On the discursive nature of Law

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ABSTRACT

The article deals with the concept of discourse in legal methodology from the point of view of discursive theory. As its starting point, this theory asks the question of under what conditions the meanings of social phenomena, social reality can become subjectively perceived, and on what knowledge, rules, statements, ideas, beliefs, values, norms, practices, and procedures their reality is based. Law is a linguistic phenomenon, and language is the core of every discourse. Therefore, the findings of this theory, transferred to the field of procedural law, illustrate how the structure of procedural discourse with its compulsive logic influences the constitution of the identity of not only discursive objects but also the constitution of discursive subjects as participants in procedural discourse as a communication process. For such phenomena, it is typical that they represent a value-neutral category from an ontological point of view. Therefore, their social and legal meaning is not given to us in advance and directly, but they acquire such meaning only in the process of intersubjective evaluation embedded in the system of assumptions according to which it is determined which statements in the discourse can influence the determination of the identity of its objects and subjects. In such a procedure, discourse is an analytical tool that resolves its internal contradictions through argumentation to reach a decision on controversial issues in accordance with its normative structure. The object of study of discursive theory is a complex and elusive phenomenon, which is translated by a series of concepts such as discourse, discourse structure, discursive thinking, discursive prac-

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tice, analytical discourse, discourse analysis, discursive objects, discursive subjects, ideology and discourse, discursive dislocation, and truth as a normative and discursive category. Therefore, the presentation of these concepts is the subject of this paper.

Key words: discourse, discursive thinking, structure, methodology of law, judicial procedure, social facts, legal facts, objects and subjects of discourse, rationality, truth

O diskurzivni naravi prava

POVZETEK

Članek obravnava koncept diskurza v pravni metodologiji z vidika diskurzivne teorije. Ta teorija kot izhodišče postavlja vprašanje, pod kakšnimi pogoji postanejo socialni pojavi subjektivno zaznavni in na katerem znanju, pravilih, izjavah, idejah, prepričanjih, vrednotah, normah, praksah in postopkih temelji njihova realnost. Pravo je jezikovni pojav in jezik je jedro vsakega diskurza. Zato ugotovitve te teorije, prenesene na področje procesnega prava, ilustrirajo, kako struktura procesnega diskurza s svojo prisilno logiko vpliva na identiteto ne le diskurzivnih objektov, temveč tudi diskurzivnih subjektov kot udeležencev v procesnem diskurzu kot komunikacijskem procesu. Za take pojave je značilno, da predstavljajo vrednostno nevtralno kategorijo z ontološkega vidika. Zato njihov družbeni in pravni pomen ni vnaprej in neposredno dan, temveč tak pomen pridobijo šele v procesu intersubjektivne ocene, vgrajene v sistem predpostavk, po katerih se določa, katere izjave v diskurzu lahko vplivajo na določanje identitete objektov in subjektov. V takem postopku je diskurz analitično orodje, ki preko argumentacije razrešuje svoja notranja protislovja, da bi dosegel odločitev o spornih vprašanjih v skladu s svojo normativno strukturo. Predmet študije diskurzivne teorije je kompleksen in težko izmuzljiv pojav, ki ga udejanja niz konceptov, kot so diskurz, diskurzivna struktura, diskurzivno razmišljanje, diskurzivna praksa, analitični diskurz, analiza diskurza, diskurzivni objekti, diskurzivni subjekti, ideologija in diskurz, diskurzivna dislokacija in resnica kot normativna in diskurzivna kategorija. Zato je predstavitev teh konceptov predmet tega članka.

Ključne besede: diskurz, diskurzivno razmišljanje, struktura, metodologija prava, sodni postopek, družbena dejstva, pravna dejstva, objekti in subjekti diskurza, racionalnost, resnica

1. Introduction

The Faculty of European Legal Studies at the University of Kranj recently published its research entitled „Ideology in the Courts.“ The study is an analysis of the influence of the ideological profile of judges on their decisions. It starts from the viewpoint that law is primarily an ideological construct in the function of politics and not its limiting framework. Therefore, it is always subjective and ideological because the legal system is never so perfect that it can exclude the subjective attitude of judges as ideological or even political actors. Ideology, which is present everywhere, determines the chosen judicial-ideological or legal-philosophical approach and influences the decision-making of judges. In this context, ideology represents a complete worldview, a rounded system of ideas and values of an individual, with which they observe, analyze, understand and co-create themselves, the relationship between themselves and the social world that surrounds them, and perceive the social world as such.

The subjectivist conception of law is diametrically opposed to its objectivist understanding because it is grounded in legal realism. Legal realism understands law as the result of the voluntary, self-interested, and therefore subjective action of judges, for whom legal language is merely a tool for subsequent justification of their decisions, which are mostly based on extra-legal reasons. While a judge‘s ideology reveals their view of the world, judicial philosophy represents the way in which the judge understands and interprets the law. The emphasis on this is primarily to mitigate the politicization of law and its idealistic, objectivist conception. This means that it is necessary to recognize its subjectivist nature, make it as transparent as possible, and also subject it to careful research because this is the way to ensure that ideology remains in the function of law, but not that the latter is in function of ideologies.

The discursive conception of law is located at the *intersection of the objective and subjective conception of law.* According to this conception, law is neither entirely objective nor entirely subjec-

tive, but rather a *discourse* as an argumentative practice that takes place in accordance with special, law-specific discursive rules that frame the actions of legal decision-makers. Acknowledging its discursive nature, according to the principle of checks and balances, ensures pluralism even within the judiciary itself. Indeed, the recognition of the presence of judicial ideology strengthens the persuasiveness of argumentation in decision-making in a specific case, in line with Dworkin's, Alexey's and Habermas' conception of law. Such an approach requires, first of all, a transition from an objective to a *discursive* conception of law, because it recognizes both its objective and subjective character. Therefore, in its concluding observations, the research advocates for the promotion of a discursive approach in the formulation of judicial decisions, not only in the Constitutional Court and the Supreme Court of the Republic of Slovenia, but also in lower courts. The study proposes that the ability of judges for discursive thinking should also be taken into account when appointing them, as evidence of their professional excellence and personal integrity.[1]

The research provides an epistemological critique not only of the understanding of law, but also of social phenomena in general. It not only emphasizes the importance of discourse in the context of the jurisprudence of the Constitutional Court, but also analyzes the influence of judges' ideology on their decision-making, and therefore the influence of the broader discursive environment on their thinking. Although discourse is referred to in various senses in legal theory, it is not defined in detail. Typically, it is defined as a synonym for argumentative speech or argumentation expressed in oral or written form, and from a methodological perspective, it represents a communicative approach to the study of law at all three levels: theoretical, legislative, and practical (Visković, 1989, p. 18–25). It is also understood as a synonym for the systematic treatment of a certain topic (Vezovnik, 2009, p. 10). It is explained with the phrase that modern law justifies its legitimacy with procedural discourse and that it is „mainly based on the procedural moment" (Zupančič, 1990, p. 118). By referring to its discursive nature, modern law also emphasizes its rationality, i.e. discursive rationality, because its implementation is supposed to be permeated by the awareness of where our actions

[1] The mentioned is a summary of the key points of the research of the Faculty of European Legal Studies in Kranj. (Avbelj et al., 2021)

are led by reason and from where irrational moments take over their guidance (Cerar, 2001a, p. 125). Emotions can sway one's decision-making, but legal logic serves as a firm rein to prevent personal biases from overriding the system of rules that dictate the normative structure of procedural discourse. This discourse centers on factual and legal issues, which form the judge's procedural object or subject.

Therefore, the question arises, *what is discourse in essence*, what kind of thinking is *discursive thinking*, what defines it, what effects does it produce and how does its normative structure affect the constitution of its objects and subjects.[2] The research does not provide an answer to it, because by referring to Dworkin, Alexy and Habermas, it assumes that this concept is clear enough and that the way in which legal discourse, embedded in its normative structure, produces legal effects, as well as in legal theory, is also clear. Regardless, it is clear that the research assigns an important place to this concept in the *methodology* of *law*, and logically calls for its more precise analysis.

In the field of discursive theory, discourse is considered a very *complex* and *elusive* concept, that it is often used in a wide variety of meanings and connections, that it is so empty in terms of content that it can mean everything or nothing, and that it can be defined in different ways (Vezovnik, 2009, pp. 10 and 11). Just as discursive objects and subjects have no *ontological* status, neither does discourse itself. Its understanding has various philosophical and theoretical basis that influence its definition as well as its use in the analysis of social practices (Frank, 2013, pp. 59).[3] Discourse is a practice that shapes the objects it discusses in a systematic way, even without the awareness of its participants. The participants are often unaware of how the discourse, confined within its own structure, influences and shapes their subjective identity (Frank, 2013, pp. 61). Being aware of the effects of discourse is crucial, especially given that social sciences cannot develop independently based solely on their own cognitive heritage. Rather,

[2] In Slovenia, the Faculty of Social Sciences, which mainly performs critical analysis of media discourse, has so far shown the greatest interest in critical discourse analysis, which is already a fully established discipline internationally. See Bergoč, S., Methodološka infrastructura slovenskega jezika, primer kritične analize medijskega diskurza, (KAD), Faculty of Humanities Koper, Symposium, p. 52.
[3] The dissertation examines the influence of European culture on gender politics in Turkey, but the introductory part, in which the methodology is presented, with reference to extensive literature, is devoted to the general characteristics of the discourse. That is why this paper refers to it to such an extent.

they must also consider findings from related fields to address common and contentious issues, each within its own context and in relation to others. The interdisciplinary and transdisciplinary nature of discourse theory introduces a new theoretical and analytical paradigm that breaks down the boundaries between philosophy, linguistics, and various social disciplines. Habermas refers to this theory as the ‚theory of communicative action' (*Theorie des kommunikativen Handelns*) and sees it as the foundation of all social sciences (*Grundlegung der Sozialwissenschaft*). (Habermas, 2019, pp. 11).

Indeed, the theory of discourse poses as its fundamental question, under what conditions the *meaning of social phenomena can become subjectively* understood, social *reality*, and on what knowledge rules, statements, ideas, beliefs, values, norms, practices and procedures is based (Berger and Luckmann, 1988, pp. 11-13 and 23). It refers to the question what kind of knowledge can become socially recognized as a measure of social *reality* (Berger and Luckmann, 1988, p. 25). This provides significance to social phenomena that are shaped by cultural mediation in the form of a semantic scheme, *structure or context*. These elements determine which statements are deemed relevant in the discourse, and how social phenomena are perceived and interpreted in order to make judgments. The presence of certain assumptions allows for the assertion of their existence and, subsequently, the determination of their social significance.

1.1. About the research methodology

The research starts from the point of view that the reality of social life *is primarily political constructed, and* the truth about it the result of ideological struggles that produce knowledge and thus power. Legal institutes are the original expression of political decisions, because only then do they take legal form. Modern law refers to the democratic principle of the protection of fundamental rights, which is expressed as the principle of discursiveness (Habermas, 1996, pp. 253-267), which is watched over by both politics and law representing a *discursive environment for each other.* Both are not always in a relationship of constant mutual coordination due to the dynamics of social life. The first is implemented on an ideological basis, the second is embedded in the structure of its norma-

tive system, which is translated by the ideology of democratic law. Sometimes they complement each other and accelerate the development of legal culture[4] with human rights as its central element (Igličar, 2012, p. 220). Both also change according to changes in social needs and according to the attitude towards important, and therefore also criminally protected, social values. In this way a true democratic society is protected from political deviations. It is quite paradoxical that they most often diverge precisely because of the question of how to protect it. If the law and its discretionary power are strengthened, the idea of democracy and the rule of law are also strengthened. When the law is undermined due to excessive political activism, democracy is weakened and becomes vulnerable to the gradual, covert emergence of authoritarian power within the society.[5] In such a contradictory relationship between them, the constitutional court is a hybrid of authorities, responsible for the original (discursive) reminder of hitherto *unarticulated* contradictions of certain social interests (Zupančič, 1998, p. 211). Therefore, the research concerns not only the relationship of law to political ideology, but the very essence of its own ideological nature, which also affects its understanding (Igličar and *Štajnpihar*, 2020, p. 283 and 244).

Political behavior cannot be understood without understanding the role of ideas that political actors have in the *social construction of reality* (Šumič Riha, 1995, p. 32). Without such a meaning, it is also not possible to understand any other behavior. Without the internalization of basic moral rules, values and legal norms, especially among the officials of the legislative, executive and judicial authorities, society disintegrates into an arithmetical sum of individuals (Igličar, 2012, p. 220). This means that, above all, jurisprudence must *be aware* of the influence of the structure of

[4] Habermas presented the philosophy of modernity from the most influential philosophers (Hegel, Kant) to the postmodernists, who had a significant influence on the theory of communicative action, thus showing that subjectivity, robbed of any substantiality, represents empty activism and that the actors who speak, listen and act must have an attitude towards morality, i.e. socially established values.

[5] „Law with its normative system", as stated by Cerar, „is the form through which politics is enforced. As such, it represents an independent value or ideological phenomenon that must establish a balance vis-à-vis politics in a democratic society, which must be maintained at all times in the relationship between its static and dynamism, if excessive legal conservatism prevails, this results in excessive rigidity of the law and inhibition development, but if its development prevails, then it can fall into arbitrariness. In the final instance, both in politics and in law, the decisive human factor prevails. Therefore, the prevention of inadmissible legal arbitrariness and the intrusion of politics into law depends to a crucial extent on all those who are the bearers of legal or political decisions. Their acceptability depends on the discourse and its structure, within which the controversy about some socially important issue takes place" (Cerar, 2001c, pp. 15-21.

procedural discourse on the discursive way of thinking and thus on the judicial decision-making process itself. Legal judgment, as a specific way of legal thinking, means an informed cognitive process of legally important facts. Therefore, it presupposes the necessity of one's own awareness (*reflection)* rather than self-awareness (*auto-reflection*). (Cerar, 2001a, p. 107). Understanding in law *is not objective* and not entirely *subjective either*, but is directed, reflexive, and situational (Kaufmann, 1994, p. 240). Ever since Aristotle, it has been held that in every good legal argument three of its fundamental elements must be intertwined, namely: logic (*logos*), ethics (*ethos*) and emotions (*pathos*) (Visković, 1989, pp. 24-25). The latter refers to such a category, which also includes *legal sense* as a complementary component of modern law (Cerar, 1999, p. 27) and therefore as material source of law. For authentic and correct law (*richtiges Recht)* it is not only necessary to be aware of it, but also to feel it. When such a feeling is not present, the content of the subject of discourse is lost, and in the field of law, the meaning of the legal order is lost, because the law becomes unreliable and unpredictable and increasingly turns into (dis)order (Igličar, 2012, pp. 219-220). The crucial question regarding the effectiveness and validity of law concerns its conceptual foundations, which serve as the basis for recognizing what constitutes true law. This makes it a subject of study for discursive theory, given its complexity and elusiveness. To fully understand the nature of law, one must consider all its dimensions and effects on both the objects and subjects of discourse, particularly within the context of legal proceedings. Discursive theory addresses this complex phenomenon through a series of concepts, including discourse, discourse structure, discursive thinking, discursive practice, analytical discourse, discourse analysis, discursive objects, discursive subjects, ideology and discourse, discursive dislocation, and truth as a normative and discursive category. This paper aims to present and analyze these concepts, along with their ideological and philosophical foundations, within the context of the research mentioned above.

1.2. The ideological and philosophical basis of the research

Although the research does not explicitly state it, it is evident from the analysis that the ideology of judges and the discur-

siveness of their way of thinking are based on the conceptual foundations of structuralism and social constructivism. These two theories are among the most significant ones of the second half of the 20th century, and they serve as the meta-theoretical background of discursive theory in the context under consideration. Structuralism introduced the linguistic analysis of social phenomena by considering them as objective structures of semantic signs. Its focus was on the actual use of language and the psychological, sociological, and historical origins and circumstances that affect the concrete use of language signs, sentences, and discourse (Stres, 2018, pp. 847-848). Using the method of intercontextual treatment of social phenomena, F. de Saussure introduced into the analysis of social phenomena: semiotics as a science of signs and the relationship between the signifier and the signified, which in dependence on each other retain their meaning only in this dependence and connection; semantics, which explains the meaning of individual words, and pragmatics, which, in addition to these two branches of the philosophy of language and linguistics, is the third most important branch in this field. Pragmatics (Gr. pragma, correct behavior) studies the use of language in relation to concrete circumstances that affect the meaning and sense of a certain statement and creates an intercontextual basis for an empirical approach to the theory of communication from the perspective of psychoanalysis, logic, and philosophy.[6] In the structure of language, each component has its own meaning and role, which none of the other parts has, even though they are all functionally connected. From a linguistic point of view, a word is the product of a reciprocal relationship between the speaker and the listener, between the communicator and the addressee, and the utterance is understood as the result of an individual action that is given meaning in the context of certain social interactions. As such, it is an expression of the inner experience of an individual. Based on this conceptual design, structuralism creates the conditions for understanding social phenomena, their structures, discourses and identities. Such social phenomena, in which the characteristics just mentioned come to the fore, include especially such legal phenomena as represented by a criminal act.

[6] Pragmatism, in the sense of everyday language, is synonymous with the attitude of someone who adapts to circumstances and knows how to use them to his advantage (Stres, 2018, p. 678).

1.3. Legal language

Law is a linguistic phenomenon. Therefore, language is the core of legal discourse and legal terminology (Pavčnik, 2019, pp. 330-345). The language of law is by its very nature ideological because it is determined by a system of professional norms that enable at least the relative objectivity of law (Vezovnik, 2009, pp. 38-40). As a specific subsystem of language, legal language is expressed on several of its levels, namely as: 1. the discourse of the legislator, as the speech of the creator of general legal norms; 2. the discourse of legal science from a dogmatic and theoretical point of view and 3. the discourse of judicial practice as a discursive practice (Visković, 1989, p. 40). In legal theory, the question of which speech should represent the criterion of legality. For *natural law doctrine* it is the discourse of legal science, for *legal positivism* it is the discourse of the legislator, and for *legal realism* it is the discourse of jurisprudence. The study of law is also approached from the standpoint of social relations, which are the source of legal norms, social values, which are reflected in legal norms and from the point of view of studying legal norms as a special technique - *nomotechnics*, the social meaning of which is evaluated with sanctions as a way of their enforcement and protection. According to such a classification, law is perceived in three ways, namely: 1. relational, 2. value-based and 3. normative. The relational method belongs to the field of sociology of law, the value method belongs to the philosophy of law, and the normative method is the subject of legal theory. While the legal language is the most solid guarantee of the *objectivity of the law*, the notion *of values is the* one that has the strongest irrational, ideological and philosophical charge as a philosophical category, in which the legal feeling as a material source of law is based. All these approaches are still characteristic of postmodern law. Their importance lies in opposing scientism, positivism and mechanistic materialism in law. Therefore, legal language is of key importance for understanding discourse and the effects of discursive thinking, for the very nature of law and thus also the relationship between its objective and subjective conception. This is a condition for shaking the myth of the pure objectivity of the law and its *positivism*, based on the belief that the judge derives his or her decision only by interpreting legal provisions (Bergoč, 2009, pp. 51-52).

1.4. Social constructivism and discursive theory

Based on the findings of structuralism, social constructivism (Latin *constructio,* composition, classification, construction) developed and became characteristic of many modern philosophical and scientific theories. Its specialty is that it is not limited to *what is known*, but *how it is known and thought, and in what context* the idea of social reality or the *reality* of its manifestations is created (Frank, 2013, p. 50). Therefore, even for truth itself, the harmony between thought and the object of thought is no longer important, as assumed by the correspondence theory of truth. Instead, for social constructivism, only the correctness of thinking is essential. Social constructivism is based on the premise that social reality is a construction and emphasizes the importance of the role of ideas, beliefs, and values, requiring a critical approach to knowledge. The material world is not given to us directly but is only accessible to us through language or a system of representations that construct the meaning of social phenomena. In other words, we only perceive it through interpretation. Therefore, both structuralism and social constructivism highlight the importance of a critical approach to knowledge and an understanding of their (non)existence, as their interpretation depends on knowledge. Knowledge is not only created on a rational basis but is also influenced by an individual's physiological and emotional characteristics, as well as their placement in a certain social environment. Therefore, social constructivism is interested not only in scientific or academic knowledge but also in human knowledge, which guides individuals in their daily lives in society, including prejudices, which are essentially micro-ideologies of our daily life. Knowledge about social phenomena, or knowledge about them, depends on social processes and social action, which determine which categories of knowledge are „right" and which are „wrong." Court proceedings are initiated to clarify who has more *rational arguments* in a dispute. They differ from each other in terms of factual and legal issues, and their autonomy and exclusivity are emphasized by the fact that only the statements of the fundamental procedural subjects, such as courts and parties, can be relevant. Discourses that take place alongside judicial discourse have no legal effects. This divergence in discourse structures explains different views, not only on the process of

judicial decision-making but also on differences in understanding and contextual conception of the same subject on which the discourse takes place.

Discursive theory has gained ground as a way of analyzing public, typed, institutionalized, legally regulated procedures and therefore controlled discourses (Berger and Luckmann, 1988, pp. 56-58), which are studied from the perspective of their normative structure or *context,* in which these discourses are created (Vezovnik, 2009, pp. 12-14). Discursive theory represents social constructivism in the *narrower* sense of the word, namely as a theory within *various social science disciplines.* Among these is also the law that is famous especially through its well-regulated judicial procedures, which justify its legitimacy through explanation and defense (Berger and Luckmann, 1988, p. 63). Due to their autonomy, they differ from each other in the normative structure on the basis of which the court assesses the relevance of the procedural statements of both parties on factual and legal issues. All three fundamental procedural subjects, with their procedural actions, which they perform with their statements, influence the beginning, duration and end of the legal proceedings (Frank, 2013, p. 50). The emphasis on the discursiveness of the concept of a criminal act in the context under consideration is mainly because it can be assumed that the *ideological and philosophical* "*cliché"* of criminal law in particular is more pronounced than it is in other legal areas (Pavčnik, 2019, p. 31), because criminal law is public law and in view of such its nature a tangible instrument of power, tied to knowledge.

The foundation of power is knowledge, that is, the willingness to learn the truth about a social phenomenon that is subject to authoritative judgment (Flander, 2012, pp. 157-158 and 214-226). Therefore, every authority is inseparably bound to truth as an ethical category. By referring to it, it justifies *moral justification*. That is why the judicial authority is so closely tied to the truth, and especially the judicial authority, which is exercised in criminal proceedings, in which it assesses the question of which statements can be accepted as true. This function of authority comes to the fore precisely in the field of criminal procedural law more than in any other legal field. The issue of evidence, especially the determination of a criminal act, raises the question of which legal rules should enforce the attitude of the authorities in order

to produce a discourse of truth about the existence of legally important facts, or what type of authority is capable of producing a discourse of truth in a certain judicial procedure and according to which rules (Foucault, 2008, pp. 12-13, 111-142). Therefore, one cannot do without the truth in either philosophy or social science (Hribar, 1961, p. 165), and therefore not even in criminal law. The findings of the discursive theory, transferred to *individual legal fields,* reveal the way in which the normative structure of procedural discourse with its system of *coercive* regulations affects not only the relevance of procedural statements and the *construction* of basic assumptions for deciding on a disputed matter, but also the *identity* of the discursive objects themselves and subjects. As a modern way of thinking, social constructivism directs its focus on the way in which a person or a society forms its concepts and meanings in its cognition, knowledge and thinking. Unlike the empirical sciences, the study of social phenomena is characterized by the fact that they are not given to us *substantially, directly and in the future* as physical objects *in the ontological* sense of the word, but rather represent primarily a value, *normative category*. A criminal act can also be understood in this sense.

1.5. Social phenomena as a cognitive problem

From *an ontological* point of view, social phenomena represent a real social phenomenon in the external world and as such a value-neutral category. Every legal phenomenon is, from a substantive legal point of view, a system of normative assumptions *in abstracto* and at the same time a highly developed *scientific* concept, especially if we have in mind the general concept of a criminal act, to which each specific and individual concept of a criminal act must correspond. As such, in relation to any particular concept of crime, it is an *abstraction of an abstraction*. From a procedural point of view, it represents an event from the past, which in the process of its determination must be clarified using the method *of retrograde analysis* to such an extent that it is possible to reliably conclude whether all the circumstances exist to which the substantive and procedural law binds their consequences. In such a procedure, Habermas‘ definition applies that in law discourse is an intermediary, a *mediator* between facts and norms on the one hand and norms and values on the other

(Berger and Luckmann, 1988, p. 63). Therefore, in the context of this paper, the focus is on the crime as a procedural, institutionalized, typified and controlled public discourse, which represents a special cognitive problem in the sense mentioned above (*Škerlep*, 2001, pp. 543-559).

These phenomena are characterized by the fact that they do not have their own „*essences*", their prior meaning, because their meaning is not given to us *in advance and directly,* but is acquired only in *discursive practice*, that is to say subsequently. According to such a conception, empirical reality is not inherently meaningful, but rather acquires meaning through the process of interpretation and construction that is influenced by social factors and knowledge. This construction involves both a priori components (such as pre-existing beliefs and values) and posterior components (such as later analytical knowledge about the existence of some socially important phenomenon) (Nastran Ule, 2000, pp. 63-66, 363 and 401). Therefore, the subject of legal evaluation is not substance, but only relations according to which the legal significance of the event in question should be determined. Social reality and the way it is discursively constructed have an impact on the perception and understanding of social phenomena. It is not that a „lost object" exists in a pre-determined way that can be found as it was lost, but rather its reality is constructed through the process of argumentation in court proceedings, according to the normative structure of the discourse in that particular context (Kaufmann, 1994, p. 239). Therefore, the key question is what is the *status of being* or the reality of the social world created by the discourse (Šumič Riha, 1995, pp. 7-9). An answer can be given from the standpoint of social constructivism in a way that summarizes four fundamental premises. These explain the key problem of the perception of such social phenomena as legally significant facts. From a cognitive point of view, they are characterized by the following:

1. They exist independently of our interpretations, but this affects their perception and justification of their existence.

2. Structures do not determine, but encourage and limit the perception of social phenomena and in this way enable action, while reflective actors interpret structures and change them.

3. Science and knowledge about social reality are fallible and under the influence of theories as frameworks through which we

learn about such reality.

4. Social changes are the result of changes in structures as a result of changes in discourses that change historically, within which the possibility of acting and influencing it and its changes is given (Frank, 2013, p. 57).

These four premises explain the key problem of judging such events, which should correspond to certain legal concepts. Therefore, the judicial procedure is the field in which legal phenomena come to expression in an illustrative way as a normative and discursive category (Habermas, 1996, pp. 8-9).[7] So, from this point of view one might ask the question in what sense the insights of structuralism and social constructivism complement the understanding of legal phenomena. Before we limit our attention to the fundamental features of discourse theory, let's first look at some interesting thoughts of the American judge Posner about how, according to his idea, American judges should think about their legal reasoning. Both the research on ideology in the courts and Posner's monography concern the same question, namely how the subjective characteristics of judges, including their ideological profile, affect their judicial decisions. Both studies reveal the essential characteristics of law as a normative and discursive category.

2. Judicial thinking and discourse theory

Richard A. Posner, a member of the US Court of Appeals, analyzes the way judges think in his monography „How Judges Think". His work is interesting because, like the research on ideology in the courts, it refers to the subjectivist aspect of the conception of law. Indeed, Posner revealed a series of characteristics of legal discourse, without explicitly mentioning this concept and analyzing it in more detail. In the introduction to his extensive study, he wrote that there is a popular belief that judges rule the nation more than the law itself. Therefore, it is not clear what law is. According to Posner, the secrecy of the judges' deliberations is „an example of professional *mystification*" (Posner, 2010, p. 3). Professions like law and medicine provide vital services to society, but their work can be difficult for

[7] Habermas defines law as a social mediator between facts and norms, and that it therefore has its own tension between reality and validity, which is the driving force of its development.

outsiders to objectively understand and evaluate. This is particularly true when considering that intuition, judges‘ mentality, and their political identity all play a significant role in judicial discretion. In the United States, for example, these factors are further complicated by the ideological conflict between Democrats and Republicans. A conservative judge may not even consider how a politician like Bush would rule in a given case and genuinely believe that their decisions are not influenced in the slightest by their political beliefs or by either of the two dominant political ideologies (Posner, 2010, p. 369). Such a widespread belief, however, contradicts the evidence of Bayes‘ theorem. This shows that judges‘ decisions are often influenced by their resistance, subconscious experiences and prejudices (Posner, 2010, pp. 11-12). In particular, judges who decide in uncertainty do not decide gradually, that is, from premise to premise, but resort to pragmatism. Pragmatism in the judiciary, however, is at odds with trust in the law. According to Posner, judges are aware of this. Therefore, they take advantage of the public‘s lack of interest and ignorance of the law, and thus also ignorance of the secrets of the judicial profession, with which they deceive even their fellow lawyers, professors and lawyers who were not judges. With such exaggerations, judges *mystify their* professional abilities because, like doctors, such *mystification* of their profession suits them. It allows them to maintain their privileged status. At the same time, they are also aware that they must overcome the lay public‘s distrust of the judiciary. Therefore, they believe that with *esoteric* means and techniques, they could self-critically build a *doctrine* that should convince many and even themselves that they are not arbitrary, politically dependent or ignorant of the demands made by the law. Based on Posner‘s views on the freedom of judicial decision-making and the potential influence of personal beliefs and values, he questions the limits of this freedom and how it can be limited to uphold the rule of law and ensure objectivity in judicial decisions. His metaphors and reflections on how judges think have drawn criticism from some individuals (Green, 2010, pp. 464-466).

In his critical response to Posner‘s thoughts, law professor C. Green responded with a rhetorical question: Do judges actually think this way, or is it only Posner himself who thinks about how judges think? That is why he wonders „is Posner a hero or a her-

etic". Despite Green's criticism, such Posner's thoughts are not without theoretical and practical basis. This is especially true if it is taken into account that the progressive development of law takes place in accordance with the creation of judicial law, which is deeply rooted in the legal tradition of Anglo-American procedural law (*well entrenched and necessary part of legal tradition).*[8] In Anglo-American law the judicial decision-making process is less restricted by legal formalism (*judicial law-making*) than it is in continental law. Therefore, Posner is by no means alone in this way of thinking (Dworkin, 2003, pp. 392 and 413). A similar thought was already expressed by Dworkin with his judicial Hercules, as a parable. He illustrated the great intellectual effort of a judge, who in difficult cases (*hard cases)* , especially in disputes between the state and citizens, has to formulate his own *political theory,* that he can judge how the constitution protects some social relationship when it comes to a conflict between individual and wider social interest.

Posner's thinking about the thinking of judges asks as the first question what the doctrine should be, which should *demystify* the function of the judge and create confidence in his or her decisions and thereby strengthen the reputation of the judiciary in the wider society. Such a doctrine, as the American judges are supposed to „build", does not have to be invented, because it already exists, and Posner indicates its fundamental elements clearly enough. In Posner's analysis, a „neurotic" problem is recognized, which is created by process discourse, which is the subject of study in discourse theory. Posner ,s *esotericism* of judicial thinking corresponds to *the exclusivity of discursive practice*. Even discourse is not without its own *mimicry,* because it „pretends" to *merely establish something*, while at the same time *concealing* the fact that by assigning meaning to the object of discourse, it is essentially *constructing* or creating it in this way. Posner is therefore neither a hero nor a heretic*,* but rather an *apologist for the* nature of law, which is otherwise always expected to ensure the objectivity, reliability and predictability of judicial decisions regardless of the pluralism of social interests and their conflict. With such thoughts as those presented by Judge Posner, a rhetorical question arises: So what is in a crisis? Is there *law in crisis* or is the *crisis of law es-*

[8] For example, in the decisions of the Constitutional Court of Croatia UI-448/2009, UI-602/2009, UI-1710/2009, UI-18153/2009, UI-5813/2010 and UI-2871/11, 19.5. 2012.

sentially a crisis of its (mis)understanding?[9] Therefore, in the following, the paper deals with the conceptual philosophical basis of the discursive theory, which explains the methodology of law in general, and thus also the methodology of judging a criminal act as a normative and discursive phenomenon in the context of the discursive theory.

3. Basic notions of discursive theories

The insights of discursive theory are also important for legal theory. They confirm its fundamental premise, according to which law is not only used in judicial practice but also created by it (Pavčnik, 2019, pp. 27-33). According to this theory, discourse is understood in accordance *with the legal model*, which presupposes the presence of a judge (*Šimič* Riha, 1995, p. 34)- The obligation to respect the law arises in the most obvious way precisely at the level of the judge, who is assumed to know the law and therefore to respect it. The judge recognizes the rules for recognizing the 'correct' law (*recognition norms,* (Hart, 1994, pp. 91-98) *normative Aussage* (Alexy, 1996, p. 39)). The fragmented nature of the law requires a procedure that involves a logical and systematic search for premises, their formation or adaptation to the structure of the procedural discourse, and their use for reasoned decision-making on the existence of a criminal act. This is what constitutes a judge, as he or she respects the normative structure of the procedural discourse (Šumič Riha and Riha, 1993, p. 56). Only criteria for recognizing the legality of a certain law can declare it as authentic law, as the law can only be expressed in each specific case. However, these rules alone do not guarantee the legality or appropriateness of the procedural discourse. They require the judge to act according to them and interpret them appropriately based on the specifics of the case under consideration, where the contact between the factual and the legal comes to its most direct expression. Laws are formed not only by legal norms, which are the result of legal evaluation, but also by normative statements of process participants. Each statement in discourse is a response to previous statements and is connected to the common field of communication created and directed in

[9] On the crisis of law, see e.g. Flander, 2012.

a specific context that defines a concrete speech situation. Thus, only the procedural statements of the court and the parties give the event in question legal meaning. In the decision-making process, the judge must not only imply the norms but also adequately explain, express, and justify them. This raises the question of how the judge recognizes the rules for recognition of law and according to what rules they do so.

The discursive model *(Diskursmodell)* , which was developed by procedural theories of law, occupies a special place among the various models of judicial procedure. Such a model is distinguished by discursive ethics (*Diskursetik*) (Kaufmann, 1997, p. 272).[10] Court proceedings according to this model are not only ethical because they emphasize justice as the possibility of both parties to influence the outcome to the same extent with their statements. They are ethical above all because they do not conceal that procedural content does not come only from its normative structure in accordance with its incentives and limitations, but also depends on the normative and discursive nature of social phenomena, which are considered as important facts in judicial practice (Kaufmann, 1994, pp. 277-282). Such a conception, however, goes beyond the anachronistic, *positivist* conception of law, according to which the judge derives his decision directly from the law. In this way, discourse theory affirms the function of the judge as a measure of legality (*Šumič* Riha and Riha, 1993, p. 89). This explains how the internalized, compulsive logic of the normative structure of the process discourse shapes its subjects as actors. The involvement of judges‘ thinking in this process determines how they perceive discursive objects, giving their discursive thinking a transpersonal and therefore more objective meaning. Based on the insights of this theory, the reasons for divergences between different discourses, such as political, media, legal, moral, ethical or philosophical views on the same topic, become clearer. Public discourses are often the subject of discursive analysis for this reason (Škerlep, 2001, pp. 153-169). Discursiveness, which discourse theory deals with, is a complex phenomenon that is translated by a series of concepts such as: 1. discourse; 2. structure; 3. discursive thinking; 4. discursive practice; 5. analytical discourse; 6 discourse analysis; 7. discursive ob-

[10] The concept of discursive ethics began to be developed by Habermas in the 1980s, and this is the key to understanding the political public.

jects; 8. discursive subjects; 9. ideology and discourse; 10. discursive displacement and 11. concept of truth itself.

3.1. Concept of discourse

Discourse is a process of intersubjective communication for the production of social meanings as negotiated categories. As such, it is not merely a synonym for strictly rational, logically correct, and step-by-step systematic treatment of a certain topic, consisting of certain knowledge based on evidence and logical conclusions that refer to an assessment of the meaning of the object that represents the topic of the discourse (Stres, 2018, pp. 847-848). Only the participants in the process of argumentation about the existence of legally significant facts give such discourse content and thus the topic for which the discourse is established. Due to its creativity, discourse is placed in the role of „creator", revealing how subjects understand objects (Frank, 2013, p. 61). Even if the material existence of a certain social phenomenon is not disputed, its social meaning may be.(Lukšič and Kurnik, 2000, pp. 169-171). Only the price of the reality of the existence of socially important facts implies the reality of what is happening in the discourse itself. In law, discourse mediates between facts and norms on the one hand and norms and social values on the other, thus representing a special type of normative integration (Habermas, 1996, p. 226). From the perspective of rational argumentation, discourse is a mechanism for the constant (re) production of conflicts and for directing aggressiveness towards ever-new „targets" or discursive objects and subjects (*Šumič* Riha and Riha, 1993, p. 33). Social reality is constructed, and the truth about it is the result of ideological struggles that produce knowledge to which power aspires. According to Foucault, power cannot be exercised other than through a specific way of producing truth, regardless of the social system in question (Foucault, 2008, p. 136). In democratic discourse, argumentation is a strategy for overcoming conflicts in a non-violent way (*Šumič* Riha and Riha, 1993, p. 32). thereby replacing physical force with the force of logic or representing an alternative to it (Zupančič, 1990, p. 121). Discourse is further characterized by the fact that it does not have a substantial, real object given to it in the *ontological* sense of the word *a priori*, but must be determined only in the discourse, i.e.

a *posteriori*. Even discourse itself does not have an ontological status because it does not have a fixed identity, essentially being a concept.

It is the historical *specificity* of a certain discourse that proves that these are not permanent but change depending on the circumstances. Thus, for example, a dominant, *hegemonic discourse at a given moment is* considered as such because it produces appropriate discursive effects at a certain time. However, it is dominant only as long as it is not displaced by a *superior* discourse, which thereby assumes a *hegemonic position.* Therefore, only such a discourse can be a guarantee of legality. It is the emphasis on the historical specificity of a certain discourse that testifies to the fact that discourses are not constant but change depending on the circumstances. Procedural discourse determines which interpretations have a legitimate basis. The principle of democracy recognizes only those norms that require recognition of their universal legitimacy (Škerlep, 2002, p. 159) It is characteristic of each discourse that it is embedded in a structure as a system of rules that determine which statements justify a certain meaning and by which it is distinguished from other discourses (Valčič, 1989, pp. 121-122). What will be the result of the discursive discussion, or the assessment of factual and legal issues, depends on the normative structure of the procedural discourse and on the way in which its participants use it and adapt it to their strategic interests.

The discourse plays a crucial role in forging a social bond by determining its findings based on the possibility of achieving social consensus. This allows for the homogenization of attitudes and the promotion of *consensus* within the social community. The guarantee of legality is based on rational, discursive discussions about the existence of legally significant facts. The divergence in discourse structures can explain different views not only on the process of judicial syllogism but also on other topics. Structural and cultural conditioning refers to the pre-existing temporal and spatial conditions that have formed over time as a result of previous structural-cultural interactions. Knowledge of discursive theory can reveal how the normative structure of procedural discourse affects not only the procedural statements decisive for its beginning, duration, and end but also the constitution of the identity of its objects and subjects. In legal evaluation, the subject is not the substance itself but rather the relationships and rules

that are used to attribute meaning to a particular event. As such, we can only recognize the real relevant reality based on *discursive thinking*.

3. 2. Discursive thinking

Thinking is a human conscious, mental activity. It presupposes conscious experiencing, remembering, attention, reasoning, judging, supposing, asserting, denying, asserting. Such thinking refers to facts, values and truths and is coordinated with logic, the correct understanding of concepts and with the ability of reasoning and judgement. It always refers to thinking that some fact, which is perceived as a sensory change in the external world, exists or does not exist and that it can be valued in one way or another. With such a generalized definition of the concept of thinking, the question arises as to what kind of thinking is *discursive thinking*, which is supposed to „strengthen legal argumentation". Unlike *intuitive thinking*, which is based on immediacy of understanding and insight, discursive thinking is distinctly rational. From the point of view of *hermeneutics* as the interpretation of texts, such discursiveness is an integral part of knowledge based on thinking. We speak of the discursive way of thinking when it represents a successive, gradual, logical process of reasoning from one logical element to another, and in this way gradually builds a certain rounded normative, i.e. value system, from individual parts. The translation from the Latin *discursus* also corresponds to this *way of thinking,* which means „to flow around" as a synonym for a systematic dispersion of elements, which, with the final connection and derivation of one statement from another, completes a logical whole (Stres, 2018, p. 172). That is why discourse is often equated with argumentation, but discourse is not just argumentation. In relation to discourse, argumentation *(argumentatio)* is proof, substantiation, implementation of a proof, giving reasons for certain claims supported by proof (Sruk, 1980, p. 34). Argumentation is giving reasons for certain claims. Through argumentation its actors exploit the normative structure of the discourse and adapt it to their strategic interests. The nature of controversial issues depends on how much argumentation the participants of the discourse need in order for the discourse to establish itself with its own knowledge and to raise its authority by referring to

the truth (Velčič, 1989, p. 124). Through argumentation discourse resolves its *internal contradictions* (Lukšič and Kurnik, 2000, pp. 169-171) in order to resolve the dispute due to the conflict between *antagonisms,* which originate not only from the nature of the disputed issues, but also from the contradictory nature of the law itself (Velčič, 1989, p. 121).

Judging is a practical science, the purpose of which is the argumentative justification of decisions. It is characteristic of law that its normative system is scattered in the multitude of its practices, in which it searches for its fundamental organizational principle (*Šumič* Riha and Riha, 1993, p. 33) and produces a joint decision or, through normative integration, a community (Igličar, 2012, p. 213). For this purpose, at its applicative level, law must bridge the *antinomy* between its many contradictions, which originate from its very nature. Law claims universality, but at the level of its application it is reduced to particularity. Although it refers to objectivity, in practice it also narrows down to subjectivity. Torn between the social and the individual, between law and right, between the rational and the irrational it must discover its coherence. Furthermore, the contradiction also lies in the fact that legal norms are abstract, but the real-life example is concrete, legal norms are general, the event in question is specific. Legal norms are simplified due to their abstractness, the real-life example is complex; legal norms are static, the particular case is dynamic. All these opposites require a synthesis. A judicial procedure such as a criminal procedure is also characterized by the fact that it is involved in a contradictory relationship between its protective and guarantee function. Its dynamism is fueled by argumentative pressure, which also requires the court to evaluate *contradictory* evidence and statements *in a non-contradictory* way in order to justify its decision. These opposites, however, can only be bridged by *syllogism*, that is a way of debating with reasoning and *subsumption*, by which the concrete is subordinated to the abstract, the individual to the general, and partial to the universal. In the process of legal evaluation, the *perception of the norm* determines the *perception of facts*, and the perception of facts determines the *adequate combination* of the above premise of the legal syllogism. A premise is a logical assumption before a conclusion as its basis, from which the corresponding conclusion follows (Stres, 2018, p. 696). If this is acceptable, the criteria for judging reality of legally

significant facts are also acceptable. What will be the outcome of the discussion, or the assessment of legal and factual issues depends on the weight of the arguments of the parties and the way the court assesses them. Each discourse is a historically specific system of meanings that shapes the identities of participants and topics (Vezovnik, 2009, p. 3; Berger and Luckmann, 1988, pp. 29, 122 and 160-169). Discursive thinking is characterized by the fact that it is based on practice, because the discursive rationality characteristic of judicial judgment is not only based on judging the quality of arguments, but also depends on the *structure* of the argumentation process itself (Habermas, 1996, p. 226)

3.3. The structure of (judicial) discourse

In order for discourse to achieve its political and legal effects and resolve disputes arising from conflicting positions based on incompatible premises and a joint decision (Šumič Riha and Riha, 1993, p. 33), or to institutionalize fundamental values through normative integration and produce a community (Igličar, 2012, p. 213). the *normative structure* that determines the rules by which it is judged which statements can be legally recognized as acceptable, and the asserted facts accepted as true, must be adequate. The structure, as a system of rules that determines which statements in the discourse are relevant, *reduces (over)complex reality* to only those essential parts that are the subject of discourse, namely, the facts to which the structure of the discourse assigns relevant meaning. The more complex the subject of the discourse, the more one-sided ideas it imposes. Therefore, such a social phenomenon, as represented by a criminal act, quite often leads to hasty conclusions that its actual state is given, even if all the (legal) assumptions for its existence are not fulfilled. Court proceedings are famous for their high level of reduction of reality because they „absorb“ only those aspects of *extra-cursive* reality that are important for such a decision, which should become the subject of impartial approval (Igličar and Štajnpifler, 2020, p. 179). The process of checking the arguments of discursive subjects takes place through the process of *subsumption* and *syllogism*. In the process of such logical reasoning, these are the supporting points in the structure of the process discourse, from which arguments are made, with which discursive contradictions are resolved and

through which the *antinomy should be bridged*. With their autonomy and normative regulation, judicial procedures reduce the complexity of everyday social relations in eight ways: 1) with their time-limited duration; 2) with their substantive differentiation (criminal, litigation, administrative, etc.); 3) that they begin, last, and end under certain legal conditions; 4) that they will have their own participants, process subjects, court, and clients; 5) that they will perform procedural actions with their statements and try to influence the outcome; 6) that the relevance of procedural statements will be judged from the standpoint of the normative structure of the procedural discourse, depending on the nature of the procedural object; 7) that the procedure will reliably end under certain conditions; and 8) that it is not known how it will end. The legal order provides only *a certain measure predictability,* which is based on legal provisions, harmonized jurisprudence, and above all on a generally accepted sense of justice, which is shared by the legislature and the judiciary as key *factors* of *legality*.

The structure of court proceedings is determined by a system of substantive and procedural legal norms that apply mutatis mutandis to each stage of the proceedings and influence the selection of statements and information from surrounding systems. It is characteristic of these norms that they apply to all similar discursive situations (Šumič Riha, 1989, p. 135). In a heteralgic, systemically centralized society, otherwise autonomous subsystems form the ideal sphere of its general culture, namely political, legal, economic, religious, ethical, and artistic, which are functionally connected to each other (Adam and Willke, 1996, p. 232). Therefore, they represent a *discursive environment for each other*. The essence of their coexistence is that, as relatively independent areas, they define mutual boundaries and thus a structure for each other. This structure both encourages and limits them, preventing their excessive one-sided understanding. In the field of discourse theory, such an environment is referred to as a structure or, more precisely, as a *context*. Context refers to the various elements that shape an individual‘s thinking and behavior, including processes, institutions, cultural practices, traditions, ideologies, and discourses, and depending on knowledge (Frank, 2013, p. 8). Knowledge is a dynamic and subjectively conditioned category that constantly develops, shaping our attitudes towards

reality and what we consider to be convincing evidence of social phenomena. While knowledge is powerful, it does not guarantee truth, which depends on our conceptual, linguistic, and interpretive abilities as *constitutive* elements of structure (Foucault, 2008, p. 136). Discourses that take place alongside judicial discourse, such as media, political, philosophical, psychoanalytical discourse, etc., are tied to their own structure, and have no legal effects. The concept of human rights serves as the philosophical basis for modern legal systems and is essential for the creation and application of laws. While language is a central component of any discourse, it is not limited solely to linguistic analysis. The broader social structure, encompassing cultural practices and ideals, also plays a critical role in shaping discourse.

In order for discourse to achieve its political and legal effects and resolve disputes resulting from conflicts between antagonistic positions rooted in incompatible premises, and to achieve consensus and normative integration, appropriate *normative structures* are necessary (Šumič Riha and Riha, 1993, p. 33). These structures determine the rules by which statements are judged to be legally acceptable and facts are accepted as true (Lukšič and Kurnik, 2000, pp. 169-171). Thus, the relationship between actor and structure is inextricably linked. The link between the normative structure, the structure of discourse, and the discursive statements of its actors is created through *discursive practice*.

3.4. Discursive practice

A practice becomes discursive when it gives *priority* to certain meanings, which are socially constructed and therefore subject to change as a result of discursive struggles. In these struggles, discursive subjects adapt the discourse to their strategic interests. In other words, discourse is a practice that operates as a system of statements that determines what can be said or thought, as well as who can speak and with what authority. This practice represents a typical way of acting or declaring, which is characteristic of a certain discourse (Frank, 2013, pp. 58-59 and 68). For example, discourse takes place in criminal proceedings on legally significant facts and issues as a system of statements with which courts and parties perform procedural actions. Discourses are not only defined in linguistic terms, but also as social practices that mani-

fest themselves through structure as an institutionalized, socially established, typed mode or pattern of action. They can be recognized at the individual level or at the institutional level. At the individual level, discursive effects limit the actor‘s awareness of their actions and ways of interpreting the environment, as they are under the influence of the limitations of the material environment of social institutions, as well as the influence of discourse and the discursive environment that affects them through symbols, ideas, and meanings. Therefore, they are not completely autonomous in their awareness of their actions and ways of interpreting the world.[11] Discourses appear in practice on multiple levels, such as the *macro level* representing the wider social environment, and the *micro level* representing everyday practices and routines. One of the important effects of discourse is that its results are also manifested in the external, *material* sense in the form of certain perceptible consequences as changes in the external world as its products. The effects of discourse are especially visible and felt in *institutional practices*, goals, routines, rules, and in the ways in which institutions interfere with life practice, including with such effects as interference with fundamental rights. Therefore, the structure of discourse determines what the subject is allowed and able to say in order to be successful with their statements. In legal jurisprudence, assessment is not merely the application of rules for adjudication, but also involves the constant explication of those rules. In this creative effort, both parties apply argumentative pressure to „force“ a favorable decision that aligns with their proposed facts and legal judgment. The relationship between the actor and the structure is thus connected through practice, in which discursive objects and subjects are *constituted*.

3.5. Constituting the identity of discursive objects

Discursive practice shows how discursive subjects as actors understand the objects of discourse (Frank, 2013, p. 79). As previously stated, discourse is manifested in the material world in the form of objects, for example norms, which arise as a result of discursive results or the impact of discourse on the *extra-discursive*

[11] Foucault described such an effect of discourse as the feeling that it is not the discourse itself, but some nameless voice behind it speaking about something that already exists as something prior. (Foucault, 2008, p. 7). This thought could be supplemented with Lacan, namely that speech is the language of the subconscious. See Lacan, J., Govorim zidovom, Studia humanitas, Ljubljana, 2019.

environment. Such objects can only acquire criminal law significance as an object of discourse in criminal proceedings through a rational process of debating contested factual and legal issues. As a normative and discursive category, a procedural object is defined by its description, which is given by prosecutors as their value assessment of the event that is supposed to represent a certain criminal act. That is why such a description is crucial in judicial practice (Horvat, 2004, p. 388). The event in question is constituted as a criminal act only if it is asserted in a procedurally acceptable manner that meets all the elements of criminality. When interpreting a combination of legal provisions that corresponds to the legal characteristics of the real-life case in question, no abstract legal norm is formed, which could be an „*abstract object of proof* „ in itself (Vodinelič, 1985, pp. 994-1003). Only their legal interpretation of proven and properly assessed legally significant facts leads to the *recognition* of this type of behavior as defined by law as a specific crime. The same applies to *discursive subjects* who also rely on a rational process of debating contested factual and legal issues to understand the objects of discourse.

3.6. Constituting the identity of discursive subjects

Discursive practice privileges only certain meanings, and these are politically constructed concepts, which always depend on the context and the nature of the object of dispute. The structure and actors have a *co-constitutive* relationship (Frank, 2013, pp. 72-73). According to discursive theory, the object of discourse *is not its substance*, and neither is the *discursive subject.* Therefore, the subject therefore does not possess the discourse, but the discourse constitutes its subjects and objects, in accordance with its structure. Although the subjects are a product of the discourse, they are also active *co-creators* reproducing and even changing the discourse to adapt to their strategic interests. These structures are not fixed but depend on the temporal and spatial environment. The fundamental procedural subjects of the criminal procedure, the court, and the parties, are established only in the procedural discourse, in accordance with their procedural role as a normatively formed expectation of certain conduct (Igličar, 2012, p. 61). Therefore, it is only the discourse that constitutes the position of a certain social actor as a discursive subject (Vezovnik, 2009, pp. 23

and 65). The participants of the discourse can take their position only within the discourse, in which both their *identity* and the identity of the discursive object are constituted. Their statements influence the beginning, course, and end of the discourse and thereby determine the meaning of its object.

The structure of the discourse affects the identity of the discursive objects and also has an influence on the identity of the discursive subjects who are mentally embedded in it. The structure of the discourse, with its *compulsive logic*, „imposes" a *transpersonal*, meta subjective, or more objective assessment of the meaning of the object of discourse on their judgment. In this sense, the discursive conception of law is at the *„intersection"* of its objective and subjective conception (Avbelj et al, 2021, p. 58). Therefore, the research mentioned in the introduction rightly advocates „a shift from an objective to a discursive approach to law" (Avbelj, 2021, pp. 299-302). For the theory of discourse, which deals with the issue of cognition, the discursive subject in itself loses its independent meaning due to its involvement in the discursive way of thinking, because this theory is limited primarily to the methodology of discourse (Habermas, 1975, p. 100).

The emphasis on the impact of the structure of the discourse, transferred to the field of law, is justified mainly because the trial is oriented in a *contextual manner*. Only the participants in the process of argumentation about the (non)existence of important facts give such a discourse content or „theme" and thus its *procedural object* as a normative category (*Šumič* Riha, 1995, p. 32). Just as discursive objects and discursive subjects do not have their own *a priori* ontological status, neither does the discourse itself. According to Foucault, meaning and knowledge are produced by discourses and not by subjects (Foucault, 2008, p. 36; Foucault, 2007, p. 249). In a discourse, the action of individuals can be conscious or unconscious, but it always depends on the structure of the discourse, which promotes and limits it in accordance with the rules that form the structure. Namely, the structure affects the thinking and actions of discursive actors. Actors are influenced by discourses that determine thinking and its functioning, but at the same time they are reflexive, which means that they can act strategically and consciously influencing the course of events and changing the structure. Even though their activity is limited by the structure, it is also enabled because the influence of the struc-

ture is not absolutely dominant. It can give meaning to disputes and rebellions of discursive subjects, but they can change it by adapting it to their own interests. The dialectical relationship between the structure and the actor enables an understanding of the changes that are the result of the *mutual influence* of the subjects and the discursive practice. This ultimately changes not only the identities of the subjects but also the structure itself (Frank, 2013, p. 71). Through discursive theory it is also possible to explain the changes in the legal system, which is transformed by judicial practice under the argumentative pressure of the participants in the judicial discourse. Argumentative pressure is also pressure on the structure, on its rules, which results in changing them according to the way in which they are interpreted by the discursive subjects. However, always in such a way that the foundations of the legal system are preserved. This means that the subjects in the discourse are only *constituted* in their practice and language when they express themselves about the relationship between certain norms and values.[12] Norms and values are two sides of the same phenomenon, namely *subjective identities* (Verhaeghe, 2016, p. 41), which is consistent with the current structure of procedural discourse. Identity is a way of self-positioning in wider social events (Nastran-Ule, 2000, pp. 189-190,217-224 and 276) It is always about ethics, just as ethics is always about ideologies. Identity is an ideology. This is how actors *position* themselves when they take their subject position within the structure of such a discourse, for example inside a criminal procedure (Dežman and Erbežnik, 2003, pp. 447-455). Structures and discourses that influence the actions and thinking of discursive subjects are ultimately conditioned by their *social power*. This applies especially to the discourse in criminal proceedings, in which the defendant is in a dispute with the state as a significantly stronger party. Therefore, his or her constitutional rights are a way of compensating for this inequality, in order to maintain the ideal of a fair criminal procedure, as a dispute between two equal parties and

[12] Values, as defined by Cerar, are, in their fundamental manifestation, a rationally aware and fluctuating, dynamic attachment of a person to a certain phenomenon. In the analytical and psychological sense, a value is a (i)rationally conditioned feeling that creates a rational projection of such a phenomenon as an object towards which it gravitates (positive attachment) or repels from it (negative attachment). Just as variable values are otherwise, they are variable also legal values. They are also characterized by the fact that they are not universal, but particular, and are temporally, spatially and culturally conditioned. With their dynamic nature, they significantly influence the (dis)continuity of law. (Cerar, 2001b, pp. 5 and 24).

their possibility to have an equal influence on its outcome. It is characteristic of such a discourse that it functions as *an analytical tool before an impartial court*.

3.7. Discourse as an analytical tool

Discourse analysis is not only a method but a research perspective that includes many methods. As such, it is an analysis of practice and institutionalized rules and norms. Therefore, it is important as a method of judicial practice, which is used in identifying and analyzing factual and legal issues, namely issues of criminal substantive and procedural law. The use of law as a linguistic phenomenon presupposes a linguistic analysis of legal concepts, which should be the criterion for judging a concrete case. Such an analysis is an indispensable tool for the construction of a legally relevant reality, if it is established that all its assumptions are met for the application of the law. As an analytical tool, discourse is therefore an instrumental tool (Frank, 2013, pp. 59-60). For such phenomena as normative and discursive phenomena, it is characteristic that the determination of their wider social and legal meaning is embedded in the already repeatedly emphasized structure or *context*, which is also the subject of *discursive analysis*.

3.8. Discourse as an object of analysis

Discourse is both an analytical tool and an object of analysis, as it is *institutionalized* and typified under the control of discursive practice. Therefore, it serves as a measure of the success of a certain discourse in achieving its goals. When applied to the field of law, specifically criminal procedure, discourse is analyzed by the judge to assess the procedural effects of the parties‘ statements, and it becomes an object of analysis if the judge‘s decision is subsequently reviewed by a higher court. At the *institutional* level, discursive practice is the subject of discourse analysis, as court decisions are formed through intersubjective *procedural communication* between prosecutors, judges, and other relevant parties. Neither prosecutors nor judges learn the law in isolation, but instead through a communal engagement with discursive practice. Procedural discourse presupposes a formally logical way of thinking, which raises questions about the reality of the existence of

asserted facts in the discourse and their impact on the application of the law.

3.9. Ideology and discourse

The distinction between discourse as an analytical tool and discourse as an object of analysis is meaningful because discourse is consciously used by its participants as a tool to achieve strategic interests, common goals, and consensus. In this sense, discourse shares similarities with the concept of ideology, which assumes the existence of a particular interest presented as a universal one. While discourse is not the same as ideology, it is closely related to it. Ideology can assign different meanings to concepts within a specific discourse, which is often expressed in a socially and politically constructed environment. Therefore, discourse can be the carrier of a particular ideology, which is reproduced through discourse, and shapes the meaning of ideological presentations. The significance of ideology lies not in its inherent value, but rather in how it is expressed and in its intended purpose.

3.10. Institutional crisis or displacement

Knowledge and meaning are situated historically and contextually, and individuals internalize this knowledge through socialization, which is reproduced and transformed through language and non-verbal practices. This mechanism of *internalization* and *socialization* becomes evident during institutional crisis or *displacement*, which refers to events that break a coherent, settled, and sedimented discourse. Displacement exposes definitions, concepts, and categories to redefinitions. When a certain development of events can no longer be understood within the framework of the dominant discourse and meanings, changes become inevitable. The existing *hegemonic* discourse loses its power and prestige in defining meanings. Therefore, displacement represents a *productive moment* in a historical and temporal context, as it prevents the completeness of the discourse structure and offers the possibility of liberation from established structural forms (Frank, 2013, p. 66). The phenomenon of displacement in law is common and has led to many changes in substantive and procedural law, including criminal procedure.

3.11. Truth as a normative and discursive category

We encounter truth in everyday life as well as in politics, philosophy, science and law. Therefore, knowledge about it depends on social processes and actions, which determine which categories of knowledge are „correct“ or „wrong“. When we talk about the truth, we refer to thinking of it. And in doing so we assume that we know it, can discover it, prove it, and pass on to others. We are especially confronted with disputes over the question of what is true. These disputes involve passion, courage, efforts, intentions, and actions aimed at finding a basis for justification, proving a claim, or exposing a lie as an abuse of truth. The question of truth acquires broader social significance when it is focused on scientific or professional discourse that is defined by institutionalized rules limiting what can or cannot be said. Such discourse is directed towards knowledge of certain facts that are assumed or asserted to be true, but it can also be subject to *argumentative pressures*, particularly when operating according to the principle of authority (Ule, 2004, p. 7). This kind of discursive procedure is clearly evident in criminal proceedings where the truth has a *strategic-tactical* meaning in *persuading* the court about the truth or falsehood of statements. Despite being a fundamental concept in philosophy since ancient times, truth remains a key problem, not only in law but in general (Hribar, 1961, pp. 7-8). In the philosophical sense, truth is a criterion for practice, and practice is a criterion for truth. It is also a criterion for itself and all other truths since it is considered the „truth of all truths.“ However, it is neither dogmatic nor critical but rather a source of permanent self-criticism and criticism of everything that exists. Nevertheless, Foucault considered truth a false universality (Foucault, 2008, p. 36).

According to the teachings of classical empiricism and rationalism, truth is considered manifest (Popper, 1973, p. 13). However, according to K. Popper‘s point of view, the problem is that the truth in itself is not always obvious and needs to be discovered.[13] Popper criticized philosophical theories for neglecting the importance of *induction* and overemphasizing deduction as the main

[13] In philosophy, a number of theories have been developed in relation to the concept of truth, such as: correspondence, consensual, schematic, parsimonious, deflationary, minimalist, epistemological, James‘s, coherent theory and the theory of radical constructivism.

source of knowledge and cognition. The purpose of inductive logic is to give scientific significance to various theoretical hypotheses based on knowledge and experience in practice. On a deductive, abstract level, truth is a concept that could directly satisfy the need for justification or persuasion. However, an authority worthy of trust is needed to decide what makes the truth obvious and credible in each case. The assumption of error implies the idea of an objective truth about which disputes arise. It has been considered since antiquity that truth is the goal of philosophy and a serious philosopher is one who is concerned with truth (Zore, 1997, pp. 125 and 193-196). In philosophy there is a consistent realization that the basis of the crisis of philosophy is precisely the crisis of truth. Philosophy has developed various truth theories, such as the correspondence or realistic theory of reflection, semantic theory of truth, epistemic theories of truth, pragmatic theory, and coherence theory, which complement and build on each other, highlighting the complexity of the problem of truth (Ule, 2004, p. 3). In philosophy, three meanings of truth are distinguished: *logical*, ontic, and *transcendental-ontological*. Truth in the logical sense refers to knowledge that asserts or denies something as logically true, while in the ontic sense, it concerns the things that we would like to know, which have their own reality and are accessible to our cognition. Transcendental-ontological truth refers to the truth that being bestows on beings as unity, reality, and goodness, which is predominantly understood in a religious sense (Stres, 2018, pp. 743-744).

Philosophy and cognitive theory attempt to resolve the fundamental issues of human knowledge or cognition (Greek *epistéme*), primarily from the point of view of its culturally conditioned cognitive limitations, i.e., structure. Only within the framework of certain professional terminology can criteria be formulated that do not lead to insoluble contradictions. The premise that the truth about the truth is that there is no truth about the truth, because truth is a matter of faith, belief, and conviction, demonstrates this (Hribar, 1961, pp. 7-8 and 163-165). However, philosophy and social science cannot do without the concept of truth. Such a situation in the philosophical field convinces us that the crisis of truth is also characteristic of all other normative and discursive phenomena such as religion, politics, ethics, and law. What all these social subsystems have

in common is that they refer to the truth when consolidating their position. They represent a plural and secular society, each with its own system of norms and values based on the belief that these values and norms are universal, and that belief in them is morally binding. They must be „missionary" spread through the process of intersubjective, discursive communication with the aim of creating the widest possible social consensus with due regard to which social phenomena can acquire the meaning of social reality (Harari, 2017, pp. 214-216). If values change, the norms that reflect the social attitude towards them also change. This inevitably changes social and individual identities, the core of which originates from a certain culture, and thus also the culture itself (Verhaeghe, 2016, pp. 38-39). Truth is a normative and discursive category. By referring to it, every discourse raises or tries to raise its *authority* and thus its *persuasiveness*. For philosophy and cognitive theory, therefore, the key question is not what truth is, but above all, what represents the *criterion of truth* (Ule, 2001, p. 121). The way in which we know the truth is an integral part of the truth itself (Nahtigal, 1996, p. 234). Therefore, truth cannot be equated with a purely subjective belief, if the assertion of the existence of facts is contrary to the objective reality that we face through the world of concepts, judgments, logic, and life experiences. A clear proof of how the truth depends on such criteria are evidentiary rules for the exclusion of illegal evidence in criminal proceedings (Dežman and Erbežnik, 2013, pp. 53-69). The rules, whether experiential, professional, or scientific, that determine under what conditions something can be considered true, are *constructs*, just as constructs are concepts through which we perceive reality. And precisely because social phenomena, that is, facts, are conceptually constructed, the truth about them is also a construct, a matter of interpretation of their existence and meaning. Therefore, since the facts that we experience as sensory changes in the external world are *constructed in our conceptual sphere*, they can also be *reconstructed* (Damaška, 2001, pp. 4-5). What we ourselves have constructed in the discourse about such extra-discursive phenomena as social phenomena and, at the same time, also legally important facts, is being reconstructed.[14] That is why we can learn about

[14] The emphasis on the distinction between discursive and extra-discursive realities is due to the fact that postmodernist discursive theory, which is based on hard and radical social constructivism,

such facts, prove them, and evaluate their importance. In such a discursive context, the methodology of judging such a social phenomenon is understood, which should correspond to the concept of a specific criminal act and, at the same time, the truth about its existence.[15]

4. Conclusions

The research mentioned in the introduction justifiably draws attention to the importance of the concept of discourse in legal methodology. Its meaning presupposes an understanding of the nature of law in wider society. Dworkin already answered the still-pending question of whether the law is in books or whether judges discover or invent law (*law in books or law in action*). He emphasized that not only laypeople assume that the law is provided in advance and only needs to be determined, but even some academically educated lawyers assume so. That is why he pointed out that judges not only use the law but also create it (Dworkin, 2003, p. 16). Although the fundamental premise of the classical concept that law is not only used but also created or constructed by judges has been overcome in the field of modern legal theory, it is still asserted that law is in crisis (Pavčnik, 2019, pp. 27-33). The question posed is what the cause of this crisis is. Either law is in crisis because there are bad laws, or it is due to insufficiently reliable jurisprudence. Or the alleged crisis of law is perhaps only a crisis of *understanding of its discursive nature*. The level of (dis) trust in the judiciary as the foundation of legal culture depends on the understanding of the law, its power, and its powerlessness. The theory of discourse provides a sufficiently clear answer to this dilemma when it explains the methodology of the discursive way of perceiving those social phenomena to which the law attributes legal significance. The ability to understand the nature of law in a plural and secular democratic society, its *unpredictability*, contingency, changeability, and above all, the willingness to recognize the relativity of justice and truth itself, represent the political problem of every country. Therefore, it is not only the

acknowledges only the *interdiscursive reality* while simultaneously denying the existence of *extra-discursive reality*.

[15] The court, which may convict the accused only if convinced of their guilt according to the provision of Article 3 CPA, can therefore form such a belief only in the indicated context.

duty of legal science but also of politics to consider and explain the true nature of law. This applies especially to a country that emphatically declares itself legal and swears its allegiance to the rule of law.

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