



Case Law and Collective Construction of Meaning

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ARTICLE



ABSTRACT

Case law has been described as a type of discursive space within which many conversations occur. In law, these dynamic conversations are essential in constructing and re-constructing the meanings of legal concepts and phenomena. Therefore, case law may be understood not only as a space of collective construction of legal concepts and phenomena, but also as a means of this construction. As there is no fixed agreement on the exact concept of *case law*, that is the meaning and role of *case law*, in most continental jurisdictions, the courts themselves join these conversations, hence engaging in a process of case law collectively constructing itself.

This paper argues that this construction is essentially collective (social) and takes place across three dimensions: the overt opinions on the role of case law as expressed in the case law itself; the implied opinions included in the presence (or the absence) of references to past case law; and the fact that the judges even recognize case law as a space that allows them to express these overt opinions or that allows them to refer (or not to refer) to past case law at all. The aim of this article is to offer a way of bringing together the loose strands of theoretical knowledge on meaning-making that meet within the concept of case law in a circular manner: case law is at the same time the *space*, the *means* as well as the *result* of specific processes of social construction, and thus to pave the way for further study.

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KEYWORDS:

case law; construction of
meaning; concepts; social
object; dialogicality; social
representations

TO CITE THIS ARTICLE:

Terezie Smejkalová, 'Case Law
and Collective Construction of
Meaning' (2023) 19(1) Utrecht
Law Review 87–104. DOI:
<https://doi.org/10.36633/ulr.833>

Recently, numerous studies have been focusing on the fickle and fascinating role and nature of case law in legal systems with romano-germanic roots (referred to as ‘continental’ in the following text).¹ The absence of formal rules binding the courts by precedent allows the courts themselves to shape the role and nature of case law by various means: by overt opinions (or the lack thereof), by references to past case law (or the lack thereof) and by the very act (or absence thereof) of choosing to express (or not to express) themselves overtly in their opinions or via references. Recent scholarly writings usually focus on one or another of these means, rarely bringing all these dimensions together.² Yet it is only bringing all these dimensions together that will lead us to fully understand the concept of case law and the way it is constructed. Only such an approach may allow us to learn about the complex phenomenon of case law within any legal system.

Case law has been described as a type of discursive space within which many conversations occur.³ The courts keep referring to one another, either in discord or to support their own claims, yet in most continental legal systems these direct references are not strictly required by law. Each individual use and inherent interpretation of legal text, or specifically, a concept used in the legal text, is a conscious contribution to the conversation about the meaning of that concept in its own right. In law, this dynamic conversation is essential in constructing and re-constructing the meanings of legal concepts and phenomena, including case law.

A theoretical framework that allows us to bring together the above-mentioned issues is the theory of social representations. This theory comes from the field of social psychology and was pioneered by Serge Moscovici.⁴ As I will discuss and explain in detail below, this approach understands social objects and phenomena as socially constructed representations. It provides a framework for studying shared meanings represented in social groups.⁵ This approach has, until recently, remained unrecognized in law. There are only a handful of papers that explore the social representations of law-related phenomena.⁶ The role and nature of case law in continental legal systems is usually not set in stone, or in a text of a formally binding legal regulation; it is being constantly shaped and moulded, in sociological terms, constructed. These constructions are activated within the processes prescribed by law as well as those stemming from a given legal system’s traditions or customs. As the theory of social representations has proven to be highly useful for exploring and understanding complex social phenomena that influence social thinking over the last sixty years,⁷ this paper seeks to show that it may do so in terms of complex legal phenomena, such as case law.

1 Typically, the focus is on EU law; see e.g. M Derlén and J Lindholm, ‘Peek-A-Boo, It’s Case Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective’ (2017) 18 *German Law Journal* 647; M Derlén and J Lindholm, ‘Goodbye van Gend en Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual CJEU Judgments’ (2014) 20(5) *European Law Journal* 667; Y Panagis and U Šadl, ‘The Force of EU Case Law: A Multi-dimensional Study of Case Citations’ in A Rotolo (ed), *JURIX 2015: The Twenty-Eighth Annual Conference* (IOS Press 2015) 71–80. For various national jurisdictions, see e.g. M Van der Haegen, ‘Building a Legal Citation Network: The Influence of the Court of Cassation on the Lower Judiciary’ (2017) 13(3) *Utrecht Law Review* 65–76; D van Kuppevelt, G van Dijck, ‘Answering Legal Research Questions About Dutch Case Law with Network Analysis and Visualization in Legal Knowledge and Information Systems’ in A Wyner and G Casini (eds), *JURIX 2017: The Thirtieth Annual Conference* (IOS Press 2017) 95ff; J Harašta, T Smejkalová, T Novotná and others, *Citační analýza judikatury* (Wolters Kluwer 2021).

2 Harašta, Smejkalová, Novotná and others (n 1) elaborated on the various meanings which a simple reference to a past judicial decision might have in a continental legal system.

3 See e.g. J B White, *The Legal Imagination* (University of Chicago Press 1985); P Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (1986–1987) 38 *Hastings LJ* 814; M van Hoecke, *Law as Communication* (Hart Publishing 2002) 203.

4 S Moscovici, *La Psychanalyse, son image et son public* (Presses Universitaires de France 1961).

5 See e.g. J Wachelke, ‘Social Representations: A Review of Theory and Research from the Structural Approach’ (2012) 11(3) *Universitas Psychologica* 729–741; S Jovchelovitch, *Knowledge in Context: Representations, Community, and Culture* (Routledge 2007); I Marková, *Dialogičnost a sociální reprezentace: Dynamika mysli* (Academia 2007).

6 See e.g. M Levin-Rozalis, ‘Playing by the Rules: Social Representations of “Law” as the Socio-cognitive Mediating Mechanism between Law and Society’ (2007) 17(1) *Theory & Psychology* 5 DOI: 10.1177/0959354307073149; A Barreiro, ‘Social Representations of Justice as Developing Structures: Sociogenesis and Ontogenesis’ in C Prado de Sousa, S E Serrano Oswald (eds), *Social Representations for the Anthropocene: Latin American Perspectives*. The Anthropocene: Politik—Economics—Society—Science, vol 32 (Springer 2021); M Mihailova, A Ruza, and I Ruza, ‘Prisoners’ Social Representations of Justice and Just World’ (2012) 6 (6) *International Journal of Interdisciplinary Social Sciences: Annual Review* 193.

7 Marková (n 5) 49.

The aim of this article is to offer a way of showing how these loose strands of theoretical knowledge that tend to occur now and then when discussing meaning-making in law meet within the discussion on the concept of case law in a circular manner: case law is at the same time the space, the means, as well as the result of specific processes, of social construction.

To do so, I will start with introducing the notion of concept as understood by this paper. This is a necessary step to avoid further confusion with the notions of legal term, legal norm or meta rules governing their usage. Then, I will situate case law into the idea of discursive space, one that has constitutive properties, as this is already a widely accepted notion in legal theory.⁸ Its constitutive nature provides a very specific meaning-making space: the courts' interpretations and constructions have an authoritative nature and the capacity to influence the legal system as a whole.

Next, I will explain the dialogues as a structure of communicative exchange within this space as the concept of dialogue has been routinely used when discussing various dimensions of case law. These dialogues are what enables the construction of concepts that is collective – social – in nature. The theory of social representations offers a complex framework for these discussions. Consequently, I will bring these considerations together and explain how case law is, at the same time, a *space* for collective construction, a *means* of collective construction, and the *object* of collective construction. To do so, I will demonstrate this construction, by drawing upon the examples of the concept of case law (*judikatura*) as used within the legal environment of the Czech Republic. As there is no unanimous agreement on the nature and role which case law is supposed to have in the judicial decision-making process, it allows the courts themselves to express their opinions on the role that case law, their case law, is supposed to play. The similarity between the Czech legal system and the other European legal systems, such as Italian, German or Austrian, makes these examples and conclusions nearly universally applicable for continental legal systems.⁹

II. CASE LAW AS A CONCEPT AND A DISCURSIVE SPACE

This introductory text is not meant as a complex introduction into conceptualization in law – this has been done at length by others.¹⁰ It is, however, necessary, to provide a sufficient framework for understanding the notion of concept as used by this text.

The understanding of 'concept' used in this paper falls within the scope of representational theories. No physical or social object can play any role in a social group if it is not 'represented'. As Hjørland stresses, if concepts are

dynamically constructed and collectively negotiated meanings that classify the world according to interests and theories ...[they]cannot be understood in isolation from the interests and theories that motivated their construction, and, in general, we should expect competing conceptions and concepts to be at play in all domains at all times.¹¹

In law, these interests, theories and contexts that constitute the concept at hand and its representation must naturally include legal norms. We can hardly separate legal concepts from the complex issue of identifying and interpreting (or constructing) the norms in which they occur.¹² The processes of conceptualization in law include the contexts of their use, both textual and real as well as the roles they are to play. This means that legal concepts are inseparable from their purposes¹³ not in the sense of necessary context, but in the sense of necessary content.

⁸ J B White, 'Law as Language: Reading Law and Reading Literature' (1981–1982) 60 Tex L Rev 415, 441.

⁹ One important caveat: the French legal system differs greatly from other European legal systems by strictly forbidding the courts from making any kind of general rules. This creates a slightly different environment where all the discussions on case law are moved away from the texts of judicial decisions to the space of *jurisprudence*. For a more detailed discussion, see M de S O- l'E Lasser, 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System' (1994–1995) 104 Yale L J 1325.

¹⁰ J Hage, 'The Meaning of Legal Status Words' in J Hage and D von der Pfordten (eds), *Concepts in Law* (Springer 2009); D von der Pfordten, 'About Concepts in Law' in *ibid*; M Jakubiec, 'Legal Concepts as Mental Representations' (2022) 35 Int J Semiot Law 1837, DOI: [10.1007/s11196-021-09853-7](https://doi.org/10.1007/s11196-021-09853-7).

¹¹ B Hjørland, 'Concept Theory' (2009) 60(8) Journal of the American Society for Information Science and Technology 1519, 1522–1523.

¹² G Sartor, 'Understanding and Applying Legal Concepts: An Inquiry on Inferential Meaning' in (n 10) 35.

¹³ T Smejkalová and others, *Veřejný pořádek, důstojnost soudce a judikatura: Tři studie využití přístupu sociálních reprezentací v analýze právních pojmů* (MUNIPress 2022) 87–90.

Let me explain this consideration in the context of the concept of case law. Case law in continental legal systems is something that usually lacks an exact, legal regulation-based definition. Judging from a study explaining the usage of this concept,¹⁴ the words themselves seem to designate at the same time: a general body of judicial decisions; a body of thematically related decisions; a precedential interpretation of a legal norm or a legal concept; a body of decisions reiterating such interpretation; a binding body of such interpretation; an authoritative body of such interpretation; simply one authoritative interpretation, and this list could go on. What is intriguing to note is the multidimensionality of the explanations of the concept of case law: they do not focus as much on what it is as what kind of normative role it has (is supposed to have) and how it is supposed to be used. Its normative role, and subsequent meta-rules on how to fulfil this role, is what makes case law what it is.

Speaking about the role of case law in judicial decision-making is not something separable from speaking about case law and its conceptual content. The role of case law as well as various meta-theories of its use are necessary parts of what case law is: all of this is an inseparable part of the conceptualization of case law. Consequently, legal concepts are their contexts of use as well as the meta-rules of their use.

At the same time, conceptualization of case law is not only the matter of what it is and what role does it have but *how* does it do that as well. To understand this multidimensionality, let me start with the issue of *how*, introducing case law as a special type of communicative space.

Across literature, law has been understood as a communicative, discursive, space.¹⁵ This approach understands law as a space delimited by a language and related culture of interpretation and argumentation.¹⁶ This space has a constitutive nature: it provides all the necessary tools and methods of meaning-making in law and in its discourse and creates statuses and communicative roles of persons and their relationships,¹⁷ as well as changes in social reality.¹⁸ As Pierre Bourdieu, a sociologist focusing on the issues of power and order in a society, whose work has been widely used in contemporary legal theory,¹⁹ writes:

[L]aw is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular. It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects. The law is the quintessential form of 'active' discourse, able by its own operation to produce its effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law.²⁰

The social world in Bourdieu's sense is being collectively produced by what he calls juridical labour²¹ and may be understood as a collective participation in the construction of the legal social world by speech. Law may thus be understood as a discursive space that allows for the actualization of a certain level of social reality.²² It is a space delimited and perpetually created and recreated by legal discourse.²³

¹⁴ See e.g. Harašta, Smejkalová, Novotná and others (n 1).

¹⁵ See e.g. White (n 3); Bourdieu (n 3); or van Hoecke (n 3) 203.

¹⁶ White (n 8) 436; R Dworkin, 'Law as interpretation' (1982) 9(1) *Critical Inquiry* 179–200.

¹⁷ White (n 8) 441.

¹⁸ T Smejkalová, *Soudní rozhodnutí jako autoportrét českého soudnictví* [Judicial Decision as a Self-Portrait of Czech Judiciary] (Masarykova univerzita 2021) 21.

¹⁹ Although it is not possible to provide an exhaustive list here, see e.g. M García Villegas, 'On Pierre Bourdieu's Legal Thought' (2004) 56–57 *Droit et société* 57–70; M Carmen África Vidal Claramonte, 'Re-presenting the "Real"' (2005) 11(2) *The Translator* 259 DOI: [10.1080/13556509.2005.10799201](https://doi.org/10.1080/13556509.2005.10799201).

²⁰ Bourdieu (n 3) 838–839.

²¹ Bourdieu (n 3) 817ff.

²² T Smejkalová, 'Legal Performance: Translating into Law and Subjectivity in Law' (2017) 22(1–2) *Tilburg Law Review* 64.

²³ We can trace this approach across various scholarly explorations; see e.g., N Luhmann, *A Sociological Theory of Law*. (E King and M Albrow trs, Routledge & Kegan Paul 1985); White (n 8) 415; P Bourdieu, *Language and Symbolic Power* (Polity Press 1992). An insightful exploration of the discursive space of law – and one this paper builds upon – was made by van Hoecke (n 3).

The discursive space of law is by no means unified. It comprises diverse communicative subspaces, whether it be the legislation, judiciary, or ‘just’ the space created by the jargon which lawyers use to communicate between themselves.²⁴ Therefore, within this vast discursive space, we may observe smaller, yet interconnected,²⁵ specialized discourses that are capable of creating their own spaces serving specific purposes. The space created by the texts of judicial decisions would be one such discursive space.

Moreover, it is through and within this discursive space that a change in physical or social reality²⁶ occurs, e.g., a person is found guilty and forced to spend time in prison; or a new family relationship is established through adoption. When a decision of a court is to rely on a concept used in the legal norm it is to apply in a particular case, it is within this space that the concept is actualized for the particular context.

Courts are usually understood as the prominent interpreters of law and legal concepts. The authoritative results of the decision-making process – the texts of judicial decisions – are the special space in which the intensions as well as extensions of concepts are realized. The discursive space of case law has some sort of normative force: it is always goal-oriented, normative and aimed at a specific organisation of the society.²⁷

It has been suggested that, despite the main role of the judiciary to authoritatively resolve disputes, the main addressees of the communication contained within the rationales of the judicial decisions are not the parties to the case but rather other courts.²⁸ In precedential systems,²⁹ the main audience of the texts of judicial decisions was suggested to be the lower courts as they are those which must follow precedent;³⁰ in non-precedential legal systems, the main audience seems to be the higher courts, specifically those which would review the judicial decisions in the case of an appeal.³¹ That does not, of course, imply that courts in non-precedential legal systems would not use references to past judicial decisions in their own decisions, or that the decisions of courts in precedential systems would not be reviewed in the case of an appeal. The communication, although by no means immediate, runs both ways and across various types of courts. This does not mean that the audience of judicial decisions would be limited to courts only. It seems to be clear, however, that a crucial part of the communication that happens across judicial decisions happens within the judiciary.

Courts, or specifically, judges, as the primary readers of past judicial decisions are those who actively participate in the construction of both the meanings they read in those past decisions as well as the meanings they further instil into their own decisions.³² The interpretation of law which they are called to perform may be seen as a creative activity that is closely linked to the social context in which it happens.³³ For Levinson, meaning is created, constructed, rather than found, and the source of the construction is the community in which we happen to be.³⁴

²⁴ Van Hoecke (n 3) 199.

²⁵ *ibid* 209.

²⁶ As J Hage points out, for example, legal status words are not empty, and as, for example, A Ross suggested, they are actually real phenomena in social reality. See A Ross, ‘Tu~Tu’ (1956/1957) 70 *Harvard Law Review* 812; and see Hage (n 10) 66.

²⁷ Van Hoecke (n 3) 126–127.

²⁸ This idea stems from Kelsen and was further elaborated on by D Stevenson, ‘To Whom is the Law Addressed’ (2005) 21 *Yale Law and Policy Review* 105 and A J Mikva, ‘For Whom Judges Write’ (1987–1988) 61 *S Cal L Rev* 1357.

²⁹ For the purposes of this text, ‘precedential legal systems’ are those that follow the doctrine of binding precedent, whereas ‘non-precedential legal systems’ are those that do not. Continental legal systems would, thus, be categorized as non-precedential.

³⁰ Mikva (n 28) 1364.

³¹ These considerations stem from Kelsen, see H Kelsen, *General Theory of Law and State* (Harvard University Press 1945) 61; and have been used both in continental legal settings as well as in common law settings. See e.g. Stevenson (n 28).

³² That is not to say that the case law is not meant to be read by other lawyers or that solicitors, barristers and others would not read judicial decisions. The legal community as a whole participates in the construction of what role case law plays by actively using it and interpreting it. The claim on the judges being the primary intended audience of past judicial decisions comes from Stevenson (n 28) and Mikva (n 28) Since this paper focuses on the construction of meaning as it appears in the judicial decisions themselves, I will leave the non-judges’ contributions to this discourse out of the scope of this paper.

³³ M Škop, *...právo, jazyk a příběh* (Auditorium 2013) 71.

³⁴ S Levinson, ‘Law as Literature’ (1982) 60(3) *Texas Law Review* 383.

Consequently, any construction of meaning is delimited by the acceptance (or lack of) by the community.³⁵ As Van Hoecke further explains '[w]hat is 'acceptable' or clearly unacceptable for each of us is socially determined'.³⁶ The wider community that delimits the meaning-making in law is unsurprisingly the given legal system and the subjects participating in the constant keeping of the system alive. The immediate community that provides this delimitation is the judiciary – the other courts and judges – itself.

III. CASE LAW AND DIALOGUES

Speaking about communication across judicial decisions is often framed by the concept of 'dialogue'. The idea that courts engage in some sort of dialogue among themselves seems to have seeped not only into scholarly texts but also into the general legal discourse. The literature that deals with what has become known as 'judicial dialogue' is immense,³⁷ showing the resemblance in what happens in various kinds of judicial interactions to communicative – dialogical – exchange.

'Dialogues' imply interactive exchanges of various kinds. Literature speaks of them as formal and direct (such as that of a preliminary question within European Union law), indirect (involving references and citations of previous judicial decisions) or even informal (involving actual meetings and exchanges between the judges themselves).³⁸ Some authors require reciprocity in order for a judicial exchange to be called a judicial dialogue,³⁹ others use it in a broader sense when various interactions between courts are involved.⁴⁰ Literature also mentions cooperative and competitive dialogues, or horizontal and vertical dialogues.⁴¹ Therefore, literature typically provides examples of various types of exchanges – dialogues – between national courts and the Court of Justice of the European Union or the European Court of Human Rights, focusing on in what ways and to what extent the national courts follow the other courts' rulings or dispute their opinions.⁴²

'Judicial dialogue' is a well-known and often-mentioned construct related to EU law, linked to what are called 'preliminary questions'. It metaphorically reflects upon the relationship between the Court of Justice of the European Union (CJEU) and the national courts of the Member States. Some authors suggest that this relationship may be analysed not in terms of authority and hierarchy, but rather of interaction and compromise.⁴³ If the CJEU and the national courts are both guardians of the legal order of the EU, then their individual interpretations of EU law may be considered additions to the construction and upholding of the EU's legal order.⁴⁴ Their interactions seem to resemble a dialogue.⁴⁵

³⁵ Škop (n 33) 71–72.

³⁶ Van Hoecke (n 3) 201.

³⁷ See e.g. A Arnall, 'Judicial Dialogue in the European Union' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012); G Cornelisse and M Moraru, 'Introduction: Judicial Dialogue on the Return Directive – Catalyst for Changing Migration Governance?' in M Moraru, G Cornelisse, P de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020); L B Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' 2005 3(4) *International Journal of Constitutional Law* 617ff; Panagis and Šadl(n 1); E F Mac-Gregor, 'What do we mean when we talk about judicial dialogue: Reflections of a Judge of the Inter-American Court of Human Rights' (2017) 30 *Harvard Human Rights Journal* 89; A Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1 *European Journal of Legal Studies* 121.

³⁸ Cornelisse and Moraru (n 37) 24. When putting together a joint book of case law, the registrars of the European Court of Human Rights and of the Inter-American Court of Human Rights imagine their activities as some sort of dialogue; one starting with interpersonal relationships and visiting judges and extending to the texts of the decisions of these courts themselves. See *Dialogue Across the Atlantic: Selected Case-Law of the European and Inter-American Human Rights Courts* (Wolf Legal Publishers 2015).

³⁹ A T Perez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009), referred to in Cornelisse and Moraru (n 37) 25.

⁴⁰ Cornelisse and Moraru (n 37) 25.

⁴¹ L Wildhaber, 'European Constitutionalism and the Dialogue of Judges' in V Göttinger (ed), *Evropský konstitucionalismus v kontextu soudního dialogu. Sborník příspěvků z mezinárodní konference* (Ústavní soud 2016) 61.

⁴² Wildhaber (n 41) lists a few involving Germany, UK, Switzerland and Lithuania.

⁴³ Arnall (n 37) 109.

⁴⁴ Arnall (n 37) 110. See also the Opinion of Advocate General Bobek 8 July 2021(1) *Getin Noble Bank*, C-132/20, not published, EU: C: 2021: 557 and Opinion of Advocate General Tanchev of 17 December 2020(1), *A.B. and Others (Nomination des juges a la Cour supreme – Recours*, C-824/18, not published, EU:C:2020:1053

⁴⁵ Arnall (n 37) 113.

[u]nlike other constitutional systems where the dialogue between the legislature and the judiciary plays the crucial role, the interaction between national courts and the Court of Justice of the EU is the only way through which the EU can be precluded from becoming a self-defining, tyrannical, constitutional order.⁴⁶

They also point out that regardless of whether the dialogue takes place between the legislatures and courts, as traditionally envisaged in the literature, or between courts themselves, '[b]oth are clearly instances of constitutional dialogue. Both scenarios aim to ensure the adherence of the Rule of Law in the constitutional system in question'.⁴⁷ Therefore, while discussing their idea of judicial dialogue alongside the concept of the rule of law, they show that it is dialogical in essence, analysing various instances of case law to prove their point. What is not shown or discussed is that it is *within* the dialogue that the very idea or concept of the rule of law is being constructed. It is not only the exchange that makes the rule of law possible, but also the exchange that, *inter alia*, *makes* the rule of law.

Judicial dialogue is not a notion belonging to EU law only. The metaphor seems to be so universal that it is being recognized in other legal systems as well as in various types of exchanges between national and transnational courts.⁴⁸ Dialogue may be seen as a matter of authority of various judicial bodies and the role which they are to play within the system.⁴⁹ However, in the context of the Czech legal system, for example, Šimiček believes that case law is by no means a strictly authoritative directive. In his opinion, it should be viewed as a conversation, a dialogue, where the lower courts are practically invited not to follow the, for example, Czech Constitutional Court's case law when they provide arguments against it.⁵⁰ This idea is in line with the Czech Constitutional Court's own views on the role of its decisions as presented in one of the decisions: 'relationships between the [Czech] Constitutional Court and ordinary courts are not characterized by a one-sided command; quite the opposite – a dialogue must be allowed'.⁵¹ Šimiček's opinion points towards yet another dimension of the idea of dialogue in meaning-making in judicial decision-making: it is an inevitable result of the lack of a doctrine of binding precedent. Opinions expressed in case law are not authoritative in the way that written laws are: they are invitations to a communicative exchange.

A dialogical nature of (the use) of case law is also recognized in non-scholarly writing: for example, the former President of the Supreme Court of the Czech Republic mentioned in an interview the tensions that exist between different courts.⁵² These tensions are reflected in the courts' interpretations of legal norms and understanding of concepts on and around which the norms are built. Similarly, a well-read legal blog often reflects on situations where various courts enter (often tense) conversations within the texts of their decisions, often related to understanding of (often vague) legal concepts.⁵³

⁴⁶ D Kochenov and M van Wolferen, 'The dialogical rule of law and the breakdown of dialogue in the EU' (EU Working Paper LAW 2018) <https://cadmus.eui.eu/bitstream/handle/1814/50764/WP_2018_1.pdf?sequence=1> accessed 30 November 2022, in abstract.

⁴⁷ Kochenov and van Wolferen (n 46) 3.

⁴⁸ B Friedman, 'Dialogue and Judicial Review' 91(4) Michal Law Review 577; Mac-Gregor (n 37); P W Hogg and A A Bushell, 'The Charter Dialogue between Courts and Legislatures' (1997) 35 Osgoode Hall LJ 75; D S Law and W-C Chang, 'The Limits of Global Judicial Dialogue' (2011) 86(3) Washington Law Review 523.

⁴⁹ P Šámal and K Šipulová, 'Úvod. Porozumění funkci rozhodnutí v mezisoudním dialogu' in P Šámal, G Raimondi, K Lenaerts and others (eds), *Závaznost soudních rozhodnutí – vnitrostátní a mezinárodní náhledy* (Wolters Kluwer 2018).

⁵⁰ V Šimiček, 'Závaznost soudních rozhodnutí Ústavního soudu v řízení o ústavních stížnostech' in Šámal et al (eds) (n 49) 53.

⁵¹ Decision of the Constitutional Court of the Czech Republic No. IV. ÚS 301/05.

⁵² I Holas, 'Ze závěrů konference NS: Judikatura nemá být chápána jako direktivní nařízení, ale jako dialog' (Česká justice 22 June 2017) <<https://www.ceska-justice.cz/2017/06/ze-zaveru-konference-ns-judikatura-nema-byt-chapana-jako-direktivni-narizeni-jako-dialog/>> accessed 20 April 2022.

⁵³ J Komárek, 'V Joštově vybuchla atomová bomba' (Jiné právo 15 February 2012) <<https://jinepravo.blogspot.com/2012/02/v-jostove-vybuchla-atomova-bomba.html>> accessed 22 April 2022; M Kopa, 'Justiční dialog jak se sluší a patří' (Jiné právo 27 December 2014) <<https://jinepravo.blogspot.com/2014/12/justicni-dialog-jak-se-slusi-patri.html>> accessed 21 April 2022.

The above-mentioned texts usually focus on the exchange itself, showing how the courts' ideas and approaches shift, grow or clash from decision to decision. It almost seems as if all the scholars talking of case law in terms of dialogue did not give much thought to it and intuitively recognized it for what it is: a communicative exchange.

However, literature on judicial dialogues is not limited to analysing examples of communicative exchanges regarding chosen legal concepts or phenomena. The idea that judicial opinions themselves are dialogical in nature has been discussed by many, typically in the precedential legal settings.⁵⁴ They are often building on the dialogical model of Bakhtin.⁵⁵ The roots of this 'dialogical principle' come from neo-Kantian thinkers who believed the world and its understanding is created and sustained in speech and communication.⁵⁶ These ideas then inspired Bakhtin, whose work on dialogues is used in contemporary legal theory.⁵⁷ For Bakhtin, meaning always emerges through dialogue.

The word, directed toward its object, enters a dialogically agitated and tension-filled environment of alien words, value judgments and accents, weaves in and out of complex interrelationships, merges with some, recoils from others, intersects with yet a third group: and all this may crucially shape discourse, may leave a trace in all its semantic layers, may complicate its expression and influence its entire stylistic profile. The living utterance, having taken meaning and shape at a particular historical moment in a socially specific environment, cannot fail to brush up against thousands of living dialogic threads, woven by socio-ideological consciousness around the given object of an utterance; it cannot fail to become an active participant in social dialogue. After all, the utterance arises out of this dialogue as a continuation of it and as a rejoinder to it – it does not approach the object from the sidelines.⁵⁸

The texts of judicial decisions, or judicial opinions, may be seen as the type of socially specific environment which Bakhtin talks about. As Brooks points out, dialogues 'implicate the words and anticipated reactions of their listeners, so that listener, or reader, cannot escape scot-free from having listened to them'.⁵⁹ A judge referring to past decisions (or scholarly works, witness accounts etc.) is at the same time a receiver of these messages and a speaker, resounding and reinforcing those opinions for posterity.

This recognition of communicative exchanges that are dialogical in nature is not something that would be strictly linked to law only. Marková, a researcher in social psychology and a prominent author within the social representation approach that I will explain further in section IV, claims that the very nature of human thinking and language – or human intelligence itself⁶⁰ – is generated by dialogicality.⁶¹ She understands dialogicality as a culturally and historically rooted phenomenon constructed and created within communication, tension and change.⁶² It is based on a hypothesis that rational thinking is rooted in a dialogical relation of ego and alter. This means, as Marková explains, that cognitive thinking is inherently linked with the ability to communicate.⁶³ In her opinion, '[t]hinking and language stems from the ego-alter antinomy, and consequently, the shared knowledge is at the same time the source as well as the product of dialogical rationality'.⁶⁴ Therefore, it may be understood as an ability of a mind

⁵⁴ R Robinson, 'The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse' (1996) 101 Dickinson Law Review 3; C Hersch, 'Bakhtin and Dialogical Constitutional Interpretation' (1994) 18 Legal Studies Forum 33; J Leubsdorf, 'The Structure of Judicial Opinions' (2001) 86 Minnesota Law Review 447.

⁵⁵ M Bakhtin, *The Dialogic Imagination* (University of Texas Press 1981).

⁵⁶ Marková (n 5) 115.

⁵⁷ See e.g. Hersch (n 54); P Brooks, 'Storytelling without fear? Confession in Law and Literature' in P Brooks and P Gerwitz (eds), *Law's Stories. Narrative Rhetoric in the Law* (Yale University Press 1996); Leubsdorf (n 54).

⁵⁸ Bakhtin (n 55) 276–277.

⁵⁹ Brooks (n 57) 132.

⁶⁰ Marková (n 5) 123.

⁶¹ *ibid* 15.

⁶² *ibid* 49.

⁶³ *ibid* 185.

⁶⁴ *ibid* 185.

to communicate and create social facts in terms of *ego-alter*.⁶⁵ It focuses on human existence as a communicative existence.⁶⁶ All human knowledge and cognition, the concepts and representations that the society is built around, come to life in dialogical exchanges. Therefore, it is also the basis for the construction of meaning within the society.

This strong focus on dialogues may seem to be in direct contradiction with the suggestion that the nature of discourse of the rationales of judicial decisions is authoritative and monological.⁶⁷ However, as regards the construction of meaning within case law, the way this collective decision on the meaning is being made – especially the situation where a court refers to past judicial decisions when constructing the meanings of the concepts it needs to use – has been likened to a special type of dialogue. A court (or, more specifically, a judge) deciding to refer to any past decision for any reason enters into a conversation with the court (or a judge) that made that decision, whether it be to concur, disagree or build upon an interpretation or argumentation within the previous decision(s).

The construction of meaning of legal concepts and phenomena thus seems to occur not only within the texts of the judicial decisions whereby the courts try to explain what case law is and what role should it have, but also within a conversation, a dialogue that occurs when courts refer to past judicial explanations and constructions of the meanings of these concepts. Therefore, what is happening within this discursive space in relation to various legal concepts is a specific form of communication: by referring to a past decision the judge enters into a conversation with it (and – by extension – with the judges making the previous decision), recognizes its existence, and typically either agrees with it or disagrees with it.

The dialogical form of judicial opinions is not the only dimension that carries a meaning and that allows us to explore the role and nature of case law. It is also the fact that such dialogues occur as well as the content of such dialogues that deserves further attention.

Judicial decisions, especially their rationales, create a space where a substantial part of law happens: legal norms are being interpreted and used and, within these interpretations, the meanings of concepts are being constructed and re-constructed. Thus, if for example Ronald Dworkin concludes that law is interpretation,⁶⁸ it means that it is a specific meaning-giving space. Reading rationales of the judicial decisions allows us to understand and analyse this space and any meaning constructions happening within this space. It is a culture of argumentation and interpretation⁶⁹ where the meanings of concepts are being constructed in the context of a case.⁷⁰ Interpretation involves adapting the norm to new circumstances, ‘by discovering new possibilities within them, and by eliminating what has been superseded or become obsolete’.⁷¹ We may, therefore, say that legal concepts come anew with every interpretation.⁷² Similarly, Frändberg points out that ‘[c]oncepts do not function in isolation but as components of legal argumentation, and their meaning must always be determined according to their function in such argumentation’.⁷³

⁶⁵ *ibid* 129.

⁶⁶ *ibid* 131.

⁶⁷ R Ferguson, ‘The Judicial Opinion as Literary Genre’ (1990) 2 *Yale Journal of Law & Humanities* 201, 205.

⁶⁸ Dworkin (n 16).

⁶⁹ Škop (n 33) 73.

⁷⁰ There are, however, limited situations in the Czech legal system (and in other post-communist legal systems) where judges provide opinions on the interpretation of legal norms outside of a case. These so called ‘unifying opinions’ have been called a residuum of the communist centralist legal system and criticized as being in conflict with the doctrine of separation of powers. Z Kühn, ‘Stanoviska nejvyšších soudů: specifikum středoevropské právní kultury nebo komunistické reziduum?’ (2005) 4 *Jurisprudence* 9–10.

⁷¹ Bourdieu (n 3) 826–827.

⁷² Foucault, too, pointed out that juridical texts are the discourses that are to be said and said again. M Foucault, ‘The Order of Discourse. Inaugural Lecture at the College de France, given 2 Dec 1970’ in R Young (ed), *Untying the Text: A Post-Structuralist Reader* (Routledge & Kegan Paul 1981) 57.

⁷³ A Frändberg, ‘An Essay on Legal Concept Formation’ in J Hage and D von der Pfordten (eds), *Concepts in Law* (Springer 2009) 15.

The claim that meaning – or in Ogden and Richards' terminology 'concept' – is something that is socially constructed is well recognized across the fields of linguistics,⁷⁴ psychology and sociology and has been introduced to legal theory. Yet there is no agreement on what exactly a concept is, the main divisive line lying between concepts as (mental) representations and concepts as abstract entities.⁷⁵ These different views are reflected in distinct theories.⁷⁶ Any discussion of concepts and their construction must, therefore, start with choosing an approach.⁷⁷

As evident from the introductory note in Section II of this text, the approach adopted here is one that connects cognitive⁷⁸ and sociocultural approaches to knowledge and meaning construction and, therefore, to concept construction, mainly through the social representations approach. This approach believes that meaning construction never appears isolated. Individuals acquire knowledge within communities, meanings emerge when people interact, when they argue, refer to each other's statements and build upon them.⁷⁹ The variety of approaches that situate meaning construction, conceptualization and learning within wider socio-cultural settings are plentiful.

Émile Durkheim⁸⁰ saw ideas, beliefs and values to be collective representations that emerge through various community-strengthening activities, such as religious rituals. These collective representations are not just a sum of individual mental representations, they are more than that. This approach was further built upon by Serge Moscovici,⁸¹ who coined the term 'social representations'. He understood them as collective elaborations 'of a social object by the community for the purpose of behaving and communicating',⁸² a result of social construction that performs a symbolic role, representing an object to a group of persons.⁸³

Therefore, a social representation is not a mental representation of an individual. It is closely connected to a system of beliefs, values and practices of the whole community. Social representations are essential because, in the end, they constitute our reality and socialize us.⁸⁴ We take them for granted and no longer see them as 'the way we represent and understand a concept' but we 'see them as the concept itself'.⁸⁵ To explain, let me use the example of 'justice'. Justice is an abstract term. From a linguistic point of view, it does not have a physical referent, an object it would refer to. Yet it has a 'meaning' and it is capable of fulfilling various functions in a society, both law-related as well as society-related. What 'justice' means for us as members of our communities

⁷⁴ In his seminal work, *Course of General Linguistics*, de Saussure explains that meaning is a link between the signifier and the signified and is socially constructed; see F de Saussure, *Kurs obecné lingvistiky* (Academia 2007). Consequently Ogden and Richards explain that the meaning (they call it thought, or reference) is this mental link we make between the symbols (signifiers) and referents (reality, the signified), showing that '[b]etween the symbol and the referent there is no relevant relation other than the indirect one, which consists in its being used by someone to stand for a referent,' whereas this usage and thought processes that provide this indirect relation is what may be thought of as 'concept'; see C K Ogden, I A Richards, *The Meaning of Meaning. A Study of the Influence of Language upon Thought and of the Science of Symbolism* (Kegan Paul, Trench, Trubner 1930) 11.

⁷⁵ Von der Pfordten (n 10) 19–20. For an alternative classification see Hjørland (n 11).

⁷⁶ Margolis and Laurence list them as: the Classical theory, the Prototype theory, the Neoclassical theory, the Theory-Theory and Conceptual Atomism. E Margolis and S Laurence, *Concepts: Core Readings* (MIT Press 1999) 4–81.

⁷⁷ See e.g. T Spaak, 'Explicating the Concept of Legal Competence' in Hage and von der Pfordten (n 73) 68.

⁷⁸ I.e. those that are based around the individual and their conceptualization, usually by means of individual mental representations, understanding concepts as psychological entities, internal systems of representation (see for example S Pinker, *The Stuff of Thought: Language as a Window into Human Nature* (Penguin 2007) or J Fodor, *Hume Variations* (Oxford University Press 2003). Mental representations are mental objects with semantic properties. See E Margolis and S Laurence, 'Concepts', *The Stanford Encyclopedia of Philosophy* (Spring edn, 2021) <<https://plato.stanford.edu/archives/spr2021/entries/concepts/>>.

⁷⁹ A C Clark and B C Douglas, 'Learning through collaborative argumentation' in Ci E Hmelo-Silver, C A Chinn, C K K Chan and A O'Donnell (eds), *International handbook of collaborative learning* (Routledge 2013).

⁸⁰ É Durkheim, *The Elementary Forms of the Religious Life* (K Fields tr, Free Press 1912/1995).

⁸¹ Moscovici (n 4).

⁸² S Moscovici, 'Attitudes and opinions' (1963) 14 Annual Review of Psychology 231, 251.

⁸³ Wachelke (n 5) 730.

⁸⁴ U Flick and J Foster, 'Social representations', in C Willig and W Stainton-Rogers (eds), *The Sage handbook of qualitative methods in psychology* (Sage Publications 2008) 197, referring to S Moscovici and M Hewstone, 'Social representations and social explanations: from the "naïve" to the "amateur" scientist' in M Hewstone (ed), *Attribution Theory: Social and Functional Extensions* (Blackwell 1983).

⁸⁵ Flick and Foster (n 84) 197. They refer to I Marková, 'Towards an epistemology of social representations' (1996) 26(2) Journal for the Theory of Social Behaviour 177.

depends on the beliefs and practices of those communities. For most of European societies, the concept of justice has its philosophical roots in Greek and Roman civilizations and Christian systems of belief, shaped by our shared histories and lately actively shaped by the international treaties and their products, such as the European Court of Human Rights, and its decisions. Yet when we use this word to say that something was ‘unjust’ we are not consciously constructing the meaning of this word in the way I have just described, we simply reach for the concept we share as a community. To be able to do so, ‘justice’ has to be represented in our community, simply put, a shared understanding of what the word ‘justice’ designates, despite being abstract in nature, must exist. And since there is no physical object that we can point at and say ‘This is justice’, this shared understanding, this social representation, is what we see ‘justice’ as *being*.⁸⁶ The same might be said for abstract legal concepts, especially those with a strong vague dimension.

Moreover, social representations are depicted not only as the result of social construction but also as the process of social construction. Similarly, Cascinelli points out that ‘[t]hey are constantly converted into social reality while continuously being re-interpreted, re-thought, re-presented’.⁸⁷ Within this line of thinking, it is clear why meaning construction may be described as an emergent process: new meanings may arise as a result of collaboration and communication within a group. And as already discussed in Section III above in a slightly different context, this communication is dialogical in nature.⁸⁸ Individuals and their contributions to the common discussion are influenced by the context and culture.⁸⁹ Therefore, while conceptualization as a constructive activity⁹⁰ is based on the individual’s cognitive structures, experience and knowledge, it is necessarily grounded in their social reality.⁹¹

This grounding, or anchoring, approach of making sense of the new in the world by means of already existing knowledge plays an important role within the social representations approach, too. A social representation is generated by two processes. First, we need to transfer the given, usually less familiar, object into our own sphere of understanding where we are able to interpret it, usually by comparing to what we already know. Second, we tend to link and reproduce it to the things we see and touch.⁹² The first process is called anchoring, the second objectifying and both of these mechanisms make the unfamiliar familiar. These processes involve the whole community (sometimes unknowingly) participating in this collective communicative endeavour that produces the social representation, the social object with semantic properties. Similarly, collective construction of meaning is a process in which knowledge and meaning is created in a social and collaborative manner by people.⁹³ Seeing case law as a social object with semantic properties would, therefore, imply that it is being constructed by the legal community in a collaborative manner. As any other social representation, this process of constructing case law take dialogical form. What is intriguing, however, is that since case law is at the same time the space for the dialogue on and about its own role and nature, including the meta-rules of its use in the given legal system, as well as the product of such dialogue, it is essentially actively contributing to collectively constructing itself in its entirety. I will now discuss these three dimensions of case law conceptualization: where case law is at the same time a space for its own construction, as well as the means and object of this construction.

V. CASE LAW AS A SPACE FOR COLLECTIVE CONSTRUCTION, MEANS OF COLLECTIVE CONSTRUCTION, AND THE OBJECT OF COLLECTIVE CONSTRUCTION

Generally speaking, continental legal systems do not rely on precedent as a specifically defined binding source of judicial decision-making; some even prohibit judges from formulating

⁸⁶ That is not to say that the lack of physical referent makes the represented object any less real – it is very real in its consequences, as it influences people’s experience.

⁸⁷ P Cascinelli, ‘Social Representations and Economic Integration in the Mediterranean Area’, *EUI Working Papers*. RSCAS 2010/89, 6. The same holds for case law.

⁸⁸ Marková (n 5).

⁸⁹ E.g. U Cress and J Kimmerle, *Collective Knowledge Construction* (Routledge 2018) 139.

⁹⁰ J Piaget, *The development of thought: Equilibration of cognitive structures* (The Viking Press 1977).

⁹¹ Cress and Kimmerle (n 89) 138–139.

⁹² S Moscovici, *Social Representations. Explorations in Social Psychology* (New York University Press 2001) 42.

⁹³ Cress and Kimmerle (n 89) 137.

any kind of general rule.⁹⁴ That does not mean that the role which judicial decisions play in continental legal systems is insignificant. However, the range of roles which judicial decisions play in subsequent judicial decision-making in continental legal systems, regardless of whether we call it case law, precedent, *judikatura*⁹⁵ or by any other name, is vast. Therefore, there have been numerous studies related to various continental law jurisdictions trying to build a theory⁹⁶ and/or explore the actual practice⁹⁷ of using previous decisions in judicial decision-making to explain the role of previous judicial decisions in subsequent judicial decision-making.

Apart from numerous explorations of case law in scholarly writings, the construction of the concept itself, including its role and purpose, comes predominantly from the case law itself. As already mentioned above, a significant number of opinions on the normative nature of case law come from the courts themselves. Therefore, case law seems to be at the same time the platform, i.e., the space where the collective construction of case law takes place, as well as the object whose collective construction happens across this very platform. The social representation of case law in a given legal system takes place through the space and means provided by the case law itself.

The process of representation, that is the process of construction of case law, is collective in nature: the judges making the decision always build upon the bases provided by previous decisions, either consciously, or unconsciously. It seems as if the texts of judicial decisions provide a space for the construction that is dialogical in nature, thus allowing for certain types of collective bargaining or negotiation on meanings.⁹⁸

Cress and Kimmerle explain that when it comes to collective construction of meanings 'individuals do not merely contribute additively but refer to each other and take up each other's arguments in such a way that the group as a whole may arrive at new insights'.⁹⁹ This explanation implies the existence of a group of people, i.e. a community, established channels and processes of communication, a competence to use these channels and processes, and a willingness to use these channels and processes.

Let us explore what that means for the collective construction of the social object of case law. The community involved here are the lawyers and, specifically, the judges. The channels and processes are not necessarily formal ones (although in the case of judicial decision-making that would most likely be the case). They comprise various social objects, physical artifacts, individual utterances and interactions among the members of a community to allow for meaning-making.¹⁰⁰ Legal processes – judicial decision-making especially – are heavily scripted activities. Law contains specific rules that influence and shape the individual's role in these processes, especially the decision-making ones. It delimits the judge's role, the space in which the interpretations and applications of law take place; it even has more or less formal scripts for the form and content of written judicial decisions as well.¹⁰¹ Scripting procedures are used as catalysts in the collective construction of knowledge.¹⁰²

⁹⁴ Continental legal systems prefer written laws formulated and created by legislative as well as executive bodies. The judiciary is often strictly set aside by a doctrine of separation of powers, where it may not formulate any norms of a general nature. For example, the French Code Civil Article 5 says 'Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises'. This in turn means that courts are not allowed to use previous judicial decisions as general norms to guide their decision-making.

⁹⁵ *Judikatura* is the word used in the Czech language to designate the phenomenon which this text discusses.

⁹⁶ A Peczenik, 'The Binding Force of Precedent' in N MacCormick and R S Summers (eds), *Interpreting Precedents. A Comparative Study* (Aldershot 1997), 461–479.

⁹⁷ Derlén and Lindholm 2017 (n 1); Derlén and Lindholm 2014 (n 1) 667ff. For the Czech legal environment specifically see Harašta, Smejkalová, Novotná and others (n 1).

⁹⁸ The same – although in a different way – may be said for collaborative texts like Wikipedia. See Cress and Kimmerle (n 89).

⁹⁹ Cress and Kimmerle (n 89) 137.

¹⁰⁰ This has been partially adapted from Stahl's model of group cognition (G Stahl, *Group cognition: Computer support for building collaborative knowledge* (MIT Press 2006)) in Cress and Kimmerle (n 89) 139), although originally formulated in terms of Learning Sciences.

¹⁰¹ Lasser (n 9). For the Czech legal context see Smejkalová (n 18) 53–104.

¹⁰² I Kollar, F Fisher and F Hesse, 'Collaboration scripts: A Conceptual Analysis' (2006) 18(2) *Educational Psychology Review* 159 as discussed by Cress and Kimmerle (n 89) 140. It is worth noting that Kollar, Fisher and Hesse speak about collaborative learning, both face-to-face as well as computer-mediated. However, the same may be applied to the scripted nature of judicial proceedings where its results – discovery of facts and subsequent legal qualification – happen to be actualized within this scripted setting.

The competence to use the channels and processes then involves communicative, semio-linguistic, socio-cultural and referential competences,¹⁰³ all necessary to successfully participate in the legal discourse.¹⁰⁴ Understanding and communicating require a meaning system and the necessary knowledge of the system and related processes. While it may seem to be the result of subjective interpretation, the given meaning system is socially and culturally determined.¹⁰⁵ Van Hoecke explains that meaning systems are products of communication while at the same time literacy in a given meaning system is a pre-requisite for any successful communication: 'Just like law, language can only be correctly understood when seen as an interactively developing social construct. Language is learned and developed in social discourse'.¹⁰⁶

When it comes to the specific case of case law in most continental legal systems, the willingness implied by Cress and Kimmerle may seem like a superfluous element. However, as using case law is not a strict necessity and judicial decision-making may well be deemed legal, legitimate and well-argued even without any reference to past case law, overtly referring to any past judicial decision is mostly the judge's choice.¹⁰⁷

It further follows from the above that collaboration among individuals occurs in a dialogical form. Jovchelovitch¹⁰⁸ explains that representations are dialogical forms, interrelations between self, other and object-world. Understanding them is, consequently, the key to understanding meaning in communities. This meaning, this knowledge, is then an intersubjective enterprise.¹⁰⁹ Marková's concept of dialogicality that is essential for human thinking and language belongs in the wider social representations approach: 'Dialogically constructed and re-constructed social world is a world of multilateral and polyphonic facts embedded in culture'.¹¹⁰ Yet dialogicality is not only about acquiring intersubjectivity and understanding of the perspective of the other, thus reducing tension and conflict; it is, at the same time, about conflict and reduction of conflict, understanding the other as well as a struggle for identity.¹¹¹ The conflicts and tensions regarding the nature and role of case law, whether expressed overtly or implied by the use (or non-use) of past case law are what shape the social representation of case law in a given legal system.

The process of representation may also take place through collaborative development of both physical and social artefacts. This process may even be called triological.¹¹² Following this line of thinking, case law may be seen as such a social object, a social artefact that plays a vital role in knowledge construction. Any case law would thus 'present knowledge in a materialized form that exists independently of their creators'.¹¹³ At the same time, case law is an artefact that manifests the contributions of individual judges in the specific collaborative space that is the case law as well. The same follows from Marková's claim that the core of the dialogical theory of social knowledge stems from a triad: *ego-alter-object*.¹¹⁴ This dialogical triad may be seen in the communicative process of the construction of case law: a court – or specifically a judge writing a decision (*ego*) – refers to a past decision made by another court/judge (*alter*)¹¹⁵

¹⁰³ R Odin, *Spaces of Communication* (Amsterdam University Press 2022) 72.

¹⁰⁴ See Dell Hymes, 'On Communicative Competence' in J B Pride and J Holmes (eds), *Sociolinguistics* (Penguin 1972) and P Bourdieu, 'The forms of capital (1986)' in I Szeman and T Kaposy (eds) *Cultural theory: An anthology* (Wiley-Blackwell 2011) 81, 82–88.

¹⁰⁵ Van Hoecke (n 3) 129.

¹⁰⁶ *ibid* 129–130.

¹⁰⁷ The choice element has been used in more empirical explorations of the use of judicial decision. See J H Fowler and S Jeon, 'The Authority of Supreme Court precedent' (2008) 30 *Social Networks* 16.

¹⁰⁸ Jovchelovitch (n 5) 2.

¹⁰⁹ *ibid* 10. These considerations are in line with those already well established in law and legal theory. For example, in Goodrich's view, law may be understood as a sociolinguistically delimited speech community (P Goodrich, 'Law and language: An historical and critical introduction' (1984) 11(2) *Journal of Law and Society* at 173. The use of language in a speech community is delimited by the social context, implying the community members' knowledge and pre-understanding. See also S Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press 1980) 14.

¹¹⁰ Marková (n 5) 120.

¹¹¹ *ibid* 158.

¹¹² S Paavola and K Hakkarainen, 'Triological approach for knowledge creation' in S C Tan, H J So and J Yeo (eds), *Knowledge creation in education* (Springer 2014).

¹¹³ Cress and Kimmerle (n 89) 140.

¹¹⁴ Marková (n 5) 196

¹¹⁵ In fact, in terms of case law, *ego* and *alter* may be the same judge, albeit at different points in time.

regarding case law (object). It is, however, clear that the process of relating to the object (case law) is not only a matter of the reference itself: it is also a matter of choosing to make that reference as well as expressing one's opinion on the act of referring, presence of reference or even directly about the role and nature of case law.

This exchange is not symmetrical: the communicating subjects are not in a situation of equal exchange, they are not in the same space, which does not allow them to directly react to one another. Rather, this communicative exchange is a network oriented in time.¹¹⁶ This approach may lead us to believe that the dialogue analogy might fail and that the concept of collective construction, as explained in the case of collaborative sites such as Wikipedia, makes more sense.¹¹⁷

As I have suggested already in the Introduction to this paper, case law is a *space* of its own construction, a *means* of its own construction and a *goal* of its own construction. Let me discuss, what happens within these three dimensions of case law construction.

V.1 OVERT OPINIONS ON THE ROLE AND NATURE OF CASE LAW

Most often, scholarly texts on what courts think of the role of case law focus on the opinions which the courts may choose to express overtly. Such an opinion may be seen in the following dialogical exchange between the Czech Constitutional Court and one of the lower courts.

The explanations of what case law is and how is it supposed to be used in subsequent judicial decision-making usually appear in contexts where another court's decision expresses its own opinion on the matter and the Constitutional Court feels the need to reply. These instances of explanations and further constructions of the meaning and role of case law thus usually happen in a reaction to previous situations and previous arguments. The Constitutional Court takes up both its own and other courts' opinion on the matter and, consequently, generates new insights.¹¹⁸

In one of the earlier cases, a lower court claimed that it was bound by the 'settled and valid' case law. The Constitutional Court rejected this claim, replying to the lower court that, while past judicial decisions may be taken into account by lower courts, they must be aware that the settled-ness and 'validity' of case law depend on concurrent social and legal development and lower courts must not follow any previous judicial opinions blindly.¹¹⁹ The Constitutional Court did, however, stress that although its decisions were not formally binding, it would not mean they were legally irrelevant; the reason being that when courts do not follow already established case law, it might negatively impact the feeling of legal certainty of the citizens. Therefore, in the Constitutional Court's opinion, following an already established interpretation of law stems from the very nature of *Rechtsstaat*.¹²⁰

This is a direct and clear exchange, one that builds upon a conflicting view of the role and nature of the Constitutional Court's case law. However, the communicative exchange happening by means of overt opinions is not limited to two courts, reacting to one another. These opinions, especially when expressed by apex courts, may later be picked up and reinforced by a different court or in another situation.

For example, the opinion cited above was later picked up by another decision of the Czech Constitutional Court.¹²¹ The notion of legal certainty and importance for the understanding of the role of case law has been further elaborated on.¹²² In a reply to the Supreme Court of the Czech Republic and the regional court that had dealt with the decided case previously, the

¹¹⁶ See Harašta, Smejkalová, Novotná and others (n 1).

¹¹⁷ Cress and Kimmerle (n 89).

¹¹⁸ References to case law and various attempts at voicing the judges' opinion of what it is and what role it should play in judicial decision-making are plentiful. The word case law [CZ: *judikatura*] itself is used in over 40,000 decisions of the Czech Constitutional Court. Naturally, not all can be considered to be conscious attempts at joining the discussion on its role; however, each may be considered in its own way an actualization of the concept in an individual context, a tiny piece of this collective construction of the concept of *judikatura*. It is not the purpose of this paper to provide their systematic overview. The following text should, therefore, be read as an example of the more prominent layer of this construction.

¹¹⁹ Decision of the Czech Constitutional Court No. IV. ÚS 200/96.

¹²⁰ Decision of the Czech Constitutional Court No. I. ÚS 70/96. I have chosen to use the expression "Rechtsstaat" instead of "rule of law", as the Czech concept of *právní stát* is closer to the German concept of "Rechtsstaat".

¹²¹ Decision of the Czech Constitutional Court No. III. ÚS 68/16.

¹²² *ibid.*

Constitutional Court claimed that not following its own opinions infringes the claimant's right to a fair and independent trial (as specified in Article 36/1 of the Czech Charter of Fundamental Rights and Freedoms). And it seems that this opinion itself has become settled, as the Constitutional Court uses it now and then when it feels the need to explain the, as it sometimes calls it, 'precedential' meaning of its case law.¹²³

V.2 IMPLIED OPINIONS ON THE ROLE AND NATURE OF CASE LAW

Overt opinions are not the only way in which the courts express their opinions on the role and nature of case law, hence adding to its construction. The courts either simply refer or do not refer to past case law. Both these actions carry a semiotic significance regarding the beliefs which the courts (or more specifically the judges) hold concerning the nature and role of case law. Recent citation analyses of case law, coming from both precedential¹²⁴ and non-precedential¹²⁵ settings, are built upon this very idea. They usually elaborate upon Fowler and others who understand a reference to precedent as a latent (i.e. implied) expression of relevance of such a precedent to the case at hand as well as to the legal system.¹²⁶

In the context of citation analysis of the US Supreme Court, Cross and others formulated three theories that explain the presence of a citation to a past judicial decision in a judicial decision: (1) a citation reflects a precedent, as a source of the decision at hand; (2) a citation covers and masks the real reasons behind the decision, often of a political or ideological nature; and (3) a citation confirms the institutional legitimacy of the courts and provides limits for the decision-making process.¹²⁷

As these theories have been formulated in the context of precedential decision-making, transferring them into the non-precedential settings might not fully work. While theory (2) may very well explain the reason behind citing case law in a non-precedential setting, discussing this particular notion falls outside the scope of the present article. When it comes to theory (1), a citation may refer to a source of the decision at hand, but this source will never have the formal bindingness which a vertical precedent might have. In such cases, it may be possible to see a citation as confirming the institutional legitimacy and authority of the courts. Every decision that either refers specifically to a past judicial decision or just mentions that it seeks to follow the 'settled case law' without further specifications, serves as an implied opinion on the fact that it is acceptable (or desirable) to do so and, consequently, adds to the construction of the nature and role of case law. Interestingly, so does the absence thereof. The acceptability of such a practice – the lack of any references to past case law – may also be interpreted in terms of its role and nature as clearly conveying the idea that case law is not necessary in order to make a proper and legal decision.

Choosing to refer to past case law, therefore, speaks of the acceptability of such a practice as well as the fact that the judge believes it is a good idea to do so. The fact that recent citation analyses show that about 80% of all decisions of Czech apex courts contain at least one reference to a past judicial decision seems to suggest that the judges may even believe that they should be doing so.¹²⁸

¹²³ Decision of the Czech Constitutional Court No. IV. ÚS 301/05. It should be noted that the allusion to precedent is, however, rather peculiar here. Despite the tendency not to consider case law in the Czech legal system as an equivalent to precedent, Czech legal discourse lacks the terminology and conceptual instruments to describe it without using the word 'precedent', albeit in quotation marks. In yet another of its decisions, the Constitutional Court talks about an obligation of lower courts to follow the *ratio decidendi* of its decisions and calls this situation 'precedential'. It even criticizes one of the other Czech apex courts, the Supreme Administrative Court, for not following the Constitutional Court opinions, saying: '...courts must respect the constitutional interpretations by the Constitutional Court as expressed in the *ratio decidendi* of its decisions, simply said, they must follow precedents'.

¹²⁴ Fowler and Jeon 2008 (n 107); J H Fowler, and others, 'Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court' (2007) 15(3) Political Analysis 324; M P Hitt, 'Measuring Precedent in Judicial Hierarchy' (2016) 50(1) Law and Society Review 57.

¹²⁵ Derlén and Lindholm 2017 (n 1); Derlén and Lindholm 2014 (n 1) and M Derlén and J Lindholm 'Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions' (2015) 16(5) German Law Journal 1073. In the Czech legal system specifically, see Harašta, Smejkalová, Novotná and others (n 1).

¹²⁶ Fowler and others (n 124) 325–326.

¹²⁷ F B Cross and others, 'Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance' (2010) 2 University of Illinois Law Review 493.

¹²⁸ Harašta, Smejkalová, Novotná and others (n 1) 167.

Similarly, as Fowler and others¹²⁹ and Fowler and Jeon¹³⁰ build upon the idea that a reference to a past judicial decision is an expression of its own relevance for the case ahead, the simple act of either choosing to express an overt opinion on what case-law is and what is its role – either in the system or in relation to the case – is an act of recognizing the text of a judicial decision – and consequently case law – as a space that allows such an action. If research shows that 80% of all the decisions of Czech apex courts contain at least one reference to past case law, it clearly shows that the courts see the texts of the judicial decisions themselves as the space that allows them to do so (or not to do so). Such an extensive use of the space of the case law to refer to past decisions or to express overt opinions on what the case law is, speaks of the wider understanding that the courts may use the case law itself to construct the role and nature of case law.

To sum up, judicial decision-making is the space where the identification, interpretation and construction of norms occurs and judicial decisions might be understood as the spaces where the process of identification, interpretation and construction of norms is recorded. The meaning of the concept of case law and its role is usually not explained in written legal regulations. Any explanation of what it means exactly or what role it is supposed to play is thus a record of an instance of construction of its meaning within the legal system as a whole. Therefore, it may follow from what Sartor says about legal terms and their occurrences in legal norms that, rather than assuming that legal terms might have an a priori independent meaning that needs to be discovered, we need to focus on the occurrences of the term in legal discourse and on the inferences they enable.¹³¹ And he is not the only one who stresses the continuity and process-like nature of legal concepts.¹³² As discussed in Section IV, the social representation approach to understanding concepts stresses the process-like nature of representation of social objects and phenomena as well. Therefore, the representation of the social object that is the case law comes from the interpretive and argumentative practice¹³³ established in the texts of the decisions that become case law. Frändberg stresses that '[c]oncepts do not function in isolation but as components of legal argumentation, and their meaning must always be determined according to their function in such argumentation'.¹³⁴ This basically means that any legal concept comes into being anew with every interpretation. Case law (and its role) may thus be understood as the shared social object as well as social practice through which collaboration and collective construction of meaning and knowledge happens.

VI. CONCLUDING REMARKS

In line with Foucault's claim that juridical texts are 'over and above their formulation, said indefinitely [...] and are to be said and said again',¹³⁵ concepts and meanings are collectively constructed and represented across the texts of judicial decisions by means of repetition and dialogue. The dialogue which numerous scholarly works on judicial decision-making speak of is a prerequisite for the collective construction of meaning of and by means of case law.

This paper has used the notion of collective construction to bring to light theoretical frameworks that are behind the recognition of case law as a discursive space or case law as a dialogue. It brings together the knowledge on social construction and social representation as means of understanding meaning-making in law, thus bringing more understanding to the meaning-making of the notion of case law within continental, non-precedential legal settings.

I have shown that this collective construction of the concept of case law takes place across three dimensions: the overt opinions on the role of case law as expressed in the case law itself; the implied opinions included in the presence (or the absence) of references to past case law; and the fact that the judges even recognize case law as a space that allows them to express

¹²⁹ Fowler and others (n 124).

¹³⁰ Fowler and Jeon (n 107).

¹³¹ Sartor (n 12) 35.

¹³² See e.g. Frändberg (n 73) 1.

¹³³ J Potter, *Representing Reality. Discourse, Rhetoric and Social Construction*, (Sage Publications 1996) 103.

¹³⁴ Frändberg (n 73) 15.

¹³⁵ Foucault (n 72) 57.

their overt opinions or that allows them to refer (or not to refer) to past case law at all. Bringing together the loose strands of theoretical knowledge on meaning-making have shown how they meet within the concept of case law in a circular manner: case law is at the same time the space, the means, as well as the result, of specific processes of social construction.

Case law offers a unique formalized space for meaning-making in law, one that may be used only by specific members of the legal community – judges. Given the lack of legislative definition of the concept of case law and its role, the discursive space it creates invites its own construction. Constructing the meaning of case law across the case law itself is a continuous representational process: case law as a social object may be represented in the texts of case law itself, as the judges may feel the need to address it in order to justify their choices. The way in which the courts address the nature of case law and its role in judicial decision-making often happens in passing and is not always explicit. Moreover, from what we know about the representational processes, it may never be finished.

Although having proven to be highly useful for exploring and understanding complex social phenomena that influence social thinking,¹³⁶ the theory of social representations has, until recently, remained largely unrecognized in law. Yet it is one of the approaches that are capable of uncovering the shared meanings that drive the opinions – and consequently the usage – of case law. This is especially so when we realize that the space to be explored empirically is nicely provided by the texts of judicial decisions themselves in which we can explore how the representations travel, circulate, become more or less powerful as they are being (re)explained and (re)iterated.

It is not only legal norms that shape the way in which judicial decisions are used in judicial decision-making. In the absence of legal norms that delimit the role of case law within a given legal system, it is the practice – and the persons participating in this practice – that make case law what it is in terms of the role it is playing within the given legal system. Methodologies available within the social representations approach are capable of uncovering the hidden driving forces in the people using the case law. As recent research of the social representation of case law (*judikatura* in Czech) within the Czech legal system showed, the legal community represents case law as something to be used in ‘legally similar’ cases, while refusing the ideas that would explain case law in terms of precedent. The results of this research also suggest that this ‘legal similarity’ may lead to the fact that the legal community will approach the opinions expressed in judicial decisions as if they were general legal norms, risking decontextualization of their use and thus undermining the legitimacy of the judiciary.¹³⁷ While further research is needed in this regard, using this theory to empirically approach the notion of case law further may thus be the natural next step that awaits the researchers.

FUNDING INFORMATION

This article is a part of a project *Využití metod sociální reprezentace v analýze právních konceptů* [Methods of social representations in analysis of legal concepts] funded by the Czech Science Foundation, Grant Agreement No (GA20-10171S). Parts of the theoretical background used in the present paper have been partially translated and have appeared in Czech in Smejkalová and others (n 13) 91 ff. The present author is the sole author of these parts.

COMPETING INTERESTS

The author has no competing interests to declare.

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¹³⁶ Marková (n 5) 49.

¹³⁷ Smejkalová and others (n 13) 222 ff.

TO CITE THIS ARTICLE:

Terezie Smejkalová, 'Case Law and Collective Construction of Meaning' (2023) 19(1) *Utrecht Law Review* 87–104.
DOI: <https://doi.org/10.36633/ulr.833>

Published: 11 September 2023

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