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Review article
UDK 340.12:340.54(497.2)
DOI: https://doi.org/10.25234/pv/36824
Paper received 6 June 2025
Paper accepted 15 January 2026

VAGUENESS AS A TOOL FOR (NON-)ADJUDICATING: THE BULGARIAN EXAMPLE**

Summary: *This article examines how the Bulgarian legal system systematically refuses to acknowledge linguistic vagueness and broader legal indeterminacy, despite their unavoidable presence. Unlike most theoretical literature that treats vagueness in the abstract, the study analyses concrete legislative provisions and judicial practices in Bulgaria in order to show that the absence of a principled framework is not accidental but serves specific socio-political functions: it masks judicial discretion, preserves institutional authority, and prevents public contestation of judicial power. The article argues that this "meta-vagueness" paradoxically increases arbitrariness and undermines legitimacy. It concludes that openly recognising the constitutive role of vagueness would enhance predictability, accountability, and public trust.*

Keywords: *vagueness, comparative law, Bulgarian legal system, legal theory*

1. INTRODUCTION

Legal theory has long debated the nature, desirability, causes and consequences of vagueness in law. Most contributions, however, remain abstract and universalising. They rarely examine how particular jurisdictions actually handle (or deliberately mishandle) vagueness and what sociopolitical effects follow from those choices.

This article takes a different path. Using Bulgaria as a case study, it shows that vagueness can be politically instrumentalised precisely by being ignored. The Bulgarian legal system lacks any coherent doctrine on what counts as "vague", how vague terms should be interpreted, or what role judicial discretion may legitimately play in borderline cases. This absence of principle

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** This study is financed by the European Union – NextGenerationEU, through the National Recovery and Resilience Plan of the Republic of Bulgaria, project Nº BG-RRP-2.004-0008-C01, for which support the author express his gratitude.

is not a theoretical oversight; it is a deliberate strategy that allows courts to preserve authority while presenting themselves as mechanically applying clear texts.

The central thesis is twofold:

(1) the systematic non-recognition of vagueness/indeterminacy is rooted in a specific form of post-socialist legal formalism that continues to dominate Bulgarian legal culture; and

(2) this non-recognition serves to legitimise judicial power in a socio-political context marked by low institutional trust and recurrent legitimacy crises.

Methodologically, the article combines doctrinal analysis of statutory interpretation rules and landmark decisions with socio-legal observation of judicial rhetoric and public reactions to controversial cases. After a brief theoretical framework (Section 2), Section 3 presents the Bulgarian "vague-proof" approach in legislation and adjudication. Section 4 discusses the advantages and dangers of this strategy. Section 5 concludes.

2. THEORETICAL FRAMEWORK: VAGUENESS, INDETERMINACY, AND THEIR FUNCTIONS

"Vagueness", in the context of this article, refers primarily to the linguistic phenomenon of terms implying borderline cases or admitting degrees of uncertainty, both predicates such as "tall", "bald", and legal notions like "good faith", "equity", or "reasonable time". "Legal indeterminacy" is the broader concept that includes not only linguistic vagueness but also gaps, conflicting norms, and evaluative openness. Within these boundaries of the notions there are vast theoretical discussions which would be summarised in this article only as to the dispute whether vague and indeterminate legal language can be preferrable in certain cases.

In this sense, scholarly opinion is sharply divided on whether vagueness is a defect to be minimised or an inevitable and sometimes desirable feature of law. Some authors, such as Roy Sorensen, claim that vagueness has no constructive function in law but that it merely appears to be functional "due to a cluster of logical and linguistic errors about its nature" as, in fact, it does not promote the common good.[1] Sorensen's main arguments are that vague legislation is often used in a way contrary to the furtherance of the common good, and that vague legal language, in genuinely hard cases, leads to serious judicial insincerity.[2] In his opinion judges are motivated by conscience to avoid clearly determining borderline cases but this contradicts "other high-minded concerns" in adjudication. Thus, from a moral point of view, judges are faced with a dilemma that cannot be dissolved away. Accordingly, Ronald Dworkin famously claimed that in hard cases there is always a right answer discoverable through principled interpretation, implying that apparent indeterminacy can be overcome by moral reasoning.[3]

1 Hrafn Asgeirsson, 'Vagueness and Power Delegation in Law: A Reply to Sorensen' in M Freeman and F Smith (eds), Current Legal Issues: Law and Language (OUP 2012) 344.

2 Roy Sorensen, 'Vagueness Has No Function in Law' (2001) 7(4) Legal Theory 388.

3 Ronald Dworkin, 'No Right Answer?' in PMS Hacker and J Raz (eds), Law, Morality, and Society: Essays in Honour of HLA Hart (OUP 1977) 68.

A second, more pragmatic camp insists that vagueness is inescapable and often functional. Since the world presents itself to us with discrete objects but also continuous phenomena such as horizons and, more fundamentally, the continuum of space and time, vagueness is unavoidable.[4] As Diana Raffman puts it, as quoted by Kompa, "at a certain point, the rules give out and competent linguistic practice must become arbitrary", thus necessitating vagueness.[5] Being aware of vagueness and incorporating it in the legal system can provide certain advantages such as approximating legal language to natural language, for example. The outcome might be less precise but would more fully serve the goals of legal expression.[6] Jeremy Waldron argues that vagueness provides for healthy contestability, as it brings certain issues to the fore, while Endicott claims that the discretion due because of vagueness is a "far cry from a society governed arbitrarily by despotism". He further declares that vague language shall be preferred in cases where a widely varying range of conduct is to be regulated.[7] It is even argued that replacement of more vague standards with those more precise might lead to "interpretative ingenuity", as in the case of the English Statute of Frauds as compared to the more abstract standards of those envisaged under Art. 6 of the European Convention of Human Rights.[8]

This echoes Kelsen's idea that indeterminacy might be intentional whereby superior authority openly delegates an inferior authority to specify its own general rule by means of other rules in order to adapt it to the singularities of particular cases.[9] As a result, according to a variety of views praising or at least tolerating vagueness, it can be considered not a deficit in and of itself but only in so much as it violates the reason of the law.

This debate shows that vagueness is a contentious issue for every legal system which shall perforce develop a methodology on the use of language and required levels of lingual clarity in order to be fully operational. The crucial lesson is that being a political and even a philosophical problem, the presence of vagueness in every legislation always requires sovereign evaluation by the legislator and courts. This is because its relationship with vagueness demonstrates how the system works in general, what trust it enjoys and how the balance between competing interests might be achieved. Moreover, vagueness cannot be understood as an anomaly, a mere glitch in the system, as it has constitutive function for the existence of law and influences even the application of evidently clear norms. These are clear only in contrast to the standard for vagueness. In fact, every instance of vagueness implies a positively defined statement on how law is applied.

It follows that vagueness is not a question in itself but it is thoroughly related to the definition of hard cases and their management, as well as to the more general topics of arbitrariness

4 Ralf Poscher, 'An Intentionalist Account of Vagueness: A Legal Perspective' in G Keil and R Poscher (eds), Vagueness and Law: Philosophical and Legal Perspectives (OUP 2016) 72.

5 Nikola Kompa, 'The Role of Vagueness and Context Sensitivity in Legal Interpretation' in G Keil and R Poscher (eds), Vagueness and Law: Philosophical and Legal Perspectives (OUP 2016) 210.

6 Marc Andree Weber, 'The Non-Conservativeness of Legal Definitions' in G Keil and R Poscher (eds), Vagueness and Law: Philosophical and Legal Perspectives (OUP 2016) 199.

7 Timothy Endicott, Vagueness in Law (OUP 2000) 188.

8 *Ibid*. 191.

9 Claudio Luzzati, 'Discretion and "Indeterminacy" in Kelsen's Theory of Legal Interpretation', in L Gianformaggio (ed), Hans Kelsen's Legal Theory. A diachronic point of view (G. Giappichelli 1990), 130.

and the decision-making authority of courts in its institutional dialogue with the remaining institutional actors.

This article does not aim to resolve the above-mentioned philosophical debate. It limits itself to one specific question raised by the literature: what are the institutional and political consequences when a legal system refuses to develop any explicit methodology for dealing with vagueness/indeterminacy? The Bulgarian case offers an unusually clear example.

3. THE BULGARIAN "VAGUE-PROOF" STRATEGY

3.1. THE HERITAGE OF THE BULGARIAN LEGAL SYSTEM

Unlike the theoretical discussions which imply a positive statement on vagueness' role in the legal system, Bulgarian legislation and court practice, as will be shown, represent interesting examples, as the Bulgarian legal system lacks a sufficiently clear view of vagueness. In fact, it is not simply a pun to say that Bulgaria is vague on the issue of vagueness. From a general standpoint, neither legal theorists nor ordinary lawyers tend to advocate a principled approach towards the role of vagueness.

At first glance, Bulgarian legal culture remains heavily marked by Soviet-era formalism and by the subsequent need to incorporate large bodies of EU law into an unreformed civil-law framework. The dominant self-image of judges and legislators is that law consists of clear texts that must be applied literally (*the dura lex sed lex* maxim). Open acknowledgment of linguistic vagueness is perceived as threatening the "supremacy of the text" and as opening the door to unacceptable judicial activism.

Therefore, the only anchorage at which to properly interpret the law seems to be its ostensibly clear text. In line with this, the 'open' nature of legal language can expect to be perceived as a threat to plain 'text', as it would probably invoke the indeterminate 'spirit' of the law, or at least disturb the supremacy of ordinary meaning, and, as a result, create major contradictions. Additionally, refraining from positivism and embracing the vagueness shall lead to numerous moral dilemmas, as demonstrated by some authors[10] while moral considerations have been largely lured away from the Bulgarian understanding of the law. The latter is evident from numerous factors which will be further elaborated below.

However, if the attitude described were so obvious and one-sided, it would have led to different outcomes. For example, vagueness' greatest shortcoming is that it predisposes unpredictability in case law, depending, as it does, on the less objective criteria of the adjudicating body. Thus, there could be no avoidance of vagueness 'at all costs' without simultaneously seeking and guaranteeing greater predictability. However, the levels of judicial predictability in Bulgaria continue to be profoundly questionable in terms of the consistency of case law in various matters and this, at least in part, presupposes that vagueness is accepted as something ordinary and common or, essentially, inexhaustible. More importantly, however, it would be

10 Roy Sorensen, 'How Vagueness Makes Judges Lie' in G Keil and R Poscher (eds), Vagueness and Law: Philosophical and Legal Perspectives (OUP 2016) 298.

expected that a positivist legal system would clarify statutory mechanisms to avoid vagueness. This is where things become more interesting. Although the legal community in Bulgaria is quite consistent in its positivist approach, this maxim applies predominantly in 'easy cases' and in the potential conflict between law and equity. It does not pertain in 'vague' cases where conflict lies in the clash between the legal text and its possible interpretations. In this regard, several issues should be considered.

A fundamental question in law-making is whether the occurrence of borderline cases is healthy for the system or not? A prerequisite of this is lingual vagueness which creates 'hard' cases wherein different interpretations might be equally legitimate. In accordance with Hart's classical explanation, the "penumbra" of debatable cases is created precisely where "words are neither obviously applicable nor obviously ruled out".[11] In tackling this challenge, lawmakers are faced with the dilemma of whether to pre-empt and eliminate borderline cases by adding more, and more precise, definitions of seemingly vague terms, or to consciously leave vague provisions, so that judges have wider discretion to decide on them.[12]

However, such a question does not seem to be addressed thoroughly by the Bulgarian legislator, and this leads to inevitable tensions when a party to the case is interested in facing a more or less activist court to interpret applicable law and rule on the specifics of the case. If there is any semblance of consensus, it tends towards the idea that any 'hard' case is unfamiliar, foreign to the system, and does not foster development of the law because it adds further uncertainty to the already excessive unpredictability thus rendering the entirety of the judiciary obsolete. This can be confirmed by the system's scepticism towards any kind of modern legal phenomenon. The foundational laws in force, both civil and criminal, date, at best, from the late 1960s and exclude regulation of ambiguous and untested cases even at the price of adjusting modern legal findings to old-fashioned understandings, while contemporary 'hard' cases are further restrained by courts. For example, this is evidenced by their rejecting almost any kind of damages that are difficult to prove, atypical in nature or (even slightly) indirectly related to the harmful action[13], or by the limiting of LGBT rights on procedural grounds because of the vaguely established relationship between national and EU law.

In the sense in which Hart's understanding may be relevant, a borderline case is mostly regarded as disruption, as if it draws up the entire system and sets it apart from its ordinary routine. The expectations of the court are always the same, "simply to apply the law to the facts", and to render some final decision notwithstanding the nature of the case and particular efforts required in it. It seems that a judge in Bulgaria never faces the dilemmas pointed out by Greenawalt according to whom a difference would arise if two judges are confronted with an issue, they think is difficult. In this event a judge who holds that the issue has a correct resolution only if it is determinate would behave differently from he who thinks the issue has a correct answer even when it is indeterminate.[14] The pressure to decide in order to avoid denial of justice, irrespective of the decision, deprives the court of the potential power to admit the borderline nature of a case. This may not only provide for the additional benefits of

11 Goran Dajovic, 'Hart's Judicial Discretion Revisited' (2023) 50 Revus para 12.

12 Asgeirsson (n 1) 354.

13 Interpretative Decision 3/2021 Supreme Court of Cassation (13. January 2023) (BG).

14 Kent Greenawalt, 'Vagueness and Judicial Responses to Legal Indeterminacy' (2001) 7(4) Legal Theory 443.

entertaining a case with far-reaching societal consequences but, by so doing, the court might also manage the parties' expectations and transform them from "partisans to agnostics".[15] In general, the specific Bulgarian approach of *ignoring the mere existence of vagueness as a legal phenomenon* does not amount to denying it in a legal (and lawful) sense. It only lays it outside the sphere of the legally relevant.

This is exacerbated by the fact that the legislation is almost silent on the issue of how to resolve the inherent contradiction in facing vagueness. Indeed, there are rules on interpretation, but they are too general and too few for the multitude of situations. The main rule, extracted from the Law on Normative Acts (LNA), reads such that the provisions of normative acts shall be applied according to their precise meanings and, if these are unclear, shall be interpreted in the sense that most closely corresponds to other provisions, the purpose of the interpreted act, and the fundamental principles of the law of the Republic of Bulgaria.[16] Similarly, although not identically, the main civil procedural statute prescribes that the court shall hear and decide cases in accordance with the exact meaning of laws and, where these are incomplete, unclear or contradictory, per the legal text's 'common' sense. In the event of the lack of a law, the decision shall be based on the common principles of the legislation, custom and morality.[17] The striking contradiction in these two relevant rules is not only that they provide for seemingly different anchors in the event of vagueness (the purpose and fundamental principles, on one hand, and common understanding, on the other) but that they provide for an algorithm for overriding vagueness which is underdeveloped and thus likely to facilitate more vagueness. In any event, the fact that there are detailed rules on the interpretation and application of the law in general, regulated in a separate normative act, casts doubt in the mind of the Bulgarian lawyer that vagueness is even conceivable.

Of course, this reliance on written law should not be overestimated, as principles such as *in dubio pro reo* (i.e. *doubt must benefit the accused*) are applied as a matter of legal tradition and maybe minimum decency. However, if Bulgaria was reliant to such a degree on its written law, there would not be that many unanswered questions as to how to treat potential vagueness when encountered. For example, again referring to Art. 46 of the LNA, the law expressly provides that when a provision is unclear, it is interpreted in the sense that best corresponds to other provisions, the purpose of the act being interpreted and the basic principles of the law of the Republic of Bulgaria.[18] This formulation is broad enough and should indicate a certain acceptance of vagueness which, in itself conflicts with the prevailing attitude of positivism towards law. At the same time, precisely because it is *too* broad, the formulation should be applied in conjunction with other interpretive methods to deter impermissibly extreme judicial activism. Surprisingly, there are none. That is to say the disambiguation tools available often come into intractable conflict with one another. Thus, it is entirely possible that a 'systemic interpretation', as prescribed by law, does not match or even contradicts the ordinary meaning of words. This is equally important in applying the same rule.[19]

15 Sorensen (n 10) 298.

16 Article 46, para. 1 of the Law on Normative Acts (SG 3. April 1973) (BG).

17 Art. 5 of the Civil Procedure Code (SG 20. July 2007) (BG).

18 Article 46, para. 1 of the Law on Normative Acts (SG 3. April 1973) (BG).

19 Lawrence Solan, 'Why It Is So Difficult to Resolve Vagueness in Legal Interpretation' in G Keil and R Poscher (eds), Vagueness and Law: Philosophical and Legal Perspectives (OUP 2016) 235.

3.2. EXAMPLES OF BULGARIA'S APPROACH TO VAGUENESS

Numerous examples can be brought in order to demonstrate Bulgaria's complex relationship to vagueness described in the previous subsection. The best of these examples is the following: in the event of a gap in the law, the judge (according to the legal framework) has two equally legitimate, but completely contradictory options, to apply an existing rule by analogy "if this corresponds to the purpose of the Act"[20], or to apply an argument to the contrary (i.e. apply the opposite of the established rule), if the explicit rule is exhaustive. The only barrier between these two conflicting possibilities is whether the settled case is sufficiently similar to the unsettled one, but there are no established criteria for when this is the case or not. Indeed, to a certain extent, the law cannot be expected to provide such specific instruction, but it is the inherent role of case law to develop relatively clear, objective and enduring criteria for 'similarity', which will predetermine the application of one or other principle of interpretation. However, it does not seem that such exist. As 'analogy' itself is often considered "stranger than a legal fiction"[21], its seemingly unrestrained application raises serious doubts as to the predictability of the results from its application. Given such deliberate uncertainty, it is not surprising that very recent puzzling interpretations have prevailed. According to these, for example, vaping does not constitute cigarette smoking within the meaning of the smoking ban legislation and social networks shall not be interpreted as 'media' for the purpose of advertising gambling, despite ample arguments for analogous application and entirely differing conclusions.

The pinnacle of this interpretive impotence, however, was the decision of the Constitutional Court, in 2018 which declared the Istanbul Convention 'unconstitutional'.[22] A main argument for the majority was that the rule of law in a formal sense, equated to legal certainty, requires that legal concepts are stipulated in a "clear and unambiguous" manner. From this point of view, the concept of 'gender' used by the Convention would contradict the established notion of gender according to the Bulgarian Constitution where it is described, entirely in a biological sense, as 'sex'.[23] This key fundamental argument can be used, without further qualification, against virtually any legal provision because even the clearest of these is open to interpretation and, as such, open to considerable suspicion from the point of view of legal certainty. Taken to its logical extreme, this could render any rule implementing EU legislation void if its translation is not 'clear enough' without any recourse to the instruments of legal interpretation, as if the only admissible rules in a 'rule of law' state are those that defy interpretation at all. It is more important to note, however, that the plausibility, and even public acceptance that made this reasoning possible, cannot be explained without observing that the lack of meaningful conversation about the role of vagueness in law leads to fear of it. This is to the extent that 'vagueness' becomes equated with 'unconstitutionality' by its invoking non-existent standards of the rule of law in this regard instead of setting standards for the interpretation of vague legal rules.

20 Art. 46, para. 2 LNA.

21 Verena Klappstein, 'Stranger Than Legal Fictions: The Argument of Analogy' in V Klappstein and M Dybowski (eds), Languages of the Law (Springer 2025) 241.

22 Decision 13, Constitutional Court of Bulgaria (27. July 2018) (BG).

23 In Bulgarian there is no linguistic distinction between both words.

The approach of the Bulgarian court to relatively ill-defined concepts is also indicative of the system's attitude towards vagueness in general. For example, 'equity' is used as a standard for evaluating the amount of non-monetary damages.[24] The rule is applied extensively, and as early as 1968 the Supreme Court issued a binding decision according to which the concept of 'equity' is not abstract or arbitrary but related to the assessment of a number of specific, objectively existing, circumstances that must be taken into account by the court when determining the amount of compensation.[25] Similarly, in the case of fundamental private law concepts such as 'due diligence' or 'good faith', which are assumed to be at least somewhat subjective, it is stated that the assessment of the court should be 'concrete' and made on a case-by-case basis by taking into account all the factors. In no way should the assessment be abstract or subjective. Ironically, this *sounds* totally arbitrary, as if it does not matter what the facts of the relevant case are exactly provided, they can be classified according to a seemingly 'objective' criterion. The same applies to the powers of the Court to explain the reasons behind its decision. The law prescribes a blanket requirement to give reasoning, and decades of case law have 'refined' and developed this requirement in a similarly ill-defined way by stating that the reasoning must include all objections of the parties, as well as the evidence collected in relation to their arguments. In addition, the court is obliged to indicate on which evidence it bases its factual conclusions. Finally, the standard of proof is continuously defined as that whereby a complete conviction is created in the judge's mind that the fact has occurred. Once again this is described in quasi-objective wording but without further guidance as to how this mental process may be disclosed and verified.

All these examples seem largely indisputable and of little concern. Who would deny that the judge must consider a plethora of criteria, that an indefinite concept becomes more definite by considering as many factual circumstances as possible or that a vague idea can be subject to theoretical interpretation which becomes settled in legal practice? The problem is that behind this 'objectification' of concepts (such as equity, good faith, or standard of proof) a perfidious agenda exists that is likely anticipated by a legal community used to the technology of adjudication, but not by the true observers of legal norms. This leads to legitimacy issues.

Firstly, these examples show the tendency of the Court to legalise as many concepts as possible, even if they are blanket in nature and accordingly unclear by the standards of the law. Such language is, in strict terms, 'legalistic', even scientific, in a way that is both alienating but strangely familiar and predictable to the 'initiated'. Any attempt to feign subjectivity in the interpretation of words like 'equity' or 'good faith' is to be vigorously avoided, but such effort rather masks the powerlessness of any attempt to limit the influence upon the law of common sense and ordinary language. If we look carefully, all the above dubious examples sound more like tautologies. These, however, suggest the law, and respect for it triumph over life itself. After all, there is nothing about life which is inscribed in such wording. In fact, this demonstrates how insufficient is the only indisputable rule for interpretation, namely that the ordinary meaning of the words *must* be used. In such cases, the court does the opposite. It holds that words that may have too confusing, vague or subjectively ordinary meaning *must* be transferred to the legal arena and given an unusual meaning reserved for legal purposes.

24 Article 52 of the Law on Contracts and Obligations (SG 22. November 1950) (BG).

25 Ruling 4, Supreme Court (23. December 1968) (BG).

Secondly, this strategy by the Court has more unambiguous power implications. It first draws a distinction between 'legal' and 'non-legal', translating certain everyday categories to the legal lexicon, thus leaving all other phenomena, even if similar, beyond legal relevance. An even more direct strategy is for the Court to retain exclusive jurisdiction to rule, even on the most obscure of questions. As an example, the well-known 'good faith' is now shrouded in the ghostly mist of legal analysis and is already considered a metaphysical notion. It is monopolised by elite priests rather than offered to mere mortals who may wonder how to act to satisfy the 'objective' preference of the court. Even so, in ruling, the court can still make a sufficiently unpredictable decision since, on every occasion, the justification would be that the court has applied the same standard, even though it does not actually fulfil this function given its tautological nature. This is precisely the best tactic to adopt in remaining vague and unpredictable because there is no actual threshold for the actions of the judiciary, only smoke and mirrors. This, however, solves the "field of pain and death" on which legal interpretation takes place.[26] Once a court has deigned to explain, in its all-encompassing language, what is just or what actions are reasonable, it has fulfilled its duty to act transparently when in fact its explanation turns it into a 'black box', impervious to rational analysis and subsequent scrutiny. It is not surprising, therefore, that when it comes to non-pecuniary damage compensation there is still a considerable degree of unpredictability in the amount of compensation awarded under similar sets of facts and law.[27]

The negative impact of the elitism described can be seen when the law engenders particularly strongly public sentiment by dint of its mechanical supremacy. A good example of this is provided by a relatively recent case in which the 'clarity' of the law proved surprisingly intolerable. In the summer of 2023, a young girl became the victim of extremely sadistic abuse by her boyfriend that ended with her requiring 400 stitches. Inflating the case and saturating it with details of the victim's wounds while it was still pending, did the court no favours. The case prompted a widespread discussion on criminal legislation. As discontent peaked, the Court did not permanently remand the assailant pending a final verdict because statutory criminal law clearly provides that permanent arrest is not applicable when the alleged offense constitutes 'minor bodily harm'.

For an already enraged public, this was too much to bear, and each subsequent graphic photo of the victim provoked new questions as to how this could be classified as 'minor' bodily harm and the criminal let off the hook? Of course, this case highlighted other, lesser issues, such as the backlash occasioned by the misapprehension that the court owes no explanation for its actions, or the dangers of any layman giving an opinion on delicate cases without sufficient public information. But there was something more enthralling about this case: the court had applied the 'clear and unambiguous' text of the law, yet there was a widespread sense of error. How was this possible?

Part of the reason can be traced, again, to the refusal to consider 'vagueness' as a constituent part of the legal system. If its importance were recognised, the system would become used to its being expected and thus predictable and prone to domestication. If the judicial decision were expressly aimed at *avoiding* vagueness, it would be clear that such decisions are the price we must pay for this virtue. It would also then be possible to develop sustainable criteria,

26 Robert M. Cover, 'Violence and the Word' (1986) 95(8) Yale LJ 1601.

27 For example, at the end of 2023 a record compensation of EUR 400.000 was granted to a woman suffering because of road accident while the victims of similar accidents had previously been largely undercompensated.

whereby the clear language would nevertheless give way to the vague balance between considerations of a different order. The latter are most obvious in the field of criminal law.

What is even more interesting is that, although the text of the law *sounds* clear, this excessive clarity alienates it from its purpose. The reason is that the Bulgarian criminal law's antediluvian understanding of 'bodily harm' takes an extremely anti-human approach to the most sensitive subject for any individual: his own body. The division of physical damage into 'minor', 'medium' and 'severe', which at first glance sounds arbitrary, is consistently and perpetually reduced to objective distinctions: a broken tooth is a 'minor' harm, but if the tooth is one without which it is difficult to speak or chew, then the harm is 'medium'.[28] This is a positivist's dream come true. However, this dream, rooted in a completely different social context dating back some 45 years, looks and sounds cynical given certain types of violence and specific harms. This is a good example of how the shame of vagueness, and its complete extinction, can boomerang surprisingly when the law loses its connection with ordinary life and common sense, and even denies this connection as necessary to the law's proper existence.

The urgent reaction of the populist legislator to the abovementioned case was even more telling. There was obvious tension between the unpredictability of vague language and the 'clear and predictable' verdict that might render the latter unjust. As a result, the law on domestic violence was amended, so that a new separate category of 'intimate relationship' was added in order to encompass similar cases and provide for better victim protection. However, as the call for yet more clarity could not be ignored, 'intimate relationship', as a ground for protection, was defined as "the sum of all the voluntary and lasting personal, intimate and sexual relations" (...) if they lasted at least 60 days. Predictably, this arbitrary definition was widely mocked, not least for its ambition to define the intimate. This again obscured the more valuable point: dissatisfaction with the generally misguided and outdated approach of the legislation and the Courts can only be overcome by the even more arbitrary definition (why 60 days and not 61?) of concepts that should not be definable at all. This also reaffirmed that the fear of vagueness is even stronger than the unavoidable shortcomings inherent in a strict and formalistic application of law. This ill-fated attempt to legally 'neologize' demonstrated that even the most vague-averse system reaches a point where the law can only suffer if everyday language is refined or entirely substituted by legal definition. To suggest an experiment in decisiveness; if you ask a number of people if they prefer the speed limit to be '130 km/h' or 'reasonable',[29] they will overwhelmingly prefer the former, even if there are far too many instances where an exact speed limit might be inadequate to resolve an issue. The fact that such a study has never been conducted in Bulgaria is, in itself, telling.

4. DISCUSSION: THE POLITICAL ECONOMY OF AVOIDING VAGUENESS

Several conclusions can be drawn from this brief review. To begin with, it is quite possible to have a hybrid legal system that does not take a clear view of vagueness in law but instead

28 Ruling 3, Supreme Court (27. September 1979) (BG).

29 Poscher (n 4) 72.

fumbles with how to deal with it in a largely informal and utilitarian way. Interestingly, this approach can be both criticised and supported depending on the perspective.

On the one hand, there is copious fear and immaturity involved. Fear consists in refusing to acknowledge vagueness, even though it is impossible to imagine a legal system without some degree of it. Sweeping vagueness under the carpet does not eliminate it because it is a function of language, not of law. In its turn law cannot operate without language. This is where immaturity comes from. The lack of debate about the role of vagueness in law leads to far greater arbitrariness than if vagueness was more widely recognised in legislation and case law. If vagueness does not exist 'lawfully', and every single norm and case is treated in the same way in terms of interpretation, then anything becomes possible since it cannot be understood exactly what the substance of the applied rule is. The paradox is that precisely such fear of admitting vagueness simultaneously engenders the greatest vagueness, as it guarantees unpredictable outcomes in the future. After all, how is it possible to evaluate your conduct as 'reasonable' if the only guidance is that this means 'rightfully considering all circumstances'? Do you act in good faith if this implies a 'careful evaluation of all the possible facts'?

On the other hand, there is certain wisdom hidden in this meta-vagueness. Judges in Bulgaria face a very uncomfortable contradiction. Their image depends on their institutional authority, but their institutional authority stems from their submitting to the law in contrast with the remaining institutional stakeholders. This reflects the basic trap into which a judge falls every time vagueness occurs. It imposes a predicament in which the judge has an obligation both to lie *and* an obligation to refrain from that lie. As neither requirement overrides the other, the judge inevitably violates an obligation.[30] After all, vagueness forces us to draw arbitrary boundaries which, moreover, capriciously change their position.[31] Thus, judges' strategy is to remain stubborn in ignoring vagueness, not as some personal preference but rather because the law (including the tacit law of how things work) provides so in order to hold them to their overriding performative duty. This also evidences that a jurisdiction which has, *prima facie,* all the elements of a modern democratic state (i.e. separation of powers, rule of law, etc.) could, nevertheless, be easily managed by invisible principles and rules, given the fact that Courts are, in practice, creating rules to the extent that they lack clear guidance on how to approach vagueness.

Such a process is not at all appealing and as such, courts are obliged to maintain societal peace by avoiding arbitrariness and boosting confidence that lingual boundaries are not arbitrary in law. Any hint of weakness, which would mean admitting that some cases are difficult enough not to have a satisfactory solution, or that the judge's work, as a whole, is riddled with contradictions, would mean to risk losing the symbolic capital of the court as the last resort for solving disputes. More importantly the necessary illusion of trust would be prone to disenchantment. That there is no rule requiring that the judge should embark upon a grand quest for truth, or reinvent his or her role as a political theorist, allows for an image of the judge in which law gains precedence over truth.[32] This self-image is obvious even in the way the courts refer to themselves, namely without any suggestion of 'we' or 'I' in the attempt to represent an objec-

30 Sorensen (n 10) 298.

31 Kompa (n 5) 211.

32 Andrew Halpin, 'Language, Truth, and Law' in M Freeman and F Smith (eds), Current Legal Issues: Law and Language (OUP 2012) 77.

tive point of view.[33] Strangely enough, if an arbitrary decision could be expected in every hard case, this would lead to greater predictability in terms of expectations from the judgement.

The implicit maturity of such a 'social contract' is that the refusal to adopt a broad methodology assumes that even if all the vagueness were erased, there would still be borderline cases and ambiguous definitions. Thus, formalism could not suffice no matter how fundamental it is declared to be. It is now well established that even the most committed formalist is forced to shift from one approach to vagueness to another since there is no single solution.[34] Moreover, the nature of language in law is such that, even an attempt at minimising vague definitions cannot guarantee a fair and equitable outcome. To an even greater extend non-vague legal texts are dubious enough given that semantic meaning and application regularly diverge, and this is considered normal practice in law.[35] Of course, it can be argued that this social contract illustrates the low level of legal consciousness and the zeitgeist that informs discussions. A society which cannot let itself dwell in discussions surrounding the philosophical foundations of law, in which vagueness is a key element, is rudimentary in its evolution. Here, however, is where the role of language in law as a great equalizer emerges: even the most developed theory of language cannot overcome the issue of vagueness conclusively so, counterintuitive as it is, instilling awareness of the limits of language might be a more workable solution than developing a comprehensive theory of how to address vagueness directly.

The main challenge to such approach is that lack of legitimacy might become more pertinent. If the system cannot explain clearly how it reaches a decision, especially in the case of vagueness, it should not be surprised to remain misunderstood by the general public. Disruption in the social contract necessitates partial unclogging of the system by the admission of certain borderline cases and their normalisation as a necessary evolutionary step in legal development. If the weakness of the law caused by vagueness is not clearly recognised, particularly in these current, increasingly legally complex times, disappointments can only increase. This requires becoming aware that the law is never 'just applied'. The reason for this lies precisely in vagueness being the permanent background noise of the system. With that awareness the disappointing results of unpredictable justice could be more easily swallowed because at least it would be clear as to what the discrepancies were due. The 'democratisation' of justice, i.e. the openness of the system to wider public scrutiny, which is necessary for its legitimacy, requires an 'informed decision' to be made about how much vagueness to allow and where it is useful. It is most appropriate that such debate be triggered by the judiciary. A pivotal element is to realise that there are texts that could benefit, and those that may suffer from openness. This is not an easy step, as every admission by the court that it *has* 'discretion' or anything even remotely close to it, based on the openness of vague legal language, will be interpreted as a policy statement and could disrupt the fragile comfort of the balance of powers in Bulgaria. However, strategically speaking, this is the only possible way forward.

More generally, Bulgaria's troubles with vagueness show an overestimation of the importance that philosophical and general theoretical discussions have to law. The problem of vague-

33 Lorenz Kaehler, 'First-Person Perspectives L Kaehler, 'First-Person Perspectives in M Freeman and F Smith (eds), Current Legal Issues: Law and Language (OUP 2012) 533.

34 Solan (n 19) 234.

35 Brian Bix, 'Vagueness and Political Choice in Law' in G Keil and R Poscher (eds), Vagueness and Law: Philosophical and Legal Perspectives (OUP 2016) 255.

ness is solved, to a significantly greater extent, by normative and social practices. The levels of vagueness depend principally on answering the practical question of what to do rather than on theoretical considerations. This confirms Schiffer's suspicion that philosophical theories of vagueness, even if true, have nothing to offer jurisprudential concerns about it.[36]

In this regard, there are some very good reasons for the Bulgarian legal system to avoid vagueness at all costs, notwithstanding the possible negative outcomes. They can be traced to its peripheral status as a jurisdiction. Thus, it was doomed to be influenced by various legal concepts and prone to accepting various legal implants without any independent reasoning behind them. Another reason is the lack of clear legislative intention that is notorious in Bulgarian laws. Thus, the 'soul' of legal practice is overwhelmingly more important than strict formal procedures. Unlike other systems, where arbitrariness is recognised as a serious challenge, in Bulgaria there is an instrumentalization of arbitrariness, so that the court addresses its main risk as unduly affecting one's legitimate interests[37] and instead focuses on how to reconcile opposing interests, no matter how unambiguous the law. Perhaps for this reason, vagueness seems to be a secondary consideration that has never seriously been placed at the centre of the debate. Still, vagueness is alive and well even when seemingly elusive.

5. CONCLUSION

The Bulgarian example analysed in this article illustrates a broader phenomenon: vagueness and legal indeterminacy are never merely technical problems, but they are, in fact, deeply political. A legal system can choose to recognise them and develop transparent methodologies for their handling, or it can deny their existence and let discretion operate in the shadows. The Bulgarian case shows that the second strategy, albeit it might seem so, does not eliminate indeterminacy. It merely disguises it, with three main consequences: increased actual arbitrariness, periodic legitimacy crises when the disguise fails, and foreclosure of public deliberation about the proper boundaries of judicial power.

The way forward necessitates institutional maturity: acknowledging that vagueness is constitutive of law, developing reasoned and reviewable methods for handling borderline cases, and accepting that judicial discretion, when exercised transparently, strengthens rather than weakens democratic legitimacy.

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36 Stephen Schiffer, 'A Little Help from Your Friends?' (2001) 7(4) Legal Theory 421.

37 Kompa (n 5) 211.

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NEODREĐENOST KAO SREDSTVO (NE)ODLUČIVANJA: BUGARSKI PRIMJER

Sažetak

U radu se ispituje kako bugarski pravni sustav sustavno odbija priznati jezičnu neodređenost i širu pravnu neodređenost, unatoč njihovoj neizbježnoj prisutnosti. Za razliku od većine teorijske literature koja neodređenost promatra apstraktno, u radu se analiziraju konkretne zakonodavne odredbe i sudska praksa u Bugarskoj kako bi se pokazalo da izostanak načelnog okvira nije slučajan, već ima određene društveno-političke funkcije: prikriva sudsku diskreciju, čuva institucionalni autoritet i sprječava javno propitivanje sudbene vlasti. U radu se iznosi teza da takva „metaneodređenost" paradoksalno povećava arbitrarnost i potkopava legitimnost. Zaključno se ističe da bi otvoreno priznavanje konstitutivne uloge neodređenosti pridonijelo većoj predvidljivosti, odgovornosti i povjerenju javnosti.

Ključne riječi: *neodređenost, komparativno pravo, bugarski pravni sustav, pravna teorija*

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