

Legal concept of public order: A Case for Social Representations Approach

Terezie Smejkalová, PhD

Markéta Štěpáníková, PhD

Overview

- Case 2 As 199/2018 – 37 and use of public order
- Restrictive approach to law and doctrine in light of normativism
- Methodology & data
 - How did the participants thought about the model situation?
 - How do they believe the concept of public order should be interpreted?
- Consequences of the restrictive approach

Case 2 As 199/2018 - 37

- Transperson asking to have their national security number changed from XX0XXX/XXXX to XX5XXX/XXX
- Their request was refused citing law allowing this change only when the person underwent gender reassignment surgery incl. mandatory sterilization

Case 2 As 199/2018 – 37 and use of *public order*

- Claims it makes a „minimalist“ argument, leaving possible changes in social values to the legislator

BUT

- Prevalent sentiments and attitudes of the society
- Correspondence to reality argument – to say otherwise would be contrary to public order

Normativism heritage and restrictive approach to law

- Hans Kelsen and his purity thesis
- František Weyr:
 - legal science as epistemology of norms
 - Legal theorists should study the form of law; content and values do not belong to law

Methodology & research questions

- 13 participants, legal academics, chosen to span across all the major legal fields traditionally recongnized in Czech legal thinking
 - 3 women, 10 men; aged between 26 and 48
1. Model situation
 2. Thoughts about the process of how the concept should be interpreted

Model situation

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



- Public order as perceived fundamental ***core legal norms***
+ this issue is a matter of public order
- „Correspondence to reality“ argument

- Public order does not extend that far
- Reverse „correspondence to reality“ argument (we have no right to know)

How should a judge go about interpreting *public order*?

- Public order as a vague *legal* concept:
 - Laws – travaux préparatoires – commentaries – case-law – doctrine

- What if this process does not yield an answer?
 - General tradition
 - Social values
 - Political documents and memoranda

But

□ „...the judge should not evaluate the mood in a society without any scientific data...“

What science, what doctrine?

- Weyr's normativistic tradition
- Judge is not a sociologist

Capacity of the concept of public order to veil the lack of argumentative evidence

- Invitation to make uneducated guesses about the content of vague legal concepts

A case for social representations approach?

- Normativistic approach may be seen as arrogant and overlooking deeper understanding of law *in* society
- Social representations are capable of helping in examining and exploring what are essentially folk meanings of concepts within law

Thank you.

terezie.smejkalova@law.muni.cz

marketa.stepanikova@law.muni.cz