

## Systematic versus Casuistic Approach to Law: On the Benefits of Legal Casuistry

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*Abstract:* The period of 16th to 18th centuries has brought about significant changes in legal thought. In addition to looking for a system in conflicting Roman law and Canon law texts, late scholastics formulated the first general rules (regulae) that they derived from the Roman case law and which were to become the nucleus of current, predominantly systematic, approach to law in Europe – applying the rule prescribed by law, court practice or legal science onto the facts of the case via the so-called legal syllogism method. And although in the mid-20th century there were also attempts to reinvigorate the casuistic approach to law known previously in the ancient Rome and in medieval moral theology (revived through Viehweg's topics or Perelman's new rhetoric), these efforts have ultimately not changed the prevailing way of legal thinking. However, current technological challenges as well as strongly perceived ambiguity of law, especially in the so-called hard cases (the most difficult legal cases), where there is no clear legal solution to be found in legal norms, the approaches and methods of problem-based (casuistic, topical) legal thinking resurface again. There seems to be thus a need for a new (and indeed beneficial) reconsidering of legal casuistry, helping to address the so far unclear legal problems, arising more often than ever before. This sort of new legal casuistry can be thereby built on the foundations taken from Roman law as well as from ethics, more specifically from the early modern moral theology.

*Keywords:* casuistry, systematization of law, moral theology, cognitive studies

## 1. Introduction

The currently prevailing systematic approach to law can be perceived as the victory of 19th-century legal thinking, based on Kant's concept of law. At the turn of the 18th and 19th centuries, the idea of axiomatization of law and of legal science *more geometrico* was namely abandoned as an unsuccessful attempt, being criticized on grounds that some of the axioms were legal, while others were moral, as demonstrated by Immanuel Kant: "As Kant's critical philosophy eventually pointed out with merciless clarity, each of these elements was of a different nature and therefore required different thought processes. Mixing up these elements, therefore, led to hopeless methodological confusion." (Reimann, 1990, 844). Thus, Kant was the one who brought decay and rejection of the geometric method in law, while at the same time, his name is also associated with an attempt to create a new form of legal science and legal thinking – on non-geometric and non-axiomatic foundations. In order to be a true "science", Kant suggested to deal instead of "things themselves" with positive law only, as a manifestation of phenomenal world, while this law was to be given a specific scientific systematization (Ibid., 846–847).<sup>1</sup>

This was to be constructed by the incoming German Historical School of Law based on analysis of historical (especially Roman and Germanic) law. Afterwards, the individual abstract legal concepts were further developed by the Conceptual School of Law and pandectists, peaking in the school of legal normativists in the first half of the 20th century. However, similarly to the failed axiomatization of law in the 17th and 18th centuries, the positive systematization began to show several shortcomings soon (see *infra*), which were addressed in the 20th century by rejection of formalist normativism and by re-introduction of natural law principles, as well as by realist and psychological approaches to law, with related doubts as to the possibility of "one right answer" in law.

In addition to the standard, traditional – systematic – approach to law, supplementary theories have been formulated in the mid-20th century to make up for the deficiencies of the concept of a closed system of law either by attempting to construct law as an open system (Canaris) or by introducing problem-based thinking into law – so-called *Problemdenken* (in Viehweg's topics). However, these authors and their solutions were not entirely original. E.g., the topical view and *Problemdenken* were already used by ancient Greek philosophers (cf. Moro, 2015) and ancient Roman lawyers

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<sup>1</sup> In contrast, common law is still not systematized and is to a greater extent empirical compared to continental European legal systems (Spector, 2004, 261).

as part of their triple function of *cavere, agere, and respondere* (Otte, 2006). Viehweg himself was aware of these ancient roots of his ideas. However, similar (problem-based) medieval thinking was completely disregarded by Viehweg and others in this context, especially the thinking elaborated in canon law and moral theology, where a priest-confessor acted in a function similar to that of a legal counsel (attorney), seeking for correct solution to a problem of potentially sinful behaviour (cf. Jonsen and Toulmin, 1988).

In this paper, we shall try to compensate for this omission – starting from the historical problem-based approach known in ancient Rome and going through the early modern casuistry present in moral theology, we shall finally attempt to offer a “realistic” view on solving current legal problems for which there is no unanimous solution. It is namely clear that fast societal and technological development contribute to emergence of numerous “natural deficiencies” of legal systems, including foremost their porous nature. Both law and ethics share the current need for searching ways to respond to the challenges brought about by sudden changes in both society and technology. In ethics, especially in bioethics, one of the approaches proposed in this respect is a casuistic approach, especially since classical principlist or utilitarian views on ethics seem to fail in providing an answer to numerous bioethical dilemmas. Obviously, lawyers could react in the same way as ethicists – where there is no clear solution to new legal issues, the topical argumentation or legal casuistry might offer a solution, meaning a case-by-case approach, looking for an ideal solution for each particular case, until explicit legal regulations or unambiguous principles for dealing with such cases will be provided by legislators or legal scholars.

In order to develop such a case-by-case approach to legal issues raised by quick development of our societies and modern technologies, we shall offer in this paper an introductory comparison of the traditional systematic approach to law (which is characteristic of the 19th and 20th centuries’ legal systems in Europe) with the revived casuistic (bottom-up, topical, argumentative-rhetorical) approach, deemed useful particularly in controversial and currently under-regulated issues associated specifically with the challenges of modern societies.

## **2. Systematic Approach to Law**

The scholastic legal science taught at the medieval universities as a theoretical discipline (cf. Meder, 2008, 55) met all the contemporary demands for a scholarly discipline and constituted one of the fundamental university disciplines. However, it still did not represent a seed of modern way of legal thinking; the theoretical legal education cultivated in universities differed

from the present legal scholarship and legal thought foremost in that it did not examine the law of a particular state or its implementation and application in practice. It was in fact not really related to legal practice at all.

The legal scholarship, born and developed in European conditions especially at the medieval universities, nevertheless opened the door for a modern idea of law. This materialized in the period of absolutism, starting from the 16th century onwards, when the rulers started representing the state monopoly of law-making. University-educated lawyers, by becoming the bureaucrats of absolutist states (rulers) started soon thereafter with transplanting their theoretical concepts of law into the sovereign's newly issued laws – in accordance with Halperin's theory on the role of lawyers in creation of modern legal systems (Halpérin, 2014, 187–188). Law was thus soon transformed from a “learned” idea to a practical regulatory reality, influencing the running of states and of lives of their peoples. The absolutist states of the 16th to 18th centuries namely tried to take over all instruments of social control, be it norms of municipalities, churches, guilds or other communities, traditionally being interpreted by local law enforcement authorities (local courts). These norms were to be replaced by and transformed into the law centrally issued by monarchs and interpreted by their judges acting as civil servants. Thus, the idea of law started resembling its current paradigm, the paradigm of the state-made law, law made by a designated law-making body, being interpreted and applied by judges appointed by the state itself. The hoped-for outcome thereby was that the law thus created would not even be interpreted by the judges, but only directly applied instead – for example, the Prussian *Landrecht* of 1794, with more than 19,000 paragraphs, instructed judges to address the Prussian sovereign in case of doubt and reserved for him the right of interpretation,<sup>2</sup> not unlike the exegetical concept in French legal system with the Montesquieu's idea of judge being only the mouth of the law – *la bouche de la loi*.

This change in the nature of law taking place in the 16th-18th centuries was of course followed also by changes in the nature of legal science. First of all, legal scholars gradually abandoned the traditions of Roman and canon law in favour of natural law, but also their methodological approach to law has significantly changed. The well-known philosopher and lawyer, Leibniz, may be seen as a typical example of this development (cf. Berkowitz, 2005). In addition to the fact that in his person the new mission of legal science as an instrument of absolutist ruler was being reflected (Leibniz was the

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<sup>2</sup> Preceded by the well-known *Müller-Arnold-Fall* from 1779, where the Prussian ruler Frederick II. advised the courts on how to decide the case of the miller Arnold, and upon their refusal he punished the judges by imprisonment.

author of the *Codex Leopoldus*, a legislative proposal never adopted by the ruler), Leibniz's work also offers a good example of the new scientific approach within legal scholarship. Leibniz has namely adopted a formalistic, systematic approach to law, being a rationalist, deductive approach, apparently trying to axiomatize law and legal science *more geometrico*. Thus, under the impressive advances in natural sciences, scholarly methods used in legal scholarship should have also been brought closer to other (notably natural) sciences, ideally using geometric and logical mathematical rules and principles. Leibniz, of course, did not remain alone in this endeavour – lawyers of the 17th and 18th century German countries followed him without major reservations.

At the turn of the 18th and 19th centuries, however, the idea of axiomatization of the legal science *more geometrico* began to be abandoned as an unsuccessful enterprise when it was accused that some of its axioms were legal, while others were rather moral, while each of these normative systems requires a different scientific approach, as demonstrated foremost by I. Kant (cf. Reimann, 1990, 842–843). At the same time, however, his name is also linked to the creation of a new form of legal science – supposed to deal only with positive law, which was to be given a scientific system (Ibid., 846–847). The German Historical School of Law has attempted to create such a Kantian system of law, drawing from historical (especially Roman) legal sources. The foundations of this approach were laid down in the first half of the 19th century by Hugo and Savigny. Later on, the individual abstract legal concepts and notions were further developed by the so-called Conceptual School of Law (*Begriffsjurisprudenz*) and by scholars known as pandectists, including foremost Puchta, Ihering, Vangerow and Windscheid (Ibid., 864–866). It might not be a coincidence that their procedures thereby consistently resembled scientific procedures used in chemistry – namely, the merging and separation of components (legal concepts) (Ibid., 883). The product and the culmination of this scientific approach is the German Civil Code, effective from 1900 until today, embodying formalist and systematic legal science in the Max Weber's *wertfrei* rendition.

However, similarly to the failed attempt at axiomatization of law, even this positivist systematization of law began to show a number of shortcomings very soon – in the form of gaps in law, ambiguity of law, abuse of rights and the like – to be compensated for since the mid-20th century (especially after the abuse of *wertfrei* law and legal science by totalitarian regimes) by natural law principles on one hand and by critical and realistic approaches to law, doubting the “scientific nature” of legal science.

As a correction to purely conceptual jurisprudence, schools began to be formed already since the late 19th century and then in the 20th century,

pointing to the need to take into account the purpose of law (Ihering), interests in law (Heck), sociological (Genes, Duguit, Ehrlich, Kantorowicz) and psychological (Petrazycki) elements in law, the importance of the personality of the judge (legal realism), or the values and principles in law (Alexy).

Still, however, legal thinking is being dominated by a positivist approach to law that focuses on the text of laws foremost – applying the text of the law onto the facts of a case in the procedure known as legal or judicial syllogism.

Thus, in most legal textbooks students even nowadays read that legal decision-making is divided into (more or less) the following steps:

- 1) Analysis of the facts of the case;
- 2) Finding (a) and interpretation (b) the law;
- 3) Conclusion in the sense of syllogism (Prümm, 2011, 1239 ff.).

Thereby, already the movement of legal realists in the USA pointed out the fact that brute facts of a case themselves need to be interpreted, influencing thus the actual application of law and the final decision of the case by the court. However, analysis of the facts of the case never really played a role in the academia. Emphasis is instead being put on finding the relevant legal norm. H. P. Prümm thereby acknowledges that in reality, never one norm alone answers the legal question; instead one has to construct a so-called decision-norm from several legal norms, he claims. The construction of such decision-norm can be sketch in the following form:

*Answer-norm + Helping norms + Counter norms = Decision-norm* (cf. Prümm, 2008, 37)

However, sometimes not even reading down the norm does lead to a practicable or reasonable result, and often neither reducing the scope of the words nor interpreting the words in a broad sense helps. Here, legal methodology offers other instruments for a legal decision-making: a) filling of statutory gaps and b) correcting legal defects (Prümm, 2011, 1242). These methods are exclusive exceptions that can only be justified when they are inevitable (Ibid.).

Finally, concerning the step of application of law onto the facts, the classical approach emphasizes the logical-systematic application of law, as a sort of analytic-deductive derivation, within the quasi-mathematical application, known as syllogism – e.g.:

First/ major premise: A person who commits the crime of murder is liable to imprisonment for life.

Second/ minor premise: M murdered F.

Conclusion/ result: M gets life imprisonment.

However, as already pointed out above, both the construction of facts in the minor premise as well as the interpretation of law within the major premise

show a number of traits which may lead to an overall different formulations of the two premises, leading to a completely different conclusion. Thus, the apparent logical system of application of law is not explaining how the law actually works in practice. This is yet more true specifically in those cases where the major premise itself is lacking and needs to be constructed first (e.g. due to the novelty of the problem emerging in legal practice), or where the facts of the case are unclear or can be interpreted in various ways. Accepting this leads to the overall need for compensating for the deficiencies through some other approaches to law, including the topical (rhetorico-argumentative), problem-based or casuistic approach to law, taking into account the specificities of each particular case instead of applying general rules in the logical sequence of steps within the traditional view of application of law.

### 3. Casuistic Jurisprudence

The emergence of legal profession and legal science has traditionally been associated in legal historiography with the ancient Roman empire (Schulz, 1946), and with the rediscovery of Roman legal science in the Middle Ages (starting from the 11th century). Generally, legal historians namely believe that it was the ancient Romans who first, unlike the Greeks, distinguished between legal and extra-legal norms (Gagarin and Woodruff, 2007, 7). Some recent research views, however, disagree with this concept, and in a critical sense claim that distinguishing between legal and extra-legal norms in today's sense does not hold even for the ancient Romans. Namely, while legal historians and legal Romanists mostly pay attention to Roman private law only, which is being perceived as an inspiring pattern for further development of medieval, but also of modern law in continental Europe, Roman public law is being almost completely neglected. The public law of Roman empire thereby seriously compromises the image of strict distinction between legal and extra-legal (especially religious) norms (Kantor, 2012, 59). In addition, Romans also lacked the concept of hierarchy of legal norms, even in contrast to the Athenians, whose laws already in 403 BC introduced a rule that *nomos* can not be changed by a decree (Ibid., 72). Furthermore, Roman law was developed only by theoretical lawyers who did not always have a direct impact on normative (legislative) and judicial practice. Roman classical lawyers were namely “only” theorists who advised their clients on how to avoid legal problems – Roman legal science was therefore also called *cautelar*, since its representatives advised to exert caution (*cautela*) mostly. Opinions of these lawyers were not legally binding, although in practice they might have influenced the magistrates in drafting laws and edicts (Čipkár,

2008, 113). Finally, the differences between Roman lawyers and modern lawyers also include the fact that Roman lawyers mostly did not apply general standards to a particular case, since a predefined set of standards did not exist in the form as we are used to today. Rather, they were trying to find the most appropriate solutions for specific problems. Such an approach is labelled as “casuistic” or being a “casuistry”, in fact being a problem-based approach to law, as opposed to today’s “systematic approach” (Honsell and Mayer-Maly, 2015, 138). Summarizing this main principle, the Roman lawyer Paul wrote: “*The law can not be derived from a rule, but the rule must come from the law as it is.*” (D 50.17) (cf. Cairns and du Plessis, 2010, 1).

Only upon collecting the individual legal solutions, in the 6th century AD, in the post-classical Roman law period, the Justinian’s Corpus Iuris Civilis was created, which soon started to be considered a “code” (and a source of inspiration for barbaric “codes of *leges*”), containing answers to specific legal issues. However, the decline in education has subsequently led to substantial simplifications of this “codification” and to its replacement by more brief and compact works.

Classical Roman legal science thus differed considerably from our current legal scholarship (being casuistic instead of systematic), but also from the medieval, scholastic legal science which used a specific method – trying to reconcile disagreements within the norms of Corpus, hoping to “scientifically” solve the contradictions just as in case of contradictions found in canon law (Gratian’s decree is therefore called “*Concordia discordantium canonum*”), or contradictions between Roman and canon law (Hsin, 2017, 14–15). However, even the “casuistic” or “topical” approach to solving disputes where there is no specific regulation did not disappear in the period of medieval scholarship. It only moved primarily to the field of moral theology, which attempted to respond flexibly to moral problems of believers, realizing that only a fraction of possible behavioural variations was regulated by “law” (the Holy Scripture), and the question of what is permitted and what is not was thus often to be solved by theologians and priests (confessors) themselves, introducing numerous theories differentiating between the degree of risk of “illegality” or, on the contrary, the degree of adherence to the “law”, being called the theories of legalism, probabilism, probabiliorism, aequiprobabilism, or tutiorism.

Casuistry in this period (and also in the early modern period) thus acquired strong ties with morals (ethics). That is the reason why when looking back through centuries, the Sophists’ casuistry is sometimes not even considered a proper casuistry, acknowledging only Aristotle’s narratives as those which opened the door to proper casuistry. After Aristotle, the Greek casuistry became even more refined, and more integrated into law, as witnessed in the

works by Cicero.<sup>3</sup> The original Greek casuistry thus mixed with elements of Roman and canon law argumentation, and Patristic and Thomistic theology and morals, leading finally to the outcome of fully developed confessional manuals, used in medieval and early modern era throughout Europe and Christian world.

The so-called era of high casuistry thereby began with the publication of Martin Azpilcueta's *Handbook for Confessors and Penitents* and ended with Blaise Pascal's (1623–1662) *Provincial Letters*.<sup>4</sup> The chief promoters of casuistry itself were most notably Jesuits, who were trained in disputation and logic (Calkins, 2014, 8–15). However, later on, even protestant casuistries emerged (cf. *Ibid.*, 141).<sup>5</sup> Casuistry eventually fell out of widespread use in Europe in the Enlightenment period, when casuists were often accused of being able to pardon even a murder, based on the subtle arguments voiced in the manuals.<sup>6</sup> Even so, casuistry did not die out altogether. It lived on to re-emerge later (Calkins, 2014, 141).

Throughout its heyday, but also thereafter, the impact of casuistry on law was very significant throughout Europe. During this era, casuistry was often employed to resolve problems related to the Church's authority over the consciences and social behaviour of believers and also in cases when ancient Roman law failed to offer clear solutions to new problems (cf. Jonsen and Toulmin, 1988, 47, 52–53, 101, 113–121.). The casuistic method has been especially widely adopted in the common law countries where the judges have had and continue to have more discretion in the administration of law, and where the principle of equity has been always respected. The casuistic method namely provides an ideal pattern of judicial reasoning. The place of abstract moral and legal principles in making judgements, attention to the circumstances, appeal to reason, different ways of interpretation of the

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<sup>3</sup> The rhetoric works of Cicero contained a sample of future casuistic analysis of cases: concentration on the issue, establishment of relevant moral principles and rules held by conscience, presentation of a set of arguments, and the emphasis on particular circumstances of the case (Shytov, 2001, 76).

<sup>4</sup> Sometimes dated until the work of Alphonsus Liguori (1696–1787), one of the most prominent theologians in the post-Reformation period of the Roman Catholicism.

<sup>5</sup> The same situation was present even in Eastern Europe. E.g., Hungarian scholar, Tapolcsany, studied and later taught moral theology (in Tyrnavia, northern Hungary), which actually represented a general legal theory at that time. In his book *Centuria casuum ex academicis qua decretalibus qua theologis praelectionibus* (Tyrnavia, 1728), he also dealt with issues relevant to secular legal practice – e.g., in case 5 – whether the law is valid even if it has not been approved by the people, cases 17 and 20 on the self-defense, 18 on contractual relationships, 41 on the extent of the debtor's obligation in the case of devaluation of money, and, 45 on the contract with a murderer. Thereby, he often noted that the moral and legal aspects are conflicting, but in his view, morality should always prevail (Rebro, 1968, 15).

<sup>6</sup> In a similar vein, lawyers and casuists were considered immoral (cf. Romeo, 2017).

established legal rules and new situations which were not envisaged by the lawgiver, all these have originated in the casuistic thinking, many authors agree (Shytov, 2001, 75).

The end of the flourishing casuistry approached when the idea of systematization of law and of its codification emerged. The core of the casuistic method namely lies in the idea that general rules, whether religious or legal, should be applied in a flexible way. Circumstances affect the applicability of the rules. Casuistry thus gives more freedom to decision-makers to determine how far the application of rules matches particular situations.<sup>7</sup> The second important idea is that when there is a serious diversity of opinion about what is the right course of action, casuists use a technique of comparing, and contrasting different opinions. Thirdly, the main interest of (Catholic) casuistry lays in exploring cases of doubt, understood as inability of the moral agent to give assent to either of two contradictory propositions. The task of casuistry was to resolve the doubt by investigation of the circumstances and by recourse to authoritative texts. Fourthly, confrontation was done between rules that were thought of as long settled and emerging conditions that apparently challenged those rules. The casuists tried to find a basic principle that would allow here the moral agent to choose a different way of action (Shytov, 2001, 78–79). The usefulness of the method of casuistry was thus seen foremost in the process of decision-making where the agent had a discretion in selecting the facts, in choosing the rules, or in determination of final legal conclusions to the dispute (Ibid., 82). Understandably, this sort of casuistic thinking was not acceptable in the world of absolutist states and monarchs in which an individual (including the judge) was to obey law without any discretion.

On the other hand, seeing the reasons for downfall of casuistry, one should not wonder nowadays in the era of postmodern doubts and crises of the legislative monopoly of states in the late 20th and early 21st centuries that the ideas of casuistry resurfaces again. Nothing else than reflection of the basic ideas of casuistry is namely also the current “legal realist” view of axiological gaps in law and of the defeasibility of legal norms (Guastini, 2010). In the same way, casuistry provides a ground for interaction of legal and extra-legal (originally moral/theological) approaches, helping to find a

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<sup>7</sup> For example, in the situation where officials have to apply a law which seems to be unjust in a particular situation, they are advised in order to escape the open conflict and disobedience to look for the exceptions allowed by the lawgiver himself or to undertake detailed scrutiny of the formula in which the law is expressed. The purpose of such a scrutiny is adjusting and factual amendment of the law (Shytov, 2001, 80). Just like in the medieval Satan’s trial, where Satan was a legal formalist, while the Mother of God was a casuist (Coulson, 2015, 409–430).

way which allows an agent (the judge) to solve a dispute in a fair and just way. The general approach shared by any casuistic theory is namely that one cannot decide which rule has to be followed until all circumstances of the case are taken into consideration. The way the circumstances are collected and considered thereby determines to a large extent the choice of a rule to follow and the final decision to be reached by the agent (Shytov, 2001, 83).

#### **4. Recent Attempts at Revival of Casuistry**

Although casuistry is relatively close to legal topics (Sanz Bayón, 2013, 83–108) as developed by Viehweg in mid-20th century, he himself only invoked Aristotle, Cicero, Vico and Hartmann's *Problemdenken* in his work. He completely omitted the medieval and early modern moral casuistry. Other authors, however, soon realized that Viehweg's topics is similar to casuistry, both being part of an overarching methodological approach to law that resembles the approach of common law judges in deciding cases and disputes (Launhardt, 2005, 1, fn. 5).

Viehweg was mostly building on Aristotle's search for places (*loca*) of certainty (*certitudo*) which were seen in legal scholarship by Viehweg in numerous premises and mottos (*topoi*), often taken from Roman law and medieval canon law, being applicable either in the whole legal system or at least in some of its branches (e.g., *pacta sunt servanda*). Viehweg thereby distinguished between the first-level topics (*topoi*), which the lawyers rely on intuitively, and the second-level *topoi* that require more detailed consideration and selection of topical "places" from a catalogue of *topoi* (Ibid., 38-39). This is clearly a forerunner to the cognitive distinction between fast/intuitive and slow thinking as evidenced later by D. Kahneman (cf. Kahneman, 2013). Similarly, modern cognitive studies point to a specific mechanism of legal thinking, again close to what Viehweg states, namely believing that experienced lawyers mostly think in basic principles (Cankorel, 2008, 168 ff.), premises, or *topoi*, rather than in detailed legal norms, which helps them to decide the relevant case in a faster and more efficient manner (see *infra*). This is thereby the way of thinking characteristic both for topical approach as well as for casuistry, which together challenge the direct application of legal norms onto the facts of a case, i.e. simple application of legal (judicial) syllogism – specifically in "hard cases". Both topical approach as well as casuistry, on the contrary, highlight the investigation of circumstances of each case and the search for an ideal solution to the case (problem), on the basis of identification of all the circumstances of the case, using analogy with other similar or contrast with dissimilar cases, through weighing of principles (*maxims*, premises), or through searching for places of certitude

(topoi) with the aim of an equitable and effective solution. Casuistry thereby does not attempt to elucidate or to appeal to principles directly when making judgments. It remains focused throughout its application on reaching moral (just) judgments that are actionable in concrete situations. Therefore, even in ethics where a sort of topical or casuistic thinking is mostly being employed nowadays, it is claimed that casuistry fulfils the main objective of ethics better than principle-based approaches that are more concerned with satisfying the demands of the theories that generate the principles than fulfilling the central objective of ethics (Calkins, 2014, 27).

In contrast, as John Arras explains, in casuistry “*ethical principles are ‘discovered’ in the cases themselves, just as common law legal principles are developed in and through judicial decisions on particular legal cases*” (Arras, 1991, 30, 33). In this understanding, casuistry is not a top-down process deriving from general concepts, but a form of bottom-up approach with principles having an “open texture” (Ibid., 29, 35), being “*always subject to further revision and articulation in light of new cases*” (Ibid., 35; Calkins, 2014, 30).

Casuistry as a bottom-up process does have one overarching goal, that is, to establish defensible judgments in particular situations. It does not bother to establish comprehensive theories nor try to derive conclusions having absolute certainty. Rather, casuistry draws upon previously settled cases to develop a defensible judgment about a contentious matter at hand. In this way, it is not a process that is aimless but one that is both purposeful and morally relevant, claims Calkins (Calkins, 2014, 45).

All these aspects were perceived as an advantage foremost in medial sector, where casuistry was brought into first (specifically in bioethics, cf. Paulo, 2015), because it blended well with standard medical decision-making processes. In medicine, critical judgments are namely made through an ongoing process of comparisons and decisions that have to be made quickly. In complex situations where multiple doctors are needed, each practitioner advances an opinion based on his or her prior experience. Opinions are framed in terms of the similarity to the present situation. The reasoning used is therefore analogical and the opinion rendered is an estimation based on what is probable but not absolutely certain. Medicine is in this way compatible with casuistry. But casuistry was retrieved for use in other disciplines as well: e.g., casuistry has an affinity with certain areas of computer ethics and journalism (Calkins, 2014, 65–69), respectively with ethics and morals in general. It is hence starting from ethics, moral philosophy and bioethics that we have to depart anew, should we wish to develop a new legal casuistry on solid foundations, re-introducing in this way an older paradigmatic approach to legal thinking in the era of crisis of systematic legal thought

that we all witness currently. Casuistry can namely provide us with a useful tool for legal scholarship and specifically for legal decision-making in the post-modern condition.

The revival of casuistry can thereby largely be attributed to Albert Jonsen and Stephen Toulmin (Jonsen and Toulmin, 1988), who offered a modern version of casuistry in their 1988 book “The Abuse of Casuistry”, matching the start of post-modern era. Many authors thereby recognized the close relation between casuistry and the reasoning in common law systems immediately. John Arras even called casuistry “morisprudence” and “common law morality” (Paulo, 2015, 374). Its applicability in the context of continental European legal systems still awaits its assessment, to which this contribution is but an introductory attempt.

To ponder upon benefits of casuistry for continental Europe, it is important to recall that casuists reestablished casuistry as an approach to ethical problems that focuses on paradigms and analogical reasoning in order to resolve questions about moral obligations in particular cases. Jonsen and Toulmin developed their new casuistry drawing heavily on the high casuistry of the Jesuits, while introducing three categories: taxonomy, morphology, and kinetics. However, before embarking on the three notions, it is necessary to place the casuistic approach to ethics next to its rival concepts of principlism (deontology) and utilitarianism (consequentialism), representing together three kinds of contemporary ethical theories (cf. Paulo, 2016, 111 ff.). Out of these three, consequentialism is a paradigmatic instance of top-down reasoning, starting from a very abstract moral principle and working down to particular problems (similarly as known and applied in jurisprudence). Casuistry, with its focus on moral experience and analogical reasoning with paradigm cases, represents the opposite way of ethical reasoning. It is a bottom-up approach, starting from particular cases and working up to more abstract moral rules, avoiding, as far as possible, talk of universal principles. Principlism combines elements from both the top-down and the bottom-up approaches (Ibid.). Its main methods are specification and balancing, similar to weighing of principles as recognized in legal scholarship by Dworkin and Alexy. However, in situations where principles or norms (rules) are absent, mostly in face of new societal and technological challenges, none of the top-down approaches can be of use; there, preference should be given to the only possible – bottom-up (casuistic) approach.

To sum up once again, the main features of bottom-up casuistry are the following: (1) the reliance on paradigms and analogies, (2) the appeal to maxims, (3) the analysis of circumstances, (4) the degrees of probability, (5) the use of cumulative arguments, and (6) the presentation of a final resolution (Ibid., 182). In addition to these six elements, the three mentioned

concepts of taxonomy, morphology and kinetics may play a role in casuistry, as proposed by Toulmin and Jonsen (Ibid., 182–206).

The morphology thereby consists of the “center of a case” and of the circumstances that “stand around the center”. The center is “*constituted of certain maxims, brief rule-like sayings that give moral identity to the case ... [Maxims] distill, in a pithy way, experience*”. Maxims are, however, different from the more abstract paradigms. E.g., when a paradigm is the general prohibition of killing, a maxim might be a saying such as “force may be repulsed by force”. The maxims are thus similar to the *topoi* and serve as the *loca* of certitude, based on which the arguments can be construed and a final decision reached (Ibid.).

The taxonomy is then the “lining up of cases in a certain order”. The starting point is usually a case that is a paradigmatic instance of rightness or wrongness within the relevant type. E.g., in case of killing, the line starts with unprovoked killing, then moving to less certain cases, e.g. cases of physician assisted suicide (Paulo, 2015, 375). The idea is, thus, to start with the “*most manifest breaches of the general principle, taken in its most obvious meaning [and then to propose cases that move] away from the paradigm by introducing various combinations of circumstances and motives that [make] the offense in question less apparent*” (Paulo, 2016, 183ff.). Thereby, when two or more paradigms apply in conflicting ways, they must be “weighed” or “mediated”. In fact, however, this is not comparable to the weighing of conflicting principles. Balancing principles within principlist approach to ethics itself resolves the case, while classifying a case into a particular paradigm<sup>8</sup> still does not give the final solution to the case (Ibid., 189–190).

It is then only within the so-called kinetics, where the circumstances get fitted to other “important social institutions” or “personal ideals”, thus appropriating or weighing them up (Paulo, 2015, 376). It means the relevant features get quantified and weighed in order to resolve the case (Paulo, 2016, 190–191). However, this may seem quite an unclear place in Jonsen and Toulmin’s theory of casuistry, raising doubts as to the overall concept of morphology, taxonomy, and kinetics in casuistry. Perhaps a more simple and instructive directive can be construed with resort to modern theories of argumentation with underlying concepts taken from cognitive sciences, that we shall introduce in the following, final subchapter of this paper.

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<sup>8</sup> Casuists claim that paradigms are rules that are more abstract than maxims; they are paradigmatic instances of rightness or wrongness. Examples for paradigms are sexual abuse of children, gratuitous care of the impoverished sick, and the general prohibition of killing (Paulo, 2016, 194).

## 5. Informal Logic, Modern Argumentation Theory and Cognitive Sciences

In Ancient Greece, two types of judicial speeches were distinguished. The purpose of the first kind, *genus rationale*, was to assess the general nature of an act in order to punish or reward the act (Socrates in his trial thus says he should be rewarded). The second category, *genus legale*, was based on the text and content of law, which was to be specified and applied onto individual case (Kraus, 2011, 53). This is clearly the forerunner of the relationship between casuistic and systematic interpretation in law and a starting point for the development heading into two separate directions, as explained in the first two subchapters of this paper.

Aristotle was still aware of the possibility of seeking arguments through a case-by-case (bottom-up) approach. In his work called *Topics*, he introduced dialectics as the art of finding different perspectives and arguments in any specific case. Dialectics in this sense was thus to be exploitable in several ways: First, it served as an exercise to gain the ability to discuss any problem. Second, it was exploitable to discuss an issue with any layperson, customizing the choice of arguments so as to make the layperson understand them. Third, it served to critically evaluate arguments and different views and to uproot unfounded concepts. Fourth, it allowed scientists to explore every phenomenon from all possible perspectives. And finally, it also allowed to explore the so-called *aporiai* for which there are two equally likely views. That is why Cicero, who said that Aristotle's *Analytics* is a work about *ars iudicandi*, i.e. formal logic, claimed that *Topics* is in contrast about *ars inveniendi* (Aristoteles, 1975, 19–21). The name “art of invention” was thereby used precisely because dialectics allows for discovery of premises and axioms applicable to the case (problem). It thus leads to the beginnings (axioms), in contrast to formal logic, which departs from axioms. Dialectics and logic hence do not clash with each other but rather complement each other.

The notion of dialectics is thereby still familiar even nowadays to those who are acquainted with the theory of argumentation, mostly in connection with so-called “informal logic”. Interestingly, socialist theory of argumentation and logic also recognized a special “dialectical logic” (based on Hegel and Marx), opposed to formal logic (cf. Knapp and Gerloch, 2000, 15 ff.). It was considered a sort of logic that examines thinking in a social context, being thus a sort of ecological logic, eco-logic. The dialectical logic, being a content logic, was therefore often openly claimed to be ambiguous, in contrast to formal logic (Knapp and Holländer et al., 1989, 22), and was to be mostly employed in non-deductive legal argumentation – as even nowadays claims

the Polish legal theoretician Krzysztof Szymanek (Szymanek, 2003, 33–44). But also Aulis Aarnio similarly stated that a good argument in law is always based on the culture of society that affects any legal discourse. However, he also pointed to the fact that a good legal argument must also be relevant, acceptable and verifiable (cf. Aarnio, 1977), although at the same time it may be defeasible (Brożek, 2014, 165–170; Prakken and Sartor, 2004, 118–39) – even should defeasibility be only the result of an activity of counter-parties to the dispute, and not an inherent feature of norms and arguments (Guastini, 2006, 284).

Of course, the informal or dialectical “logic” and the defeasibility of norms and arguments is closely related to the problem of systematic nature of law and of the “one right answer” in legal scholarship and legal disputes (Aarnio, 2011, 165–166). It namely undermines the concept of absolute certainty in law and of systematic and scientific nature of law, which is being questioned even in a situation where the decision-making body perceives the subject matter of the dispute in person (e.g., a referee in sports competition or in a match<sup>9</sup>), and, quite naturally, the more it is being questioned in a situation where a judge decides on the basis of information and arguments presented by the parties to the dispute *a posteriori*. All of this contributes to the doubts as to the possibility of systematization and axiomatization of law and as to the theory of “one right answer” in law. Instead, it becomes rather clear that if Aristotle rightly found the impossibility of axiomatizing ethics, the same probably applies also to law. This sceptical, but realistic approach to the category of so-called practical (phronetic, cf. Flyvbjerg, 2001) sciences is being widely embraced today – e.g. also by American legal pragmatists.

Based on the above, it becomes clear that even casuistry can never offer a one-and-only directive or instruction to decision-making in unclear (hard) cases. The suggestion is that legal “practical sense”, serving to decide a case, is only attained through professional experience. Another living strand of contemporary legal thought, virtue ethics, speaks in this respect instead of practical sense rather of intellectual virtues, but still with the same outcome: correct decision-making requires some sort of training – an expertise.

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<sup>9</sup> Consider the basketball example: “One referee calls a particular action a foul while another, with equal plausibility, does not. It is reasonable to argue that the referees do not disagree over the meaning of the word foul and they do not apply different rules. Nor is there a problem of vagueness. Rather, the difference is one of judgment concerning the factual situation in circumstances in which the facts are unclear. The facts may be clear to an omniscient basketball referee, Hercules, who would have no fact-finding difficulties (as human referees often do), and therefore even if another omniscient referee, Hercules II, were present, they would probably make a similar call on that particular action. It seems impossible that Hercules would call the action a foul and Hercules II would not, but in the world of sports and omniscient judges one wonders...” (Sinai and Golding, 2016, 480).

Expertise has thereby been defined as the ability to solve problems efficiently and accurately, which rests on two factors: a) the amount of knowledge and b) the quality of its organization. Put simply, knowing more does not make an expert. The distinguishing mark of an expert is the ability to organize one's knowledge in ways that permit to recognize patterns and retrieve information from the pool efficiently. This often requires "chunking" groups of information together and storing them in mental models with high levels of abstraction. The relationship between organization, abstraction and chunking has been paid detailed attention in the scholarly literature on expertise from the point of view of cognitive sciences (Ericsson and Smith, 1991; Cankorel, 2008, 171). Leading theories of expertise thereby argue that the main difference between experts and novices is the cognitive ability to access relevant knowledge efficiently, which is being achieved by classifying the expert's knowledge pool into various "chunks" and then by combining and using these.

It is thereby apparent that when solving a legal hard case, especially where specific circumstances of the case need to be taken into account in order to reach a "just" decision, resort to a deductive application of rules or principles does not apply (especially in a situation where there are none). Paradoxically, this is the case also when solving legal problems that have their solutions expressed in legal norms – even in the traditional (systematic) problem-solving, it is namely common in practice to use the expertise acquired through experience – either in the form of an intuitive fast-thinking (which can, however, be negatively influenced by cognitive biases), or in the form of slow thinking, taking form of applying chunks of knowledge in the form of organized pool of maxims and paradigms in order to reach a best fitting (and just) solution of the case at hand. This hypothesis working with the "practical sense" and "practical wisdom as a virtue", both being acquired by expertise, thus reconciles both systematic (top-down) as well as casuistic (bottom-up) approach to problem-solving, showing there is not much difference at the cognitive level when using the two different paradigmatic approaches (at least upon reaching a certain level of expertise in legal decision-making). Still, in case of new challenges not regulated by prior laws nor principles, only the latter paradigmatic approach – i.e. that of casuistry, is viable to solve the hard case at hand – interestingly, while using similar cognitive operations as when solving a case within the systematic paradigm.

## **6. Conclusions**

If we proudly accept the heritage of Roman law, it must be remembered that the formal approach of Roman lawyers to solving legal problems was

fundamentally different from what we are accustomed to today – they did not to try to apply general laws or norms on a specific case – a set of standards to be applied namely did not exist in the classical period. On the contrary, Roman lawyers sought to find the most appropriate solutions for specific problems by comparing them with other analogous cases, i.e. by using analogy or by using an approach that is referred to as distinguishing and overruling in the common law systems. Such a procedure was traditionally referred to as casuistic or case-based or in other words problem-based approach to law, as opposed to the modern systematic approach to law.

The systematic approach to law is thereby – somewhat paradoxically – also derived from the Roman law model, but from the later, post-classical, Justinian era. *Corpus Iuris Civilis*, being a compilation of the works and cases taken from classical Roman lawyers, was re-discovered by medieval scholars from the 11th century onwards, whereas the medieval lawyers tried to find (or rather create) a “system” out of the elements of Justinian’s set, which in fact displayed too many ambiguities and even contradictions.

The period of 16th to 18th centuries has subsequently brought about significant changes in legal scholarship. In addition to looking for a system in conflicting Roman law and Canon law texts, the late scholastics formulated first general rules (*regulae*), derived from the Roman case law, becoming thus the nucleus of current, predominantly systematic approach to law – applying the rules prescribed by laws, court practice or legal science (Gordley, 2010, 81) onto facts of the case via the so-called legal syllogism method. And although in the mid-20th century there were some attempts to reinvigorate the casuistic approach to law (Viehweg’s topics or Perelman’s new rhetoric), these efforts have ultimately not managed to change the currently prevailing way of legal thinking. However, the post-modern era with its crisis of systematic legal thinking offers once again an opportunity to revive legal casuistry – being beneficial at least in the so-called hard cases, the most difficult legal cases, where there is no clear legal solution expressed in legal norms or even principles, which is usually the case with the latest societal and technological challenges...

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