do not go well together clash. We than face the question of 'Can we achieve social value through thinking?' Legal thinking is not the bottom of importance of legal activity for us to take off against, which leads to the question: What determines legal thinking? The purpose of legal thinking is to know and to understand, but is it really necessary for the perception and cognition of law? Considering the above, it should be said that legal thinking must be what harmonises things that are completely incompatible, legal security and certainty, and the respective changes that lead to the development of society.

231 *Ibid.*, p. 20.

232 E.g., see: *ibid*, p. 18.



## ASSUMPTION OF PHYLOGENETIC EVOLUTION OF LEGAL BEHAVIOUR (CATEGORIES OF THINKING)

Ever since the dawn of the primitive social system and the advent of the first civilisations, whole ages of philosophy (philosophy of law included) have been devoted to reflection, pondering, search for true wisdom and the truth. Still, it was much later that thinking as a phenomenon, its meaning, stages, and processes became the subject of a discussion: the archaic rules of law with their inherent formalism, when the main thing was to strictly follow the established form in performing legal acts[233], rejected the possibility to think and to look for the true causes and motives altogether. They considered legal behaviour to be based on association rather than causality (you just have to follow the rules or else you will be punished). Still, the recent changes in law (such as correlation with philosophy, psychology) have created a necessity to answer primary questions like *What is thinking*? In fact, a phenomenon like thinking should be relevant to law (and the philosophy of law in particular).

### General Conception, Qualities, and Significance of Thinking

The objects and phenomena of reality have qualities and relationships that can be recognised directly by virtue of senses and awareness (colour, sound, shape, positioning and transfer of objects in the visible space), and qualities and relationships that can only be recognised though generalisation, i.e. by exercising thinking. Thinking is a generalised and indirect reflection of reality, a type of intellectual activity that covers perception of the essence and mutual relationships of objects and phenomena. On top of that, thinking is a mental activity, acquisition and application of knowledge of reality and new methods of intellectual activity. The process of thinking does not simply involve accumulation of knowledge; knowledge is analysed and synthesised, generalised and abstracted. Thinking is based on a system of concepts that has a general reflection in reality[234].

Furthermore, thinking can be described a brain function, the result of its analytical activity. It is ensured by the action of both of the signalling systems, with the second signalling system playing the lead role. When we resolve thinking problems, a process formation of temporary nervous connections takes place in the cortex of the brain. The appearance

233 More on the formalism of the archaic law, see: MACHOVENKO, J. *Teisės istorija.* Vilnius: Centre of Registers. 2013, p. 103–117.

234 KAFFEMANAS, R. *Mąstymo psichologija.* Šiauliai: Šiaulių universiteto leidykla, 2001, p. 6.

of a new thought actually means that a nervous connection is made in the new formation. Thinking has a set of qualities:

1. The first quality of thinking is its *mediatory character.* What the Human Being cannot recognise directly, the Human Being gets to know indirectly, recognising some qualities through others, qualities that are unknown through those that are known. Thinking always relies on data from sensory experience: senses, awareness, imagination, and theoretical knowledge acquired in the past;
2. The second quality of thinking is its *generality.* Generalisation as recognition of what objects of reality have in common and what essential features they possess can be achieved because all of their properties are interconnected. Generality exists and shows only through what is separate and specific[235]. Human Beings express generalisations through the use of language. A linguistic symbol is the property not of an isolated object, but of a group of separately similar objects. Generalisation is also a typical characteristic of images (imagination and even awareness). But there it is limited to what is obvious. Yet word allows us to make unlimited generalisations. The conception of essence, movement, law, phenomenon, quality, quantity, and other philosophical concepts is the widest form of generalisation expressed in words.

Thinking is the *highest order of learning about reality.* Thinking has a basis that consists of feeling, awareness, and imagination. Information reaches the brain through senses, the only channels of communication between our organism and the world that surrounds us[236]. The brain processes the content of information. The most complicated (logical) form of processing information is the thinking activity. While solving problems of thinking that life gives him, the Human Being thinks, makes conclusions, and investigates the essence of objects and phenomena, discovers the laws that govern their relationships, and use his findings as a basis to mould the world.

Transition from sense to thought is a complicated process that involves identification and generalisation of an object or its properties. Thinking first of all manifests at the time of solving continuous tasks, questions, problems of life. Solving tasks does not always give knew knowledge to the Human Being. Sometimes finding a solution is a very difficult process and therefore thinking activity is very intense, it calls for focus and patience. The real process of thought is always not just a cognitive, but an emotionally volitional process as well.

235 КОЧЕТОВ, А. И. *Как заниматься самовоспитанием.* Минск: Вышэйшая школа, 1986, p. 46.

236 *Психология*: учебник. Под ред. А. А. Зарудной. Минск: Вышэйшая школа, 1970, p. 16.



The objective tangible form of thinking is language. Thought becomes a thought to oneself and to other Human Beings only through word, be it spoken or written. Thanks to language, thoughts, intellectualisation does not vanish, it is handed down from generation to generation as a system of knowledge. Yet we have other tools to transmit the results of our thinking, such as colour and sound signals, electrical impulses, gestures, and so on. Modern science and technology use arbitrary signs as a universal and efficient tool to transmit information. When it acquires a verbal form, thought gets shaped and realised in the process of language. The movement of thought, its adjustment, the mutual relationships of thoughts happen through linguistic activity alone. Thinking and language are one. Thinking is inseparable from language mechanisms[237], particularly those related to speech and hearing, and speech and movement.

Thinking is also inseparable from the practical activity of Human Beings. Any type of activity implies thinking, accounting of and planning and observing the conditions to act. When the Human Being acts, he solves certain problems. Practical activity is the essential condition for thinking to take place and evolve, as well as a condition for thinking to be true.

## Psychology of Thinking

Psychology of thinking is one of the most sophisticated fields of psychological science. We can encounter different theoretical positions of researchers in the psychology of thinking. Some of them consider thinking to consist of elementary processes of information and manipulation of symbols, while others believe that the psychology of thinking involves rather more complicated ideas, prioritising the specific character of human thinking that has to do with creativity, critical approach, and other qualities.

The psychology of thinking deals with how and in what categories and forms and operations the Human Being (the subject) thinks. If we analyse a particular act of a Human Being only theoretically, we can abstract from the subject as we look for the logic, sequence, circumstances of what happened, but we cannot abstract from it in terms of psychological analysis. Thinking is stimulated by personal needs, motives[238].

Thinking is the ultimate product of uniquely organised matter (the brain), an active process of reflecting the objective world. Being inseparable from the brain, thinking cannot be fully accounted for with the action of the physiological apparatus. It is first of all rooted in social rather than biological evolution. Thinking (a cognitive process of an individual) is a generalised and indirect reflection of reality[239]. Animals, too, can exhibit elementary

237 MYERS, D.G. *Psichologija*, 2000, p. 652.

238 KAFFEMANAS, R. *Mąstymo psichologija*, 2001, p. 4–5.

239 MYERS, D. G. *Psichologija*, 2000, p. 322.

thinking; it enables dynamic, or operative, adaptation of the organism to the demands of the environment[240].

In the context of general activity and the interaction of Human Beings, thinking is dissected as an element of the structure of interpersonal relationships. In this respect, thinking is interpretation of another Human Being's reactions and motions, treatment of material actions and activity results in general, the understanding of the language (both verbal and written) of another Human Being. It is a part of personal consciousness and a unique object, its structure consisting of the conception of oneself as the subject of thinking, differentiation between own and someone else's thoughts, perception of an unresolved problem as one's own, perception of one's relationship with the problem.

Contrary to senses and perception, thinking does not reflect separate objects and their properties, but, among other things, the nature, internal relationships, functions, dependencies, developmental consistencies of phenomena. Thinking is often approached as a transition between what is unknown to what is known; from what is incomprehensible to what is understandable. Unclear, inaccurate knowledge should not be seen as a flaw in thinking to be eradicated, but rather as a threshold of cognition that we must overstep to get to know what is unknown.

Thinking is inseparable from:

1. senses,
2. perception,
3. practical activity,
4. memory images,
5. concepts.

Just like any type of activity, thinking has motivation. Thinking is solving problems on the basis of a system of concepts and the conditions of the problem. When the Human Being thinks, he investigates the environment, analyses, states, generalises, makes conclusions, decides. Notably, thinking is driven by motives that are not just assumptions for its development, but also the actions that affect its productivity. Unity of consciousness and subconsciousness is a defining attribute of human thinking. Emotions play a very important role in thinking; they define the search for the solution to the problem. Ergo, thinking is a mental activity of the Human Being that is expressed through generalised reflection of the world. This reflection is the result of objective environmental analysis and synthesis, a conclusion of practical and cognitive activity. Thinking is the highest and most complicated form of cognitive activity that we develop gradually. It is one of our latest mental formations[241].

240 *Psichologijos žodynas.* Vilnius: Mokslo ir enciklopedijų leidykla, 1993, p. 162.

241 KAFFEMANAS, R. *Mąstymo psichologija*, 2001, pp. 6–8.



## Thinking processes

Human thinking activity involves solving various thinking problems that aim to unveil essence. A thinking operation is a human thinking activity the Human Being uses in solving his thinking problems. Thinking processes and actions of thought that create and alter concepts, the content of thinking.

Thinking operations are highly diverse: *analysis, synthesis, comparison, abstraction, concretisation, generalisation, classification*[242], and so on. Which thinking operation the Human Being applies depends on the nature of the problem and information available. Thinking processes determine the level of concepts. For any action of thought to become a thought operation, it needs to be connected to a counter-action, which verifies and adjusts it. Comparison is used in identifying the relationships of similarity and difference; abstraction and concretisation, those of the whole and a part; generalisation, the relationships of severalty and generality[243].

The ability to reflect reality in a generalised manner becomes apparent through the Human Being's ability to intellectualise, make logical inferences, argue, forge general concepts. Thinking allows us to learn about what we cannot perceive with our senses by analysing directly conceivable facts. Thinking does not exist merely as an intellectual process; it is closely tied with other mental processes and is not isolated from the whole of the consciousness of the Human Being.

*Analysis and synthesis* are the main thinking operations. Many thinking processes cannot take place without them. *Analysis* constitutes dividing the whole into its individual parts or distinguishing its parts, actions, relationships[244], for instance, mentally breaking down a particular activity into individual actions, operations, or phases. Whereas synthesis, in contrast to analysis, means combination of parts of events or arrangement of their attributes or qualities by thought[245]. As two separate operations, analysis and synthesis are very closely tied to one and other at the same time: for instance, when we read the text of a law, we can identify individual sentences, words, letters to combine them together and understand the underlying thought. When we engage in analysis, preliminary understanding of what we need to distinguish from the whole and the perception of that part separately from the whole comes to play an important role[246]. Preliminary understanding of the whole of individual parts facilitates mental synthesis, too.

242 LAPĖ, J.; NAVIKAS, G. *Psichologijos įvadas,* 2003, pp. 139–142.

243 *Ibid.*

244 PALUJANSKIENĖ, A.; JONUŠIENĖ, D. *Psichologijos pagrindai*, p. 19.

245 *Ibid.*

246 JEWELL, R. *Experiencing the Humanities. Philosophy and Basic Beliefs.* [interactive]. [accessed on 28 August 2017]. Online access: <http://www.tc.umn.edu/~jewel001/humanities/book/5philosophy.htm>.

Comparison as an action of thinking cannot take place without consistent analysis. Analysis is a necessary element of comparison. However, comparison does not end with analysis, it always establishes a particular relationship among objects distinguished from their qualities or part. Therefore, it is also a synthetic operation at all times. The Human Being can understand the surroundings and find his way in the world only by comparing objects and phenomena and by responding to their differences and similarities. Comparison in general constitutes identification of the similarity and difference among objects and their individual elements and qualities. Objects and phenomena can be compared by one particular quality or an entire group of qualities and properties. Comparison can be one-sided or narrow, thorough or detailed. Just like analysis and synthesis, comparison can have different levels, ranging from marginal to in-depth. In this case, the human thought moves from external qualities of similarity and difference to internal properties; from the seen to the unseen; from phenomena to their essence.

Also, as we think, we can often break away from many qualities of an object (or from objects in their own right) and identify one particular property or quality. Mental break-away from many objects and identification of a particular one of them that we need is called *abstraction*[247], which can be perceived as the process of mental break-away from certain qualities in order to get to know them better. The Human Being singles out a particular quality of an object in his mind and inspects it in isolation from other qualities, temporarily breaking away from them. Isolated investigation of individual qualities of an object and break-away from the rest of them enables the Human Being to obtain in-depth knowledge of the essence of objects and phenomena. Abstraction helps the Human Being break away from a single particular object and to ascend to the highest level of cognition, scientific theoretical thinking.

*Concretisation* is the opposite process to abstraction, which is perceived as the return of thought from what is general and abstract to what is concrete to reveal the content[248]: if we specify a particular object or accentuate its particular quality, a process takes place that we call *concretisation.* It is a thought of a partial incidence, which corresponds to a certain general phenomenon. Not only do we break away from the qualities of that partial incidence, we also think about it with the whole diversity of its inherent qualities in objects in mind.

*Generalisation* is mental identification of what is common in real-life objects and phenomena, and their mental combination on that basis. mental identification and the resultant connection of what is general in objects and phenomena. Thinking activity is always focused on obtaining a certain result. The Human Being analyses objects, compares them, abstracts their individual qualities to identify their general attributes and reveal regularities governing their development. The Human Being creates concepts through generalisation, by mentally combining objects and phenomena that possess common characteristics. Generalisations are correct when objects and phenomena are combined on the basis of their underlying quality[249]. By distinguishing what is common in objects or phenomena, and by revealing their differences in doing so, the Human Being gains a possibility to classify those objects or phenomena[250].

247 *Ibid.*

248 LAMINAVAS, J. *Psichologija.* Moscow, 1960, pp. 255–257.



## Components of Thinking

To be able to think of many events, the Human Being divides them into concepts which are considered to be the main components of thinking[251]. When we think of something, we always operate concepts. A concept is an element of the content of thinking, expressed with a word or words[252]. It is a thought of an object or phenomenon that reflects its general and essential qualities. Concepts are broader than images. They may denote what cannot be expressed with images. Even though it is expressed with words, a concept and a word are not interchangeable[253].

Cognition becomes more effective through hierarchical arrangement of concepts[254]. For instance, we classify regulations of the Republic of Lithuania based on their legal power: the Constitution, constitutional laws, ratified international agreements, laws, other regulations having the power of laws (such as issued by the President, the Government, the Constitutional Court, and so on)[255]. Some concepts are made by definition: we know that a triangle has three sides and therefore consider every shape of the kind a triangle[256]. Also, we often form concepts by identifying prototypes, the most characteristic representative of a particular category, such as the concept *bird*[257].

A concept is tagged with a word and cannot exist without a word because it constitutes a mental distinction and combination of common qualities of real-life objects and phenomena. However, the word denoting a concept necessarily has a connection with

249 GONOBOLINAS, F. *Psichologija*, Vilnius: Mintis, 1973, p. 76.

250 LAMINAVAS, J. *Psichologija.* Moscow, 1960, pp. 255–256.

251 LAPĖ, J., NAVIKAS, G. *Psichologijos įvadas*, 2003, p. 143; MYERS, D. G. ***Psichologija***, 2000, p. 323.

252 The Dictionary of the Modern Lithuanian Language [interactive]. [accessed on 29 August 2017]. Online access: <http://lkiis.lki.lt/>.

253 GONOBOLINAS, F. *Psichologija*, 1973, p. 77.

254 MYERS, D. G. *Psichologija*, 2000, p. 324.

255 The European e-Justice portal. Information on the legal system of Lithuania [interactive] [accessed on 29 August 2017] Online access: <https://e-justice.europa.eu/content_member_state_law-6-lt-maximizeMS-lt.do?member=1>.

256 MYERS, D. G. *Psichologija,* 2000, p. 324.

257 *Ibid.*

sensory experience the Human Being has obtained through learning about the real-life objects and phenomena that the concept generalises. Sensory cognition is a mandatory source of concepts. A concept is the product of uninterrupted interaction of both signalling systems. To internalise a concept is to master all the knowledge about the objects to which the concept applies, meaning that acquiring a concept does not equal perception of the common qualities of all objects or phenomena that the concept signifies. The content of concepts is revealed in decisions that always have a verbal expression. A decision is a reflection of the relationships or some qualities of objects and phenomena[258]. A decision is a form of thinking used to propose or deny something. For instance, when we reveal the content of the concept of 'birthright', we provide a set of decisions on the inherent qualities, attributes of birthright and its differences compared to positive right, and so on.

The results of human cognitive activity are registered in concepts. To learn about an object is to learn about its essence. Concepts are reflections of the essential qualities of an object. To be able to reveal those qualities, we need to learn about all aspects of an object, determine its relationship with other objects. The concept of an object occurs on the basis of intellectualisation and induction. Concept as the result of generalisation of the Human Being's experience is the highest product of the mind, the highest level of learning about the world. Every generation of Human Beings realises scientific, technical, moral, aesthetical, and other concepts that society has established in the process of its historical development. To realise a concept is to perceive its content, to be able to identify its essential qualities, know its exact limits, its place amidst other concepts, know how to use it in cognitive and practical activity.

The form of thinking when a new decision is made on the basis of one or several other decisions is called *reasoning.* Reasoning can be *inductive* and *deductive*[259]. Both of these forms of reasoning are closely connected. Inductive reasoning is validated not only by the number and diversity of incidents that form the basis of a general proposition, but also on the basis of a more general proposition, more general rules that can be used to derive a general proposition. Induction validates deduction and vice versa, deduction is based on previous induction. Complicated processes of consideration always constitute a chain of reasoning where both types of conclusions are closely connected to one another. A key condition to apply a concept in practice is to know its relationship with other concepts[260].

One of the purposes of human thinking is to understand the essence of a phenomenon or a thought voiced by other Human Beings. Understanding is heavily affected by knowledge and experience, which we must have in order to be able to connect the new with the old, the incomprehensible with the understandable, the unknown with the known[261]. As a result, understanding – disclosure of essential qualities of real-life objects and phenomena – plays a significant part in thinking activity. The nature of understanding can vary from one case to another. Sometimes understanding is limited by our classification of an object or phenomenon; our answer to the question: What is it? In other cases to understand something is to get to the cause and the consequence of the phenomenon, to answer the questions of why and how it happened, why it was done, and so on. Answering these questions will reveal essential, consistent relationships among real-life objects or phenomena.

To understand actions of Human Beings is to reveal the objective causes of their actions, the motives of the act, the meaning attached to the act and its social significance. Just like every type of thinking activity, understanding is physiologically analytic systemic brain activity. Analysis (identification of essential qualities) and synthesis (actualisation of connections established in past experiences or formation of new relations) are mutually closely related and define the success of comprehension[262].

The types of thinking as cognitive activity are identified on the basis of generalisation and tools used. There are three major types of thinking:

1. *Practical (action-based)* thinking occurs when relationships and qualities of objects or phenomena are recognised on the basis of practical, physical actions involving the objects or phenomena;
2. *Visual thinking* results in finding relationships of objects or phenomena by mentally rearranging available images;
3. *Abstract (conceptual) thinking* is the discovery of the relationship between phenomena by connecting and rearranging available concepts[263].

So, types of thinking are identified on the basis of where the word, image, and action is in the process of thinking, as well as the interaction of those things.

*Practical thinking* is focused on solving problems under the conditions of manufacturing, constructive, organisational, and other kinds of human practical activity. Its essence lies with understanding technology and the Human Being's ability to tackle technical problems. The process of technical activity is a process of interaction of mental and practical components of work. Intricate operations of abstract thinking intertwine with the Human Being's practical actions and are inseparable from them. Practical thinking is defined by clearly expressed observation, attention to detail, and ability to use it in specific situations, as well as control of spatial images and schemes, ability to move swiftly from thought to action and vice versa. This type of thinking possesses the highest degree of unity of thought and will.

258 GRAKAUSKAITĖ-KARKOCKIENĖ, D. *Kūrybos psichologija:* mokslinis metodinis leidinys. Vilnius: Logotipas, 2002.

259 GONOBOLINAS, F. *Psichologija*, p. 78.

260 LAMINAVAS, J. *Psichologija,* pp. 258–270.

261 GONOBOLINAS, F. *Psichologija*, pp. 78–79.

262 LAMINAVAS, J. *Psichologija*, pp. 271–273.

263 *Psichologijos žodynas.*, pp. 161–164; LAPĖ, J.; NAVIKAS, G. *Psichologijos įvadas*, 2003, p. 138.

Thinking could not exist without sensory cognition. Mental activity is characterised by a certain optimal amount of stimuli or influences; otherwise the brain will lose its activity. We are aware of tests performed in the so-called sensory vacuum chamber. In it, the Human Being is isolated from all stimuli (eyesight, hearing, smell, etc.) to a maximum degree. Under conditions like those, the mental activity of the subject breaks down, he becomes prone to hallucinations and nightmares. However, in the opposite case, when the Human Being receives an overload of high-intensity information, his mental receptivity decreases, he overstrains, and can suffer spontaneous mental shut-down. That is a self-defence response of the body, which protects the mind from overload and overstrain.

Information gathered through senses, perceived, and stored in memory is the material that thinking manipulates by rearranging, grouping, and systemising it. Therefore, thinking cannot exist in isolation from information that sensory cognition provides. On the other hand, thinking is not a mechanical sum of senses. Figuratively speaking, thinking is like a transition from sense and understanding to thought clad in a verbal or graphical form[264].

One of the main channels for the Human Being to receive knowledge of the world surrounding him are the senses, and the only way for that knowledge to travel from the sense organs to the brain is by nerve impulse. Frequency impulse modulation is a method of transmission of different knowledge of the world to our brain. Impulses travel a lot of conductive paths – fibres – to reach different parts of the brain from various sense organs and from a particular sense organ. Spatial and wild summation of impulses and the related stimulation of the cortex is the physiological basis of human thinking. However, impulse processing and summation does not constitute thinking per se. We still need spatial and wild impulse configurations.

*Visual thinking* is embodying thoughts and generalisations in concrete images. For instance, a chess player looking for the best move will imagine the placement of the chess pieces on the board after one or several moves and chooses the best move accordingly[265].

The ability to recognise images is one of the key characteristics of the brain. Notably, the optic organs are the most informative of all the senses. But even though the Human Being receives most of the information about the external world through his eyes, it is a known fact that absence of eyesight does not impair thinking. The so-called purely visual or purely symbolic thinking is the exception rather than the rule. The course of thought always relates to associative transitions from symbol to image and vice versa. It could be that it is these transitions that cause logical leaps (or logical gaps) in the process of thinking. When it comes to analysis of thinking, it is normal to contrast thinking with images (specific thinking) to thinking with concepts (abstract thinking).

The physiological basis of image is a neuron model, or the whole of nerve cells and their synaptic connections that constitute a rather steady group, as far as time is concerned.

264 KAFFEMANAS, R. *Mąstymo psichologija*, p. 5.

265 LAPĖ, J.; NAVIKAS, G. *Psichologijos įvadas*, p. 138.



Every external phenomenon perceived by the Human Being is modelled in his cortex as a particular structure. The brain contains various memory mechanisms and therefore models can vary, too, and not always possess a neuron structure; for instance, short-term memory models are a system of impulses that circulate in the contour of neurons. Therefore, there should always be complete conformity – code – between real-life objects and their models in the nervous system. This is one of the conditions for objective cognition.

The Human Being recognises objects even when he sees them in an unusual position, such as turned-over, and so on. This allows him to understand an object based on a probabilistic rather than identical coincidence of stimulated neurons. The neuron model is a codified expression of an object or phenomenon. The structure of the model mirrors the structure of the object it reflects. Usually, there are two identifiable types of structure: spatial and wild. A music melody has a wild structure, while the structure of the same melody written down as notes is spatial. The model in the brain is information that is processed in a particular manner.

The building of a neuron model can be considered to be correlative to the so-called imaging. Stimulation and inhibition, their transition from one model to another is the tangible basis of the process of thinking. Thought requires activation of at least two models to appear. The contrasting of these models constitutes the actual content of the thought.

*Abstract thinking* is basically focused on finding general regularities in nature and the society. It reflects common ties and relationships. It is in this case that we operate concepts stored in our memory and look for the connection among them[266].

All three types of thinking are closely related to one another. The practical, visual, and abstract thinking is equally developed in many Human Beings but, depending on the character of the problems the Human Being is solving, a certain type of thinking becomes the predominant one.

Thinking only exists in permanent correlation with human activity and language. That is why human thinking is closely connected to speaking and has its results registered in language. Thinking and language are interlaced in an intricate way. Language shapes the Human Being's main thoughts. It is but a means to express thoughts. Words reflect rather than design our method of thinking, even though they can affect what we think. It would be too bold a claim to say that language defines our method of thinking, but our words can really affect what we think. Of course, some ideas are independent from language and we sometimes think with images, not words. Therefore, we can say that thinking affects our language, which affects our thinking[267].

In terms of quality, human thinking is made different by the ability to symbolise. Word is the most universal symbol, although it is not the only one. Verbal symbolism is needed for us to perceive complicated situations. Also, we would not be able to remember

266 PALUJANSKIENĖ, A., JONUŠIENĖ, D. *Psichologijos pagrindai*, p. 18.

267 MYERS, D. G. *Psichologija,* pp. 322–352.

complex phenomena unless we formalise the object we want to remember using our internal language. Forging links between words and symbols in human memory usually takes place in the form of association of ideas. Only in the simplest of situations where we act purely automatically can we do without verbal formulation of the problem.

In addition to its ability to expand the potential of our memory, verbal symbolism also serves as one of the conditions for conceptual thinking. Simple trials have shown that words in human memory accumulate to form some sort of clusters, associative reserves that are used in the processes of understanding and thinking. Associative templates apparently economise thinking, albeit obviously making it less flexible. In the absence of such reserves, thinking breaks down and becomes random. Yet the process of thinking differs from free association in a way that thinking constitutes focused association. The physiological basis of thinking is the free nerve connections (conditional reflexes) that are born in the cortex of the large hemispheres. These conditional reflexes occur when something triggers the second signalling system (words, thoughts) that reflects reality, but are necessarily grounded on the first signalling system (senses, concepts, images). We can only think normally when both signalling systems are engaged; yet it is the second signalling system that plays the leading part because word is a signal that has deeper content, it is connected to processes of dissociation and generalisation.

### Thinking, Opinion, Conclusion, Understanding, Surprise

Human thinking is expressed in opinions and conclusions. An *opinion* is a form of thinking that reflects real-life objects from the perspective of their connections and relationships. Every opinion is an individual thought, and consistent logical association of several opinions needed to resolve a certain problem of thinking or to understand something or find an answer to a question is called *intellectualisation,* which is defined as 'thinking in which a new logical solution is derived from one or several solutions, also known as presumptions of intellectualisation'[268]. Intellectualisation is only meaningful when it leads to a specific conclusion, which is the answer to the question, the end of the quest for thought.

*Induction* is an opinion formed on the basis of several intellectualisations that gives us new knowledge of objects and phenomena in the objective world[269]. Intellectualisations are inductive, deductive, and based on analogy.

*Inductive intellectualisation* is intellectualisation that moves from an isolated (private) case to a general case. The Human Being uses intellectualisations of several isolated

268 The Dictionary of the Lithuanian Language (vol. I–XX, 1941–2002): electronic version [interactive] [accessed on 3 August 2017]. Online access: < http://www.lkz.lt/Visas.asp?zodis=samprotavimas&lns=-1&les=-1>.

269 JEWELL, R. *Experiencing the Humanities. Philosophy and Basic Beliefs.* [interactive]. [accessed on 28 August 2017]. Online access: <http://www.collegehumanities.org/>.



cases or groups of them to make a general conclusion. Intellectualisation when thought moves in the opposite direction is called *deduction*, and the underlying conclusion, deductive. Deduction is a method of identifying a specific case out of a general attitude, the transition of thought from a general to a private, isolated case. With deductive intellectualisation, and knowing a general attitude or rule, we make a conclusion about private cases even though we did not investigate them specifically. *Intellectualisation by analogy* is intellectualisation when a conclusion is made on the similarities of two objects in other relationships based on their similarities in a certain type of relationship. For many hypotheses, the basis of guesswork is intellectualisation by analogy.

Human thinking activity manifests itself through the understanding of the objects of thinking and solution of various thinking problems. *Understanding* is the process of thought penetrating the essence. The object of this process can be anything, phenomenon, fact, situation, action, human language, piece of literature or art, scientific theory, and so on. Understanding can be part of the process of internalisation of an object and have an expression in its recognition, perception; however, it can take place outside of perception as well[270]. Understanding is a prerequisite for solving problems of thinking

As the Human Being acts, he solves various problems. A problem is a particular situation that determines the behaviour of the Human Being who is satisfying a need by changing the situation. The essence of a problem is to achieve a goal. Complicated problems are solved by the Human Being in stages. Once he realises the goal, the question, the need, he analyses the conditions of the problem, draws an action plan, and acts[271].

Some problems are solved by the Human Being directly, by performing the usual practical and mental actions, others, in stages, by acquiring knowledge required to analyse the conditions of the problem. These latter problems are thinking problems. They are solved in several stages:

1. Understanding the question of the problem and the quest for an answer to it. Without the question, there is no problem, no thinking activity.
2. Analysis of the conditions of the problem. If we do not know the conditions, we cannot solve any problem, be it practical or mental.
3. Solution. The proof of a solution occurs through different mental actions, using logical operations. Mental actions form a particular system by consistently altering one another.
4. Validation of the solution. It introduces a degree of discipline to thinking activity, allows us to perceive every step of thinking, find and correct any mistakes we may have missed[272].

270 GRAKAUSKAITĖ-KARKOCKIENĖ, D. *Kūrybos psichologija*, pp. 74–77.

271 *Психология,* p. 23.

272 LAMINAVAS, J. *Psichologija,* p. 67.

Thinking begins when we are faced with a difficult situation. Simply put, a difficult situation is a multiple-choice situation.

That means that the logical structure of situations that trigger the thinking process mirrors the structure of situations that cause a surprise reaction. After all, surprise happens when the expected situation does not match the actual situation. Therefore, it is necessary at the beginning of thinking. They say that cognitive activity benefits those who never cease to be surprised the most.

Thinking begins with perception and ends with action, albeit taken at a later time. And the main link in any thinking activity is the making of a decision.

### Individual Differences of Thinking

Types of thinking are also the typological defining characteristics of human mental and practical activity. Every type is grounded on a particular relationship of signalling systems. If the Human Being's practical thinking prevails over visual thinking, it points to a relatively predominant first nervous system; if the Human Being tends to think in an abstract way rather more, it is the second nervous system that dominates. There are other differences in human thinking activity, too. If they are constant, we call them *qualities of the mind.* The concept of the mind is wider than that of thinking. The human mind is as defined by the characteristics of thinking as it is by those of other cognitive processes (such as observation, artistic creativity, logical memory, attentiveness). By understanding the intricate relationships of the objects and phenomena of the world that surrounds him, an intelligent Human Being must also understand other Human Beings very well, be sensitive and emphatic. The qualities of thinking are the underlying qualities of the mind. They include flexibility, independence, depth, width, consistency, and so on.

The flexibility of the mind shows in the agility of thinking processes, the ability to consider the shifting conditions of mental and practical actions and to alter the methods in which problems can be solved. The flexibility of thinking is contrasted by inactivity of thinking. The Human Being of inert thought tends to reproduce what he has internalised rather than actively look for what is yet unknown. An inert mind is a lazy mind. The flexibility of the mind is a typical trait of artistic Human Beings.

The independence of the mind is expressed through the ability to raise questions and find original solutions to them. The independence of the mind implies its self-criticism, or the ability of the Human Being to see both the strengths and weaknesses of his actions. Other qualities of the mind – its depth, width, and consistency – are also largely important. A Human Being of a deep mind is able to penetrate the essence of objects and phenomena. Consistently-minded Human Beings are able to intellectualise consistently, adequately prove a particular conclusion to be false or correct, and verify the progress of intellectualisation.



### Legal Thinking and Analogy

To think analogically means to compare a hypothetical case with cases in which decisions have already been made. As facts and circumstances very often define legal objects, we need to see whether the facts of a case match the facts of a previous case. If essential facts are sufficiently comparable, we can rely on analogy and follow the decision made in the previous case. And, vice versa, if material facts differ, we have to separate the case at hand from the past case stating that the first is too different compared to the precedent for us to be able to apply the rule adopted in the previous case.

Thinking by analogy does not require for all facts to be matching at all. Ideally, we will discover a case with precisely matching facts. Still, as often as not, we will identify some differences in facts. Therefore, persuasion cannot only rely on analogy; additional tools may be required as well.

When we read case files, we must pay attention to the facts that support the elements of the rule. Material cases will inevitably guide us to other precedents to draw a course. To maintain a balance in text and to reach the right result, the court looks for an equilibrium of different interests. First of all, it has to identify the factors that had led to the decision. Obviously, factors (such as age, education, wealth, health, experience, intent to do harm, and so on) will differ from matter to matter. They do not come from a mandatory list of elements; otherwise, they would form part of the rule. The right result is the product in the shift of the balance of the scales due to the factors collected.

### Thinking and the Standard of *Reasonable Man*

The qualities, processes, components, forms and formation of thinking represent the main aspects of thinking. Thinking begins with perception and ends with action, albeit taken at a later time. The main link in any thinking activity is the making of a decision. Based on these attributes, thinking is regarded as a condition for the phylogenetic development of legal behaviour. This stance leads to some questions. First of all, a shared, objective, uniform scheme of thinking and universal stages of development of thinking in no way imply uniform legal behaviour as individual differences in thinking do exist. What is more, the standard of *reasonable man*, i.e., the Human Being whose thinking is to be considered when it comes to solving legal problems, is rather questionable. Problems arise not only because the *reasonable man* standard implies standard thinking – it determines (indirectly) how the Human Being must think to act legally (as if someone else's thinking pattern were imposed on him). On the other hand, the very concept of *reasonable man* is not explicit, fully clear and understandable. For these reasons, we should discuss the standard of reasonable man in detail.

*The standard of* reasonable man *or* reasonable person is legal fiction arising out of the general legal system. The reasonable man is a hypothetical individual whose under-

standing of the world and thinking is to be considered when it comes to defining legal decisions to be made. The question of how the reasonable man would behave under the same circumstances is highly relevant for legal reasoning and, obviously, the philosophy of law, too. This standard is based on the fact that law per se will aid society when it serves its reasonable members; hence, interaction of the members of society will ensure reasonable application of law.

The reasonable man is not an average person: it is not an instrument of democracy. For us to be able to adequately define the sense of responsibility of the reasonable man and other standards of reasonable man, obviously, we first need to find out what the reasonable man is. Medically speaking, defining what the average Human Being thinks and what he can do is inappropriate and, as often as not, impossible. But the reasonable man can be defined as an appropriately informed, conscious, law-savvy Human Being of sober thought. Such a Human Being can under certain circumstances do something out of the ordinary; but it does not matter what he does or thinks, he will always think reasonably.

Advocates of the *reasonable man* standard defend this conception as an instrument to achieve objectivity. When a lawyer or lawmaker follows the *reasonable man* standard, he needs to imagine what he sees through someone else's eyes, and try to distance himself from all of the insignificant traits and unrealistic expectations of the Human Being under certain circumstances that a particular situation might dictate. Critics of the *reasonable man* standard point to the problem with its application being justified or objective and stress that in many cases, the application of this standard leaves no room for unquestionable exercise of law. It is often difficult to decide which motives or values have more weight. What defines justification of the *reasonable man* standard? What is the relationship between the concepts of *reasonable* and *rational*? The concepts of *reasonable* and *rational* can be used in many different contexts and have a lot of meanings; and even though they sometimes are used interchangeably, we should interpret them separately.

When, for the purposes of definition, *rationality* is put in contrast to *reasonableness,* the word *rational* most often connects to instrumental rationality – the rationality of means and goals. Let us say, there is a subject with the goal X; it is rational for him to take actions Y only if that will help him achieve X. Instrumental rationality is related to the goals of a particular subject; on the other hand, it can (but need not) be associated with the interests of other Human Beings. Therefore, I might find it instrumentally rational to steal something from another person if they have something that I want, and I have a good reason to believe I will not get caught. But then helping a stranger if my goal is the wellbeing of others could be equally rational. When we contrast *reasonable* with *rational,* the implication of reasonableness does not mean instrumental rationality by any means. It may be rational for someone else to steal from me, but for me, doing it to another person would be unreasonable. Why? It is a good question. One side of the answer is grounded in the idea that what is reasonable is in some way related to what would be equitable in terms of the others. Another argument is that what is reasonable has something to do with what others would approve of.



So, when we talk about the reasonable man, it is very important do draw a line between him and the rational man. The rational man either considers or does not consider the interests of other Human Beings. One way or the other, being rational means assigning an appropriate value to the views and interests of others. Of course, all that is extraordinarily abstract. To be able to adopt *reasonable man* as a special concept in law, we must define the criteria that would help us differentiate between reasonable and unreasonable acts.

*Subjective and objective reasonableness.* In fact, it is extremely difficult to distinguish between what is subjective reasonable and what is reasonable in an objective way. For instance, we could have a 'reasonable man,' but then we could have a 'reasonable intoxicated man,' a 'reasonable man with developmental disorders,' or a 'quick-tempered reasonable man.' More often than not, when we talk about the *reasonable man* standard we say that it is an objective standard and note that in this case specific personal traits should not be taken into consideration. Some critics of the *reasonable man* standard accentuate that objectivity is but a mask of bias, meaning that this standard benefits some groups of Human Beings more than others.

***Judge Learned Hand and the analysis of reasonable man as cost and benefit.*** The conception of reasonableness currently taught to virtually all law students was first formulated by Judge L. Hand in the famous case of *Carrol Towning*: 'The owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables:

1. The probability that she will break away;
2. the gravity of the resulting injury, if she does;
3. the burden of adequate precautions.

Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B > PL.'[273]

Indeed, Hand's formula of B > PL is highly debatable, but the significance of the *Carroll Towing* case is that in it, the analysis of cost and benefit applies as a carelessness criterion. A conclusion is therefore made that the *reasonable man* determines the potential cost and benefit of his actions and refrains from acting in a way that would entail cost that the benefit would not justify.

***Immanuel Kant and the reasonable man as one who respects the interests of others.*** Many scholars interpret Hand's formula as an economic stance on the reasonable man, but it can be approached from a different angle as well. Hand's formula can be argued to reveal the principle of fairness. Abstractly speaking, the reasonable man can be said to be a Human Being who regards others with respect. The concept of the reasonable man can be related to the philosophy of morality and Kant's categorical imperative. Ergo, we can say that the reasonable man behaves so that the maxim of his conduct (or the principles

273 *United States v. Carroll Towing Co.*, 159 F.2d 169, 173, reh'g denied, 160 F.2d 482 (2d Cir. 1947).

he follows in his acts) could become a universal law[274]. In other words, the reasonable man understands others as goals rather than means. Sticking to this view, Dworkin argued that Hand's formula can be construed as a reflection of moral equality of the Human Being.

***Jurisprudence of morality and the aretaic conception of reasonable man.*** Another approach to the reasonable man derives from Aristotle's theory of morality (or ethics of morality), particularly from the idea that the basic standard of morality is the 'representative of morality', or the Human Being with moral and intellectual characteristics.

*What are those characteristics?* They are qualities such as courage, good nature, temperament. Intellectual values are *sophia* (theoretical wisdom) and *phronesis* (practical wisdom). The problem with the aretaic approach to the reasonable man is that it imposes too many demands. Aristotle's personal traits are *phronimos* – the Human Being of above-average skill level with an extraordinary ability to assess and choose.

When we apply the vying theories of the *reasonable man* in law, we must understand and identify the one that is the most appropriate to law, and the one that justifies our moral understanding and political theories.

### Thinking with Desires

If the Human Being can choose, he will do what he wants. The stronger the desire, the higher the probability he will do it. This can be said both of actions of the Human Being we can see and of things that cannot be seen, such as thinking[275].

There are thoughts that the Human Being likes and there are things he is afraid to think of. The Human Being treats unpleasant thoughts just like he treats unpleasant things – he avoids them. When we are eating a hamburger, thinking about the poor animal that was slaughtered for our breakfast is unpleasant. It does not take any exceptional effort. Thinking simply bounces off unpleasant thoughts much like a hand off something hot.

The judge is also a Human Being. What defines all Human Beings, defines him, too. There are thoughts he is afraid of, thoughts he loathes. There are ones he likes, ones that make him proud or, on the contrary, thoughts he is ashamed of. In the words of Friedrich Nietzsche: 'Memory says, "I did that." Pride replies, "I could not have done that." Eventually, memory yields'[276].

It is very important that consciousness does not realise that[277]. It is not easy for the judge to realise he is feeling disappointed when the Human Being that appears unpleasant

274 KANTAS, I. *Dorovės metafizikos pagrindai*, p. 52.

275 JUSTICKIS, V. *Bendroji ir teisės psichologija,* 2003, p. 252.

276 *Ibid.*

277 *Ibid.*



to him is found not guilty[278]. Just like he feels satisfaction, pride when he manages to find proof of guilt of the Human Being who did not appeal to him from the very start[279].

The law sets forth grounds for the judge to follow in making a decision[280]. In doing so, he has to abide only by the goal to resolve the case justly and to determine precisely whether the defendant is guilty or not. When the judge lives (either consciously or subconsciously) by his personal sympathies or antipathies, a desire to gain the approval, fear, hatred (etc.) of others, he is driven by extra-legal motives[281].

The law aims to protect the judge from potential influence. We have the institute of independence of judges to perform that function[282], and there are concrete measures to ensure economic, organisational, legal independence of the judge in place[283]. Still, despite the fact that the judge's distancing himself from his own subjective views, beliefs, personal attitudes and moods is considered an important element of the institute of the independence of the judge, said measures provide no guarantee of *psychological independence*, or the ability of the judge to resist motives that could make him have a vested interest in the case[284].

How these processes work and what the judge (consciously or, most importantly, subconsciously) roots the judge during the trial, depends on the different shades of his personality. Every one of us would be hard pressed to say why we choose to support one or another team.

It is no wonder that psychological studies have shown judgments to be grounded on the personality of the judge, yet the data showing the extent of that effect are highly variegated and even controversial. The studies that have testified that woman judges tend to be sterner towards woman offenders are quite impressive[285].

When it comes to judicial proceedings, it is highly important that the psychological factors that shape the judge's internal conviction of the story to be true are independent of his consciousness. The judge may feel he believes a particular story but it is difficult for him to grasp to what extent this belief is down to the consistence of the story or its figurativeness or ties with common sense postulates. It is therefore extremely important

278 *Ibid.*

279 *Ibid.*, pp. 252–253.

280 *Ibid.*, p. 253.

281 *Ibid.*

282 The Constitution of the Republic of Lithuania. *Valstybės žinios,* 1992, No. 33-1014, Articles 109, 114.

283 MASNEVAITĖ, E.; ŠINKŪNAS, H. Teismų nepriklausomumo samprata. In *Lietuvos teisinės institucijos.* Vilniaus universiteto vadovėlis. Vilnius: Centre of Registers, 2011, pp. 150–151.

284 JUSTICKIS, V. *Bendroji ir teisės psichologija*, 2003, p. 253.

285 SISK, G. C.; HEISE, M.; MORRIS, A. P. Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning. *New York University Law Rewiew,* 1998.

for the judge to be able to visualise the factors that define his belief in the story well, to be conversant with the mechanism in which they operate, and to be able to notice their effect. Only by doing so will he be able to control their action[286].

### Causality and Imputation

We have already talked about how thinking and cognition are two phenomena very related to one another. As the Human Being learns about things, he is capable of finding causal relations, and after he experiences that causality exists in many cases, he can think. And vice versa. Eventually, even nature itself is defined as an order or system, its elements interrelated as causes and effects, which means that their relationships are developing in line with the principle of causality.

The society (a phenomenon different from nature) is a normative order of human behaviour. However, there are no irrefutable arguments why human behaviour should not be perceived as part of nature defined by the principle of causality, or why it could not be interpreted as a set of causes and effects, much like facts of nature. Without the shadow of a doubt, this kind of interpretation ***is*** possible, at least to an extent, and has already been introduced. However, as we analyse our propositions regarding the behaviour of Human Beings, we can see that we connect some acts of human behaviour with others and with other facts in a manner that is completely different than that which applies under the causality principle. As yet, there is no generally recognised scientific word for the enforcement of the principle of causality. If we are able to prove that this principle indeed is embedded in our thinking, we would be able to draw a distinct line between society and nature. Only when law constitutes a normative order of behaviour towards others can we distinguish it from nature as a social phenomenon.

A principle other than causality, which we use to describe the normative order of human behaviour, has been titled by Hans Kelsen *imputation*[287]. As we analyse legal thinking, we can show that even though it is similar to the principle of causality, this principle that we apply to the rules of law, is essentially different from the first principle[288]. It is very similar in a way that the rules of law function in a manner that resembles the principle of causality in laws of nature. For instance, the following propositions are rules of law: an individual who commits a crime must be punished; civil recovery must be made out of the property of an individual who has failed to repay debt. A generalised wording is this: given conditions defined by the legal order, an act of coercion as defined by the legal order must

286 JUSTICKIS, V. *Bendroji ir teisės psichologija*, pp. 252–253.

287 KELSEN, H. *Grynoji teisės teorija*. Vilnius: Eugrimas, 2002, p. 95.

288 *Ibid.*



be enforced. Just like the law of nature, the rule of law combines two elements, however, the meaning of the association expressed by the rule of law is completely different than that of causality that the law of nature expresses[289]. Therefore, elements of a legal norm (such as crime and punishment[290]) do not share a tie of cause and effect.

According to Kelsen, 'opposite to the law of nature, the rule of law asserts not that if there is A, there "is" B, but when there is A, there "must" be B, even though B might not actually exist'[291]. According to the theoretician, said difference in the association of the elements of the rule of law and the laws of nature is caused by the fact that the defining connection of the rule of law wilfully comes from legal authority, while the relationship between cause and effect in nature is free from human will[292]. On the other hand, the fact that the rule of law describes something does not mean that what is being described is a real fact, because we can describe both real facts and norms, or specific meanings of facts[293]. According to Kelsen, the rule of law is not an imperative; it is only a solution, a proposition about the object of cognition, because the rule of law does not imply any agreement with the legal norm it describes either[294]. The rule of law remains an objective description; it does not become a prescription. The rule does nothing more – just like the law of nature, it states a relationship between two elements – their functional connection – alone. According to Kelsen, this means that the description does not have ties with meta-legal values and does not imply any emotional agreement or disagreement[295].

Studies of primitive communities and primitive thinking have shown that in his interpretation of nature, the primitive man most likely did not follow the principle of causality but rather that of imputation[296]. This means that he would interpret the facts he grasped through his senses on the basis of the social norms that governed his relationship with other Human Beings[297].

When Human Beings live in a group, eventually they get the idea about what constitutes good behaviour, and what constitutes bad. Such conditions spawn rules that define how, in a certain set of circumstances, members of the group must behave. If you behave properly, you must be rewarded, given something of value. However, if you behave

289 *Ibid.*

290 *Ibid.*

291 *Ibid.*, pp. 95–96.

292 *Ibid,* p. 96.

293 *Ibid.*, p. 97.

294 *Ibid.*

295 *Ibid.*

296 KELSEN, H. *Grynoji teisės teorija.* Vilnius: Eugrimas, 2002, p. 99.

297 *Ibid.*

improperly, you must be punished, i.e., have something bad done to you[298], like an imposed sanction. In this fundamental rule, the cause and effect are interrelated not on the basis of the principle of causality, but on imputation[299]. Therefore, the oldest sanctions were grounded on the principle of retribution: the fundamental rule of social life of the primitive Human Being, which covered both punishment and reward[300].

As Kelsen points out, the consciousness of primitive man did not carry the conceptions of nature as an order of elements intertwined by the principle of causality. At the time, nature was seen as part of the society, a normative order whose elements are interconnected by the principle of imputation[301]. At the time he was not aware of the dualism of nature as a causal order and the society as a normative order, which is inherent in the development of Western intellectual thought[302], including the perception of law. In the words of said theoretician, this kind of dualism appeared in the thinking of the civilised Human Being in the course of the development of intellect, when Human Beings were finally distinguished from creatures, Human Beings, and objects, and the causal interpretation of relationships of objects was separated from the normative explanation of human relationships[303].

## Thinking, Motivation, Consciousness, and Will

Economy or the theory of rational choice has no place for the concept of *will*. Economists and others who approve of the prospect of decision-making, approach behaviour quite simply as a prudent and logical choice of an option to act. When we choose an appropriate behaviour pattern, we presume there will be no problems with its application. And the hint to will means that the chosen course of behaviour will not always be implemented automatically. Sometimes we need strong motivation to consistently stay our course. The concept of *will* is used to describe a certain internal power (power of will) related to the purpose of controlling one's conduct.

The conception of will implies that there is one side to a person that has to be controlled when it does what the other side wants. So which side is the controlling side, and which one is controlled by will? Daily real-life situations that demonstrate an expression of will point to a very simple answer: will is most often expressed when we need to quench,

298 *Ibid.*

299 *Ibid.*

300 *Ibid.*

301 *Ibid.*, p. 100.

302 E.g. see: LOY, D. R., On the Duality of culture and Nature. *Philosophica,* 1995, vol. 55, pp. 9–35.

303 KELSEN, H. *Grynoji teisės teorija,* p. 100.



control *visceral* motivation. We can identify three main categories of motives that include visceral factors:

1. *instincts,* such as hunger or sexual desire;
2. *emotions,* such as anger or fear;
3. *somatic senses,* such as pain.

Every visceral factor performs an important vital or reproductive function. Hunger and thirst make us look for enough food and liquids, sexual desire ensures reproduction, anger protects us from being exploited by others, pain from the danger of getting injured. In every case, visceral factors act so that, on the one hand, we will experience some unpleasant sensation unless they are satisfied, and on the other, the desire to satisfy them goes up.

Although visceral actions play an important vital function, they sometimes also make us succumb to empathy even though that means going contrary to our interests. What is more, historically visceral factors (commonly known as *desire*) have been considered a force of debauchery running contrary to the civiliser forces such as intellect, cause, or egoism (selfishness). Granted ready access to high-calorie food, we have become so spoiled that we eat as soon as we are feeling slightly hungry. And social sanctions pertaining to the avoidance of hunger, fear, pain, work in much the same way.

The visceral factors of animals and Human Beings overlap to a much greater extent than their cognitive abilities. Like most animals, Human Beings experience hunger, thirst, fear, pain, and most likely many of the emotions. The most obvious neuropsychological difference between the Human Being and the animals that are his next of kin is the size of the cortex. As a reflection of this gap, the biggest difference of neurological function manifests in the abilities closely connected to the functions of the cortex, and is most evident in language and consciousness.

To sum up, we can conclude that animals can be regarded as slaves to their instinct, appetite, emotions to the extent that they eat when they are hungry, mate when they reach sexual maturity; they steer clear sources of fear and pain or run away from them. Accordingly, thanks to their consciousness, Human Beings can predict the consequences of their behaviour and identify conflicts between visceral and instinctive behaviour and higher-order motives and goals, such as physical fitness or respect of others. The underlying argument is that *will* is the force that is aimed at controlling behaviour driven by visceral motivation, which runs counter to *higher-order goals*.

Will is not a bottomless font. Just like muscular function, mental focus, or other human qualities that take effort, will, too, implies exercise of a certain force[304].

304 LOEWENSTEIN, G. Willpower: a decision-theorist's perspective. *Law and Philosophy.* January 2000, Vol. 19, No. 1.

## EXERCISE OF LOGIC

When we analyse the exercise of logic in the field of legal reasoning, first of all we have to discuss its conception. Even though the science of law in Lithuania recognises the use of logic in legal reasoning[305], this phenomenon is given an ambiguous evaluation[306]. This is the product of the category being used without discussing its conception, which at the same time prevents a deeper analysis of its role in making judgements.

They say that, when it comes to using logic in legal reasoning, for a long time it used to be tied with syllogism, which covers deduction of a proposition out of two presumptions (general propositions), yet fails to reflect either the complexity of the reasoning in question, or all of the types of logic[307]. In fact, there are many more types of logic than just syllogistic: we have non-classical logic (polysemous, deontic logic, and so on), or discontinuous logic (non-monotonous, contestable, voidable logic)[308]. Bearing this in mind, the concept and role of using logic in legal reasoning gain a vast range of meanings.

According to Eglė Mackuvienė, an important quality of logic is that it has to do only with the *form* of reasoning and performs the function of connecting presumptions and conclusions[309], whereas the acceptability and correctness of the result is not the matter of logic; therefore, if you do not like the conclusions, you have to blame the presumptions, not logic[310]. Steven Burton argued that the form of legal reasoning is like an empty vessel, its usefulness depending on what is inside[311]; therefore, the validity of the outcome of legal reasoning is determined by the content of the arguments that fill in said 'vessel'. Ergo, none of the existing types of logic are able to resolve all issues that arise in the process of legal reasoning[312].

Considering the above, it becomes apparent that even though the correctness of conclusions in logic and in law is goal number one, it is perceived differently, because the former focuses on the form in which the result is obtained, and the latter, on its content.

305 MIKELĖNIENĖ, D.; MIKELĖNAS, V. *Teismo procesas: teisės aiškinimo ir taikymo aspektai,* pp. 94–106.

306 E.g., see: GUMBIS, J. Teisės samprata: logikos taikymo problematika. *Teisė*, 2010, vol. 76, pp. 46–62; LASTAUSKIENĖ, G. Teisinis kvalifikavimas formaliosios logikos požiūriu. *Teisė,* 2009, vol. 73, pp. 38–54; MACKUVIENĖ, E. Loginis metodas teisėje: sampratos problema. *Teisė*, 2010, vol. 77, pp. 126–145.

307 LASTAUSKIENĖ, G. Teisinis kvalifikavimas formaliosios logikos požiūriu. *Teisė,* 2009, vol. 73, pp. 38–54; MACKUVIENĖ, E. Loginis metodas teisėje: sampratos problema. *Teisė*, 2010, vol. 77, pp. 126–145, p. 128, p. 135.

308 MACKUVIENĖ, E. Loginis metodas teisėje: sampratos problema. *Teisė*, 2010, vol. 77, pp. 126–145, pp. 138–140.

309 *Ibid.*, p. 129, see PRAKKEN, H. *Logical Tools for Modeling Legal Argument. A Study of Defeasible Reasoning in Law.* Dordrecht: Kluwer Academic Publishers, 1997, p. 23.

310 *Ibid.*, see PRAKKEN, H. *Logical Tools for Modeling Legal Argument. A Study of Defeasible Reasoning in Law,* p. 23.

311 BURTON, S. J. *An Introduction to Law and Legal Reasoning,* p. 25.

312 MACKUVIENĖ, E. Loginis metodas teisėje: sampratos problema. *Teisė,* 2010, vol. 77, pp. 126–145, p. 141.



Therefore, we should agree that for the purposes of law, logic is generally the right, the correct way to think[313], one that allows to secure only consistency and correctness of thinking for the purposes of legal reasoning, but not the correctness of the contents of the original propositions[314].

### Opportunities and Boundaries of Exercise of Logic

In the course of a trial, the judge is required to make the right decision, but what constitutes the right decision is not always the subject of general agreement. Under legal regulation in the Republic of Lithuania, the court decision has to be motivated and based on legal and factual arguments[315]. Ensuring that every decision possesses these qualities requires adequate and correct legal reasoning, which makes logic an important element of the intellectual process of the Human Being.

The roots of the value of logic in legal reasoning lie in Western intellectual thought. The origin and development of logic is connected to Ancient Greek philosophy[316], the codification of law that emerged in the Roman and Byzantine empires[317], the philosophy of St Thomas Aquinas[318], and the world order by early advocates of the natural sciences, such as R. Descartes, Gottfried W. Leibniz[319]. So, over the centuries, various social and public matters were being dealt with using the logic of the period; hence the modern Human Being's inclination to support answers to legal questions with logic should be seen as an ordinary thing as well. In the words of Giedrė Lastauskinė, modern logic has adopted the achievements of many philosophers and logicians, is highly variegated and still considered a tool to assure correct thinking[320].

Using logic to interpret law is to be tied to the principle of legal certainty: the judgment must be predictable and provide a guarantee of certain legal stability. Otherwise it would be difficult to foresee how the Human Being should act in a particular situation lest he be exposed to negative consequences, and the lawyer would be unable to provide

313 *Ibid.*, 126–145, p. 129.

314 MIKELĖNIENĖ, D.; MIKELĖNAS, V. *Teismo procesas: teisės aiškinimo ir taikymo aspektai.,* pp. 112–113.

315 E.g., see: The Code of Civil Procedure of the Republic of Lithuania, Article 270.

316 LASTAUSKIENĖ, G. Teisinis kvalifikavimas formaliosios logikos požiūriu. *Teisė*, 2009, vol. 73, pp. 38–54, pp. 39–40.

317 LANKAUSKAS, M. Teisės aktų kodifikavimo prielaidos Lietuvoje. *Teisės problemos,* 2011, No. 4 (74), pp. 52–98, p. 69.

318 ANZENBACHER, A. *Filosofijos įvadas*. Vilnius: Katalikų pasaulis, 1992, p. 172.

319 LASTAUSKIENĖ, G. Teisinis kvalifikavimas formaliosios logikos požiūriu. *Teisė,* 2009, vol. 73, pp. 38–54, p. 40.

320 *Ibid.*

adequate reliable advice to his client, among other things. In a democratic society where the legislative, the executive, and the judicial powers are separated from one another, legal thinking grounded on logic is a must: e.g., the judge cannot formulate new legal norms. He must, in adherence to logic, apply to the relationship of the dispute a legal norm formulated by the lawmaker thus legitimising his decision. Therefore, even though it is understood that the line between the application and creation of norms of law is sometimes quite vague, still, traditionally the standard or the goal to be achieved is the requirement for legal reasoning grounded on logic[321].

However, we should not forget that legal certainty, hence logic, is the only legal value and therefore must be kept in balance with other values such as justice, integrity, rationality, common sense, and so on. It is indeed very difficult to find arguments as to why logic should be made absolute or dominant with respect to other values. As we render one value absolute, we restrict the scope of other values and hence drift away from justice, it being the key legal result. By restricting the absolute character of logic in law, we expand the scope of existence of other values. The judge must seek a reasonable equilibrium of all legal values in every case rather than just go for the easiest option, which is to provide logical justification of his judgment.

As Dalia Mikelėnienė and Valentinas Mikelėnas point out, there is more than just one method of legal reasoning based on logic. For instance, syllogism, deduction, analogy, and so on[322]. Still, considering that with logic, it is the correct method (form) of intellectualisation that matters, this logic-based process of reasoning is rather formal. Whereas law means material correctness: we probably could not find a lawyer, scholar, or practitioner who would doubt that court judgment is affected by many factors and events; therefore, formal application of the legal norm (by way of deduction), precedent or any other form of legal reasoning grounded on a particular type of logic is not enough. The judge has the right result in terms of content to think of, too, picking the line of reasoning with it in mind. Therefore, even though the consensus is that the judgment has to be logical, meaning that the court has to interpret and apply a particular legal norm in line with the rules of logic, yet in practice, the trial usually involves complicated cases when the facts and circumstances of the case are vague, or the regulations ambiguous by virtue of various value-based or evaluative terms. In such cases, even though the requirement for the judgment to be logical is still there, the judge must adopt a certain position and needs to employ tools to assure a legal reasoning that is correct, and not just in terms of its form.

With reference to the above, it should be stated that interpretation of law on the grounds of logic assuring the adequacy of legal reasoning in terms of form is obviously aligned with the principle of legal certainty and is necessary in a democratic society.

321 BURTON, S. J. *An Introduction to Law and Legal Reasoning*, pp. 2–9.

322 MIKELĖNIENĖ, D.; MIKELĖNAS, V. *Teismo procesas: teisės aiškinimo ir taikymo aspektai,* pp. 94–106.



Besides, logic has relevance at this point, when the number of cases is growing rapidly and, for instance, analogy can be applied to solve a lot of simple cases quickly. Nonetheless, the significance and power of logic is often being made absolute and given a too-wide application or perceived as the sole basis of legal reasoning. In such cases, we have the question of whether this judgment grounded on logic holds any value in terms of justice. After all, logical interpretation does not help arrive at the right answer (in terms of form) at all times. And so, when the judge passes his judgment, he cannot rely on logic alone. The inadequacy of logic becomes particularly apparent in complicated cases that, contrary to the ordinary cases, include difficult matters pertaining to law and fact that require the situation to be examined from all angles.

Against this kind of background, we must attach significance to the idea of Oliver Wendell Holmes representing legal realism that: 'The logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgement as to the relative worth and important of competing legislative grounds, often and inarticulate and unconscious judgement, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. <…> But why do you imply it?'[323] It is said position that makes us stop and think, during ever instance of legal reasoning, of the extent we will have to use one or another type of logic to arrive at a decision that is correct both in terms of form and content.

That is why what is often described (in the legal doctrine of Lithuania in particular) as 'exercise of logic in law' is not completely comprehensive and appropriate. To provide a more complete description of legal reasoning that is appropriate in terms of form and content, which would at the same time grant us legal certainty, we have to consider not only exercise of logic, but valid legal reasoning in general, one of its elements being logic, or rather certain types of it that we invoke in specific situations involving legal reasoning.

### Logic and Legal Reasoning

The above aspects imply that when it comes to legal reasoning, in addition to the exercise of a particular type of logic, other factors have to be considered as important as well. Therefore, below we will analyse the exercise of certain types of logic in law: (i) the role of syllogism, one of the most common deductive elements of intellectualisation, in legal reasoning; (ii) the meaning and restrictions of logic in the application of a judicial precedent; (iii) logic as a potential tool of abuse of law; (iv) logic as a factor preventing flexible reference to principles of law.

323 HOLMES Jr., O. W. The Path of the Law. In FEINBERG, J.; COLEMAN, J. *Philosophy of Law.* Seventh Edition. Thomson, Wadsworth, 1980, pp. 119–124, p. 123.

*Syllogism in the Application of Legal Norm*

Traditionally, the judge is required to rely on the rules of logic in his application of the legal norm, and to provide various arguments to back it up; this ensures impartiality of the judge, legal certainty, and the judge's non-involvement in the field of the lawmaker.

Usually, in making a decision, the judge has facts (external factors) and the legal norm (internal factors) at his disposal. Ideally, all the judge has to do is determine the facts and apply the legal norm accordingly. In such case, the judge's activity in making a decision is considered formal, it does not allow any room for personal experience, rationality, personal values. The function the judge performs is cognitive when he determines the facts, and logical, when he applies the legal norm. All of these circumstances must guarantee objectivity; at the same time, it means that there must only be one right decision in every situation[324].

It is in a situation described above that the judge derives new propositions from a set of given ones, using deductive legal reasoning. All that can be formalised as syllogism – intellectualisation from what is general to what is specific. In that case, the legal norm is used as the major premise of the syllogism, and the fact of the case is used as the minor premise. If the major premise is found to mirror the minor premise, a conclusion is made. For instance, the major premise is that unless the contract or law provides otherwise, a secondary object is in for the fate of the underlying object[325]. The minor premise is that title to the underlying object has been assigned to person A; the contract or the law does not stipulate anything regarding the secondary object. The conclusion then is that title to the secondary object must be assigned to person A. This type of application of syllogism can be thought to guarantee impartiality of the judge, legal certainty, and non-interference in the legislator's domain on the part of the judge.

Still, this type of deductive thinking clearly has some flaws. No matter how correct it is in terms of form, syllogism never indicates whether its premises are correct, because, as it was already mentioned, '[l]ogic only relates to the form of reasoning'[326]. When it comes to searching for the right major premise, one of the problems is to identify the applicable legal norm correctly. In complicated cases, identifying the applicable legal norm is not an easy thing to do, especially if the language of the regulation is vague or ambiguous or the judge has to address an issue of competing norms or apply analogy. Legal norms are always general by nature, and therefore the judge has to decide whether a particularly case-related situation conforms to what is specified in the norm every time. In this case, difficulties are also due to the fact that syllogism does not address certain structural characteristics of regulations, such as application of exemptions, hierarchy of regulations, overlapping blanket norms, presumption, certain established terms of application or validity of the norm.

The above Article 4.14(1) of the Civil Code stipulates that, unless the contract or law provides otherwise, the secondary object is in for the fate of the underlying object. The latter legal norm stipulates that secondary objects are only objects that exist in parallel to underlying objects or objects that belong or are related to underlying objects. Which makes these norms general in nature, and it is up to the court to decide which particular object (the subject of a dispute) is secondary. Sometimes this can be difficult to do due to the ambiguous or inaccurate language of the regulation.

Identifying the applicable legal norm can be difficult not only due the above linguistic flaw, but also by virtue of the fact that certain things have been left for the judge to evaluate. After all, the legal norm cannot envisage every specific case pertaining to the relationship it regulates. Another defining feature of a legal text is that for it to be applied as appropriate, a lot of terms need to be defined, effecting the choice of the applicable legal norm. For instance, if we are to apply the institute of transaction invalidity, the court will have to consider the factual circumstances and evaluate categories such as fallacy[327], deceit, or real threat[328], and so on[329], and establish whether a particular legal norm can be applied based on its findings. Which means that the judge will have to find the relationship between the abstract situation referred to in the legal norm and a particular real-life situation, meaning that he will have to determine whether the factual circumstances match the content of the legal norm. Syllogism that helps us formally pinpoint a conclusion but fails to award us with any means to determine the content of important categories, in many cases will be of little use to the judge[330].

It is equally important to duly establish the facts of the case so that they can be used correctly (in identifying the right minor premise) for the purposes of application of the legal norm. For the court to be able to establish the facts, the parties to a dispute will provide evidence or the court will collect it at its own initiative. Assessing whether the evidence is sufficient to determine some facts and deny others is the prerogative of the judge. The judge has freedom to assess evidence based on his beliefs and experience. In this case, logic is of little use because, as previously stated, it simply 'does not assess the correctness of presumptions'[331].

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324 VARGA, C. The Nature of the Judicial Application of Norms. In VARGA, C. *Law and Philosophy: Selected Papers in Legal Theory,* Budapest: Akaprint, 1994, p. 295.

325 The Civil Code of the Republic of Lithuania, Article 4.14(1).

326 MACKUVIENĖ, E. Loginis metodas teisėje: sampratos problema. Teisė, 2010, vol. 77, pp. 126–145, p. 129 *see* PRAKKEN, H. *Logical Tools for Modeling Legal Argument. A Study of Defeasible Reasoning in Law.* Dordrecht: Kluwer Academic Publishers, 1997.

327 The Civil Code of the Republic of Lithuania, Article 1.90.

328 *Ibid.*, Article 1.91.

329 Grounds of Invalidity of Transactions (The Civil Code of the Republic of Lithuania, Articles 1.80 to 1.93).

330 BURTON, S. J. *An Introduction to Law and Legal Reasoning*, pp. 41–57, 68.

331 MACKUVIENĖ, E. Loginis metodas teisėje: sampratos problema. *Teisė*, 2010, vol. 77, pp. 126–145, p. 143.

However, establishing facts alone is not enough. In every case, they can be presented and interpreted in many different ways. Obviously, the court must adopt a particular stance towards facts: approve of the interpretation presented by one of the parties, or revise it, yet structuring the rule of logic, the legal norm, and the facts in the form of syllogism is of no help in this respect. The court's establishment and assessment of facts will depend on the judge's experience, pragmatism, rationality, values, and so on.

Syllogism does not help the judge interpret the values embedded in the legislation. It does not offer any means to weigh such values. Deductive reasoning can be instrumental in ordinary cases where the facts are simple and the legal norm is clear; however, with complicated disputes that call for a wide discretion of the court to evaluate the facts, this kind of reasoning offers limited assistance. It is some kind of fiction, which implies that the court only followed the law and was impartial, and so on. Ergo, the vital criteria in resolving such disputes are clearly not related to syllogism. This leads to doubt as to giving too much prominence to logical thinking in law, because it focuses only on formal legality, without saying anything as to the material correctness of presumptions.

As we said, one of the aims for employing syllogism is to make sure that the judge does not interfere with the field of the lawmaker and adopts an impartial judgment. The litigating Human Being who is interested in the outcome of the case expects the judgment not to be affected by any subjective actions and the judge to be objective and to apply the law appropriately. This means that society wants to know the competence that is bestowed on the judge to act as a representative of the state authority and to pass a binding judgment which will affect a person's freedoms, property, and may be enforced under coercion from the government. Society seeks that the judgment implies legitimate exercise of state authority. The boundaries of the judge's competence are strictly defined, he has to legitimise his verdict and pass a legitimate judgment. For these reasons, his duty is to resolve a dispute on the basis of regulations rather than his personal scale of values that the law does not recognise.

When the judgment is grounded solely on the application of the law or any other regulation, it is not a decision of an individual Human Being; it is a decision by the state, which operates through that Human Being and constitutes an enforcement of authority. Under the traditional conception of the requirement of legality, it is understood as legal formalisation in the resolving of a dispute. Legal formalism is used to produce an abstract, formal model of legality. The court's reasoning and judgment can be verified through the prism of this formal model. Hence the requirement for the judge to apply the law as syllogism, to use the rules of logic since they eliminate subjectivism, as well as the judge's bias and scale of values.

For the judgment to be legitimate, it needs to be the sole decision arising out of the legal norm. Legal formalism attempts to tell us that the judgment is dictated by law and logic and not by the value system of the judge in every case[332]. However, even advocates of legal positivism do not deny that in certain cases the judgment is defined by moral beliefs[333]. Legal positivism merely denies that the judge should rely on moral values or social policy criteria to determine what the existing law says. However, once he identifies the existing law, the judge may decide it does not offer an answer to the question of the case. He then can rely on extra-legal criteria.

However, this type of interpretation is not quite accurate even at the theoretical level. In that case, law becomes a purely logical conception: application of law constitutes classification, systemisation, and conclusion-making, and the job of the judge is to administrate law rather than administer justice. Law is defined as a linguistic abstraction, and its application as linguistic, logical analysis. Thus, law is also given an illusion of completion – every situation can be resolved under the legal norm, and every human act can be described as either aligned or running contrary to the legal norms.

Legal formalism presumes that law is free from gaps. But in fact gaps do exist. We should not forget that the legislative apparatus is an institutional framework geared towards professional mass legislation. However, we cannot supplement it with a mass apparatus to dispense justice, even though it might seem that we could just as well authorise the court to apply the law with logical precision. Such judgements would be justifiable and legitimate as they would be in line with the law, and would be undisputable as, if we apply the legal norm, only one judgment is equitable and only one conclusion can possibly be made.

By definition, every pattern of behaviour that logically stems out of the effective legal norm is legitimate. However, the judge must apply the legal norm to the individual case; his functions and application of the law is completely different as in making the right decision he is responsible towards the specific parties to the case. We cannot design a legal system that would cover every specific real-life situation. Legal formalism does not eliminate the gap between the abstract rule and the problem of a particular situation. In resolving a dispute, the judge applies the legal norm to the specific real-life situation and, if necessary, he needs to eliminate all flaws, collisions of such legislation and fill in its gaps. So, logic cannot and should not be the only tool in litigation. Yes, it performs a certain controlling function by restricting the judge's discretion, acting as a safeguard against obviously inequitable judgments, but it cannot be made absolute by any means[334], and highly rigid legal formalism is subject to a certain amount of criticism.

As we already mentioned, in practice legal formalism is impossible in its rigid sense, because every state of interpretation of the law involves a higher or lower degree

332 LATVELĖ, R. *Teisėjo vaidmuo aiškinant teisę:* daktaro disertacija. Socialiniai mokslai, teisė (01S). Vilnius: Vilnius University, 2010, pp. 35–36, see BIX, B. H. *A Dictionary of Legal Theory.* Oxford University Press, 2004.

333 E.g., see: HART, H. L. A. *Teisės samprata,* p. 189.

334 VARGA, C. Heterogenity and Validity of Law: Outlines of an Ontological Reconstruction. In VARGA, C. *Law and Philosophy: Selected Papers in Legal Theory,* 1994, pp. 209–215.

of value judgment. Notably, society too does not only want to restrict the freedom of the judge so he does not interfere with the legislator's field and become partial, but to experience justice in the general rather than specifically legal meaning of the word as well. The judgment must be understandable and acceptable for as much as possible in its moral or ethical sense, too. Depending on the situation, the judge should not only blindly follow the law that could have been passed through lobbying, but also support his judgment with criteria of good morality, the general public understanding of what is just and what is not, as well as integrity, and so on.

At the same time, we should emphasise that any vagueness and need for interpretation does not mean that judges and lawyers only ground their decisions and assessments on guesses and subjective circumstances. It is not an attempt to support advocates of legal scepticism who argue that the judge makes whatever judgment he likes in the case, and facts and the law can be interpreted so that any kind of judgment can be passed. The lawyer will evaluate the situation so that, in his opinion, the judgment will match the facts established in the case as closely as possible and will be more aligned with how the applicable law should be interpreted in a particular legal system. Different lawyers can evaluable the same situation differently, providing comprehensive and convincing arguments. This often happens when the cassation court overrules the judgment by the court of appeal on the grounds of a failure to interpret the legal norm properly. However, this should not be taken as a reason to believe that court judgments are unpredictable. In many cases, even when the situation is difficult, the lawyer can rely on the doctrine, precedent, the opinion prevalent in the legal community, and come up with a rather reliable assessment of the situation and convincing arguments, while the judge can adopt a responsible and equitable judgment. In this case, it is the method of logical interpretation of law made absolute rather than the ambiguity of law in its own right that is to be criticised.

The judge must exercise logic in his application of the legal norm, and it is particularly evident in simple cases; however, dispensation of justice is more than mere logical application of the legal norm. The legal norm and facts to be applied in the process of dispensation of justice are not self-evident. It is the prerogative of the judge to identify the applicable law, establish and interpret facts, apply law in a systematic manner considering the democratic regime and the autonomy of the Human Being. During this process, the judge interprets the situation and decides how it should be evaluated and what aspects of it are the most important. Then he can rely on the formal logic and draw a conclusion from the legal norm and the facts of the case. The judge must understand that, apart from empirical inspection and logical deduction, there are many other opportunities to employ rational reasoning and justification, and it is one of his main duties to find them. By understanding that legal reasoning grounded on syllogism is not the only instrument, the judge would be forced to give more consideration to the individual context of the case, specific facts, and the content of the applicable legal norms.



*Logic in the Application of Judicial Precedent*

We must analyse the relationship between logic and precedent law. Precedent as a source of law is typically referred to in countries of the general law tradition, but it is relevant to the practice of the Republic of Lithuania as well. For instance, the Courts Law stipulates that, for the purposes of trial, courts shall follow the official judgments published by the Constitutional Court of the Republic of Lithuania; decisions by judicial bodies of the European Union, as well as their prejudicial decisions on matters of interpretation and validity of European Union regulations. Furthermore, 'In adopting decisions in relevant categories of cases, courts shall be bound by their own rules of interpretation of law that are formulated in similar or essentially comparable cases. In adopting their decisions in relevant categories of cases, courts of lower instance shall be bound by the rules of interpretation of law of courts of higher instance formulated in similar or essentially comparable cases'[335].

It is the instances when the judge applies a prior precedent to a specific current situation that constitute legal reasoning by analogy. It is a method of intellectualisation when, after identity or commonality of several objects has been established, the rest of their attributes are deemed to be matching or identical[336]. Without precedent, the method in question can be expressed as analogy of law[337].

This application of precedent based on logic as a source of law aims to ensure compliance with the principle of legal certainty and stability of law. For that purpose, using the method of judicial precedent, the judge performs the following actions:

1. analyses the dispute at hand;
2. analyses the available precedents;
3. analyses the similarities and differences between the dispute at hand and the available precedent's *ratio decidenti;*
4. decides whether the similarities and differences are significant;
5. makes a value-based judgment.

When he applies the method of legal reasoning by analogy, the judge has to be well aware of the case-law to be able the precedents that could be applied, properly structure the disputed situation, and determine all similarities and differences between the disputed situation and the situations that have been resolved by precedent. This is where the experience and professionalism of the judge comes in. It would appear that all it takes is to logically apply the suitable precedent. However, such legal reasoning by analogy does not address the key problem of deciding whether the similarities of two situations (the dispute at hand and the precedent) have sufficient weight so that the dispute would need to be

335 The Law on Courts of the Republic of Lithuania. Official Gazette *Valstybės Žinios*, 1994, No. 46-851, Article 33.2, 33.3, and 33.4.

336 MIKELĖNIENĖ, D.; MIKELĖNAS, V. *Teismo procesas: teisės aiškinimo ir taikymo aspektai,* pp. 107–108.

337 The Civil Code of the Republic of Lithuania, Article 1.8.

solved in the way that was done in the prior case, or if they are outweighed by the differences between the two situations, which therefore should be approached differently.

Before applying precedent, the judge must decide whether the circumstances of the case approximate to those covered in the precedent so closely as to merit similar resolution of both situations for the sake of justice. The judge may rely on precedent when the situation of the dispute at hand is essentially similar to that of the prior case. If the comparable situations are different, they have to be approached and addressed differently.

Said identification of two situations is more than a mere indication of factual differences or similarities; it also constitutes the judge's reasoning why he chose one or another decision, why he applied (or did not apply) precedent. To justify its reliance or non-reliance on precedent, the court uses not only legal criteria, but the criteria of morality, social policy, common sense. For instance, in one case the court will apply the criteria of above-average individual (i.e., the standard of professional or the standard of conduct) and will impose a civil-law penalty on a person for negligence. Yet in some other case, albeit in a potentially similar situation, the court may decide that application of such higher requirements to a person is not right, and reliance on the average person standard must be made instead.

Further development of law in states of the continental legal system like Lithuania will add an increasing amount of relevance to the matter of application of precedent. A particular situation will have been covered in several different judgments made under similar circumstances and answering the question of which one of them should be applied will be all the more difficult. This is particularly evident in countries that have solid precedent traditions and are dominated by the general law tradition, where journals of abridged judicial precedents are made because the abundance of cases makes it impossible to look a particular precedent up.

Precedents are analysed as a system of judgments of which the most appropriate one has to be selected. The judge must be able to show that one or all of the existing circumstances have been considered, this decision is the most fitting. This means that he must prove that the judgment can be supported with arguments at least for as much as any other possible judgment. The situation will become even more difficult when the court decides that a new precedent has to be established, or one that already exists modified, as a result of some change in the circumstances of social life. The court will have to consider and compare the new rule with the existent precedents and justify the reasons why they cannot be applied, as well as consider hypothetical future situations and the effect the precedent under development will have on future judgments. After all, looking forward, the precedent will shape the case-law. Such considerations might not make it in the case file, if only to withhold the fact that the court is forging a legal norm rather than resolving a particular dispute. However, the judge whose function is to construct a uniform case-law should be expected to think about the implications his judgments may have on future cases as well. It is therefore obvious that mere rules of logic are not enough for this kind of comprehensive analysis. A judgment like that must consider the social policy and the public interest; it needs to be pragmatic, realistic, and so on[338].

In theory, it is possible for a precedent to be formulated so as to approximate the legal norm as much as possible, indicating all facts established in the case so that the precedent could be relied upon. However, this is not so in practice. Edward H. Levi is even more categorical about this: *'The rules change when the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them.'* Court judgments always appear as if the rule applied has long been established, but that is pure fiction[339].

Precedent is a rule established in a particular case. Precedent registers a generalisation of facts and the resultant legal consequences, the way the court ruled in a specific case. Yet precedent only registers the way in which one particular case was solved, which the judge did not and could not have passed a judgment that would apply to a separate category of cases. He might have considered the potential import of the judicial precedent on further judgments, but he could not have foreseen every future situation; besides he did not provide more arguments than was necessary to resolve the particular dispute at the time. Future cases will be settled by other judges who will have to analyse the behaviour of the parties and the existing situation, follow the sense of justice and decide whether the situation of the case and precedent have enough significant similarities for the judgments to be approached equally.

Another problem relates to cases when the court decides to expand law and modify the case-law due to changes in the economic, legal, or social situation. Obviously, one of the underlying reasons might be a change in the legal norm, but precedents are not only changed as a result of some change in the legislation. In that case, the court follows the sense of justice, rationality, the new social values, pragmatism, experience, considers the possible outcome of every different interpretation, but logic is of no help here. On the contrary, logic keeps us from changing precedent: the more we adhere to it, the harder it is for the cassation court to expand law through alterations of the existing precedents[340]. This kind of law becomes static and cannot keep up with the pace of society's evolution.

This is not a purely theoretical issue. It is quite common for the court not to invoke a precedent submitted by one of the parties or applied by a court of lower instance due to a difference in the *ratio decidendi* of the cases. By the way, we should note that sometimes the court virtually fails to indicate the reasons why the situations of the case at hand and the precedent are so different that they cannot be resolved in a similar manner, only referring

338 SARTORIUS, R. The Justification of Judicial Decision. In AARNIO, A.; MACCORMIC, N. D. *Legal Reasoning*. Vol. I. Dartmouth, Aldershot, Hong Kong, Singapore, Sidney, 1992 , pp. 127–136.

339 BURTON, S. J. *An Introduction to Law and Legal Reasoning*, p. 36.

340 SARTORIUS, R. The Justification, pp. 11–40.

to the general formula that the *ratio decidendi* of the cases is different. The court's position is clearer to understand when such arguments are stated, if only in brief[341].

Considering the above, it can be said that the rules of logic do not help us resolve the problem with the application of precedent, which is the establishing of whether the differences between two cases are material or not. In the latter case, the judge may follow the general sense of justice, the teleological or any other method of interpretation, use pragmatism and rationality, where logic is of very limited use.

*Logic and Abuse of Law*

Law is a social regulator which establishes a certain order and human relations. In case of a dispute, law should be able to tell us which one of the parties is right. The decision is objectively made by the judge, but as they argue the truth, the parties to the dispute exercise a certain amount of influence on the decision as well. The more complicated the case, i.e., the more obscure its final resolution, the higher the influence of the parties on the decision of the judge.

In difficult disputes, parties are usually represented by professional lawyers whose thinking is rather specific; they are capable of looking at law as a system, finding in law the norm that benefits their client, meaning that they first of all do not look at moral or rely on the sense of justice, but discover and rely on the norm that makes the client right, and the position of the other party appears to be unjustified. All there is to do then is to convince the judge that the relationship of the dispute is governed by that particular norm and that this norm has to be interpreted as specified by the lawyer representing the party. As far as logic is concerned, being a professional, the lawyer is able to lay down his arguments with flawless consistency. That way, the factual circumstances are presented to the court so that, logically thinking, that norm should appear as the one applicable to the relationship of the dispute.

In this case, the judge is in a different position. The court first regards the dispute from the position submitted by the parties and must decide what is permitted to, and what is required of the party by law[342]. We all know the general legal principle of *iura novit curia*[343], yet in difficult cases it is on extremely rare occasions that the judge will rely on a separate legal basis. As often as not, he will agree with the position of one of the parties either completely or in part. Not every judge who has explained, with logical consistency, and

341 The judgement of the Supreme Administrative Court of Lithuania in administrative case No. P-40-602/2016 dated 18 May 2016; the judgement of the judicial board of the Civil Cases Department of the Supreme Court of Lithuania in civil case No. 3K-3-827/2000, *J. Č. v. V. R. and A. S.*, cat. 37, dated 18 September 2000.

342 BURTON, S. J. *An Introduction to Law and Legal Reasoning*, p. 1.

343 *The court knows law* (Terms used in court deeds [interactive]. Online access: <http://www.lrkt.lt/lt/teisine-informacija/terminu-vertimai/teismo-aktuose-vartojami-terminai/342> [accessed on 31 August 2017]).



provided appropriate arguments that a particular norm should apply for the resolution of the dispute would have the courage to rely on legal principles, the sense of justice, or rationality. When the dispute is complicated, the judge comes under certain psychological pressure as well: the resolution of the dispute under criteria other than the norm logically applied would be seen as the judge's inability to appropriately apply the law to the relationship of the dispute. As a result, the judge's opinion of how the dispute should be resolved may quite often be defined by the parties, and their lawyers in particular.

In the above cases, we have the problem of abuse of law, which is prohibited by the regulations[344]. The legal norm has a certain function, objective to regulate a relationship in a certain manner, and to set priorities, however, often a party to a dispute or its representative, a professional lawyer who follows the principles of logic and aims to derive benefit for himself or his client, will begin to apply the legal norm mechanically, regardless of the purpose of that norm, or the type of relationship it aims to regulate and what the result should be. All that leads to a conclusion that the more we rely on the principles of logic in legal reasoning, the harder it is for us to avoid abusing law.

*Logic and the Interpretation of Legal Norms*

The judge may employ several methods (systematic, linguistic, comparative, historical, teleological, etc.) to interpret the law. This diversity of methods indicates that using logic alone is not enough for the judge to be able to adequately apply the legal norm and resolve the dispute. In addition to logic, valid legal reasoning requires other methods of interpretation of law.

The higher the significance assigned to written law, the more valuable logical interpretation becomes, and vice versa: the more the law is regarded through a prism of the ideas of morality and justice, the more freedom there is for the judge to exercise discretion and to think. After all, all that the judge is required to do in the latter case is establish the facts, apply an appropriate legal norm, and make the right decision. If logic is made absolute, law must be casuistic, otherwise the judge will have difficulty applying it. Besides, in that case the court has the duty to decide only on the facts of the case rather than the law, because it is just, rational, and unquestionable. In the case at hand, law would be static and would remain the same even as the society evolves, unless the legislator amends the laws. But it is difficult to predict the problems that may arise in the future and the necessary direction of change in law; as a result, the legislator would be delayed in his regulation of changing relationships.

Still, law must provide an answer every time a dispute arises, because the judge cannot refuse to resolve a dispute on the grounds that no legal norm regulating the rela-

344 The Civil Code of the Republic of Lithuania (as amended and supplemented). Official Gazette *Valstybės Žinios,* 2000, No. 74-2262, Article 1-137(3).

tionship of the dispute exists. Hence, the main problem of casuistic law. It is impossible to design legal norms to cover every specific real-life situation. Therefore, the legal norms that are being written are abstract and only regulate a particular group of relationships. Ergo, we have to agree that the language of law as such implies a certain degree of vagueness and incompleteness. This is why the court must reach its verdict gradually, through definition and categorisation, i.e., by interpreting law so that it could pass the right judgment in a particular case with reference to abstract norms.

In the words of H. Kelsen, *'the essence of the norm is not that it is a rule for judgement, but that it must be such a rule for judgement which is conceived as an approving or disapproving verdict during the rendition of a judgement'*[345]. Every time he applies an abstract norm, the judge explains how it should be understood and discloses the content of the norm. That is subjective, because the judge does not apply the legal norm with logical methods, but reveals the meaning of an abstract norm. Disclosure of meaning is a process that expands and shapes law, because every time the content of the legal norm is defined by shifting attitudes and values of the society, as well as the changing historical situation.

Still, considering what was said above, one should not conclude that law is completely vague and the judgment is always unpredictable and subjective. After all, that is why the rules for the interpretation of law are formulated so that the court could adequately weigh the arguments and properly disclose the content of the legal norm[346]. This description of the language of the law also means that when law is applied to a real-life situation, there cannot be just one right decision. No matter how accurate and clear the logical syllogism is, it cannot dictate a sole right judgment.

In this regard, we should remember Kurt Gödel's ideas of how every good theory contains propositions that are right as such, but will never be proven[347]. In other words, every consistent and official system must be unfinished. Said scholar's 'incompleteness theorems' are very interesting from the logical point of view. According to his theory, a statement being undecidable in a particular deductive system does not raise any questions of whether the statement was appropriately identified as correct or if its correctness can be defined with other tools. Undecidability simply means that a specific deductive system does not prove the statement to be correct or incorrect. Of course, said theorems require complete analysis. They need not be applied every time a decision is made. However, if

345 VARGA, C. The Nature of the Judicial Application of Norms. In VARGA, C. *Law and Philosophy: Selected Papers in Legal Theory*, p. 301; see KELSEN H. *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze.* Tübingen: Mohr 1911, xxvii, 709 p. 17.

346 *Ibid.*, pp. 294–307.

347 PUTNAM, H. W., The Godel Theorem and Human Nature. In BAAZ, M.; PAPADIMITRIOU, C. H.; PUTNAM, H. W., *et. al. Kurt Gödel and the Foundations of Mathematics.* Cambridge: Cambridge University Press, 2010, pp. 325–337, p. 325.



we follow logic as a landmark in this process, we should not forget that, as an exhaustive system of statements, it is also incomplete.

The judge considers abstract legal norms that dictate various judgments and has to select a method and line of reasoning to provide the best resolution of the dispute. The abstract legal norm becomes a rule adapted to a real-life situation only after it is defined, explained, and tailored to fit a specific situation. This kind of classification and adjustment does not come from logic; neither is it something that the judge discovers – it is what he establishes on the basis of certain arguments. When interpreting the legal norm and applying it to a particular situation, he applies practical associations and considerations rather than rules of logic. Logic only provides a tool to connect two propositions – a construction to draw a conclusion out of two statements – yet it does not tell us anything about the correctness or incorrectness of those propositions as such[348]. When the judge adjudicates a particular situation and interprets the law, he will first of all indicate which of the statements can be used as a basis for the conclusion, and what they mean, which is the basis of judgment.

The judge is free to apply or not apply one norm or the other. Logic, as a link between the conclusion and statements, is still there, but it does not affect the court's interpretation of the legal norm and choice of the statements for the conclusion. The perception of the norm of law is dictated by experience, it has its statements and conclusions tested amidst the society, in a social setting. Development means an ever-improving ability to make a decision on a particular situation. That a specific decision was made in one situation does not mean that a similar decision will be made in the same situation in future. If the judge's experience acquired after the earlier decision shows that a different decision is required in a new similar situation, he will make another decision with no limitations imposed by the rules of logic as to his ability to do so whatsoever. This interpretation forces us to admit that dispensation of justice is not absolutely perfect, yet still practical[349].

A lot of difficult cases entail several possible judgments, which means that different interpretations will lead to different conclusions. Even if the rules of interpretation of law do not specify which of the possible interpretations should be priorities in the situation at hand, we still have the principle of justification of judgment: the judge must make a judgment that is at least as justified as any other judgment that can be made in that situation. All arguments must be weighed, compared with one another, matched against the general rules and the principles of law in every situation[350].

348 MACKUVIENĖ, E. Loginis metodas teisėje: sampratos problema. *Teisė,* 2010, vol. 77, pp. 126–145, p. 143.

349 VARGA, C. The Nature of the Judicial Application of Norms. In VARGA, C. *Law and Philosophy: Selected Papers in Legal Theory,* pp. 307–313.

350 SARTORIUS R. The Justification of Judicial Decision. In AARNIO, A.; MACCORMIC, N. D. (Eds.) *Legal Reasoning,* Vol. I, pp. 137–140.

The court's discretion to interpret law should be considered the largest in countries that follow the general law tradition, where the pragmatic approach, common sense, and practicality are given a lot of attention. It is acceptable to representatives of the continental legal system, as well. It was only after the restoration of Independence that the courts of the Republic of Lithuania made their first steps towards the Western law tradition, but today, this right of courts to interpret law is unquestionable. It is therefore customary for higher instance courts to interpret law and even to expand or constrict applicable legal norms. This tradition of explaining and interpreting law is most ardently upheld by the Constitutional Court and the Supreme Court of the Republic of Lithuania. Still, the legislation covers this subject rather laconically and incomprehensively; for instance, the Code of Civil Procedure contains a brief note that one of the goals of the civil procedure is to interpret and expand law[351].

This right of courts has wide recognition and a lot of respect in Western countries, and the amount of criticism it receives in Lithuania is rather small. One good case in point is the competition law of the European Union, its formation most heavily affected by the precedent that Community courts create. The European Commission is responsible for the enforcement of the competition policy and publishes notices introducing pending policies of the Commission in this field, matters it considers relevant, yet underlining that the notice does not violate or affect the interpretation of respective provisions as presented by European Union courts[352]. This shows that this institution recognises and respects the courts' right to interpret, explain, and expand law.

As an example, we could analyse historical interpretation and its significance. This is particularly relevant with Lithuania's history in mind. With regard to the application of the old Code of Civil Procedure, the Supreme Court of Lithuania has accentuated that: *'The period when a state that has established a new national, political, and economic regime still applies regulations that were adopted by the previous state is called 'transitional': the legislation of another or former state can apply for some period of time, but not to the extent it was enforced by the state adopting it, but rather considering the new social relationships. Under the historical principle of law interpretation, the legal norms must apply historically considering the period when they were adopted and the subsequent material changes in the economic, political, and social functioning of the society and the state. Therefore, for the purposes of assessment, interpretation, and application of regulations passed before 11 March 1990, we must consider the cardinal changes in the political, economic, social, and other conditions of social life and the functioning of the state of the Republic of Lithuania. Hence, for the purposes of interpreting and applying Article 479.1 of the Code of Civil Procedure, we must consider the historical conditions in which this norm originated'*[353]. The important thing about said case is that the Supreme Court of Lithuania, while relying on historical interpretation of law, overruled the judgment by the court of appeal that had applied the same legal norm completely appropriately from the standpoint of logic.

The fact that courts rather liberally use the rules of interpretation of law that, from the positive law perspective, are not even anchored in the legislation shows that the court needs more than just logical interpretation. In every specific case, it uses other methods to interpret law to convince the parties to the case and the society and to make a halfway decision by choosing which values are to be protected first, which ones are to be prioritised. This is particularly important in complicated cases that usually do not have one right judgment that would serve as some kind of a logical conclusion of the application of the legal norm; therefore, the court uses rules of interpretation to weigh arguments and to select a better-fitting judgment.

In making its judgment, the court will specify the legal norm it applies and will provide arguments, without even holding a discussion as to what other possible options there are to resolve the case. That, however, does not mean that the judgment was self-evident to the court and the court had no difficulty in applying the regulation. After all, appellate court judgments that are superbly justified and supported with arguments, are altered in the instance of cassation as well, and the Supreme Court of Lithuania in cases like that tends to rely on different arguments that it claims to have more weight[354].

Furthermore, interpretation of law ensures the existence of law, guarantees expansion of law with society and worldviews changing. Law could not exist without interpretation and explanation; it would be static, stiff, and hard-to-apply in practice, and therefore would fall short of meeting society's expectations. In making his judgment, the judge should consider a great many criteria and only dismiss those that cannot be applied next to the official source. Of all the possible options that satisfy the requirements of law, the judge should pick one with the highest moral, not logical, value.

Law demands interpretation. Legal statements are the interpretation of the modern-day legal practice. Law and the theory of law are understood best as a process of constructive interpretation. The judge is like a literary critic, revealing the true essence of a piece of work (the law). Constructive interpretation is giving form to the object of interpretation; also, it is the source of that form. The interpreting Human Being cannot divert from the object of interpretation and specify just any meaning. At the same time, in solving

351 The Code of Civil Procedure of the Republic of Lithuania, Article 2.

352 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004. OJ C 325, 22/12/2005, p. 7.

353 The judgement of the judicial board of the Civil Cases Department of the Supreme Court of Lithuania in civil case No. 3K-1/1998, *V. S. v. US Embassy*, cat. 1, dated 5 January 1998.

354 VARGA, C. Heterogenity and Validity of Law: Outlines of an Ontological Reconstruction. In VARGA, C. *Law and Philosophy: Selected Papers in Legal Theory,* pp. 215–216.

cases, the judge should consider the integrity of law, seek that it is applied consistently, prioritise the kind of interpretation that is integral from the morality point of view.

According to Dworkin, the laws and arguments that judges have relied upon in solving past cases, need explaining. In some cases, there will be no doubt about the correct interpretation because only one interpretation will be suitable to resolve the dispute. However, quite often several different interpretations will exist that can be applied to resolve the dispute. The judge then should decide which interpretation is more aligned with the criteria of morality. In comparing the possible ways to handle the dispute and their moral value, the judge will have to use interpretation again.

Dworkin also points to facts of legal practice that cannot be explained from the viewpoint of legal positivism. First of all, he argues that lawyers tend to debate even the most basic aspects of the legal system (such as explanation of ambiguous laws or direct application of constitutional provisions), and not just 'marginal' cases. In his words, there is no simple 'as-is' definition of law. Law as it is can be disclosed only through interpretation, which calls for a decision as to what interpretation satisfies the requirement formulated in the source of law the best. Law as it is constitutes a collection of legislation and judgments that only serves as material for interpretation. On top of that, Dworkin notes that moral assessment is an integral part of explanation and perception of law[355].

Law is vague, general in nature, it cannot be just applied, it has to be interpreted and explained whilst choosing the best possible solution. Therefore, if we are to approach law and jurisprudence from the stance of birthright (and modern birthright in particular), logical thinking would move much further to the background. Birthright leaves more room for rationality and the natural sense of justice of the judge.

To sum up this discussion of the topic of application of logic, it can be said that modern law science should focus on probabilistic processes of legal reality rather than just strict laws of logic. More attention should be given to how logical reasoning operates in practice when it is addressed in the process of interaction of reasonable social personalities. Also, application of logic in law poses some problems, because here, justice grounded on values and supported with appropriate arguments is important as well. Legal certainty (to an extent secured by logic) is but one of many legal values that must be kept in balance with the rest.

355 BIX, B. The Natural Law Tradition. In FEINBERG, J.; COLEMAN, J. *Philosophy of Law.* Seventh Edition. Thomson, Wadsworth, 1980 pp. 8–19.



## SENSE OF (IN)JUSTICE, A CONDITION FOR SOCIAL EFFECTIVENESS OF LAW?

*/.../ human legal behaviour is both facilitated and constrained by our biological nature.*

Dr. jur. Margaret Gruter, J. S. M.

Modern society brings the meaning and significance of justice as a fundamental social value to the front like never before. Justice has recently become both the basis of publicity and transparency requirements, a general principle of law[356], the declared qualitative and strategic goal of evolution of state and society[357], and an essential requirement for social order in general. As we observe the processes currently taking place, we find ourselves under an impression that the ancient Roman metaphor *justitia est fundamentum regnorum*[358] is rendered absolute in today's society.

These days, demands for justice are very often placed on courts and other bodies and officials dispensing justice. By virtue of the function that these structures perform exclusively in the name of the state, and the serious consequences that failure to perform it properly entail on the legal status of the parties in litigation, said requirements are taken for granted as something that is really necessary. An independent and unbiased court is considered to be an indispensable part of a democratic and legal state, and the possibility to defend one's injured rights in such a court is a right bestowed on the Human Being.

Empirical experience suggests that when faced with particular social phenomena (such as death penalty as a sanction), emotions are stirred both in the subconscious of the people involved in the particular phenomenon (for instance, a person who is sentenced to death), and those observing it. The nature of the reactions that environmental factors invoke varies depending on whether the factors are objective (such as erudition and social standing) or subjective (such as the individual's relationship with the phenomenon), yet the very fact that such emotions do occur and exist is something that we cannot deny.

Legal theoreticians are inclined to believe that these human reactions not only form a part of the 'living law', but they can also be instrumental in clarifying the questions of the social effectiveness of law that arise in the doctrine of law. Still, as we analyse the sense of justice, we fall under an impression that we only encounter more uncertainty: Is this phenomenon constant, or is it shifting? Is the sense of justice inherent by nature? Why do individuals and individual societies differ in their stance on what should be considered right, and what not?

356 Civil Code of the Republic of Lithuania, Article 1.5.

357 The preamble of the Constitution of the Republic of Lithuania sets forth an objective of achieving an 'open, just, cohesive civil society and legal state.'

358 Justice is the backbone of the state (Lat.).

Such questions are not the subject of analysis for the purpose of resolving dispute by trial. However, they cannot be separated from the judgment and the process of its rendition. Parties to the proceeding, the judge, and (with widely publicised cases) members of the public are emotional in their reaction to the judgment: they approve of it, at the same time admitting that justice has triumphed, or doubt it as being just, or are outraged by what they believe to be an inequitable judgment. Notably, the reaction usually occurs outside of any assessment of the legitimacy of the judgment and therefore is likely not to be caused by any motives of positive law.

The sense of justice cannot be considered solely as a legal phenomenon. It combines an emotional and sensory origin. The system of all of the above elements as a unit can be construed as the sense of justice, one that always exists but, depending on the circumstances, has different forms of expression in empirical reality.

### Importance and Studies of the Sense of (in)Justice

For the purpose of administering justice, the main function the court has to perform is resolve a conflict, i.e., to examine a case and make a legitimate and justified judgment based on the internal conviction of the court and a thorough, exhaustive, objective investigation of all of the circumstances of the case. The case-law stipulates that: *'internal conviction is not prejudice, precognition, but a conclusion based on evidence that is made after all of the required evidence has been collected, material facts examined, all possible versions raised and addressed, every piece of evidence assessed individually and as a whole'*[359] *and that 'internal conviction is not prejudice, precognition, but a conclusion based on evidence that is made after all of the material evidence has been examined'*[360] .

The above case-law shows that the process of dispensation of justice recognises the influence of irrational factors, which is put in contrast with conscious application of the legal norms and rational assessment of circumstances. Considering the above, it is important to analyse how and to what extent impulses that are independent of any effort of will affect behaviour governed by legal norms.

To eliminate any influence of outside factors, there are quite a few procedural guarantees in place, the procedure of hearing legal disputes is regulated in detail, and finally a hierarchy of courts is established to eliminate mistakes made by lower instance courts. But are these measures enough to ensure that objective truth will be established in the trial, or can subconscious psychological factors still affect judgement? Are there safeguards to hedge and control the internal conviction of the court?

359 E.g. the judgment of the Supreme Administrative Court of Lithuania in civil case No. N9(62)-1489/2006 dated 7 December 2006.

360 The judgment of the Supreme Court of Lithuania in administrative violation case No. 2AT-31-303/2015 dated 7 April 2015.



To examine the effects of the internal conviction of the court on the process of dispensation of justice in detail, we have to investigate the nature of the function of the Human Being's sense of justice as an irrational, emotional element drawing dangerously close to law, a system supported with formal logic laws, as well as the specific ways in which it operates and its influence on the course of the proceeding.

Value judgement of justice, or court justice, is as important as it is difficult to define. A lot of attempts to describe justice only show us how difficult it is to accurately define and grasp this phenomenon. Modern-day law theory, ethics, philosophy all offer a lot of definitions of justice. However, as yet there is no common consensus of what justice is and what separates it from injustice. Nor is it any easier to identify the subjective criteria that Human Beings follow in deciding whether something that was done to them was equitable or inequitable[361].

The fact that the argument of the sense of justice applies in the modern legal discourse in one form or the other (for instance, it can be quoted in the motives behind a judgment[362], referred to[363] in works of scholars of law, who also may try to define it[364], as well as used in political speeches[365]) and that this phenomenon has so far been a surprisingly ambiguous evaluation in the science of philosophy of law, while Lithuanian scholars have failed to address it at all, with a few seemingly incidental reflections on this topic, is to be considered a sufficient presumption to launch a more detailed investigation using methods of scientific cognition. The most important thing is to find out whether this common internal ability has an emotional, cognitive charge, any effect on legal disputes and resolution thereof, and what that charge or effect might be, if any. Said circumstances force us to take a closer look at the internal sense of justice of the Human Being as a phenomenon, realise its qualities, assess them, and give them a systematic description. Without getting to know this phenomenon, we would lose an additional opportunity to be more versatile in our assessment of legal, political, social processes, and to identify the effects that factors outside of the control of human consciousness have on the behaviour of individuals.

361 JUSTICKIS, V.; VALICKAS, G. *Procedūrinis teisingumas Lietuvos kriminalinėje justicijoje ir alternatyvios justicijos modelių taikymas:* mokslinė tyrimo ataskaita. Vilnius: Atviros Lietuvos fondas, Vilniaus universiteto, Bendrosios psichologijos katedra, 2004, p. 8.

362 'Law in the last analysis must reflect the general community sense of justice', State v. Maldonado, 645 A.2d 1165, 1181 (N. J. 1994) (see SAYRE, F. B. Public Welfare Offenses. *Columbia Law Review,* 1933, Vol. 33.

363 AMAR, A. R. The Supreme Court, 1999 Term–Foreword: The Document and the Doctrine. *Harvard Law Review,* No. 26, 2000.

364 ROBINSON, P. H.; DARLEY, J. M. *Justice, Liability, and Blame: Community Views and the Criminal Law.* Boulder, CO Westview Press, 1995.

365 BENKA, R. W. Remembrances of William O. Douglas on the 50th Anniversary of his Appointment to the Supreme Court. *Supreme Court Historical Society Publications,* Yearbook 1990.

## Interpretations of the Content of the Concept of the Sense of Justice

*The Problem with the Definition of the Concept of the Sense of Justice*

To be able to perceive the sense of justice as a phenomenon, the meaning of this concept can be revealed through analysis of reliable foreign dictionaries of law[366] and summary of its scientific definitions. As we analyse dictionaries of law, we can see that there is no established terminology to describe the category in question.

Sources leaning towards the general law tradition carry a lot of categories naming the sense of justice that offer highly similar content but are all different in their own right. There are various terms coexisting in the English language, such as *natural equity, the sense of justice, moral certainty, moral sentiment*[367]*, the sense of justice*[368]*, inner sense, common sense, moral sense, community sentiment, sense of fairness*[369] *moral capacity*[370]*, mental capacity* <…> *involving the exercise of thought*[371]*, moral sentiment*[372]*, moral truth*[373]*, justice motive*[374], and so on. Albeit having different forms of expression, these terms basically denote the same meaning: they signify a general competence that embraces emotional and sensory abilities. Edmond N. Cahn, who was the first to study the phenomenon of the sense of justice, assigned a similar meaning to this category: 'empathy or imaginative interchange,' through which each member of a group 'projects himself into the shoes of the other'[375].

*The Concept of the Sense of Justice in the Doctrine of Law*

In the Lithuanian language, the above concepts can be said to be mirrored by the following terms: *nuojauta* (precognition), *intuicija* (intuition), *vidinis įsitikinimas* (internal conviction), *moralinės nuostatos* (moral attitudes), *sąžinė* (consciousness), *išankstinis nusistatymas* (prejudice), and so on. In essence, these terms are not interchangeable and should not be construed as a proper reflection of the meaning of their English counterparts; therefore, the psycho-sociological phenomenon that all of the above terms stand to denote can be covered by the concept of 'the sense of justice.'

The Lithuanian doctrine of law does not contain the concept of the sense of justice. Although the category of justice is anchored both on the ideological, and normative, and case-law level, it is understood as a general principle of law, one that expresses a moral attitude of the Human Being or a criterion to measure all acts of individuals by. Justice and injustice are understood on the basis of other moral criteria: good and evil, equality and inequality, humanity and inhumanity, reason and unreason, honesty and dishonesty, and so on.[376] To seek justice is to seek a reasonable balance of different interests[377].Considering what was already said, we can conclude that justice is understood as a legal and evaluative category geared towards objective qualification of human behaviour when positive law fails to provide a concrete rule to the judge.

In terms of the Lithuanian law doctrine, justice as a category of law is essentially different from the intrinsic sense of justice as a subjective view of an individual that is perceived as a sense, assessment, or emotion. We have to realise that justice as a philosophical category must be separated from the concept of the sense of justice.

*Classifications of the Conceptions of the Sense of Justice*

Analysis of the concepts of the sense of justice that are presented in dictionaries and scientific monographs shows that there is a degree of disagreement about the uniform understanding of the meaning of this phenomenon. If we sum up these concepts, we can distil the following understanding of the sense of justice:

1. practically speaking, as a procedural guarantee of law; or
2. theoretically speaking, as a philosophical category.

Authors who define this phenomenon as a *procedural guarantee of law* identify two

366 E.g., *Black's Law Dictionary.* Compiled by J. R. Nolan, J. M. Nolan-Haley. 6th ed. St Paul, Minn: West Publishing Co, 1990; *Oxford Advanced Learner's Dictionary of Current English.* Compiled by A. S. Hornby. Oxford: Oxford University Press, 1987; *Oxford English Dictionary.* Compiled by J. Simpson. Oxford: Oxford University Press, 1989; *Merriam-Webster's Collegiate Dictionary.* 11th ed. Springfield: Merriam-Webster, 2003; *Cambridge Advanced Learner's Dictionary.* Compiled by E. Walter. 2nd ed. Cambridge: Cambridge, 2005.

367 SMITH, A. *The Theory of Moral Sentiments.* London: Kessinger Publishing, 2004.

368 JASSO, G. Culture and the Sense of Justice. A Comprehensive Framework for Analysis. *Journal of Cross-Cultural Psychology*, January 2005, Vol. 36, No. 1, pp. 14–47.

369 KARNI, E.; SALMON, T.; SOPHER, B. Individual Sense of Fairness: An Experimental Study. *Experimental Economics,* 2008, Vol. 11, pp. 174-189.

370 RAWLS, J. *A Theory of Justice.* London: Oxford University Press, 1999, p. 46.

371 *Ibid.*, p. 48.

372 *Ibid.*, p. 51.

373 HARRIS, J. W. *Legal Philosophies.* 2nd ed. London: Butterworth, 1997, p. 20.

374 LERNER, M. J. The Justice Motive: Where Social Psychologists Found It, How they Lost It, and Why They May Not Find It Again. *Personality and Social Psychology Review,* 2003, Vol. 7, No. 4, pp. 388–399.

375 CAHN, E. N. *The Sense of Injustice.* New York: New York University Press, 1949, p. 24.

376 Commentary of the Civil Code of the Republic of Lithuania. Volume One: General Provisions. Vilnius: Justitia, 2001, p. 75.

377 Ruling of the Constitutional Court of the Republic of Lithuania dated 6 December 1995 On the compliance of the Resolution of the Government of the Republic of Lithuania (No.. 465) "On a Partial Amendment of the Resolution of the Government of the Republic of Lithuania (No. 124) 'On the Work Pay of Employees of the Courts of the Republic of Lithuania, the State Arbitration, the Prosecutor's Office, and the Department of National Audit' of 3 March 1993" of 31 March 1995 with the Constitution of the Republic of Lithuania, Paragraph 1 of Article 46 of the Republic of Lithuania's Law on Courts, Paragraph 1 of Article 4 of the Republic of Lithuania's Law on the Prosecutor's Office, the Republic of Lithuania's Law on the National Audit Office, and the Republic of Lithuania's Law "On the Service Remuneration of Judges of the Courts of the Republic of Lithuania, Employees of the Prosecutor's Office, State Arbiters, and Employees of the Department of National Audit" dated 6 December 1995. Official Gazette *Valstybės žinios,* 1995, No. 106-2381.

legal principles embedded in the doctrine of law and their importance for the dispensation of justice. They say that any judgement is void if, at the time of making it, the judge did not follow the rules of the sense of justice, meaning provisions such as *nemo judex in causa sua*[378] and *audi alteram partem*[379]. As already mentioned, these rules are considered to be a guarantee for the rules of fair play and are designed to ensure that human rights are properly protected[380].

Procedurally speaking, the concept of the sense of justice is specific and is typical only of doctrines that follow the general law tradition. For this reason, we will not be scrutinising the second part of the meaning of the sense of justice, which is defined as a system of *principles* constituting the conception of equity[381].

Sources that accentuate that the sense of justice is a *social category* point out that it is a concept with no precise or one meaning that is usually used as a synonym of the sense of justice, integrity, and internal right dealing of the Human Being with others.
In terms of *origin*, scientific definitions of the sense of justice can be split into three independent groups:

1. advocates of the *relativistic approach* point out that the sense of justice stems from an agreement or mutually harmonised benefit of individuals. Competing individuals have it in their bests interests to harmonise with another Human Being particular standards that are acceptable to both parties and consider them equitable, even though such standards provide no objective grounds that may exist independently from the agreement for the declaration of equity;
2. scientists who recognise the *doctrine approach* to the origins of the sense of justice tend to believe that there are absolute, historically defined standards that are universal and should be considered equitable *a priori*;
3. the *realistic theory* group points to the fact that the sense of justice is driven by objective factors that define different perceptions of law and equity in different communities of individuals**.**

Considering the nature of the sense of justice, the conceptions can be divided into those that recognise either a collective or an individual origin of the sense of justice:

1. definitions in group one guide us to the fact that the sense of justice is the *unique ability* of every individual to assess the moral value of phenomena, and categorise them as good or bad. Usually, this ability applies to evaluating and understanding one's own actions, but can be employed in its general sense to perceive acts of others;
2. less often, the sense of justice is perceived as a *collective phenomenon.* It is recognised that the perception of the Human Being, objects, their mutual relationships common to the members of a particular community and sufficient for the thinking of the individuals to be directed in a direction that is characteristic to that group. It has to be emphasised that every culture has its own unique or predominant sense of justice.

Depending on whether there is a recognition of the possibility for external factors to determine the sense of justice, the following conceptions are identifiable:

1. the *dynamic approach*: certain factors (the era, sex, culture, race, ethnicity, and so on) shape unique the sense of justice that is only characteristic to Human Beings who belong to specific groups;
2. the *static* understanding of the sense of justice recognises no influence from external factors on the formation of the sense of justice. Advocates of this theory argue that the sense of justice comes from objective universal circumstances that all individual shares;
3. the sense of justice is considered to be an *integrated system* that consists of an element independent from outside factors, which is characteristic to all individuals, and a portion of the sense of justice not resistance to the effect of cultural formation. In the opinion of supporters of this approach, unique (but similar across separate individuals within a community) the sense of justice is developed in communities that recognise different traditions and rules of social co-existence. When it is understood that way, the sense of justice denotes the average degree of empathy in a representative of a specific community, which is expressed as an ability to guide the consciousness and thinking of an assessor of social phenomena in a direction that is usual for a particular community, social group, or location, thus building a foundation to make a qualitative decision.

Notably, scientific debate of the fundamental qualities of the phenomenon shows that the ability to get to know the sense of justice is rather limited. The difficulties in analysing the phenomenon are due to the irrational character of the sense of justice and the fact that the essential qualities of this phenomenon are rooted in the subconscious of the Human Being. Said circumstances allow us to classify studies of the sense of justice as an object of the science of sociology and philosophy of law rather than the pure science of law, thus facilitating the choice and application of scientific method for the purposes of investigation.

The sense of justice is an attribute that exists in social reality (and law as a social phenomenon); it is difficult to explain scientifically, but it is defined by the very nature of an individual. Law has long been argued to be a logical and systemic whole of rules that

378 No one can be their own judge (Lat.).

379 The right to be heard (Lat.).

380 *Oxford Advanced Learner's Dictionary of Current English.* Compiled by A. S. Hornby. Oxford: Oxford University Press, 1987, p. 261.

381 MEGARRY, R. E. *Snell's Principles Of Equity.* 23rd ed. London: Sweet & Maxwell, 1947.

performs the regulatory function of social behaviour. By popular belief, legal certainty and clarity had to be the obvious and only objective of legal regulation. However, thanks to the modern approach to ever-developing and intensifying subject relationships and inevitable atypical disputes in areas not covered by the norms directly, we have to consider phenomena that still remain hidden by having a very real impact on the effectiveness of social norms.

### Philosophical Analysis of the Sense of Justice

Scientific effort to get to know the inherent sense of justice first appeared in the studies of philosophical scholars of the Age of Enlightenment. The idea of the sense of justice as a force that directs thinking and a common guiding origin for making the right decision is not the product of contemporary research; its roots are hidden in the past. As we analyse the theoretical approach to the sense of justice, we can rely on insights by Scottish and German schools. Philosophical scholars from these two schools represent various trends (relativist (David Hume, Adam Smith) and strictly rationalist (Immanuel Kant, Georg Wilhelm Friedrich Hegel)) of philosophy. Besides, the contribution of the above-mentioned scholars in the development of the philosophy of justice is obvious.

#### *The Stance of the Scottish School*

Adam Smith, one of the most prominent representatives of the Scottish school, supported the position that the community is bound by internal bonds of mutual sympathy and sense of justice[382]. He argued that the sense of justice is nothing but the interior voice of an impartial observer, which the scientist described as 'reason, principle, conscience, /.../ the great arbiter of our conduct. It is he who, whenever we are about to act so as to affect the happiness of others, calls to us, with a voice capable of astonishing the most presumptuous of our passions'[383]. Not only is the sense of justice considered a common trait of all individuals, one that prompts them from staying away from doing harm to their neighbour or from seeking individual benefit at the expense of the next man; it is also a quality that is capable of guiding our behaviour.

Smith believes that the sense of justice stems from the sense of community and sociability of the individual, which helps us justify the mutual altruism of Human Beings, yet he does not analyse the origin of this phenomenon in any greater detail. Yet Smith's thoughts about how this sense works are rather more informative. He accentuates the

382 SMITH, A. *The Theory of Moral Sentiments*, p. 308 (*Our sensibility to the feelings of others* <...> *is the very principle upon which that manhood is founded*).

383 *Ibid.*, p. 277.



power of imagination that helps the individual imagine himself in another Human Being's shoes, empathise with the subject of his evaluation, and thus identify himself with that person, and form attitudes about his sense[384]. This approach was critiqued for its failure to consider the fact that moral decisions and assessment can only be made if one can perceive their role as that of an impartial observer and distance themselves from the subjective attitude that may be defined by such identification.

David Hume, another representative of the Scottish school, recognises the mutual relative separateness of the roles of the assessor making the moral decision, and the subject of their assessment[385].

The ideas voiced by the above authors do not reveal the individual qualities that allow every Human Being to use the power of imagination to reincarnate and assess the situation through the eyes of others. In the opinion of Martha Nussbaum, that is the sense of vulnerability that all Human Beings have in common. However, when we are making a moral decision, the fact that the assessor will or will not be able to place themselves in the particular situation of the subject of the assessment, is irrelevant[386]. That is the specifics of the moral decision that separates this kind of decision from those that are affected by the mind or emotions. For instance, the sense of pity towards a Human Being who is in an inferior position to that of the assessor will not be considered a moral sense (as the sense of justice is) because it is the product of a comparison of the status of the assessor and the subject of assessment.

In the opinion of Jürgen Habermas, the cause of general vulnerability should be narrowed down to general vulnerability inherent in the Human Being's personality which, in his opinion, is an intrinsic quality of any personality, one that allows us to empathise with another Human Being[387].

#### *The Stance of the German School*

Representatives of the German school disagree that the trait of individual personality vulnerability must be the starting point when it comes to investigating the sense of justice expressed as a moral sense.

Kant's philosophy of morality is grounded on a 'special' metaphysical moral feeling (*moralgefühl*) that explains a rational individual's ability to perceive the categorical impera-

384 SMITH, A. *The Theory of Moral Sentiments*, p. 9.

385 BAIER, A C. Master Passions. In RORTY, A. O. *Explaining Emotions.* University of California Press, 1980, pp. 403–423.

386 NUSSBAUM, M. C. *Poetic Justice: The Literary Imagination and Public Life.* Boston: Beacon Press, 1995, p. 65.

387 HABERMAS, J. Morality and the Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics? In HABERMAS, J. *Moral Consciousness and Communicative Action*. The MIT press, 1990, p. 199.

tive ('Behave so that your maxim of will could become a principle of universal legislation'[388]) as a basic law of morality. If we recognise the categorical imperative, we may consider that an individual's behaviour conforms to the law of morality and can identify the moment when the behaviour is aligned with it[389]. We should emphasise that even though in his theory Kant did not deny the significance of the Human Being's subjective senses (for the purposes of qualifying acts of the assessor or others in terms of morality), he still recognised that irrational senses of an individual were not one of the underlying aspects of the theory of morality with analysis of decisions that the Human Being makes in a rational and voluntary way as its defining characteristic. ThereforeKant never investigated the human ability to perceive the categorical imperative and to use it as a guideline for the assessment of individuals' behaviour.

Speaking about Kant's perception of equity (morality), we must note that his moral philosophy is defined by a recognition of overarching respect for persons per se. This respect logically connects with human dignity that emanates from the universally recognised existential independence of an individual, his freedom to act, or autonomy. The ability of every individual to choose an acceptable behavioural model on the basis of their autonomy of action allows them to feel dignity. As the autonomy of action is an intrinsic characteristic of every individual, this universal attribute reveals the commonness of all Human Beings.

Being equal in dignity and having the ability to distinguish, based on the categorical imperative, between acts that are acceptable and to be avoided from the standpoint of morality, individuals become responsible towards one another for their specific immoral deeds. Therefore, by committing to the requirements of the sense of morality, Human Beings also assume an obligation to respect other individuals whose autonomy and dignity is expressed and protected by the sense of morality, which within the framework of this thesis, should be construed as the sense of justice.

The philosophy of G. W. Friedrich Hegel also contains arguments supporting the importance of self-identification with the neighbour. The sense of justice is derived out of it as a particular intermediate form of empathy. Hegel separated the sense of justice (*rechtsgefühl*) that occurs objectively in reality from subjective feeling (*empfindung*).

In Hegel's opinion, the sense of justice as a sense of self, should be analysed as a feeling (*rechtsgefühl*) and not a sense (*empfindung*). It is this sense of oneself, a formal realisation of one's own identity, that enables the observer to take part in an empathic mental experiment that is necessary if one is to comprehensively assess decisions of institutional justice[390]. Personhood, or the ability to identify with another Human Being, his situation –

388 KANTAS, I. *Praktinio proto kritika.* Vilnius: Mintis, 1980, p. 45.

389 KANT, I. *Grounding for the Metaphysics of Morals.* 3rd ed. Hackett Publishing Company, 1993, p. 59.

390 FREUD, S. *Group Psychology and the Analysis of the Ego.* New York: Boni & Liveright, 1922.



a common personal trait of all Human Beings – is to be considered the umbilicus that connects separate individuals and substantiates the abstract mutual equality of all individuals. In modern-day society, the bond that ties all of its members in Hegel's opinion should be seen as the main factor affecting the mutual relationships of individuals[391]. Regardless of whether an individual has acquired some other traits (for instance, by acceding to a family or community), the mutual commonness of individuals survives due to individuals identifying with human nature and, at the same time, with one another[392]. In the words of Hegel, it is identification with the general personhood intrinsic for all Human Beings that defines the sense of justice of individuals – their ability to have a particular status and demand satisfaction of expectations or enforcement of means of retribution with regard to individuals who violate the overarching personhood of Human Beings.

Kant also recognised the link between the sense of justice and the personhood of the Human Being. If we are to analyse the expression of the sense of justice from this angle, we have to note that an individual can recognise another Human Being as having qualities that are rather similar to that of his own and on that ground, using empathy, visualise themselves in that other Human Being's shoes, whilst trying to assess the value of certain phenomena on the scale of justice.

This leads to the question of: Should the sense of justice still be considered to be in action when the assessor does not recognise that their neighbour possesses enough similar qualities, but is still able to identify with them, their situation and the experience gained in it, assess it and make certain decisions based on empathy? In the opinion of Kant, when it comes to morality, there are some important motives that generate and support the Human Being's ability to empathise and assess real-life phenomena through the eyes of another member of the community. The boundary at which the morally-charged sense of justice vanishes is delineated by instances when the assessor ceases to consider another Human Being whose situation they intend to perceive as having a comparable status and possessing his own autonomy.

To sum up, we can say that representatives of the German school described the sense of justice as the ability to follow the principle of moral justice in interpersonal relationships. The sense of justice is recognised as consisting of perception and a goal to live by the appropriate imperative of justice, meaning to treat other Human Beings as equal and conscious and possessed of an autonomous status. It means that *the sense of justice is considered to be a system of a sensory element (perception of the sense of justice) and a voluntary element (the goal to act on the rules that the sense of justice dictates).*

Kant's ideas on the action and structure of the sense of justice were consistently elaborated by the British philosopher *John Rawls,* who argued that the sense of justice

391 *Ibid.*

392 HEGEL, G. W. F. *Elements of the Philosophy of Right.* Cambridge University Press, 1991.

stems out of having a particular status, or the quality of 'moral personhood'[393]. Human Beings are moral subjects, they all possess the quality of moral personhood to the extent they have:

1. an understanding of their own good; and
2. a sense of justice[394].

The sense of justice is defined rather ambiguously: it is 'a skill in judging things to be just and unjust, and in supporting these judgements with reasons', a 'desire to act in accord with these pronouncements and expect a similar desire on the part of others'[395]. Even though Rawls provides different definitions of the sense of justice, its essence still can be defined as the Human Being's 'effective desire to apply and to act from the principles of justice and so from the point of view of justice'[396].

### The Structure of the Sense of Justice

*The Elements*

With reference to the philosophical ideas outlined above and relying on the application of an analytical method, we can reach several conclusions. First of all, the sense of justice consists of two independent albeit inseparable *elements:*

1. a cognitive element; and
2. a voluntary element.

In other words, the sense of justice is to be considered a specific quality independent of human will, one that manifests as the ability to identify, recognise, perceive the principle of justice and to apply it in a particular empirical situation.

After he perceives a relevant rule as the most appropriate model of behaviour for a particular situation, the rational Human Being must act on it, i.e., carry out certain actions or refrain from them. Obviously, satisfying this condition takes some willpower on the part of the Human Being. Ergo, the Human Being's internal resolve, inspiration that defines a specific model of action and pushes him to apply it, is considered to be the second aspect of the Human Being's sense of justice in addition to the cognitive element.

In his book *A Theory of Justice*, Rawls highlights a motivational aspect of the sense of justice, contrasting it to the cognitive component of the sense of justice as a prerequisite for the latter to be triggered. It is the voluntary element that Rawls claims to be the guarantee of stability of the principle of justice in a specific society. He argues that merely declaring conformity to the principle of justice and establishing an institutionalised system on the back of this value is not enough. Members of a well-ordered society must realise the reflection of their sense of justice in the political system of institutions. Once a member of the society is convinced that the institutional system and its performance is in accord with the imperatives of the sense of justice, his motivation to model his actions on the rules that the sense of justice dictates increases. In a society like that, the sense of justice coincides with the desire to act by the existing norm[397]. Therefore, the author justifies the conclusion that members of a society in which the principle of justice operates realise that their private interests become the public interests and by acting as the sense of justice dictates they eventually contribute to their own personal good. According to Rawls, this assumption is the baseline in trying to explain the origins of the voluntary element of the sense of justice. According to the philosopher, the Human Being naturally aspires to behave so as to bring about consequences that benefit him.

The elements of the sense of justice show how varied the nature of this phenomenon is, and how difficult it is to analyse. That in the objective reality the sense of justice is not expressed in its pure form (that of a sense of irrational origin) and we observe this phenomenon only as it interacts with outside factors affecting an individual's behaviour, is cause for discussion. Some scientists[398] understand the sense of justice in its broadest sense, recognising that it comes into existence as empirically perceived activity of an individual that is affected by outside sources (such as the will).

Still, there is no reason for us to say that other people's behaviour as such prompts us to use our sense of justice. It cannot be an additional goal to use the sense of justice rather than selfish motives in particular situations. The voluntary element cannot be considered a mandatory criteria for the purposes of proving the existence of the sense of justice. That the meaning of the voluntary element is conditional can be used as an extra argument in arguing that an artificial break-up of the sense of justice into elements and a quest for logical structure are not something that is acceptable.

*Relativity of Structuring*

We can understand the trend of describing the sense of justice as a category that has a broad content in scientific literature. The sense of justice as a mechanism that represents a moral assessment of real-life phenomena always presupposes an influx of emotions of favour or animosity that inevitably defines the true behaviour of the assessor. By its nature and essence, this sequence of reactions bound by ties of causality is the natural form of external materialisation of the Human Being's internal impulses (such as anger, envy, indifference). The fact that a strong sense of justice increases the probability

393 RAWLS, J. *A Theory of Justice*, p. 505.

394 *Ibid.*

395 *Ibid.*, p. 46.

396 *Ibid.*, p. 567.

397 RAWLS, J. *A Theory of Justice,* p. 312.

398 DUBBER, M. D. Making sense of the sense of justice. *Buffalo Law Review,* Summer 2005, No. 53.

of certain actions to take place is nothing but a statement of a direct sense of justice and the human reaction to it (a relationship of cause and effect) rather than any proof of the voluntary element of an autonomous sense of justice.

As a result, we should state that classifying the consequences of an irrational phenomenon – empirical facts – as elements of that phenomenon would run contrary to the essence of the sense of justice and therefore is not acceptable.

Considering the irrationality of the sense of justice and the diversity of circumstances affecting the Human Being's behaviour in each particular case, we should think that actions driven by the sense of justice are not an inseparable element of the sense of justice, one that proves its action. The sense of justice does not disappear per se. The fact that decisions made on the basis of this ability can be consciously suppressed by the Human Being for various reasons, thus preventing them from being brought to fruition, does not negate its existence. To sum up the philosopher's ideas, we must note that all it takes to prove that the sense of justice exists is to have a continued attitude of the Human Being towards another individual as a moral subject who is equal to him in terms of the need for, and perception of, justice.

### Psychological Analysis of the Sense of Justice

Instead of plunging the depths of the philosophical structure of the sense of justice which is obviously variegated in nature and difficult to analyse, we should discuss the *practical functioning* of the sense of justice, disclose the psychological meaning of this phenomenon. This would expand our knowledge of the nature of the sense of justice, assess the impact of irrational actions on an individual's choice of an appropriate model of action based on, or suppressing the decisions that the sense of justice dictates.

### Factors Affecting Behaviour and Assessment of Phenomena

Following Charles Darwin's theory of natural selection, living creatures who live in an environment limited by resources, first of all have to satisfy their physiological needs[399], which results in self-interest of an individual. As we analyse the behaviour and reactions of the Human Being, a creature that is as natural as it is social, we can see that sometimes they are very difficult to predict on the basis of the model of satisfaction of self-interest alone. This leads to the reasonable question of what other factors affect individuals' behaviour, and to what extent.

399 THAYER, B. A. *Darwin and International Relations: On the Evolutionary Origins of War and Ethnic Conflict.* Lexington: The University Press of Kentucky, 2004, p. 70.



#### *The Meaning and Insufficiency of Self-interest*

Many of our actions promote, actualise, and ensure the existence of justice in real life. However, if we are to take a closer look at behaviour, we will see that it has nothing to do with the true sense of justice and should merely be considered as various forms of expression of self-interest. After all, even though when we lock our door we realise that we are doing the right thing, the underlying motive behind such behaviour is the aim to protect our property. The duty to leave a generous tip that a patron at a restaurant feels is also nothing but a smart investment in the quality of future service. When a party defaults in its contractual obligations, the counterparty's sense of justice prompts it to go to court. However, we have to admit that the formation of this intention is just as heavily affected by the desire for tangible compensation. When the amount of the probable tangible benefit is significantly lower than the cost of litigation, the resolution of the dispute will depend on the ambitions, principles, weight of reputation rooted in self-interest, and so on. This means that even altruistic deeds can result from the selfish internal satisfaction with one's acts.

Furthermore, research has shown that the striving for justice in individuals is not separated from self-interest in any way and carries a low motivational value. Presumably, the Human Beings apply justice as a social tool to acquire valuables globally desired. Advocates of this approach have admitted that: '<...> we act justly when we realise that this promotes our personal advantage. When we realise that unjust behaviour will promote our personal advantage, we will act accordingly'[400].

We have to agree with the position that self-interest drives the Human Being to behave in a certain way. Yet in some situations we can observe a conflict among the incentives for the Human Being to act and logic alone falls short of explaining his deeds. Naturally, the strive for justice often entails certain expenses that a selfish and rationally minded individual does not want to incur of his own volition. Still, the sense of justice is the force that drives our deeds when the Human Being risks his life to save a complete stranger (in situations outside of line of duty), or when a tourist tips a waiter who will probably never wait on him again to express his appreciation of the service provided.

To sum up the above examples, we can say that acts promoting justice may or may not be results driven by selfish aims. Their causes can hardly be explained outside of the sense of justice, and merely stating that the sense of justice exists will not explain why or when it occurs, or how it operates.

There is no unanimous view of how selfish motives interact with the sense of justice and which one of them is the more important. If they are triggered simultaneously, how do they match each other? Which one is the more predominant if they are triggered one after another? We can only guess that in the event one of them is pronounced stronger and the other one weaker, the stronger element will dominate the motivation of the appro-

400 DUBBER, M. D. Making sense of the sense of justice. *Buffalo Law Review,* Summer 2005, No. 53.

priate reaction. We cannot disregard the potential situations of a 'rational choice' when a more or less rational and conscious search for and processing of the available information forces the model of satisfying self-interest to prevail. To be able to verify these assumptions, we should analyse individuals' behaviour in the context of circumstances significant to them.

*Causes of the Sense of Justice*

To uncover the origin of the sense of justice, we must admit that individual reactions to environmental phenomena are highly variegated. Reactions to phenomena with some or the other subjective value of justice differ in their nature and character.

*The first type of reaction* is automatic *perception of self-evident (in)justice* of circumstances or a phenomenon as a direct response to recognisable signals or elements (familiar cues) in a relevant situation without virtually assessing the existing circumstances. This sudden reaction constitutes recognition of a particular circumstance (such as a human action, sequence of events, institutional practice, and so forth) as the cause of perceived (in)justice and the desire to restore justice. In other words, emotional imperatives based on perceived (in)justice are expressed as pre-programmed typical human reactions that include (a) outrage (but not anger) or satisfaction; and (b) the inevitability of retribution[401].

*The second type of reaction* are cases when all of the elements of an allegedly (un)just phenomenon are assessed rationally and a *conscious decision* is made about the (in)justice of the phenomenon. We could say that the individual links in the sequence of conditions leading to a particular phenomenon being just are, for instance, the merits of the subject Human Being, the relationship between the personal gain and merits of the subject Human Being, the expectations of the subject, assignment of moral responsibility and guilt to the persons who have caused injustice, and the modelling of different scenarios of the event[402].

Scientists dealing with social psychology describe the first type of reaction using an overarching term of *heuristics,* which denotes automatic, intuitive human reactions that usually take place according to the typical decision-making scenario[403]. The heuristic form of thinking involves simplistic mental operations that regulate and control general principles of a particular activity empirically discovered embedded in the subconscious of the Human Being. In the face of difficult problems or a shortage of information, Human Beings follow these general rules that have been tried out in real-life situations and recognised.

401 GOLDBERG, J. H.; LERNER, J. S.; TETLOCK, P. E. Rage and reason: The psychology of the intuitive prosecutor. *European Journal of Social Psychology,* 1999, No. 29, pp. 781–795.

402 WEINER, B. On sin versus sickness: A theory of perceived responsibility and social motivation. *American Psychologist,* 1993, No. 48, pp. 957–965.

403 CHAIKEN, S.; TROPE, Y. *Dual process theories in social psychology.* New York: Guilford, 1999.



The second type of reaction is called *systemic reactions* that are grounded on rational thinking procedures based on conscious analysis and generalisation of information, i.e., arising out of the application of decisions that the mind dictates, as well as the laws of logic.

The above two types of reaction to phenomena that carry some subjective value of justice differ in attributes that are particularly relevant when it comes to assessing human decisions and behaviour. Assessments of real-life phenomena that are based on the heuristic method of thinking carry a certain degree of primitivism, i.e., rigid assertiveness and unambiguous, usually simplified assessments of pending results, personal qualities of an individual that will arise out of emotions or retribution, for instance: 'bad things only happen to people who deserve it,' 'bad things are caused by unjust people,' 'people who share similar views or other qualities deserve to be treated equally.' Whereas decisions and assessments based on systemic reactions reflect generally accepted, ordinary laws of human thinking, rules for assessing circumstances that affect rational decisions (such as the qualities of the subject of assessment, obvious merits, guilt of the Human Being), and restoring perverted justice (such as equality, rules vested by the positive legal norms)[404].

Also, heuristics occur automatically as a direct response to real-life phenomena while systemic reactions call for the Human Being to be clearly interested in analysing the situation, as well as for some time-costs and possibilities to learn about the phenomenon (situation). Besides, opposite to systemic reactions, the process of heuristic thinking is bumpy and therefore often induces systemic bias of thinking, hence human errors in judgement.

The above differences show that in assessing a legal phenomenon (situation) and making a decision, the assessor (for instance, the judge, judicial board, jury, defendant) will inevitably come across factors that are both conscious and subconscious in nature, which will define his subjective conviction in the phenomenon (situation) and the judgement being just.

### The Action Mechanism of the Sense of Justice

Realising the high probability of human error and biased assessment based on the sense of justice (the heuristic form of thinking) and in order to ensure effective legal compliance, we must analyse the causes behind the effect the sense of justice has on rational decisions. That means that we need to analyse the influence of the sense of justice on the assessor in the process of making decisions both in important and insignificant situations.

404 LERNER, M. J. Integrating societal and psychological rules of entitlement: The basic task of each social actor and fundamental problem for the social sciences. In VERMUNT, R.; STEENSMA H. *Interpersonal justice in social relations.* Vol. 1. New York: Plenum, 1991, pp. 13–32.

*Impact in Insignificant Situations*

Insignificant situations are instances when the assessor of the justice of a phenomenon (situation) does not attach any significance to the phenomenon (situation), meaning that it does not entail any personal consequences or such consequences are small (for instance, voicing a person opinion about a hypothetical or real phenomenon in a conversation will most likely did not induce significant punishment or benefit). We cannot deny that such situation can cause heuristic reactions. Still, given a minimum amount of personal interest to achieve justice, the assessor will not react to the situation by the primary rules as automatically dictated by heuristic thinking, but will draw on the available resources of time and situational analysis to consciously form the reaction (such as an opinion or a model of behaviour) that fits the attitude to the phenomenon in question prevalent in the society of the assessor.

Without the risk of immense losses and without the prospect of large personal gain, in this case the assessor of the phenomenon is mainly driven not by the aim to achieve justice per se, but rather to justify his image in the public eye, which is nothing but self-interest. Efforts are made to secure self-respect or a favourable public opinion by upholding specific rules for the perception of justice as they exist in society or, on the contrary, by opposing such rules to avoid shaming, contempt. By consciously validating their position, assessors will most probably not be inclined to support their acts with primary rules that heuristic thinking dictates, which normally contradict the rational decision.

In view of what was mentioned above, one should think that norms that stand in accord with the social optimum of justice and are relied upon in making conscious decisions (that is, in the event of a *systemic reaction*) reflect an *enlightened self-interest*[405]. We can therefore draw a perfectly natural conclusion that in this case, individuals only follow the principles of justice when they realise that in the short or long run, this model of behaviour will mirror the balance between gain and risk the most. Therefore, in insignificant situations an individual distances themselves from conscious assessment of phenomenon, and *only* actively follows the sense of justice when there is no time or other incentive to give a rational reaction. We can conclude that self-interests will take the dominant position in complex situations – when the sense of justice is followed after making a rational assessment of the situation – as well[406].

The field in which self-interest occurs is so vast that the extent of its influence is often overestimated. Sometimes individuals who follow their sense of justice do so under the cover of self-interest and admit that should they reveal the true motives of their behaviour, they would expose themselves to suspicion for departure from the 'norm'[407].

405 RATNER, R. K.; MILLER, D. T. The norm of self-interest and its effects on social action. *Journal of Personality and Social Psychology,* 2001, No. 81, pp. 5–16.

406 MILLER, D. T. The norm of self-interest. *American Psychologist,* 1999, No. 54, pp. 1053–1060.

407 RATNER, R. K.; MILLER, D. T. The norm of self-interest and its effects on social action, pp. 5–16.



*Impact in Significant Situations*

When faced with phenomena (situations) affecting fundamental interests of the Human Being (such as his destiny, freedom, life, and so on) that are not aligned with the subjective perception of justice, the individual's reactions will obviously be defined by emotionally occurring attempts to restore and protect violated justice rather than reasons based on enlightened self-interest that drive him to conform to the social optimum (as in the case of insignificant situations). Naturally, in seeking to restore violated justice, an individual who is more interested in a phenomenon (situation) will not be inclined to waste time, analyse the situation, act in a way so as to comply with the behavioural model generally regarded as just[408].

As already mentioned, the original heuristic assessment of phenomena (situations) provides a foundation on which strong, primitive emotional reactions are built[409]. It has been proven that perception of injustice in significant situations (such as relating to a judgment sentencing the assessor (the subject) to a prison term) ***leads*** to all sorts of reactions: anger, apathy, guilt, shame, disgust, contempt, sadness, and so on[410]. These emotions replace the usually rational behaviour that is governed by self-interest and prompt for restoration of justice at any cost. The effect of this aim in significant situations is larger than the fear to incur sanctions for disobeying the regulations, failure to comply with instructions from a police officer, failure to comply with a court order, and so on. The social behaviour of the Human Being is no longer regulated by law but by irrational emotions instead.

Depending on their intensity and character, reactions can strengthen or weaken adherence to the legal norms to a greater or lesser degree, thus affecting social effectiveness of law. Heuristics, being a sequence of original intuitive assessments and reactions to them and a basis for the sense of justice, play a vital part in this process, while systemic reactions can only affect the original assessment of the injustice of a situation and the striving for retribution that is taking shape to a minimal degree (as moral reasoning).

408 MEINDL, J.; LERNER, M. J. The heroic motive in interpersonal relations. *Journal of Experimental Social Psychology,* 1983, No. 19, pp. 1–20.

409 GOLDBERG, J. H.; LERNER, J. S.; TETLOCK, P. E. Rage and reason: The psychology of the intuitive prosecutor, pp. 781–795.

410 MIKULA, G.; SCHERER, K. R.; ATHENSTAEDT, U. The role of injustice in the elicitation of differential emotional reactions. *Personality and Social Psychology Bulletin,* 1998, No. 24, pp. 769–783.

## Implications of Injustice Subjectively Perceived

As previously mentioned, if injustice is realised in a situation that is highly significant to the Human Being, the automatic intuitive reaction (unless affected by subsequent conscious assessments) in many cases will manifest as strong emotions and anger as often as not[411]. Knowing that such situations involve a high risk of personal loss or a probability of gain, a reasonable question arises: Why do individuals follow irrational forms riven by the sense of justice, rather than systemic reactions that are based on self-interest?

Being highly concerned, individuals end up in a stressful situation with its characteristic lack of resources, such as time and motivation to look for the above enlightened self-interest, necessary for the situation to be assessed rationally. This means that the original intuitive perception of injustice and the related strong emotional reaction are to be considered essential factors of behaviour in a significant situation.

Still, we have to admit that clear signals that draw our attention (such as the debtor suddenly acknowledging their debt and undertaking to repay it, the lawyer promising the client to appeal the verdict) can break the sequence of deeds dominated by the motives driven by the sense of justice. When the original emotions are strong but hard to provoke later, the intensity of the emotional charge and its effect on the acts of an individual eventually ebbs, creating conditions for rational decisions to appear. So, with emotional excitement diminishing, an individual becomes increasingly susceptible to the impact of stimuli that can cause mind-controlled reactions.

Empirical research has confirmed the above tendencies. During a trial, a group of participants were told that hypothetical offenders had been caught and punished as soon as they had committed the offence, while the other group was told that the offenders had not been apprehended and punished[412].

It was noted that later the mind of the former demonstrated a different emotional and retributive reaction to offenders than those who were told that the offenders had never been caught. The behaviour of the second group was dominated by reactions driven by anger. The extent of anger was directly proportionate to the extent of the punishment that the subjects meted out to the same hypothetical offender who had dodged punishment in a later situation.

Considering the above, we can conclude that the stronger the anger, the more the subjects are inclined to impose heavier punishment. The subjects who knew that the hypothetical offenders had been punished were far less discontent. Besides, their retributive reactions to the same hypothetical offender being punished in a later situation were mitigated by rational assessment of the respective circumstances. Knowing that justice had already been served in the case of the hypothetical offenders, the anger of the subjects that would result in more severe punishment in a later situation is automatically replaced by an emotional reaction more complex, measurement of guilt more objective, and the penalty more optimal.

To sum up, we must note that unless they are affected by reactions to injustice induced by chronological prior events (factors), individuals tend to focus more on the significant circumstances of a subsequent event (phenomenon). They are more rational in their assessment thereof and do not experience any irrational reactions that could distort the making of an objective decision or reasonable assessment of the situational circumstances. Besides, in significant situations individuals focus primarily on eliminating the perceived injustice and restoring the subjectively realised justice. The motivation to seek justice restrains or completely destroys the individual's attention to significant factors (such as factual circumstances, legal norms, established problem-solving practice). For this reason, the sense of justice is to be construed as an independent behavioural motivator that can define or strengthen equitable or inequitable behaviour of the Human Being depending on the circumstances.

*Interaction of Assessment of Distributional and Procedural Justice*

Assessment of distributional justice happens in the case of distribution of certain valuables. It is obvious that when any kind of division of property takes place, every Human Being is interested in getting as large a share as possible. Naturally, the more he gets, the more the Human Being is satisfied with the results of the distribution (an expression of self-interest). However, research[413] has shown that it is not the only factor that affects the degree of satisfaction with the results of distribution. This satisfaction is heavily affected by the Human Being's value judgement of the degree of justice or injustice of the distribution of valuables. For instance, those who received a disproportionately large share in the distribution (i.e., the result did not match the subjective conception of justice) regarded both the procedure and the results of the distribution poorly.

The view that assessment of distribution procedures is not an independent factor but is directly tied to the actual or imaginary result of application thereof has been negated by the results of later studies[414]. Until then, the popular belief was that if the Human Being regards equal distribution of some valuables as just, he will recognise distribution procedures which ensure that everyone gets an even share as just, too. Data from the latest

411 MIKULA, G.; SCHERER, K. R.; ATHENSTAEDT, U. The role of injustice in the elicitation of differential emotional reactions, pp. 769–783.

412 GOLDBERG, J. H.; LERNER, J. S.; TETLOCK, P. E. Rage and reason: The psychology of the intuitive prosecutor, pp. 781–795.

413 ADAMS J. S. Toward an understanding of inequity. *Journal of Abnormal and Social Psychology,* 1963, No. 67, pp. 422–436.

414 THIBAUT, J.; WALKER, L. A theory of procedure. *California Law Review,* 1978, Vol. 66, pp. 541–566.

studies suggest that the assessment of the justice of the procedures applied can be an independent factor nonetheless. In other words, the Human Being can assess procedures of judicial dispute resolution as just, but have a negative opinion of the result of their application (the judgment itself), and vice versa[415].

All of the above suggests that assessment of distributional justice (the results of the court judgment) and assessment of procedural justice (the procedures applied during the proceeding) do not share a close bond. Assessment of both the results of the dispute (such as the extent of punishment) and the procedures that were applied to achieve them (such as actions relevant to collecting evidence about the parties to the dispute and the object of the dispute, adjusting the distribution criteria, and interpreting the position of the parties) constitute independent factors that can lead, either jointly or severally, to the Human Being's discontent with justice and irrational emotional reactions.

*Implications for the Effectiveness of the Proceeding*

Considering what was discussed above, we ought to admit that the effect of satisfaction with both distributional and procedural justice can have a direct or an indirect expression. Positive assessment of the procedures applied during the trial has a *direct* effect on the Human Being's satisfaction with the results of the dispute resolution. However, the *indirect* effect plays quite a significant role here as well, because satisfaction with the results of judicial resolution of a dispute also depends on the level of the Human Being's confidence in law enforcement institutions (such as courts) and on how much he is inclined to trust the judge who is examining the dispute. Perceived justice of procedures applied during the dispute (the believing that the dispute was resolved justly) often boosts confidence in the institution and the judge alike. In its own turn, stronger confidence adds to the satisfaction of the results of the dispute resolution. Ergo, we can see that some ties of mutual interdependence exist.

Such conclusions usually have extraordinary practical and social significance. After all, various disputes and conflicts are nothing out of the ordinary in our life. Every dispute or conflict has to be resolved so that the parties are satisfied with the decision. Otherwise the conflict will not go away; worse, it may even escalate. Depending on the resolution of the conflict, the same kind of result of a resolution in one case can lead to a sense of discontent and exacerbate mutual animosity of the parties, and in another, improve their relationship and give them satisfaction. Therefore, if applied equitably, methods to resolve a conflict or dispute that are being assessed can integrate, and if inequitably, disintegrate the parties. This is particularly important when the conflict or dispute is resolved to the disadvantage of an individual.

415 JUSTICKIS, V.; VALICKAS G. *Procedūrinis teisingumas Lietuvos kriminalinėje justicijoje ir alternatyvios justicijos modelių taikymas,* 2004, p. 8.



The conviction of the losing individual that everything was resolved justly is an important safeguard mitigating the effect of an adverse judgment, reducing disappointment and discontent, helping cope with failure. It is therefore very important for us to know the origin of the conviction that a dispute or conflict was resolved justly (knowing that would be instrumental in ensuring that the loser believes he was treated justly)[416].

Said 'chain of factors' (the interaction of justice of the procedures applied to resolve the dispute, confidence in the officials dispensing justice, and satisfaction with the resolution of the dispute) affects not just the relationship between the person involved in the proceeding and the judge, the Human Being who is being prosecuted, and the official with authoritative powers (e. g., a police officer or a prosecutor), it affects any arbitrator whose sense of justice is capable of influencing the objectivity, legality, and legitimacy of the judgment in the manner described above (that is, by evoking irrational emotions) just as strongly. Therefore, every side factor, the sense of justice included, which can affect the internal conviction of the arbitrator (the judge) regarding the outcome of the case and determine the choice of applicable legal norms of the qualification of the factual situation within the limits of discretion, is to be considered as restricting strict compliance with the requirements entrenched in the legal norms and thus defining social effectiveness of law.

### Interaction between the Sense of Justice and Application of Law

The topic of the conditions structure, operation, and consequences of the sense of justice that we discussed above has significance from the theoretical point of view. However, a lawyer finds it just as important not only to understand the principles of practical function of the sense of justice, but the practical relationship of that sense with law as well. Notably, irrational insights into the sense of justice and law as a social phenomenon are closely connected to each other. According to Rudolf von Jhering, 'it is not the sense of justice that creates law, but rather law, the sense of justice'[417]. In his opinion, law only recognises one source, and that is the purpose[418]. Indeed, when the subject (such as a lawyer or a judge) who applies law comes face to face with, let us say, an unclear, ill-defined norm, a collision of legal norms, or has to choose a norm applicable by analogy, or when the judge exercises the right of discretion, the existing legal base could be a factor contributing to the formation of the sense of justice.

416 JUSTICKIS, V.; VALICKAS G. *Procedūrinis teisingumas Lietuvos kriminalinėje justicijoje ir alternatyvios justicijos modelių taikymas,* p. 9.

417 VON JHERING, R. *Der Zweck im Recht.* Erster Band. Leipzig: Breitkopf & Härtel, 1877, p. XIII.

418 *Ibid.*

*Vagueness and Uncertainty of Law*

The text of an applicable legal norm is often ambiguous, so that its sense can be interpreted in different ways and the court and the lawyer need to evaluate and coordinate the different alternatives of interpreting the norm. The sense that the judge attaches to a norm will determine the judgment and its consequences. Besides, we must emphasise that the choice of the sense of a particular norm also serves as an expression of a value-based decision of the Human Being that, as we already mentioned, can be directly affected by the sense of justice[419].

In interpreting the sense of an abstract norm, the judge usually applies the teleological method of law interpretation and analyses the intentions of the subject that adopted the norm. The systemic, grammatical, logical, historical methods are not suitable here, as their application involves either interpreting the vague norm, or interpreting it in the context of other norms. While applying the teleological method, the judge must determine the alternative interpretation of the abstract norm that will affect the society in a way that is closest to the purpose of the norm. For this reason, application of the teleological method of interpretation of the norm must consider the perception of justice prevalent among the target audience of the norm, and the extent to which the particular interpretation of the abstract norm complies with that perception of justice. Said requirements involve a certain amount of problematics that will be discussed later.

*Collision of Legal Norms and Legal Principles*

There are many cases when the same legal relationship is regulated by different legal norms or principles. Qualification of such relationships calls for the choice of an applicable rule. It should be noted that this choice is as legal as it is based on values because the choice of the norm will determine the defence of the value selected[420]. There are two ways out of this collision:

1. by looking for additional arguments to completely justify one particular alternative; or
2. by assessing the arguments that support each alternative and prioritising one of them[421].

The first solution is not acceptable: an unending quest for arguments will delay the proceeding. It is therefore to be admitted that judgment in the case of a collision of norms or principles must rely not only on legal thinking, but on value-based attitudes as well, making the decision on the basis of emotions that the sense of justice may evoke.

419 MIKELĖNIENĖ, D.; MIKELĖNAS, V. *Teismo procesas: teisės aiškinimo ir taikymo aspektai,* p. 30.

420 *Ibid.*

421 *Ibid.*, p. 29.



*Gaps in Law*

Without a specific legal norm that could be applied to resolve a legal dispute, the court must decide the case by applying analogy of the law or law if it can be done thanks to the nature of a particular branch of law. In that case, the judge will either find a solution spontaneously by relying on his sense of justice and will later support it with rational arguments or, if no early solution can be obtained, will rationally analyse the situation and will find a particular decision he himself has made just and (just like in case number one) will provide rational arguments to back it up. Again, application of analogy means that the court solves the case by picking one solution out of several competing options and by pondering what is prohibited or allowable, what can and must be done in a particular situation. This means that application of analogy of the law or law has to do with making emotional decisions based on the most appropriate alternative.

Given the gap in technical norms and for want of specialist knowledge of a particular field, the judge may be unable to find an intuitive solution but in that case he may consider solutions of the situation that is just in the opinion of the specialist of the field.

*Judge Discretion*

Anchoring subject criteria (such as 'public order,'[422] 'good morals,'[423] 'considerable damage,'[424] 'fair business practice'[425]) in the legal norms or leaving a particular matter (such as the extent of non-material damages[426]) for the court to resolve at its discretion opens up possibilities for the judge to exercise his right of discretion. Such instances again involve a comparison of alternative senses of concepts, different values, prioritising one of them.

Said examples undoubtedly confirm that resolution of legal disputes and application of law are not mechanical logical operations, formal application of the norms to attain a solution. We cannot apply law outside of comparison and coordination of various values; hence, without making decisions that are based on them. As to apply law means to choose the appropriate legal norm, application of law means a choice of any of the values that is anchored in or protected by law[427]. In that case, the judge's choice is moved not by legal criteria (such as those of the legality of choice), but rather by criteria of emotional acceptability. Alternatives are eliminated not because they are illegal, it is down to the *emotional state of the judge.* Finally, the choice and subsequent justification of a particular alternative becomes the only just, universally binding judgment made in the name of the state.

422 E.g., The Civil Code of the Republic of Lithuania, Article 1.66(4).

423 E.g., *ibid.*, Article 1.66(4).

424 E.g., *ibid.*, Article 2.164(7).

425 E.g., *ibid.***,** Article 228(2).

426 E.g., *ibid.*, Article 6.250.

427 MIKELĖNIENĖ, D.; MIKELĖNAS, V. *Teismo procesas: teisės aiškinimo ir taikymo aspektai,* p. 31.

To sum up, we need to admit that the process of judgment involves both legal and emotional elements. Thanks to their irrationality and effect that we mentioned above, these latter are capable of guiding the court's attention away from formal legal arguments, encouraging it to rely on emotions in making judgment, choosing arguments and the applicable legal norm, determining its sense, and so on. For this reason, a judgment that is affected by the sense of justice can lose its objectivity, legitimacy, and even legality.

### Sense of Justice – What is it Like?

*An intrinsic or acquired ability?* What was laid down above suggests that any mismatch between the existing positive law or judgment and the sense of justice of the assessor leads to tension causing heuristic thinking and, eventually, emotional reactions that reduce the effectiveness of law. This leads to a reasonable question of whether said negative consequences could be mitigated by aligning the imperatives of law with the popular understanding of justice, or whether no such understanding exists at all, because every individual follows their own unique sense of justice.

There is no explicit answer to this question. Advocates of the historical theory (such as R. von Jhering) believe that the prevalent social conditions and popular views in society are inspired by the mind and they become an internal element of personality that all individuals share. Their opponents (for instance, Julian Rüemelin) dissent to the existence of a constant, unchanging sense of justice and argue that the individual development of every individual shapes their own unique perception of justice. Modern-day scientists do not consider the sense of justice a shared quality[428] and accentuate that the sense of justice is affected by intellectual factors that are defined historically and acquired empirically. If we were to sum up the origin of the sense of justice, we would need to admit it to be variegated and possessed of both an individual and a social character.

*An individual or collective phenomenon?* Recognition of the relativity and uncertainty of the origin of the sense of justice renders cases when the judge is required to consider the perception of justice of a party in the proceeding, a particular social group, or society in general rather complicated.

The Lithuanian legal doctrine postulates: 'The judge must /.../ intuitively understand the stance of the public of what is just and what is not. /.../ [The] judge must follow the values as they are understood by the public /.../. /.../ [The] court becomes a barometer of the perception of justice in the society /.../. /.../ in addressing matters left to his discretion, the judge must *feel* the public conception of justice'[429]. The requirement to feel the social sense of justice and to act on it in passing a judgment may pose additional questions to the judge as an individual with his own unique sense of justice. Which sense of justice should he follow: that of the judge or the hypothetically implied and proliferated by the majority of the public? What should be done when these conceptions of justice do not match? How do we treat it in a fragmented society ? After all, what is just to a Catholic does not necessarily have to be just to a Muslim; what is just to a teenager need not be just to a pensioner, and vice versa. Can and should the principle of majority be followed in that case? How do we find the right decision in a society obviously stricken by a moral crisis?

*A standard or dynamic phenomenon?* The factors that affect the content of the sense of justice are unknown. Legal ideals, supposedly, are the product of an interaction between the conceptions of justice of an individual and the society[430]. An individual internalises the general social perception of justice only for fear of sanctions and while under the effect of self-interest. Therefore, said interaction should take place with the individual assessing society's perception of justice and the effect of its acceptance or rejection (personal gain, sanction) in every particular case. In the long run, by storing instances of society's perception of justice that he finds acceptable on account of self-interest, the individual constantly shapes his own sense of justice. Although this question cannot be answered explicitly, the sense of justice should rather be considered as a phenomenon that is dynamic and ever-shifting rather than a static result of a momentary interaction between the personal expectations of an individual and the demands of society. Still, this question cannot be answered explicitly.

428 EHRENZWEIG, A. A. *Psychoanalytical Jurisprudence.* Leiden: AW Sijthoff, 1977, p. 219.

429 LAUŽIKAS, E.; MIKELĖNAS, V.; NEKROŠIUS, V. *Civilinio proceso teisė:* vadovėlis. T. I. Vilnius: Justitia, 1999, p. 150.

430 GRUTER, M. Biologically based behavior research and the facts of law. In GRUTER, M.; BOHANNAN, P. (Eds.) *Law, Biology and Culture: The Evolution of Law.* California: Ross-Erikson, Inc Santa Barbara, 1983, pp. 2–15.

# LINGUISTIC EXPRESSION OF LAW

*/.../ the power of words can demolish a city.*
Demosthenes[431]

Language was already perceived as a powerful tool back in ancient Athens. People knew that the regulations and the major part of the public life of the community is grounded on the expression of civil rights. Indeed, we could say that language is one of humanity's most significant inventions. Most Human Beings consider language to be the key tool of communication, but it is so much more than that: it is the essential medium of thought[432]. It helps us express our thoughts. The meaning of language is much larger, for nearly all thinking from the most primitive to the most intricate level is based on words.

Being a tool of cognition and disclosure of experience, hence, an instrument of communication, language is the foundation on which any human discussion rests. Participants in a discussion operate statements, concepts, terms, and so on. Hence, law cannot be imagined without language, because rules of behaviour (legal norms) are formulated, handed down, and interpreted with language. To be able to express law with language, we have to follow certain rules of linguistic philosophy and theory. The purpose of language in general and legal language in particular is not only to describe a particular phenomenon, but to regulate and coordinate human behaviour as well. Lawyers are highly concerned with language and often may be inclined to consider law the ultimate instrument of social control, its 'soul'. But they are forgetting that law is limited in action, and where application of law comes to an end, the action of other social norms goes on.

431 ENDICOTT, T. A. O. Law and Language. COLEMAN, J., SHAPIRO, S. *The Handbook of Jurisprudence and Philosophy of Law.* New York: Oxford University Press, 2002, p. 935.

432 WILLIAMS, G L. Language and the Law. In SCHAUER, F. *Law and Language.* Dartmouth, 1993, p. 71.



Words that we hear when we are little, such as 'coward,' 'decency,' 'manners,' 'justice,' promote socially desirable behaviour and hold us back from acting in a socially unacceptable way. Later on, the words 'success,' 'crook,' 'patriotic,' to name a few, perform much the same function. Law and the verbal apparatus of words like 'rights,' 'duties,' 'violations' simply represents application of language as a tool for social control. Words are instruments that lawyers (attorneys, prosecutors, judges, and the legislator) use to good, bad, or indifferent ends. Words grab hold of the lawyer's attention in designing and interpreting legislation, contracts, or other legal documents. Compared to other professions, such as engineers, painters, surgeons, where words are just as important (albeit rather as an instrument for interaction and sharing thoughts), words hold exceptional significance to the lawyer, for they are the tools of his trade.

Language is very important to law, for it can help illuminate its nature[433]. The reasons why having a grasp of language might be instrumental for the perception of law are the following[434]:

1. *Law uses language.* Legislation is a universal feature of a legal system. Therefore, law consists of word combinations. Without understanding how language works, we are unable to grasp the nature of law.
2. *Law is like language.* Language and law are one of the most general, and at the same time, most complicated systems of social rules available to humankind. Law and language are also the two most general and complicated schemes of social coordination, for they provide problem solutions to be considered by cooperating Human Beings who share a low degree of reciprocal understanding and limited good will.
3. *Law theoreticians must use language.* Of the tasks for law theoreticians is to understand the terms that define the subject of the matter.

Considering the above, it is important to examine the approach of law to language, their mutual relationship, the characteristics of legal language, and other relevant attributes of said categories.

Being a tool of cognition and disclosure of experience, hence, an instrument of human communication, language is the foundation on which any human discussion rests. Participants in a discussion operate statements, concepts, terms, and so on. Language enables human communication, discussion, hence legal reasoning. Law cannot be imagined without language, because rules of behaviour (legal norms) are formulated, handed down, and interpreted with language. It is with the help of language that we create and get to know law.

433 ENDICOTT, T. A. O. Law and Language. In COLEMAN, J., SHAPIRO, S. *The Handbook of Jurisprudence and Philosophy of Law,* pp. 935–968, p. 937.

434 *Ibid.*, pp. 937–938.

### H. L. A. Hart's Theory

According to Herbert Lionel Adolf Hart, law theoreticians have taken the wrong turn as they have dismissed four attributes of legal language. They have also failed to observe that legal language is *sui generis,* naturally unique. This theoretician argued that language of law possesses certain defining characteristics.

*First of all,* it is used to establish the existence of a legal system (legal rules). But not to confirm that existence, and that is one of the hallmarks of the language of law.

The *second* typical feature of the language of law is similar to the one above and it is the usage of legal terms. Legal terms define the related legal rules which imbue words with textual sense. Declarations that we make using these legal terms are legal conclusions that arise out of envisaged legal rules with regard to predicted, rather than formulated, facts.

The *third* defining characteristic of the language of law is that its verdicts vary in their sense, importance, or effect (or all three of those) depending on who applies the language, where, and when. For instance, the consequence of the judge saying in the courtroom: 'Johnson is obligated to pay 1,000 euros in default interest to Peterson' is that Johnson becomes legally liable towards Peterson. If the same phrase is pronounced by a bus driver, there would be no such consequence.

The *fourth* characteristic of legal language applies to every rule in general and is one of the universal functions that they perform. This universal function is their applicability to more than one fact. The rules are general. Empirical rules constitute generalisations of different facts. A rule can apply to a lot of facts, obtaining the same conclusion. In the words of Hart, diversity of circumstantial examples is the key element when it comes to applying legal rules. He argued that the same examples of facts can be united by different rules, potentially leading to the same or a different legal conclusion.

Hart opined that general words bear a certain core of sense[435] that allows us to use them spontaneously in standard cases. However, and without the shadow of a doubt, the theoretician was positive that not every case is of a nature that allows us to understand the meaning of words as a matter of fact; which is to say, standard.

Hart drew a line between easy (standard) and difficult cases and argued that most cases were easy. The thing that makes a difficult case difficult is what he called the *penumbra*[436]. *Penumbra* cases deal with situations in which the law does not explicitly determine a particular rule regarding a specific situation and everything depends on the agreement of how certain words should be understood and constructed (for instance, whether a skateboard can be classified as a mode of transportation). Agreement on the usage of one or the other word in one case may turn into disagreement in another. This conception of Hart's was perceived as legal formalism.

435 HART, H. L. A. Positivism and the Separation of Law and Morals. *Harvard Law Review,* Vol. 71, No. 4, 1958, pp. 593–629, p. 607.

436 *Ibid.*, 626.



*L. L. Fuller's Criticism of H. L. A. Hart, and His Interpretation of the Legal Norm*

Lon Luvois Fuller pointed out that in speaking about the interpretation of legal norms, Hart had formulated the following three statements[437]:

1. *Statement number one:* 'interpretation of the legal norm is the interpretation of the individual and concept words that constitute it'[438].
2. *Statement number two:* 'interpretation of concept words of legal norms is (or must be) defined by their ordinary use in natural language'[439].
3. *Statement number three:* 'the meaning of concept words does not depend on the legal context in which they have a function'[440]. In other words, concept words used in formulating legal rules must be interpreted so that they have the same meaning assigned regardless of the context in which the rules operate.

First of all, according to Fuller, interpretation of the legal norm is not just the interpretation of individual words, but often the interpretation of a 'sentence, paragraph, or an entire page, or an even larger quantity of text'[441]. According to this theoretician, a paragraph usually does not have a standard meaning that would not change with a change in context[442]. Fuller attaches the same quality of changeability depending on the context to individual words, as well, such as 'vehicle,' 'sleep,'[443] and so on. Therefore, according to this theoretician, interpretation is inseparable from the context, and individual and concept words are parts of the structure in which they interact. This interaction makes every case unique, and the judge, an active participant in the interpretation of these structures.

437 FULLER, L. L. Positivism and Fidelity of Law: A Rely To Professor Hart. *Harvard Law Review,* 1958, Vol. 71, No. 4, pp. 630-672, pp. 662-664. Also see: MARMOR, A. *Interpretation and Legal Theory.* Oxford and Portland (Oregon): Hart Publishing, pp. 99–102.

438 MARMOR, A. *Interpretation and Legal Theory,* p. 99.

439 *Ibid.*

440 *Ibid.*

441 FULLER, L. L. Positivism and Fidelity of Law: A Rely To Professor Hart., pp. 630–672, p. 663.

442 *Ibid.*

443 For more, see: *ibid.*, pp. 663–664.

## L. Wittgenstein's Philosophy of Language

To repudiate Hart's position, Fuller refers to L. Wittgenstein's philosophy of language[444], which suggests that words do not have 'essence,' 'a core of essence,' and language itself is or can be read in many ways[445]. Therefore, according to Wittgenstein, language is an instrument of communication that can be formulated easily[446]. As Tomas Bergmanas puts it, in the long run, academia was convinced that it was Wittgenstein, and not Fuller, who managed to demolish the formalism that the latter of the two attributed to Hart[447].

Not only did Wittgenstein negate the traditional semantic formalism – he also presented a well-developed understanding of the mechanism by which language works, which was and still is difficult to comprehend[448]. According to him, language is an all-encompassing media, a universum; one cannot stand next to it, escape it or transcend it, gain a perspective on it by taking a neutral look at it from without[449]. Language can only be explained with language itself, which means that ultimately it cannot be explained at all[450].

Wittgenstein compares language to a game: just like every game, language has its rules set in grammar. Language is an instrument[451]. Its concepts are instruments[452] that we learn and teach how to use for all kinds of purposes. It is what connects language to the world; it preserves our link with the world and can be adapted to it. The usage of language in a particular situation is regarded as a particular 'language game' in which the sentence is considered to be a move. The diversity of 'language games' is endless, each of them has its logic, rules that cannot be broken if we want to play. Language games are rule-driven interactions between practice and non-lingual environment, certain forms and systems of human communication.

444 *Ibid.*, p. 669.

445 BERKMANAS, T. Ar lingvistinis neapibrėžtumas užkerta kelią teisės viešpatavimo (*rule of law*) įsigalėjimui? *International Journal of Baltic Law,* 2002, Vol. 1, No. 1, pp. 26–56, p. 30.

446 *Ibid.*, p. 30, see: JAMES BOYLE, The Politics of Reason: Critical Legal Theory and Local Social Thought, 133 *University of Pennsylvania Law Review,* 1985, Vol. 133, No. 4, pp. 708–709; CHRISTIAN ZAPF, EBEN MOGLEN, Linguistic Indeterminacy and the Rule of Law: on the Perils of Misunderstanding Wittgenstein, 84 GEO.L.J. 485 (1996), p. 490.

447 BERKMANAS, T. Ar lingvistinis neapibrėžtumas užkerta kelią teisės viešpatavimo (*rule of law*) įsigalėjimui? *International Journal of Baltic Law,* 2002, Vol. 1, No. 1, pp. 26–56, p. 30.

448 *Ibid.,* p. 31.

449 VITGENŠTEINAS, L. *Rinktiniai raštai.* Vilnius: Mintis, 1995, p. 35.

450 *Ibid.*

451 WITTGENSTEIN, L. *Philosophical Investigations.* Oxford: Basil Blackwell, 1958, § 569.

452 *Ibid.*



'Language games' share some 'family resemblances,'[453] but never identical common features. Every term if it is sensible must have its own usage paradigm. Every word has its contrast (i.e., if the rules for playing a game are explained, we know where those rules do not apply). As a result, any rational discussion in general and a legal discussion in particular can possibly take place when its participants play by the rules of the language game. It is critical for one party in a legal discussion to be playing the same kind of language game as the other; otherwise words, sentences, and statements will be used in a completely different context and different meanings. According to Wittgenstein, the philosophical problem arises when language 'takes a vacation'[454].

Equally important is the view that the philosophy of language has adopted on language as a complicated system. The philosophy postulates that any expression of language needs to be analysed as part of a particular system rather than in isolation. Here, we must accentuate the relationship between the meaning of linguistic expression and the context in which that expression is used: the meaning of the same word or another linguistic expression is relative; it varies depending on the context. Wittgenstein argued that 'word has meaning only in the context of a sentence, because giving an object a name does not tell us anything, so you cannot guess how the word functions. You have to see how it is used, and learn from that'[455]. Language games forge a link between our language and the world; through them, we grasp the meaning of linguistic expressions.

Wittgenstein believes that the function of language is to provide a 'view of the world'[456]. Therefore, words of language identify objects of the world, assigning names and titles to them, and sentences are combinations of such words. According to the traditional formalism, a word is used to denote certain elements of the world because the word symbolises an object which connects what particular elements have in common. The object that the word symbolises gives the word its meaning. This conception distinguishes three elements: the word, its usage, and the object that the word denotes and that therefore represents the meaning of the word and provides justification for using the word.

The essence of Wittgenstein's criticism of formalism is not to criticise the third element, but to critique the trinary structure as such, and to assert a binary structure: (1) language (words, symbols of language) is (2) in use (no third justifiable element is present here).

However, usage is not understood as a necessary predicate of language; it is for instance obvious that when we put a book on a shelf, the book still contains language but it is not in use at the time. And Wittgenstein would say that a book on a shelf only contains

453 *Ibid.*, § 66. Family resemblance is perceived as a complicated network of similarities overlapping and criss-crossing. Also see: ALEXY, R. *Teisinio argumentavimo teorija,* p. 66.

454 *Ibid.*, § 38.

455 ALEXY, R. *Teisinio argumentavimo teorija*, 2005, p. 66.

456 *Ibid.*, p. 68.

dead symbols. So, binary nature should be understood more specifically as follows: first, there are symbols, then there is usage. When symbols are in use, they become living symbols, language.

Law is not a unique linguistic situation, it is an integrated and specific linguistic phenomenon. Since the usage of language is correct practice by nature, it would be absurd to maintain that language affords a certain degree of licence to judges in their application of law. However, discretion can exist in certain areas of language, but only discretion and not licence.

### J. L. Austin's Theory of Speech Acts

A different contact between language and law in modern linguistic philosophy is analysed through the prism of a system of certain norms. John Langshaw Austin addresses language as a system of *speech acts*[457]. According to him, every time Human Beings speak, they do not just say something, but perform an act of speech as well, and that constitutes a particular action, for instance, assumption of duty[458]. Therefore, an act of speech is also a behavioural act, and any kind of behaviour is an activity regulated by norms. It means that language cannot exist without certain rules that the science of linguistics designs. Therefore, we can approach language as a system of norms, i.e., an activity governed by certain rules. The rules of language must be followed both in creating and in applying law. To be able to build an adequate understanding of language, we have to know its rules.

Both Wittgenstein's 'language games' and Austin's 'acts of speech' are grounded on the concept of rule. Austin does not provide a clear formulation of such rules; he classifies cases when acts of speech may be incorrect[459]. According to Robert Alexy, in the opinion of the philosopher in question, a speech act can be wrong not only because it is logically or grammatically incorrect, but also because it can be 'unhappy' as an act, for instance, when the speaker implies he does not believe it[460].

457 E.g., see: AUSTIN, J. L. *How to Do Things with Words.* Oxford: Clarendon Press, 1963, p. 40.

458 ALEXY, R. *Teisinio argumentavimo teorija,* 2005, pp. 70–71.

459 *Ibid.*, p. 72.

460 *Ibid.*





Stanford Levinson argues that legal language can be described as creative work. The synthesis of conceptions that the words 'language' and 'creative work' represent naturally connects with the notion that the word 'literature' stands to express. Therefore, the first descriptive modus is focused on language as creative work. According to said scholar, even though the text of written constitutions normally aims to maintain the vision of their authors and thus control the future[461], '[t]here are as many plausible readings of the United States Constitution as there are versions of Hamlet'[462]. That is why law can be comparable to literature. Any case in its final form can be understood as a literary story, as well.[463]

Still, legal language is too specific a phenomenon to be reduced to a mere a literary story or an interpretation thereof[464]. The process by which legal language is born is a complex procedural and thinking activity that, inter alia, involves a highly thorough screening of ways to assess the facts and interpret the legal norm and selection of one of them. It is screening and selection that do not have any clear juxtapositions in any practice of literary research.[465] Another significant unique feature of legal language is its consequences. A literary story is not the reason why anyone should starve to death or get fed; become locked up in prison or liberated from it. A literary character is a complete nobody and the way he or she is treated does not have any implications. However, a very real defendant is made of flesh and bone and is completely dependent on the will of the law.

Considering the above, it should be said that even though the processes of creating and interpreting law are defined by a certain degree of creativity, which is also a feature found in literature, there are aspects of law that separate it from the latter in a way that is fundamental.

461 LEVINSON, S. Law as Literature. In LEVINSON, S., MAILLOUX, S. *Interpreting Law as Literature.* Evanston: Northwestern University Press, p. 156.

462 *Ibid,* 177.

463 BERKMANAS, T. Ar lingvistinis neapibrėžtumas užkerta kelią teisės viešpatavimo *(rule of law)* įsigalėjimui? *International Journal of Baltic Law,* 2002, Vol. 1, No. 1, pp. 26–56, p. 31.

464 *Ibid.*, p. 34.

465 HOGAN, P. C. *On Reading Law as Literature.* London, 1998, p. 23.

## EMOTIONAL SIGNIFICANCE OF WORDS AND LANGUAGE OF LAW

Senses are perceived as 'subjective experience of our relation with real-life things and phenomena'[466], and emotions as experiences from satisfaction or dissatisfaction of organic needs, as well as various simple situations[467]. Since, from what was said above, we could state that the term 'senses' is wider than 'emotions' and relates not only to senses driven by reflexes, the word 'sensory' should also be perceived as covering not only the emotional, but the *conative* area of the consciousness as well. The term 'senses' can express not only any instinct, feeling, or desire, but a wish or an objective as well. Therefore, compared to senses, emotions are to be considered more subjective.

Emotions play an important role in legal language, affecting us when we take an oath, reason, testify, declare something. The emotional function has a presence in everyday language as well. That is inevitable, because we use language to express our needs and to obtain satisfaction by affecting the emotions of others[468].

The most common example of a sensory sentence is value judgement[469]. That is the granting of consent or the statement of a contradiction, usually in a generalised form. It expresses an emotional reaction to reality. The tendency to present emotional assertions as instructions is inherent in philosophical, sociological, or jurisprudential work. Most subjects known as political philosophy, political sciences, or theory of law, consist of detail definitions interlaced with value judgements which are usually presented as factual declarations. One of the most frequently occurring examples of mixing an emotional assertion with an instructive statement is the language of birthright, which is nothing but an attempt to express values with terms arising out of instructive declarations.

The emotional function of words concerns the lawyer in three ways. First of all, certain legal rules are expressed with words or designed so as to eradicate or engage emotions of Human Beings with legal savvy. Second, the legal rules employ the emotional function as a tool of social control. Third, particular word combinations are used in rules on the basis of specific situations in which the rules are applied and the effects that the emotions of the Human Beings who apply the rules have on their application.

With this in mind, the rule of law is not an assertion of what actually happened or is happening in the world nor is it a tautology, simile, or definition. The rule of law is value judgement. Law is sometimes construed as a set of instructions. Nouns and verbs that are used may denote instructions, but a sentence is not an assertion of fact, but an expression of wish. Human Beings whose wishes are important in terms of law are judges and law enforcement officers. An assertion that goes 'It is the law, not me who is judging your brother' is but a figurative expression. It is the same as saying 'Even though I am accusing your brother, it is not because I want to see him in prison, but because I want to act by the law.' Therefore, we can say that the rule of law carries an expression of the 'official wish.'

466 LAPĖ, J., NAVIKAS, G. *Psichologijos įvadas*, 2003, p. 166.

467 *Ibid.*, p. 165.

468 FREDERICK, S. *Law and language.* Sydney, 1998, p. 164.

469 *Ibid.*, p. 165.



## SPECIFICS OF LANGUAGE OF LAW

Legal language is defined by a degree of formalism; it has its own unique, unusual style, and uses standard terms and phrases and specific strings and sequence of words to express thoughts, the text is recited in a particular order (chapters, sections, articles, paragraphs of the law, and so on). Despite this formalism, the language of law possesses all of the flaws of language. It cannot be fully protected from polysemy, vagueness, controversy.

Sometimes, it is quite the opposite: the specifics of legal language do not mitigate these flows as much as escalating them. The fact that legal language is abstract, vague, unclear, equivocal, involves generalisable terms, among other things, are what makes us interpret the true meaning of the legal norms and justify their application in a real-life situation. Notably, the text of a law or another source of law is not normally written in the standard, literary language, but in that of law, which involves using special legal terms, specific phrases, applying particular sentence structures, and so on.

The same word or term can have one meaning in the ordinary daily language, and a completely different one in the text of a law or in some other context. For instance, the word 'person' normally refers to the Human Being in ordinary language; however, when used as a generalisation in the text of a regulation such as the Civil Code, it denotes all subjects of legal relationships, both individuals and entities[470]. Besides, in legal language, the gender and number of words often does not differ from that present in the standard language. For instance, some nouns and the gender-inflected pertinent are used only in their masculine (such as 'judge,' 'director,' prosecutor,' and so on) or only in singular ('court,' 'lawyer,' and so on) form. Still, if a standard-language word is used in the text of a law, unless there are sufficient grounds to argue to the contrary, the standard language word must be construed in the way it is understood in the standard language and explained in standard

470 The Civil Code of the Republic of Lithuania, Second Book, *Persons.*

language dictionaries. Only when there is a difference between the standard and the special meaning of a word will we prioritise the latter sense[471].

We should also accentuate the correctness and clarity of the language of sources of law. For Human Beings to live by law, and for any act of disobedience to entail legal amenability, publishing regulations is not enough. They must also satisfy requirements like clarity of regulations, which means that the 'legal regulation set forth in the regulations shall be logical, consistent, concise, comprehensible, precise, clear, and unambiguous'[472]. Ancient Romans already had a provision that said *ubi ius incertum, ibi ius nullum* (an uncertain, vague law is not a law)[473].

Yet sources of law contain many words that are not clear as such. These can be words denoting some characteristics of assessment, which should be interpreted on the basis of the particular circumstances of the case, such as 'gross negligence,' 'justice and prudence, honesty,' 'mandatory relevance,' 'child's interests,' 'misconduct,' and so on. At a glance, using such vague concepts can be seen as a negative thing. This could encourage dishonest Human Beings to interpret them in a way that is contrary to the interpretation of the honest ones. This might not be a constant frequent problem in trials, but it occurs quite often and often has to do with the way lawyers work.

On the other hand, the rule anchored in law has to be universal, meaning that it must cover as many real-life situations as possible so that every action or happening does not call for a specialist norm to be formulated, and the number of gaps in law is kept to a minimum. We therefore have to admit that evaluative terms allow us some flexibility in applying the legal norms, considering the circumstances of a particular case. The court must reveal the content and true meaning of these terms in every particular case to be able to justify the application of the above legal norms to a particular real-life situation.

471 *Ibid.*, Article 1.9(2).

472 The Law on the Grounds of Legislation of the Republic of Lithuania. Official Gazette *Valstybės Žinios*, 2012, No. 110-5564, Article 3.6.

473 E.g., see: BRETZKE, J. T. *Consecrated Phrases– A Latin Theological Dictionary: Latin Expressions.* Collegville, Minnesota: Liturgical Press, 2013, p. 247.



## THE RELATIONSHIP BETWEEN LAW AND LANGUAGE

The relationship between law and language is rather important because law, just like any other institute, is also a product dependent on language. Even though there are many types of activities such as politics, medicine, international trade, journalism, ethics, defence, manufacturing, finances, etc. that would have a completely different function if it were not for language, the connection between law and language seems to be somewhat special. To perceive it, we need to take a closer look at the different theories of law and philosophy.

Language is the main tool of social control. Glanville Llewelyn Williams has noted that lawyers usually tend to consider law the only, or at least fundamental, tool of social control, forgetting that law in a sense is but a special chapter of language, and while law has limited application, language is ubiquitous. Words that we hear when we are little, such as 'decency,' 'manners,' 'justice,' promote socially desirable behaviour and inhibit socially unacceptable acts (later on, the words 'success,' 'crook,' 'patriotic,' to name a few, perform much the same function). Therefore, in the opinion of some authors, law and its verbal apparatus merely constitute specific application of language as a social control tool with its own particular features.

Another feature that makes the relationship between law and language so significant is that law is a tool of time and spatial affinity as often as not; it is governed by past facts and controls future events, therefore language plays a highly important role in certain situations, a role that is often addressed by pragmatics, a separate branch of linguistics.
Due to these reasons, Human Beings who make judgements here and now try to project them into a farther, less familiar future. They do that by relying on the general nature of language, the ability of other Human Beings to understand what is being said now in the future, the possibility to say what will apply in many situations. Since Human Beings making judgements can only do so to the extent permitted by language, we can say that the effect of language on the process of law is the strongest, much stronger than in other human interactions.

Language is even more important to lawyers and judges, Human Beings whose professions often involve linguistic failures. Many aspects of language can be farther more relevant to those who analyse pieces of literature than those who read them. For instance, most of the aspects of language have much more significance to lawyers and judges who adjudicate disputes directly rather than the legislator and the citizens who are only able to see the outside of law, a social regulator with a much lower degree of controversy. Lawyers who focus on linguistic matters are called pathologists or surgeons of the legal system by many authors, finding and removing flaws in legal regulation that come expressed with linguistic tools.

Studies of the vagueness of language originate in the US, where the majority of disputes are settled in courts, which enforce the bigger part of the general national policy. There is another possible explanation to this phenomenon: many US theoreticians of law are involved in the practice and preparation of practices much more than their opposite numbers in other countries. That is why US theoreticians complain about the absence of linguistic determination the most, saying that it is far less defined than one should expect. Examples of such theories are the theories of R. Dworkin, Karl Llewellyn, the American school of legal realism, Critical Legal Studies (CLS), H. L. A. Hart's teachings that the country was quick to adopt.

Linguistic philosophy, with Wittgenstein as its main ambassador, linguistics, semiotics, rhetoric, semantics, pragmatics, literary studies, and theory of communication – every discipline teaches us something about language, and what it teaches us may be successfully employed for the purposes of thinking about law. For that reason, the relationship between law and language cannot be perceived as seamless. The lack of coherence should not come as a surprise either; due to the vast nature of the subject at hand, it is inevitable. Therefore, speaking about law and language is difficult purely because these two areas can hardly be separate from one another and are easy to mix into one whole.

### Law and Language: the Historical Motive

Scientific literature suggests that a consistent, clear, or systematic assessment of the relationship between law and language is important[474]. Whereas developing incidental aspects that the modern jurisprudence has been developing in the direction of normative linguistics while investigating the 'grammar' of law or the philosophy of ordinary language, highlighting the semantics of rule application, were developed only to prove or defend the positivist approach that law is a defined system of notional (legal) meanings[475], is not sufficient. This insufficiency exists because the positivist approach allows law to be perceived as an internally defined system that usually is explicit when applied[476].

According to Peter Goodrich, lawyers and theoreticians of law have totally forgotten the historical and social characteristics of legal language and, instead of addressing the factual evolution of the legal linguistic practice, stalwartly defended deductive models of law application, where language is assigned the role of a neutral instrument geared

474 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* 1984, Vol. 11, No. 2, p. 173.

475 *Ibid.*

476 *Ibid.*



towards aims intrinsic to the internal development of legal regulation and the discipline of law[477]. Thus, the possibility to analyse law as a specific stratification, or 'registry,' of an actually existing language system was consistently removed from the field of law studies and the heuristic value of the texts of law as historical products created by rhetorical criteria was being correlatively abandoned as well.[478]

As can be seen from the situation at hand, the goal is for law, as a linguistic register or literary genre, to be described from a linguistic or discursive point of view, based on systemic matches or prioritisation of legally acceptable meanings, accents, and connotations, and systemically excluding alternative or competing meanings, accents, forms of word combinations, and discourse, as alien, inadmissible, or threatening[479]. In this context, we should also consider that the usage of legal language, just like any other language for that matter, is a social practice, that its texts will carry a brand of that practice or an organisational foundation, and that, in addition to those things, just like discourse or the genre, legal discourse, too, reflects the political, sexual, or other types of beliefs of the period[480].

To be able to understand the coherence of these processes of linguistic and semantic inclusion/exclusion, we have to analyse the problem of the relationship between law and authority and find out the inherent methods of legal expression as social discourse to be regarded as hierarchical (stratified), authoritarian (removed from the target), monologic (evenly accented, socially flat-toned), and foreign (materialised) usage of language[481]. Against this background, underpinning the concept of the newly developing link between law and language, Goodrich reviews that link on the basis of a vast historical scheme.

### Rhetoric and Exegesis

The early tradition of court rhetoric did not make any distinction between legal studies and the general forms of the usage of language as a means of persuasion and stimulus to take action[482]. Scientific literature suggests that the prevalent quality of classical (Ancient Greek and Early Roman) rhetoric was the unusually large volume of this discipline and subject of research: rhetoric was considered to include the studying of all forms of

477 *Ibid.*

478 *Ibid.*

479 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206, pp. 174–175.

480 *Ibid.*, p. 174.

481 *Ibid.*

482 *Ibid.*, p. 175.

public language, its ultimate form being the highly detailed, elaborate analysis of the suitability of language for its context (audience) and the functions of language (political, legal, ideological, and other kinds of language practices)[483].

Aristotle pointed out that rhetoric may be defined as the faculty of observing in any given case the available means of persuasion and that is why we say that, in its technical character, it is not concerned with any special or definite class of subjects.[484] The same goal is pursued with the legal norm aiming to affect an unlimited number of targets. Cicero regarded rhetoric as studies of useful language; a language suitable both for the context of the audience, and the probable convictions of the audience; a language that is capable of persuasion in its relevance to practice and the immediate needs of the society which the rhetorician serves[485]. This shows that the first rhetoricians considered rhetoric a study of language as action; a study of language that could persuade with its systematic use of linguistic and reasoning tools rendering a discourse relevant and effective, as well as with 'eloquence /…/ that enables [the listener] not only to know what needs to be done, but do what he knows needs to be done as well'[486]. This is aligned with legal reasoning, which, depending on the situation, has the goal of convincing particular targets in explaining legal norms aimed at a very broad range of subjects.

According to Goodrich, rhetoricians of the period studied philosophy, dialectics, theories of reasoning and substantiation, politics, law, language, and social psychology of the potential audience[487]. In each of those areas, they were moved by an interest both pragmatic and functional: rhetoricians studied the suitability of arguments for specific texts (Lat. *inventio*), the methods by which they were stated (Lat. *dispositio*), and the appropriate style of their presentation (Lat. *elocutio*)[488].

Legal studies really were not the only branch of the discipline of rhetoric, and legal arguments were not distinguished or privileged in any respect compared to other arguments[489]. The studies of linguistic tools and methods of reasoning from the rhetorical point of view applied to legal language to the same extent as to any other language: all discourses were equal and had their organisation measured by similar criteria. In short, history and work were a source of topics for speeches and reasoning, with rhetoric representing the

483 *Ibid.* pp. 173–206, p. 175.

484 ARISTOTLE. *On Rhetoric.* New York; Oxford: Oxford University Press, 2007, pp. 37–38.

485 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society*, Vol. 11, No. 2, 1984, pp. 173–206, p. 175.

486 *Ibid.*, see St Augustine, *On Christian Doctrine* (1956) 323; Cicero, *Topics* 166–169a.

487 *Ibid.*

488 *Ibid.*, p. 176.

489 *Ibid.*



analysis of suitability and conformity of language and reasoning used for the institutional and political purposes of society in general[490].

Still, at the same time the greatest practitioners of rhetoric admitted that rhetoric is dangerous, that probability does not equal truth, that persuasion does not equal accusation, and that analogy (metaphor) does not equal essence (necessity/indispensability)[491]. The subject of rhetoric was too wide and the discipline itself was soon to perish in the wake of the collapse of the republic and democratic institutions whose practices were tied with rhetoric. Even in the time of Aristotle, the dominating trend of linguistic research was the aim to subordinate language to logic and to replace the studies of speech as discourse or social parlance with analysis of analytical language (rules of demonstration grounded on unambiguous and necessary meanings)[492] and an appropriate amount of focus on written texts. The Latin language became the official language of Medieval Europe and philology; studies of dead languages became a predominant method of language studies from the cultural point of view for the purposes of formulating a 'universal grammar' or the language of truth[493]. Contrary to the aforementioned rhetorical concept of language[494], language was studied as a given, as static and written; language and its meaning were perceived like something that is readily available or exists somewhere 'on the other side' and simply awaits an understanding from a patient and passive philologist or exegete to reveal the true sense of the text considered unique in its own right, premeditated and pre-existing, a reflection of the state of things[495].

We may say that the role of rhetoric has diminished as a result of it becoming increasingly subordinated to logic. Like never before, rhetoric was highlighted as a secondary order of language (word inhabiting a borrowed home), one step behind normative linguistics and the correspondent philosophy of gnosticism (knowledge) postulating the original makeup of language, where the meaning of words was unique and real[496]. In line with the exegetic tradition, was meaning perceived as given, monologic, which meant that it has a source, power, singular authorship giving a primeval sense to it, and that its 'will' can

490 *Ibid.*

491 *Ibid.*, p. 176 see: Aristotle, *Methaphysics* (1957) 4 1006 b 13.

492 ARISTOTELIS. *Metafizika. Estetikos istorija:* antologija. Vilnius: Pradai, 1999.

493 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206, p. 176.

494 Language is perceived as an act, and its meaning, as an effect of rhetorical practice.

495 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206, p. 177.

496 *Ibid.*

be revealed analytically or exegetically[497]. Obviously, religious and legal texts were considered the paradigmatic forms of that meaning[498].

As we begin examining the dominating paradigm of the contemporary positivist jurisprudence linguistic analysis, we can note that the greatest historical legal systems that had evolved to an ultimate degree would increasingly employ written texts and officially declared exegetic or interpretational control of their own social practice with reference to such texts[499]. The reception of the Roman law in Medieval Europe of the 11th–12th century that in many respects became the backbone of the modern legal tradition, was a typical textual initiative. The first law school set up in Bologne was engaged in studying manuscripts, the newly discovered *Corpus Iuris Civilis*[500]. Perfected by glossators thanks to the studies of the Justinian code, the legal science technique was highly philological; it presupposed absolute (even Biblical) power of civil law texts. In short, the first law to be studied under the Western law tradition, was not national but rather dogmatic Roman law that can be found in many texts. The texts are perceived as a finished and solid corpus of the doctrine, as an embodiment of purpose and cause, as the 'source of all deductions'[501].

Dogmatic crises and radical legal changes were often accompanied by an increasing degree of non-conformity of written law or withdrawal of legal terms from circulation (when various codifications become relicts due to the established controversial practices), it is nonetheless interesting to observe the continuity of the problem of textual interpretation[502]. Codification, or, if we are to be less formal, written law, was always the object of an elitist, hierophantic, and revelatory culture of interpretation, albeit to a different degree of conformity to the practice or reality[503]. The convoluted and closed system of disciplinary and dogmatic instruments, the various forms of traditional exegeses and traditional and truly contemporary hermeneutics, as Goodrich points out, were developed early and precisely to protect and preserve the sanctity and invulnerability of the written word as a social control system: 'One never maintains a dialogue with law, one makes it talk'[504].

497 *Ibid.*

498 *Ibid.*

499 *Ibid.*

500 BERMAN, H. J. Religious Dimensions of the Western Legal Tradition. In *The Contentious Triangle– Church, State, and University: A Festschrift in Honor of Professor George Huntston Williams.* In PETERSEN, R. L., PATER, C. A. Kirksville: Truman State University Press, 1999, p. 282.

501 GOODRICH, P. Law and Language: An Historical and Critical Introduction (1984). *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206, p. 178 see P. Vinogradoff, Roman Law in Medieval Europe (1929) ch 2, 4.

502 *Ibid.*

503 *Ibid.*

504 *Ibid.*



## Basics of Linguistic Philosophy

Linguistic philosophy has made a tremendous impact on studies of language, its usage, and structure. Therefore, for the purposes of rational legal reasoning and rational organisation of legal language, we have to follow certain rules of the philosophy of language and linguistic theory. After all, the function of both language in general and language of law in particular is not only to describe a particular phenomenon, but to regulate and control human behaviour as well. Legal philosophy recognises linguistic philosophy as the root of legal reasoning[505], therefore, to better understand its basics, we have to look at the schools of linguistic philosophy.

### *Hermeneutics*

When it comes to legal reasoning, several directions of linguistic philosophy become important. First of all, we should mention hermeneutics (Gr. *hermeneutike* < *hermeneud* **–** I am explaining, reciting[506]). It is a direction of linguistic philosophy that addresses understanding and its conditions[507].The roots of hermeneutics go back to ancient times, when the different civilisations that existed during the period used religion to explain what was inexplicable[508]. Hermeneutics also came in handy in the times of antiquity to interpret pieces of literary work like Homer's *Odyssey* or *Iliad* appeared[509]. This school of philosophy was critically affected by theology's interpretation of the Holy Scripture (exegesis[510]). Still, the concept of hermeneutics only became established in modern times: first of all, as a practice and tradition to interpret texts, later as a philosophical tradition of understanding life and human existence in general[511].

505 MIKELĖNIENĖ, D.; MIKELĖNAS, V. *Teismo procesas: teisės aiškinimo ir taikymo aspektai,* p. 89.

506 TIDIKIS, A. *Socialinių tyrimų metodologija.* Vilnius: Lietuvos teisės univeristetas. 2003, p. 217.

507 The Dictionary of International Words (A–K). By V. Vaitkevičiūtė. Vilnius: Žodynas, 1999, p. 194. Hermeneutics are believed to have been pioneered by Friedrich D. E. Schleiermacher. For instance, his comments on the methods of textual interpretation (objective (grammatical) and subjective) are very relevant to legal reasoning. 'When we apply the objective (grammatical) method, the text is understood on the basis of its connection with the whole of language, and when the subjective method, considering the individuality of the author which he expressed in the process of his creative work.' (KINZMANN, P.; BURKARD, F. P.; WIEDMANN, F. *Filosofijos atlasas.* Vilnius: Alma littera, 1998, p. 183).

508 TEKORIUS, A. Hermeneutika: kalba–tekstas–ištarmė (I). *Literatūra ir menas,* 2016, No. 3573, [interactive]. [accessed on 5 September 2017]. Online access: <http://literaturairmenas.lt/2016-06-24-nr-3573/3348-mokslas/5212-alfonsas-tekorius-hermeneutika-kalba-tekstas-istarme-i>.

509 *Ibid.*

510 ANZENBACHER, A. *Filosofijos įvadas,* p. 58.

511 TEKORIUS, A. Hermeneutika: kalba–tekstas–ištarmė (I). *Literatūra ir menas,* 2016, No. 3573, [interactive]. [accessed on 5 September 2017]. Online access: <http://literaturairmenas.lt/2016-06-24-nr-3573/3348-mokslas/5212-alfonsas-tekorius-hermeneutika-kalba-tekstas-istarme-i>.

Legal reasoning is very concerned with one of the provisions of hermeneutics, which postulates that the interpreter is a creator who, by interpreting the subject in his own way, creates something new[512].This applies to interpretation of law as an element of legal reasoning. Often subjects of interpretation of law explain the applicable legal norm the way they understand it. There are various reasons behind it: the desire to win the case, an honest mistake, lack of knowledge, and so on. Whereas in presenting an unbiased and well-reasoned explanation in its judgment, the court often modifies the applicable legal norm, for instance, by expanding or constricting its scope, or even designing a basically new legal norm. The court explaining in its judgment the applicable legal norm rather than restating it word for word produces a creative result of application of law of a different kind of quality. In this regard, the case-law as the product of interpretation of law should be considered a source of law.

Another important postulate of hermeneutics has to do with volatility of interpretations. Interpretation of facts or phenomena is grounded on certain known assumptions, certain preconceived understanding; however, this preconceived understanding, changes historically[513]. It means that what was obvious 20 years ago may cause some doubt today. It is therefore no wonder that in the long run, the results of interpretation of the same phenomenon may begin to differ. In other words, volatility of interpretations may be rooted in the relativity of human experience and cognition.

Even though in hermeneutics the shift in interpretations connects mostly to the richness of cognition, it is not the only lever to cause that shift. We cannot disregard the axiological (value) theory of philosophy, which argues that interpretation is defined by value-based attitudes of the interpreter. The shift in interpretation is driven not only by objective cognition, but by an established subjective scale of values as well (that scale can often deviate from the established system of values). Therefore, by not disagreeing with the postulate of shift as formulated by hermeneutics, the philosophy of values adds one more aspect to interpretation.

Wittgenstein argued that 'all that we see, could be different. All that we can describe, could be different as well'[514]. This statement of hermeneutics regarding interpretations being prone to shift is backed up by the development of the humanities and social sciences. For instance, today we can see that the interpretation and assessment of some historical facts and economic theories has made a complete about-face from what it was

512 ANZENBACHER, A. *Filosofijos įvadas,* p. 58.

513 *Ibid.*, pp. 58–59. The aspect in question emerged in the 19th century, when the focus of hermeneutics increasingly shifted towards understanding historicism (TEKORIUS, A. Hermeneutika: kalba–tekstas–ištarmė (I). *Literatūra ir menas,* 2016, No. 3573, [interactive]. [accessed on 5 September 2017]. Online access: <http://literaturairmenas.lt/2016-06-24-nr-3573/3348-mokslas/5212-alfonsas-tekorius-hermeneutika-kalba-tekstas-istarme-i>).

514 VITGENŠTEINAS, L. *Rinktiniai raštai,* p. 64.



10 or more years ago. The same can be said about the doctrine of law. For example, for a long time in Lithuania nobody doubted the necessity for the judge to play an active role in civil proceedings, or about the right of the prosecutor to file a cassation protest or a protest by supervisory procedure. Yet with the passage of more than two decades, these matters are interpreted differently[515].It is the perception that our preconceived understanding is conditional that allows us to be more flexible in assessing the case-law, and to consider the realities of life in creating, interpreting, and applying law; at the same time, it prevents the formalism and lethargy of courts to overwhelm resolution of the real-life problems of Human Beings.

Analysis of foreign case-law also confirms that legal reasoning and interpretation of law is not something that remains steady. This is illustrated by an example of Great Britain, when the House of Lords ruled in 1966 that they are not bound by their previous precedent and can deviate from it[516].

However, this aspect does not mean at all that the case-law should be allowed to be chaotic; it must and can be stable. One of the purposes of case-law, and law in general, is to seek stability. Of course, it depends on the degree of stability in the economic, political, and cultural life of society. Stability of the political and economic regime of a society translates in the stability of its legal system and case-law. Changes in the case-law are a rare occurrence in this kind of society. For instance, we could easily find examples in states that follow the general law tradition of courts acting on precedent that was established a 100 or more years ago. The shift in the case-law, hence in legal reasoning as well, is driven both by revolutionary changes in the economic and political life of the society, and the dynamic nature of law as well.

Even if the society is stable in every respect, its law is prone to change. As a case in point, many of the norms (especially those pertaining to family) of the 1804 French Civil Code have been modified or removed altogether[517]; it is therefore natural that the French case-law followed in the footsteps of these modifications. Considering the above, it is small wonder that the Constitution of the Republic of Lithuania can also be subject to improvement based on the shifting perception of justice.

The postulate of conditionality of interpretation has further significance because most legal reasoning consists of interpretation of written (statutory as often as not) law – the text of a law or another regulation. Both the philosophy of language and linguistics

515 For instance, see the Ruling of the Constitutional Court of the Republic of Lithuania dated 14 February 1994 *On the compliance of Article 53 of the Code of Civil Procedure of the Republic of Lithuania and Paragraph 3 of Article 21 of the Law on the Prosecutor's Office of the Republic of Lithuania with the Constitution of the Republic of Lithuania,* Official Gazette *Valstybės Žinios,* 1994, No. 13-221.

516 JAMES, P. S. *Introduction to English Law.* 12th ed. London: Butterworths, 1989, p. 18.

517 E.g., see: BLANC-JOUVAN, X. Worldwide Influence of the French Civil Code of. 1804, on the Occasion of its Bicentennial. Celebration. Cornell Law School Berger International Speaker Papers. Conference material, 2004, p. 1.

recognise that the sense of any written text is not constant. It may shift depending on the situation, context, human perception, or other reasons. The text does not have one right, constant meaning, for it is we who create it as we read it under certain conditions and in a particular aspect,[518] interpreting it in our own way. Therefore, in creating or interpreting one or another legal norm, we have to consider many things that have relevance for the purposes of determining its true meaning, such as the historical conditions on which it was adopted, its place in the legal system, in the branch or institute of law, the legislator's intentions in adopting it, and so on.

By analysing interpretation as a process of cognition, linguistics and linguistic philosophy have formulated the so-called *theory of hermeneutic circle.* The hermeneutic circle is a 'model of the process of understanding and interpretation based on the rule that the whole is understood with reference to its individual elements, and an element, to the whole'[519]. Interpretation, just like cognition, moves in a kind of circle, from what is general to individual things, and vice versa, for a particular part of the subject of cognition can only be perceived if we consider it as a whole, and it can only be grasped by realising individual parts of the subject of cognition. This kind of interpretation can occur only if people involved in it heed each other's arguments and claims and listen to their statements.

It is also said that the 'concept of the hermeneutic circle means that in describing a hermeneutic understanding, one should not refer to genetic relations and priority'[520]. Philosopher Martin Heidegger tied the concept of the hermeneutic circle to the 'philosopher's attention to the historical nature of the situation of understanding and interpretation, the finite nature of the Human Being in terms of the history of existence'[521]. Hence, the interpreter must critically regard popular concept, beware the limitations of thinking habits, and understand his preconceptions. This means that rational legal reasoning can only take place if we follow certain rules that guarantee a possibility for everyone involved in the legal discussion to recite their arguments and a right to critique the arguments of another party to the discussion, provided that the court only passes its judgment after it has heard everyone involved in the legal discussion and considered their arguments.

There is another aspect of linguistic philosophy and linguistic studies that is important for legal reasoning, and that aspect is the difference between the living language and the special language (the vocabulary)[522]. One defining characteristic of legal reasoning is that even though it consists of ordinary language, subjects engaged in it operate specialist, legal terms and concepts, i.e., use specialist – legal – language. Such evident tangle

518 VILIŪNAS, G. *Nuo ko pradėti. Teksto analizė mokykloje.* Vilnius: Alma littera, 1998, p. 10.

519 MERŽVINSKAITĖ, B. *Literatūros teorijos temos.* Medžiaga bakalauro studijoms. LKMA, 2013, p. 16.

520 MERŽVINSKAITĖ, B. *Literatūros teorijos temos.* Medžiaga bakalauro studijoms. LKMA, 2013, p. 16.

521 *Ibid.,* p. 17.

522 HJELMSLEV, L. *Kalba. Įvadas.* Vilnius: Baltos lankos, 1995, pp. 155–156.



of different types of language is inevitable considering the specific subject of cognition in the court proceeding, the matters of law and fact. Legal reasoning involves interpretation of the text of a law or another source of law written in legal language rather than a piece of fiction. Facts are also argued with a specific (legal) aim in mind, i.e., seeking that a particular judgment be made. As we can see, in addition to those outlined above, one premise for the rationality of legal reasoning is the need not only to follow the rules of spoken language, but also to consider the specifics of legal language.

The legal discussion cannot be reasonable if one of the parties uses the vocabulary of the ordinary language, which the other operates categories of law. In that case, the parties to the discussion basically are speaking different languages. Once we recognise that, we can make yet another conclusion: rational legal reasoning cannot take place without specialist legal knowledge. Legal conclusions grounded on legal arguments can only be formulated by a professional lawyer. This explains why legislation in many countries provides that even civil cases may only be conducted by parties in all courts (or courts of appellate (cassation) instance in some countries) with their lawyers present, and Human Beings who want to become judges must satisfy high qualifying requirements.

Considering the above, a conclusion can be drawn that in spite of law's continued quest for stability and predictability, a legal text, just like any other text, cannot have one and the same meaning at all times. Its meaning can change as a result of the shifting perception of the interpreters, changing circumstances, special language, and other factors.

### Connection between Linguistics, The Science of Law, and Legal Semiotics

The connection between linguistics, the science of law, and legal semiotics can be addressed in the sense of the contemporary science of law and positive jurisprudence. In this way, we can analyse their potential semiotics and the historical and sociological meaning of linguistic assumptions. Scientific literature suggests that the current status of structural linguistics, a specific degree that has to be transcended for the 'pure,' or positivist, theories of law to lose their scientific standing, the usefulness of semiotic interpretation of legal logic are all disputable matters that cannot be interpreted in an unambiguous way.[523]

Both modern linguistics, and contemporary science of law bear a historical similarity. As sciences, they were born in the same place and at the same time (originating in Middle European neo-Kantianism and philosophical positivism in the last quarter of the 19$^{th}$ century)[524]. The product of the development of said philosophical schools was

523 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* Vol. 11, No. 2, 1984, pp. 173–206, p. 178.

524 *Ibid.*

shared development of language and law and the systemisation of these disciplines by the philosophical model of normative science where the subject of analyses was the ideal systemic definition rather than actual language and behaviour[525].

The origins of linguistics as a science are tied with the strife between two concepts: grammarians (who studied the Indo-European philology and argued that phonetics where the unity of linguistic forms and laws, since all languages had evolved from a single mother-tongue) and creationists (who argued that language had shifted and evolved driven by the subjective innovations and transformations on the part of its speakers as such)[526]. The latter group is highly important for the purposes of linguistic analysis as they maintained that it should not be limited in any way, meaning that the appropriate linguistic methods are psychological, sociological, and historical[527].

This discussion has led to famous Swiss structural philosopher and linguist Ferdinand de Saussure developing his own theory that belittled the relevance of the problem of discourse in his book *A Course in General Linguistic Studies* (Fr. *Cours de linguistique générale*). He returned to the dominant, philological, and exegetic concept of language[528]. Inspired by the model of phonetical laws of fluctuation of sounds, de Saussure studied language through neo-Kantian transcendent logical assumptions. He concluded that the field of linguistics should be defined *a priori* as an investigation of 'forces that continuously and globally affect all languages.'[529] The linguistic foundation as identified by de Saussure was the difference between language as a system (Fr. *langue)* and the usage of language (Fr *parole*)[530]. He considered *langue* to be a code or a set of codes that enables a speaker to design *parole,* a specific message[531].

There are several smaller differences attached to this underlying divide. A message is individual, and its code is collective (de Saussure, who had fallen under a significant degree of influence from David Émile Durkheim, believed linguistic studies to be a branch of sociology). A message and a code have a different relation with time. A message is a temporary event that belongs to a sequence of events constituting the diachronic dimension of time, while a code exists in time as a set of simultaneous elements, a synchronous system. A message is intentional; it has its owner. A code is anonymous and non-intentional. In this regard, it is subconscious, not in the sense of subconscious desires or impulses under Sigmund Freud's metapsychology, but as a structural and cultural subconsciousness outside of the libido area.

525 *Ibid.*

526 *Ibid.*, p. 179.

527 *Ibid.*

528 *Ibid.*

529 SAUSSURE, F. *Bendrosios kalbotyros kursas.* Vilnius: Vilniaus universiteto leidykla, 2014.

530 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206, p. 179.

531 *Ibid.*, pp. 178-179.



It is very important to note that a message is arbitrary and incidental, and code systemic and obligatory to a particular linguistic community. This juxtaposition is reflected by the kinship of code and scientific research, especially bearing in mind the science of word which highlights an almost algebraic level of combinational opportunities that are typical of finite structures of discrete beings (the phonological, lexical, and syntactical system). Even though *parole* cannot be described in a scientific sense, it still falls within the scope of many sciences, acoustics, physiology, sociology, and history of semantic development included. *Langue* is the subject of just one science describing the *synchronous systems* of language. This overview of de Saussure's fundamental valid dichotomies alone is enough for us to see why the progress of the science of language required that message be bracketed for the sake of code, event for the sake of system, intention for the sake of structure, and the arbitrary nature of an act for the sake of the systemic character of combinations made in synchronous systems[532].

The eclipse of discourse intensified further as a result of the attempt to deploy the structural model outside of the domain of the pure linguistic studies where it had first appeared, and the gradual realisation of theoretical requirements stemming out of the linguistic model as a structural model. The transfer of the structural model into different fields bore testimony to the essential theoretical postulates providing the basis for structural linguistic studies and semiotics in general having been realised. The structural model is defined and described by the whole of these postulates in particular.

*First of all,* synchronous investigations should precede any diachronic research, because systems are more conductive to understanding than change. After all, change at best is a partial or total shift in the state of a system. Therefore, we should look into the history of change when a theory describing the synchronous states of a system has already been established. This postulate attests that there is now a new type of understanding that is the direct opposite of the 19th century historicism.

*Second,* the structural method regards paradigm as a finite unit of discrete beings.

*Third,* none of the beings that constitute the structure of such a system has a spontaneous meaning; for instance, the meaning of a word arises out of its juxtaposition to other lexical units within the same system.

*Fourth,* all relationships with respect to the system in such finite systems are immanent. This makes semiotic systems 'closed,' which means they are not connected to the external, non-semiotic reality. This postulate is implied by de Saussure's definition of sign. A sign is not defined by its external connection with an object (this type of connection would imply a dependence of the science of language on the theory of non-linguistic

532 RICOEUR, P. *Interpretacijos teorija: diskursas ir reikšmės perteklius.* Vilnius: Baltos lankos, 2000, p. 15.

beings) but rather by the contraposition of two aspects coexisting within the scope of one science (that of signs). These two aspects are the *significant* (e.g., a sound, a note, a gesture, or any other tangible expression), and the *significate,* the distinctive value in the lexical system. The significant and the significate open a window for two different kinds of analysis, phonological (in the case of the former), and semantical (in the case of the latter). However, only when used in combination do they constitute a sign and become more than just a sign of language but, when given a broader application, a criteria of beings of every semiotic system that can be defined by 'weakening' it.

This last postulate alone is enough so that we can describe structuralism as an aggregate type of thinking unlimited by any technical matters of methodology. Language is no longer a mediator between thoughts and objects. It creates its own world where contrapositions and differences that constitute the system interact and every being points only to other beings within the same system. In short, language is no longer seen as a 'form of life' (as Wittgenstein would put it), but as a spontaneous system of internal relationships. At this point, language has vanished as discourse.

A similar type of dualism can be observed in the origins of the positivist legal science. Despite disciplinary differences, their polemic and pragmatic context is comparable. On the theoretical level, it is indeed very noticeable that legal analysis has always incurred a problem such as the difference between the system and the actual expression of language with words. Between the conception of a code and its meaning formulated in the process of applying and implementing the code.

This difference has been given varying descriptions, as a contraposition between the legal system and specific application of law in court, between the formal action of the legal norm (i.e., the norm is not repealed) and its legal meaning, between the norm and its wilful discretionary application in a proceeding or in practice. One of them seems rather objective (deductive), the other one, subjective and often relating to a high degree of discretion[533]. The more specific, historical context of the pure theory of law by Kelsen is comparable to the context of structural linguistics. For instance, for fear of excessive creationist theories of law, Kelsen suggested bringing back the normative analysis model of law which had already been anchored by Kant himself: law had to be studied in a systemic context as a grammar and hierarchy of norms and a structure: 'law is order and therefore all legal problems must be solved as problems of order. In that way, the theory of law becomes a precise structural analysis of positivist law, free from any ethnic, political judgement'[534]. Kelsen's mandatory condition of legal analysis as a normative science is the transcendental

533 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206, p. 180.

534 *Ibid.*, see KELSEN, H. P. T.L. 191–92. COHEN, J., The Political Element in Legal Theory, Yale Law Journal, 1978, 88 1; RAZ, J., The Concept of a Legal System (1980) p. 95 ff; HARRIS, J. W., Law and Legal Science (1979).



logical presupposition (the ground norm[535], Germ. *Grundnorm*) of any legal system.

Legal grammar is basically the grammar of written language, as well as an analysis of the formal restrictions of legal sense. Sense here should be perceived in subjective, logical terms as a syntax or hierarchy of authorisation that establishes the effective norm or *must* provide an objective, externally specific meaning of the Human Being's behaviour[536]. If we were to remember de Saussure's divide between *langue* (that what is real) and *parole* (an incidental thing), we could note that Kelsen draws a similar line between the legal effect of the norm (that what is real) and the legal act of will (an incidental thing), or between the positive law and judicial application of the legal norm[537]. de Saussure's concept of the linguistic system (a code or semiotics of linguistic laws) can be matched against Kelsen's grammar of the legal structure detail for detail, just like the legal communication code or semiotics can be perceived as an objective course of human behaviour based on the syntax of specific legal meanings, or 'pure' legal 'signs.'[538]

Another opportunity to study language and law came from semiotics. It deals with the internal coherence of the object of expression, or the immanent logic of a text[539]. The defining characteristic of post-Saussure semiotics is the development of many metalanguages or secondary descriptive semiotic theories[540]. Analysis of sign and code became a field of continuous development, and the contexts of its application were expanding. Literature, cinema, psychoanalysis, law, theology, and aphasic disorders; that is but a portion of the fields and disciplines that have significantly benefited from semiotics[541].

As a case in point, we can point to a typical analysis performed by Algirdas Julius Greimas. First of all, the development of the form of semiotics that we are discussing is expressed with signification of the linguistic system by building various binary structural oppositions. These are principled oppositions, such as paradigm (choice) and syntagma (combination), denotation (direction) and connotation (field of application), metaphor (similarity) and metonymy (association)[542]. Oppositions are general, they improve the investiga-

535 *Ibid.,* see I. Kant, Critique of Pure Reason (1897) 503; H. Kelsen, G.T.L.S. 434–35; W.J.? 262; P.T.L. pp. 7–18, pp. 72–75, pp. 196–200.

536 *Ibid.*, p. 181.

537 *Ibid.*

538 *Ibid.*

539 Semiotics (gr. *semeiotike(techne)* < *semeion* – sign, attribute), semiology is a science dealing with signs and their systems, as well as natural and artificial language as systems of signs from the semantic, syntactic, and pragmatic aspect (*The Dictionary of International Words* by V. Kvietkauskas (executive editor), A. Kinderys, V. Viluveitas. Vilnius: Vyriausioji enciklopedijų redakcija, 1985, p. 442).

540 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206, pp. 181–182.

541 *Ibid.*, pp. 181–182.

542 *Ibid.*, p. 182.

tion of a sign by the rules that govern the operation of the sign in any denotative system, does not matter, which: language, literature, subconsciousness, or law. Different denotative systems can be simply separated and defined using their own intrinsic methods of demarcation. For instance, by stating that the legal discourse analysed under contemporary positivist self-definition is the prevalent denotative and metonymic system[543].

The above statements also point to an important divide between semiotics and semantics that directly affects the opposition of the linguistic system and the discourse.[544] In terms of semiotics, the distinction of semantics does not carry much significance as the dominant trend means that the two categories are joined into one overarching semiotic and synchronous concept of the linguistic system[545]. A semiotician does not deal with the dimensions of subjective historic, social, or diachronic categories like meaning or discourse. That is why in his analysis of the semiotics (syntax, narrative grammar, and internal semantic structure) of specific discourses, Greimas consistently builds binary oppositions within the semiotic and notional systems of denotation, narrative, and sense[546].

According to Greimas, a legal text should be examined as an example of a pre-designed structural code. To that end, the following tiers are identified (on the basis of an immanent analysis of the text in question):

1. linguistic code (legal language is a species of the ordinary language);
2. legal code (the norms and interpretational procedures of the legal system are investigated as grammar);
3. legal assessment (the language of verification and operation of law)[547].

Such definitions on the part of Greimas (like the definition of legal grammar or legal language as a form of logic) improve, but do not repudiate Kelsen's theory of legal syntax[548]. That way, the existence of legal grammar takes on the form of transcendent logical presupposition of any legal system. It is said that the legal code, 'the impression of the entirety of legal formulation of thoughts could not exist for reasons other than the original performative act' or the presumed constitutional promulgation[549]. If we are to define legal practice ('production of law, new legal rules, and denotations'), it should be perceived as verification of language expressed in the practical form of the existence of jurisprudence and legal procedures of concretisation[550].

543 *Ibid.*

544 The very first analysis of this divide was performed by French linguist Émile Benveniste.

545 *Ibid.*

546 *Ibid.*

547 *Ibid.*, see GREIMAS, A. J. *Semiotigue et Sciences Sociales,* Paris, le Seuil, 1976, pp. 90–94.

548 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206, p. 1.

549 *Ibid.*

550 *Ibid.*



The fine points of this linguistic analysis of Greimas do not alter the essence but only provide some linguistic sophistication and precision. In some sense, they mirror the apotheosis of positivism by enlarging it with a new level of descriptive metalanguage[551]. This metalanguage took shape thanks to the prevalent opinion about the integrity and exclusivity of legal language. The unique (specific) quality of legal discourse is its ability to 'transform' and 'translate' (correct and validate) the ordinary language and ordinary meaning into a close-end legally relevant and valid code. Lawyers always said that such actions are covered by the scope of their activity, but this leads to some interesting questions as to how this process works and what its extent and product is[552]. These questions have never been asked or answered in legal literature[553].

### Alternative Opinions: Sociolinguistics, Social Discourse, Law as Social Discourse

As soon as the relationship between language and society trespassed the boundaries of the structural analysis addressed above, when this relationship went beyond the limits of the philological and normative definition of social relations and legal order, it became evident that this happened only as a result of focusing investigations on rhetorical concepts of language and the institutional discursive practice[554].

Highly important from the linguistic point of view is the modern reaction to the linguistics of neo-Kantianism and de Saussure, as recited in the latest works on sociolinguistics that openly assert the functional and the tangible concepts of the usage of language[555]. We can identify three main topics that constantly end up wedged in between the expression of discursive analysis (i.e., examination of rhetorical and communicational organisation of tools) and sociolinguistics (the studies of language by linking it to various social, anthropological, ethnographical, psychological, and other contexts)[556].

*First of all,* it is the critical and negative aspect. The concept of discourse as an autonomous and virtual entity was first understood when the theories of Émile Benveniste and James W. Harris were introduced in linguistics[557]. Even though studies of language could not perceivably negate the relative value and status of the laws of structural linguistics (the general principles of lexis and grammar), critics of the theories by de Saussure

551 *Ibid.*

552 *Ibid.*

553 *Ibid.*

554 *Ibid.*

555 *Ibid.*, p. 184.

556 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206, p. 184.

557 *Ibid.*

and the subsequent semiotic theories argued that the concept of a Unitarian language and other categories of concepts of denotation and sense relating to specific general laws are one-sided and inadequate[558]. Mikhail Bakhtin was particularly adamant in his stance on this matter[559].

*Second* is that the subject of linguistic research moves from system to practice, from a possible meaning to its definition and realisation in specific hierarchical forms of organisational social interactions[560]. The subject of investigation becomes the 'actually existing' language system and its historical and social development, research of the 'internal stratification' of the national language conducted on the basis of social dialects, professional jargons, language typical of a particular (age, gender, generation) group, biased language, authoritative language, language used for the specific socio-political purposes of the day or even the hour[561].

*The third,* and the most debatable, aspect has to do with meaning and meaning control, and the power to define[562]**.** Semantics that lie in the conceptions of heteroglossia and linguistic stratification, has a dialogical and completely semantic nature: the meaning is never pre-considered 'given' as an object of passive philological conception, but rather has to be discovered in an active and critical context of its social, institutional, and hierarchical boundaries: 'Every discourse has its own selfish and biased owner; there are no words with meanings that would fit all of the words, there are no words that would not belong to anyone /.../ who speaks, and under what circumstances; this is what defines the true meaning of a word. All direct meanings and direct expressions are a lie.'[563]

This leads to the question of social authorisation of the meaning of expression (purpose as opposed to subjective motivation); the description of the significance of forms and expression, syntax, and semantics considering the vast base of the social and institutional order of the discourse, the allocation of value to specific meanings and discourses[564]. In short, an argument does not relate to the allocation and institutionalisation of the meaning, or the process of selection, when a particular set of socially-oriented interests and habits gains control of the discourse and defines social accents and paradigms of meaning that are destined to be prevalent and trusted (in general terms, we are speaking about the issue of legitimation of specific linguistic processes, social development and con-

558 *Ibid.*

559 *Ibid.*

560 *Ibid.*

561 *Ibid.*

562 *Ibid.*

563 *Ibid.,* pp. 184–185.

564 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206**,** p. 185.



trol of the meaning in the form of discourse)[565]. This defines what can be said and what has to be said. That leads to a question: who is talking? Who has the right to talk? Who has the sufficient ability to do it? Who derives their particular values, prestige from it and, accordingly, obtains if not a guarantee then at least a presumption that what is being said is true? What is the status of the individuals who, on their own, have a legally defined and spontaneously recognised right, sanctioned by tradition or the law, to suggest this kind of discourse?[566]. In a way, these questions are paraphrased by Michael Foucault: 'Every society has its own regime of truth, its own policy of general truth, its types and discourse, which it recognises and empowers to function as just: mechanisms and examples that help us distinguish between statements that are correct and incorrect, sanctioned measures, certain mechanisms and techniques, and establish values in the quest for truth; the status of the Human Beings who are 'speaking' and that which is considered to be the truth.'[567]
There follows below an overview of studies that were aimed (at least to an extent) to establish a social context of legal linguistic practice[568].

*First of all,* in terms of the theory of law, we must mention the theory of communication, or hermeneutics, introduced in the works of Hart[569]. This was one of the movements of the 1960s. One of the methodological problems of juridical neo-positivism was the problem of language of law. Matters of the relationship of law and language and the semantic origin of legal words and concepts hold an important place in the works of neo-positivists. Their main conclusions are the following:

1. legal words (concepts-definitions) are class words that guide us to groups of relationships and facts;
2. as a result, interpretation of legal words always involves questionable cases that, according to Hart, are called problems of penumbra;
3. this in mind, the role of the judge extends beyond the mechanical application of law; the judge must also perform a creative function.

Notably, Hart's conclusions about language are rather eclectic. He sometimes adopts the teaching of Wittgenstein and argues that legal meanings are conventional and institutional by nature and therefore are clear and well-defined; at other times, he claims that their application is, on the other hand, purely intentional and can be accounted for in terms of the psychology of a separate individual. Methodologically speaking, the problem with Hart's positivist semantics is rooted in its naivety in postulating the statement that the

565 *Ibid.*

566 *Ibid.*

567 FOUCAULT, M. *Diskurso tvarka.* Vilnius: Baltos lankos, 1998, p. 50.

568 GOODRICH, P. Law and Language: An Historical and Critical Introduction. *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206**,** p. 185.

569 *Ibid.*

relationship between individual perception and the formal system or a monologic whole has no interim elements[570]. Considering that it rests on a foundation of theories by earlier authors, analysis of Hart's conception of law could be extremely detailed and broad.

*Second,* if we are to interpret legal language as the genre of rhetoric or social discourse, we should note that the literature provides detailed descriptions of the following characteristics that it has: the 'speaker' (the lawmaker); a discursive context, the matters of institutionalisation, lexis, syntax, semantic allocation of meaning (a legal text's power to define its own highly narrow conceptions of meanings and, at the same time, to eliminate alternative meanings, alternative accents and contexts), and ideology[571].

### External Description of Legal Language

As we already mentioned, one unique quality of legal discourse is its ability to 'transform' and 'translate' (correct and validate) the ordinary language and ordinary meaning into a close-end legally relevant and valid code. Legal literature often attempts to describe the reasons behind the specific character of legal language, even though they can be identified only as its external attributes. These attributes need to be described for purely practical reasons as linguistic circumstances are said to be the most common causes for interpretation of law. Any language 'is more or less cloudy all the time.'[572] Most of the words from the general (spoken or literary) language, depending on the context, have more than just one meaning. Unfortunately, not all words and not all of their meanings are completely known to us for, as Louis Hjelmslev has put it quite aptly, 'there is not one man who knows and understands all of the signs that have ever been used in the Lithuanian language, or signs that representatives of different specialities, human beings from different regions and settings, use on a daily basis'[573] ,and that is why 'the meanings attached to words can be more or less plausible'. It means that as a result of the vagueness, ambiguity, and uncertainty of language, interpretation of the true meaning of a word is a natural process of the standard language.

The Constitutional Court has ruled that 'legal regulation must always be clear, it may not lead to ambiguity, and therefore terms must always be used in the law accurately,

570 GOODRICH, P. Law and Language: An Historical and Critical Introduction (1984). *Journal of Law and Society,* 1984, Vol. 11, No. 2, pp. 173–206, p. 186.

571 *Ibid.,* pp. 187-191.

572 PAVILIONIS, R. Liudvigas Vitgenšteinas ir jo kalbos filosofija. In VITGENŠTEINAS, L. *Rinktiniai raštai,* 1995.

573 HJELMSLEV, L. *Kalba. Įvadas,* p. 44.



based on their true meaning'[574]. Still, ambiguity cannot be avoided due to the very nature of language. The ambiguity of language is a source of dispute over the true meaning of text (Lat. *ex ambiguo controversia nascitur*), and the ambiguity of the text of a law often leads to various legal disputes. This is not a new kind of situation: ancient Romans recognised that an unclear, ill-defined law is not a law[575]. Compared to the general language, legal language possesses qualities that only escalate the need to explain signs of language.

*First of all,* legal language includes specific legal terms that are only known to and understood by specialists as often as not. A Human Being who does not know the meaning of a special legal term has to look it up. However, this often happens to specialist lawyers, too, when they need to determine the meaning of special ambiguous legal terms.

*Second,* language of law is more internationalised than ordinary daily language. Legal language carries a lot of international words, loanwords from languages that are no longer in active use, such as Latin. The usage of loanwords, including international words, only adds to the difficult of legal language. Yet some things, like internationalisation, are difficult to avoid, because this process is the product of harmonisation and unification of law.

This is particularly relevant to states that are only starting to develop their legal system. In the process of developing the Lithuanian legal system, we can often feel a historically defined shortage of Lithuanian legal terms[576]. Between the two world wars, most of the regulations in Lithuania were adaptations of foreign law and there was enough time to establish a national base of legal terminology. During the soviet period, some legal terms (such as private law, public law, public interest, and so on) were out of official use altogether, and some were given a different content. Obviously, a situation like this makes the job of interpreting law so much more difficult. Therefore, the efforts of lawyers, linguists, and specialists from other fields should be focused on normalising the Lithuanian legal terminology without delay.

*Third,* legal language has its specific official, administrative (office) style that sets it apart from the spoken, literary, or scientific language. Therefore, we must read the law not as a piece of literature, but as a set of rules of behaviour, some sort of 'commands.' The rules of behaviour are formulated in an abstract, laconic, consistent, and neutral form, with

574 The Ruling of the Constitutional Court dated 10 February 2000 On the compliance of Paragraph 4 of Article 11 of the Republic of Lithuania's Law on State Pensions, Item 2 of Paragraph 3 of Article 8 of the Republic of Lithuania's Law on the Legal Status of Victims of the Occupations of 1939–1990 with the Constitution of the Republic of Lithuania and on the compliance of Items 9 and 12 of the List "The 1939–1990 Occupations Repressive Structures, Services and Positions for Serving in Which Persons Shall not be Awarded State Pensions for Victims" as approved by the Resolution of the Government of the Republic of Lithuania (No. 829) "On the Approval of the List of the 1939–1990 Occupations Repressive Structures, Services and Positions for Serving in Which Persons Shall not be Awarded State Pensions for Victims" of 3 July 1998 with the Constitution of the Republic of Lithuania and Paragraph 4 of Article 11 of the Republic of Lithuania's Law on State Pensions. Official Gazette *Valstybės Žinios*, 2000, No. 14-370.

575 Lat. *ubi jus incertum, ibi jus nullum.*

576 MIKELĖNIENĖ, D.; MIKELĖNAS, V. *Teismo procesas: teisės aiškinimo ir taikymo aspektai,* pp. 148–149.

no definition of individual behavioural options. Legal language leaves a lot to the context. For instance, legal norms are not formulated in the imperative mood, deontic sentences with terms like 'prohibited,' 'permitted,' 'mandatory,' and so on are quite rare. Quite often, the text of a law only carries a part of a legal norm, for example, a sanction, while the other structural parts of the norm (the hypothesis, disposition, i.e., the content and terms of application of the norm) must be recreated through interpretation. Therefore, interpretation of the text of a legal norm should consider not only the meaning of the words it uses, but other things, as well, such as the heading of an article or chapter in which the legal norm is embedded, the presumptions established by law, and so on. It is very rarely that a rule of behaviour fixed in the law is self-evident and completely clear, raising not the shadow of a doubt regarding its sense and application. Usually a rule of behaviour needs to be decoded, extracted from the text of the law.

*Fourth,* legal language does not have individual style as legal norms are formulated as rules of behaviour targeting an undefined number of Human Beings.

*Fifth,* legal language is defined by a degree of formalism, a unique style, with thought expressed with a particular succession and sequence of words, using standards terms and phrases and reciting the text in a particular order (as a sequence of laws, chapters, paragraphs, and so on).

Today, it is reasonably argued that an underlying operating principle of a legal state is legal certainty**.** This principle is understood in two ways: first, as a ban on retroaction of the law (Lat. *lex prospicit, non respicit; lex retro non agit*), second, as a requirements to consider the legitimate expectations of Human Beings both in the process of legislation, and application of law. For this aspect of legal certainty to be implemented, the text of the law has to be clear and unambiguous. Only then can the targets of the law properly perceive what is expected from them and the legal implications they may incur. Ergo, the clarity of laws (legal certainty) is the obstacle and hindrance to the lawlessness of the court and other bodies that apply law. It is the reason why the principle of legal certainty is both applied in the interior law of many states and is considered one of the principles of law of the European Union.

For the purpose of ensuring the quality of the laws being adopted, many states enforce special requirements for the legislation procedure that help them produce clear laws. For instance, in Finland the language of bills is checked by an ad-hoc commission set up by the Ministry of Justice, its members including linguists as well. In Germany, bills are sent to the Fellowship of the German Language to perform a linguistic expertise. France establishes special mixed commissions to forge and approve new legal terms. In Switzerland, mixed interdepartmental commissions, which include philologists among other members, prepare final drafts of bills[577]. Recently, there has been increasing emphasis on the quality of the language of laws in the legal literature of many states, realising that with the internationalisation, harmonisation, and unification of law growing, firm efforts to improve the quality of laws is required. However, regardless of the number of such efforts, the main reasons behind the interpretation of law will be those of the linguistic variety.

Internal conflicts is a defining characteristic of law. And that is no wonder, bearing in mind that legislation is a political legal process and the law stands to express both political, ideological, economic, and legal intentions. Often a law is the product of a political compromise that merges several conflicting positions; however, it will not always be consistent and logical. There can be several levels to the internal conflicts of law. First of all, we have the conflicts of the different tiers of the hierarchy of legal norms: the norm of the law contradicts the constitution, a governmental resolution contradicts the law, and so on. There are also the conflicts between international law and national law. Furthermore, there may be conflicts between the EU law and the national law of the Member States. Conflicts between the federal law and the law of the subject of the federation sometimes exist in federal states. Different norms of the same hierarchical tier can be in conflict as well. Finally, we may have conflicts of legal norms enforcing various values that are sometimes competing among themselves. For instance, Articles 21–22 and 25 of the Constitution of the Republic of Lithuania stipulate the principles of dignity and sanctity of private life, freedom of beliefs and opinions (speech) of the Human Being, which are often in competition with one another. The scale of values may change with the passage of time. Therefore, for the purposes of interpretation of law, this conflict should be addressed in the process of application of legal norms that regulate competing values.

577 MIKELĖNIENĖ, D.; MIKELĖNAS, V. *Teismo procesas: teisės aiškinimo ir taikymo aspektai,* p. 151.

# COURT JUDGMENT (LEGAL DISCRETION)

As we already mentioned, legal reasoning differs from reasoning in its general sense in a way that the former always ends in a judgment. This gives birth to a new direction of the analysis of reasoning, which is to scrutinise the process of the judge's intellectualisation, case resolution, and judgement. Considering the concept of rhetoric as a study and presentation of arguments that can potentially convince a relevant audience (such as a juridical board) that has had an enormous influence on legal reasoning (which concept we covered before), every judgment reflects a choice of one of the available known alternatives in reliance on some arguments. As a result, we have to consider a particular space of judicial discretion (or freedom), in which this official can act freely.

Discretion and the freedom within its space can only be hedged by rational discussion. The more complicated the case, the broader are the limits of the judge's discretion, and the more detailed the legal discussion has to be. The court and the parties may have to discuss matters that are not defined in practice or by the law. This is where moral, doctrine, exact science, historical, philosophical, and other kinds of reasoning begin. In other words, legal reasoning may no longer be enough to make a judgment. Moreover, cases like that entail the risk of becoming quite swamped in complex philosophical thinking. When we jump to a different kind of reasoning, we incur competition between different types of reasoning; as a result, we must consider judicial discretion per se, its relationship with certain rules, their boundaries, and so on.



## LEGAL DISCRETION: THE THEORETICAL APPROACH

Even though discussion of legal discretion is quite young in Lithuania, analysis of this category is not new in the democratic world[578]. With the significance of discretion growing and discretion itself gaining an expanding application in practice, it simply has to be analysed from every angle to ensure the enforcement of justice at every level of the society.

According to Dworkin, every legal system has situations where legal norms do not offer any answer, and judges therefore have to choose a solution by exercising judicial discretion[579]. He argued that the legal norm and discretion are two sources of judgement[580]. Discretion therefore is a psychological and social component of the Human Being that has an objective existence and cannot be denied. Even though by virtue of the differences and variety of the aspects of analysis of discretion, one overarching concept of discretion can hardly be imagined, in making judgments of varying level, it is the understanding of the essence and content of discretion that may be instrumental in ensuring justice.

The rule of law means that no political power is basically above the law[581], which means that official actions must be controlled by clear rules that enable us to precisely identify the rights, freedoms, and duties of citizens; however, discretion still affords us a certain degree of flexibility in official activity rather than an opportunity to apply the rules in a formal sense. Therefore, discretion is often linked with the prevalence of legal rationality over legal formalism; the subjugation of the internal logic of legal analysis via law to certain requirements of social gain, moral values, or other significant factors.

### Conception of Discretion

Even though there are plenty of definitions of discretion in theory, they all suggest that the fundamental element of discretion is choice. The right to choose is an opportunity to decide that arises out of the liability that the subject assumes. Noting choice, Denis J. Galligan points out that the essential element of discretion is the choice of the

578 LINKEVIČIŪTĖ, I. Administracinė diskrecija ir jos vertinimas teismų praktikoje. *Jurisprudencija*, 2006, No. 5 (83), pp. 65–72, p. 66. Also see: DWORKIN, R. Judicial Discretion. *The Journal of Philosophy,* 1963, Vol. 60, No. 21, pp. 624–638; ROSENBERG, M. Judicial Discretion of the Trial Court, Viewed from Above. *Syracuse Law Review,* 1971, Vol. 22, No. 3, pp. 635–667; CHRISTIE, G. C. An Essay on Discretion. *Duke Law Journal,* 1986, No. 5, pp. 747–778.

579 DWORKIN, R. Judicial Discretion. *The Journal of Philosophy,* 1963, Vol. 60, No. 21, pp. 624–638, p. 624.

580 *Ibid.*

581 KŪRIS, E. Teisės viešpatavimas. In ANDRUŠKEVIČIUS, A., *et. al. Krizė, teisės viešpatavimas ir žmogaus teisės.* Šiauliai: UAB „Titnagas“, 2015, pp. 29–30.

standards and principles by which authority will be exercised and which provide the basis for making specific decisions.[582] Other authors, Aharon Barak and Maurice Rosenberg, provide a similar definition of discretion. They suggest that it is a power of a person of some authority to choose between several legitimate alternatives in making a decision[583]. According to Martha S. Feldman, discretion is a legitimate right to decide that stems from a person's authoritative assessment of the situation[584].

Despite the fact that discretion can be invoked in various situations[585], choice in exercising it is not unlimited. It has to be legitimate. Also, there is a consensus that the judge cannot operate mechanically, he has to weigh, ponder, and analyse the situation[586]. Although discretion is the exercise of power/authority, this understanding does not mean that all decisions that a particular subject is entitled to make will always be correct simply because the subject has the right to make a particular category of decision. The police has the right to impose arrest, but in some cases placing someone under arrest may be unjustified. Ergo, discretion is not merely a choice – it is a legitimate choice, a decision made within the existing boundaries[587]. Therefore, discretion can be defined as a right to decide based on an authoritative assessment of the situation[588].

Discretion is perceived as a zone of possibilities, and not as a single point, and may be narrower or wider depending on the number of options[589]. Galligan similarly suggests that discretion in its broadest sense may mean an autonomous space where a person's decisions are a matter of his autonomy and personal choice[590]. However, discretion definitely has its limits, and it is the function of law to define them. According to Barak, in the general sense, the limits are defined by the legal community, which decides the legality of a choice[591]. The legal community diverges on many issues, but if it thinks that a knowledgeable lawyer would never steel himself to make a particular choice, in that case exercise of discretion is to be seen as illegal, whereas if a choice, legally speaking, does not cause any shock, it is to be considered legitimate[592]. These restrictions of discretion are split into procedural and material[593]. This in mind, we may say that the choice in question is limited by the institutional system and social context.

Another distinguishing attribute of discretion is that it empowers the subject to whom it is granted to make unilateral decisions in relation to other Human Beings regardless of their status. Most typically, discretion as authority in law is evident in the relationships between government officials and citizens; however, this goes beyond the field of action of public authority. The right to make unilateral decisions exists in private relationships as well, although with some differences compared to its expression in the field of action of public authorities.

Galligan analyses the differences of discretion granted in the areas of public law and private law[594]. The latter reduces the role of law to ensuring the conditions for the development of private relationships, usually based on mutual agreement[595]. Here, authority actions are usually limited to enforcing the legal norms; their discretion is limited as well. In public law, protection of public interests requires a larger extent of intervention, and discretion is a tool that helps achieve the goals of the socially-oriented policy[596]. Still, the key difference is not the role discretion plays in one or another case as it is the general effort to justify the entrusting of discretion as a unilateral power to the public authorities.

Considering that legal discretion manifests as a choice and power, a conclusion can be made that a liberal society that respects the principles of equality and justice must inevitably consider the granting of the possibility to make unilateral decision in a legitimate manner, seeking to attain a socially beneficial outcome.

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582 GALLIGAN, D. J. *Discretionary Powers: A Legal Study of Official Discretion.* Oxford: Clarendon Press, 1986, p. 21.

583 BARAK, A. *Judicial Discretion.* New Haven and London: Yale University Press, 1989, p. 7. Also see: RICHARDSON, G.; OGUS, A.; BURROWS, P. *Policing Pollution: A Study of Regulation and Enforcement.* Oxford: Clarendon Press, 1983, pp. 20–21.

584 FELDMAN, M. S. *Order Without Design.* California: Stanford University Press, 1989, p. 82.

585 For instance, R. Dworkin gives us a list of situations requiring discretion (see: DWORKIN, R. Judicial Discretion. *The Journal of Philosophy,* 1963, Vol. 60, No. 21, pp. 624–638, p. 627); A. Barak classifies situations giving rise to discretion as material and formal (see: BARAK, A. *Judicial Discretion,* pp. 45–110).

586 BARAK, A. *Judicial Discretion,* p. 7. See *Tedeschi,* Legal Essay 1 (1978); ROSENBERG, M. Judicial Discretion of the Trial Court. *Syracuse Law Review,* 1971, pp. 635–668, p. 636.

587 RICHARDSON, G.; OGUS, A.; BURROWS, P. *Policing Pollution: A Study of Regulation and Enforcement,* pp. 20–21.

588 FELDMAN, M. Social Limits to Discretion: An Organisational Perspective In HAWKINS, K. (Ed.) *The Uses of Discretion.* Oxford: Clarendon Press, 1992, p. 164.

589 BARAK, A. *Judicial Discretion,* p. 9.

590 GALLIGAN, D. J. *Discretionary Powers: A Legal Study of Official Discretion,* p. 8.

591 BARAK, A. *Judicial Discretion,* p. 11.

592 *Ibid.*

593 *Ibid.*, p. 24.

594 GALLIGAN, D. J. *Discretionary Powers: A Legal Study of Official Discretion,* pp. 86–87.

595 *Ibid.*, p. 88.

596 *Ibid.*

### Advantages of Discretion

Despite the differences and disagreements in the definition of the term 'discretion'[597], the science of law recognises this phenomenon as possessed of a set of positive aspects. The key benefit of discretion has to do with the fact that rules of law[598] contain flaws and do not always function properly. The rule-maker[599] is not always able to successfully predict all problems and design the appropriate legal norms to address them, or, by contrast, not always able to find bearing amidst the vast and intricate net of legal norms in the process of interpreting and applying law. It is discretion that can fill in the gaps in laws and help find a way in situations when several mutually contradictory rules apply to regulate a particular relationship. In such cases discretion empowers the Human Being who makes the decision to resolve the conflict in the best way possible, considering the interests of all of the Human Beings involved.

Sometimes an applicable rule may cause a conflict with its own purpose. Discretion allows the decision-maker to act so as to achieve the purpose of the rule. Sometimes a rule applied in a particular situation may have implications that will generally contradict what can be right. In that case, discretion empowers the decision-maker to administer justice. Sometimes the circumstances in which a rule needs to be applied are so difficult that no effective preconceived rule can be enforced at all. In this case, discretion allows us to resolve such complicated problems as well.

A better understanding of the advantages of discretion can be achieved by explaining the sources of discretion. If we understand how and why discretionary authority is granted better, we would be able to pinpoint its advantages with more precision. We should analyse four theoretical models of discretionary authority.

*Khadi discretion.* Model number one can be conditionally named khadi discretion, which relates to making individual decisions regarding other persons, based on factors stemming from legal, ethical, emotional, and political factors[600]. The thing about it is that it is granted where the prevalent opinion is that the decision-makers are reasonable, they respect the principles of justice and honesty, and are aware of important facts usually because they know the parties or obtain this kind of information from other Human Beings

597 E.g., see: CHRISTIE, G. C. An Essay on Discretion. *Duke Law Journal,* 1986, No. 5, pp. 747–778, p. 747.

598 For the purposes of this paper, rules are often constructed as legal norms – general rules of conduct imposed by the state, their enforcement ensured with governmental sanctions. Yet in exceptional cases rules can be considered to constitute other social norms as well (SCHNEIDER, C. E. Discretion and Rules. A Lawyer's View. In HAWKINS, K. (Ed.) *The Uses of Discretion,* p. 61).

599 For the purposes of this paper, the rule-maker is often (but not always) perceived as the maker of legal norms, the law-maker, the legislator.

600 GELSTHORPE, L., PADFIELD, N. Introduction. In GELSTHORPE, L., PADFIELD, N. (Ed.) *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond.* London and New York: Routledge, 2003, pp. 1–28, p. 16.



who know the parties[601]. In that case, decisions are made in reliance on legal and subjective ethical, emotional, political criteria.

Khadi discretion is irrational in a way that it does not imply strong reliance on rules or efforts to tie discretion with general principles, but involves decisions that in specific cases are made on the basis of individual criteria that set the situation aside from the rest[602]. One illustration of this kind of situation can be Solomon's custody decision: when judging who should be trusted with custody over the child, Solomon did not rely on any legal norms, and the Israelites believed him not because of his knowledge of law but because they thought he carried the wisdom of God to dispense justice. Considering the above, Khadi discretion could even be compared to absolute discretion. Barak believes it to be a dangerous kind, because it always causes harm to Human Beings[603]. According to him, discretion must always be restricted by the regulation that bestowed it[604].

*Rule-failure discretion.* The second model of discretionary authority is rather typical of Western legal systems and can be conditionally named rule-failure discretion[605]. This can be described as a situation where the decision in a particular dispute goes beyond the boundaries of application of statutory law[606]. It is granted where the prevalent opinion is that situations can be so variegated, problematic, and unpredictable that effective legal norms that would guide subjects of discretion directly and appropriately simply cannot exist. This model is different from the previous one because it is not based on any subjective criteria but rather aims to restrict abuse of discretion. It does not rely on the fact that the decision-maker knows the parties to the dispute; on the contrary, if the decision-maker is related to any of the parties, he must step down. In this case, the legal norms restricting choice in any way play a much larger part.

Even though these two models of discretionary authority have their differences, they both share one essential advantage of discretion, which is that discretion renders law more flexible and empowers judges to administer justice in every individual case, which cannot always be achieved through application of general rules designed by other subjects alone.

*Rule-building discretion.* The third model of discretion occurs when the rule-maker could regulate a particular relationship but consciously refrains from doing that and leaves it to the decision-maker, believing that he is better positioned to create an appropriate rule

601 SCHNEIDER, C. E. Discretion and Rules. A Lawyer's View. In HAWKINS, K. (Ed.) *The Uses of Discretion,* p. 61.

602 *Ibid.,* 62.

603 BARAK, A. *Judicial Discretion,* p. 20.

604 *Ibid.*

605 SCHNEIDER, C. E. Discretion and Rules. A Lawyer's View. In HAWKINS, K. (Ed.) *The Uses of Discretion,* p. 63.

606 BARAK, A. *Judicial Discretion,* p. 83.

in that particular situation[607]. This is grounded on the fact that the Human Being resolving individual disputes has more experience than anyone else who may be involved in solving general problems outside of specific circumstances. In a general legal system based on this concept, while solving specific cases and with similar judgement recurring, courts form a certain practice that later translates into certain written rules. Legal norms that take shape in practice with the exercise of discretion become particularly relevant when social relationships undergo material changes over a brief period of time. In such cases, written rules are not as appropriate because rapid development of social relationships renders them controversial, the directions in which these changes are going as well as the boundaries of the changes cannot be clearly delineated, and besides, the rules need to be modified quite often.

Judges also have the discretion to make rules because that allows them to consider the established standards of the society. In certain cases, a judgment calls for the judge to consider the social environment in which the parties operate or live. This kind of cognition can help explain certain deeds of Human Beings. It helps maintain a contact between the law and the Human Beings whose relationships it regulates, and consider significant social factors and norms. The influence of social standards may also benefit the judgment because society itself is not indifferent to the decisions that are being made. These were the reasons behind the advent of the institute of the jury.

On the other hand, identification of local social factors may involve some difficulty as the more difficult and varied the society, the more controversial and hard to define its standards are. The standards that are recognised in a particular society may be different from the general social values[608]. Problems like that often occur in family-related disputes, such as divorce cases, as well as disputes in highly religious societies. No one wants to be separated from the society in which they live; everyone can pick the priorities to follow. In resolving conflicts in good faith, courts must consider the priorities of the parties, and discretion empowers them to do just that.

*Rule-compromise discretion*[609]. This model exists when members of a governmental body cannot agree on rules or even guidelines, they will willingly hand this kind of responsibility over to Human Beings who make decisions[610]; for instance, leaving it up to courts to decide which of two legal norms applies in a particular situations[611]. In other words, the

607 SCHNEIDER, C. E. Discretion and Rules. A Lawyer's View. In HAWKINS, K. (Ed.) *The Uses of Discretion,* p. 64.

608 TEITELBAUM, L. E.; DUPAIX, L. Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law. *Rutgers Law Review,* 1988, No. 40(4).

609 GELSTHORPE, L., PADFIELD, N. Introduction. In GELSTHORPE, L., PADFIELD, N. (Eds.) *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond,* pp. 1–28, p. 16.

610 HAWKINS, K. (Ed.) *The Uses of Discretion,* p. 2.

611 DWORKIN, R. Judicial Discretion. *The Journal of Philosophy,* 1963, Vol. 60, No. 21, pp. 624–638, p. 627.



granting of discretion to courts or administrative bodies can be considered a conscious legislative compromise. On top of the legislator being conscious in awarding discretion, it may also occur indirectly. This might have to do with the structure of the decision-making process: when a decision made by one Human Being is not revised by another subject, he becomes entitled to make the final call.

Still, in some respect, vast discretion is available both to those standing on the top and on the bottom rung of the hierarchical ladder. This is primarily because fact-finding inevitably relates to the use of discretion, because it involves decisions that cannot be predicted. Establishing factual circumstances involves decisions as to what evidence should be gathered, which of the evidence can be considered relevant to the case and reliable, and so on. Usually, it is impossible to collect new evidence and therefore the process of fact-finding is basically never revised.

The subject of who comes first on the hierarchical scale also has the discretion to decide the legal norms to be applied. This affects fact-finding as we cannot define the facts that are important until we identify the legal norms to which the particular facts relate. And even though the decision on law is often subjected to revision, it has its practical value and determines the defence strategy the parties will choose, the evidence that will be collected and left outside of the investigation, and so on. Finally, the first one decides how law will be applied to specific facts. Such decisions involve both interpretation of law and fact-finding.[612] It is difficult to say whether such decisions are decisions on law (and therefore must be revised), or on fact (and therefore not to be revised).

With reference to the above, we could formulate a concise summary of the positive qualities of discretion. First of all, discretion allows us to make the right decisions under particular circumstances. Second, it gives to the decision-maker some flexibility in dispensing justice, because it empowers us to consider all of the relevant specific circumstances, which is not possible in the process of making general rules. This is also because discretion allows decision-makers to observe the consequences of their decisions, and to consider them in the future. Discretion leads to better decisions, because in essence it is a wrecking ball to the bureaucratic method of thinking.

612 COOPER, E. H. Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review. *Notre Dame Law Review,* 1988, Vol. 63, Iss. 5, p. 658.

## Discretion and Rules

We cannot just crystallise the advantages of discretion. After all, discretion is power, and any power is prone to corruption. Therefore, even though we cannot negate the role of discretion, the making of decisions first of all comes from rules. For that reason, the weaknesses of discretion are revealed best when we analyse the advantages of rules[613]. *The first advantage of rules* is that they can legitimise the decision**.** An explanation for that can be sought in the democratic state concept which prioritises the fact that power comes from the people. The more decisions are connected to the will of the people, the more legitimate they are. Therefore, the rule of the legislative power is said to be more closely related to the people than any administrative or judicial rules are. All representatives of legislative bodies are elected, while judges (with a few exceptions) are not; the former are elected on views, while the views of the latter are not known.

The first aspect is related to discretion's most troublesome weakness, which is the danger of judges being inclined to depart from the roots of their power and to substitute public standards with their own*.* In some cases, this can happen because judges are simply affected by the standards established in the society, which may or may not overlap with legal requirements. As a case in point, we can mention custody cases. Regulations in many countries usually require that custody be awarded so that it is in the best interests of the child[614], yet in practice custody rights are usually granted to the mother[615]. Of course, legal norms can mitigate that risk, but this cannot be taken as absolute. Therefore, in deciding on the best ratio between rules and discretion, we should not be concerned with whether it is always possible to avoid conflict between personal interests and official requirements, but with the extent to which that risk can be mitigated.

The second advantage of rules (without prejudice to what was said about discretion allowing us to individualise decisions) has to do with the fact that still, *rule-makers are often in a better position when it comes to deciding what constitutes justice and how it can be achieved in a particular case and in general.* The legislator often has more time to analyse the problems and to consider more elements systematically. He has more sources of information at his disposal and is not bound by the rules of collecting evidence or other procedural rules. The legislator also can engage many social groups concerned with the resolution of the problem into the process of deliberation.

On that basis, critics of the method of creation of the legal norms of the general legal system argue that judgments can also be affected by circumstances that are less significant[616]. For instance, judges are inclined to award custody to an honest spouse rather than one who has been unfaithful, however, sometimes, looking forward and considering the circumstances in their entirety, such judgments may not always be just.
Therefore, the legislator is often better positioned to identify the principles by which the dispute has to be resolved, but that could only be confirmed with final assurance once we analyse all the circumstances that move the actions of the decision- and rule-making subject.

*The third advantage of rules is connected to the principle that similar cases must be solved in a comparable manner.* Robert Harris Mnookin writes that 'ill-defined standards' create a much higher risk of breaching this essential principle[617]. One of the ways to achieve consistency is to create legal norms. Legal norms iron out the kinks in opinions on which principles should apply to what facts, how they should be applied, and what is generally necessary to achieve justice; otherwise, such differences in views will lead to conflicting decisions, even though the situations may be comparable. Legal norms also serve as a kind of practice notes that can be used with more efficiency than a system of precedents. Finally, legal norms coordinate the decisions of many subjects and the decisions of the same subject over a certain period of time.

One of the functions of the principle that similar cases must be solved in a comparable manner is for the parties to believe that the case is being handled with integrity and equity. Here, legal norms have an advantage as standards that provide a basis for the trial are legitimate. Whereas discrete decisions are often critiqued because they are grounded on subjective thinking of the judge as well. On the other hand, even if the parties recognise the legitimacy of the standards applied, they often still tend to believe that judgments which disfavour them are inequitable.

*The fourth and the fifth advantages of rules have to do with their relatively public nature and the relatively private nature of discretion.* The process of formulating rules by the legislator is followed by a round of discussions, reports from various departments, publication of draft rules and regulations.

Furthermore, society knows its legal norms. First of all, they define the general rules of behaviour. The purpose of a legal norm will not be achieved if Human Beings do not know the pattern of behaviour that is legally required of them before they start to act. Besides, legal norms often serve to instruct legal subjects on how particular decisions should be made. Ergo, a legal norm can only be acceptable to someone who knows it and is prepared to follow it.

In the meantime, discretion is rather more private in nature. Many decisions grounded on discretion are not published because they are made by not-so-public admin-

613 SCHNEIDER, C. E. Discretion and Rules. A Lawyer's View. In HAWKINS, K. (Ed.) *The Uses of Discretion,* pp. 68–79.

614 E.g., see: The Civil Code of the Republic of Lithuania, Article 3.249(1)(1).

615 SCOTT, E. S.; REPPUCCI, N. D.; ABER, M. Children's Preference in Adjudicated Custody Decisions. *Georgia Law Review,* 1988, No. 22, pp. 1076–1077.

616 SCHNEIDER, C. E. Discretion and Rules. A Lawyer's View. In HAWKINS, K. (Ed.) *The Uses of Discretion,* p. 72.

617 MNOOKIN, R. H. Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy. *Law and Contemporary Problems,* 1975, Vol. 39: No. 3, p. 263.

istrative bodies. Even if society finds such decisions acceptable, they warrant less attention for failing to provide any general behavioural guidelines. The fundamental standards of discretion are known in advance, but a decision made on that basis often cannot be foreseen. Decision is the right to choose vested to a subject who has exclusive discretion; as a result, no prior instruction is required and the publicity of decisions is not so relevant.

That in mind, we can say that *the fourth advantage of rules is that they play a 'planning role.'* People must know how the case will be handled to be able to plan their actions in accordance with the requirements of law. We have the principle of no power of legal retraction to prove it. R. Mnookin writes that application of ill-defined standards involves a high degree of probability of retroactive application of the norm which the parties could not have expected[618]. Legal norms are better in performing a precautionary function because they provide clear and detailed information on what actions the court may take. Of course, Human Beings do not always think about the legal implications of their actions before their act. For instance, a lot of married people do not believe there is a point in thinking about custody in the event of divorce, but even if there is no need to be aware of the legal implications, knowing them can often be important psychologically; for instance, a woman will be able to rest assured that the child will stay with her after divorce. One way or the other, even if they do not need to know the legal implications before taking any action, Human Beings always want to know them in the face of a conflict. For instance, the parties must know the judgment the court will adopt to be interested in negotiating a settlement. On the other hand, the more unpredictable the judgment, the more room there is for negotiation.

*The fifth advantage of rules is that rules (legal norms) can benefit the interests of the society due to their public nature,* something that is far less typical of discretion. Legal norms are often some kind of a message of how Human Beings should behave, which at the same time aims to affect human behaviour. Legal norms convey this information clearly and often are understandable as a kind of command. On the other hand, this function occurs less often when we are trying to regulate non-social relationships by guiding them in a different direction, for example, resolution of disputes.

*The sixth (and last) advantage of rules is that they are more effective as discretion as often as not, because they basically anchor experience.* A rule is a refined element that has gone through a lengthy process to take shape, which shows us how certain conflicts have to be solved. Subjects with discretion cannot draw on any kind of experience (unless they rely on some rules) and in each case begin the entire process from scratch. Rules can release a subject with discretion with senseless repetition and at the same time prevent inaccuracies in such repetitions.

618 MNOOKIN, R. H. Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy. *Law and Contemporary Problems,* 1975, Vol. 39, No. 3, pp. 262–263.



Rules also increase effectiveness by pointing to subjects of discretion about which facts and arguments are important. Rules facilitate the work of such subjects and allow the parties to save their strength by steering clear of inconsequential facts and arguments[619].

On the other hand, rules are not irreplaceable either. Making rules takes time and effort. Sometimes discretion can be exercised more effectively, especially when there are several alternatives and the possibility of making the wrong choice is low. Discretion works best when comparable decisions are made repeatedly and a particular working practice gets established. Still, rules can be quite effective in situations like that as well, because circumstances and facts to which they apply are not very complicated or different. Furthermore, even if law does not define specific rules of behaviour, subjects with discretion tend to make rules themselves, drawing on their practices that have been applied on more than one occasion.

Saying that rules with all of their advantages is the only way to adequately regulate social relationships is not accurate. For equitable decisions to be made, every situation calls for an appropriate balance of rules and discretion.

### Restriction of Discretion

We already mentioned that rules are a vital element of law, and the effectiveness and legitimacy of discretion is not as widely recognised. Still, discretion is tolerable. This is partly because certain safeguards exist preventing it from becoming distorted: restrictions arising out of rules, precedent, tradition, for other objective and subjective reasons. They have to be discussed to be able to thoroughly reveal the nature of discretion[620].

First of all, discretion is limited because someone needs to appoint Human Beings who will be exercising discretion, for instance, we have a special procedure for the appointment of judges[621]. The effectiveness of this restriction is hindered by the life term of judges; this is why judges are re-elected on a regular basis in many democratic states. Of course, appointment of Human Beings who will be exercising discretion is more important when the Human Beings so appointed will be charged to make one type of decision. When the Human Being is empowered to make different decisions, selecting the right Human Being whose views can be predicted is rather more difficult; besides, there are no Human Beings whose views on every matter are just right.

619 WHITEHEAD, A. N. *An Introduction to Mathematics,* 12th impression. London: Oxford University Press, 1948, pp. 41–42.

620 SCHNEIDER, C. E. Discretion and Rules. A Lawyer's View. In HAWKINS, K. (Ed.) *The Uses of Discretion,* pp. 79–88.

621 E.g., see: The Law on Courts of the Republic of Lithuania. Official Gazette *Valstybės Žinios,* 1994, No. 46-851, Chapter VII *Selection of Judicial Candidates, Appointment and Career of Judges.*

Second, decisions of Human Beings with discretion are affected by their social setting and educational background. Decision-making Human Beings do not live in isolation; they are affected by their social setting where various social norms play an important role. According to Dworkin, a person experiences the importance of the standards of rationality, honesty, and effectiveness in nearly every situation[622]. Many decision-making subjects feel duty-bound to make socially acceptable decisions. And even though there may be instances when such social norms will not have much influence, this only happens on very rare occasions.

In addition to the social environment, decisions of judges are also affected by their legal education. Even though university teaching is the backbone of everything in this respect and while it continues upon graduation, it becomes less formal. Lawyers learn in their interactions with judges, more experienced colleagues, competing lawyers. Lawyers also learn from their predecessors by following the official practice and intuitively assimilating what is useful to them. Education helps them acquire certain thinking habits that provide guidelines and define the range of possible solutions. Lawyers know the norms of material law that anchor the principles to be relied on. They are also conversant with procedural norms that establish the kind of evidence and actions that are permissible. Lawyers learn ethical norms that prevent them from using discretion to selfish ends. Therefore, socialisation and teaching restrict discretion as much as it reduces the possibility to abide by personal, rather than public, standards. Socialisation and teaching also give lawyers a common language and add a degree of predictability to their behaviour.

On the other hand, socialisation and teaching have their own flaws. They can create personal standards that usually reflect the interests of a profession or group of Human Beings. As an example, critics point to the police often being able to establish their own standards that are not aligned with public interests[623]. Another way in which the social setting affects subjects with discretion is through their public criticism; a lawyer's decisions can be criticised by the media, politicians, or society in general. Lawyers can even be heavily criticised by their own families and  friends.

The third restriction of discretion might be related to other internal factors**.** Ordinary reasons, such as laziness, being unwilling to assume responsibility, or even a desire to avoid the repeated reasoning necessary for the case to be resolved makes decision-making Human Beings rely on their prior experience in handling similar cases[624]. In other words, decision-makers often tend to make their own rules, limit their discretion even though no external restrictions exist. The busier the court is, the less it will be inclined to liberate its discretion. In cases like that, the court will only use its discretion to formulate general principles that would make it easier for it to pass routine judgments.

622 DWORKIN, R. M. *Taking Rights Seriously,* p. 33.

623 SCHNEIDER, C. E. Discretion and Rules. A Lawyer's View. In HAWKINS, K. (Ed.) *The Uses of Discretion,* p. 82.

624 *Ibid.*



The same kind of factors can also restrict discretion so that one decision-maker will be inclined to rely on another decision-maker, usually another Human Being in an official capacity. For instance, US courts of appeal have established substantial practice to limit their discretion by delegating certain matters to be resolved by lower instance courts[625]. However, in other cases legal subjects can rely on more than just official institutions. Courts often endorse spouses' settlements in divorce cases without even looking into them much, even though the law demands that the interests of the more vulnerable spouse and underage children be considered.

Closely related is another restriction of discretion, which stems from the fact that often we have the need to coordinate actions of several decision-makers or decisions made by the same subject over a longer period of time. One of the primary functions of courts of appeal is to unify practice that takes shape through different interpretations and applications of law on the part of individual courts. Likewise, lower instance courts are expected to coordinate their judgments. A rule formulated by one court, albeit not binding in nature, may serve as a precedent for other courts of the same instance.

On top of that, Human Beings usually tend to classify events they incur. So do judges and other Human Beings in an official capacity. Such categories restrict discretion in a way that they grant judges fewer choices of how to approach a case. Besides, these categories are also affected by the judge's experience.

Four, discretion is as restricted by internal factors relating to the subject with discretion as much as it is affected by the institutional context[626]. No governmental body is removed from the rest, and the discretion of one of them is restricted by the powers of the other. An obvious case in point is that courts have to comply with acts adopted by the legislative power. There are, however, cases of a different kind. For instance, courts often dare not interfere with family affairs even if those are related to the enforcement of a particular contract. In that case, they act on the principle that law recognises the power of the family inside it as the power of a state within the state[627]. Court discretion is restricted by the lack of jurisdiction to solve such matters.

This restriction of jurisdiction also occurs when the resolution of a particular matter belongs to the subject's jurisdiction, but he shares this jurisdiction with others. For instance, a custodial office may initiate a procedure to restrain the parents' power and should it fail to do so, the court would have the right to impose a visitation ban on one of the parents restricted. The office may also affect the judgment by presenting its firm opinion on custody, and so on.

Courts share their competence both with other governmental bodies and the parties to the dispute as well. The parties agree on disputes to be settled in court. For instance,

625 *Ibid.*, p. 83.

626 BARAK, A. *Judicial Discretion,* p. 21, see *R v Wilkes* (1779) 4 Burr. Rep. 2527, 2539.

627 *North Carolina v. Rhodes,* 1868.

only about 10 per cent of all custody disputes in divorce end up in court.[628] Even after litigation begins, the parties can still affect the course of the trial because they can determine the matters and the evidence to be addressed and examined by the court.

Five, one of the conscious restrictions of discretion is the hierarchical system. Decisions made by bottom-instance courts are revised by courts of appellate instance, which are in turn controlled by supreme courts. As a result, court judgements can be modified. What is more, in unique cases judges may be penalised or removed[629]. Judges are also motivated by the prospect of promotion. Due to its bureaucratic nature, the discretion of administrative bodies is restricted by the hierarchical structure even more than that of courts.

Six, another conscious way to restrict discretion is the demand to follow procedural rules. These rules restrict discretion by fixing the type of evidence that can be used, who may present arguments, who must be notified of the ongoing proceeding, how the burden of proof is assigned, and so on[630]. The thing is that if the decision-making Human Being followed every procedural rule, the judgment is all the more likely to be equitable. One such procedural requirement is to present the judgment in writing, and that is very important because when the judge writes down the judgment, he explains his position. While listing all the motives, one could hardly not mention abuse of discretion, if any. Besides, this opens up a possibility for the judgment to be critiqued and revised.

Seven, one of the ways to control discretion is to provide the decision-maker with certain guidelines and principles of how he has to conduct the case. As a rule, the judgment is defined by its purpose. One classical case in point is the principle that the court in awarding custody over a child in a divorce case must decide so that the judgment is in the best interests of the child[631]. This principle grants the court the discretion to decide, but also imposes a certain degree of restriction on it.

Eight, discretion is also limited by awarding relevant rights to others. Rights relocate (to an extent or even in full) the governmental body's responsibility for its decision to an individual: for instance, when a marriage is terminated by mutual consent, it is the spouses and not the judges who have to agree and establish the terms and consequences of the termination (such as division of property, child support, and so on)[632].

Nine, a restriction of discretion is the establishing of specific rules, as they tell the subject with discretion what decision has to be made given a corpus of specific facts.

628 MELLI, M. S.; ERLANGER, H. S.; CHAMBLISS, E. J. The Process of Negotiation: An Explanatory Investigation in the Context of No-Fault Divorce. *Rutgers Law Review,* 1988, No. 22, pp. 1133–1172, p. 1142.

629 E.g., see: The Law on Courts of the Republic of Lithuania. Official Gazette *Valstybės Žinios,* 1994, No. 46-851, Article 86.

630 E.g., see: BARAK, A. *Judicial Discretion,* p. 22.

631 The Civil Code of the Republic of Lithuania, Article 3.249(1).

632 *Ibid.*, Article 3.51(1)(2).



Indeed, this can be seen as a juxtaposition to discretion if we are to adopt the view that the Human Being who must follow certain rules has no discretion. Still, this is not a very accurate point because in cases where relationships are regulated by particular norms, discretion does not disappear altogether. There is the discretion to interpret rules, which is inevitably connected to decisions of one kind or another. In this context, rules are understood not only as an alternative to discretion, but as its boundaries as well.

## LEGAL DISCRETION: THE SOCIAL APPROACH

Discretion is usually constructed as a space within the boundaries of the legal norm where legal subjects can exercise their choice; any decision made in that space is the product of the subject's freedom to decide what is best. This in turn is believed to make law too flexible, subjective, and unpredictable, yet there is a position that unpredictability of the consequences of discretion is but a myth and that this phenomenon is not so unpredictable. It is said that discretion as a phenomenon is much more limited by social factors and the social nature of the Human Being. This proves that we must take a closer look at the use of discretion in a social context and that it can be understood not as a purely legal, but as a socially ordained phenomenon.

### Discretion and Social Factors

Traditionally, judges solve cases following legal norms, legal consciousness, and their own internal conviction[633]. However, they cannot totally distance themselves from their personal or social views. Every case has a subjective moment which is inevitable merely because Human Beings with discretion are not fully indifferent to the environment[634]. By following their subjective internal conviction judges often tend to resolve similar cases differently. We should think that this creates a risk of law becoming unpredictable because of the ability for every judge to invoke discretion.

Still, not everyone agrees with the above position. For instance, Mary P. Baumgartner encourages us to take a different look at the phenomenon of discretion,

633 KAZANAVIČIŪTĖ, R. Klasikinis požiūris į teisėją kaip teisės aiškintoją ir taikytoją. *Teisė*, 2009, vol. 70, pp. 86–101, p. 98.

634 More, see: GUMBIS, J. Teisinė diskrecija: socialinis požiūris. Teisė, 2004, Vol. 52, pp. 52–61, p. 53.

using a social perspective[635]. According to her, despite the stratification of the public, there were instances in times past when a sovereign or any other person of a higher social standing (such as master over slaves and servants, or husband over wife) would invoke his discretion to make decisions on people who were considered below him, just as there were manifestations of bottom-up social control[636]. That, according to Baumgartner, points to the ingenuity of persons who had smaller normative resources but whose quest for justice prevented them from assuming the role of a victim[637].

Although every judge exercises discretion while under the effect of subjective factors, as of the mid-20th century, when attention to and respect for the Human Being surged and international standards for the protection of human rights were created (at least formally), law with regard to human rights and freedoms, at least so far in the countries of the Western tradition of law, is no longer all that unpredictable. With this in mind, we can say that aspects such as human rights and freedoms affect judicial decisions when they are indeed accepted by a particular society.

Socially, the above situation can be explained with reference to the fact that all judges within a particular society live in the same environment that affects every one of them in almost the same manner. Therefore, judicial decisions are driven not by some mystical individual qualities of each case, but rather by general social regularities. They are not created every time from scratch but are rather epitomised by principles common to similar cases. This allows us to claim that discretion is limited by a social context more than by rules[638]. It is therefore where national law can no longer control and predict the use of discretion, social regularities can.

Still, the exercise of discretion based on social factors does not have such a wide recognition. Both sides – Human Beings with discretion and the targets of discretion – often are completely unaware of the social regularities that affect the judgment. Judges are inclined to believe that they solve cases considering the specific qualities of the circumstances of each particular case. Nonetheless, social regularities have an effect and that is why comparable cases are solved in different jurisdictions and at different stages of the proceeding in a similar manner.

To be able to explain how the social context defines a particular resolution of cases, we have to discuss individual social factors that have a material effect on the exercise of discretion and allow us to understand discretion as a logical and explainable phenomenon.

635 More, see: BAUMGARTNER, M. P. Social Control from Below. In BLACK, D. *Toward a General Theory of Social Control.* Vol. I. Fundamentals. Orlando: Academic Press, 1984, pp. 303-339, pp. 305–324.

636 *Ibid.,* pp. 303–339, p. 305.

637 *Ibid.,* pp. 304–305.

638 LEMPERT, R.; SANDERS, J. *An invitation to Law and Social Science.* Philadelphia: University of Pennsylvania Press, 1986, pp. 135–140.



### Significance of the Parties to a Case to Discretion in Administering Justice

The social status of Human Beings involved in a trial that affects the legal implications can be described on the basis of different characteristics: people differ in their age, sex, health condition, education, social group affinity, personal qualities, origin, religion, and so on. All of these are important factors for exercising discretion and predicting decisions.

Civil and penal cases involve resolution of a matter between two opposite sides. Cases with comparable circumstances can have a very different resolution, depending on who the parties in the proceedings are, and what their status is. In addition to the parties, the dispensation of justice can also be palpably affected by the social characteristics of the group of Human Beings who support them, or even the society and the Human Beings who administer justice or contribute to its dispensation.

*Implications of Proximity*

One of the essential social factors causing discretion to be used is the extent to which the victim and the perpetrator had known each other before the offence occurred. The higher the degree of proximity, the more judges are inclined to not interfere. This can be said of other officials involved in different stages of the proceedings as well. This law is said to have the same kind of effect in different categories of cases and in societies of a different level of development[639]. With this in mind, it would seem that often offences committed with regard to unfamiliar Human Beings would be considered to be real offences and would merit more scrupulous investigation and entail sanctions that are more severe. Whereas offences against family members, friends, other familiar Human Beings are often glossed over, their investigation ends up in acquittal or a milder sanction.

Said aspects are revealed by the phenomenon of domestic violence – a hot topic as of late. Even though scientific literature suggests that until the mid-20th century other persons, including representatives of the legal system, were prohibited from interfering with this phenomenon[640], the recent developments in Lithuania, like the quest to outlaw violence against children, have shown that domestic violence is still subject to varied assessment. It was in the process of contemplating amendment to the Law on the Grounds of the Protection of Child's Rights that a lot of discussion broke out on whether the ban on violence against children that the law contemplates might be excessive, because, for instance, Article 140 of the Criminal Code already stipulates penal liability for inflicting bodily pain or minor health disturbance[641]. Another question that was raised at the time of deliberation of the said amendment was whether the amendment would restrict the parents' right to

639 BARAK, A. *Judicial Discretion,* pp. 40–48 .

640 MICHAILOVIČ, I. Kai kurie smurto šeimoje problematikos aspektai. *Teisė,* 2012, No. 82, pp. 26–40, p. 27.

641 The Criminal Code of the Republic of Lithuania. Official Gazette *Valstybės Žinios.* 2000, No. 89-2741, Article 140.

raise their children at their own discretion. Of course, for want of a deeper analysis of all the circumstances of this situation, we cannot say with any kind of assurance that opposition to the above amendment stems from the fact that it concerns the relationship of close people, parents and children, however, we cannot rule out this possibility either, especially if we were to look at the argument regarding the parents' right to raise children at their own discretion.

Despite the amendment being passed, the above discussion clearly shows that, legally speaking, the tendency of non-interference when it comes to the mutual relationship of close people, and family members in particular, is still quite strong. This can be seen even in human health- and life-threatening situations.

*Respect and Social Standing*

There are other social factors that allow us to predict the consequences of the use of discretion. One of them is the level of respect towards the Human Beings whose conflict has reached an official stage of resolution[642]. Human Beings of impeccable repute are regarded more favourably than those who have previously transgressed with regard to moral or legal norms. Just like with the proximity of relationship, in this case, too, social regularities have an equal effect throughout the stages of the proceedings, when decisions are made with respect to different Human Beings and under different circumstances. Officials tend to impose more severe sanctions on those who have already had dealings with law enforcement compared to first-time offenders. Not only previous offences, but other patterns of non-legally compliant behaviour matter as well. Even if a Human Being has not committed any offence, he can command a lower degree of respect and that will affect the use of discretion towards him.

Offenders may be regarded as constant trouble-makers on account of their outfit or behaviour[643]. Those who show disrespect to officials (usually with their impolite conduct or unwillingness to cooperate) will be judged more critically. A negative reaction can also be caused by factors like bad habits, a predilection for an activity or actions that run counter to the moral attitudes of the majority. And vice versa, Human Beings who engage in socially beneficial activity or have distinguished themselves in national or military service, are regarded more favourably. Predicting the exercise of discretion is furthermore affected by how the victim is regarded. Those who commit an offence against socially respectable persons receive harsher sentences.

Social status is equally important for the purposes of predicting the course of discretion. Offences against Human Beings with a high social status merit active intervention

642 BLACK, D. *The Behaviour of Law.* New York: Academic Press, 1976, Chapter 6.

643 FEELEY, M. M. *The Process is the Punishment: Handling Cases in a Lower Criminal Courts.* New York: Russell Sage Foundation, 1979, p. 163.



from competent bodies and entail more severe sanctions, and offenders who have a lower social ranking receive harsher sentences. When no data about the victim are available, the social status of the offender becomes important for the purposes of exercising discretion. Therefore, officials use their discretion to make decisions that can be predictable by virtue of the social status of the Human Beings involved in the case. The more the decision-maker knows about the parties to the dispute, the less ambiguity about his decision there is. This social factor has a blanket effect on all Human Beings who are sufficiently independent from one another at all stages of the proceedings.

*Human Beings Who Support Parties to the Dispute*

The offender and the victim are not the only ones to affect the use of discretion; the characteristics of the supporters of the parties to the dispute may be just as important. Supporters of one of the parties affect the exercise of discretion through their social characteristics. The deeper they are involved in the proceedings, the higher their effect on a particular method of use of discretion. When a dispute involves not two individuals but two parties, the supporters can turn a sociologically weak case into one that is sociologically strong. That explains why disadvantaged individuals sometimes gain an edge over those who seem to have a tremendous advantage at a glance. Supporters that have a high social standing and impeccable reputation are excellent allies in any case and at any stage of the proceedings.

The inability to receive support is a negative thing, especially when the other party enjoys strong support. Examples date back to medieval times, when witnesses played an important role in court cases[644]. Even today, someone who has committed a criminal transgression, a negligent wilful offence of mild or moderate gravity, may be released from prosecution if he is vouched for by another Human Being[645]. Friends or family members attending a hearing testify to the stability of the offender, and the stance of the parents, teachers, employers is equally important as well.[646]

*Law Enforcement Officials*

In addition to what was discussed above, the use of discretion can be predicted on account of the social characteristics of the decision-makers themselves. That is another aspect that debunks the myth of the unpredictability of discretion.

If the decision-making Human Being has personal ties with one of the parties, he will probably favour that party more. Of course, this often jeopardises justice and therefore

644 MACHOVENKO, J. *Teisės istorija,* p. 106.

645 The Criminal Code of the Republic of Lithuania. Official Gazette *Valstybės Žinios.* 2000, No. 89-2741, Article 40.

646 FEELEY, M. M. *The Process is the Punishment: Handling Cases in a Lower Criminal Courts,* p. 164.

such Human Beings are required to remove themselves from judging the case[647]. When the decision-making Human Being is related to both of the parties, he will be less willing to support one of them from the beginning of the trial. However, even then it all boils down to the level of proximity: the closer he is to both of them, the less he will be inclined to demonstrate aggression towards any one of them[648].

In addition to proximity to the parties, another important factor is the social status of the decision-maker. The higher the status in comparison to the social status of the parties, the more severe is the decision that will be made.

All these social factors allow us to predict and explain the use of legal discretion. In terms of space and time, they are common to different societies, different stages of the proceedings, different cases of offence. Officials can imagine they consciously seek to individualise their decision in every particular case, however in fact their decisions are rather re-ordained by the social regularities that become objective in that particular situation. If we know those regularities, we can predict discrete decisions. For the sake of accuracy, it should be noted that this does not mean that judges or other discretionary decision-makers do not have much of a choice; it rather means that their choice is limited and predictable due to the inevitable social factors.

All of the above calls not only for a new concept of discretion, but for a revision of its implications as well. Theoretically, the exercise of discretion is understood as a highly subjective decision driven by mostly inexplicable factors such as success, emotions, or whim. From the social perspective, decision-making can be accounted for by factors that are less mystical. Decision-makers rely on their consciousness, and this presents different conclusions depending on the social situation of the case.

Against this kind of background, we have to admit that legal norms per se are the product of discretion as exercised by the legislator of the judges who make the norms. Legal norms as the product of discretion also depend on social factors. It means that lawmakers are affected by their own social characteristics. All of the above also affects the legislator to the extent he usually makes decisions with regard to cases that are general rather than specific in nature. In later stages of law application, discretion expands to the extent its enforcement can be modified or enlarged with individual decisions by a specific decision-making Human Being. Without the ability to expand discretion in that way, there would simply be no discretion.

When lawmakers and those who apply law have a different social standing, the purposes of legal norms and the practice of their application might not overlap. The social factors that affect law application cause law to become more discriminatory than the legislator intended it to be. When this happens in practice, lawmakers and those who apply law

647 E.g., see: The Code of Civil Procedure of the Republic of Lithuania, Article 65.

648 HORWITZ, A. V. *The Logic of Social Control.* New York: Plenum Press, 1990, p. 57.



are in competition. Those who apply law are affected by different social factors that have relevance in every specific situation, which the lawmaker was not aware of. The higher the degree of discretion those who apply law have, the more their decisions are affected by social factors.

Efforts to reduce social discrimination in the process of law application have been riddled with difficulty. It is very hard to minimise social discrimination where discretion is involved. Just as discrimination is inevitably poised to follow discretion, so the two of them follow law in general. One opinion is that discrimination cannot be reduced because discretion as part of law cannot be eliminated completely. The enforcement of law is a decentralised process, the decision-making is delegated to individual Human Beings who in some cases act independently and cannot always be controlled. Furthermore, the application of law always calls for the interpretation of legal norms, using such evaluative terms as 'major threat,' 'reasonable man,' 'offender's intentions,' and so on. Legal norms cannot be applied mechanically; application of abstract standards to a particular situation always calls for an individual approach.

Discretion can never be removed from law. Social discrimination emanates from discretion, and law will always remain discriminatory, if only to an extent. The only way to eliminate social injustice is to abandon law, which would, for all practical purposes, mean delegalisation of the society[649].

### Discretion in the Context of Human Sociability

Discretion is necessary in bureaucratic work, especially in situations where decisions must be made, although it is impossible to ensure permanent supervision of Human Beings who make the decisions. A proper example could be the work of the lowest ranking, public servants (teachers, policemen, social workers, etc.) who directly interact with customers. They must have discretion because their work cannot be constantly supervised by anyone else. They are often geographically removed from the entities that control them; moreover, their working place may be not defined. The strict regulation in such cases would not be effective, as particular situations may be very different and quite complex. Also, in such cases discretion cannot be replaced by another method of control, the measurement of efficiency or results: for instance, the high number of cases heard does not necessarily mean good quality court work.

Discretion is limited by factors of dual – individual and social – nature. Those who make decisions have their views and values which affect their decisions. Great concern arises regarding cases when the actions of the Human Being who makes the decision

649 BLACK, D. *Sociological Justice.* New York: Oxford University Press, 1989, Chapter 5.

are caused only by internal factors and his behaviour depends neither on formal rules or sanctions, nor on direct supervision. However, it is considered that there is always a connection between decision-making and social processes, that is, decision-making is always dependent on social control. In respect of the organisational aspect, the decision-making should generally be recognised as a social rather than an individual process.

*Discretion as Decision-Making*

Scientific literature offers various models of the decision-making process that consist of the following stages[650]. First, the situation (the problem) is defined. Second, the goals are set and must be achieved in order to solve the problem. Third, possible options, or alternative decisions are proposed. Fourth, information is collected in order to evaluate the alternatives presented considering the likely implications of each and every one of them. Fifth, the decision is made regarding the most beneficial alternative. This scheme of making decisions appears quite logical and rational, yet not every decision-making process falls within it precisely[651]. This situation can be explained with the help of the following facts.

First, the amount of information the above scheme requires to function successfully is often too large: this model requires that all alternatives be discussed and evaluated on the grounds of all relevant information. Still, analysis of the relevant information is rarely possible.

Moreover, even if it is physically possible to evaluate the huge amount of information, in some cases certain information may be excluded as the person making the decision is not aware of its relevance at that time. As a result, there is a different kind of perception of decision-making, one that recognises that certain inaccuracies do exist and they cannot be resolved but it does not prevent the making of a decision. This model may be called the *relatively rational model of decision-making.* Under this model, Human Beings set goals and make decisions without maximising of benefit received after such goals are achieved in any way. They are rather satisfied with the respective available, than the absolute, level of achieving goals.

If all information could be collected, all rational Human Beings would make identical decisions. However, decisions depend on the available information and they vary depending on the person making the decision. This is how we introduce the category of subjective benefit[652], which replaces the previous perception of benefit with the possibility

650 E.g., see: ALLISON, G. T. *The Essence of Decision: Explaining the Cuban Missile Crisis.* Boston: Little Brown, 1971, p. 115; ŠARKUTĖ, L. Sprendimų priėmimo samprata ir tyrimų tradicijos. *Sociologija. Mintis ir veiksmas,* 2009, pp. 105–119, p. 107.

651 ŠARKUTĖ, L. Sprendimų priėmimo samprata ir tyrimų tradicijos. *Sociologija. Mintis ir veiksmas*, 2009, No. 25, pp. 105–119, p. 108.

652 COOTER, R.; ULEN, T. *Law and Economics.* Illinois: Foresman, 1988, pp. 102–108.



to collect the ideal information. Hence, there is a rather clear push from absolute to limited rationality in reality.

Second, under the model described above, the decision is made by one Human Being, which eliminates any objection regarding the goals and the ways to achieve them. Following this approach, organisations making decisions are said to act as one entity. However, in practice the decisions are made not by one but by multiple entities where opinions of different Human Beings do not match in most cases. Opinions differ even more not only regarding the goals but also the ways how to act in order to achieve the goals. In such cases, agreement must be reached through compromise, negotiations or voting. Then the choice is made without there being a prior agreement on the goals.

Another questionable aspect of the rational model is the importance of goals for actions. Do the goals really constitute the aim of actions, or are they the factors determining actions? In this aspect, the rest of the rational model is totally disrupted. Not only are the goals not agreed before the process of decision-making takes place; they can even be left undiscussed.

The essence of models of an absolutely rational and relatively rational decision is the possibility to find the right decision. In the first case the decision is absolutely right, the alternative chosen corresponds to the goals being set best. In the second case the decision is relatively right, considering the available information, and the alternative chosen mirrors certain goals. In this case, additional information that may come up later could lead to a different decision.

All of the above, although not based on legal examples, mirrors the model of judgments. When investigating cases, generally there is only a small amount of information on the actual circumstances available. The key is the selection of important information as it may have influence on the final decision in a particular case, as well as on a more common goal. The serious problem in making discrete decisions is that the goals of the legislator or of a certain regulation, in most cases, are explicit but there is no explicit agreement on how to achieve them in a more efficient manner and to what degree the goals must be achieved considering all other consequences, for example, economical. Even when the goals of a policy are explicit and interpreted equally with knowledge of how to achieve them, other problems still remain. For instance, sometimes requirements of law may be implemented in a slightly different way than expected.

The theory of rational decision-making suggests two methods for control of discrete behaviour. One of them is selection. The process of selection of Human Beings must ensure that hired Human Beings are capable of making rational links between actions and the final result. Moreover, selected Human Beings must be those who have the same goals as the goals of duties assigned to them. The other method is motivation or sanctions and bonuses that have to ensure that individual goals and goals of service match each other.
These however are not the only measures. Actually, intellectual Human Beings with similar goals very often interpret situations differently and make different conclusions. This

kind of situation occurs partly due to the fact that both the information and the goals are ambiguous, meaning that many interpretations may exist depending on what is expected from them, what the policy or law seeks, and what information is significant. In such case, the social context determining the different perception of the situation is very important. The modifications of the theory of rational decisions show that control may be exercised through measures having influence on the interpretation of context. Such measures are training, socialisation, and routine.

*Control of Discretion Determined by the Sociability of the Human Being*

Proper behaviour may be encouraged by rules of law or other mandatory rules just as it can be determined by other processes, namely training, socialisation, and routine.

1. *Training forms the practice of work.* The cognizance of how to do a certain job properly does not end with graduation from a particular study programme. On the contrary, most practical situations are not discussed during the study process. A new employee continues to learn the specifics of a certain job from t colleagues. Thus it is learning that constitutes the grounds for the development of working methods of the Human Being. The standards formed in training are applied in practice; for example, social workers follow the principle of confidentiality indoctrinated during their studies already; police officers tend to treat persons they meet as sourcea of information[653]. Deviation from such practice may attract the attention of colleagues, management, authorities, and clients. Training is also important during the selection of Human Beings for a certain job. Human Beings are selected for training programmes according to particular criteria making it possible to decide on the most suitable candidate. Also, during training, those who are not capable of performing certain functions are identified.
2. *Informal socialisation* takes place in many ways. Human Beings behave in some particular way because they are incentivised to do so or because that is what is expected from them. Human Beings follow the values because they appreciate them or they want to make such an impression. Finally, Human Beings rationalise their actions applying such standards which are advantageous to them. All this adds to and sometimes even changes the standards formulated during formal learning.
3. *Routine* is another element of social context determining the application of discretion. Routine consists of models of behaviour that determine who and in what order will fulfil tasks; for example, selection of new employees may be done by several Human Beings; however, the one who stays to work has to follow the same principles as the first one. Sometimes Human Beings must fulfil tasks simultaneously or they are dependent on each other. Such dependence is based on models of behaviour and the trust that the others will follow such models as well. Most bureaucratic work calls for individual Human Beings to coordinate their actions with others. The simple reason for this is that Human Beings implement overlapping functions so that there is no interruption when someone is absent due to illness or vacation. In other cases, work must coordinated when working in teams.

653 SPROUL, L. S. *Handbook of Organizational Design.* Oxford: Oxford University Press, 1981, p. 209.



Thus, discretion is not only limited by formal rules and management supervision but also depends on the organisational and social context that cannot be strictly defined. It is more plausible than absolute and offers the model of preferred behaviour but does not usually provide for sanctions for non-compliance.

## Discretion in Terms of Behaviour

Discretion granted by law may be analysed as a feature of rules of law, a feature of behaviour or sense that a Human Being has freedom to act at his own discretion. The first aspect of discretion is mostly analysed by lawyers and sociologists are more concerned with the other two. Discretion as behaviour is the object of research of the behaviouristic trend.

As discussed in this paper, traditionally, legal discretion is treated as the discretion of those who apply law. Discretion is an ability to choose from two or more ways of action, where each of them is admissible and possible. It exists when there is more than one possible decision, which is considered as right by Human Beings, to whom the person making the decision is accountable, and if certain standards do not provide a clear answer what kind of decision must be made[654]. Therefore, discretion enables us to choose from alternatives within the limits allowed by law. In other words, law both grants *and* limits discretion. It gives freedom to the person making the decision because it does not instruct what particular decision must be made. Moreover, it also imposes its limits because not each and every decision is acceptable. If the choice of the judge is not limited in such a way, it means that the judge is not exercising legal discretion but is acting in some sphere outside the limits of legal regulation[655].

Following such approach, more focus is placed on the nature and scope of rules allowing discrete behaviour than on the same behaviour as emphasised according to the behaviouristic theory. However, discretion is a category not only of law but also of behaviour. It is possible that judges are going to act even if they do not have the discretion granted

654 GREENWALT, K. Discretion and Judicial Decision. *Columbia Law Review,* 1975, No. 75, pp. 359–379.

655 BLACK, D. *The Behaviour of Law,* p. 19.

by law, and vice versa, when they have legal discretion, they are not necessarily going to consider all options allowed by it. The social situation is just as important a factor as rules of law when it comes to determining the application of discretion. Although law provides for a certain number of modes of behaviour, the subject tends to choose only a few from those possible when solving cases, based on the established practice. In fact, the subject may be bound to a lesser or greater extent. It is less bound because there is always the discretion to ignore the requirements of rules of law. Such behaviour depends on the role of the subject and the impending sanctions. Besides, according to Barak, the discretion of a judge is a choice of the possible versions of a legitimate decision[656], therefore judges, contrary to other subjects, should be less inclined to ignore the explicit requirements of law.

On the other hand, discretion may be defined as freedom from restrictions established by law. Of course, in view of the fact that discretion means the choice of possible legitimate decisions[657], it is not the freedom to make decisions as one may like; it is the possibility to be exposed not only to the rules of law but also to other legitimate factors.

All this confirms again that irrespective of the legitimacy requirement that is posed in relation to the decision, discretion is not only a legal, but also in large part a socially determined process. Moreover, it is quite possible that the definition 'legitimate' shall include an especially high variety of decisions, which stems from the interpretation of the positive norms of law. In such cases social factors may influence the exercise of discretion in a way that the requirements of rules of law may be denied. Thus, when analysing discretion, the social factors cannot be eliminated as now they are even more important than legal factors.

## PSYCHOLOGY OF DECISION-MAKING: PSYCHOLOGICAL ELEMENTS OF DECISION

Many things in the world are nothing but the results of decisions made once by someone. The Human Being does not make a decision as a knee-jerk reaction or something done out of habit. The need to make a decision arises when the Human Being must choose some mode of behaviour with regard to a particular situation. Therefore, decision-making is usually considered as the process where one decision is chosen from several potential alternatives – a decision which seems the most optimal to the subject making it.

656 BARAK, A. *Judicial Discretion,* p. 7.

657 *Ibid.*



Although decisions are made in various spheres of life of the Human Being and they refer to problems caused by various factors, all such decisions have one general structure. However, the evidence of all (or none) of the elements depends on the particular sphere, particular problem and the inner state of the Human Being who makes the decision.
*The most detailed definition of the structure of decision-making can be found in the so-called model of rational decision.* Historically, it is the first aspect of psychological research of decision-making. A lot of prescriptive, or normative, theories have been developed, their main goal is always to present as many structured rules on the ways to collect information, develop potential decisions, choose the best alternative, or, simply put, make as rational a decision, as possible.

Many examples of irrational behaviour of the Human Being make one look for an answer to the question of what processes actually take place when the Human Being makes the decision. Analysis of the thinking of Human Beings, especially detailed studies of the heuristic form of thinking, have revealed certain aspects of thinking which intersect with rationality and determine a certain partiality of behaviour generally typical to all Human Beings; in other words, human errors which are unlikely to be avoided. Doubt about the possibility to eliminate an error, or recognition of the likelihood or an error, also raise doubts about the same rational decision as the method of decision-making which can be fully applied in practice.

However, the Human Being is not only thinking; he also has feelings. Sometimes emotions are nice and desired, and sometimes, on the contrary, they are depressing and painful, making it necessary to get rid of them. The affect does not surrender to the mind with any kind of ease, and even if it does, this kind of control therapy of emotions usually causes other, even less palpable consequences that may have an effect on a par to that of emotions. Of course, decision-making is driven by emotions. These are the emotions that a particular decision aims to invoke, emotions that are inherent to the inner state of the Human Being at the moment of making the decision, which took form specifically when the problem was being solved, and also emotions that were determined by sources having nothing in common with such a problem. It allows explaining the irrationality cases of human behaviour regardless of the sphere, be it management, medicine, law, etc., where the problem appeared and where the decision must be made.

### Rational Decision

Before going into the psychological aspects of decision-making, we should mention the aforesaid rational decision, which is based on the idea of power of the Human mind and logics and almost does not exist in reality, as discussed in this paper. However, the rational decision features conditional, but still a rather explicit structure, which enables the analysis of the decision-making process.

Having in mind the number of factors determining the decision and the variety of their origins, solving the simplest problem is a very complicated process psychologically, yet scholars agree that the rational decision usually consists of the following stages:

1. cogitation;
2. development of decision options;
3. choice; and
4. evaluation[658].

The stages listed above consist of more detailed elements. Having cognised and analysed the elements of every said stage one may find it easier to reach a (completely or at least as much as possible) rational decision.

At the cogitation stage, which in scientific literature it is also called the stage of collecting information, the facts relating to the given problem are investigated: the main obstacles for making the decision are identified; also, information that is important for solving the particular problem is established and, after these factors are determined, this information is collected. Namely, at the first stage it is important to establish the quantitative and qualitative criteria that will be the further basis for the selection of alternative decisions. In addition, it is important to set the goal that will be sought by a particular decision. This step is especially important as it is the goal of the decision that indicates the desired consequences of the decision, which frames the overall process of decision-making and sets its direction in the next stages of making a rational decision.

At the stage of the development of decision options, having in mind the essence of the mechanism of making a rational decision, it is necessary not to be confined to the minimum number of decision options. Despite the very explicit decision options that are proper and important for a particular problem it is important to find as many decision alternatives as possible. Then there is the possibility of a wider choice and the likelihood to make the best decision.

When as many decision options as possible have been established, one is selected. It is complicated because most of, or even all potential decision options may have some advantages, which are not featured by the other methods of solving the problem. They also may have specific advantages typical only to them. The science of prescriptive psychology provides for several common rules according to which the choice of one decision alternative should be considered as rational[659]. For example, it is suggested to follow the compensatory model, according to which the optimal decision would be the one, which allows to realise more values than any other, meaning that the values determined by the chosen particular decision option would compensate other values, which are not implemented after the remaining alternatives of decision-making are rejected[660].

Another rule is the so-called conjunctive model. Its essence is that during the process of decision-making, a certain feature of a potential decision option is absolutely unacceptable to the particular subject making the decision, therefore such an alternative is rejected as improper despite its other advantages[661]. Everything depends on the goal of the decision and if to achieve such a goal the decision must be connected to certain values, no other values can compensate them.

One more rule to apply in making a rational decision as suggested by science is the so-called lexicographic model[662]. On the grounds of this model, first of all, the essential advantages of each potentially possible decision option are compared[663]. The alternative that offers a more valuable essential advantage in a particular situation should be the rational decision. If it is difficult to make decisions and reject decision options based on the evaluation of essential advantages, then less significant advantages of the decision alternatives using the lexicographic model must be considered and the optimal decision option against this consideration chosen. If such 'less significant' advantages are of similar importance, then another features of decision alternatives which are less significant in a particular situation must be evaluated until, finally, the value of one of them in particular decision-making becomes higher than that of the others.

It should be added that the choice of one of the models discussed here depends on the sphere where the decision must be made and the goals to be achieved. Furthermore, in choosing the most optimal decision out of the potentially possible decision alternatives, the rules mentioned above may be adjusted to each other.

However, the possibilities to adjust the models mentioned above in practice are quite limited because in the light of the rational decision they function only if such a decision involves zero risk. This means that they are the direct causal relation between the potential options of problem solving and the consequences sought by them[664]. In other words, it is only possible to evaluate and compare the advantages of decision alternatives under the rules mentioned above when there are no doubts that the choice of a certain decision option will cause the precise consequences that are expected. In practice, such situations do not occur very often; more common and complicated are situations when

658 FRANK, N. Decision Making as Cognitive Process. In *International Encyclopedia of Psychology.* London: Salem Press Inc., 1996, p. 1281.

659 CONNOLLY, T.; ORDONEZ, L. Judgment and Decision Making. In *Handbook of Psychology.* New York: John Willey & Sons, 2003, p. 502.

660 *Ibid.,* p. 503.

661 *Ibid.*, p. 502.

662 CONNOLLY, T.; ORDONEZ, L. Judgment and Decision Making. In *Handbook of Psychology.* New York: John Willey & Sons, 2003, p. 503.

663 *Ibid.*

664 ARSHAM, H. *Tools for Decision Analysis: analysis of risky decisions.* [interactive] [accessed on 15 November 2017]. Online access: <https://home.ubalt.edu/ntsbarsh/opre640a/PartIX.htm>.

it is necessary to make a choice from decision alternatives, which do not ensure that the consequences relating to them will definitely arise.

In such a case, the prescriptive psychology of rational decision-making suggests referring to the so-called expected utility model, which has been widely researched and often applied in practice[665]. According to the expected utility model, the choice of a rational decision option is based on the evaluation of utility (in its broad sense) of possible consequences of each decision alternative and on the consideration of the probability of such utility[666]. However, it would not be wrong to say that this model is mostly based on axioms of mathematical probability theory and it highlights the very dimension of probability but not the evaluation of the same utility[667].

As already mentioned, the last stage of the prescriptive rational decision is the evaluation of the decision. At this stage, checks are made to see if the consequences of a decision made correspond to the initial goal of the decision. In the opinion of some scholars, the inspection of decisions covers not only the inspection of the correspondence of the original goal and the actual consequences of the decision, but also the evaluation of the adjustability of this particular decision-making mechanism for solving new problems. Only when a decision is made concerning a particular problem may it be considered as the model for other similar problems may that decision be treated as the right one, having 'real value'[668]. On the other hand, in the opinion of other theorists of decision-making, the evaluation of the decision is not a stage of decision-making at all[669].

When evaluating the above-mentioned method of decision-making, i.e. the rational decision, it should be noted that the idea of such a decision is based on logics, mathematical accuracy and the aim to minimise the probability of coincidence as much as possible. The main tool of the rational decision is thinking. Therefore, the concept of the rational decision absolutely denies any excursions beyond the space of Human consciousness or mind control. As already mentioned, when a decision is made using the rational method, all steps taken during the decision-making (for example, information collection, establishment of criteria for the selection of the optimal decision option from other alternatives, certain rules according to which the alternatives of the decision are evaluated, etc.) are limited by the direction as determined by the goal set in the first stage. This goal is the

665 CONNOLLY, T.; ORDONEZ, L. Judgment and Decision Making. In *Handbook of Psychology.* New York: John Willey & Sons, 2003, p. 505.

666 CONNOLLY, T.; ORDONEZ, L. Judgment and Decision Making. In *Handbook of Psychology.* New York: John Willey & Sons, 2003, p. 505.

667 FISCHOFF, B. Statistical Models of Decision Making. *Encyclopedia of Psychology.* Oxford: Oxford University Press, 2000, p. 453.

668 GUČAS, A., *et al. Bendrosios psichologijos paskaitos.* Vilnius: Mokslas, 1980, p. 127.

669 MOKŠIN, V. Priimti sprendimus paprasta. *Vadovo pasaulis,* 2003, No. 11.



desired consequences which have to be caused by the rational decision and which satisfy the interests of the subject entity making the decision to the maximum extent possible. It is the interests of that subject that are the driving force behind the rational decision.

Actually, considering the method of decision-making mentioned above, the interests should be understood in a wide sense as any need, regardless of its origin. They also include public interests when a public entity, such as a civil servant or a judge, implements the functions assigned to them to achieve the goals for which it is responsible, as well as private interests, such as economic benefit, reputation or other needs, the satisfaction of which is important to an individual or a small group of them. In addition, the interests may be clear and defined, such as, the aim to earn profit of defined amount from a particular transaction, or abstract, like the goal to solve a problem professionally and to make a decision that is just right and moral in terms of values. Of course, in many cases the aim of making a decision is to satisfy not one but several interests of a similar or different degree of definition.

Due to its nature (the choice is based on logics, mind and must be mathematically precise), the rational decision may be used for problem solving when quantitative criteria must be applied to choose the optimal decision. However, it is unlikely that this method may help to solve problems that require consideration of values which cannot compensate each other due to their autonomous weight and, in most cases, are undefined and hardly expressible.

There can be a situation when the logically right decision is wrong and unacceptable in terms of values. This is particularly obvious in relation to solving legal disputes and political matters. Thus, the application sphere of the method of making the rational decision depends on the origin and nature of the problem. The limitations of the rational decision are also grounded on high financial costs (for example, to collect information necessary for making such a decision or to develop potential decision options), time costs (mostly, also to collect information, develop potential decision options, sometimes to select the most optimal alternative), the complexity of explicit definition of decision goals, the coordination of such goals as well as the complexity of the foresight of the future consequences of the decision.

Due to the impartial disadvantages of rational decision-making mentioned above, individuals making decisions are often forced to consciously choose another method of problem solving, for example, one that is based on intuition or experience. Moreover, the descriptive decision-making theory provides for a lot of evidence that even the thinking process following the logic axioms of the rational decision carries the elements of Human subjectivity, which distort the rational decision sought by that individual. Finally, the theories of influence of emotions on decision-making developed during the last decade generally force one to think only about the ideal and declarative nature of the rational decision, which would only allow seeing this method of problem solving as the goal which cannot be implemented in practice.

## Limits of Rationality

*Heuristics*

Statistics research has shown that the majority of subjects who make decisive decisions on administration, business or education rarely use a rational problem solution in practice, as often as not referring to their own practice or intuition, according to themselves[670]. Moreover, separate steps of the rational decision (irrespective of the will of the deciding subject) may be intuitive or 'based on practice', and they may divert the very rational decision (as expected) from the direction determined by the rules of logics. In other words, in reality Human Beings often make decisions in a way other than that determined by the theory of prescriptive decision-making. It is namely the factual intellectual process that attracts the interest of theories of descriptive decision-making that are attributed to the branch of cognitive psychology.

In terms of thinking, both intuition and practice share the same roots, which are heuristics. The heuristic form of thinking is characterised by simplified brain activity that is regulated and controlled by empirically determined and well-established general principles of certain actions. When faced with complicated problems or lack of information, Human Beings tend to follow those rules – they are rather general but already tested in practice and are suitable for Human Beings.

This form of thinking results in a more flexible way of decision-making, which is less costly and enables the Human Being to make a decision in a faster and more rational way. Moreover, the intuitive process adds creativity to the very thinking and this is a great advantage bearing in mind the rapidly changing relations and the variety of problems. On the other hand, the process of heuristic thinking is no longer 'controlled by the brain'. It is inconsistent, quite often (not always) it results in a systemically tendentious thinking, and thus Human error in decision-making. In order to explain the irrational nature of the Human Being, it is worth making a more thorough examination of the scientifically proven main heuristics of thinking and their effect on the irrationality of a decision.

One of the major and actually very often 'simplification' of thinking is the representativeness heuristic. No final agreement on its definition exists[671], but its defining characteristic is that Human Beings often assess probability according to the level by which A represents B, i.e. to what extent does A resemble B[672]. In other words, representativeness

670 MYERS, D. G. *Psichologija,* p. 330.

671 *Ibid.*

672 *Ibid.*, p. 233.



may help to decide whether an example of a trigger falls into a certain category[673]. This type of heuristic may manifest in different spheres. For example, in the theory of economy the representativeness heuristics may be perceived as a bias, which means that investors, in case of uncertainty, would tend to believe that the perfect running record of a certain company is a material representation of its activity that the company will continue to maintain in future[674].

In order to solve a problematic situation that he faces, the subject who makes the decision searches for its prototype – a previous solution to a similar problem he achieved in the past. Of course, the problems that have the same characteristics require the same solution, but in the case of representativeness heuristic, the identity of two situations is most often assessed upon examining only *prima facie* characteristics (often – superficial ones), rather than fundamental characteristics, the ones that express the specific nature of the situation. When deciding on the probability of something certain, the subject that makes a decision uses his intuition and compares it to the already available mental presentation of the same type. And if they are identical, the subject usually ignores the different arguments (those of statistics or logics)[675]. It is rather easy to illustrate a situation like this in the legal sphere. A great example of the principle of functioning of such heuristic is legal precedent that is improperly applied by a court when the judge fails to determine the difference between two legal conflicts.

Another rule (this one proven by numerous experiments and studies) that speeds up and simplifies the process of thinking is the availability heuristic, which is used when the decision is based on the easily accessible information in the memory[676]. If isolated examples relating to something certain, for instance, are easily retrieved from memory, one often concludes that it is something usual[677]. For example, when trying to assess the future consequences of some decision, the consequences that are distinctly described and bear a positive emotional load will be most often perceived to be more probable compared to those that are difficult to imagine or understand. Alternatively, the consequences that we imagine to be dismal or tragic will be rejected as the least probable without going into detail (the syndrome 'this cannot happen to me'). Meanwhile, the logical theory of probability often proves different.

673 FIEDLER, K.; VON SYDOW, M. Heuristics and biases: Beyond Tversky and Kahneman's (1974) judgment under uncertainty. In EYSENCK, M. W.; GROOME, D. *Cognitive Psychology– Revisiting the Classic Studies.* SAGE Publications, Limited, 2015, pp. 146–161, p. 148.

674 BOUSSAIDI, R. Representativeness Heuristic, Investor Sentiment and Overreaction to Accounting Earnings: The Case of the Tunisian Stock Market. *Procedia - Social and Behavioral Sciences,* 2013, vol. 81, pp. 9–21, p. 9.

675 MYERS, D. G. *Psichologija,* p. 331.

676 *Ibid.*

677 *Ibid.*, p. 332.

The anchor and adjustment heuristic also functions as an intuitive mechanism of decision-making. The key of this heuristic is that a certain initial anchor is chosen for the object of assessment. It may be a size or quantity or even a moral value that will be treated as the point of reference in the assessment of a certain object[678]. Later this initial anchor shall be applied in view of additional information retrieved from memory or external sources[679]. For example, a company that wants to project potential sales for the upcoming quarter will take the sales indicators at the moment of assessment as the initial anchor and (since the company treats them as the underpinning factor) will adjust the current indicators according to market trends, new initiatives, etc. Due to such principle of functioning of this particular heuristic its use in the thinking process may result in misleading assessment, because either a reference value/indicator is wrong or it is adjusted inadequately and/or improperly. The said heuristics are the internal mechanisms of thinking that enable the subject (as already mentioned) to make more flexible and creative decisions at a lower cost. In this way, the method of decision-making by using heuristics is obviously superior to the so-called rational decision. Nevertheless, another characteristic of heuristics, the so-called cognitive trend (sometimes referred to as the human factor) may result in a situation where the adopted decision has consequences other than those expected.

*Cognitive Partiality*

Cognitive partiality is understood as any phenomenon, when certain consequences of the action performed by the observer himself tend to change in the course of observation and assessment. Cognitive partiality is deemed to also include the basic statistical and memory errors that are characteristic to every Human Being and that discredit the scientific method, which has been developed and is still being improved in order to minimise this very tendency. Cognitive partiality is the fundamental disadvantage when the problem is solved by intuition, i.e. upon effect of heuristics. The effect of this phenomenon and its individual forms upon the efficiency of decision-making is worth examining in more detail.

Descriptive psychology offers evidence that quite often an obstacle that prevents effective decision-making is the wish of the Human Being who makes the decision to search for information that would support his ideas. This phenomenon is called the confirmation bias[680]. This means that even if an idea is wrong, one often believes, trusts in it, and

678 *Ibid.*

679 FIEDLER, K.; VON SYDOW, M. Heuristics and biases: Beyond Tversky and Kahneman's (1974) judgment under uncertainty. In EYSENCK, M. W.; GROOME, D. *Cognitive Psychology – Revisiting the Classic Studies.* SAGE Publications, Limited, 2015, pp. 146–161, p. 149.

680 NICKERSON, R. S. Confirmation Bias: A Ubiquitous Phenomenon in Many Guises. *Review of General Psychology,* 1998, Vol. 2, No. 2, pp. 175-220, p. 175.



searches for way to substantiate it, while information that denies the idea is rejected[681]. Such tendency is explained by the fact that more cognitive effort is needed to replace a hypothesis raised by a person who makes a decision with another hypothesis, compared to the search for information that proves the first hypothesis. Therefore, such an inclination may have a direct effect on the decision-making and may cause obvious and disappointing consequences of such a decision.

The confirmation bias has a related tendency – *partiality due to belief,* which is perceived as subjective belief of a person who solves a problem, which causes a deviation from the logical thinking and rational decision[682]. Such an irrational trend is explained by an idea that has been confirmed by experiments. This idea says that it is easier for Human Beings to understand the absence of logics in statements when the assessor has a negative opinion in advance, compared to the situation where the assessor believes that the said statements are true[683].

Partiality due to beliefs has an effect on thinking and the so-called *phenomenon of sustainability of beliefs* proves this fact. This phenomenon may be characterised as inclination of the Human Being to stick firmly to his own beliefs if confronted by contrary evidence[684]. Even if the contra-arguments clearly prove the falsity of prerequisites of such beliefs, the subjective confidence may endure[685]. This tendency is somewhat similar to the previously discussed cognitive partiality (confirmation bias), but the latter has a specific characteristic – irrationality of thinking may not necessarily be affected by preliminary conviction, i.e. primary hypothesis may be simply made in a particular case without any preliminary assessment. The compared partialities are also different in terms of rejection of the object, i.e. upon the effect of confirmation bias the very search for subjectively unfavourable information is rejected, and the phenomenon of sustainability of beliefs is an illustration of the irrational nature of the Human Being even in the presence of indisputable evidence, which happens from time to time. However, this does not mean that the subjective beliefs of the Human Beings remain unchanged – they simply need stronger evidence than those referred to when forming said beliefs[686].

Another example of limitation of rationality in the course of decision-making is the overconfidence bias. This is a tendency to be more confident in the knowledge and accuracy of assessment, which emerges through problem solving according to intuition (by use of heuristics), through constant attempts to strengthen own beliefs and ability to

681 *Ibid.*

682 MYERS, D. G. *Psichologija,* pp. 337–338.

683 *Ibid.,* p. 338.

684 *Ibid.*

685 *Ibid.*

686 *Ibid.,* p. 340.

justify mistakes made[687]. Strange but true, while on the other hand it is absolutely clear that overconfidence is most often displayed when making a decision in an area, where the subject who makes the decision has certain knowledge or strong beliefs. Of course, self-confidence, which is actually an element of heuristic thinking, is valuable and effective in the majority of cases. The degree of overconfidence becomes lower when the Human Being obtains more skills and experience in a certain field. Moreover, psychological research has shown that Human Beings who make mistakes due to overconfidence tend to live a happier life and make faster decisions than those who lack such confidence[688]. Nevertheless, despite the various advantages of this phenomenon, belief in one's own knowledge and expertise in a certain field tends to limit the search for information and its processing, and thus, rationality of decision-making, as well, which may have a negative effect[689].

Finally, one must examine the phenomenon of fixation. The key characteristic of this phenomenon is the inability to have a fresh look at a problem[690]. Once decided, the Human Being consolidates (fixes) the decision both consciously and unconsciously and hopes that in case he needs a new decision, the formerly efficient decision will become the proper way to solve the problem. It is difficult to argue against the belief that application of former decisions in new situations may be an efficient solution. Still, solving the problem in such a way prevents formation of a new approach to the problem and its solution. The world that surrounds the Human Being becomes more complex, relations in every sphere change faster, and the scale of values constantly undergoes transformations. In a situation like that the problem should be assessed anew, as if from the side, disassociating from unnecessary preliminary conditions based on history. Otherwise the decision made (even if it was progressive at the moment of time in the past when it was made) may be considered irrational due to its conservatism.

Thinking in heuristics, the possibility to practise the cognitive bias that is partially caused by them is what makes one believe that the irrationality of the Human Being is not solely a consequence of a lack of attempts. The science of psychology proves that such a distortion of the rules of logics is often caused by the very mechanism of thinking, which may be influenced to a certain extent but not changed in its essence. Even if (for the sake of rationalism) we watch our own behaviour, results of such 'control' may be confusing as in this situation, other mental and nervous processes emerge and they are affected by other factors. One of the fundamental factors that affects decision-making is emotions.

687 *Ibid.*, p. 333.

688 *Ibid.*, p. 335.

689 MYERS, D. G. *Psichologija*, p. 327.

690 *Ibid.*, p. 327.



*Emotions*

Accentuating their own specifics, the theories of both rational and cognitive decision as discussed above paid very little attention to emotions as factors that affect decisions. The effect caused by emotions is a new trend of the theory of psychology of decision-making. Its successful development started only a decade ago, but this trend already provides many more opportunities to interpret the process of decision- making and offers more evidence in the proof of statements that even incidental, i.e. objectively unrelated with particular decision, emotions may have a significant effect when making a certain decision or choice, as well as the statement that lack of innate or gained emotionality may result in a lower quality decision, etc.

There are two ways for emotions to affect the decision – the effect may be exerted through expected emotions and immediate emotions[691]. It has been determined that immediate emotions may have either direct or indirect impact, and they may be caused by either anticipatory or incidental influences[692]. In order to disclose the advantages and disadvantages of certain aspects related to the effect of these and other emotions on decision-making, as well as the advantages and disadvantages of the effect caused by emotions, we must have a more in-depth look at these topics.

*Expected Emotions*

The effect of the expected emotions on decision-making relates to the forecast of emotional consequences of the result of the decision. The issue is not the expected emotions, i.e. a feeling of affect, which the Human Being will experience after the decision gives a result, but rather the senses that arise in the course of thinking about such emotions and imagining them. It is worth noting that traditional prescriptive and descriptive decision-making theories recognised only the effect of expected emotions (to the extent they recognised any significance of emotions)[693]. In this respect, decision-making is perceived as a choice, which will increase to the maximum extent the balance of the positive emotions that are expected and negative emotions that are avoided.

Recent studies have shown that perceiving emotions as one of the elements of the utility which is aspired by the decision would be too narrow and would not correspond to the processes of thinking that exist in reality[694]. Therefore, a new approach to emotions has some new aspects of interpretation of risky decision-making that are in conflict with

691 LERNER, J. S.; LOEWENSTEIN, G. The Role of Affect in Decision Making. In DAVIDSON, R.; GOLDSMITH, H.; SCHERER, K. *Handbook of Affective Science.* Oxford: Oxford University Press, 2003, pp. 619-642.

692 *Ibid.*

693 *Ibid.,* p. 621.

694 *Ibid.,* pp. 621–622.

axioms that are offered by the traditional expected utility model and based on mathematical theory of probability[695].

The first statement of the research into emotions is that the subject who makes a decision, when assessing outcomes of the prospective versions of the decision, often fails to refer to the criterion (an absolute number) of a situation of final utility (the sum of all wins and losses). He rather operates the very same wins and losses as criteria (a comparative number). Alternatives of the choice are recognised as bearing an emotional load.

Another trend, which is proposed for the purpose of modifying the traditional expected utility model, is the reaction to something that has been noticed – that the Human Being often compares consequences of his own decision with the situation, which could have occurred if the circumstances of decision-making were different or the Human Being himself acted in some other way. Such a situation creates the so-called counterfactual emotions[696]. Two emotions that are significant in this respect are disappointment and emotional upswing[697]. They originate from the comparison of expectations related to the decision (at the time it was made) and the actual situation.

One more emotion illustrating that expectation was different from reality is regret[698]. In this context, regret originates when the current outcome of the decision is compared to the outcome, which could have occurred if the subject had chosen another option. Disappointment, emotional upswing or regret may affect the decision if these emotions (which will actually arise only after the outcomes of the decision become known) may be anticipated, expected at the very moment of decision-making. However, the aspect of will is important in this situation, as well. The subject who makes a decision may consciously avoid assessment of predicted counterfactual emotions and thus eliminate their ability to affect the decision[699].

The third important theoretical innovation related to the impact of emotions on risky decisions is the so-called non-linear probability weighting[700]. The phenomenon of non-linear probability weighting when making risky decision was discovered after one found that the possible outcomes of the prospective versions of the decision are weighted with indirect proportion to the mathematical probability of such outcome[701]. The traditional model of expected utility, which is offered by the so-called rational decision theory,

695 *Ibid.*, 622.

696 LERNER. J. S.; LOEWENSTEIN, G. The Role of Affect in Decision Making. In DAVIDSON, R.; GOLDSMITH, H.; SCHERER, K. (Eds.) *Handbook of Affective Science,* p. 623.

697 *Ibid.*, p. 623.

698 *Ibid.*

699 *Ibid.*

700 *Ibid.*, p. 624.

701 *Ibid.*



is based on the strict rules of the mathematical theory of probability[702]. The majority of studies of the Human Being's behaviour have proved that the subjects who make decisions tend to overestimate low probability, they don't feel the fluctuation of average probability and often underestimate high probability[703].

The said innovations of the decision-making theory are significant for making decisions in real life, they provide better opportunities for a general interpretation of the models of deciding, and offer evidence that numerous factors exist in real life that determine the irrationality of decisions of the Human Being.

*Immediate Emotions*

As already noted, emotions in the course of decision-making have a role in both the predicted future outcomes (expected emotions) and the affect, which is experienced at the moment of decision-making and which changes the trend of the decision in the direction other than that determined by logic. Immediate emotions may affect the decision in two ways: directly and indirectly. Both ways are worth individual attention.

*Direct effect of immediate emotions.* Emotions and mood may directly affect the behaviour of the Human Being even without changing the perception of the subject who makes the decision about the criteria of the decision to be made, for example, the outcomes of the decision and the probability that they will occur. The nature of such an effect significantly depends upon intensity of emotions[704].

In the case of low or average intensity of emotions, immediate emotions have basically an advisory function. In this case one may note that lately a so-called affect-as-information theories are being developed in the science of psychology and they had the greatest impact on the development of the said approach. According to these theories the Human Being, when making a certain decision, often faces himself and asks: How do I feel when I act like that?[705] And then the mood of the reply is used for the purpose of formulating the decision. It is claimed that a positive emotional state at that particular moment will result in a positive assessment of certain elements of 'uncertainty' and recognition of a higher risk[706]. Moreover, in a contrary situation negative emotions will inhibit risk acceptability, intuitive thinking, and redirect the decision towards rationality[707].

On the other hand, one believes that in case of low and average intensity of emotions the direct affect will not exert its influence on each and every decision. Immediate

702 *Ibid.*

703 *Ibid.*

704 LERNER, J. S.; LOEWENSTEIN, G. The Role of Affect in Decision Making. In DAVIDSON, R.; GOLDSMITH, H.; SCHERER, K. *Handbook of Affective Science*, p. 627.

705 *Ibid.*

706 *Ibid.*

707 *Ibid.*

emotions may fail to affect the decision because *(i)* the expected outcomes of the decision have no emotional charge (the majority of advocates of the theories discussed express their consent to such a statement), *(ii)* the dominant assessment criteria are not emotional but those of a different nature, such as logic. Its dominance most often manifests in the areas where the subject who makes the decision has sufficient knowledge, may operate it and therefore simply avoid the situation of 'uncertainty'.

One believes that there is a chance to consciously avoid the direct effect of immediate emotions. This is possible due to accountability manipulations that encourage the individual to thoroughly examine each characteristic of the problem to be solved, which has effect on a particular decision or choice[708]. However, it is difficult to outline the unsuitability of certain specific emotional reactions for a particular decision[709]. In the course of mental processes cognition and emotions partially overlap, therefore it is often impossible to distinguish whether particular feelings are a reaction to the purpose of the decision or simple incidental emotional reactions that originate for reasons that are absolutely unrelated to the decision. Human Beings often fail to understand that the decision they made was affected by emotions that were triggered in an absolutely different situation[710]. For example, even if one discovers and eliminates the emotions that have no link to the topic at hand, it would be practically impossible to eliminate absolutely precisely such effect from the process of decision-making without under- or overcompensation[711].

One may conclude that the effect of the discussed type of emotions on the decision is weak, since such an effect may be consciously influenced only by a rather simple reverse process called accountability manipulation[712]. Anyway, higher vigilance of the individual who makes the decision may help to reduce the effect caused by emotions, if only slightly.

When emotions intensify, their influence on the behaviour of the Human Being increases as well[713]. Therefore, when the intensity reaches a certain point, emotions may suppress not only the problem solution, which is based on thinking, but also ability of the Human Being to perceive the environment at large[714]. An emotionally intense situation is often referred to as the loss of self-control or behaviour that is detrimental to the very

708 LERNER, J. S.; LOEWENSTEIN, G. The Role of Affect in Decision Making. In DAVIDSON, R.; GOLDSMITH, H.; SCHERER, K. *Handbook of Affective Science,* p. 627.

709 *Ibid.*

710 *Ibid.*

711 *Ibid.*

712 *Ibid.*

713 *Ibid.*

714 *Ibid.*



interests of the Human Being who acts this way[715]. The best examples of this phenomenon are already considered to be health conditions (such as agoraphobia), however, even a lower degree of intensity of emotions may in certain circumstances be sufficient for the Human Being to adopt a decision that is hard to support with logic and that is absolutely unjustified[716]. In such a case, it is possible that the expected emotions and immediate emotions with direct effect will be different, and it is the result of their balance that will determine whether the outcomes of the adopted decision will be such as expected, or at least similar, or absolutely unexpected and disappointing.

Scientific research into emotions provides a reason to believe that the influence of affect depends not only upon its intensity, but also on the *quality characteristics of these emotions.* It has been determined that certain emotions cause specific behaviour trends[717]. Of course, this is a relative statement, but it is known that, for instance, anger causes aggression[718] and fear causes retreat or self-defence[719]. Besides, one believes that such trends of behaviour tend to accumulate for a certain period of time and they vanish only after the action with a 'discharge' effect[720]. Therefore it is highly possible for the hidden purpose of a certain emotion to become realised in a situation (and in the course of solving a particular problem), which has no direct link to the source of the emotion that caused this trend of behaviour[721].

So far, it is these particular emotions (anger, fear) and the behaviour trends caused by them that have been examined to the deepest extent. It is difficult to say how many types of emotions that cause behaviour trends may be identified and to what direction and what extent would the behaviour of the Human Being and the problem solving be directed (compared to the point of reference, logic) if they were triggered. Despite the attempts by the theory masters to discover a method that would enable one to determine such accumulating undesired behaviour trends and to artificially implement them, it has been mentioned that determining the undesired emotions and controlling their influence on decision-making is too complicated to reasonably deny the doubts related to the rational nature of the behaviour of the Human Being.

*Indirect effect of immediate emotions.* Emotions play an important role in decision-making when they act indirectly, i.e. when they have influence (contrary to the direct

715 *Ibid.*

716 *Ibid.*, pp. 628–629.

717 MYERS, D. G. *Psichologija,* p. 628.

718 MYERS, D. G. *Psichologija,* pp. 450–451.

719 *Ibid.*, p. 448.

720 LERNER, J. S.; LOEWENSTEIN, G. The Role of Affect in Decision Making. In DAVIDSON, R.; GOLDSMITH, H.; SCHERER, K. *Handbook of Affective Science,* p. 628.

721 *Ibid.*

effect of immediate emotions) on the perception of outcomes pursued by the decision and expected emotions, as well as quantity and quality aspects of processing the information[722]. One of the aspects of the indirect effect of emotions on the decision is their *effect on the assessment of the outcome of the expected decision*[723]. One rather general postulate is that, for example, the Human Being who is feeling optimistic is more prone to take risks, improvise, act innovatively. Meanwhile, a pessimistic mood at the moment of decision-making will most probably support the restrictions of the accepted risk level. Therefore, sometimes this may result in the loss of a great business opportunity, which may be followed by another emotion, regret. This aspect of the indirect effect of emotions has to do with the distorted assessment (under- or overcompensation) of the probability of prospective outcomes of the alternative decision.

On the other hand, direct emotions equally affect the probability of material outcomes of the decision and the assessment of emotional reactions caused by them. It has been found that while trying to anticipate the feelings to be inspired by the outcomes of their decision, the Human Being tends to project his emotional state at the moment of making the decision[724]. The problem is that Human Beings who are making a decision in a state of confidence and security most often underestimate their emotional state, which (to the extent expected by the subject who makes the decision) should be caused by a situation of uncertainty as an expected outcome of the decision. The so-called situation of uncertainty is not negative in itself, since the circumstance in its background – the risk in numerous spheres (like business) – may not be avoided and is treated partially positively, and is necessary to attain good results.

The discussed phenomenon manifests in a retrospective way, as well: when a decision is made in a state of uncertainty, it is hardly possible to make a very precise prediction of the emotional state, which (as expected by the subject who makes the decision) should be caused by a situation of security – the emerging outcome of the decision. Another aspect is that it is difficult to anticipate the behaviour of Human Beings whose intrinsic state is different in terms of quality compared to that of the subject who makes the decision. Of course, situations of certainty and uncertainty are perfect categories, which are perhaps impossible to implement to the absolute extent. By contrast, one should speak of the situation where the Human Being is absolutely aware of and knows each element of his environment or, vice versa, but has absolutely no understanding of the environment. However, the said trends of behaviour may still manifest when the situation of the Human Being changes from 'more real and clear' to 'more unreal and unclear'.

722 *Ibid.*

723 *Ibid.*

724 LERNER, J. S.; LOEWENSTEIN, G. The Role of Affect in Decision Making. In DAVIDSON, R.; GOLDSMITH, H.; SCHERER, K. *Handbook of Affective Science,* p. 629.



Another aspect of the indirect effect of immediate emotions on decision-making is the *effect on the very process of decision-making.* Immediate emotions may result in a systemic partiality when interpreting information that is necessary for decision-making to the extent that the subject who makes the decision will search for information, select it and perceive it partly due to his emotional state at that particular moment. Psychological tests prove that a positive emotional state usually results in a wider spectrum of information collected, while bad feelings cause a more narrow scope of information[725]. On the other hand, a negative emotional state (even if it restricts the scope of collected information) forces the subject who makes the decision to concentrate on the sources that are more closely related to the objectives sought by a particular decision[726]. For this reason, a good emotional state may result in a more risky, innovative, unusual decision and it may be a great success; however, the chance of making a mistake here is greater, as well. In a contrary situation, negative emotions make the decision-maker reach a more careful decision, perform a rational assessment, and follow logics[727] – this in turn has its own advantages and disadvantages that manifest in a different form (both positive or negative) in every individual situation.

Immediate emotions have a similar effect on *the depth and thoroughness of the decision-making process,* as well. A negative emotional state is more often associated with systemic decision -aking compared to a positive state. This phenomenon may be explained by the fact that emotions function as a notification that 'everything is fine' or that a problem arose and it needs attention[728]. Thus, internal dissatisfaction may cause a more prudent, alert, gradual decision-making process, and the feeling of happiness, satisfaction, and internal harmony will more often result in thinking that is based on stereotypes – in other words, heuristic thinking.

*Factors that Generate Immediate Emotions*

Immediate emotions experienced by the individual who makes the decision are a reaction to factors of dual – anticipated and incidental – nature. The anticipatory influences are related to the forecast of prospective alternatives and the choice of the decision made, as well as the assessment of outcomes, while incidental influences cover the elements that are absolutely dissociated from the decision made[729].

*Factors that originate from anticipation.* Immediate emotions that have a diverse effect on the decision-making process are in their own turn under the normative influence

725 *Ibid.*

726 *Ibid.*

727 *Ibid.*

728 LERNER, J. S.; LOEWENSTEIN, G. The Role of Affect in Decision Making. In DAVIDSON, R.; GOLDSMITH, H.; SCHERER, K. *Handbook of Affective Science,* p. 629.

729 *Ibid.,* p. 630.

or thinking about future outcomes of the decision[730]. It is usually stated that thinking about positive outcomes results in a positive effect and thinking about negative outcomes leads to negative emotions[731]. If one is highly anxious about the outcomes, the process of imagining them may cause frustration. Moreover, one may claim that a direct link exists between the expected emotions and the intensity of immediate emotions. Thus if the emotions are highly intensive at the moment when the outcomes of the decision become evident, then the immediate emotions that originate from thinking about such anticipated outcomes will be intensive to a proportionate extent[732].

One should note that it is the proportionality of the level of emotional intensiveness (rather than the equality or, even more, identity of the type of emotions) that is subject to scrutiny. The most important criterion for this aspect of the relationship between the so-called anticipated and immediate emotions is not the quality, but the quantity. Interesting as it is, immediate emotions that are caused by thoughts about the anticipated outcomes of the decision quite often lead the behaviour of the Human Being in a direction that is absolutely different from the one dictated by emotions caused by thinking about the very outcomes of the decision. This phenomenon may be explained if we go into details about individual factors of immediate emotions, which stem from anticipation, and their differences compared to the factors that cause the expected emotions.

First, the difference between immediate emotions caused by factors stemming from anticipation and expected emotion is dependent upon a different role of *assessment of probability of alternative outcomes of the decision* in the process of formation of emotions. For example, when choosing an optimal decision according to the rule of *expected utility,* the rational decision would be driven by the alternative, which offers the biggest summary result of value of the outcome of the decision added to the value of the probability of such outcomes. In other words, in this situation both the outcome of the decision and the probability that this outcome will really happen are equally important. However, in the process of formation of an emotional reaction caused by anticipation this rule seems to be not valid[733]. According to popular opinion, in the process of formation of emotional reactions to the outcomes of a decision with an unclear outlook, the function of probability is still an auxiliary factor. In this case, a more important role is given to assessment of the outcomes of the decision in terms of the quality and intensity of their anticipation. In other words, it is the thinking process rather than an attempt to anticipate the probability of outcomes that really matters. This phenomenon has a simple explanation – emotions that stem from

730 *Ibid.*

731 *Ibid.*

732 WANG, Z. M. Judgment and Decision Making. In *The Corsini Encyclopedia of Psychology and Behavioral Science.* New York: John Willey & Sons, 2001, p. 823.

733 FRANK, N. Judgment and Decision Making. In *International Encyclopedia of Psychology,* p. 523.



anticipation are a reaction to mental images, the abstract nature of which causes weak reaction to the probability.

Absence of the direct proportionality of the probability that certain outcomes of the decision will originate and the emotions related to the anticipation of such outcomes enables one to explain the so-called phenomenon of non-linear probability weighting when the objectively low probability of certain outcomes of the decision is overestimated and the high probability is underestimated[734]. It is due to the emotional reactions that originate in the course of assessing the prospective decisions and choosing the most optimal of them (in view of the subject who makes the decision) that sometimes this choice turns out not to be the best from the possible alternatives.

Another factor that originates from the anticipation of the outcomes of the decision, which has a different effect on immediate emotions and expected emotions and which may affect the decision-making, is the *period of time from the moment the decision was made until the outcomes of the decision originated.* Everyone has experienced the feeling that manifests in an uprising of the intensity of emotions such as fear or anxiety when certain outcomes approach. This emotional trend is in place when probability of the outcomes does not change in the course of time. Therefore, for example, the Human Being, even one who consistently followed the rules of decision-making and decided to make a risky decision, at the moment when such decision should be made may become overloaded with immediate emotions caused by the anticipation of unsuccessful outcomes of the decision and refuse such a decision.

When differentiating between expected and immediate emotions, there is an important factor to remember and that is *control.* When making decisions and anticipating the prospective outcomes of alternative decisions the Human Being feels that he has control – in any case it will all depend upon the decision of his own rather than that of another person. Meanwhile the control of immediate emotions is minimal (if any at all is possible in this case). We may recall certain forms of emotional state therapy, the so-called accountability manipulations, which may be used to correct immediate emotions to a certain extent. However, as already mentioned, *(i)* such methods may be applied only to a relatively low intensity of emotions, and *(ii)* application of such methods in reality is a highly complicated task.

Moreover, it has been mentioned that certain immediate emotions *tend to systemically draw the behaviour of the Human Being in the direction that is typical to them.* Bearing in mind that expected emotions are virtually the result of knowledge about the outcomes of the decision, i.e. the affect that originated after the outcomes of the decision, they may have no influence on the decision in terms that they draw the decision towards the trend of behaviour encoded in these emotions. Therefore, it is possible (and it often so happens)

734 CONNOLLY, T.; ORDONEZ, L. Judgment and Decision Making. *Handbook of Psychology,* p. 506.

that expected emotions and immediate emotions (which both exert influence over the decision in their own way), will draw the decision as an act of behaviour of the Human Being in an absolutely different, even opposite direction.

It is important to understand the key difference between the immediate emotions caused by factors that originate from anticipation of the outcomes of the decision, i.e. identification, consideration, and any other thinking about such outcomes, and the anticipated outcomes. The former may not be treated as a weaker form of the latter. The immediate emotions of anticipation and those that arise after the outcomes of the decision are different in their quality. They not only exert a different type of influence on the decision – they are of different nature in themselves. For example, when examining a particular decision, the Human Being that makes the decision operates the emotions which are caused by the outcomes of a single alternative decision and which bear a certain positive charge (let's say, satisfaction with profit), but he does not feel well (feels disappointed): his immediate emotions have no positive charge since there are certain circumstances (such as a wish or objection by the client) that prevent him from implementing one of the prospective versions of the decision, which could have outcomes with higher positive effect (let's say, both satisfaction with profit and an unusually high professional satisfaction).

*Incidental factors.* A number of mistakes in real-life decision-making help to explain the idea that decision-making, just as any other act of the Human Being's behaviour, is the product not only of factors related to the assessment of the decision elements but also factors which have no objective connection with the problem being dealt with in a particular case. As the impact of emotions resulting from incidental factors on the decision-making does not depend on assessment of different alternative solutions, such an effect is sometimes referred to in the literature as non-normative[735]. Even though the importance of incidental factors and emotions resulting from them on decision-making has already been mentioned a number of times, the sources of the incidental affect, i.e. dispositional and situational factors, are worth discussing in further detail.

Character factors of direct emotions determine the Human Being's biased response to certain circumstances irrespective of the specific time and situation. This is a long-lasting response. There is evidence that specific emotions and the particular bias of a decision or choice are interconnected. For example, timid subjects arguably have quite a pessimistic assessment of risk, whereas Human Beings in anger tend to take risks more often and make more optimistic decisions. What is even more interesting is that decisions made in anger are more compatible with those made under the conditions of happy emotions rather than decisions influenced by fear[736]. This might be explained by the fact that happiness and fear are more interconnected with the sense of reality and control, while fear is related in particular to the state of uncertainty and loss of a possibility to control.

735 CONNOLLY, T.; ORDONEZ, L. Judgment and Decision Making. *Handbook of Psychology,* p. 506.

736 MYERS, D. G. *Psichologija,* p. 451.



*Situational factors* make an impact irrespective of the Human Being's character, however, contrary to the character factors, they respond to circumstances of a particular situation occurring in a particular setting, at a particular time. Situational factors of direct emotions have an effect only in that situation and at that time, i.e. they do not have a continuing impact[737]. Still, it has been mentioned that some emotions have a feature of continuing impact for some time and they have to be discharged. For example, this is true with the emotion of anger, which, arising for whatever reason, may strongly affect the Human Being's decision[738] that has objectively nothing to do with the source of anger: the emotion of anger gets simply discharged. However, such an emotion is active only for a fixed period of time – until it realises. While factors of features of emotions are the individual dispositions of each Human Being, which may influence his decisions made during his lifetime.
What is interesting is that situational and character factors may influence emotions interactively and, depending on the similarity or absence of similarity of behavioural tendencies resulting from emotions arisen by them, strengthen one another's impact on decision-making or suppress them to a certain extent or neutralise them all. Obviously, anger, happiness, fear, and hunger – these are very well known emotions. One can say that these are the emotional nuggets that are hard to find affecting something in isolation from the rest. Most often, the state of the Human Being making the decision is the one affected by several or a number of emotions; they trigger or suppress each other, exaggerate or neutralise, etc. However, the fact that a lot of psychological experiments are usually based on primitive emotions does not leave other emotions completely unknown. In other words, knowledge about the Human Being's neurological system, modes of reasoning, which is characteristic to all emotions, allows abstracting results of research of emotional nuggets, and applying them to different effects through schematic modelling.

*The Advantages and Disadvantages of the Emotional Effect on Decision-Making*

The main aspect of the positive effect of *expected emotions* is that they help to identify the value of the consequences of potential decision options in a more precise way[739]. The maximisation of expected emotions is one of the important factors of normative decision-making which forms the grounds of many theories of rational decision. On the other hand, expected emotions when making decisions have positive impact only when they satisfy the following two conditions:

1. cover all factors important to the entity making the decision;
2. are precise.

737 CONNOLLY, T.; ORDONEZ, L. Judgment and Decision Making. *Handbook of Psychology,* p. 507.

738 *Ibid.*

739 LERNER, J. S.; LOEWENSTEIN, G. The Role of Affect in Decision Making. In DAVIDSON, R.; GOLDSMITH, H.; SCHERER, K. *Handbook of Affective Science,* p. 620.

When verifying the first condition, expected emotions may be analysed through research of the importance of direct emotions for the behaviour of the Human Being. It is known that, for example, analysis of reasons of a particular choice, i.e. the diversion of attention from emotions, depreciates the quality of decision-making. The quality of decision-making is also lower when the subject making the decision lacks emotionality, although the level of his cognisance of the situation is high. This happens because the emotional signals having the role of denotation do not function and such signals are usually used by the subject making the decision when he evaluates the future consequences of the decision. Therefore, the strong impact of direct emotions on decision-making raises doubts about the range of the evaluated factors of expected emotions. In other words, if expected emotions cover all factors relevant to decision-making, the impact of direct emotions would not be so high.

It is also hardly possible to satisfy the second condition, which has to do with the precision of expected emotions. The ground for this statement comes from scientific research proving the partiality of false prediction of expected emotions, which undoubtedly may have various negative outcomes for decision-making.

When analysing the positive impact of *direct emotions* on decision-making, it is worth mentioning once more that these emotions highlight the important circumstances of the problem and, by giving preference to the resources of the decision, have an impact on the same process of decision-making[740]. A direct emotion also informs us about the willingness or disinclination of the consequences caused by a particular choice[741]. Direct emotions may include such factors as moral or aesthetic values, which can hardly be expressed objectively and thus conceived, so they seem to have quite a low impact on the decision based on objective considerations. Finally, direct emotions determine the motivation to realise the particular choice. We can find many practical examples when we look at the difference between 'knowing what is the best' and 'doing what is the best'.

The perception of emotions as the source misdirecting the activities of the Human Being, which has been predominant for a long time, has its own valid foundation. As was already mentioned, certain trends of behaviour caused by certain emotions may not correspond to those, which should exist after the situation has been subjected to a rational evaluation, and even may be totally contrary to them. Therefore, factors arising from prediction determine the direction of direct emotions and behaviour, which differs from the one that should be caused by the consequences of the decision. Moreover, direct emotions may distort the consideration of the value of the consequences and of the probability of their occurrence by the decision-making subject, and therefore may influence the impact of expected emotions on the making of the decision.

740 LERNER, J. S.; LOEWENSTEIN, G. The Role of Affect in Decision Making. In DAVIDSON, R.; GOLDSMITH, H.; SCHERER, K. *Handbook of Affective Science,* p. 620.

741 *Ibid.,* p. 626.



## INSTEAD OF CONCLUSIONS…

Similar to any other process related to the intellectual, mental or even emotional activity of the Human Being, legal reasoning is also difficult to define or to place in any other more specific framework. As indicated in this paper, there are certain elements of legal reasoning: understanding, thinking, linguistic expression, and decision. However, the human factor brings numerous nuances and colours to these four elements and at the same time makes the comprehensive definition of legal reasoning highly conditional and difficult to achieve. Nevertheless, the said uncertain and dynamic nature does not deny the importance of legal reasoning and the necessity to analyse the related aspects; therefore, this paper attempted to disclose said infinite nature and to build a foundation for further discussions on legal reasoning and its importance.

*For failure to grasp the boundaries of legal reasoning, or for want thereof, we feel fear and experience the beauty of this discourse…*

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*4.4. Special court judgments*

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