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What Makes Some Considerations Legitimate Political Arguments? On Public Reasons in Rawlsian Liberalism

Wojciech Ciszewski[a]

Abstract. The paper considers an important problem set against the backcloth of John Rawls's political liberalism, namely the issue of the distinctiveness of public reasons. According to Rawls public reasons are types of proper arguments and considerations that may be invoked in democratic political life. They are the reasons that fulfil the requirement of the liberal legitimacy. In different writings, Rawls describes them in terms of common acceptability, universality, accessibility, shareability, transparency, and intelligibility. In the paper the author aims at answering the doubt raised by Ronald Dworkin with regard to the distinctive character of public reasons. The response will be given by developing an adequate definition of public reasons in six steps.

Keywords. Public reasons, argumentation, legitimacy, political liberalism, justificatory reasons, constructivism.

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1 Introduction

The role of 'public reasons' in political discourse, on the grounds of contemporary liberal philosophy, is really difficult to overestimate. According to J. Rawls, among other functions, public reasons ensure respect for people's freedom and provide justification of political power; they are responsible for the stability of constitutional regime and stipulate the legitimate participation in public discussions. Therefore, the identification of public reason requirements becomes a practical necessity for every democratic citizen. Each political agent, in order to postulate a legal reform, to vote for a party, or even to talk publicly about political matters, should necessarily recognize the obligations of public reasons and act in accordance with them.

Nevertheless, it is important to ask how one can, as a democratic citizen, find out if the reason he has is a legitimate public reason. Do we have any method of distinguishing those publicly legitimate arguments from other normative considerations? In the paper, I would like to shed some light on this matter in line with Rawls's writings.

2 Why Public Reasons?

Before moving to the core topic, I would like to recall some remarks that constitute the starting point of public reason theory. First of all, Rawlsian theory is based on the recognition of the fact of pluralism, which means that people who live in the same society differ deeply from each other in their values, beliefs, and attitudes and pursue different conceptions of the 'good life'. In circumstances of freedom, it is impossible for all people to converge on the same moral, philosophical, or religious conceptions. Secondly, although people differ deeply in their worldviews with regard to political matters, they have to act collectively and make decisions as one body. They are equal in their political status and in their participation in political power. According to Rawls, the political power, understood as the power of free and equal citizens, is coercive in its essence because a collective choice made by society is then coercively imposed on everybody. And because of the irresolvable disagreement between people's conceptions of good, exercising political powers becomes a serious threat to freedom. Thirdly, the tension between pluralism and equal freedom grows due to

the fact that most people possess strong external preferences. They are interested not only in pursuing their own conception of the good, but also in creating an environment that will be friendly for their worldview. In fact, they have some preferences against other people's ways of life and try to embody them through political and legal means. Political decisions are likely to be corrupted by these kinds of preferences.

The above mentioned circumstances constitute an important predicament—how to reconcile the multiplicity of standpoints and the necessity of exercising political power with the respect for people's freedom and equality. Rawls's moral solution to this dilemma is expressed in his formulation of the

> [...] duty of civility: [...] duty to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason (Rawls 1995, p. 217)

The essence of the duty is founded on the validity of political values of public reason and, consequently, on the recognition of certain considerations as public reasons. According to Rawls

> [...] to give public reasons is to give reasons that we can reasonably expect that others can reasonably accept as democratic citizens. (Rawls 1999, p. 578)

In different passages, Rawls describes public reasons in terms of acceptability, universality, accessibility, shareability, transparency, and intelligibility making his descriptions a bit confusing. The vagueness of the concept was the main charge raised against the idea of public reason by R. Dworkin. As he writes:

> I do not see, however, what the doctrine of reciprocity excludes. If I believe that a particular controversial moral position is plainly right [...] then how can I not believe that other people in my community can reasonably accept the same view? (Dworkin 2004, p. 1397)

In the next section, I would like to explicate how the reciprocity mechanism works and what is so distinctive about public reasons. The issue will be clarified by developing a full and adequate definition of public reasons in six steps.

3 What Are Public Reasons

3.1 Public Reasons (...)

It would be fruitful to start with some preliminary considerations with respect to Rawlsian terminology. Before we define what is meant by the phrase 'public reasons', we should explain briefly how Rawls understands the two terms that form this phrase, namely 'reasons' and 'publicity'.

The concept of 'reasons' is founded in the Rawlsian reading of Kant's practical reason theory. In his 1980 paper, Rawls described the essence of the constructivist view on reasons in Kantian moral philosophy (Rawls 1980, pp. 515–572) and afterwards, in his later writings, applied this idea to his own political theory of justice. We can say that constructivism with regard to reasons is the opposite view to realism; it is definitely a kind of antirealist account. The clue of the constructivist position is the statement that value considerations (or normative considerations) do not possess their value-property independently of assessing them as valuable. Their normative character depends on recognizing them as valuable according to some prior principles or standards. Rawls claims that we must have some initial premises because not everything can be constructed; we need some material from which to begin (Rawls 1995, p. 102). The role of the 'material' is performed primarily by a liberal framework with the ideas of free and equal citizens and a society as a system of fair cooperation. The constructivist perspective must always be a view *from somewhere* (ibid., p. 116).

The above claims can be illustrated by the Rawlsian example of slavery. From the constructivist perspective, some facts about slavery constitute reasons and others do not. It is not important whether slavery is economically effective or when it arose historically. What is crucial is that it allows some persons to treat others as their property. This fact exists independently of our moral and political principles; however, it becomes a reason only in the light of these principles. When we take into consideration that people are free and that they have equal dignity, then the relevant facts about slavery will gain moral weight.

The second notion, 'publicity', was also developed by Rawls throughout his writings. In short, the publicity condition is fulfilled when a given consideration is known by the members of the public. The opposition of publicity is 'secrecy' or 'privacy', a situation when given rules, principles,

or reasons are not commonly known. Therefore, the meaning of publicity is close to 'transparency', or 'apparency'. C. Larmore shows the increasing significance of the concept in Rawlsian theory (Larmore 2003, pp. 368–393)—from the understanding as a condition imposed on original position to the central aspect of public justification in political liberalism. The evolution shows that Rawls considerably broadened the application and function attributed to the publicity condition. In his later writings, the concept relates not only to the product of the social contracting (publicity with regard to rules and principles), but also to the process of reaching agreement (publicity with regard to reasons).

The preliminary analysis shows that the terms 'reasons' and 'publicity' are separate and independent concepts. In the next five sections, I will explain how they work together.

3.2 Public Reasons Are *Good Reasons* (...)

According to Rawls, every political action, decision, or legal regulation, in order to be legitimate, must rest on reasons that are good; in liberal democracy, each citizen should have a good reason to endorse the law. What is more, the condition of publicity requires that everyone may be sure that others also affirm the law for reasons that are good. It is worthy to clarify what the goodness of reasons signifies.

For most contemporary theories of action (including the Rawlsian conception), good reasons are justificatory reasons, which means that they provide justificatory force for an action. They are normative considerations that count in favour of some act and, hence, always refer to values or other evaluative standards. Justificatory reasons are employed when we want to show others that our decision or action was just or adequate—that it was the right thing to do in a given context. In these cases, reasons that guide our actions constitute an account for evaluating the action. It is important that justificatory reasons must be strong enough (sufficient) to support performing the action. It means that there should be no other easily accessible normative counter-consideration, especially a justificatory reason for not performing the action.

Good (justificatory) reasons should be distinguished from explanatory ones. We may act for a reason that fails to justify the action; however, it constitutes a plausible explanation. For example, the reason why I overslept is the fact that I forgot to turn on my alarm clock. The argument

performs here an explanatory role and makes one's oversleeping intelligible. Explanatory reasons are not reasons in themselves, but reasons why something is thus and so (Raz 2007). Although most of Rawls's clarifications of public reason refer to giving reasons as the explanation of political decisions (e.g., duty of civility is a *duty to be able to explain to one another* (Rawls 1995, p. 217)). It is worth noting that they should be explainable in terms of values, what makes them definitely closer to justificatory reasons. According to Rawls, a good example of considerations that fail to sufficiently justify actions are those given in favour of a compromise. Accepting a decision or a law only as a lesser evil is not a good reason in the Rawlsian sense.

3.3 Public Reasons Are Good Reasons *Taht Could Be Accepted (As Reasons)* (...)

Due to circumstances of value pluralism and the undeniable fact that different people regard different considerations as good reasons for action, the duty of civility sets one main touchstone for arguments permissible in political discourse—the acceptability criterion. Common acceptance with regard to reasons signifies that for all relevant points of view, it should be relatively easy to acknowledge certain considerations as good (justificatory) reasons. On this point Rawls is quite clear; nevertheless, the important question that arises concerns the modality of this acceptance. Do we deal with actual or only potential acceptance of public reasons by the audience?

As F. D'Agostino states:

> [I]n each case, we have a contrast between what A and B would accept based on their actual beliefs and desires, and what they could accept if their beliefs and desires were supplemented in some way. (D'Agostino 1996, p. 32)

In Rawls's writings, there is some ambiguity about this issue. In some passages he declares that public reason is committed to values and principles that citizens 'would accept when suitably presented' (Rawls 1995, p. 125). He is also concerned with actual acceptance condition with respect to the idea of overlapping consensus (ibid., p. 386). Although some theorists attempt to tie the Rawlsian position with actual acceptance (Bohman

and Richardson 2009, p. 14), in my opinion, this interpretation is highly implausible. Rawls is aware that it is actually very doubtful that people would accept unanimously any normative consideration as valid, even the most general political values. Empirical research seems to confirm this conviction. For example, in the United States, according to the survey evidence (Klosko 2009, pp. 23–44), the majority of public opinion do not approve most liberal political values and, at the same time (and contrary to Rawls), most of Americans support the increasing role of religious reasons in political life. If the acceptance criterion was interpreted as actual acceptance, then empirical data from the survey would establish a great challenge to it. Besides, we should realize that if a current consensus on political matters really existed, then the fact of pluralism and the burdens of judgment would not constitute any serious challenge for a society. The Rawlsian answer would then signify nothing more than the prescription that citizens should accept what they in fact accept.

It is beyond doubt that Rawls frequently uses the modality of possibility. It is expressed in different formulations by might (Rawls 1995, pp. 218 and 374), could (ibid., p. 382), or can (ibid., pp. 10 and 128). If we agree that potential acceptability is the adequate interpretation of Rawlsian criterion, we need to indicate what normative assumptions frame it. In my opinion, there are two main constraints that constitute the condition of acceptance: the first is moral and the second is epistemic, and both are to be presented in next two sections.

3.4 Public Reasons Are Good Reasons That Could Be Accepted *By Each Reasonable Citizen* (...)

Public reasons can be recognized as good reasons only within a qualified group of people—reasonable citizens of democratic society. The concept of 'citizenship' determines the political status of these persons and ensures that they can freely (not coercively) accept some reasons as good. But it should be emphasized that the notion of 'reasonableness' is much more complex and weighty. Its meaning is primarily concerned with moral assumptions.

Reasonableness, with regard to citizens, is generally characterized by two features. We should indicate firstly, the set of moral beliefs that is held by a reasonable person (the intellectual condition), and secondly, the moral

motivation towards the democratic actions and cooperation (the voluntary condition). According to Rawls, the set of moral beliefs that reasonable citizens accept comprises convictions that (1) citizens are free and equal in their status, (2) political society is a fair system of cooperation, and that (3) reasonable pluralism is a permanent fact that is connected with the burdens of judgment. The voluntary condition refers to the willingness to offer other citizens fair terms of cooperation and to act in accordance with these terms (even contrary to one's personal interest). The ideal citizen has a will to act in a reasonable manner and also wishes to be seen as a reasonable agent by the other members of the public. Both components—intellectual and voluntary—taken together constitute the threshold of reasonableness. Moral assumptions of reasonableness are not as thin as they seem to be, as long as several important implications may be derived from them. These conclusions are, for example, the rejection of the use of political power in order to repress any comprehensive worldview, the necessity of taking into account others' conceptions of good while taking an action, and accepting the duty of civility and requirements of reciprocity, etc.

Public reason is a reason of persons in their capacity as reasonable citizens. Therefore, we have to distinguish reasonable citizens from two other groups that do not fulfil the threshold requirements. In every democratic regime, we can find many citizens who reject at least one of three premises that constitute the intellectual aspect of reasonableness. Because they do not meet this condition, they should be seen as unreasonable. Usually they are adherents of unreasonable comprehensive doctrines that do not conform to democratic order—discard the equal status of citizens or do not acknowledge the fact of pluralism. There are also citizens who are not reasonable, but who, at the same time, are not unreasonable. Although they accept the threshold of intellectual premises, they do not fulfil the voluntary condition, and they cannot apply their convictions correctly in a given situation.

Reasonableness is primarily, but not solely, a moral ideal. As Rawls states:

> [b]eing reasonable is not an epistemological idea (though it has epistemological elements) (Rawls 1995, p. 62)

In the next section, I attempt to clarify this epistemological component, which is not as marginal as Rawls suggests.

3.5 Public Reasons Are Good Reasons That Could Be Accepted By Each Reasonable Citizen *According To Common Evaluative Standards* [...]

As stated by Rawls, public reasons are transparent and admissible due to the fact that reasonable citizens could accept them on the basis of human reason and common sense. To be precise, the special political status of these considerations is a consequence of their equivalent accessibility and perspicuity among the members of the public.

Public accessibility is a standard based on two assumptions; firstly, on the existence of social consensus (at least in some dimensions of the political domain), and secondly, on the conviction that people have equal epistemic access to this consensus. For Rawls, public political culture with fundamental ideas of democratic citizenship, society, and political values constitutes the source of equally available and permissible arguments. He says:

> In a democratic society there is a tradition of democratic thought, the content of which is at least familiar and intelligible to the educated common sense of citizens generally. Society's main institutions, and their accepted forms of interpretation, are seen as a fund of implicitly shared ideas and principles. Thus, justice as fairness starts from within a certain political tradition. (ibid., p. 14)

The set of shared political values includes, among others, freedoms of speech, of thought, and of religion, equality, public peace, representative form of government, human rights, social minimum, etc. Consensus on these essential democratic ideas constitutes a common ground for our political disputes and agreements. For example, I can understand your argumentation and then accept or challenge it because I share with you the same political premises at the deeper level. There are arguments that both of us find comprehensible and persuasive. For the same reason you can prudently expect me to endorse principles of justice on the same terms as you do. As long as the background of the dispute is equally available for all disputants, nobody is privileged and nobody is discriminated against—the position of both parties is perfectly equal. Thus, if we accept religious truths or sophisticated metaphysical proofs as permissible arguments in the public domain, we would enable some citizens to have better

and wider access to the source of arguments than others, and this would undermine the equal political status of citizens.

In my opinion, this is the main argument for excluding from political discourse so-called comprehensive reasons derived from religious, moral, and philosophical comprehensive doctrines (called 'duty of restraint'). These doctrines are traditions of thinking about good, and they are usually defined by two distinct features: firstly, by their 'comprehensiveness', which means that they cover all recognized values and virtues within one rather precisely articulated system, and secondly, by their essential 'contestability' referring to the fact that they are founded on controversial assumptions or disputable visions of the truth. They contain conclusive answers to fundamental philosophical questions. In contrast, political values or ideas derived from common consensus can be presented independently of any controversial premises (although it is possible that they are supported by such considerations).

The idea of background consensus together with the accessibility condition is often criticized even by adherents of political liberalism. According to some of them, the constraint on permissible argumentation is too burdensome for ordinary citizens; its restrictive character establishes a serious threat to the fact of pluralism and the citizen's fundamental right to freedom. G. Gaus and K. Vallier aim to rescue the idea of public reason and, hence, abandon the accessibility condition. They postulate replacing it with an alleviated demand of intelligibility, which provides the epistemic requirement based on each person's conception of good. In accordance with the intelligibility condition, religious or moral comprehensive doctrines can legitimately provide reasons for and against laws. On this account, a reason is permissible to the public if a person finds the reason justified according to his individual standards. Gaus claims that the idea of widespread starting consensus is doubtful and superfluous; the principle of legitimacy should be recognized as fulfilled when citizens converge on a given law for intelligible reasons. For example, Vallier claims that the typical Catholic argument against abortion is fully understandable and intelligible for all members of the society. Although some citizens may not share the assumptions of the argument, it does not mean that they do not understand the argument itself.

3.6 Public Reasons Are Good Reasons That Could Be Accepted By Reasonable Citizens According To Common Evaluative Standards *And Are Identified By The Process Of Universalization*

The last important aspect, which should be noted, is the manner of recognizing arguments as permissible public reasons. On this point, Rawls' solution also raises controversies among contemporary liberals. Although he does not dedicate too much attention to answering the problem, we may conclude that his method involves universalizing confidential judgments with regard to public reasons. Rawls's method of identifying justificatory reasons is clearly monological. It is important to recognize this fact, as Rawls is often regarded as an adherent of strong deliberative regime (due to his sympathetic comments on the idea) where senses and reasons are worked out in interactive deliberations. Nevertheless, on his account, it is not required for citizens or public officials to deliberate commonly so long as the requirements of hypothetical universalization are met. There are some passages that suggest that it is the proper interpretation of Rawlsian account. The most widely known is the quotation where he suggests the mode of public reasoning for the purpose of voting:

> How though is the ideal of public reason realized by citizens who are not government officials? (...) To answer this question, we say that ideally citizens are to think of themselves as they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact. (Rawls 2001, p. 135)

The answer to the problem of identification brings to mind Kantian moral philosophy and the idea of imperatives. In this situation we should ask ourselves if our reason might be as sound as the legislator's argument or judicial justification for the sentence.

A second important passage concerns the argumentation for the exclusion of moral autonomy from the scope of public reason. Rawls says:

> Whatever we may think of autonomy as a purely moral value, it fails to satisfy, given reasonable pluralism, the constraint of

> reciprocity, as many citizens, for example, those holding certain religious doctrines, may reject it. Thus moral autonomy is not a political value. (Rawls 1995, p. 146)

Here, the Rawlsian way of thinking comes very close to T. Scanlon's test of reasonable rejectability. The test, aimed at distinguishing reasons, will take the formulation by saying that a reason is legitimate only if it cannot be reasonably rejected. However, in order to dismiss a consideration, a reasonable person does not have to make a public opinion poll. All he should do is to ask what could be accepted by a reasonable citizen because, as J. Quong claims:

> [...] if we have justified something to one reasonable person, we have justified it to all reasonable persons. (Quong 2009, p. 6

The procedure of the non-interactive universalization test is charged by discoursive conceptions of public reasoning. S. Macedo, in his interpretation of Rawls's political liberalism, insists that through the process of public deliberation political communities can converge on shared principles and a shared rationale. (Macedo 2008, p. 9) His idea, contrary to Rawls, involves interaction, which is aimed at selecting good reasons. We should not start from the clear and actual consensus on right reasons, but a consensus should be the final process of our deliberative practices. A similar charge was raised by J. Habermas, who blames Rawls for the monological character of public reasoning. (Habermas 2009, pp. 69 and 71) He claims that the contemporary reading of Kant's imperative in circumstances of pluralism requires rejection of first person inquiry as definitely too limited,

> [...] the justification of norms and commands requires that a real discourse be carried out and thus cannot occur in a strictly monological form, i.e., in the form of a hypothetical process of argumentation occurring in the individual mind. (Habermas 1992, p. 68)

Good reasons are considerations that should be worked out during our discoursive practices. Due process of communication and, finally, a reasonable agreement between disputants provides the adequate validity for political claims.

4 Public Reasons and Exclusion

The charge against Rawls formulated by Dworkin concerns the difficulty of seeing what the doctrine of public reason excludes. In my opinion, that foregoing clarification gives ground for the utmost different charge—that the Rawlsian idea excludes too many considerations from political discourse. Such exclusion applies to reasons that are not commonly acceptable, like values that are controversial among members of the public (just as most of the moral or religious considerations); exclusion also covers arguments that are not equally accessible (e.g., scientific achievements that are contestable or incomprehensible). Beyond the scope of public discourse are unreasonable citizens who adhere to illiberal comprehensive doctrines and reject, for example, the conviction that the fact of pluralism is an irreducible fact about our social reality. Not permissible in the public sphere is also supporting political demands on personal or group interests and on reasons in favour of compromise (lesser-evil reasons). Additionally, the possibility of achieving social stability by unanimous convergence on non-public reasons likewise lacks justificatory force.

The exclusionary character of Rawls's conception seems to be more serious than the Dworkinian charge. The range of reasons in the 'justificatory pool'[1] seems to be very tight from the beginning and very 'resistant' to broadening. Rawls does not foresee replacing the content of the 'pool' in the future. We can ask if it is really a manifestation of respect to pluralism, diversity, and equality, when the majority of pluralist considerations and arguments are excluded by force from the political sphere.

The charge is accurate, but only to a certain extent. Although many theorists forget about it, Rawls's theory of justification is much more complex, and it also provides a place for non-public considerations. The most important remark is that the priority of public reasons over other political arguments is valid only with respect to fundamental political issues (constitutional essentials and matters of basic justice). When discussing political matters other than the fundamental, they may refer to both public and non-public evaluative standards. The border between fundamental and non-fundamental matters is drawn in compliance with the basic/non-basic interest distinction. (Marneffe 1990, pp. 253–274) Basic interests

[1]The concept of 'justificatory pool' was introduced by Vallier 2011, p. 372; and also by Friedman (as 'legitimation pool') in Friedman 2000, pp. 16-33.

(warranted by fundamental matters) are those necessary for all persons regardless their conception of good; they constitute personal well-being to a great degree. The fact that we can indicate some commonly needed values (such as life, freedom, and self-respect) makes citizens' conceptions of good partially alike, it justifies why similar rules should guide reasoning in these spheres. Beyond this scope, imposing such strict requirements is unnecessary because none of the basic interests are at stake.

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Over-Aggregated Concepts, Adjective-Modifiers, and Argumentation

Adam Dyrda[a] *and Tomasz Gizbert-Studnicki*[b]

Abstract. The paper discusses the idea that due to the uncontrolled growth of meaning of natural language, there may appear some concepts with attributes or features that can either collide with other features that already exist or simply overreach the generally and publicly shared criteria of the concept's application. These concepts are referred to as over-aggregated concepts. In the following parts of the paper a few strategies of conceptual disaggregation are presented and briefly discussed. Eventually, one of these ways, namely the idea of creating concept sub-types by adding an adjective modifier, is closely examined. It should be recognized that in some circumstances such adjective modifiers not merely construe fine-grained distinctions, but may also lead to creating either "diminished" or "defeated" ("dismissive") sub-types. In either case, we may be confronted with a very different concept. Thus, the lack of such recognition may lead to a great confusion in argumentative practice.

Keywords. Over-aggregated concepts, conceptual analysis, adjectives, legal argumentation, concept disaggregation.

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1 Introduction: the growth of meaning

Political and legal theory is cram full of different types of concepts, and it is supposed to be one of the most important tasks of political or legal philosophers (on the most general level) to put in order the set of concepts that legal and political philosophy is using and to arrange for proper relations among them (and, consequently, among the things that they refer to). The same problem appears on a lower level in connection with concepts contained in statutory law or coined on the basis of case law.

In the field of legal theory, K. Llewellyn once recognized that all wholesale legal categories (like 'contracts' or 'property') are 'too big to handle,' since they encompass too 'many heterogeneous items.' In such a case, he simply recommended

> the making of smaller categories – which may either be subgroupings inside the received categories, or may cut across them. (Llewellyn 1962, p. 27[1])

Such a move would enable a lawyer to develop the law while 'testing it against life-wisdom,' so that would be of great practical importance. Hence, if the decision-making procedure is to be conclusive, it has to be conducted under the guidance of 'the sense and reasons of some significantly seen type of situation,' (ibid., p. 27) and cut off all the possible, but inaccurate meanings. In Llewellyn's view, the particular, situational context enables one to apply a general concept, which in purely abstract terms may be conceived as over-aggregated, i.e., confused, internally inconsistent, or (either essentially or contingently) contested. The mechanism of applying a concept to a legal case at hand is, however, somehow mysterious. Despite this mystery, legal (resp. – political) systems work well and cases are being decided all the time. But the question about in which way the contextual elements of a case are chosen and associated with particular features of the general concepts in use has manifold answers.

The problem may arise in connection with the process that S. Haack calls 'the growth of meaning.' All natural languages shift and adapt to new circumstances. Words acquire new meanings and also lose older connotations. But the growth of meaning means also

[1] Cf.Dagan 2005, p. 648.

> the coining new terms or co-option of old ones to express new concepts and distinctions, [thus being] just one aspect of [...] much larger, enormously complex phenomenon of the evolution and development of languages.(Haack 2009, p. 7)

We agree with Haack's contention that the growth of meaning does not necessarily undermine the rationality of discourse (as is claimed by many post-modern theorists). Therefore, the philosophical method of conceptual analysis serves as a proper tool to resolve problems with the meaning of words expressing concepts, starting from the most fundamental, ordinary language distinctions that

> men have found worth drawing, and all the connexions they have found worth making, in the lifetimes of many generations. (Austin 1961, p. 130)

If we use Peirce's distinctions of three grades of clarity, the conceptual analysis allows us to jump from the most fundamental level on which people grasp the concept in their everyday experience, being the first grade of conceptual clarity, through the definition, being the second grade, eventually reaching the highest, the third grade of conceptual clarity that would cover all the practical bearings the concept may have. (Peirce 1878) However, the analysis of the concept used in a particular discourse should cover not only the actual usages of the concept, but also all the hypotheses relating to the content of the concept explaining such usages. Such a modest type of conceptual analysis (as opposed to the immodest type, which aims at the discovery of the nature of things denoted by a concept) serves to

> elucidate concepts by determining how subjects classify possibilities, [and is a] hypothetical-deductive exercise. (Jackson 1998, p. 36)

So, on the highest level of conceptual clarity, the theorist is

> seeking the hypothesis that makes best sense of a person's responses to possible cases, taking into account all the evidence. (ibid., p. 36)

The analysis allows one to grasp certain concepts in their full range and adequately.

Sometimes the growth of meaning leads to an over-aggregation of certain concepts. Many concepts are, through that process, being enriched with attributes or features that either can collide with other features that concept already has, or simply overreach the generally and publicly shared criteria of the concept's application. That may lead to a conceptual confusion that comes to light in the moment when scholars use an over-aggregated concept, without any differentiation, clarification, or classification. This is exactly the situation that Llewellyn, quoted above, had in mind. But over-aggregation of concepts may not only lead to confusion. It may be that some concepts have generally shared criteria for their application but, due to the normative valence of some of those criteria, there arises, as an empirical fact, a disagreement concerning the proper instantiations (uses) of the concept. Thus, concepts can be contested, either in an essential or a contingent way. In the case of essentially contested concepts, as W.B. Gallie demonstrated many years ago, their existence in the discourse

> involves endless disputes about their proper uses on the part of their users, (Gallie 1956, p. 167[2])

and the controversy cannot be solved solely by any conceptual analysis and logical methods (which is usually possible in the case of conceptual confusion or contingent contestability).

2 Different strategies of conceptual disaggregation

In this paper, we would like to analyze just one type of mechanism that may well be in use not only in applying general, over-aggregated concepts to particular situations, characteristic of the argumentative work of an operative lawyer (which situations Llewellyn had in mind), but which may also be used by legal and political philosophers, dealing with abstract jurisprudential questions, as well. The use of certain concepts in argumentation in every situation demands the highest grade of clarity, in order

[2]On the features of ECC and disputes over the use of the concept of ECC, see also: Collier, Hidalgo, and Maciuceanu 2006, p. 212.

to make the claims rational, and, thus, the whole argumentative practice reliable.

As we pointed out, the starting point is that sometimes a certain concept (which is the object of the analysis) may be discursively over-aggregated. As explained above, such over-aggregation consists in the ascription to a concept of such features that either (at least potentially) collide with other, historically previous features or overreach the generally and publicly shared criteria of concept's application. This is a natural consequence of the growth of meaning. In such circumstances, in order to use such a concept in any kind of rational argument, there arises a need to dis-aggregate it.

There are at least a few strategies of conceptual clarification and differentiation (viz. dis-aggregation) that would grant an adequate use of the concept against particular case[3]. D. Collier and S. Levitski (1997) describe three strategies of such conceptual 'innovation' that are commonly used (they are using these methods in the context of the concept of democracy, but their classification of methods can be easily generalized): (1) précising the concept definition; (2) shifting the overarching concept with which a general concept is associated; (3) generating various forms of subtypes.

The main aim of those strategies is to avoid 'conceptual stretching,' that is, the situation in which certain concepts are applied to cases for which, by relevant scholars, they are thought to be inappropriate. So, in other words, it is the situation of overextending the concept by applying it to circumstances that either do not fulfill all the criteria relevant for its application or, although they do, they also have other features that collide with the main features that are characteristic for pivotal understanding of such a general concept.

The first strategy, namely the précising or contextualizing the definition of the concept, as applied to the concept of democracy runs as follows:

> As the concept of democracy is extended to new settings, researchers may confront a particular case that is classified as a democracy on the basis of a commonly accepted definition yet that, in light of a larger shared understanding of the concept, does not appear from the perspective of some analysts to be

[3]However, in case of an essentially contested concepts the methods presented could afford the possibility of understanding each of competing meanings within the framework of essential contestability.

> fully democratic. This situation may lead them to make explicit one or more criteria that are implicitly understood to be part of the overall meaning, but are not included in the formal definition. The result is a new definition intended to change the way a particular case is classified. (Collier and Levitsky 1997, p. 442)

As it appears this is a clear example of the classical conceptual analysis, since, as a matter of fact, it consists in testing a hypothesis relating to the content of the concept against possible (or actual) cases (cf. Jackson 1998, p. 86). This strategy simply amounts to adding a further differentiating criterion for establishing a cut point between the concept of X and the concept of non-X (e.g., democracy and non-democracy). It is rather obvious that this strategy of innovation both achieves an inner differentiation of the concept of X and avoids conceptual stretching vis-à-vis the larger shared understanding of the concept, given that the meaning and functioning of specific attributes of X can vary considerably in different contexts (in the case of the concept of democracy, 'given that the meaning and functioning of specific democratic procedures can vary considerably in different political contexts' (Collier and Levitsky 1997, p. 442). However, this strategy has its limits, as it would hardly be productive (and even less innovative) to produce a new formal definition every time an analyst encounters a somewhat anomalous case (ibid., p. 442). Hence it is useful to use different strategies of disaggregation as well.

The second strategy is to shift the overarching concept of which X is seen as a specific instance. For example,

> in using the concept of democracy to characterize particular countries, scholars most commonly view it in as a specific type in relation to the overarching concept of 'regime'. (ibid., p. 442[4])

Now, the shift from the concept of 'democratic regime' to the concept of 'democratic government' will lower the standard for applying the label 'democratic' and imply that

[4]There are many other overarching concepts for democracy: "government," "moment," "order," "state," and so on.

> although a particular government has been elected democratically, the ongoing functioning of democratic procedures is not necessarily assured. (ibid., p. 442[5])

As Collier & Levitsky note, this innovation avoids conceptual stretching and at the same time it introduces a finer differentiation, but in situation where too many overarching concepts, i.e., additional analytical categories are employed, the conceptual confusion is almost a principle.

The third strategy consists in forming sub-types.

> A subtype is understood [...] as a derivative concept formed with reference to and as a modification of some other concept. [In case of the concept of democracy] the most common means of forming subtypes is by adding an adjective to the noun 'democracy' as in 'competitive democracy' [...]. (ibid., p. 435[6])

The important strategy of conceptual differentiation along these lines was the one proposed by Sartori 1970. He showed that one of the most important aims in comparative conceptual analysis is to achieve fine-grained distinctions by moving down the ladder of generality to concepts that a) have more defining attributes and b) correspondingly fit a narrower range of cases. (Collier and Levitsky 1997, p. 435 et seq.) However, this method presumes that all differentiated concepts are pure sub-types, namely, the sub-types that are all perfect instantiations of the general concept. In case of the differentiation of the concept of democracy, the appropriate subtype would be 100% democracy with some additional characteristic. So, the Sartori's subtypes preserve the 'kind' of the concept, but do not allow for any change in 'degree.' For instance, 'semi-competitive democracy' cannot be classified as a sub-type by Sartori's method. Thus, this method can be used only to differentiate the concept into sub-type concepts within the boundaries of the overall concept and only if all the substantial features of the original concept are preserved. Otherwise, the danger of conceptual stretching will easily appear.

[5]On the contrary, shifting from the concept of "democratic regime" to the concept of "democratic state" will establish a more demanding standard for the concept application. (Collier and Levitsky 1997, p. 442)

[6]The directly quoted sentences can be found in the working draft of that paper available on: http://kellogg.nd.edu/publications/workingpapers/WPS/230.pdf.

However, sub-types of concepts that do not preserve all characteristic attributes ('a kind') of a general concept, but deliberately omit some of them, are called 'diminished subtypes.' (Collier and Levitsky 1997, p. 437 et seq.) They allow both avoiding conceptual stretching and providing greater differentiation.

> [T]hey are not 'full' instances of the overall type with reference to which they are formed. (ibid., p. 437)

By using subtypes like 'semi-competitive democracy,' a theorist makes a more modest claim about concept application, indicating, usually by use of the adjective, what is lacking for a sub-type to be a full-type.

The complex structure of meaning is generated by these strategies that allow for different results, offering to an analyst 'an impressive array of terms and conceptions' that may be used in to the study of certain applications of the general concepts (like the concept of democracy or democratization[7]).

3 Dis-aggregation and the semantics of adjectives

Dis-aggregation of the established concepts requires a deeper analysis of the role of adjectives that are simply added to nouns expressing such concepts while re-coining them to fit the new, changed circumstances. The following analysis will show that there are many pitfalls in the semantics of adjectives and one must be very careful in order not to fall into them. Such a slip may eventually lead to a 'conceptual stretching,' and thus ruin the whole effort of conceptual dis-aggregation. In such a case, the analyst would be back in the starting point, but at the risk of the greater danger of falling into conceptual confusion.

Let us start with a few general remarks on the semantics of adjectives.[8] It appears that our understanding of the semantic function of adjectives in natural languages tends frequently to be oversimplified. We are inclined to think that by adding an adjective to a noun, we obtain a noun phrase,

[7]See: the draft version of Collier and Levitsky 1997 available on: http://kellogg.nd.edu/publications/workingpapers/WPS/230.pdf.

[8]The following distinction is based on Twardowski 1965, p. 375 et seq.

the range of which (the class of its designata) is narrower than the range of the same noun without the adjective. For example, if the adjective *white* is added to the noun *horse*, we obtain a noun phrase *white horse*. Each white horse is a horse, but not every horse is a white horse. Therefore, the class of designata of the noun phrase *white horse* is narrower than the class of designata of the single noun *horse*. Let us name such function of adjectives as 'determining function.' This is a semantic function, as the use of an adjective in such a function affects the reference of the noun phrase.

This is true in most, but not all cases. Let us consider the following example: the noun *friend* and the noun phrase *true friend*. If the relationship between them were the same as between *horse* and *white horse*, we would have to admit that each true friend of us is a friend, but not every friend of us is a true friend. This would mean that we may have friends who are not true friends. Such a conclusion, however, would be against the meaning of the word *friend*. A false friend is actually not a friend at all; he or she only pretends to be a friend. Therefore, if we add the adjective true to the noun *friend*, the range of designata of this noun remains the same. Semantically, *friend* and *true friend* do not differ, as they have the same reference. *True* does not refer to any specific feature that certain friends have and others do not have. This, however, does not mean that the adjective *true* is redundant and has no function at all. Its function is pragmatic. If I say *X is true friend of mine* I usually want to stress that I am certain that X has all qualities that make him a friend of mine, I have no doubts that I can rely on X etc. Therefore, the linguistic function of *true* is rather to express a sort of propositional attitude (deep conviction in the truthfulness of the proposition *X is a friend of mine*), and *true* does not denote any additional feature or quality of X. The function of *true* is different than the function of other adjectives I may use in reference to friends of mine and which refer to certain properties which some friends of mine have and others do not have (for example *old friend of mine, English friend of mine*, etc.)

Such a function of adjectives can be referred to as a 'confirming function'. This is a pragmatic function, as the use of an adjective in such a function does not affect the reference of a noun phrase, but expresses the propositional attitude of the speaker. So the adjective *true* does not play any semantic function in this noun phrase. Obviously such a function of the adjective *true* is context-specific and is a consequence of ambiguity of

the adjective *true*. In another context (for example *true sentence*) this adjective (in its different meaning) plays a determining function.

As it appears, in each natural language there are a number of adjectives, the main function of which is just the confirming function. If we say '*that is an actual fact*', or '*that is a real success*', we do not refer to any specific features or qualities of certain facts or successes. All facts are actual and all successes are real. A fact which is not actual is not a fact at all. By use of such a noun phrase, we rather express our propositional attitudes; we say that we are fully convinced that something has happened, or we attempt to eliminate the hearer's actual or potential doubts as to a certain state of affairs.

There is still another function that may be played by adjectives. Let us consider the noun phrase *forged note*. If we define the noun *note* by reference to its function, a forged note is not a note. We can pay in a store with a note, but not with a forged note. We can divide notes into $100 notes, $50 notes, etc., but we cannot divide notes into forged notes and true notes. Designata of the noun phrase *forged note* are not designata of the noun *note*. By adding the adjective *forged* to the noun *note* we move the range of the noun phrase *forged note* to a class of things that differ from the designata of the noun *note*. Let us call such a function of adjectives as 'modifying function.' This is again a semantic function, because by adding such an adjective to a noun the reference of the noun phrase is affected. Let us note that antonyms of most of the adjectives with confirming functions usually play a modifying function. A *true friend* is simply a friend. A *false friend* is not a friend at all.

Adjectives with a confirming or modifying function frequently occur in legal and political discourse. Let us point to a couple of examples. A part of the basic meaning of the word *contract* is that a contract binds the parties.[9] An invalid contract does not bind the parties, so an invalid contract does not fall under the definition of a contract. Therefore, the adjective *invalid* plays the modifying function in the noun phrase *invalid contract*. No invalid contract is a contract and no contract is an invalid contract. A valid contract is just a contract, so the adjective *valid* plays the confirming function. Similarly, lawyers speak frequently about *judicial*

[9]Under Polish law "contract" is defined as exchange of declarations of will of two or more parties, which triggers legal effects intended by the parties. Legal effects consist inter alia in obligations of the parties to perform what they promised in the contract. An invalid contract does not trigger such a consequence.

truth. A statement that is judicially true does not have to correspond to the facts (because such a statement may be based on a legal fiction or a presumption). Judicial truth is, therefore, not a specific sort of truth *tout court*. Otherwise we would have to accept a logical contradiction, as one and the same statement may be false (as not corresponding to the facts), but judicially true. (Gizbert-Studnicki 2009, p. 5 et seq.)

To sum up: Adjectives play various roles in the discourse. It is frequently overlooked that not all adjectives forming noun phrases have a determining function (e.g., the range of the noun phrase is narrower than the scope of the isolated noun). Some adjectives in certain contexts may play a confirming or a modifying function.

On the basis of the above observation, let us have a closer look at the role of adjectives in the discourse pertaining to legal, political and ethical matters. Our claim is that (i) sometimes, due to the lack of proper understanding of the function of adjectives, the discourse may be distorted and (ii) adjectives may be used for the purpose of manipulation and disorientation of the opponent. The third strategy of dis-aggregation of concepts, designed by Collier & Levitsky, can serve as a convenient example for our analysis.

4 Adjectives in action

From the linguistic point of view, the third strategy consists in adding an adjective to the noun expressing the concept in question. In this way, a noun phrase is generated. Such a noun phrase is meant to denote a subtype (a subcategory) in relation to the type (category) to which the noun refers. The question arises: What is the function of the adjective of such a noun phrase? Psychologically, there's a strong incentive to assume that the adjective in question has the determining function.

This may be true in most cases, but certainly not in all cases. Let us give an obvious (and certainly exaggerated) example, relating to the concept of democracy.[10] Before 1989, the regime prevailing in the countries of former Soviet bloc (such as Poland and Czechoslovakia) was called *socialist democracy*. One does not need to have a profound historical knowledge to conclude that such a regime had nothing to do with democracy in any

[10] As was indicated earlier, the detailed analysis of such and similar examples is provided by Collier and Levitsky 1997, passim.

ordinary meaning of the word (and, notwithstanding the highly contested nature of the concept of democracy, it did not fall under any of the conceptions of democracy). Therefore, the noun phrase *socialist democracy* does not denote any sub-type or sub-category of democracy *tout court*. The adjective *socialist* in this noun phrase does not have the determining, but the modifying function. No democracy is a socialist democracy. The same applies to many other noun phrases containing the adjective *socialist* (for example: *socialist rule of law*[11]). What's more, it would be an even greater exaggeration to speak of a 'diminished subtype' in this case, because the adjective *socialist* in the Polish and Czechoslovakian context literally wipes out almost all features of democracy. It would be more proper to speak of *socialist regime*, in order not to confuse all less historically educated subjects (although the meaning of the adjective *socialist* in this phrase materially departs from the meaning of this adjective in political philosophy).

The above example is certainly exaggerated. But our purpose is only to draw attention to the fact that we can have no certainty that, by adding an adjective to the nouns expressing such basic concepts as democracy, justice, rule of law, etc., we always obtain a noun phrase denoting a subcategory (or subtype) of the phenomenon denoted by the original concept. This matter always requires careful examination. For example: Is social justice (as, for example, referred to in article 2 of Polish Constitution[12]) a 'pure' sub-type of justice (in Sartori's sense, being just a specified instantiation of a full-type)? Or, rather, does the adjective *social* have a modifying function that makes the concept of social justice either a diminished concept (but it remains unclear what feature of justice is lacking in *social justice*) or the one that differs to a larger extent, falling over the boundary of acceptable 'diminishing,' being therefore a label for a very different thing? To use Collier's example: is *semi-competitive democracy* a sub-type of democracy? What does it have in common with democracy *tout court*? If such adjective has the modifying function, does the strategy designed by Collier & Levitsky really lead to dis-aggregation of the concept (and, in effect, therefore help to improve the discourse), or, rather, does

[11] In Poland before 1989, the following joke was popular: what is the difference between *rule of law* and *socialist rule of law*? The same as between *chair* and *electric chair*.

[12] "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice."

it lead to a potential conceptual confusion? If semi-competitive democracy has little in common with democracy *tout court*, what do we win by forming such a noun phrase?

As it appears, when with talk about democracy 'with adjectives' (for example, semi-*competitive* democracy) we may have two different things in mind. First, we can mean that semi-competitiveness is just a specific feature of certain democratic regimes, differentiating them from other types of such regimes. Before we find out what is specific for a given sub-type, we must first know what is common for all sub-types. In other words: Each type of democracy must have features A, B... to N. Specific sub-types have additional features (for example: semi-competitiveness). This would, however, mean that we have a clear concept of democracy *tout court*, encompassing only such features and all such features which are characteristic for each instance falling under the concept. If we do have such a concept, no dis-aggregation is needed, as we have criteria for application of the concept (even if such criteria are vague). Such a sub-type is not a diminished sub-type. This is pretty obvious and certainly that is not something that Collier & Levitsky had in mind.

Second, adding an adjective to the noun denoting the concept may lead to formation of a diminished sub-type. The instances of such a sub-type (for example: semi-competitive democracy) do not have all of the features defining the over-aggregated concept (in this case: democracy). One or more such features are missing. This means, however that the instances of such a diminished sub-type are not instances of the over-aggregated concept (democracy *tout court*). In the vocabulary used in this paper, this would mean that the adjective *semi-competitive* is used in its modifying function, as it affects the reference of the noun phrase *semi-competitive democracy*, moving it to a different sort of things. In effect, such a strategy of disaggregation does not produce any single dis-aggregated concept of democracy, but in *lieu* of one concept we have two different concepts with partially different criteria of application: on the one hand the (still over-aggregated) concept of democracy, and on the other the concept of semi-competitive democracy. The latter concept denotes a diminished sub-type that is characterized not only by an additional feature, but also by the absence ('semi-') of certain features characteristic of democracy *tout court*.

Instances of various diminished sub-types have certain common and certain different features. The use of the same noun with different adjec-

tives underlines both the similarities and differences. There is, however, a risk involved in application of such a strategy, as it may trigger a conceptual confusion. In order to avoid such risk it must be clear that the sub-type denoted by the noun phrase with an adjective is a diminished sub-type, and not just a sub-type. Conceptual clarity may be achieved only by an indication of the feature or features defining the general concept which are missing in the sub-type. For example it is not sufficient to indicate only specific features of *semi-competitive democracy*, differentiating it from other sub-types of democracy, but for the purpose of avoidance of conceptual confusion it is necessary also to explain which features of democracy *tout court* are missing in semi-competitive democracy. Second, the question arises: What are the limits for such a strategy? Let us assume that the general concepts under discussion refer to instances having features A, B... to N. How many of those features must be preserved in instances of the diminished sub-type? Which features are more important than others? If we do not answer these questions, we run the risk that our diminished sub-type will include instances so much different from the instances to which the general concept refers that, instead of dis-aggregation, a major conceptual confusion will be produced. Of course, it is not possible to design any general criteria for answering those questions. If, however, we do not put any limits, we ran the risk of abuse of the general concept (as in the example of *socialist democracy* given above).

There is also a practical threat involved in such a strategy of dis-aggregation. The concepts analyzed in legal and political philosophy are usually appraisive (in the sense that their application must be based on evaluation), which causes them to become (essentially or contingently) contested (as evaluations are notoriously controversial). Usually (but not always) contested concepts express positive valuation. Something that is democratic is (in normal circumstances) perceived as better than something that is undemocratic. Something that is just is better than something that is unjust. If, by using an adjective in its modifying function (in connection with formation of diminished sub-types) we move the reference of the noun phrase to another set of designata, positive evaluative associations linked with the original noun usually remain intact. This may lead to disorientation and manipulation. The regimes in the former Soviet bloc were called *socialist democracies* for just this reason. This was a sort of linguistic manipulation, consisting in the abuse of positive valuation,

usually linked to the word *democracy*.

There may arise another problem with applying concepts of political theory, such as democracy, rule of law, justice, etc., as well as with legal concepts such as contract, will, offence, etc. Namely, at least some of those concepts are defeasible.[13] This means that, although all conditions of their application in a given situation are satisfied (e.g., such a situation has all features A...N set out in the adopted definition of the concept), we refuse to apply the concept to such a situation, since this situation has an additional feature O. To give a classical example: let us assume that all of the requirements defining *contract* under Polish law have been satisfied, but one of the parties acted under a threat. In such a situation we will not say that this situation is an instance of a valid contract. We would rather say that this is a void (or voidable) contract. The phrase *void contract* does not denote a diminished sub-type of contracts. An instance of void contract has all the features of a contract, but it has also one additional feature which causes that it is not an instance of a contract *tout court*.[14] The adjective added to a concept in such situation refers to a very different concept that may be called a 'dismissive subtype'.[15] The issue of defeasibility of the basic legal concepts has been intensively discussed in legal theory. An interesting question that we are unable to take up in this paper is whether basic concepts of legal and political philosophy (such as justice, rule of law, democracy) are defeasible as well.

5 Final remark

As far as we can see, there are at least three different ways of conceptual dis-aggregation. One of them, the differentiation of sub-types, feeds on the semantics of adjectives. But now there appears a need to discriminate between different functions that adjectives play with regard to nouns: determining, confirming, and modifying. Only by discerning the modifying

[13]The notion of defeasibility was introduced to legal theory by Hart 1949.

[14]Such sub-types may be called 'defeated sub-types', or, as Collier & Levitsky write, 'dissmisive sub-types'. (Collier and Levitsky 1997, p. 442) An example given by them (without a detailed analysis) is 'façade democracy'.

[15]Let us note that the dismissive sub-type (resp. *defeated subtype*) is, due to the role that adjective *dismissive* plays as a modifier, is in fact a dismissive sub-type of the concept of *subtype*, hence indicates a very different, but *defeated*, concept.

function of adjectives can one distinguish 'diminished' and 'dismissive' subtypes from typical subtypes of a concept, being in fact two very different things. In the field of legal and political discourse, the ability to do so is an essential feature of argumentative skills that, while neglected, would surely result in in-reliable argument or conceptual confusion.

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Comment on David Enoch's argument of pro tanto retributivism in discussion about legal luck

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Abstract. In this paper I would like to analyze the argument used by David Enoch in his discussion on legal luck. Enoch believes that if there is no moral luck, we have a *pro tanto* reason to deny legal luck. However, what does a '*pro tanto* reason' mean? Enoch refers here to so-called weak retributivism, or *pro tanto* retributivism. My aim is to present the origins of this argument, provide a précis of it, and show some controversial assumptions that are behind it.

Keywords. David Enoch, moral luck, legal luck, retributivism, pro tanto, legal moralism.

In one of my previous articles, I tried to conceptualize the relationship between moral and legal luck. ("Miedzy trafem moralnym a trafem prawnym") My conclusion was that statements concerning the admissibility of legal luck are only a matter of assessing law from a moral point of view. To deliver this finding, I referred to David Enoch's idea that if there is no moral luck, there is a *pro tanto* reason to deny legal luck. It does not matter now if we agree or disagree with him on the acceptability of moral luck. However, essential for my thesis is the very structure of his argument.

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Let's start with a brief introduction of the discussion on moral and legal luck. Bernard Williams (Williams 1993) and Thomas Nagel (Nagel 1993) once observed that within morality, people share two opposite intuitions concerning the influence of luck on moral responsibility. The first of these is widely called the 'control principle' and holds that

> [...] we are morally assessable only to the extent that what we are assessed for depends on factors under our control. (Nelkin 2004)

Thus, when there are two moral agents who control the same range of circumstances, we should not accept any differentiation of their moral responsibility; they ought to be treated identically. However, often we follow a second intuition, called 'moral luck,' i.e. our moral judgments are affected by some circumstances uncontrollable by assessed agents. If we believe that morality is or should be a coherent and self-consistent set of beliefs, we have to provide an explanation for the paradox of our contradictory moral intuitions. If, for instance, there are two drivers who exceed the speed limit and one of them meets nobody on the road but the second causes a fatal accident because a child appeared out of nowhere, our moral assessment of these two cases will probably be a good example of above paradox. On the one hand, neither driver has control over the actions of a child who might run into the road; on the other however, the two drivers will very likely be assessed differently: the former just for risking the lives of others on the road, the latter for killing the child. We find the same problem in the field of law. The first driver will be probably only held responsible for speeding, while the other will be held responsible for manslaughter or vehicular homicide. Legal responsibility often varies according to circumstances that are beyond the culprit's control. This is legal luck. The question, however, is if it should be this way.

David Enoch strongly supports the thesis that there is no moral luck, i.e., that only the control principle is a valid ground for determining the blameworthiness of a moral agent. (Enoch 2007, pp. 23–60) More interesting for the purposes of this article, he claims that if there is no moral luck, there is a *pro tanto* reason for denying legal luck. How did he come to this conclusion? His reasoning starts from the theory of retribution in criminal law. However, there are still some useful conceptual distinctions to be made.

First, Enoch and Marmor, (critically) inspired by Strawson's 'Freedom and Resentment,' point out the difference between blameworthiness and blame-related reactions within morality. They write:

> Judgments about blameworthiness [...] and related judgments about responsibility, culpability and the like, are not logically equivalent to judgments about the appropriateness of blame-related reactions. Rather, the former serve to ground or justify the latter. It is because a person is blameworthy that certain blame-related reactions towards him are appropriate. (Enoch and Marmor 2007, p. 433)

An agent can be morally blameworthy without encountering any blame (such as social ostracism), e.g. a man who is unfaithful to his wife but nobody knows about it; however, the opposite situation, in which an agent meets blame without committing any moral wrongdoing, would be probably regarded as incorrect moral judgment. Similarly, we can distinguish between legal responsibility and responsibility-related reactions, i.e. legal punishment. The former is a justification for the latter. Analogously to morality, one can be legally responsible but suffer no punishment. An agent who commits a crime but is not caught by police is, of course, still legally responsible. The same is true of an agent who commits a crime, is caught by the police, but is not penalized by a court of law for some reason (e.g., active repentance or advanced age of the convict).

However, what is affected by the paradox of legal luck: legal responsibility or legal punishment? If the latter, we must ask why two culprits who are responsible for the same legal wrongdoing are punished differently. If the former, the question is why two culprits who control the same range of circumstances are responsible for different legal wrongdoings that justify different degrees of punishment, or why one of them is responsible for a legal wrongdoing and the second is not responsible at all and deserves no punishment. I believe that both questions are equally important. Regarding the first question, we will focus on the application of a law and reasons used by judges in sentencing. This concerns choosing a theory of punishment and justifying the grounds for punishment. Regarding the second question, we will focus on the content of abstract norms and reasons used to justify criminalization. Enoch is interested in the first problem; that is why I will focus on it, but at the end, the second problem will inevitably return.

Referring to retributivism in criminal law, we need to ask whether the basis for legal punishment is moral wrongdoing (moral retributivism) or legal wrongdoing (legal retributivism). Brink commented on this issue in the following way:

> The worry is that legal norms and moral norms are different and that legal wrongdoing is not necessarily moral wrongdoing. But where legal wrongdoing is not morally wrong, it's not so clear that blame or punishment is morally deserved. (Brink 2012, p. 501)

Although Brink claims that

> [...] if we don't embrace the extreme natural law conclusion, we cannot dismiss this worry about the moral case for blaming and punishing culpable legal wrongdoing. (ibid., p. 501)

I think one can be a legal positivist[1] and at the same time a legal and/or moral retributivist. One just needs to abandon treating retributivism as a theory of necessary substantive connections between concepts. A positivist retributivist (PR) can simply say that punishment *is* proportional to the moral or legal wrongdoing (descriptive thesis) in a given legal system, but this is not really interesting thesis, because it can be empirically verified by analysis of legal norms or study on judicial decisions. However, a PR can also maintain that punishment *should be* proportional to the moral or legal wrongdoing (normative thesis) in a given legal system or even in general, i.e., he believes that it would be good if moral or legal wrongdoing were the basis for legal punishment. But these claims are not necessarily connected. A PR can admit that a descriptive thesis is false, i.e., in some legal system punishment is not proportional to the moral or legal wrongdoing, but at the same time insist that it should be. Even if legal norms are completely different from his beliefs about them, he will not say that they are not legal rules. He will rather say that these legal rules are unfair or unjust and should be changed.

Let's now examine the difference between moral and legal retributivism.[2] A legal retributivist (LR) claims that the only factor that should

[1] 'Positivist' is here understood as one accepting the separation thesis.

[2] I present here the strongest versions of these positions.

influence the degree of punishment is legal wrongdoing. His opponents can argue that punishment should not be based on legal wrongdoing and justified only by the consequences of punishment, e.g. general prevention (legal consequentialists). A moral retributivist (MR) believes instead that the only (or the most important[3]) circumstance that affects the degree of punishment should be moral wrongdoing. Similarly, his opponents can counter the argument by saying that legal punishment should be independent of any considerations concerning moral blameworthiness. Thus, (1) if one is only an MR and not an LR, he argues that moral wrongdoing is a necessary and sufficient condition for punishment. Legal wrongdoing is not prerequisite. An MR believes that (some) moral wrongdoings should be punished by the state even if they are not criminalized. A radical version of this position can be illustrated by the example of a religious fundamentalist who believes that punishment is grounded by protection against public acts of indecency. In his opinion, rules concerning chastity are moral rules, so if these rules forbid women to expose their hair, women who expose their hair in public should be punished by the state, even if no such crime exists. (2) If a person is only an LR but not an MR, he believes that a basis for punishment should be legal wrongdoing, i.e., that legal wrongdoing is a necessary and sufficient condition for punishment. Therefore, an LR thinks that legal rules are very different from moral rules. If something is morally wrong, it does not also have to be legally wrong, and vice versa: If an act is a crime, it does not necessarily have to be moral wrongdoing. But of course, this does not imply that some moral rules and some legal rules cannot overlap. A culprit who commits a crime could also have committed a morally analogous moral wrongdoing, but the argument is that the latter wrongdoing should not affect his punishment. So state can treat morally neutral (or even praiseworthy) acts as crimes and punish those who commit them if there is a good reason for it. Finally, (3) a legal and moral retributivist (LMR) claims that legal punishment should be based on both legal and moral wrongdoing, and that implies that all legal wrongdoings should also be moral wrongdoings. However, it does not mean that they are. So if state decides to criminalize some activity that is not morally blameworthy, an LMR should protest that such a law is unjust. Similarly, if the court punishes an agent who commits a moral wrong, an LMR should protest that such a punishment is illegal because

[3]See the below discussion on pro tanto retributivism.

this act should first have been criminalized. These three alternatives can be represented as follows:

(1) moral but no legal retributivist MR & ∼LR

(2) legal but no moral retributivist. LR & ∼MR

(3) legal and moral retributivist. LMR = LR & MR

How can a positivist be an LMR? If all of the above statements are normative, not descriptive, this is not a problem at all. Even a positivist can have his own vision of the content of legal norms and criticize them if they do not meet his moral expectations. Of course, he will not claim that only because they are unjust, they are not legally binding. He can even be an adherent of punishing someone who committed no crime but only some moral wrongdoing, and simply admit that it is contrary to existing law. However, is Enoch an LR, MR or an LMR? If he had been an MR, he would not have considered relations between moral and legal luck, because then just statement concerning moral luck would be a justification for punishment. If he had been an LR, he would not have bothered about morality at all. That is why I will now leave out MR and LR alternatives and remain with LMR.

All of these alternatives refer to the positive aspect of retributivism: requiring that conditions be satisfied to justify punishment. However, there is also a negative aspect: setting out conditions that forbid us to justify the punishment. Usually it is the innocence of an agent (for LR legal innocence, for MR moral innocence and for LMR both). No punishment can justly be imposed on a person who did nothing (morally or legally) wrong. Although there is no room here to analyze the origins of such limitations (Duff 2013), Enoch explicitly claims that they are valid (Enoch and Marmor 2007, p. 33).

So far, I have considered only different varieties of strong retributivism. Its adherents claim that punishment should reflect only moral or legal blameworthiness, and other circumstances should not be taken into account. If we accept MR, it is obvious that our position concerning legal luck should be the same as our position concerning moral luck, because if both agents are equally blameworthy, they deserve equal punishment. If we accept LR, we do not have to worry about moral luck at all.

However, Enoch believes that weak (moral) retributivism is a more plausible theory than strong retributivism. Weak retributivism claims that legal punishment should *pro tanto* reflect moral blameworthiness, that is, the agent's moral blameworthiness should be the starting point and basis for considering his legal punishment.[4] We can say that

> [...] moral blameworthiness is always a positively relevant factor, so that if two people are alike in moral blameworthiness, there is a (*pro tanto*) positive reason to treat them alike. (ibid., p. 34)

If there is no moral blameworthiness, we cannot punish a person at all. However, other important arguments, such as the possibility of rehabilitation or a high level of threat, can disrupt the balance between blameworthiness and punishment (these should be non-moral arguments, whereas the moral ones influence the agent's moral blameworthiness). To explain nature of *pro tanto* reasons, Enoch uses the example of a professor grading students' essays. The positively relevant factor is always "the intellectual achievement x incorporated in the paper." If the professor has two essays with the same level of intellectual achievement, he has a *pro tanto* reason to grade them identically. But there are other reasons that may influence his assessment, i.e., the style of the essay, or the time and level of effort put into the paper. If two students wrote two papers that are intellectually equally valuable, the professor has a *pro tanto* reason to give them identical grades. But if one of the students has clearly put much greater effort into the paper, this is a good enough reason for the professor to give this student a higher grade. As Enoch writes:

> Not just any old reason will outweigh considerations of intellectual achievement in grading papers. It will take a strong enough countervailing reason to justify giving significantly different grades to papers that incorporate intellectual achievements that are roughly equally valuable. (ibid., p. 34)

[4]Enoch uses the phrase *pro tanto* instead of *prima facie*, probably because of the subtle but important difference between them. As Shelly Kagan writes, "A pro tanto reason has genuine weight, but nonetheless may be outweighed by other considerations. Thus, calling a reason a *pro tanto* reason distinguishes it from a *prima facie* reason, which I take to involve an epistemological qualification: a *prima facie* reason appears to be a reason, but may actually not be a reason at all." (Kagan 1989, p. 17). I will adhere to this terminology.

(1) Student 1: achievement x ->grade a

(2) Student 2: achievement x ->grade a

(3) achievement & effort ->grade b (b > a)

Similarly, moral blameworthiness is always a positively relevant, *pro tanto* reason for punishment. That is why, to assess if legal luck is justified, we have to see whether moral luck is justified in the field of morality. If differentiation between the moral blameworthiness of two agents is groundless, it is a pro tanto reason not to threat them differently while deciding about legal responsibility and punishment. Enoch believes that there is no moral luck, so this is a pro tanto reason to deny legal luck. This claim can be represented as:

$$\sim\text{moralLuck} \rightarrow \text{proTanto}(\sim\text{legalLuck})$$

Is there any hidden assumption behind this argument? I think there is quite a strong one concerning not responsibility-related reactions, but the very concept of legal responsibility. If we want legal punishment to be grounded at the same time by both moral and legal wrongdoing we cannot remain only on the level of punishment, so responsibility-related reactions. To have a legal wrongdoing compatible with our moral beliefs, we have to admit that we want the norms of criminal law to correspond to the norms of morality. And of course, this raises the question of legal moralism.[5] Simply speaking, the main thesis of legal moralism is that

> [...] the state can and should regulate immorality, as such. (Brink 2012, p. 504 and Cranor 1979, p. 155) [...] wrongfulness is a sufficient reason to regulate conduct [...] (Brink 2012, p. 506 and Cranor 1979, p. 155)

But similar to retributivism, there is also weak legal moralism, which states that

> [...] wrongfulness establishes a *pro tanto* reason to regulate conduct [...] (Brink 2012, p. 506 and Cranor 1979, p. 155)

[5]Probably it is rather matter of legal responsibility than responsibility-related reactions.

[...] and there are strong reasons to believe that it is more pausilble than strong legal moralism. (Brink 2012, p. 508

If we mix an LMR with a *pro tanto* legal moralist, we will obtain a person claiming that legal punishment should be justified by both moral and legal wrongdoing but that such a moral wrongdoing should not always be criminalized. Therefore, there are some situations in which there are good reasons not to criminalize some moral wrongdoings, such as lying or extramarital sex. However, if we try to mix an LMR with opponents of legal moralists, we will obtain a person claiming that legal punishment should be justified by both moral and legal wrongdoing, but that the state should not criminalize moral wrongdoings just because they are moral wrongdoings, but only when they are harmful acts. Then, of course, the practical result would be similar to that in the previous case, because the majority of moral wrongdoings will likely be criminalized—not because they are immoral, but because immoral acts are usually harmful too. However, punishing such a legal wrongdoing would not be justified by moral blameworthiness, and this is inconsistent with LMR. That is why, if Enoch is an LMR, he is also a legal moralist (*pro tanto*). But he does not refer to this issue and does not give any justification of legal moralism at all.

In conclusion, I am not providing ready answers here, but simply pointing out the problems that we have to consider and resolve if we believe that Enoch gives a good explanation of the legal luck paradox. I have shown that his *pro tanto* (legal and moral) retributivism entails (*pro tanto*) legal moralism, which is an extremely controversial belief in modern liberal societies. To retain *pro tanto* retributivism, we must provide some good reasons justifying (*pro tanto*) legal moralism. Looking at the argument of opponents, this is a difficult task but not a doomed one.

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Why do Pragmatics Matter in the Legal Framework?

Izabela Skoczeń[a]

Abstract. Grice founded his theory on the assumption that the speaker conveys not only what he says, but also what he pragmatically implicates. This is possible because of the context shared by the utterer and the hearer as well as some common rule-like assumptions called maxims of conversation. Grice's theory concentrated on a communication oriented at the exchange of information between speaker and hearer. The main objections against it were that it is narrow, as the informatively oriented communication occurs rarely in human interactions. Consequently, the content of maxims as designed by Grice could not apply in many legal contexts. This paper aims at considering only one of the multiple contexts in the realm of law – the relations between the legislature and the judicial powers.

Keywords. Grice, Maxim Content, Polysemy, Pragmatics, Originalism

1 Introduction

Among theories of communication developed by modern pragmatics Grice's theory of implicated meaning is being constantly discussed by his numerous followers. Grice founded his theory on the assumption that the speaker

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conveys not only what he says, but also what he pragmatically implicates. In other words, the meaning conveyed goes beyond the amalgam of the semantic meaning of the words used. This is possible because of the context shared by the utterer and the hearer as well as some common rule-like assumptions called maxims of conversation. Grice's theory concentrated on a communication oriented at the exchange of information between speaker and hearer. He defined four maxims – of quantity, quality, relation and manner (Grice 1975). His conception of the content of maxims was put under large criticism. This led to the formation of alternative ideas by, among others, Levinson (Levinson 2000), Sperber (Sperber and Wilson 2004) or Horn (Horn 2004). The main objections against the Gricean account were that it is narrow, as the informatively oriented communication occurs rarely in human interactions. Consequently, the content of maxims as designed by Grice could not apply in many legal contexts. This paper aims at considering only one of the multiple contexts in the realm of law – the relations between the legislature and the judicial powers. There exists in the literature three hypothesis concerning this matter (I) there is a conversation between the courts and the legislature, but the maxim-content is specific (Marmor 2011), (II) there is a conversation, but the cooperative principle does not apply (Poggi 2010), (III) it is something similar to a monologue formed by two independent agents – the legislator and the judicial authorities (being more than a standard hearer - indicating what a reasonable hearer would have understood in the concrete case's context and pragmatically enriching the received meanings). It could require a double-leveled, contextual enrichment of meaning: first in determining the existence of meaning of a legal act going beyond the literal one and second determining the content of that meaning by the judicial authorities. The third possibility seems the most probable for reasons stated in the following paragraphs.

2 The legal contexts

The diversity of legal contexts causes a differentiation of aims of the communication. It is a rarity for a communication within a legal context to be oriented at a cooperative exchange of information (the Gricean idea). The aim of a political party, trying to make its view to prevail in parliament so as to enact a new regulation in accordance with it, will necessarily be

utterly different from the aim of a barrister trying to defend his client in front of a jury. In general, there seem to be 3 main types of 'legal' contexts of communication to be distinguished:

- The communication within a legislative body, aiming at making one's intention concerning the regulated matter to prevail. This is a typical type of political communication, a part of what A. Marmor names strategic speech.
- The communication between the legislator and the court that has to decide on a specific case by applying the enacted (and so communicated by the legislator) regulation. This seems to be the most problematic and challenging context to be described in Gricean or neo-Gricean terms. The considerations in this paper will be specifically devoted to it.
- The communication occurring in court, while deciding on a specific case between the judges or jury and litigants.
- The communication between the legislator and the target agents of the legal act.

Let us have a closer look on the second type of communication, which is probably most controversial, as far as linguistic matters are concerned.

3 Polysemy and normative worries

Human language is an imperfect communicative tool. It generates difficult issues for its users such as: ambiguity, vagueness, open texture and polysemy. The last one is common in natural language. This occurs also within the legal language. Let's take the example given by "Meaning and Belief in Constitutional Interpretation":

'It is not fair that X...'

Now consider the following options for X:

1. My daughter saying, 'you bought my sister a new shirt but not me.'
2. The president saying, 'the most wealthy people in the country pay such low rates of income tax.'

3. The inmate in prison saying, 'I got convicted, because I didn't do it.'
4. My wife saying, 'we planned this trip for so long and now the weather is going to ruin it.'

Consequently, the phrase 'not fair' is quite differently understood in each of the sentences.

> In (a) there is some notion of equal treatment in play; in (b) there is some notion of redistribution in play; in (c) it is a concern about truth and desert; and in (d) it is about bad luck. ("Meaning and Belief in Constitutional Interpretation")

In natural language, the context of the conversation and the pragmatic enrichment of meanings is helpful in determining, at least a rudimentary, prima facie understanding of each of this utterances. Is therefore context helpful in constitutional or statutory interpretation? As far as constitutional interpretation is concerned, Marmor argues, it is a matter of moral or political arguments, to define, what kind of a speech act is being produced, which is explicit in cases called 'super-polysemous'. It is not the linguistic considerations that will help us choose the relevant moral-political argumentation, while solving a case. The moral-political argumentation that we have chosen will in fact be determining the linguistic considerations, which are going to be conducted. Marmor comes to this conclusion as a result of the rejection of both the externalist (endorsed by R. Dworkin and J. Perry) as well as the internalist (endorsed by W.B. Gallie) view. He points out, that the concept-conceptions distinction in its externalist version leads to a metaethical realism, which is a rather controversial, not to say unwanted, conclusion (as it would probably deny linguistic pragmatics its significance in determining meaning (Bix 2003)). The internalist approach stating that there are some notions, we can have a reasonable disagreement on, but which is not solvable by argument of any kind - is a descriptive statement, failing to explain why such disagreements occur. Notions, which are incommensurable or are a 'matter of taste' (Marmor gives the examples of comparing French and Californian wine, or the choice between urban and rural life) should render us indifferent as too choosing between them, rather than generating disagreements on them. If two notions are remote and incomparable to the extent that at the very beginning of the debate we already know there is no argument, which would designate one of them as predominant in a manner in which absolutely every

person would agree with, then what is the reason for considering such issues? Nevertheless, when it is the case, that a 'winner' has to be declared or a decision must be taken, the problem arises. ("Meaning and Belief in Constitutional Interpretation") In those peculiar situations, individuals hold subjective views (and they believe their views are the correct ones), while at the same time accepting that others can hold contradictory views on the same matter. In other words, individuals accept that their preferred arguments do not need to be reasons for others to hold similar views. Good examples of this super-polysemy could be notions such as: cruelty, justice, equality or fairness in constitutional interpretation. The image given by Marmor is adequate at a descriptive level. Some polysemous cases are resolvable by pragmatic factors, when the case reaches a court. When it comes to a polysemy of the above described, 'problematic' kind, individuals can only hold subjective views on their preferred argumentation, but they know it cannot be a reason for others to follow it. This descriptive view is problematic at the normative level: imagine a court has to make a decision. When deciding on matters of polysemy of the above mentioned kind, the judge makes a decision based on a subjective-preference argumentation. Therefore, why should people treat the court's argumentation as a reason to act in accordance with the court's decision? Relativism is the crucial point here. This seems to be the reason why Marmor is so skeptical about constitutionalism in general (as such cases often occur in constitutional interpretation – if constitutions are made to 'fix' certain meanings then in the described cases they obviously fail at large and become virtually useless).

Subjectivism is one of the principal reasons of the heated debate between originalism and its opponents – anti-originalists - currently taking place in USA. Each of the parties attempts to back their moral or political statements with semantic arguments. They adjust their semantic arguments to the preferred line of moral or political argumentation. (Gizbert-Studnicki 2012) Nevertheless, it is the moral and political arguments, which are decisive here and not the linguistic considerations. Another cause for this disagreement is the fact that the divide of powers principle is strongly historically grounded in our thinking about law. ("Two Dimensions of Originalism") This, in the above-described cases of constitutional super-polysemy, forces judges to include in their lines of argumentation justifications of their deference to the meaning intended

by the legislator. The originalist stance consists of two main approaches. It can either be considered as a constitutional interpretation aiming at disclosing the original (psychological) intention of the legislator[1], or the original meaning emerging from the context of the publically available debate. There exists originalists accepting either both approaches, or only one of them. (Gizbert-Studnicki 2012) As an example justice Antonin Scalia rejects the first 'intentionalist' –originalist approach, while favoring the second one. This 'switch' from the first approach toward the second one is also favored by S. Soames. The second approach is the one where linguistic pragmatics play a major role, as the public debate forms a context enabling the recipients to form a pragmatic enrichment of the received meaning. The 'living constitutionalism' stance is an alternative view. It can also be described as mainly consisting of two approaches. The first one, 'formalism' (this label is used in statutory interpretation), favors an interpretation directed at discovering the literal, conventional meaning, allowing only co-textual implicatures[2] and devoid of context. It denies the role of pragmatics in constitutional interpretation. The second anti-originalist approach is analogous to meaning emerging from the context of the publically available debate, except it is the current meaning and not the original one. The time factor, influencing context alterations is therefore the key factor. It is something similar to the 'new textualists' view in statutory interpretation.[3] In other words the second approach tries to establish what a reasonable hearer, knowing the relevant context or publically available debate would have understood from the provision

[1]The principal argument against this approach consists of underlining the impossibility of reconciling it with the rule of law principle, as psychological legislative intentions are very often disclosed from the public. Furthermore it is not even clear if we can at all speak of collective psychological intentions, while legislatures are collective bodies in democratic states.

[2]The notion of co-textual implicatures will be discussed later, see Poggi 2010.

[3]See Tiersma 2012: 'In reality, there are no American judges who would routinely ignore what a statute says in favor of devining what the legislature was interested in accomplishing based on extra-textual materials, and then base a ruling entirely on this analysis. By the same token, those dubbed "new textualists" (Eskridge 1990) most often accept to apply interpretive rules of thumb for the purpose of ascertaining the legislature's goals while attempting to constrain the universe of evidence they consider in order to reduce the role of judicial discretion in the decision making process. **That is, textualists eschew some species of context, but are not anti-contextualist in principle**.'

at the time of deciding on a particular case and not at the time of the law's enactment.[4] If we choose the originalist approach (which, I believe is not a choice based on linguistic arguments, but a choice based on moral or political ones) and agree with S. Soames that:

> the originalist looks for what the lawmakers meant and what any reasonable person who understood the linguistic meanings of their words plus the publically available facts and recent history in the lawmaking context would take them to have meant. This – not the original linguistic meaning of the words they used – is the content of the law as enacted ("Textualism, Pragmatic Enrichment and Objective Communicative Content", p. 4),

then pragmatic factors and context become crucial. It is some kind of a shift of focus from subjective psychological intentions, to a more objective notion of what a standard hearer, knowing the relevant context (the accessible public debate) of an utterance would have understood in that situation, at the time of the law's enactment.[5] An acknowledgment of the subjectivity and sensitivity to abuse of the process of 'guessing' the true psychological intentions of the legislator is being made. It is a dangerous process mainly because of two reasons. First, the legislature is a collective body. This entails we cannot view its intentions as having exactly the same nature as psychological intentions of a unitary speaker. Secondly, if the psychological intentions of a unitary speaker can often be hidden for the hearer or not explicitly enough expressed by the speaker or misinterpreted by a hearer, then the psychological intention of a collective body seems even harder to grasped. It is unclear what such intentions shall be. A sum of the unitary intentions? Or maybe a prevailing intention? It

[4]Analogously in statutory interpretation: '(...) the meaning of a statutory text, according to contemporary textualists, is the linguistic content that a rational and competent speaker of the English language would, *knowing the relevant context and conversational background*, have associated with the relevant text at the time of enactment.' See "Textualism, Pragmatic Enrichment and Objective Communicative Content", p. 2.

[5]The considerations in this paper are mainly devoted to constitutional interpretation. There seems to be an analogous idea of shifting the debate in statutory interpretation in the States. This program is being endorsed by the so called purposivists, claiming that a judge should seek for the objective purpose of a law – and so introduce some normative construct. See "Textualism in Context", p. 4.

seems therefore more viable to resort to some less subjective criteria like a standard, objective hearer, who knowing the relevant context understands the speech act intentions in the most reasonable way given the available public debate. Such approach seems more conform to the expectations of fulfilling the rule of law in democratic states, as it takes into considerations factors available to the broad public, while allowing no unexpected interpretations basing on hidden psychological intentions and emphasizing the 'predictability' in the realm of law. (Bix 2003) This line of argumentation can also cause issues. It somehow includes a normative element: we introduce a factor that determines how the content of the legislative utterance should be understood. Determining the most reasonable way in which it is to be understood also requires an argumentation, which in turn could be accused of hidden subjectivism and arbitrariness. Pragmatics helps us to avoid confusion between the rudimentary, standard and most common understanding of a sentence and its understanding in a given context.

> The sentences 'Do you use a cane?' and 'I have never used a firearm' *do not* have the same meanings in the English language as the sentences 'Do you use a cane *for walking*?' and 'I have never used a firearm *as a weapon*.' ("Two Dimensions of Originalism", p. 3)

Consequently, if the legislator issues a statute of the form 'It is forbidden to use a firearm', he may intend to say 'It is forbidden to use a firearm as a weapon' or 'It is forbidden to use a firearm as a weapon or as a payment device or any other non-standard purpose etc.', depending on the context of his utterance. The purpose is hidden in the pragmatic context. There can also be, as Soames points out, a second dimension of the interpretative issue – the content asserted by the legislator in the particular context[6] can be indeterminate.

> In these circumstances, the task of the judicial interpreter is *not* to discover an idealized law that is already there;*it is to make new law.* The challenge to originalism is to articulate what form of deference to original sources should guide this process. (ibid., p. 14)

[6]In fact in the context of a particular case in court.

The task of the judge is to construct the minimum necessary presicification (a term introduced by S. Soames) of the law:

> My version of originalism maintains that in such cases, the court's duty is to adopt the minimum principled precisification of the indeterminate existing content that allows a definite verdict to be reached that most closely conforms to the original lawmakers' rationale for adopting the legal provision.

According to his view, this rationale consists

> not in the causally efficacious motivators of lawmakers but in the chief reasons publicly offered to justify and explain the law's adoption.

This definition seems to be some kind of a 'purposivist-originalist' view. Purposivism is a term traditionally used in statutory interpretation, but here it is being smuggled in the constitutional one. The considered paper seems to weaken an initially strong originalist stance with a purposivist element, rendering originalism a more practical and descriptively plausible theory. Soames argues that this 'presicification' process is open to abuse, but this was never the issue.

> [T]he point of an originalist conception of interpretation is not to *prevent* abuse, which no reasonable conception of interpretation can do. The point is to lay down solid and defensible criteria by which the inevitable exercise of interpretive judgment must be justified.

This seems to be a quite controversial statement. Solid and defensible criteria are precisely what enables us to lay the border between interpretation and abuse. They are supposed to prevent abusive interpretation or at least reduce it to a minimum. It is in this second dimension of originalism, when the asserted content of the law is indeterminate that pragmatics again come into play. Soames defines 'an originalist view of judicial responsibility':

> Courts are not to legislate, but are to apply the laws adopted by legislative authorities to the facts of particular cases. To

> do so they must determine what the lawmakers in a given case asserted or stipulated in adopting the relevant legal texts, and apply that content to the facts of the case to arrive at a legal result. When the content of the law or laws fails to provide reliable guidance in determining a unique, acceptable legal outcome (in cases in which one is needed) – either because that content leads to inconsistent outcomes, or because it fails to lead to any outcome, or because it leads to an unforeseen outcome that subverts the predominant legislative rationale of the lawmakers in adopting the relevant laws – the task of the judicial authority is to **fashion the minimal modification** of existing legal content that removes the deficiency and allows a decision to be reached, while maximizing the fulfillment of that rationale. ("Two Dimensions of Originalism", p. 30)

This fashioning of the minimal modification is necessary for the originalist view to be applied in practice. Soames argues without it, descriptively speaking, the originalist programme wouldn't be possible to be realized. It also enables a maximum compliance with the historically valued divide of powers principle. It seems however, that an additional distinction is required. The minimal modification made by a court can be of two kinds. It can be 'creative' in the sense the court uses new political or moral argumentation. Nevertheless in some cases, the minimal modification can stay within a pragmatic enrichment of an asserted meaning. An enrichment caused by additional, new facts of a particular case, which is being decided upon. Consequently, if the minimal modification is of a purely pragmatic character, then the decision process is fully originalist. Take the example of a regulation forbidding the use of drugs enshrined on a list. The last point of the list is a legislative blank cheque stating that the use of other existing drugs having similar effects is also forbidden. This blank cheque does not have to mean the legislator approved an anti-originalist stance of the court, because the legislator must be aware of the possibility of new pragmatic factors occurring. Imagine ten years after the enactment of this law, a new drug having similar effects is invented. No rational recipient of the legislature utterance at the time of its enactment could have had in mind that drug, because it did not yet exist. In any case the court can rule that this is forbidden – since the rationale of the legislature was to forbid the use of drugs with similar effects. This minimum

change of the law is strictly pragmatic. It is not clear however, whether it is the assertive meaning of the law, which changes here (Soames' view). This enrichment of meaning seems more similar to an implicature in the Gricean sense. So the switch is located more at the level of implicated, than asserted meaning.

In the first dimension of originalism it is so commonplace that context plays a major role in determining the assertive content of the law, not only because we are applying the more objective approach considering what a rational hearer would have understood knowing the relevant publicly accessible context, but also because in legal cases a judge does not have to be absolutely positive that the legislator asserted more than the literal content of the enacted statute (as Asgeirsson convincingly argues). It is sufficient for him to be significantly more probable that there is some assertive content different than the literal one. ("On the Possibility of Non-Literal Legislative Speech", passim) The demand of obviousness of asserting something different than what one says is being replaced by a weaker requirement – for a judge a high probability level of a pragmatically altered assertive content is sufficient. What is more, the shared conversational background required in legal contexts has to be quite rich. (ibid., p. 33) That is the reason for the limited number of non-literal assertions in law, as the legislative and judiciary powers rarely share particularly rich conversational backgrounds. Its' richness poses constraints on the pragmatic enrichment of a literal utterance. The judge may interpret only within the frame given by the conversational context. (ibid., p. 28) The richer the context, the broader is the possible pragmatic enrichment.

It has to be noted though, that Soames' description does not differentiate between constitutional and statutory interpretation. This distinction is made by Marmor, who also points out that

> Sometimes, however, the opposite is the case; an expression that is not particularly vague or indeterminate, becomes pragmatically or conversationally vague precisely because the particular context of the conversation makes it doubtful that the expression applies to its ordinary semantic extension. ("Varieties of Vagueness in the Law")

The context of the case, instead of helping the judge in forming a more precise version of the legislative meaning makes the task even more

challenging and unclear. An example is given concerning the enactment of contradictory statutory law with different presuppositions by the same legislature. It is possible however, that this is more a co-textual problem, than a contextual one. These are pragmatic factors sensu largo, which are dealt with by the continental courts with interpretative rules or canons of construction like 'lex posterior generali non derogat legi priori speciali' or 'lex posterior specialis derogat legi generali'.[7] Conventional and co-textual implicatures can be predicted at a legislative level. A typical example of a conventional implicature is the sentence 'Even X can A', implicating that everybody can A and X is the least likely to be able to A. A co-textual implicature could be a legal definition in another statute, committing the court to understand a phrase in a definite manner. The purely contextual implicatures are often unpredictable, because the facts of the cases that will be decided by the courts in the future are impossible to be foreseen (just as in the example of the drug, which has not yet been invented). Consequently the context of a particular case at stake can render even a definite expression vague and there is no possibility for the legislator to foresee this at the time of the statute's enactment. This entails context – both at the level of interpreting the legal provision and at the level of applying it to a certain case, can not only narrow the considered range of meaning, but also have just the opposite effect. In some cases pragmatic factors are the cause of the sufficiency of a linguistic method (they enrich literal meanings sufficiently), while in others they create the need to resort to a moral or political argumentation to solve the case.

4 Conclusion

In some cases pragmatic factors play a substantive role in the described exchanges between courts and legislatures. While a court stays within the pragmatic enrichment, as an effect of his interpretative actions, it is not 'creative' (or 'activist') and stays in compliance with the traditionally valued principle of the divide of powers. If it is the case, then analyzing this phenomena in the light of theories like Paul Grice's or neo-Gricean ones appears to be promising.

The image, looming out of the above considerations is quite complex.

[7] An interesting differentiation between conventional, co-textual and contextual implicatures is given by Poggi 2010.

The clash between – the need of introducing subjective arguments in interpretational considerations and the traditionally defined divide of powers principle has been the cause of a long and tedious debate between originalists and anti-originalists in constitutional interpretation. It seems however, in cases were pragmatics are decisive of the chosen meaning originalists and their opponents become quite univocal. The problem arises when pragmatic arguments are insufficient and there is need to resort to subjective moral or political argumentation, as then linguistic or pragmatic arguments are solely fashioned so as to fit the already chosen line of reasoning. The pragmatic enrichment can be double, occurring in some cases both in the first and second originalist dimensions. What is more, pragmatic factors of concrete cases can be decisive or insufficient as far as the second dimension is concerned. Decisive – when the context is sufficient to determine what was the content of the legislator's utterance. It can be insufficient when determining the content depends on moral or political arguments. The strategic speech (to use Marmor terms) taking place between the legislature and judicial powers is particularly interesting. If we assume the objective understanding of intentions – so what a reasonable hearer understands from the enactment in the relevant context, then it is de facto the court, who will decide on them. The judge can therefore communicate the legislator that he understands the law in a certain way. If it is not conform to the legislator's intentions, the legislature can amend the law. So the court becomes a quite powerful hearer, being able to indirectly influence the law's content. I am not sure however, if this is at all peculiar. In ordinary, everyday speech situations, it also happens that a speaker fails to convey what he intended to convey. When observing unwanted reactions of his hearers, the speaker can amend his utterances, so as to be better understood next time. That is why suggesting the Gricean cooperative principle does not apply here (as F. Poggi does) could be misguided, even when accepting the textualists or formalist approach.[8] It is the content of the maxims that can be very specific here. The judge directs his decision to the litigation, who receives a 'double-processed' or 'two-dimensional' utterance.

[8] A. Marmor in a theory of statutory interpretation advances the view that the textualists approach rejects the cooperative principle, by accepting only the content, that the legislator promulgate and negating the content intended to be conveyed by a legislator. See "Textualism in Context", p. 16.

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Law and Literature Workshop

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Batman and the Rise of the Drones

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Abstract. This paper aims to leave the usual scope of the law and literature and focuses on one of the greatest comicbook superheroes—the Batman. Batman is often claimed to be the greatest vigilante, but in this paper I dare to argue with this general view on its role in society. Batman cannot be claimed to be a vigilante, because he does not aim to alter the existing state monopoly of violence. He acts as a catalyst enhancing the law enforcement powers. He present the incorruptible role-model to something we see in our world even today as the technology advances further into our lives—crowd-sourcing of the law enforcement through the collective effort of some of the law-abiding citizens.

Keywords. Batman, comicbook, criminal justice, drones, law enforcement, rendition, technological development, violence.

1 Introduction

When it comes to capturing the essence of law or legal problems in literature, people often choose classics. Merchant of Venice by Shakespeare together with famous Crime and Punishment by Dostoyevskiy are landmarks of law in literature. But what about the literature that fails to be

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generally understood as high and worthy? What about comicbooks? Is it really the kind of literature not worth the attention of lawyers or does it speak to us about the law and its general understanding? I believe that when it comes to Batman, often claimed to be the greatest vigilante ever, language might be different, but the role of perception of law is no less important.

In this article I would like to bring to light several issues accompanying the fact that not only the high literature often copies the society and vice versa. When the Dark Knight trilogy, as the cinematic depiction of the new Batman narrative, turned into blockbusters in the past decade, new stories of Batman and new understanding of Batman's role in society targeted probably the biggest audience so far. My questions related to this approach challenge the basic premises on which the Batman stands. Can he really be perceived as a vigilante or is he something rather different? Vigilantism is strongly depicted in American culture (which currently presents the single most powerful culture in today's globalised world), so my question also stands, whether the Batman-like behavior in society can in any way enhance its law enforcement activities. And does the technological development enhance this kind of behavior?

2 Violence

Violence in a national state belongs to the government. Government as such is granted the monopoly to legal violence in any country and as such presents the single authority to ensure criminal punishment within its given area. Without the monopoly, there is no state as such for the monopoly presents one of the basic characteristics of a state. According to this premise, vigilantism as a mean to achieve extra-judicial justice through self-help should only occur in countries that are unable to exercise such monopoly in the long term. Because if the government functions properly, vigilantism is not needed, as the criminal punishment is provided by the government within reasonable time through the means of law. Despite this, vigilantism occurs in rather normally working countries as well, such as the United States of America. According to some experts, this can be attributed to the strong belief of citizens about their supposedly inalienable right to safeguard their own interests. (Lenz 1988, pp. 118 and 125) This is quite often depicted as a part of the American way of life, which is

therefore inherently present in the culture. Comicbook superheroes exist because they can fight the crime,[1] without being shackled and tied by the bureaucracy, which captures the aforementioned inalienable right in its very essence.

Criminal punishment through the system of criminal justice, as the realisation of the governmental monopoly to violence, is perceived in law and economics as balancing the three main considerations. First of them is the net harm from the crime to the society, which is captured through the varying punishments for various crimes. Second is the cost of sanction, which prefers cheaper sanctions. Third one is the expense for law enforcement. (Hine 1998, p. 1231) These have to be balanced in order to create law enforcement policy that does not burden society with over-enforcement. Over-enforcement can supposedly become more costly than the crime itself and affect the well-being of society as such. Applying the same law and economics ratio, we have to conclude that people behave in what they believe to be their best interest. Therefore the criminal justice system has to provide penalties for criminal behavior. Penalties have to be imposed with sufficient regularity so that the legitimate activities are favored over the criminal activities. However, this model cannot be put in reality perfectly. Even in the countries with superb police forces, most of the criminal activities remain unpunished. (Silke 2001, p. 1) By not burdening the society with over-enforcement, most of the criminals shall walk freely among us without the punishment. This may present problem due to clashing interests in the non-criminal side of criminal behavior. Closed communities are strongly related to the victim and therefore are strongly inclined to feel necessity for punishment within the shortest possible amount of time. Community feels this as more urging over the overall criminal policy and a possible burden of the over-enforcement. It is in the interest of society to set appropriate safeguards, so that the alleged criminal can be punished without any reasonable doubts whether and how the crime happened. But by that time it might be too late for the community, even in case the alleged criminal is caught and prosecuted.

[1]This paper focuses on rather ordinary, yet powerful criminals. It omits existence of the typical comicbook villains with superpowers effectivelly removing such individuals from the boundaries of law.

3 Vigilantism

Abovementioned is what I understand as the root of vigilantism in countries with standard governments. On the lowest level, individuals, families and communities react to the crime with anger, demanding the swift justice. On the other hand, the state presents another level of interest focusing on the safeguard and the general picture where the justice has to be imposed on sufficient amount of criminals in order to work efficiently. This is rather understandable—a family or an individuals are directly affected by the crime and usually not repeatedly, therefore it is important to achieve justice swiftly (because of the personalised effect of crime) and every time (because crime does not come in astonishing amount of cases). On the other hand, the state focuses on the general message seeing the broader picture. Every crime in statistics is depersonalised and the broader picture only demands sufficient amount of criminals to be punished. And the different interests create tension even in countries with sufficiently functioning government, creating demand for vigilantes.

The classical vigilante was described by William E. Burrows as (1) a member of an organised committee who is also (2) an established member of the community (3) proceeding with definite goals. This character (4) claims to act as a last resort because of a failure of the established law enforcement systems and they (5) claim to work for the preservation of the existing system. (Burrows 1976, pp. 13–15) Given these definitions, I finally approach the important questions whether Batman is a vigilante or not. And I conclude that Batman is not a vigilante.

4 Batman

Batman as such does not act as a member of an organised group, but also, and more importantly, Batman does not claim to act as a last resort of the failing system. He always delivers criminals to court, he refuses to use fire arms, he refuses to kill criminals and in the cinematic depiction he urges Harvey Dent (Gotham's public prosecutor) to become the 'white knight'. Batman does not aim to alter the existing monopoly for violence, he aims to strengthen it and encourage its officials. Batman does not aim to meddle into the issue of the criminal justice delivered by the state for he does not want to impose punishment on criminals, he simply delivers

alleged perpetrators to justice. So, who is Batman and what is his role in the criminal justice system in the abovementioned triade of criminal justice? Batman provides means to bypass the costs of law enforcement. He artificially rises efficiency of the law enforcement without biasing the balance and causing over-enforcement through the mean of overfunding of the law enforcement agencies. Batman de facto lowers the threshold for criminal justice when the procedure fails facing the powerful and rich criminals that can corrupt the police forces. In this case, the threshold is being lowered by the incorruptible vigilante-like superhero Batman. Batman does not act as an executioner and his actions can be therefore compared to the practice of rendition in the international relations. When a criminal cannot be brought to trial through the formal process of extradition, rendition ensures the ineffective or corrupted procedures are bypassed and the threshold for imposing criminal justice is lowered. (Ip 2011, p. 215) In Gotham, Batman's hometown, some sort of criminals reached such high places that despite the undisputed enormous net harm to society and possibly bearable costs to impose sanctions, enforcement expenses to enforce law on such criminals would be unbearable for the society, despite its general law enforcement efficiency. When it comes to the nature of Batman, there is no usurpation of the criminal punishment by any individual. This also makes the paradox of breaking the law for the purpose of maintaining it obsolete. One cannot interfere with the state monopoly to violence while in the same breath claiming his or her actions to serve the purpose of ensuring the continuity of such monopoly. As concluding from the abovementioned I state that Batman is not a vigilante for he does not provide any alternative for the existing criminal justice system and he does not impose any criminal punishment at all.

5 From Comicbooks to Reality

Without being classified as a vigilante for his lack of will to alter the existing criminal justice system, Batman, without any doubts, acts extra-legally. His restriction of freedom, warrantless surveillance and other practices are not legal. Can such an extra-legal activity aiming to bring criminals to justice, but not to punish them as such, be observed in the actual world? If we focus on the general post-9/11 practice of the US, the practice of rendition has been frequently replaced by the practice of extraordinary

rendition. (Ip 2011, p. 215–216) It does not aim to bring the alleged terrorists to justice, but merely aims to punish them extra-legally. This might be perceived as the vigilantism enacted by the state. In the history, we can often see that extraordinary situations require extraordinary measures that might break the national or international law. In this case state (or rather, some of its law enforcement agencies) acts as a vigilante when intentionally breaking the law in order to achieve justice (or what is percieved as justice). Armed drones killing suspects and special forces ensuring extraordinary rendition clearly approach the no-jurisdiction model. When aiming to the criminal punishment, this clearly can be deemed as extra-legal self-help. The Batman-like behavior therefore can be hardly observed on the state level in today's world.

Individuals, on the other hand, seem to be more similar to Batman in their actions. Comicbook-like reality of lowering the law enforcement threshold can be observed and is clearly present in our society. For example, hacktivist groups break the law in order to collect evidence on the unlawful behavior that would otherwise be unreachable. Although evidence obtained in this way might be inadmissible at court, social and media pressure might play its role. Or course, the virtual and actual worlds are vastly different, but even in the latter, as I believe, we will soon be able to witness similar behavior. Price of the sophisticated remote-controlled aerial vehicles drops constantly and turns available also for citizens.[2] And even without this special equipment, Batman-like behavior is possible. Today everyone is able to record what is happening around through a cell-phone. After the unfortunate bombing on the Boston marathon, a vast amount of citizens supplied law enforcement agencies with raw footage or another information. Everyone gathering information online or offline who provides it to law enforcement agencies does basically the same job as Batman—individuals help to lower the threshold that would otherwise have to be reached by the vast amount of money streaming into the law enforcement. This vast amount of money would cause over-enforcement that would, once again, harm the well-being of society.

[2]For further reference see (Pagallo 2011).

6 Conclusions

This paper tries to present that not only the high literature could be a source to observe the society. Comicbooks provide us with role models and with notions on how the society might work or works. The key aspect of Batman is his refusal to use violence—that can be eventually understood as a refusal to alter the existing monopoly of violence which undisputably belongs to the state. He acts as an element preventing the over-enforcement when dealing with high-profile criminal cases able to corrupt the law enforcement agencies.

Batman-like behavior cannot be understood as an ultimate tool to bring down some of the powerful criminals today's society is facing. But he can be understood as a role model for providing law enforcement agencies with crowd-sourced information. We know this model since the beginning of time. Law enforcement agencies cannot be everywhere and for that reason they turn to informants or general citizens—to fill the blanks that otherwise would not be filled.

From the legal point of view, we have Batman at reach. Batman is not a vigilante because he does not want to alter the existing criminal justice system. He wishes to help it, which is a wish of the major part of the society—more effective law enforcement without the burden of over-enforcement. A vigilant society, not a society of vigilants. This phenomenon cannot be easily claimed as good or bad—it most certainly has its benefits, but surely has its pitfalls as well. When searching for the one and final pitfall, we do not have to look too long—Batman is no ordinary citizen for he truly is incorruptible.

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Why Havel's Plays Should Be Still Played?

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Abstract. This paper deals with the importance of Havel's plays for the legal awareness in the Czech Republic. I will focus on Havel's texts dealing with law both in politological and artistic form. The aim of this paper is to prove and explain how Havel, as an important European and international figure, influenced our legal discourse and to answer why his plays should be played.

Keywords. Havel, Law and Literature, theatre, legal theory, postmodernism.

1 Introduction

The purpose of establishing the legal-theoretical field of Law and Literature was, in my opinion, to move legal theory and practice closer to social context. At the beginning of 20$^{\text{th}}$ century, positive law, and after all the legal theory as well, was being developed based on the opinions and views of Kelsen and Weyr and as every escalated idea has to have its opposite, it may be said in retrospective that Law and Literature could be the opposite to normative theory.

This statement is, of course, slightly distorted, but it is sufficient as a framework for this paper. Back then, real law was indeed very formalistic as well as was the legal theory—the concept of normative theory is

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probably well known among today's lawyers. But back then the Law and Literature movement offered an alternative, whose followers were pointing out that the law is not an isolated system standing by itself, but it is a part of a large system where every human being exists.

With this idea this legal-theoretical movement made a breakthrough. Because of the movement's multidisciplinary efforts, the legal theory went ahead of its time. After all, if the Critical Legal Studies which currently embrace Law and Literature were developed in the 60s, it means that this movement had a head start of half a century.

Nowadays, Law and Literature, as well as Critical Legal Studies themselves, face a critique based on their being isolated from legal reality. But in fact all these essentially more or less minority and revolutionary ideological movements resulted from the positive influence on the legal reality and legal theory emerging from the reality. Creating theories from theories and running around in circles of academic debates is not (or it was not in the past) its purpose.

The purpose of Law and Literature's existence is to offer an alternative to classic legal method in legal argumentation, interpretation and legal education. Its core idea is that for the right usage of law its knowledge is not enough, but wider knowledge, especially in culture, is necessary.

The answer to the question of the purpose of this idea is at hand. Law is a part of culture in its wider meaning and thus it influences people together with other cultural elements, such as art. Thus, we could assume that the law and culture act together and in a mutual interaction.

Law is a basic inspirational source for art which in turn forms legal knowledge. If our aim is to manage law in a most persuasive way, it would be almost despotic not to use art as a persuasive means, whether it is by argumentation by belles-lettres, interpretation of the legal text as if it was literature or by teaching law using theatre.

Taking into consideration the current state of law in Czech Republic and the situation and the state of the Law and Literature movement, it turns out that Václav Havel's plays should be performed way more often in this country. Explaining the reason for this statement will be the focus of this contribution and may this contribution's aim be to persuade you of its necessity.

2 Why Havel's Plays

3.1 Author

Václav Havel was a playwright, essayist and later a politician. In his life he wrote a large amount of journalistic and theatrical texts and essays that regardless to the genre have been influencing not only the Czech society. (Carey 1992, pp. 200–211)

For many people he still is a controversial persona with contradictory artistic ideas and political legacy (Brooks 2005, pp. 491–522), but his significance in current Czech paradigm is unquestionable. (Pontuso 2004)

For many people he was

> [...] a playwright who mocked the authoritarian system in his absurd dramas but also stood up against it, refusing to play the role assigned to him by the system, was imprisoned several times and finally, in a momentous turn of history, led a peaceful, 'velvet', revolution that brought it down and became his country's first democratic president. (Ditrych et al. 2013, pp. 407–417)

On the other hand he was also a 'usual' politician with certain political opinion and not even a philosopher or idealistic dissident. He stood by his concept of anti-political politics, on which his understanding of 'real' politics in the post-dissident times was based. (ibid., pp. 407–417)

Politics in Havel's eyes were definitely cultural and moral. This opinion was influenced by Masaryk's concept of democratic state. Havel's text the Power of the Powerless refers to the world of a ritually reproduced lie. Havel refused this post-totalitarian lie as well as the consumer value system of the Eastern Europe because he simply refused each such failure of modern humanity. (Petrusek 2012, pp. 569–576)

It is often said that Vaclav Havel is considered one of the foremost playwrights of the 20^{th} century. This statement is quite widespread but not scientifically verifiable for lawyers. Only literal scientists can examine and decide that. So we have to focus only on the impact of his work on law.

The question is whether it is possible to use Havel's ideas (contained in his plays) in law and if it is possible for such ideas to influence current legal awareness in the Czech Republic.

I think that it is possible and that Václav Havel's life, personality and achievements may justify the use of such ideas in law.

Václav Havel is a controversial figure of our history and of course of our political life. But he remains a big moral authority of our time, he emphasized the most crucial topics of our society and his writing craftsmanship is globally recognized.

I believe that these three characteristics need to be fulfilled when we ask about the real impact of a work of art on legal world and I am sure that Václav Havel and his absurd drama have all these qualities. So let us now look at the content of Havel's plays and try to find and describe their hypothetic legal impact.

3.2 The contents of Havel's plays and its impact on legal awareness

Havel defined his dramatic goal as forcing the audience

> [...] to stick his nose into his own misery, into my misery, into our common misery, by way of reminding him that the time has come to do something about it [...] Face to face with a distillation of evil, man might well recognize what is good [...] (Havel 1990)

Carey writes that there are three types of Havel's drama: the early absurdist comedies; the Vanek morality plays; and the psychological-prison plays. I think this division is nearly perfectly suitable for our purposes so we shall preserve it. (Carey 1992, pp. 200-211)

In his first important play, 'The Garden Party', Havel focused on the clichés, which influenced our lives by language. (Havel 1993) In 'The Memorandum' Havel deals with language again and an artificial language *Ptydepe* is what moves the story towards (political) absurdity. (ibid.)

These two early absurdist comedies complement the legal awareness with a critical view on the state and the law and in many ways they also reflect Derrida's concept of the law as a play. (Derrida 1978) Language is perceived as a key aspect of perception of reality and the fact of reality being abused by bureaucratic language, by phrases with no content or by artificial language, has to have its consequences.

'The Garden Party' may be interpreted as a critique on state bureaucracy, which absurdly capitalizes itself and absorbs human beings to change them beyond recognition. That is exactly what a postmodern state should not be doing and that was the reason Havel pointed it out. What he described in 'The Power of the Powerless' as empty phrases that serve only to express one's conformity with the regime, not to express the real content, can be found in The Garden Party in infinite modifications.

Besides, 'The Memorandum' may be seen as the next stage of the situation described in 'The Garden Party'. The language that defines and manipulates people's minds also guides their actions. Human beings are becoming robots in the hands of the state, because the state is controlling their actions by the imposed language. By meaningless words the state also turnes the human thinking into a load of nonsense, which allows easier control.

This situation characteristic for post-totalitarian states could be very inspirational even for a postmodern democratic state in 21st century, because it describes extremities, which cannot be allowed.

The term The Vanek Plays refers to three one-act plays written in the 1970s that are based on one character, Ferdinand Vanek: 'Audience', 'Private View' and 'Protest'. The first and the second are important for us. (Carey 1992)

'Audience' (Havel 1992) may be seen as a Havel's critique of paradoxes of the resistance against the post-totalitarian regime. Vanek's denial of accepting the rules of the system is confronted with an assault on intellectuals and their principles. The main aim of depicturing this main paradox is to show how dangerous it is to live within a lie. But the question is what the word 'lie' actually means. Can a principle work as a lie? Is it really different from 'Living for nothing?'

The second Vanek play is called Private view. It's main topic is again 'living for nothing.' It criticizes consumerism of modern society and furthermore it depicts 'the crisis of human identity' (which is included in all Havel's plays and is fundamental for his point of view) in the most accessible way of all Havel's plays. (ibid.)

3.3 How Can a Theatre Play Affect Legal Awareness?

In the post-modern world the culture and the law are closely related. They have a common fate based on the fact that the traditional state that formerly held them both in its hands is now abandoning their strict authoritarian interpretation and is beginning to respect the diversity of individual truths. (Škop 2008)

Culture and law are both a part of socio-cultural system and also a part of a symbolic capital as described by Bourdieu, (Bourdieu 1998) and both serve the state as means of power to control the population, as described by Foucault. (Foucault 2000) Furthermore, according to Derrida, both are imprisoned in the same form—the language, meaning that both have at least same form in which they apply their influence. Therefore, mutual impact of law and art is inevitable. Furthemore, taking into consideration Rorty's idea that in law, anything that is convincing may be used for argumentation, it is possible to see an appropriate source of impact on law in art. (Škop 2008)

On the other hand in law as well as in art privatization efforts are getting stronger, giving the floor to those from whom the capital came from—the population of the state. There are no longer great narratives that could portray the relationship between law and art. It is up to everyone to deal with art's possible impact on law, especially on legal awareness.

The area where art influences law the most is legal awareness. That includes knowledge of the objective law, as well as the attitude towards law including the values. But where else to find values in postmodern world than in art?

Postmodern world gave up on scientifically rational and hence impersonal truths. It is searching for a single truth, which contains multiple individual truths and justices to cover the diversity of the society after postmodern turn.

The law in a postmodern state contains in its core an ethical dimension, but it cannot draw it from itself. Postmodern state cannot prioritize one value over another and justify this action on its own system of values. The state has to seek compromise of multiple different truths leading to the most just solution. The basis for this compromise must necessarily be individual truths related to the problem. The source of these truths may be art. For this source to be acceptable as a part of the only truth and justice

that the postmodern law seeks, it needs to meet certain requirements.

As stated above, almost all Václav Havel's works are in theory such works of art, which affect legal awareness and therefore law can make use of them. Substantiation consisting of the author's authority, artistic quality of the piece and the content oriented onto values, all this could be generalized and stated as general conditions for the works considered important for law.

Every single one of these characteristics has other consequences that may not be apparent on the first sight.

The author's authority is in contradiction to the classic postmodern doctrine about the death of an author, but in this case we will have to moderate the approach to postmodern theory, similarly to the case of the legislator. Authority of the author of the artwork used in legal argumentation determines the value of the piece same way as in case of the legislator.

It is caused by the fact that a large part of society is not and cannot be familiar with these artworks. As the amount of existing works of art is immense, it is impossible for everyone to know everything. From this amount of works there are some pieces sticking out – artistic mastery of their authors being so highly regarded that knowledge of these works is a part of general cultural knowledge.

What is the subject matter of this generally assumed knowledge could be hardly determined. Although there are authors, who are so important that there are no doubts about their place in the general cultural knowledge. These authors are e.g. Sofokles, Shakespeare, Dostojevski, Kafka or Beckett. In my opinion, for the Czech Republic, Václav Havel is one of those.

The author's authority however has yet another dimension. In the postmodern world controlled by the media and almost fully globalized when it comes to information, the personality and self-presentation of the author plays its role in the artwork's evaluation. In the eyes of the public, the author's persona becomes an integral part of his authority. When it comes to the author from the past, this dimension disappears, because it is either questionable, fully unrecognizable or at least not generally known.

In case of a contemporary author the situation changes entirely. His artwork is being perceived in context of his professional and personal life, his artistic or non-artistic opinions. A Textbook example could be the case of Milan Kundera, whose political past is impacting his artwork overview

greatly, at least in the Czech Republic. It raises the question whether the artwork of such an author has any persuasiveness at all when it comes to the values it communicates.

Václav Havel's political career could have diminished the persuasiveness of his ideas, but I think that its influence is not that significant. After all not even his political colleagues refrain from questioning his qualities as a playwright.

The second condition, the artistic value of the artwork, is closely related to the first one and has to be accomplished cumulatively. Only after meeting the first condition we could get to assessment of the author's works. Each artwork then must be assessed according to its general content familiarity and its widely regarded artistic quality.

Only while insisting on meeting both aforementioned conditions, there is a higher probability of avoiding a situation where we take into consideration an artwork that has an artistic quality that could be questionable or only temporary, even though the artwork is currently generally well known.

In case of Václav Havel's plays we should consider especially 'The Garden Party' and 'Audience'.

The third condition is then the content of value of the work that has met the first two conditions. Only the work that tackles core questions of values that are at the same time inevitably connected to law but irresolvable by law,could practically influence the society's legal awareness.

This content is clear in both the aforementioned Havel's plays, as stated above.

3 Conclusions

Each country has its own characteristic features of law based on its historical experience and Czech Republic is not an exception. The critique of law is a mirror of law itself so we necessarily need to know it to meet the complex discourse. However, it is not only the purely legal critique of law which constitutes legal environment.

I think that Václav Havel's critique of state and society is important enough to influence our legal system. His point of view influenced legal consciousness during the period of Actually Existing Socialism as well as later after the Velvet revolution. Even after the end of communism in the

Czechoslovakia, Václav Havel remained a critic of the defects of our state, society and law.

Besides that, Havel as an international figure influenced legal discourse in all Central and Eastern European countries. He connected our experience with the experience of foreign states of our area so he established a really important connection between our law and their law. Of course, his opinion cannot be considered as a legal one in the usual sense but his ideas can be used in legal reasoning because of their moral qualities.

In his work Havel explains that conformity, uniformity, and discipline were obligatory for each citizen of communist era. He says that

> This system serves people only to the extent necessary to ensure that people will serve it. (Havel 1990)

Analogically it means that law of this system served only to the extent necessary to ensure that people will serve the system. Nowadays it is not different and we must be aware of that.

Havel also explains the principle of legality in the situation of our post-totalitarian Czech discourse:

> Of course, one need not be an advocate of violent revolution to ask whether an appeal to legality makes any sense at all when the laws-and particularly the general laws concerning human rights-are no more than a facade, an aspect of the world of appearances, a mere game behind which lies total manipulation.

The denial of such a game is naturally included in all Havel's texts and the reason is connected with his intention of living in truth. Havel shows the importance of the principle of legality by the basic rhetoric question:

> They can ratify anything because they will still go ahead and do whatever they want anyway—this is an opinion we often encounter. Is it not true that constantly to take them at their word, to appeal to laws every child knows are binding only as long as the government wishes, is in the end just a kind of hypocrisy, a Švejkian obstructionism and, finally, just another way of playing the game, another form of self-delusion? In other words, is the legalistic approach at all compatible with the principle of living within the truth? (ibid.)

And he also answers that a persistent and never-ending appeal to the laws does not mean at all those who do so have succumbed to the illusion that in our system the law is anything other than what it is. Fortunately, any system cannot exist without the law, because it is hopelessly tied down by the necessity of pretending the laws are observed. Havel concludes that demanding that the laws be upheld is thus an act of living within the truth because such appeals make the purely ritualistic nature of the law clear to society. People who insist on the principle of legality draw attention to real material substance of law.

In his plays Havel transformed his ideas and beliefs into artistic forms. He expressed his ideas in essays and later on even during his political career His critique of the law, state and the society is so accurate and timeless that it offers a necessary critical point of view even today. In the postmodern world, the subject of Havel's writhing and the world we still live in, the law is necessarily related to the culture. According to this fact we can assume the possibility of the legal knowledge being affected by artwork without any doubt. Some artists could significantly affect legal knowledge and Havel is an excellent candidate for this role. This is why his plays should be still played.

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