

**MASARYK  
UNIVERSITY**

FACULTY OF LAW

**ARGUMENTATION 2021**

BOOK OF ABSTRACTS

22/10/2021 BRNO

MAIN THEME: CONCEPTUALIZATION IN LAW

## CONTENTS

1	CONCEPTUALIZATION .....	3
	The Intensionality behind Legal Concepts and Their Extensional Boundaries: Remarks made on the Connection between AI and Legal Methodology (Angela Condello) .....	3
	Conceptualising the Right to Memory: What May Public Spaces Tell us? (Miroslaw Michał Sadowski) .....	3
	Conceptual Structures and Legal Reasoning (Michał Araszekiewicz) .....	4
2	CONCEPTUALIZATION: EXPERIMENTAL JURISPRUDENCE .....	4
	Alice in Wonderland: Experimental Jurisprudence on the Internal Point of View (Michele Ubertone and Corrado Roversi) .....	4
	Conceptualization of 'public order' within Czech Legal Style (Terezie Smejkalová and Marketa Štěpáníková) .....	5
	Problematizing the Concepts (or Experimental Explanations) of Ocean Governance and Law (Lena Schønning) .....	5
3	LAW AND LITERATURE .....	6
	Letters of the Law: The Imago Decidendi of Baigent v Random House (Thomas Giddens) .....	6
	The Dynamics of Consent and Antagonism in Ian McDonald's Luna Trilogy (András Molnár) .....	7
	The judge-butler or the judge-architect in the visual culture. What professionalism? Whose responsibility? (Przemysław Kaczmarek) .....	8
	Clothing and Public Order (Markéta Štěpáníková and Terezie Smejkalová) .....	9
4	LAW AND LANGUAGE .....	10
	Vagueness and the Theory of Gaps (Lukáš Hlouch) .....	10
	The Concept of Legal Language: Law is Language (Ondřej Glogar) .....	10
	The Normativity of Legal Discursive Practice: On the Third Scope of Reason-Giving (Weronika Dziągiewska) .....	10
5	EMOTIONS, INTUITION AND LEGAL ARGUMENTATION .....	12
	Is there Emotional Argumentation in Law? (Marko Novak) .....	12
	Do Not Ignore an Elephant. Exploring the Role of Intuition and Experience in Judicial Decision-Making (Linda Tvrdíková) .....	12

## 1 CONCEPTUALIZATION

THE INTENSIONALITY BEHIND  
LEGAL CONCEPTS AND THEIR  
EXTENSIONAL BOUNDARIES:  
REMARKS MADE ON THE  
CONNECTION BETWEEN AI AND  
LEGAL METHODOLOGY

### **Angela Condello**

This presentation constitutes an attempt to reexamine a crucial issue of legal theory from the perspective of philosophy of language and of social ontology: by analyzing some jurisprudential cases, I shall explain how Searle's account on rules in *The Construction of Social Reality* constitutes an important starting point for the clarification of traditional jurisprudential debates such as that between conventionalism and interpretivism. I show that Searle's framework, while strictly conventionalist, makes it possible to conceive of the distinction between the semantic content of rules (their intended purpose) and their extension, by drawing a parallel with the idea of "deep conventions" (and "essential rules") as well as with the semantic conventions in natural language. The presentation, finally, presents a specific perspective and some remarks drawing from current applications of AI to legal decision making and more generally to legal methodology.

CONCEPTUALISING THE RIGHT  
TO MEMORY: WHAT MAY PUBLIC  
SPACES TELL US?

### **Mirosław Michał Sadowski**

Major events, important historic and contemporary figures are vital for the creation of national identity, and thus often become immortalised in public spaces in the form of monuments – places of memory. But

what happens when these places are reminders of a corrupt memory, a past that many would rather forget? Should they be removed, as if the people and the events they commemorate never existed, never took place, or should they be kept as sites of conscience, present-day reminders of a painful past? What may be their new role in the cityscape? And, ultimately, who has the right to be remembered, and who has the right to be forgotten within a city's network? Do the monuments themselves have any rights? The purpose of this paper is to present the author's conceptualisation of the right to memory (perceived as a two-faced, Janus right: the right to remember and be remembered, and to forget and be forgotten) on the basis of the recent changes to the cityscapes around the world, motivated by the second wave of decommunization and decolonisation. In the first part of the paper the author introduces the concept of places of memory, showing how monuments become carriers of collective memories within the city. The second, main part of the paper is devoted to the author's proposed understanding of the right to memory, which he uses to provide an analysis of the conflicts emerging in a city when various groups are lobbying for the right to be remembered at the same time (while some individuals would rather be forgotten). In the third part of the paper the author uses his idea of the right to memory to critically analyse two recent case studies regarding decommunization: Hungary and Poland. Ultimately, the fourth part of the paper is devoted to the question of potential rights of monuments themselves – with the author pondering whether certain monuments should be allowed to persevere as (properly explained) reminders of the painful past in the future.

CONCEPTUAL STRUCTURES AND  
LEGAL REASONING**Michał Araszkievicz**

The structure of concepts is extensively investigated in cognitive science. So far, this research has not been widely acknowledged in the theory of legal reasoning. Apparently, the two insights from the general research on concepts are reflected in legal theory: first; inferential character of legal concepts as initiated in the famous paper "Tu-tu" by Alf Ross and second, the problem of gradual character of legal categories as reflected in numerous contributions concerning the topic

of vagueness in law. However, this does not reflect the scope of contemporary research on concept formation, acquisition and then influence of concepts on the legal reasoning. In this paper we outline the theory of conceptual structures understood as mental entities which are projected on the data available by an agent performing legal reasoning, at the same time enabling certain types of reasoning steps and constraining the scope of admissible inference. We also discuss the significance of this theory for the development of legal knowledge information systems.

**2 CONCEPTUALIZATION: EXPERIMENTAL  
JURISPRUDENCE**ALICE IN WONDERLAND:  
EXPERIMENTAL JURISPRUDENCE  
ON THE INTERNAL POINT OF  
VIEW**Michele Ubertone and Corrado Roversi**

According to the most widely accepted theories of concepts in cognitive science, all concepts are grounded in the social and physical environment of the specific subject who is entertaining them. This means that concepts should not be thought as definitions, i.e. as shared representations of necessary and sufficient conditions for applying words. Firstly, because people using the same word, to represent the same reference, in the same linguistic community, may do so by way of very different mental patterns. Secondly, because these patterns are not necessarily representational in nature. Both of these elements support aspects of HLA Hart's legal theory. According to Hart, the conceptual machinery that allows a community to operate as a legal system is characterised by a division of cognitive labor. Every developed legal system has some officials who are able to use legal notions in a way in which common people are not. Moreover, according

to Hart, mastering legal concepts is not just a matter of entertaining certain mental representations, it is also a matter of having a special disposition to use those concepts as standards. In order to have a legal system, it is insufficient for the community to be able to have a mental representation of such things as obligations, rights, the State and so on, it is also necessary for at least some of them to act upon them. In Hart's terminology, it is insufficient for the community to take an "external point" of view on the legal system. Some of its members should take an "internal point of view" on it, and the officials, according to Hart, are among these members. To see whether some light could be shed on the cognitive nature of what Hart calls the internal point of view, the Legal Theory and Cognitive Science Laboratory at the University of Bologna conducted an experiment which involved the interview of 537 volunteers. They were divided into two groups: a law group constituted by 274 law graduates or law professionals and a control group constituted by 263 graduates or professionals in fields other than law, such as philosophy, art, communication science. The aim of the research is to study, on a grounded

and embodied cognition perspective, the ways in which expertise in law affects how institutional notions are conceptualised. The results give some degree of confirmation to the Hartian model, while at the same time calling for some interesting qualifications and alterations to it.

CONCEPTUALIZATION OF  
'PUBLIC ORDER' WITHIN CZECH  
LEGAL STYLE

**Terezie Smejkalová and Markéta Štěpáníková**

In an ongoing project, we explore the use of social representations approach (Moscovici 1961/1976, 2008) in studying conceptualization in law. One of the concepts we explore is that of "veřejný pořádek" ("public order"). Public order is a vague legal concept and as such it lacks legal definition and needs to be interpreted and re-interpreted in relation to context. While the interpretation of vague legal concepts is essentially in the hands of persons applying the rule containing them, some of them have inescapable links to social realities. It would seem that using public order in legal argumentation requires understanding that is far from strictly formalistically legal. Is that the case for Czech legal environment and how far should a judge go in order to understand the concept in order to apply it properly?

In a recent case the Czech Supreme Administrative Court relied on the concept of public order when making a decision on gender indication in a person's national identification number. The court indicated that for the national identification number to bear a different than assigned-at-birth gender identification when the identified person has not yet undergone complete gender affirming surgery would be (among other reasons) contrary to public order. The argumentation leading to this conclusion seems to show clear argumentative gaps when it comes to the steps taken to determine the content of the concept of public order, as the court

practically entirely relied on personal insight of the judge making that decision.

In this paper, we report the findings of a part of wider complex research related to social representations approach in understanding vague legal concepts. In the course of our research, we have explored our participants' understanding of public order in a very similar setting to the one presented in this case. Their understanding seems to suggest that although public order points towards basic values of a given society, some of our participants suggest that it is a concept whose interpretation remains strictly legal, confining the judge to – sometimes incomplete – information provided by formal legal sources or legal doctrine. While such a confinement may result in weak argumentation, we believe it may also be explainable in terms of normativistic and formalistic tendencies present in the Czech legal culture.

PROBLEMATIZING THE CONCEPTS  
(OR EXPERIMENTAL  
EXPLANATIONS) OF OCEAN  
GOVERNANCE AND LAW

**Lena Schøning**

Ocean governance is a theme and a field of study for interdisciplinary endeavor and methodological heterogeneity, embracing multiple disciplinary and thematic perspectives including legal perspectives such as the law of the sea and environmental law. As with any discipline or field of study, ocean governance is characterized by a number of concepts, such as integrated ocean management, the ecosystem approach to marine management, and marine spatial planning. International legal and policy documents, as well as scholarship on ocean governance, present these concepts as responses to a broad set of ocean-related societal objectives, relevant to a wide audience of management actors. The concepts of ocean governance find their way

into the legal sphere as norms and standards and as regulatory instruments.

This article problematizes some premises of these concepts. As per Sandberg and Alvesson, problematizing means “taking something that is commonly seen as good or natural, and turning it into something problematic” (Sandberg and Alvesson, 2010, *Ways of constructing research questions: gap-spotting or problematization?* Organization, London, Vol. 18, pp. 23-44., p. 32). The premises to be problematized are to what extent these concepts respond to societal objectives and for which management actors they are appropriate. The concepts are reconstructed by identifying the different and conflicting ocean-related societal objectives, such as the environmental objective of protecting the marine environment (for example, by reducing marine pollution) and the economic and social objective of increasing production of food and energy (which results in some pollution). Further, the reconstruction identifies the various management actors (for example, nation states, NGOs, regional organizations, and local communities) and the different potential and possibilities to respond to societal objectives vested in each of these actors, arising from, for example, their formal legal authority. Thus, the knowledge need of these actors vary.

Forming concepts by high-level generalization or abstraction “to unify things and provide coherence and possibility for

cognition of the objects of the world” reflects a knowledge need. (Davies, M., (2017) *Theoretical Variables, Law Unlimited: Materialism, Pluralism and Legal Theory*. Taylor and Francis, London, pp. 1-19., p. 14) Research is called on to provide knowledge on how to understand and respond to the societal objectives relevant to the ocean. While the article recognizes that concepts are high-level generalizations that marginalize or exclude a number of conflicting or diverging premises, the question emerges what generalizing across the aforementioned premises to form a common concept of ocean governance result in? It results in that the conflicting societal objectives and the different intervention potential of these actors are marginalized or excluded. Further, it risks that – to make the generalization possible – basic features of management are emphasized (such as a management process or the advantage of coordination and cooperation) framed as something more ambitious. One way to advance the use of the concepts of ocean governance is to replace the belief in them as universally relevant by thinking of, and explicating, “concepts as experimental explanations rather than universals,” resting on premises which should be transparently accounted for (ibid.). With such a caveat, the concepts (understood as experimental explanations) of ocean governance are more likely to be subject to well-deserved critique and relevance tests.

### 3 LAW AND LITERATURE

LETTERS OF THE LAW: THE  
IMAGO DECIDENDI OF BAIGENT  
V RANDOM HOUSE

#### Thomas Giddens

A secret message is encoded in the typography of *Baigent v Random House* [2006] EWHCA 719 (Ch). A copyright claim against *The Da Vinci Code*, the trial judge was

inspired to transmit a code of his own by strategically formatting individual letters throughout his written decision. These typographic shenanigans were given short shrift by the English Court of Appeal, which mentions the code solely to denounce its relevance. The visual appearance of the common law’s printed text only articulates meanings ‘on which nothing turns’ (*Baigent v*

Random House [2007] EWCA Civ 247 at [3]). But if this were the case, why would the appellate justices mention the code at all?

This paper argues that the typographic differences between these two decisions reveal what Peter Goodrich has conceptualised as the *imago decidendi*: the image that grounds the decision. The visual overruling of the first instance typography is set in consistently formatted Times New Roman—an ubiquitous font that generalises the decision as universal while at the same time connecting it to the historic roots of the common law. This *imago decidendi* of the case not only embodies the common law's enduring tensions between the universal and the specific, but also reveals the importance of the visuality of the common law's printed form within the multimodal apparatus of state governance.

THE DYNAMICS OF CONSENT AND  
ANTAGONISM IN IAN  
MCDONALD'S LUNA TRILOGY

**András Molnár**

My paper is an attempt at a close reading of Ian McDonald's Luna cycle from a legal theoretical standpoint. Methodologically, it relies heavily on William P. MacNeil's conception of "lex populi," a thesis which states that popular fiction can carry important messages about how we may think of law and its roles in society.

Luna is a science fiction novel trilogy about the struggle for domination between five big family corporations that pursue various business activities on the Moon. One of the salient characteristics of the fictional world created around the plot is that there is no codified legal system nor an organized state, aside from courts which, however, instead of strictly regulated decision making bodies representing state authority, function as mediating fora that preside over dispute settlements ranging from bargaining and compromises to duels. The Moon's colonies are represented as a sort of anarcho-capitalist

civilization whose transactions are concluded by virtue of AI created contracts, the imaginary historical context reminds the reader of the situation of American colonies before the Revolutionary War, and the significance of familial ties and the practice of duels resemble feudalism. The Moon à la McDonald is thus not exactly without law, but its purpose and dynamics are fundamentally different from what is accustomed to the reader with an average legal consciousness.

The most fundamental point of my paper is that operating with a science fiction setting, the trilogy invites the reader to reflect on how and in what form a legal system may contribute to the proper functioning of a human community. My claim is that the law of the Moon, paradoxically, rests on the principles of consent and antagonism. The first part of the paradox, the "consent" principle reflects law and economics' conception that a person should be left to freely negotiate for their interests and rights, and that unless the transaction costs transcend the benefits, such free negotiation is the most effective way to regulate social relationships and increase common wealth. The Moon's legal system, in this respect, is taken to the extreme, because even though courts do exist, there is no state apparatus to enforce judicial decisions. The system operates on a fully individualistic and voluntary compliance to judicial decisions, which means that abiding by a pact—the principle of *pacta sunt servanda*—is salvaged exclusively by the individual interests of the participants. This reliance on individual interests—a pivotal point of law and economics—seemingly warrants cooperation, but also carries in itself the germ of the second part of the paradox I proposed earlier: antagonism.

Antagonism, in my opinion, can be traced on two levels of the workings of the Moon's so-called legal system. First, it calls to mind Rudolph von Ihering's conception of the "Kampf ums Recht" (a thought that one's rights should be earned by an argumentative

battle before the courts) and Jerome Frank's "fight theory" (a characterization of American procedural law as a method based on a persuasion-based truth instead of a substantial one). Substantial truth matters little, if at all, in the "lex Lunae" (my coinage), what matters is pure bargaining power, tactical sense, and sometimes even bluffing, and this feature is even ideologized in the novel by one of the protagonists, a highly talented lawyer. One's rights come about undoubtedly as a result of "Kampf." Second, however, the novel also deconstructs this notion of the law by centering on a more general level of antagonism, the armed conflicts of the various families to ground their own interests. Such conflicts demonstrate the inherent instability of the system that is not backed by a normative structure above pure partial interests. In fact, the trilogy ends with a sort of communistic happy end, the possibility of free access to basic resources to everyone, which implies that it is critical of the radically capitalistic setting. However, there is another level of instability lurking in the story: the lack of a stable normative structure aside from pure interests.

THE JUDGE-BUTLER OR THE  
JUDGE-ARCHITECT IN THE  
VISUAL CULTURE.

WHAT PROFESSIONALISM? WHOSE  
RESPONSIBILITY?

### **Przemysław Kaczmarek**

The idea for this text is as follows: I "borrow" the title category of foundability from Artur Kozak, while modifying its meaning to a certain extent. This philosopher of law from Wrocław used the concept of the foundability of law to denote the attitude adopted towards law by social institutions that shape the awareness of citizens. Using the category of foundability, I see this crisis in the underestimation of the social component in presenting the role of the judge. This

underestimation can be measured by the concept of social space - or more precisely - its limitations. I use the concept of social space to denote the network of relations in which the judge is situated as the performer of the role. The extent to which the space understood in this way in professional practice takes into account relations with other social spaces is a variable that influences the modelling of the professional role. Taking into account this variable, I see the basis for the crisis of foundability in building in the public space the image of a judge whose attitude is characterized by: a) loyalty to the will of the legislator (judge-guardian) or b) moralism, consisting in overemphasizing the importance of individual beliefs in the exercise of the judicial profession (judge-architect). Both of these patterns position a person on a single identification. In its light, professionalism is understood as adapting to the will of the legislator, i.e. being its transmission belt or guided by individual axiological judgments. I intend to question such views due to the above-mentioned social factor. It is important not only in the context of shaping the court-citizen relationship but also in the context of professional socialisation. In response to the two images of the judge: the guardian and the architect, I will propose a third one in my article, which focuses on the idea of liminality (liminal judge).

In carrying out such a task, first of all, I will introduce the category of the foundability of the role of a judge. I will perform this task by discussing the circumstances affecting the social image of this profession. One of them is the process of visualizing social life, which also includes law. The vision of the judge that emerges from the visualization of the judiciary has an impact on the crisis of the foundability of the role of a judge.

Two images of the judge - as a guardian and a moralist, respectively, can be derived from this visualization. Both these approaches are built on the opposition of the

internal (legal) and external (social) point of view, and the related inaccessibility (for the citizen) to the administration of justice. In response to both proposals, I will present a vision of a liminal judge that breaks the indicated opposition, emphasizing the social dimension of the legal service of law.

I will present all three visions of the role of a judge from the perspective of a question: what vision of professionalism and responsibility do they adopt? I would also like to add that I refer to sociological and anthropological research in the field of visual culture. This approach to the subject, which consists in shifting the emphasis from text to image, also rehabilitates the significance of visual representation in jurisprudence, a field traditionally dominated by the view that law is a linguistic phenomenon.

#### CLOTHING AND PUBLIC ORDER

##### **Markéta Štěpáníková and Terezie Smejkalová**

In an ongoing project, we are exploring the possibilities of using the social representations approach in the analysis of legal concepts. The social representations approach approaches the meaning and understanding as a collective elaboration 'of a social object by the community for the purpose of behaving and communicating' (Moscovici 1963), that is the result of social construction that performs a symbolic role, representing an object to a group of persons (Wachelke 2012, 730). The social representations approach offers various methodological tools to explore these results of social construction and vague legal concepts are such results of social construction.

In the first part of the project, we have conducted fourteen semi-structured interviews with members of legal academia. Our main goal has been to explore their social representation of the concept of public order. We have come across an interesting

revelation: Although we did not address the issue of clothing in any way, some of our participants brought the topic up themselves, indicating that they believed certain clothing choices are capable to disrupt public order. Moreover, since they brought it up themselves when prompted for examples, some even considered it to be a typical example of such a disruption. Since we never asked about clothing nor implied anything like that would have anything to do with public order, the references to clothing popped up in various contexts of our interviews.

Therefore, it seems that clothing is a visible and maybe even symbolic personification or sign of public order. However, in usual legal research, clothing is not regarded as anything significant or even attention-worthy. Still, we believe that for interdisciplinary research, clothing as an object of research provides a very promising opportunity concerning public order.

Still, it is not often that (legal) research would find the issues of clothes interesting because it is (mostly) not regulated by (positive) law. However, sociologically, fashion and clothing have been analyzed by many influential scholars such as Bourdieu (*La couturier et sa griffe*, 1975, *Distinction*, 1979) or Barthes (*System of fashion*, 1983; *Language of fashion*, 2004), for decades. Fortunately, in recent years, there have been also interdisciplinary projects dealing with this topic (eg. Watt, 2013). It seems that clothing has finally become relevant for law and legal studies. But how exactly and why does it concern public order?

In many ways, public order seems to be a narrative created by legislators, judges, and police, and even communities themselves. Clothing appears to be a visible symbol of this narrative. We believe that this perspective may be useful for a better understanding legal regulation of clothing.

In this paper, we focus on if there is a connection between clothing and public order and how it works. We present the results of the interviews and connect them to

theoretical doctrine determine how clothing represents public order.

## 4 LAW AND LANGUAGE

### VAGUENESS AND THE THEORY OF GAPS

**Lukáš Hlouch**

This contribution is dedicated to the concept of gap (*lacuna* in Latin, *Lücke* in German), more precisely to the theory of gaps and its role in legal thought, particularly in the Czech Republic. The starting point to this analysis is the notion of vagueness. For the beginning, different meanings of vagueness shall be presented and explained. Then the focus shall be laid on the relation between the „theory of gaps“ and vagueness. Therefore main attention is paid to the theoretical distinctions between various types of legal gaps and their usage in the legal practice. As a conclusion I will try to resolve the question whether or not the notion of „gap“ shall apply for instances of vague terms (uncertainty) of normative text.

### THE CONCEPT OF LEGAL LANGUAGE: LAW IS LANGUAGE

**Ondřej Glogar**

This paper deals with a metaphor ‘law is language’ coined by James Boyd White and how it can be useful to understand the concept of legal language, connections between law and language and how is the term language used in legal realm. At the beginning, the article aims to give an overview of possible approaches to legal language and continues with further analysis of one of them (the above-mentioned White’s proposition). By applying semiotic approach on this concept, namely Saussure’s theory of distinguishing between *langue* (language) and *parole* (speaking), the paper helps understand that language (and even legal language) can be understood in two different

forms. It can be either considered as an abstract system of signs, or it can be comprehended as individual speech acts – *langue* and *parole*, respectively. White’s metaphor is usually used in the meaning of texts, way of reading, writing and speaking. However, such conception rather corresponds to language in the sense of *parole*. These considerations lead in the end of the article towards communicative theory of law and its merits to jurisprudence. According to a given doctrine, in some instances it can be more accurate to consider law as communication rather than language, in other cases vice versa. Nevertheless, in either case it is essential to bear in mind the distinction between both of the concepts.

### THE NORMATIVITY OF LEGAL DISCURSIVE PRACTICE:

#### ON THE THIRD SCOPE OF REASON-GIVING

**Weronika Dzięgielewska**

It becomes a rather common observation that when philosophers talk about normativity, philosophers of law included, they tend to talk about different things. This fact can be concluded with assuming - after Stephen Finlay - the polysemic nature of the notion of normativity, which means that among philosophers there is a tendency to use the notion in closely related, yet diverging senses.

Therefore, for normativity is usually being connected (thus in several different ways) with reasons, one expression of the above phenomenon is the distinction between wide and narrow scope of reason-giving. It derives from the distinction made by deontic logics in relation to the place of the sentential operator ‘ought’ in sentences

describing the obligation to take the means to one's ends. The wide scope interpretation of the obligation, reconstructed by Mark Schroeder, places ought before the inference itself – you ought (if you have the ends then you take the means) whilst the narrow scope interpretation situates the operator in the consequent – if you have the ends then you ought to take the means. David Enoch transfers this distinction to the domain of reasons, stating that in the wide sense: you have a reason to (if  $x$  does  $\phi$ , to do  $\psi$ ) when in narrow sense if  $x$  does  $\phi$ , you have a reason to  $\psi$ .

The distinction is far from unproblematic: certain ambiguities concerning both the scopes are to be disentangled. The narrow needs a non-mysterious account of how facts lead to a normative reason while accepting the wide calls for adequate grounding as it is true independently of an act of reason-giving. In a Standard Model of interpreting the relation between both, the only way narrow scope conditional can be true is that its explanation is mediated by the wide scope inference. However, the natural observation is that the Standard Model conclusion does not necessarily follow from its premises.

How does it all matter then, for legal philosophy and specifically, normativity of law? Enoch uses the distinction for wide and narrow scope of reason-giving to analyze whether law necessarily gives real or genuine reasons for action, irrelative from the actual acts of agents. Concluding the negative, he provides an alternate account of robust normativity of law, in which robust normativity becomes a case of triggering normativity that concerns actualizing reasons that an agent had already adopted. However, this does not eventually lead to answering the question of whether law does or does not give robust reasons for action.

The paper is to become a discussion of whether it is possible to distinguish another interpretation – that is a third scope – for an account of reason-giving in law, basing on the

apparatus provided by the Robert Brandom's analytical pragmatism. The proposition is based on the assumption that the above two senses of reason-giving – the narrow and the wide – does not acknowledge the distinction, set forth by Brandom, between acting intentionally, acting with reasons and acting for reasons. It can be stated, following Maciej Dybowski, that an agent acts intentionally when her practical commitment can be inferred from the context of her action or from speech acts. The agent acts with reasons, on the other hand, when she is entitled to her practical commitment, which can be explained to others by producing a suitable part of practical reasoning to explain what reasons for action did she have. Lastly, acting for reasons rests on agent's acknowledgment of practical commitment elicited by proper reasoning, and particular reasons function as causes for acting.

Transferring these observations to the grounds of legal practice concerns describing law as type of a discursive practice, constituted by discursive moves made by agents in a form of basic speech acts – assertions - supplemented by other moves such as deferral, disavowal, query or challenge, that all can serve as premises in practical inferences. The important thread is that for Brandom conditions for correct material inferences have a normative dimension that can be accounted for in the normative vocabulary of deontic statuses: commitment and entitlement. The practice itself can be therefore accounted for, Dybowski observes, as a chain of adopting and reacting to normative statuses of acting with and for reasons, where legal norms are perceived as licences for legal reasoning. The third scope of reason-giving is therefore to include the latter distinction in accounting for normativity of law, where the inference in question acquires a scheme of: if  $x$  acts with reason  $\phi$  (adopts a normative status  $\omega$ ), you act for a reason  $\phi$  (have a reason to adopt a normative status  $\psi$ ).

The conclusion is an attempt at answering a question of whether describing “the third” scope of reason giving can serve an explanatory purpose as to the character of legal reasons and nature of legal normativity

and whether it accounts for a dilemma stated by Andrei Marmor: " how can a conventional practice give rise to reasons for action and, in particular, to obligations?".

## 5 EMOTIONS, INTUITION AND LEGAL ARGUMENTATION

### IS THERE EMOTIONAL ARGUMENTATION IN LAW?

**Marko Novak**

Emotional argumentation has in recent years been placed on the map of argumentation theory by argumentation theorists such as, e.g., Gilbert (1994), Ben-Ze’ev (1995), Plantin (1999), Wohlrapp (2007) and Carozza (2007). With respect to real-life argumentation, Gilbert discussed emotions in relation to argumentation in two manners: (i) emotions as reasons or grounds for a certain claim; and (ii) emotions as means of expression of a certain argument. Moreover, Wohlrapp claimed that there are three ways that emotions can be related to an argument such that (a) emotion appears instead of an argument; (b) emotion is an argument; or (c) emotion appears in an argument.

From the above, and following O’Keefe’s (1979) distinction between argument1 (static: “making an argument”) and argument 2 (dynamic: “having an argument”), it seems that there are two approaches: (1) dialectical seeing emotions as grounds (evidence) in an argument; and (2) rhetorical understanding them as “means of expression of a certain argument” or “appear(ing) in an argument”.

Due to developments in neuroscience and cognitive psychology, it is scientifically no longer acceptable to strictly separate logic from emotions and psychology. Also, a metaphor that emotions are only present outside a courtroom became a myth. From an argumentative normative position, however, it will be erroneous to recognize their presence in a dialectical sense as the

structure of legal arguments must be logical – in the sense of an inferential relation between the premises of legal norms and facts and the conclusion. Therefore, emotional-argument1, when for making a claim we rely on emotions as grounds/reasons, will not work in the context of law. Exceptions to this would be legislative procedures (induction), where emotional arguments are mixed with cognitive ones, and ADR procedures in which also emotional arguments are legitimate.

Still, there is a plenty of room for rhetorical vividness of emotional arguments, either in the form of oral or (sometimes even) written legal argumentation, when we understand them as emotional-argument2, used in deductive processes of applying law as emotions within logical arguments. Thus, emotional argumentation – even if seen as “interstitial” in relation to logical argumentation – is there in the framework of law, especially when legal argumentation is recognized as rhetorical argumentation.

### DO NOT IGNORE AN ELEPHANT. EXPLORING THE ROLE OF INTUITION AND EXPERIENCE IN JUDICIAL DECISION-MAKING

**Linda Tvrđíková**

If we look at the literature about judicial decision-making and interpretation of law we can find many texts which are dedicated to legal arguments, logics and legal reasoning – in those texts the rationality, analytical and logical thinking is glorified and an interpretation seems “just” as logical operation where judges subsume certain facts under general legal norm or norms,

those norms are formulated linguistically, so it seems that the whole job of judges is to analyze texts, as Bartosz Brożek puts it: “It seems that the legal world is linguistic and that lawyers are excellent text analyzers.” (Brożek, 2020, s. 2) What we can see more rarely are discussions and texts exploring the role of intuitions, feelings and emotions in judicial decision-making – at least in the Czech republic. Those our faculties are often seen as the source of bias and distortion (at least among legal theorist but nowadays some realised their importance). Even if we look to the history those themes are not so common among legal theorist and philosophers – especially in our tradition where we are still influenced by Hans Kelsen and František Weyr and their normative theory. We can find exceptions and those are the American legal realists and in this paper we will show that their observations and insights seems to be quite right. How can we know it? Because in the last decades cognitive scientists have made big progress in the area of decision-making and it seems that we are not so rational as we thought us to be, they have explored that our thinking does not take place only through deliberative system but surprisingly there is also another system which influence our decisions and this is an automatic, fast, intuitive system - some call this system S1, Seymour Epstein as experiential system. This automatic system is more influential than our deliberative system because it is always heard – we can use the Jonathan Haidt’s metaphor of an elephant and a rider. S1, the intuitive, experiential system is an elephant and S2, the deliberative, analytical system is the rider – in legal theory we have talked much about the rider but we do not explore an elephant sufficiently and this paper will try to uncover the nature of the elephant, at least a part of it.

So, first of all we will present American legal realists’ insights, observations and ideas, especially those of Joseph C. Hutchenson who wrote an article about intuitions in judicial decision-making,

and Oliver Wendell Holmes who emphasized the importance of experience. Then we will move to the modern world and explore intuitions by the help of cognitive science and its findings – we will see that they are intimately connected to our experiences, that they are resistant to changes, so when gaining relevant experiences it seems that an environment and a feedback are really important. After this, we will be armed by needed information and we could connect the old and the new – ideas of American legal realists and findings of cognitive science. We will see the connections and the fact that American legal realists – although they did not have enough information that we have thanks to science nowadays – described quite aptly how this automatic system works and they realised its importance when making decisions.