Legitimacy of the judiciary in the interpretation of vague statutory provisions

La légitimité du pouvoir judiciaire dans l'interprétation de dispositions législatives vagues

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Abstract:
The article presents a philosophical analysis of works of Lon Fuller, John Locke and Charles Louis Monstesquieu and precises the consequences of their thoughts on the judiciary's option to interpret vague statutory provisions. It further provides comparative analysis of the application of those concepts in case law of United States and the Czech Republic as a representant of the civil law systems. The article uses the methodology of balancing different constitutional values and principles and criticizes the practice of courts not applying the proportionality test while changing the interpretation of statutory provisions.

Keywords: separation of powers, principle of certainty, predictability of decisions, inner morality of law, vague provisions, judicial review, constitutional review, overbreadth doctrine, retroactivity, retroactive changes to the case law

Résumé :
L'article présente une analyse philosophique des travaux de Lon Fuller, John Locke et Charles Louis Monstesquieu et précise les conséquences de leurs réflexions sur le choix du pouvoir judiciaire d'interpréter des dispositions législatives vagues. Il fournit une analyse comparative de l'application de ces concepts dans les jurisprudences des États-Unis et de la République tchèque en tant que représentants des systèmes de droit civil. L'article utilise la méthodologie de la mise en balance des différentes valeurs et principes constitutionnels et critique la pratique des tribunaux qui n'appliquent pas le test de proportionnalité lorsqu'ils modifient l'interprétation des dispositions législatives.

Mots-clés : *séparation des pouvoirs, principe de certitude, prévisibilité des décisions, moralité interne du droit, dispositions vagues, contrôle juridictionnel, contrôle constitutionnel, doctrine de la portée excessive, rétroactivité, portée rétroactive des revirements de jurisprudence.*

What is the line between the authority of the legislature to create legal rules and the authority of judiciary to interpret them? The separation of powers is one of the defining principles of democratic legal states. From the times of John Locke and Charles Louis Montesquieu, it was perceived that three powers in a state – legislative, executive and judicial – are the best way to structure and direct the distribution and division of institutional power.[1] That led many authors to conclude that separation of powers is one of the defining criteria of a legal state (known from civil law systems, or the rule of law doctrine in common law legal systems, respectively).[2] I am

1 E. Carolan, *The New Separation of Powers. A Theory for the Modern State*. Oxford: Oxford University Press, 2009, p. 22.

2 The issue is connected with the division between formal and material concepts of legal state. Material legal state is a concept governing in the current case law and jurisprudence of many European countries, including Czech Republic, Germany and Poland. Nevertheless, Maxim Tomoszek (M. Tomoszek, *Podstatné náležitosti demokratického právního státu*. Prague: Leges, 2015, p. 22 and onward) lists many authors who include separation powers among the key principles of legal state. Namely P. Holländer, legal philosopher and former judge of Constitutional Court of the Czech Republic, V. Šimíček, current judge of Constitutional Court of the Czech Republic, K. Stern, one of the most renowned constitutional lawyers in Germany, professor and legal scientist, also a

not of the same opinion and while this problem would deserve its own text to fully present the reasoning, it is possible to argue in short that the principle of separation of powers is not a value on its own and is only an effective instrument supporting the other principles of a legal state which brings values to its main principles, such as the principle of legal certainty and the equality under the law.

This article attempts to provide an analysis of ways how to systematically minimize the number of cases in which the legislator formulates unclear and vague provisions of statutes. The legal certainty can be violated by both judiciary and legislature. The judiciary would violate legal certainty, for example in cases when a court would choose to interpret a statutory provision in a completely opposite way to its linguistic meaning, or when it would change its case law unexpectedly and retrospectively without any measure to reduce impact on people relying on the text of statutory provision or previous case law.

When it comes to a failure of legislature, the most known description is Lon Fuller's eight principles of morality which constitute the inner morality of law.[3] Actions leading to their violation are also known as eight ways to fail to make a law. These principles are 1) generality (while violation of this principle is a failure to achieve rules at all – and as there are no rules that leads to ad hoc decisions), 2) publicity (a failure to make the rule available), 3) prospectivity (an abuse of retroactive legislation), 4) intelligibility (a failure to make the rules understandable), 5) consistency (enactment of contradictory rules), 6) practicability (enactment of rules that require conduct that is impossible), 7) stability (introducing such frequent changes in the rules that their addressees cannot orient their actions by them) and 8) congruence (failure of existing disconformity between the rules as announced and their actual administration).[4]

These are, by their nature, principles that can be violated by the legislature except for the principle of congruence as the principle requiring conformity between the rule and its actual application, which is in responsibility of judicial and executive power.

However, there are principles that can apply on both – legislature and the judiciary (respectively on executive power). Even though separation of powers dictates that rules should be set generally by legislative power (while it is debatable whether it is actually the case – both in the civil law and common law systems),[5] courts some-

judge of Constitutional Court of North-Rhine Westphalia.

3 R. Henle, "Principles of Legality: Qualities of Law. Lon Fuller, St. Thomas Aquinas, St. Isidore of Seville", *The American Journal of Jurisprudence*, vol. 39, issue 1, 1994, p. 47.

4 L. L. Fuller, *The Morality of Law. Revised edition*, New Haven and London: Yale University Press, 1969, p. 33-91.

5 Cf. R. Guastini, « Les juges créent-ils du droit? Les idées de Alf Ross », *Journal for Constitutional Theory and Philosophy of Law*, no. 24, 2014, p. 108: "*The law is not a set of texts, but a set of meanings. Meaning are products of interpretation. To interpret is to produce meanings. And to produce meanings with authority is to produce a law.*" On this issue cf. also chapter 5 of the article J. A. Gealfow, *Case*

times change the meaning of a rule as it might be perceived from the grammatical expression used by the legislature through the process of interpretation. It might be argued, therefore, that while altering these rules courts might commit the same offences against the inner morality of the law as a legislature can – i.e., by stating alteration of rules that are unintelligible or inconsistent with each other. But mainly, they can change the rules in a way that it applies retroactively on actions in the past or they can make so frequent changes in their case law that the principle of stability is violated.[6]

This article will focus on two areas, both of which always include a link between legislature and judiciary in a way that legislature failed to create clear and precise rules and judiciary had to react on that issue.

1. Changes in the case law interpreting vague legislation

The first area concerns a situation of statutory provisions vaguely formulating a limitation period to file a lawsuit for compensation of immaterial harm. In the year 2010, two boys (of 11 and 14 years) filed a lawsuit against a hospital for compensation of psychological strain caused by the death of their mother in 2003 after *non-lege artis* treatment by the doctors employed by the defendant. There have been previous criminal and civil proceedings against both the hospital and doctors, in which plaintiffs were not successful for various reasons. The case started by their lawsuit filed in 2010 was different and plaintiffs won in the court of first instance. The decision was, however, overturned by the higher instance court, while this appellate decision was later confirmed by the Supreme Court of the Czech Republic. The reason was the limitation period to file a lawsuit already expired in the year 2006, four years before the lawsuit in this case was filed.[7]

But exactly the question of limitation period, its length and the moment of its beginning is the heart of the problem, and also the reason why plaintiffs filed a complaint to the Constitutional Court of the Czech Republic. Until 2008, the Supreme Court's case law has been constant and stable in the conclusion that the time period to file a lawsuit for financial compensation of immaterial harm is unlimited.[8] In 2008, the Supreme Court changed its case law and stated that while immaterial personal rights and actions providing defense against their violation and providing satisfaction are still without any limitation period in accordance with the §13(2)

Law and its Binding Effect in the System of Formal Source of Law, Juridiskā zinātne/Law, no. 11, 2018, p. 53-55.

6 It has been commented by the Constitutional Court of the Czech Republic that the stability of law and legal certainty of citizens is not determined just by the quality of legal rules enacted by the legislator, but also by how they are interpreted by the state organs who apply these rules – especially courts. Cf. Czech Constitutional Court decision no. IV. ÚS 334/11 from 26th November 2012.

7 Czech Constitutional Court decision no. IV. ÚS 3500/18 from 10th December 2019.

8 Cf. Czech Supreme Court decision no. 30 Cdo 1542/2003 from 30th November 2005 or no. 230 Cdo 1522/2007 from 28th June 2007.

of the Civil Code valid in the time of decision,[9] a financial compensation for this violation has a limitation period of three years.[10]

The Constitutional Court has previously subjected the changed case law to its review and found it compliant with the Constitution and the rest of constitutional order. However, even at that moment the Constitutional Court warned against retroactive effect of this change, and that even though the change of the case law might be legitimate, it is necessary to also take into account a possible breach of a legal certainty in each individual case.[11]

In the analyzed case, the Constitutional Court has followed up on its previous warning and stated that lower courts have, in an illegitimate and unconstitutional way, transferred a burden of predicting a possibility of a change of the future case law on plaintiffs. As they relied on a statutory provision that (even though not completely specific about the limitation period) was interpreted in a constant way for decades by case law of the Supreme Court, they had a legitimate expectation. The limitation period, therefore, could not start to run sooner than in 2008. To be more specific – the limitation period started to run on the day that the new decision of the Supreme Court overruling the previous case law has been published. The reason is that the date of publication marks the ending of anyone's legitimate expectation.[12]

The core message is that if statutory provisions enacted by legislature would be clear, the need of such a broad and significant judicial interpretation would not arise. But at the same time, it means that if the judiciary chooses to do so and, in a way, benefits from the freedom to not be restrained by the legislative rules and formulate general rules by themselves, then it must bear the same burden as legislature does when it comes to formulation of these rules – including the respect for their prospective nature and a duty to not retrospectively infringe on rights of individuals. We might, therefore, conclude that eight principles of inner morality of law apply even to courts when they choose to define general rules.

2. Vagueness in statutory provision and attempts to cure it

In the previous chapter we analyzed a situation where the judiciary, due to the failure of legislature to formulate clear and unambiguous rules, had to formulate a

9 Cf. §13(2) of Czech Civil Code, statute no. 40/1964. It is interesting to add that the new Civil Code valid since the year 2014 (Czech Civil Code, statute no. 89/2012) has already altered this rule in its provision §612 which states: "*In the case of the rights to life and dignity, name, health, respect, honor, privacy and similar personal rights, only the rights to remedy harm caused to these rights are subject to limitation.*" This provision, therefore, states the same conclusion as have been reached by the changed Supreme Court's case law. That only emphasizes that the problem is not change of the case law itself, but the retroactive effect that it had. It can be perceived as positive that legislator has remedied the vagueness of the statutory provision.

10 Cf. Czech Supreme Court decision no. 31 Cdo 3161/2008 from 12th November 2008.

11 Cf. Czech Constitutional Court decision no. II. ÚS 635/09 from 31st August 2010.

12 Czech Constitutional Court decision no. IV. ÚS 3500/18 from 10th December 2019.

general rule by itself in the process of interpretation, but also fails to as it did not formulate those rules in accordance with the principles of formulation of law. If the judiciary chooses to interpret the law in a way that it formulates new general rules, it must accept that it acts, in a manner of speaking, as a legislature and, therefore, must act according to standards of formulation of rules by legislature.

In this chapter we will explore how legislature might try to cure the statutory provision. This might sound like a trivial question – improving legal order is the purpose of existence of legislature and formulation of a more precise rule based on previously identified vagueness is not that interesting from the philosophical perspective. It is something that legislature should do. The interesting part comes with the reaction of judiciary on the changed provision.

This chapter is to a big degree inspired by the paper of George Anhang analyzing consequences of the overbreadth doctrine of the Supreme Court of United States. Overbreadth can be defined as a case of vagueness of statutory provision in which a reasonable person cannot distinguish between permissible and impermissible speech. This concept is, therefore, closely tied to the First Amendment of United States Constitution and the freedom of speech. There are many cases that shaped the doctrine into its current form. But more than that, the overbreadth doctrine is an exception from the general rule that a person to whom a statute may be constitutionally applied can no longer challenge the statute on the ground that it may be unconstitutionally applied to others.[13] It allows a defendant to attack a statute because of its effect on conduct other than the conduct for which he is being prosecuted as he may, in a way, theoreticize about the unconstitutionality of the provision as a whole.[14]

We will focus on two cases which share the connection to the separation of powers: *Massachusetts v. Oakes*[15] and *Osborne v. Ohio*.[16] George Anhang argues that what happened in these two cases illustrates how the separation of powers can be seen as a delicate incentive structure which although not ensuring the certainty and predictability, helps to promote it.[17]

The facts of the *Massachusetts v. Oakes* are that the defendant took pictures of his 14-years old stepdaughter only in bikini bottoms and was charged of committing a crime by allowing a minor "to pose or be exhibited in a state of nudity". Oakes's case has been dismissed and his conviction abolished by the Massachusetts Supreme Judicial Court, because the current provision of a criminal code would

13 *Massachusetts v. Oakes*, 491 U.S. 576 (1989), §2, p. 581.

14 *Massachusetts v. Oakes*, 491 U.S. 576 (1989), concurring and dissenting opinion of Justice Scalia, joined by Justice Brennan, Justice Marshall and Justice Stevens, §1, p. 586.

15 *Massachusetts v. Oakes*, 491 U.S. 576 (1989).

16 *Osborne v. Ohio*, 495 U.S. 103 (1990).

17 G. Anhang, "Separation of Powers and the Rule of Law: On the Role of Judicial Restraint in 'Secur[ing] the Blessings of Liberty'", *Akron Law Review*. 1991, vol. 24:2., p. 211.

make "a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach".[18] The Massachusetts court, however, did not decide whether the statute could be applied constitutionally, it only reversed Oakes's conviction. The case continued to the Supreme Court of United States, which led the Massachusetts legislature to amend the statute and narrow the scope of the statute to require "lascivious intent" to better balance the conflict with the First Amendment guaranteeing the freedom of speech. Supreme Court was, therefore, already deciding about a statutory provision that was no longer in force.

The decision of Supreme Court brings an argumentation for systematic measure to incentivize legislature to formulate rules as precisely as possible. The most relevant part of the decision is concurring and dissenting opinion to the judgment formulated by Justice Scalia, joined by four other judges, in which he looked from the perspective of economic model and considered gaining a conviction of a person violating the statute as a right of the state. As an interest of the state is to prosecute and convict as many situations of law violations as possible, it is motivated to act in a way to do so.

If a statute is declared to be overbroad, state loses a conviction which it would otherwise have had. Justice Scalia stated: "*If no conviction of constitutionally proscribable conduct would be lost, so long as the offending statute was narrowed before the final appeal, legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place.*"[19] Therefore, legislature enacts overbroad statutes at the cost of having the first person convicted under the statute who successfully mounts as overbreadth challenge go without punishment. This cost deters legislature from enacting overbroad statutes.[20] The purpose of a right of protection under this doctrine is, therefore, not just protection of rights of individuals, but it is a systematic tool to incentivize legislature into writing better statutes. Justice Scalia further adds: "*It (is) strange judicial theory that an act which is lawful when committed (because the statute that proscribes it is overbroad) can become retroactively unlawful if the statute is amended preindictment*." The Supreme Court decided to send Oakes's case back to a lower court to determine if his conviction should be upheld under the original statute.

In *Osborne v. Ohio*, the situation was slightly different. The defendant was found with four photographs of a nude male adolescent in sexually explicit positions and was convicted under an Ohio state statute for "possession or viewing of any material or performance that shows a minor who is not the person's child or ward in a state of nudity". Ohio Supreme Court confirmed Osborne's conviction after an intermediate appellate court did the same. It did so by trying to cure the Ohio statute by choosing

18 Cited from the decision of Massachusetts Supreme Judicial Court, 486 U.S. 1022 (1988).

19 *Massachusetts v. Oakes*, 491 U.S. 576 (1989), concurring and dissenting opinion of Justice Scalia, joined by Justice Brennan, Justice Marshall and Justice Stevens, §1, p. 586.

20 G. Anhang, "Separation of Powers and the Rule of Law: On the Role of Judicial Restraint" *in* "Secur[ing] the Blessings of Liberty'", *Akron Law Review*. 1991, vol. 24:2., p. 215.

to read the statute narrowly and apply it only to "the possession or viewing of material or performance of a minor who is in a state of nudity, *where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals*, and where the person depicted is neither the child nor the ward of the person charged". The court basically construed the statute to avoid overbreadth problems and then applied the statute, as newly construed, to past conduct.

The case went to the Supreme Court of United States and above other arguments, Osborne argued that arguments presented in *Massachusetts v. Oakes* stand for a similar but distinct proposition that, "when faced with a potentially overinclusive statute, a court may not construe the statute to avoid overbreadth problems and then apply the statute, as construed, to past conduct".[21] In a way, the argument is the same as in *Massachusetts v. Oakes* that if a legislature could count on a court to adopt a saving construction as it could count on its own ability to amend the statute, a legislature would have less incentive to draft narrowly tailored laws in the first place.

The Supreme Court, however, concluded that courts routinely interpret statutes narrowly to avoid the potential overbroad.[22] And to react on the systematical incentive for the legislators – legislators know that they can cure their own mistakes by amendment without any significant cost.[23] That does not apply for the saving construction by the judiciary "*because the legislatures cannot be sure that the statute, when examined by a court, will be saved by a narrowing construction rather than invalidated for overbreadth*."[24] As a legislator can never accurately predict whether a court will be willing and able to adopt a saving construction, it is, therefore, still incentivized to make unambiguous and clear rules. The Supreme Court still reversed Osborne's conviction and returned the case to lower courts, but that happened because of other due process infringement reasons as the Supreme Court explicitly refuted arguments from *Massachusetts v. Oakes* that Osborne was trying to relate on his case.

Overbreadth doctrine is an example of how common law system is able to develop and apply systematic measures to support important principles of democratic legal state. To compare with civil law system example of a measure similar in its consequences, Constitutional Court of the Czech Republic may annul statutes or their individual provisions if they are in conflict with the constitutional order. We can differentiate between an abstract constitutional review, i.e. the process of determination of compliance with a constitution and other constitutional documents

21 *Osborne v. Ohio*, 495 U.S. 103 (1990), §2, p. 119.

22 *Ibid*.

23 *Ibid*, §2, p. 121.

24 *Ibid*.

without a reference to a specific case, which might be started e.g. by a group of senators or by a president, and a concrete constitutional review.[25]

As overbreadth doctrine is an individual defense mechanism, the further focus will, therefore, be on concrete constitutional review – a process of review when a possible constitutional violation is identified in a particular case. Even in a case of concrete review, there is a possibility to annulate the statutory provision or the whole statute – it will, therefore, have broader effects than just on the parties of the dispute. According to the article 95(2) of Czech Constitution: "*Should a court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court.*"[26] Even a court of first instance can, therefore, start this proceedings to annul a statute without the need to go through the whole judicial system and the case can go directly to the Constitutional Court.

But the most common start of the proceedings is §74 of the Constitutional Court Act[27] according to which any person filing a complaint to the Constitutional Court (typically to challenge the final decision of the Supreme Court) may also adjoin a petition proposing the annulment of a statute or its individual provision application which resulted in the situation that is the subject of the constitutional complaint.[28] But from there the situation is much simpler than in the described cases from United States. A complainant may basically argue with anything that might help his case. Whether they are facts of his own case or hypothetical scenarios in which statutory provision might be unconstitutional.

Furthermore, the position of a complainant is strengthened even by the fact that the Constitutional Court is not bound by the scope of review formulated by the complainant. Based on the principle *iura novit curia*,[29] the Court may apply even provisions that complainant or other parties did not argue with.[30] And above all

25 Cf. H. Spector, "The Theory of Constitutional Review", *in* M. A. Jovanović, *Constitutional Review and Democracy*, Eleven International Publishing, 2015, p. 33.

26 Article 95(2) of the Czech Constitution, statute no. 1/1993.

27 §74 of the Constitutional Court Act, statute no. 182/1993.

28 Cf. Czech Constitutional Court decision No. I. ÚS 740/15 from 27th June 2017, §8: "*the right of a complainant to do so is dependent solely on the fact that by applying the statute or its individual provisions caused the situation which is subject of the constitutional complaint*".

29 Meaning "the court knows the law", sometimes expressed also as "give me the facts and I shall give you the law". This principle typical mainly for civil law countries implies that once the facts of the case were proven, the legal consequences of those facts are to be evaluated solely by the court as it is its responsibility to apply the law. While parties might present their opinions about the legal norms relevant for the case, their main role is in furnishing facts of the case, judge will later establish the law. "*In the English, Irish and Scottish systems, on the other hand, the court has a less active, or even a passive, role: the procedure is generally based on the assumption that the court has no independent knowledge of the law, that it is dependent upon the submissions advanced by counsel for the parties, and that its function essentially is to adjudicate on the exclusive basis of their submissions.*" Opinion of Mr Advocate General Jacobs delivered on 15 June 1995 in joined cases of Court of Justice of European Union C-430/93 and C-431/93.

30 Czech Constitutional Court decision No. II. US 2027/17 from 7th August 2017, §11, which quotes

that, even if the complainant did not pursue to strike down statutory provision and just proposed the Court to declare unconstitutionality of decision against him and to abolish this decision, the Court may on its own conclude that the statute or some of its provisions are unconstitutional and should be annulled and start a procedure of the annulment described in §78(2) of Constitutional Court Act.[31]

What above mentioned means is that a complainant might make hypothetical arguments to add more reasons of unconstitutionality of the provision, even though these arguments do not apply for himself personally as he is not in a situation he is describing.

To provide an example, the Constitutional Court was reviewing constitutionality of regulatory fees for medical services and concluded on their unconstitutionality and annulled some of statutory provisions in the statute that enabled them.[32] The main argument that caused the annulation was that the fee can put a disproportionate burden on some groups of population. For the purpose of this article let's assume that this case would not be an abstract constitutional review started by the group of deputies of the Parliament, but the case would be commenced by the individual constitutional complaint. Let's further assume that the complainant would be actually very successful financially and the argument for the disproportionate burden on some groups of people, which was the main reason for the annulment of the statute, would not apply for him.

The argumentation that would speak directly for the complainant would be based on his right for free healthcare,[33] but as Constitutional Court made a parallel in its reasoning to its previous decision on review of the conditions of providing free textbooks for students,[34] where it stated that the concept of free education (also guaranteed by the Constitution, same as free healthcare) cannot mean that the state will bear all the costs that are connected with benefiting from the right to education. The Court argues for the same in the analyzed case.[35] If a complainant would be able to use only arguments relevant to him, he would not be successful. But as he can provide any reason of unconstitutionality, the argument of a disproportionate burden on some groups of people in the society will play in his favor, the relevant statutory of provisions will be abolished and the complainant will win the case de-

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also Czech Constitutional Court decision No. Pl. ÚS 37/04 from 26th April 2006, §54.

31 §78(2) of the Constitutional Court Act, statute no. 182/1993: "*If in connection with deciding a constitutional complaint, a Panel comes to the conclusion that a statute or some other enactment, or individual provisions thereof, the application of which resulted in the situation which is the subject of the constitutional complaint, is inconsistent with a constitutional act, or with a statute, if the complaint concerns some other enactment, it shall suspend the proceeding and submit to the Plenum (…) a proposal for the annulment of that statute or other enactment (…)*"

32 Constitutional Court decision No. Pl. ÚS 36/11 from 20th June 2013.

33 Constitutional Court decision No. Pl. ÚS 36/11 from 20th June 2013, §37 and onward.

34 Constitutional Court decision No. Pl. ÚS 25/94 from 13th June 1995.

35 Constitutional Court decision No. Pl. ÚS 36/11 from 20th June 2013, §41.

spite the fact that he is not in the group that Constitutional Court wants to protect the most.

More than that – Constitutional Court can annulate the statutory provision even if claimant did not propose to do so. It can also analyze the argument of disproportionate burden on some groups in the society, even though the claimant did not use the argument on his own. Practically speaking, it is, of course, always better to give all the relevant arguments to a court as that increases a chance of favorable decision. But from a strictly formal perspective – Constitutional Court can overstep the scope set out by the claimant and go through unlimited constitutional review of the statute in question.

It seems, therefore, that the scope of constitutional review in the Czech Republic is considerably broader than in the United States as the overbreadth doctrine is an exception broadening the general scope of review in the United States, while the review by the Constitutional Court of the Czech Republic applies the same, maybe even wider, scope as a general rule for any kind of case, not just of cases including freedom of speech.

3. Separation of powers as systematic tool to increase legal certainty

George Anhang perceives that John Locke's main criterion of the rule of law is to put an emphasis on a person's certainty about what the law requires. He bases this argument on the fact that in Locke's perspective chilling speech is bad for same reason as chilling any other legal behavior – it is an infringement on personal liberty.[36] It is possible to agree with the fact that Locke's formulation of division of power has its goal in improving equality and liberty of individuals, same as good of any commonwealth.[37] Same goes for Charles de Montesquieu who stated that when powers in a state are united in the same person, there can be no liberty.[38]

The separation of powers is an instrument by which society may increase the likelihood that each citizen will be certain as to what he may and may not lawfully do.[39] The argument arising from the above shown examples support the thesis that separation of powers between judiciary and legislation promotes rule of law doctrine and legal certainty, because the more often a court will adopt a saving con-

36 G. Anhang, "Separation of Powers and the Rule of Law: On the Role of Judicial Restraint", *in* "Secur[ing] the Blessings of Liberty", *Akron Law Review*. 1991, vol. 24:2., p. 218.

37 Cf. J. Locke, *Two Treatises on Civil Government*, London: G. Routledge and sons, 1887, cited version of McMaster University Archive of the History of Economic Thought, available online: https://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf, p. 161, §131.

38 Ch. Montesquieu, *The Spirit of the Laws*, New York: Hafner Publishing Company, 1949, p. 151-152.

39 G. Anhang, "Separation of Powers and the Rule of Law: On the Role of Judicial Restraint" *in* "Secur[ing] the Blessings of Liberty", *Akron Law Review*, 1991, vol. 24:2., p. 218.

struction of a vaguely defined statute, the more certain legislature will be that the statute will be cured, and in turn, the more often it will tend to overlook vagueness and other deficiencies when drafting a statute.[40]

The situation is, however, more complicated than that. The difference between a case of the limitation period and retrospective application of the changed case law is significantly different from two United States cases – *Massachusetts v. Oakes* and *Osborne v. Ohio*. It cannot be omitted that the separation of powers argument is much stronger in criminal law cases than in cases of private law. The reason is that if we look at convictions for criminal offenses as goods that a state is trying to maximize,[41] we cannot see the same simple incentive for the legislative power in private law cases. If a court encounters a vague provision in criminal proceedings, it drops charges against defendant. This way, it has a choice not to apply this vague provision. But in civil law cases, there is no easy choice like this. The court must choose from a several possible interpretations of a vague provision or not apply the provision at all. Either way, the damage will be done to one party or another, because one of them will have to bear the consequences of a negative decision, and both of those parties will suffer additional harm coming from the decreased legal certainty, lowered predictability of a decision and also breached legitimate expectations.[42] That is the reason why the separation of powers consideration will never be as effective in private law disputes. In criminal and administrative law, it is effective because a state is in a superior position to an individual. In private law disputes, there is either no state at all, or if it is, it has an equal position to an individual due to the principle of equality in the private law. As long as the exception from this principle will not be construed to provide further incentive for a state to construe its rules better, the separation of powers, as a most effective tool usable by judiciary to increase legal certainty by incentivizing legislature to construe clear and precise rules, is not usable to its full potential.

40 *Ibid*, p. 219.

41 Let's, of course, assume that the goal of a state is not to put all of its citizens to prison, but rather that those convictions are based on criminal legislation that has its rational reasons in criminalizing certain behaviors that are demonstrably harming to the society and its members.

42 Dworkin also analyses this situation and states: "*If a judge makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the event*"(R. Dworkin, *Taking Rights Seriously*, Cambridge: Harvard University Press, 1978, p. 84), but he explains (p. 86) that we can look on that situation also from different perspective: "*If the plaintiff does indeed have a right to a judicial decision in his favor, then he is entitled to rely upon that right. If it is obvious and uncontroversial that he has the right, the defendant is in no position to claim unfair surprise just because the right arose in some way other than by publication in a statute. (...) if the court decided that on balance the plaintiff's argument, then it will also decide that the plaintiff was, on balance, more justified in his expectations*." The situation is less sensible when a new rule is formulated in case when it is a state standing against an individual. Vague legislation is attributable to a state and an individual benefits from reasonable expectation and relying on it. In situations of two individuals in a court dispute, the more delicate approach is needed. Dworkin, however, showed that even in this situation the creation of a new rule is not unjust, and it is compliant with the principles of legal state.

The consequences of making an exception from the principle of equality would amount for another full article, but I will at least shortly react on the possible objection that by using this measure we hinder state's efforts to fulfill its goals in general. The state has a lot of agenda and reasons of existence, as we know from works of the previously mentioned works of Locke and Montesquieu. The possible argument might sound that some degree of vagueness in legal norms will be always present and by penalizing state for something that is not completely eliminable in proceedings in which state has a standing legal claim and is in the rightful situation, is undermining state's efforts because it is depriving it of funds necessary to do so. That is a reasonable objection. The exception would definitely have to be formulated in a way that it would not make it impossible for state to fulfill its function. Legal certainty is not the only principle, and it is not an absolute principle. We call our states democracies with respect to human rights with the rule of law (or legal state in *civil law countries*). Legal certainty is one of the principles of rule of law. The benefit from increasing this principle has to be balanced with the detriment to every other principle and to state's policies. The following formula must apply:

> benefit from increased legal certainty ≥ detriment on other principles and policies

To conclude the article with the last comparative note – even though the argumentation on separation of powers was ubiquitous in the analyzed decision of the Supreme Court of United States –, it did not take its place (at least not explicitly) in the decisions of the Czech Constitutional Court. It is a lost opportunity. On the one hand, Czech court system provides individuals with stronger procedural guarantees to defend their constitutional rights against legislature's actions. On the other hand, such a strong emphasis on incentivizing legislature to construe better rules in the future is not apparent. It would not be legitimate, however, to conclude that even this approach does not have an effect on legislature as it sets boundaries for how far legislation can go while restricting constitutional rights. At the same time, it gives judiciary almost unlimited power to review statutes and it might be possible to argue that it disbalances the system of separation of powers too much on the side of judiciary.

Legislative power representing the people through the process of election is supposed to represent a set of political opinions and ethical norms that it is supposed to formalize into the rules of law. To do so, it has democratic legitimacy. Legitimacy of judges to formulate rules like that is very limited.[43] Even though the

43 While making legislation, pluralism as an ethical system takes place. Politics a way how to balance different values that are colliding with each other. Cf. R. E. Goodin, K. Spiekermann, *An Epistemic Theory of Democracy*, Oxford: Oxford University Press, 2018, p. 206. The problem of which value should prevail in an individual situation has just one correct answer in democracy – voting. That does not have to mean a general referendum, but it must be choice of the people at least by representation. A representant of the people in democratic states is legislative power. If these ethical conflicts are solved by the judiciary, it is a violation of separation of powers. Sometimes, no one else

goal of judiciary and individual judges is to abstain from considering its own personal values, judges are just people and it is not possible to completely avoid doing so. Values of unelected judges brought to a legal order through the process of legal interpretation will always be burdened by democratic deficit. However, the whole process is unavoidable and is not generally problematic, if the system is balanced by 1) the legislative power not formulating rules that are too vague, which gives judiciary disbalancing amount of power to basically make their own rules, and by 2) the judiciary making structural and systematical moves to incentivize legislative power to make rules that will not be found unconstitutional.

The principle of separation of powers is truly an important tool to protect freedom and liberties of individuals. As a consequence of its application, values of democracy, human rights and legal state are empowered and protected.

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but legislature can be blamed as in private law, courts cannot refuse to decide a case brought to them, that would be against the principle of prohibition of *denegation iustitiae*. Whether courts interpret a vague provision or whether they ignore it and apply another one, they are always bringing values to the law that have previously not been there. Sometimes, it is a violation by the judiciary, when it forgets its place in the constitutional system and solves the conflict brought to it, even though this conflict should not be solved in a court room, but in a parliament.