

Research Article

CAN WE MAKE ALL LEGAL NORMS INTO LEGAL SYLLOGISMS AND WHY IS THAT IMPORTANT IN TIMES OF ARTIFICIAL INTELLIGENCE?

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Summary: – 1. Introduction. – 2. Dividing Cases into Hard Ones and Easy Ones. – 3. The Ways of Resolving Cases Proposed by Legal Positivism. – 3.1. *Syllogisms as a Way to Resolve Cases*. – 3.2. *Application of Analogy (Precedent)*. – 4. Legal Realism and Hard Cases. – 4.1. *Psychological Factors that Determine Decision-Making*. – 4.2. *Sociological Factors Determining Decision-Making*. – 5. The Dichotomy of Hard and Easy Cases and Artificial Intelligence. – 6. Conclusions.

Keywords: hard cases, legal positivism, legal realism, artificial intelligence.

ABSTRACT

Background: *The term ‘hard cases’ trace back to Herbert Lionel Adolphus Hart who was one of the first legal philosophers who directly used it in his works and Ronald Myles Dworkin to whom the development and establishment of this concept in legal language is linked. Even though these two legal philosophers in one of the most famous - The Hart–Dworkin – legal debate couldn’t agree on certain things, they both agreed that when dealing with hard cases, there is a need to act*

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creatively in order to resolve such a case properly. The division of cases into easy ones and hard ones gradually lost its popularity, even in legal theory, but perhaps it can be resurrected and used these challenging times to help meet the challenges prompted by technology?

Methods: This paper analyses the dichotomy of hard and easy cases as well as circumstances relating to the courts' decision-making processes in such cases. The essay examines whether the solutions proposed by legal positivism (such as applying syllogisms and precedents) are sufficient to deal with easy cases. The paper also examines what factors analysed by legal realists have an impact on judges while making decisions in hard cases (for example, psychological factors, such as hindsight bias, intuition, hunches, the anchor effect, laziness, unwillingness to take responsibility, or the gambler's fallacy, as well as social factors, like upbringing, life experience, social relations, gender, age, education, etc.). Given that the article is theoretical in nature, logical, systemic, teleological methods dominate. Both descriptive method and scientific research method were used as well.

Results and Conclusions: The author concludes that easy cases should eventually be delegated to artificial intelligence to resolve, whereas hard cases will remain in the competence of human judges, at least until technological development reaches a certain level.

1 INTRODUCTION

The uncertainty regarding how judges make decisions raises doubts about compliance with both the principle of legitimate expectations and the principle of legal certainty and contributes to the lack of trust in the judiciary in general. The analysis of court decisions is important not only for private interests (parties of the proceedings) but for the public interest as well, since court decisions that shape case law are also important to society. Moreover, the analysis of what lies behind the discretion of judges and for which types of cases certain decision-making methods are most appropriate and effective is useful not only for the parties in a court case and society but also for the judges and courts themselves.

In 2019, France became the first country in the world to criminalise research on individual judges and predictions of their future decisions.² These violations are currently punishable by up to five years in prison. Naturally, the question arises, why should the activities of judges not be analysed? This paper invites us, in R. A. Posner's words, to focus on helping judges cope with complexity because, *inter alia*, they need instruction in the cognitive abilities and psychological characteristics of judges, jurors, and witnesses, as well as instruction in avoiding fallacies in reasoning.³ The analysis of the decision-making process is considered to be beneficial for the courts, individual judges, and the public.

The administration of justice is the prerogative of the courts, implemented when the courts make decisions that are subject to requirements of legality and reasonableness. The proper exercise of this exclusive competence directly correlates with greater trust in the courts. Increasing public confidence in the judiciary system is a constant goal of all courts worldwide. The absence of a single common formula for judicial decisions poses a risk of mistrust in the courts and directly correlates with the principle of legal certainty. Accordingly, this analysis of a judge's decision-making is likely to provide some legal certainty and thus promote greater trust in the judiciary.

Art. 109 of the Constitution of the Republic of Lithuania enshrines that: 'When considering

2 Art. 33 of the Law on 2018-2022 programming and reform for justice of France.

3 RA Posner, *Reflections on Judging* (Harvard University Press 2013) 346.

cases, judges shall obey only the law.⁴ The positivistic approach to decision-making embedded *expressis verbis* raises the question of whether this decision-making approach is still sufficient in modern times.

2 DIVIDING CASES INTO HARD ONES AND EASY ONES

Before analysing the dichotomy of hard and easy cases, it should be noted that there are no uniform definitions of these concepts in legal doctrine. The theory of hard cases has been proposed by representatives of legal positivism – H. L. A. Hart’s ‘The Concept of Law’ describes hard cases as situations where rational and informed lawyers may disagree on which of the answers is legally correct. According to him, in such cases, the law itself is fundamentally incomplete – it simply does not provide an answer to the questions raised in such cases. As H. L. A. Hart claims, different principles supporting competing analogies may arise in each hard case; therefore, a judge will often have to choose between them, relying, like a conscientious legislator, on his or her sense of what is best and not on any pre-established order of priorities prescribed by law.⁵ R. Dworkin, a representative of a unified theory of law, categorically opposed these ideas and argued that those are the cases where the result is not clearly dictated by statute or precedent, but the judge’s duty, even in hard cases, remains the same: to reveal the rights of the parties rather than to retrospectively create new ones. According to Hart, the structure of law is complete – it is an all-encompassing empire of law – so every legal question has right and wrong answers, answers in accordance with the law and contrary to the law. The judge must discover the law, not create it.⁶ Without going into the discourse of whether judges in hard cases create law or interpret it, the opposite views outlined above show something in common regarding this chapter: hard cases cause uncertainty about to what approach to choose – which legal norm or which method of interpreting a certain norm. Thus, cases in which alternatives arise from which the judge must choose are deemed to be hard cases.

This definition of hard cases is quite abstract and requires a little more detailed investigation. The word *hard* is defined as difficult to understand or solve.⁷ Linguistically speaking, the cases that require a great deal of effort from a judge to resolve them correctly are indeed hard. In fact, another definition of the word hard is simply the opposite of the word easy. This is how the concept of hard cases will be explored further – as an opposite to easy ones. As mentioned before, there are different approaches to the concept of easy cases. Both the initiative of the Estonian Ministry of Justice to create a ‘robotic judge’ to solve disputes on petty cases amounting to less than €7000 and the initiative to reform the judiciary system in England and Wales to enable new technological solutions to decide cases under £25,000 online show that in some countries, cases are divided into easy and hard ones based on the amount of a claim. Naturally, the question arises as to whether such a correlation between the amount of the claim and the complexity of a case is justified. After all, there are many cases where the financial expression of a dispute related to morality or religion is relatively small, but its value and significance for the law and thus, the complexity, are enormous. A claim to recover damages in the amount of several thousand euros, but arising from, for example, a failure to satisfy the conditions of an agreement of purchase and sale, could be resolved in a very simple manner, even though the amount of the dispute would be relatively high. Consequently, the division of cases into hard and easy based on the amount of a dispute, as

4 Constitution of the Republic of Lithuania, 1992.

5 HLA Hart, *The Concept of Law* (3rd edn, Clarendon Press 1994) 275.

6 R Dworkin, *Law’s empire* (Belknap Press 1986); R Dworkin, *Taking Rights Seriously* (Bloomsbury Publishing Plc 2013).

7 A Stevenson, *Oxford dictionary of English* (Oxford University Press 2010) 799.

well as, for example, based on the scope or a number of parties or charges, are relative and do not reflect the real complexity of the case.

It seems most appropriate to understand easy cases as ones where there are only primitive, uncomplicated legal questions to which the answer is obvious, and such a case can be resolved by applying the relevant legal norm. This approach is supported by professor V. Mikelėnas – if the applicable legal norm is completely clear both from the linguistic and other points of view, there is no need to interpret it. In easy cases, the judge may resolve a case without interpreting the law. Easy cases are those in which judgments are easily reasoned and made – they are made almost without thinking.⁸ In principle, in an easy case, the judge does not have to decide which of several possible options to choose, and legal reasoning becomes essentially unnecessary, as no one questions why that particular legal norm is applicable, and the case is resolved in that way. To conclude, simplicity, obviousness, and comprehensibility of the arguments of the adopted judgment are the features by which an easy case should be defined. According to R. A. Posner, such cases are easy to decide by virtue of being controlled by existing law.⁹ Therefore, hard cases are fundamentally different from easy cases since easy cases are clearly governed by existing law, and the right decision is obvious, whereas in hard cases, other factors must be used to make the right decision. Hard cases are special, non-traditional, atypical, exceptional cases where there is a lack of legal regulation or improper enshrining of legal norms. Thus, in hard cases, it is not enough for judges to rely on a legal norm (as in easy cases), considering that there is no appropriate legal norm, or its application would be manifestly incorrect. In such cases, judges seek a solution, for example, while trying to determine the legislative intent of the legislature or with the help of principles of law.

After discussing the common features of both hard and easy cases, it is important to analyse the importance of this division. First of all, the decisions in hard cases must be fairly and convincingly reasoned by judges. The judge must, in a sense, convince others why he or she has chosen a certain way to resolve the case (as mentioned, in hard cases, there is no single, clear solution), whereas the legal norms applicable in easy cases are clear, so there is no need for a judge to interpret them. In these cases, over-argumentation could even have a negative effect – the judge could risk saying too much about a certain established practice or the meaning of a legal norm. Secondly, the role of the judge in the decision-making also depends on where the particular case will be assigned. In easy cases that can be resolved by deduction, a detailed legal analysis would be redundant and would not be in line with the principle of legal effectiveness. In difficult cases, on the contrary, judges must put a lot of effort into finding the right solution. In this essay, the division of cases into hard and easy is particularly important, as the aim will be to show that the methods of resolving cases proposed by legal positivism are only suitable for easy cases, while in hard cases, judges are often influenced by factors identified by legal realism.

3 THE WAYS OF RESOLVING CASES PROPOSED BY LEGAL POSITIVISM

*A judge in a democratic mechanism does not have the right to be Shakespeare.*¹⁰

A. Comte's positivist philosophy, which laid the foundations for the doctrine of legal positivism, sought to formulate new, clear, and precise principles of the social world,

8 D Mikelėnienė, V Mikelėnas, Teismo procesas: teisės aiškinimo ir taikymo aspektai (Justitia 1999) 21.

9 RA Posner, The Problems of Jurisprudence (Harvard University Press 1990) 161.

10 T Berkmanas, 'Ar lingvistinis neapibrėžtumas užkerta kelią teisės viešpatavimo (rule of law) įsigalėjimui?' (2002) 1 (1) International Journal of Baltic Law 52.

analogous to the laws of nature. As a result, the representatives of legal positivism sought to purify the law, separate it from values, and objectify it. In a much-simplified version of legal positivism, a judge's activity in interpreting the law and making decisions is considered an almost mechanical process in which the court's decision cannot be based on illegal arguments, political or social values, or the judge's opinion. The law perceived by the paradigm of legal positivism is a clear system of instructions of the legislator in which a rational, logically reasoned answer to practically any question of law can be found. Thus, there is no need for the judge to find a way to resolve the case on the basis of subjective non-judicial criteria – the decision of the case for the positivist judge is dictated by the duty to find that single logical, obvious, and ultimately predictable solution.

The spirit of legal positivism is perfectly reflected in the provision entrenched in para. 3 of Art. 109 of the Constitution of the Republic of Lithuania, which states that when considering cases, judges shall obey only the law.¹¹ It is in the law that the judge finds the right answer – by applying the pre-existing law. Legal positivism recognises these ways of resolving cases as deduction and adherence to the principle of *stare decisis*, which is the essence of court precedent. Firstly, both methods of resolving cases ensure the principle of legal certainty – they are predictable. Secondly, both methods also find answers in law, which means that decisions are based exclusively on legal norms.

It is worth analysing the criticism of the ways of resolving cases suggested by legal positivism. Some claim that the correct answer cannot be found by following the rules of formal, ambiguous logic alone. In each case, the answer is found only after a value decision has been made, that is, by applying certain evaluation criteria: fairness, reasonableness, equality, and other general principles of law. However, these values and principles are not sufficiently defined and clear, so their content and application to specific life situations also must be interpreted.¹² The question arises as to whether it is really effective to insist on a value decision in a legal dispute that can be resolved with the help of a simple legal syllogism. Is it really necessary to apply the principles of justice, reasonableness, fairness, equality, and other general principles of law in each and every case? Given the axiom that justice delayed is justice denied, the essence of both the principles of efficiency and effectiveness, and the constant problem of judicial backlog, it can be argued that not all cases require a thorough legal assessment – the *fabula* of some cases can be fitted into a mathematical formula and solved much more efficiently with the help of formal logic. Criticising the analysed approach to the activities of a judge, R. A. Posner points out that in this way, the law is treated as a set of data having no chronological dimension and the principles themselves as timeless, like the propositions of Euclidean geometry. In this way, law is separated from life because a formal system, such as geometry, is a system of the relationship between ideas and not the relationship between ideas and physical reality.¹³ Nevertheless, assessing such a criticism within the limits of pure legal positivism, it should be noted that a positivist judge does not create law – on the contrary, he interprets the law created by the legislator. The principle of the separation of powers is particularly prevalent in democratic countries; hence it is the legislator that must deal with the discrepancy between the rules in force and real life, not the judges. The courts must respect the will of the legislator, presume that the legislator is rational and prudent, seek to identify its real objectives, and see whether the content deriving from the legal text is in line with those objectives and intentions. In summary, there should be a presumption that legal norms are relevant, and the correlation between the law and the actual legal relationship in easy cases must be followed and steered in the right direction by the legislator.

11 Constitution of the Republic of Lithuania, 1992.

12 D Mikelėnienė, V Mikelėnas, *Teismo procesas: teisės aiškinimo ir taikymo aspektai* (Justitia 1999) 140.

13 RA Posner, *The Problems of Jurisprudence* (Harvard University Press 1990) 16.

It is claimed that the approach of legal formalism (the model of extreme legal positivism) does not assess the difference between hard and easy cases but treats all cases as if they were easy. Accordingly, a judge's activity is limited in the field of interpretation of the law, without recognising their choice or creative contribution in determining the meaning of the legal norm.¹⁴ However, perhaps on the basis of this reason alone, the benefits of legal positivism in resolving court cases in general should not be underestimated. After all, the fact that the methods of resolving cases promoted by legal positivism are not sufficient for some cases does not *per se* presuppose the fact that these methods are completely unusable. After identifying the main features of easy cases, the rest of this chapter will seek to demonstrate that the methods of resolving cases proposed by legal positivism are not only sufficient but should also be deemed a priority – they should be considered the first option in easy cases.

3.1 SYLLOGISMS AS A WAY TO RESOLVE CASES

According to N. MacCormick, an easy case is one in which there is no dispute as to the relevant facts or the applicable law and where the decision can, in principle, be justified by deduction.¹⁵ Syllogism, as one of the oldest and most popular kinds of logical argument that apply deductive reasoning, can be understood as a scheme consisting of a legal norm (the major premise), the factual circumstances of the case (the minor premise), and a deduced conclusion. For example, on the basis of syllogism, (certain) administrative offences (for example, speeding more than 10 km / h but not more than 20 km / h) may be subject to half the minimum penalty provided for in the relevant article (the major premise). Person X has committed an administrative offence referred to in the major premise (the minor premise); consequently, person X will be subject to half of the statutory minimum fine for the violation. This example was chosen to show that by putting the routine and mechanical process of compiling an administrative order into a legal syllogism – starting with 1 January 2019 – certain amendments that introduced the automation of administration order without any human intervention came into force in Lithuania.¹⁶

When considering the application of syllogisms in the decision-making of judges, it should be emphasised that, in principle, when a judge is making decisions, a connection is established between the legal norms and the facts, which determines a certain conclusion. It is a mechanical, logical sequence of actions when moving from assumptions to conclusions. As J. Gumbis fairly points out, when a judge's decision is based solely on the applicable law, it is not the decision of an individual. It is a decision of the state that acts through that person – it is the exercise of power.¹⁷ This model, also known in academic literature as the doctrine of mechanical justice, is based on the so-called static doctrine of legal interpretation, according to which a judge must always follow only the letter of the law and cannot interpret law *praeter legem* or *contra legem*. Consequently, a judge, even if he or she sees that the application of a certain legal norm may lead to a violation of legal principles (for example, proportionality, equality), he or she must apply such a norm anyway. Thus, legitimacy > proportionality, equality, etc. Such a conclusion is presupposed by the principle of separation of powers promoted by legal positivism – a positivist judge merely carries out the will of the legislator and must follow and apply it until the legislator (and not the court itself) decides to change it.

14 R Latvelė, *Teisėjo vaidmuo aiškinant teisę. Daktaro disertacija* (Vilnius universitetas 2010) 49.

15 N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978).

16 Art. 611(4) of the Code of Administrative Offences of the Republic of Lithuania.

17 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 *Teisė* 50.

Syllogisms as a means of resolving cases in legal doctrine are often criticised for 1) proving only the fairness of the thought process, rather than establishing the truth in the process,¹⁸ or 2) that in such cases, the work of judges is more similar to the administration of justice rather than the execution,¹⁹ or 3) that the judge treats the law as a set of data without a chronological dimension and views the principles and norms of law as truths that are independent of changes in time or the environment.²⁰ However, the advantages solving cases using syllogisms provides – such as ensuring legal stability (judgments are based on norms that were agreed by the public), recognising the authority of the legislature, and ensuring the principle of legal certainty – are essential for the sustainable existence of a sound legal system.

Legal doctrine states that a syllogistic approach in cases is necessary in order to protect legal certainty and stability and to ensure the principle of the rule of law.²¹ It is obvious that such regulation expresses respect for the legislative body and encourages the presumption of reliability and validity of the norms developed by the legislator. It also creates more legal certainty and predictability, as the conformity of court decisions with legal norms is visible. The principle of legal certainty is ensured because such decisions are easy to predict in the future. For example, a litigant expects that the judgment of the court will not be determined by any subjective factors, and the judge will be objective and will apply the law properly. More generally, this means that the public wants to know what competence is given to a judge to act as a representative of state power and to make a binding decision that affects individual freedoms and property and can be enforced by state coercion. The public wants a court decision to be a legitimate exercise of state power.²² Consequently, the use of syllogisms helps to ensure the objectivity of judges and thus of the decision taken – the autonomy and objectivity of the law are secured by confining legal analysis to the formal level, requiring only an exploration of relations among legal ideas. Autonomy and objectivity are threatened when the legal outcome depends on facts surrounding the world, which might be facts of a dispute or social or ethical facts relevant to creating or interpreting a rule.²³ It is believed that it was the closure of the system and the mechanisation of dispute resolution that determined the success of eBay – one of the largest online auctions and e-commerce sites, resolving an average of 60 million consumer disputes a year through an online dispute resolution centre. Disputes over goods of poor quality, late delivery, or improper delivery through this platform are resolved remotely through alternative dispute resolution.²⁴ It was the limited possibilities of the cases and solutions that determined the efficiency and people's confidence in the system.

It is indisputable that legal syllogisms are difficult to apply in hard cases where several possible solutions compete and/or the solution proposed by the rules of reasoning is questionable from the point of view of common sense and/or justice. Hard cases are not usually resolved in accordance with established formal legal rules, but they result in decisions that are atypical, extreme, and incompatible with normal legal standards. They also usually provide for exceptions to the legal rules.²⁵ However, syllogisms are an excellent basis and starting point from which judges should resolve cases, and in easy cases, it should be deemed a sufficient and priority way to do that. The principle of separation of powers

18 RA Posner, *The Problems of Jurisprudence* (Harvard University Press 1990) 54-55.

19 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 Teisė 51.

20 R Latvelė, *Teisėjo vaidmuo aiškinant teisę. Doktoro disertacija* (Vilniaus universitetas 2010) 48.

21 Ibid 40.

22 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 Teisė 50.

23 RA Posner, *The Problems of Jurisprudence* (Harvard University Press 1990) 40.

24 For more information, see www.ebay.com

25 G Lastauskienė, 'Teisinis kvalifikavimas formaliosios logikos požiūriu' (2009) 73 Teisė 51.

presupposes that the legislator is entrusted with a special legislative function, so it should be reasonable to expect that the clearest, easiest model cases will be properly regulated by the legislators. It should be noted that the rule of law requires laws to be consistent, stable, and comprehensible. Consequently, authoritative legislators have a constitutional obligation to ensure the adoption of such laws. In summary, the presumption that the least that can be expected from an authoritative legislator is the proper enactment of the most basic 'rules of the game' and, accordingly when noting that it would be manifestly incorrect to apply a rule which is appropriate to a clear, elementary ordinary legal dispute, such gaps in easy cases should be filled by the competent legislature and not by the courts, seems reasonable. Advantages of the formal application of rules identified by J. Gumbis are as follows: rule makers are often in a better position to decide what justice is and how to achieve it in a particular case, and in general, the legislature generally has more time to analyse problems and systematically consider more elements. It has more sources of information, is not bound by gathering evidence and/or other procedural rules. Rules are often more effective than discretion because they essentially consolidate experience. A rule is a certain crystallised element formed by the lengthy process of how certain conflicts are to be resolved.²⁶ It is argued that, in easy cases, the judge would, in a sense, become an administrator of the law. Rather than insisting on seeking justice by deviating to various discourses, the principles of legal expediency and economy would be better ensured, the workload of courts would be significantly reduced, the law would be more predictable, and that would encourage greater public confidence in the judiciary. Perhaps, this would even reduce the number of cases in the courts in general, as individuals would be able to resolve disputes in easy cases themselves, and judges would be able to focus more on difficult cases.

3.2 APPLICATION OF ANALOGY (PRECEDENT)

We refer to a legal precedent as a decision of a state institution, usually a court, made in a specific case and later considered as an example in resolving similar cases. It can be understood as an authoritative opinion on how to resolve a problematic dispute. The application of precedents helps to ensure compliance with the *stare decisis* principle (similar cases must be dealt with in a similar way). Relying on precedents is a condition for uniform (consistent) case law and thus for the full administration of justice. Therefore, the precedents of the courts cannot be unreasonably ignored when resolving similar cases.²⁷

The origin of court precedents is often linked to the medieval kingdom of England. The axiom is that in the common law countries, where court precedent is recognised as the main source of law and case law was the basis for the formation of the whole legal tradition. Precedent is of far greater importance than in the continental legal tradition. However, the institution of precedent is also extremely important for the states of the Romano-Germanic tradition. Lithuanian legal doctrine notes that the dominance of court precedents as sources of law is a natural stage of legal development, which each evolving legal system goes through.²⁸ For example, the doctrine of *stare decisis* prevailing in the Anglo-American legal tradition can be summarised in the following instructions: (1) the court is bound by the decisions of the higher courts, the courts of the highest levels (sometimes any level), and their own; (2) the decision of any other court in the present case is a compelling argument and must be considered; (3) the decision is binding only to the extent of its *ratio decidendi*; (4) a precedent

26 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 Teisė 47.

27 E Kūris, 'Teismo precedentas kaip teisės šaltinis Lietuvoje: oficiali konstitucinė doktrina, teisinio mąstymo stereotipai ir kontrargumentai' (2009) 2 (116) Jurisprudencija 134.

28 J Machovenko, Teisės istorija (Vilniaus universiteto leidykla 2013) 98-99.

does not automatically lose its binding force over time, but a very old one may be disapplied if it no longer meets the changed social relations. For example, in Lithuania, although the principle of *stare decisis* is not explicitly established, even without using this concept, a court decision is not considered to be a mere act of law, but an authoritative source of law, binding not only other courts dealing with similar cases but also the precedent-maker him/herself. Thus, court precedent is a source of law in both vertical and horizontal terms.²⁹ In Lithuania, the peculiarities of the institute of court precedent have mainly been developed by the Constitutional Court of the Republic of Lithuania, which states that the following factors are decisive (among other important factors) in ensuring the continuity of jurisprudence: courts of general jurisdiction of higher instance must, when reviewing decisions of courts of general jurisdiction of lower instance, always assess those decisions in accordance with the same legal criteria; those criteria must be clear and known *ex ante* to legal persons and *inter alia* to courts of general jurisdiction of a lower instance (hence, the jurisprudence of courts of general jurisdiction must be foreseeable).³⁰ Subsequently, the duty of courts to formulate uniform case law allows precedent a special place in the legal system, regardless of whether the principle of *stare decisis* is explicitly enshrined or not. Such adherence to consistent case-law ensures the safeguarding of constitutional principles, such as the principle of equality – if similar cases were to be handled differently or different cases were to be treated equally, we would face unjustified unequal treatment of persons; the principles of legal certainty and legal predictability encourage clear precedents, and there should be no deviation from them without reason – this fosters legal clarity and predictability. In summary, in Lithuania, which does not belong to the Anglo-American legal tradition, the special place of precedent as a source of law is determined not by the explicit establishment of the *stare decisis* principle, but rather by such constitutional principles of law as equality, predictability of law, and legal certainty.

After describing the essential features of precedent, it is appropriate to discuss its applicability in easy cases. It should be noted that, in principle, the process of deciding on the application of precedent in a particular case can be divided into the following essential steps: identification of precedent content, assessment of its suitability for the case, and the actual application.³¹ It should be noted that the second and third steps are very similar in nature to the application of syllogisms in decision-making analysed in section A of this chapter. For example, when we have a clear and appropriate precedent, we equate it with a certain legal norm. Such an approach is also supported in legal doctrine, where it is stated that the *ratio decidendi* part of a court precedent can be understood as having a normative nature.³² Equating the application of analogy by precedent to the application of legal syllogism, it can be concluded that this way of resolving a case, which reflects the ideas of legal positivism, should also be sufficient and the main approach in easy cases.

The main advantages of applying analogy (precedent) in easy cases will be analysed below. First, the fact that in a similar situation, the court will have to decide the case in the same way as in the case law allows individuals to predict court decisions, even when such legal instruction is not explicitly disclosed in law. In this way, as was already mentioned, the principles of legal certainty and legitimate expectations are ensured. When similar situations are resolved in the same way, the court's decision by analogy makes its arguments more

29 E Kūris, 'Teismo precedentas kaip teisės šaltinis Lietuvoje: oficiali konstitucinė doktrina, teisinio mąstymo stereotipai ir kontrargumentai' (2009) 2 (116) Jurisprudencija 135.

30 See, e.g., Ruling of 24 October 2007, no. 111-4549 and ruling of 28 March 2006, no. 36-1292 of the Constitutional Court of the Republic of Lithuania.

31 There are a number of legal problems in the first step of applying precedent, but this discourse is not the subject of the present paper. This paper presupposes the existence of criteria for relying on precedents, which can be used to identify the need to apply certain precedents in specific cases.

32 R Cross, JW Harris, *Precedent in English Law* (Oxford University Press 1991) 72.

convincing to the parties, the judge is considered more objective, and his or her decision is determined by the application of obvious law and not by non-legal factors, promoting greater public confidence in the judiciary. The application of precedents in easy cases is also in line with the principles of economy and efficiency of the process because of the following reasons. 1) The efficiency of court proceedings increases (it can be objectively perceived that the productivity of judges would be significantly reduced, whereas the workload would increase significantly if relevant decisions made in the past could not be relied upon) – it should also be mentioned that the consistent application of precedents in easy cases would also reduce the workload of courts of appellate and cassation instances. 2) Clear and widely applied precedent rules are expected to lead to less litigation and encourage individuals to settle disputes out of court, the outcome of which can be easily predicted (this would, of course, also contribute to a lower workload of judges). In summary, the automatic application of precedent (analogy) in easy cases would give courts more time to focus on hard ones. Another particularly important argument is the duty of courts to shape common practice. As mentioned above, when resolving a specific dispute, the court enforces not only the private interests of the parties to the proceedings but also the public interests, as the prerogative exercised by the judge to interpret legal norms in the form of judgments are duty-bound by the public.

It should be noted that this paper does not analyse the problems of the application of precedent in difficult cases, such as, for example, competition between precedents or a situation where precedent is legally valid but does not reflect the existing relationship, since the aim was to defend the idea that the application of the analogy is a comprehensive and sufficient way of dealing with easy cases specifically. Summarising the above, it can be stated that this hypothesis was defended on the grounds that not applying precedents in easy cases and re-establishing the compliance of the subject matter with the legal norms each time would be ineffective, and this would not guarantee the principles of legal expediency and economy. In addition, once the application of precedents in easy cases became common practice in the courts, greater predictability in court decisions would be seen, which would lead to greater public confidence in the courts and the judiciary (this would happen due to the perception that the decisions of such courts are objective and their adoption is not influenced by subjective factors) and encourage the search for a solution to such cases without turning to courts. As was emphasised, the principle of legal stability requires at least a minimum degree of predictability in how judges will decide a case. Therefore, we can argue that easy cases could constitute that minimum. The rule of law and respect for trustworthy authorities should presuppose respect for the laws they enact and a reasonable presumption that legal regulation in the clearest, simplest, easiest cases is legal and fair. In the event of a situation where such regulation does not correspond to the actual situation, the solution should not be to allow courts to be creative in easy cases, but rather to oblige the entity that created such regulation to ensure its relevance and the 'vitality' of the law.

4 LEGAL REALISM AND HARD CASES

*In most cases, especially in the most important ones, the judge will stick to a reasonable result, rather than being able to come up with a result that is demonstratively and indisputably logically correct.*³³

In the previous chapter, it was concluded that methods of legal reasoning, such as conclusions drawn with the help of syllogisms or reliance on precedents created in the past, are useful,

33 RA Posner, *Reflections on Judging* (Harvard University Press 2013) 6.

sufficient, and even encouraged as the main approaches in easy cases. If we put it in a formula, we would get the following result in easy cases: factual legality > justice. In complex disputes, in cases that require a wide judicial discretion to assess the facts, logic is of little help. It is a fiction that the court is guided only by the law, is impartial, and so on. However, the most important criteria for resolving such disputes are clearly not logical.³⁴ As it was correctly observed, the most important and constant reason for dissatisfaction with the law always stems from the necessary mechanical application of legal norms.³⁵ It should be noted that society also wants not only to restrict the freedom of a judge (so that he or she does not interfere in the field of legislation or become biased) but also to feel justice in general rather than in the specific legal meaning of the word. The judgment must also be understood from a moral or ethical point of view. A judge in a given situation should not blindly follow the law, the adoption of which may have been influenced by lobbyists, but also argue on the basis of good morals, a general public understanding of what is right and wrong, honest, etc.³⁶ In hard cases, because of their special importance and the legal relationship on the basis of which the dispute arises, factual legitimacy loses its relevance, and, more precisely, justice outweighs other principles of law. In the words of R. A. Posner, it is legal realism that helps to avoid this short-sighted justice.³⁷

O. W. Holmes Jr. gave us the aphorism that the essence of law is not logic but experience.³⁸ The ideas of legal realism are based on the idea that a judge must discover and, in some cases, create the law. Divided into American and Scandinavian versions, legal realism is fundamentally at odds with the idea of legal positivism that law is comprehensive – judges supposedly make decisions based not on the law but on what seems right to them, influenced by certain factors and incentives.

Legal positivism and the methods of resolving easy cases discussed before leave no room for the judge's discretion – the right judgment of the case is obvious, so the judge is, in a sense, more like an administrator of the law, who simply attributes the appropriate norm to the legal dispute that has arisen. Meanwhile, in hard cases, it is more difficult to apply the right legal norm – the right solution is not so obvious, and the judge must choose what decision to make. In other words, the judge has discretion. Those with discretion are not entirely indifferent to the environment. This is not always negative – on the contrary, one of the purposes of discretion is to give the law flexibility so that the applicable law is not a mere blind norm.³⁹ It is those factors that can influence judges' decision-making that will be further analysed in this essay, dividing them into the social factors researched by the representatives of American legal realism and the psychological factors researched by Scandinavian legal realism.

4.1 PSYCHOLOGICAL FACTORS THAT DETERMINE DECISION-MAKING

A judge uses his mind to rule the mind. So, it is not allowable for a judge's mind, from its earliest years, to be brought up in close contact with minds which are no good, or for it to have done a complete course in all forms of wrongdoing for itself, so

34 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 Teisė 50.

35 M Stone, 'Formalism' in JL Coleman, S Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2002) 166–205.

36 SJ Burton, *An Introduction to Law and Legal Reasoning* (Little, Brown & Co. 1985) 167-183.

37 RA Posner, *Reflections on Judging* (Harvard University Press 2013) 5.

38 OW Holmes, *The common law* (Little, Brown, and Co. 1881) 1.

39 J Gumbis, 'Teisinė diskrecija: teorinis požiūris' (2004) 52 Teisė 53.

*that it can readily draw on its own experience in dealing with the wrongdoings of others.*⁴⁰

According to the representatives of Scandinavian realism, the personality and individual psychological characteristics of a judge are of special importance in their decision-making in cases. Cognitive psychologists have found that even educated, intellectually refined people are prone to retrospective determinism – they tend to view events that have already occurred or facts that have been identified as obvious, regardless of the lack of primary information to identify them, which leads to incorrect statements and can become the result of methodological problems in the interpretation stage (hindsight bias), the anchor effect, and overconfidence in one's intuition. These problems exist at all levels of the judiciary. For example, according to J. Frank, judges' decision-making is a factor in human psychology, so there is no point in developing any normative theory that explains to judges how to make decisions.⁴¹ K. Oliverona argued that the reality that legal scholars should study consists of the psychological reactions of individuals – the images and feelings they experience when they become familiar with a particular rule. Therefore, in order to perceive legal norms as effective, it is necessary to consider them as a psychological phenomenon.⁴²

Concerning psychological factors affecting specific judges, CH. S. Hutcheson said that judges use intuitive decision-making (hunches) first and only then use logical thinking to find a justification for the desired outcome.⁴³ Simple internal factors and reasons, such as laziness, unwillingness to take responsibility, or even a desire to avoid repetitive reasoning, also affect judges. In summary, when judges have discretion to make one decision or another, the decision-making process is influenced by a variety of psychological factors, such as over-reliance on intuition, the anchor effect, and such internal factors as, for example, laziness or unwillingness to take responsibility for the decision.

The gambler's fallacy is one of the logical errors arising from a misinterpretation of probabilities. It is an underestimation of the occurrence of random sequences. Hypothetically, if someone flips a coin landing heads up four times, most people will believe that the coin would land on the tails side next time, although, in reality, the probability is still 50/50. Empirical research has shown that the gambler's fallacy can be discovered when judging asylum cases. It was found that there is a 0.5% lower probability that a judge would make a positive decision to grant asylum to an applicant if the previous decision to grant asylum was positive rather than negative, despite all other circumstances being identical. Interestingly, a stronger negative autocorrelation was also observed between cases resolved on the same day. The closer the cases were to each other in time, the more consistent the occurrences of the player's error were observed, as newer cases are more obvious and lead to stronger expectations for change.⁴⁴

Another psychological phenomenon affecting judges' decision-making is the anchor effect. In principle, the anchor is understood as the starting point, on the basis of which a decision is made in the future when information is lacking. After analysing the influence of the social environment on the entities implementing the discretion, the possible influence of public criticism on the decisions of lawyers in decision-making can be observed. Judgments made by judges can be and often are criticised by journalists, politicians, and society at large. The relationship between the anchor effect and the possible influence of journalists and the

40 Plato, *The Republic* (Cambridge University Press 2003) 100-101.

41 R Latvelė, *Teisėjo vaidmuo aiškinant teisę. Daktaro disertacija* (Vilnius universitetas 2010) 212.

42 JW Harris, *Legal Philosophies* (2nd edn, Butterworths 1997) 106.

43 JC Hutcheson Jr, 'Judgment Intuitive: The Function of the Hunch in Judicial Decision' (1929) 14 *Cornell Law Journal*, Rev. 274, 273-288.

44 DL Chen, et al. 'Decision-Making Under the Gambler's Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires' (2016) 131 *The Quarterly Journal of Economics* 1199-1205.

impact on judges dates back to 2006 when an experiment was carried out in which some of the participants in the investigation (prosecutors and judges) who were familiar with all the relevant material in the case had to imagine receiving a hypothetical call from a journalist asking whether the custodial sentence imposed on the defendant would exceed a certain length or be less. The duration of the custodial sentence in this case was the anchor. One study group was asked whether the sentence would exceed a period of one year and the other – a period of three years. Next, study participants had to consider what answer they would give to their fellow investigators about the length of the prison sentence proposed by the journalist – whether the length of the prison sentence proposed by the journalist was appropriate, too long, or too short. The results obtained showed that the decisions of the study participants, regardless of their experience and competence, were influenced by the anchor provided: those who were suggested to impose three years in prison imposed an average of a 33.38-month sentence, whereas those who were given a one-year anchor imposed 25.43 months.⁴⁵ In summary, when a judge has discretion as to what decision to make, empirical research shows that his or her decision is affected by psychological phenomena such as the gambler's fallacy or the anchor effect.

There is, of course, a risk that judges, influenced by various psychological factors, will make decisions by replacing public expectations with personal ones. It is believed that judges often do not even understand that their decision-making process is influenced by various factors. This is especially the case with psychological factors. Judges tend to think that they individualise each case, take into account all the relevant circumstances, and make the decision as objectively as possible. R. A. Posner suggested appointing more judges to reduce the impact of psychological factors on judges' decision-making, giving judges more time to consider each case.⁴⁶ But would judges really use that time for deliberations? And, after all, should judges' decisions be completely objective? When making a decision, a judge has the facts at his or her disposal (external factors) and the legal norms (internal factors). All a judge must do is establish the facts and apply a legal norm accordingly. Thus, the judge's activity when making a decision is rather theoretical – there is no room for personal experience, rationality, or values. The work of a judge is cognitive when they establish the facts and logical when he or she applies certain legal norms.⁴⁷ However, in support of the statement that the methods of resolving cases proposed by legal positivism are not sufficient for resolving hard cases, we are also basically arguing that an objective decision based only on legal norms is legal but not fair in hard cases. Thus, we recognise a certain need for subjectivity in hard cases. The problem arises only when trying to determine how much of the influence of psychological factors should be allowed when resolving hard cases. In order to find the right answer, analysis of judges' activities without discrediting the work of those judges should be encouraged.

4.2 SOCIOLOGICAL FACTORS DETERMINING DECISION-MAKING

Sociological factors also influence the decision-making of judges. Such factors have been widely studied by representatives of American realism. For example, B. Cardozo argued that the final form of a decision is given by the judge's life experience: a judge's understanding of the canons of justice and morality, his or her studies of the social sciences, sometimes intuition, conjecture, even ignorance or prejudice. After assessing the correlation between

45 D Petkevičiūtė-Barysienė, et al, 'Inkaro efekto pasireiškimas skiriant laisvės atėmimo bausmę' (2012) 11 Tarptautinis psichologijos žurnalas: biopsichologinis požiūris 135.

46 RA Posner, *Reflections on Judging* (Harvard University Press 2013) 312.

47 J Gumbis, 'Teisės samprata: logikos taikymo problematika' (2010) 76 Teisė 48.

the social connection between persons and a more favourable decision for a close person, the principles of judicial impartiality were established. Art. 6(1) of the European Convention on Human Rights states that in the determination of his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.⁴⁸ For example, the Constitutional Court of the Republic of Lithuania has clarified that a person's constitutional right to have his or her case examined by an impartial court also means that a person's case may not be heard by a judge whose impartiality is in doubt. The judge hearing the case must be neutral. The impartiality of the judiciary, like the independence of the judiciary, is an essential guarantee of human rights and freedoms, a prerequisite for a fair trial, and thus a requirement for confidence in the judiciary.⁴⁹ In summary, the absence of influence of certain social relations in the decision-making of judges is ensured with the help of the institute of removal of judges.

However, the decision-making of judges is also determined by other social factors, which, due to certain circumstances, cannot be measured and regulated by law. People differ from each other by gender, age, education, origin, and religion, and these are the factors that may determine their decisions. For example, in cases of gender discrimination or equality, female judges tend to take a more liberal position.⁵⁰ Female judges also tend to punish those who have committed violent sexual offences more severely than their counterparts.⁵¹ Besides, each judge is a part of his or her nation, and all judges in a certain society live in the same environment, which affects each of them almost identically; thus, the decisions of judges are not determined by some mystical individualities of each case but can be predicted on the basis of general social regularities. Although, as in cases of influence of psychological factors, judges are often unaware of the social laws that influence decision-making, and even if they are aware, they often do not recognise that influence, such laws do exist and may even be predictable. In principle, the law gives the judge the freedom to choose one of several ways to resolve the case, and the judge chooses a particular option under the influence of social factors.

Traditionally, the exercise of discretion is understood as a highly subjective decision driven by largely unexplained factors: success, emotion, or even whim. From a social point of view, decision-making can also be explained by less mystical actions. Decision-makers rely on their consciousness, presenting different conclusions depending on the social situation.⁵² As mentioned, the social factors that determine the decision-making of judges form certain social laws, which, due to their low attractiveness, are not widely analysed in legal doctrine. Indirect empirical research shows that legal training or judicial experience does not produce a higher expert judgment. One of the reasons why judges do not make better decisions than ordinary subjects is that judging is poorly based on the environment – judges do not receive feedback on the quality of the decisions they make, so judges do not improve their decision-making skills.⁵³ As has been emphasised in this paper, in hard cases, short-sighted justice, complete objectivity, and formal application of rules are not the aspirations to be followed. In such cases, the public expects that judges will not formally apply the letter of the law but will seek justice and individualise the dispute. With this in mind, there is a need to examine the

48 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

49 Ruling of 12 February 2001, no. 14-445 of the Constitutional Court of the Republic of Lithuania.

50 LJ Siegel, JL Worrall, *Essentials of criminal justice* (Wadsworth 2017).

51 K O'Connor, *Gender and Women's Leadership: A Reference Handbook*. (Vol 2, SAGE Publications Inc 2010).

52 J Gumbis, 'Teisinė diskrecija: teorinis požiūris' (2004) 52 *Teisė* 56.

53 V Tumonis, et al, 'Judicial Decision – Making from an Empirical Perspective' (2013) 6 (1) *Baltic Journal of Law & Politics* 158.

social factors that may influence a judge's decision-making. This would promote greater public confidence in the judiciary since social factors form laws, the examination of which in cases requiring the discretion of a judge would form tendencies of judgments made, and that would bring legal certainty. In this way, judges would also have a better understanding of themselves and the functioning of the decision-making mechanism and would be able to assess the impact of certain factors that may have had an influence on the decision-making process.

5 THE DICHOTOMY OF HARD AND EASY CASES AND ARTIFICIAL INTELLIGENCE

Technology is evolving so fast that it has acquired the name of the Fourth Industrial Revolution.⁵⁴ In Estonia, a robot-judge project is currently being developed to resolve small (up to € 7,000) civil disputes arising from contracts.⁵⁵ It is believed that court systems will be able to concentrate on complex cases, and cases will be resolved more efficiently and expeditiously. It is likely that the number of countries that will follow Estonia's example will increase rapidly, especially considering that the European Ethical Charter of the use of AI in judicial systems and their environment encourages the use of artificial intelligence in online dispute resolution.⁵⁶ R. Susskind, the world's most-cited author on the future of legal services, discusses the possibility that the decision-making processes of judges will be entirely replaced by artificial intelligence eventually.⁵⁷ Accordingly, an analysis of the judicial decision-making mechanism is required not only to assist in the development of technology but also to assess which cases could potentially be delegated to technological solutions.

Cases that can be and even should be resolved using either syllogisms or by applying precedents – referred to in this essay as easy cases – will be the first ones assigned to artificial intelligence to resolve. Lawyers must be the first ones to submit their insights; otherwise, we risk putting the rule of law in jeopardy. Technology is evolving very rapidly, and we are on the brink of disaster if we do not react quickly. A method should be proposed to accommodate as many cases as possible into legal syllogisms and precedents. Otherwise, as mentioned before, cases in which a claim corresponds to a certain amount of money will *prima facie* be deemed to be easy cases. The first examples could be licensing, court orders, consumer disputes, etc. This way, hard cases – those that usually have a particular impact on legal systems – would remain at the discretion of human judges rather than robot judges, at least until the development of technology reaches a certain level, when we can confidently delegate even cases of this scale to an AI.

6 CONCLUSIONS

When judges make decisions in easy cases, the ways of resolving cases proposed by legal positivism should be deemed to be a priority. The use of syllogisms in easy cases helps to ensure compliance with the principles of efficiency and effectiveness, respect for the principle of separation of powers and an authoritative legislature, and minimum legal stability. This also ensures legal clarity and predictability. The application of analogy (precedent) in easy

54 K Schwab, *The Fourth Industrial Revolution* (Crown Publishing Group 2017).

55 E Niiler, 'Can AI Be a Fair Judge in Court? Estonia Thinks So' (WIRED, 24 March 2019) <<https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/>> accessed 5 October 2021.

56 CEPEJ *European Ethical Charter on the use of artificial intelligence in judicial systems and their environment* 2018.

57 R Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019).

cases is in line with the principles of procedural economy and efficiency, thus reducing the workload of courts not only in the first instance but also in courts of appeal and cassation, which means that courts have more time to resolve hard cases. It also encourages less litigation, and the consistent application of precedents helps to ensure the duty of courts to develop uniform practice.

When judges make decisions in hard cases, where they have the discretion to choose how a certain case is decided, they are influenced by various sociological and psychological factors. A broader examination of these factors without discrediting judges would not only help judges to critically assess the factors that affected them in the process of making a judgment but would also be beneficial to society by identifying some systematic influence of factors, which would lead to greater predictability of decisions. The methods of resolving cases proposed by legal positivism are not sufficient when resolving hard cases, as such cases require more than just full objectivity and formal application of legal norms. Empirical research shows that judges are influenced by such psychological factors as overconfidence in intuition, gambler's fallacy, anchor effect, and social factors such as close relationship with the party to the case or/and gender. More in-depth research on the performance of judges should be encouraged, as this would allow judges to assess the impact of factors that affect them on their decisions and give the public a better understanding of how decisions are made, which would foster greater trust in the judiciary.

Given the current state of technological development, lawyers should be encouraged to accommodate as many cases as possible – such as consumer disputes or court orders – into legal syllogisms and transfer precedents into certain formulas. This way, only easy cases will be delegated to AI, whereas hard cases will remain in the competence of human judges for some time yet.

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