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Participation, Culture and Democracy

Participation, Culture and Democracy:

Perspectives on Public Engagement and Social Communication

Edited by

Tadej Pirc

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Perspectives on Public Engagement and Social Communication

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INTRODUCTION

PARTICIPATORY CULTURE AND THE FUTURE OF DEMOCRACY

TADEJ PIRC

The title of this collection of essays could indeed be perceived as wide in scope. However, if we think about what the concept of 'participatory culture' – which lies at the very core of all chapters – entails, it cannot be denied that participation, culture, and democracy all revolve around and intersect in that very concept.

While the term 'participatory culture' certainly is rather new, what it describes does not necessarily mean an innovation in the spectrum of social phenomena. Its roots are deeply embedded in the traditions of ancient Greece and are profoundly intertwined with the concept of democracy. The idea of participation has been strongly present in every revolution, revolt, uprising, rebellion, strike or other cultural means for influencing the politics and structural organisation of society, and its lifestyles throughout history, and it is receiving increasing attention in educational institutions and the policies shaped by liberal democracies all around the globe.

With the use of new technologies, innovative ways of communication have been established, helping citizens to connect on the basis of cultural, political or other interests, regardless of their geographic or social remoteness. Technological tools of participatory culture and their advantages, therefore, open the possibility of new forms of civic engagement, as well as a new concept of engaged, active citizenship. Furthermore, new forms of expressing concern, involvement, and responsibility have emerged.

Nevertheless, all these means and possibilities are mere opportunities for public engagement and active, participatory citizenship, while it is not always the case that these are actually encouraged, developed and used. Due to this imperfection or, more precisely, the discrepancy between the *ideal* democratic citizenship and the democratic citizenship as practiced in

real-life circumstances, my colleagues, and myself included, have studied, analysed, and assessed the *actuality* of participatory and inclusive mechanisms engaging civil society, the employment of means and tools of the digital era for democratic participation, and indeed all those seemingly minor, but nonetheless important issues and gaps posed by the culture of participation.

In the first chapter, Daniel Leisser addresses the participation gap in the normative space, testing a hypothesis that the normative space is a space of participation. His particular interest in the situation in Austria sheds new light on legal language as a language of institutional power, which is evident in the divergence between ordinary language interpretation and institutionalised meaning-making processes. Assuming that linguistic indeterminacy plays a crucial role in the identification and analysis of juridical power, this chapter provides a multifaceted discussion from a legal linguistics perspective, elaborating on theoretical as well as empirical aspects (tenant law and criminal law) relating to the relationship between legal language use and the concept of participation. It is argued that the participation gap in the normative space may be understood as co-determined by the lack of relevant educational measures in Austrian secondary schools. The integration of awareness building towards legal language use could be achieved by establishing basic legal competence in the relevant national curricula. By tackling the current lack of legal competence in Austrian classrooms, one may achieve a reduction of the participation gap. Unless sufficient steps are taken in education to enable students to approach normative systems with more scrutiny, as Leisser emphasises, individuals will not be treated as legal subjects, but will instead continue to be subjected to the rule of law.

In close connection to the first chapter, Thomas Kronschläger, Anne Fuchs, and Felix Kreinecker test the participation gap with an empirical study into attitudes towards legal texts in Austria. Their interest is focused on the motivations of Austrians for reading original legal texts and the question of whether they read these texts at all. Evidently, full participation in social and political life requires a solid knowledge of the rules of democratic participation, and precisely this is the starting point of this chapter. The theoretical foundation is then upgraded with an analysis of a qualitative field study conducted in Austria, which investigated participants' attitudes towards legal texts.

An important effect produced by these first two chapters is an awareness of the problem posed by representational democracy wherein citizens often sign their participatory rights over to their parliamentary

representatives and indulge in a comfortable, yet *ignorant* non-participation in the apparatus that is democracy.

In their text, Sam Lehman-Wilzig and Chan Sabag Ben-Porat consider an aspect of this issue in a study of social (re)media(ted) communication between legislators and constituents. They have based it on interviews with Israeli Knesset parliamentary assistants, in order to describe the intermediaries' function in facilitating communication between legislators and the public: a universal phenomenon that heretofore has not been researched in any depth. After providing a typological model of such intermediation, the study focuses on several ethical and philosophical issues deriving from such intermediation: Should the public be informed when the parliamentary aide and not the legislator writes the social media texts? Is this different from previous text production by politicians' 'ghost writers'? Are the answers dependent on the public's perceptions and expectations? Should the mainstream media cite the exact source of such social media posts?

All these questions prove pertinent not only because of their relevance in the world of the digitalisation of social relations – as a parallel process to the digitalisation of social communication – but especially due to the issue of transparency. Nevertheless, the quest for transparency does not necessarily make a government, state, or a system more democratic. This becomes evident, at least as a by-product of his main investigative objective, in Michael Lithgow's chapter on performativity and power at the Canadian Radio-Television & Telecommunications Commission (CRTC). The digitalisation of everything and everyone notwithstanding, his encounter with the theatre of public engagement enters the discussion through an incontestable thesis that physical and embodied encounters continue to dominate many aspects of political life and political procedures in Western liberal democracies – for example, in parliaments, legislatures, municipal councils, tribunals, commissions, courts, and public hearings. The digital transformation of political engagement raises essential questions about the continuing significance of embodied proceedings. The approach Lithgow employs to tackle this problem is through the analytic framework of performance. One of the most interesting, but also quite disturbing findings of his investigation is that one of the most common forms of discursive regulation occurred through the performance of 'ludic pleasures' – the production of levity and laughter that also functioned to regulate norms and standards of discourse in the hearings and hence play a role in shaping outcomes.

A thin line thus distinguishes the theatricality and performativity of politics on one side and the performativity of, for example, fictional TV

series and TV characters on the other. Both address the public, often a very similar portion of the public, and by playing on their emotions and sympathy – even empathy – stir the public's reactions and engagement. In her chapter, Małgorzata Lisowska-Magdziarz attempts at discerning and analysing authors, owners, influencers, entitled fans and ultimate fanboys' role in a controversy known as The Johnlock Conspiracy (TJLC). Applied to the politics of media content creation and based on the online controversies within the fan communities after the completion of the *Sherlock* BBC television series, she outlines different attitudes among the creative fans and media users in regards to the rights of the ownership or the influence over the development of the co-created and consigned transmedia product. In this case, the distinction between creators and consumers, but also between TV fiction and *real-world* non-fiction, evaporates. Does this mean ultimate public engagement?

Contemporary means and tools available in the digital era allow for the wider public to engage in all matters public, be they political, social or artistic. All-encompassing participation is one of the ideals of the democratic social order, and new media and technologies are making it increasingly feasible. Precisely due to this specificity of the digital era, Bojana Matejić's chapter on digital democracy, net art, and the artistic production of sociability seems so pertinent for the discussion on participation, culture, and democracy. The focus of her piece is on the dialectical problem of the technology and society of so-called digital democracy in relation to contemporary artistic practices and their socio-political effect as regards the possibilities of the realisation of the aspirations of direct democracy. In her view, digital democracy rests upon the issue of how the internet might be used in procedures for the improvement of democratisation and citizen participation. Most of the exponents of the ideals of digital democracy advocate the thesis that new information technologies will transform the nature of the political activity of representative democracy, by transforming it in accordance with ancient Greek direct democracy ideals. The author seeks to examine and indicate the contradictions and shortcomings of such a position in the case of internet art practices in which digital democracy does not necessarily entail direct democracy.

The seventh chapter takes a step back into the metaphysics of democratic social organisation and social communication. The author focuses on the notion of *ressentiment* in relation to mediocrity, which is, in accordance with the thesis following from Nietzsche's explication, determined and shaped precisely by the democratic social organisation. Despite all positive aspects that the latter introduced throughout world

history, the author strives to consider processes and mechanisms that essentially determine social communication and convert it from vertical to horizontal. In this context, psychopolitics amounts to the manifestation of *ressentiment* at the collective level and the reproduction of *ressentiment* as the essential emotion determining the relationship between the mass subject, namely the mediocre, and individuals over or below average, in the democratic process of the levelling of social structures at the foundation of widely acceptable standards and principles of the morality of normality or decency. The chapter emphasises repetitive patterns of culture, the psychopolitical power of which is maintaining *ressentiment* as the essential component of democracy, but above all, its foundation in mediocrity.

Nevertheless, it is in these mass collectives where the democratic inclination to participation matters the most. In this vein, Nicholas McMurry tackles the issue of the impossibility of total participation, in particular by outlining and assessing a human-based approach to participation. It is his objective to advocate an integration of democratic political theory and human-rights principles to develop a more robust programme for implementing participatory democracy, which is a process whereby those who are affected by particular policies can influence the development of them through interaction with the decision makers. It is impossible in a modern democratic system to allow everybody to participate in the development of every policy, but this chapter argues that human-rights principles can be used to evaluate whether participatory systems are sufficiently inclusive.

Human rights and inclusiveness are two categories where the majority, or the mass often breaks down as regards minorities and marginal social groups. The biggest minority in Europe, and simultaneously the most left out, perhaps even pushed aside, in Central and Eastern, but also Southern Europe in particular, is the Roma minority. Maja Biernacka tackled this issue and focused on the dictum of culturalism. Her text studies the transformation in the social construction of the Roma in Poland within the public policy discourse from assimilationism to social inclusion ideals. The latter, elaborated extensively in her chapter, is underpinned by two perspectives of fundamental importance: culturalism and voluntarism. Being a theoretical perspective explaining behavior as driven by culture rather than individual agency, social stratification, etc., culturalism foments treating the Roma culture in essentialist terms and, in its extreme, deterministic form, accepts it as conclusive with respect to the causality of human behavior. This stance discharges individuals from responsibility for their own lives upon a presumption that they cannot break cultural

patterns. Paradoxically it is coupled with voluntarism, qualifying integration as subject to the free will of individuals and communities. Their combination endorses inclusion to be a utopia. Moreover, legal recognition of the Roma as an ethnic minority and granting the right to protect their culture, as stressed by the author, does not redeem them from marginalisation.

In addition to minorities, large social segments are also often excluded from participatory mechanisms of democracy. Jeff Miller studies such a case from the aspect of community organisation in low-income neighborhoods in the USA in the 1960s. Specifically, Miller scrutinises long-forgotten training manuals of Syracuse University's Community Action Training Center (CATC) after then-president Lyndon Johnson signed the Economic Opportunity Act into law on 20 August 1964, launching America's 'War on Poverty'. The act created the National Office of Economic Opportunity, which awarded its first Research, Training, and Demonstration Grant to Syracuse University on 15 December 1964. The funds were used by Warren C. Haggstrom to form the Community Action Training Center (CATC), which he envisioned as a ground-breaking programme intended to educate and train professional community organisers and empower the disenfranchised and poverty-stricken African American neighborhoods in Syracuse, New York. Miller's contribution to this interdisciplinary collection of essays discusses the research component of the CATC, focusing specifically on a long-forgotten series of training manuals written by student-organisers, which offers a glimpse into American community organising practice in the 1960s as well as advice and guidance that remains relevant for today's organiser.

Precisely this last remark reminds us of the key issue of participatory models of democratic societies and points to the very core of the need for the concept of participatory culture. The democratic legislature and general principles of democracy indeed envision participation of the civil society at the core of any policy-making procedure; however, and as several authors have concluded in their studies contained in this volume, a huge participatory gap between the mechanism of democracy and the *demos* itself persists. For this reason, social communication is key. By that, I principally mean public engagement of the broadest scope, bottom-up community organisation, peer-to-peer exchange of knowledge and encouragement, open discussion of the public matters across all social strata, as well as responsible communication and two-way exchange between representatives and the individuals they represent. It

may be that this is the only design of democracy with the potential of self-sustainability.

Edinburgh, April 2018

CHAPTER ONE

THE PARTICIPATION GAP IN THE NORMATIVE SPACE: THE STATE OF PLAY IN AUSTRIA

DANIEL LEISSER[1]

1. Introduction

The language of the law is used to mediate and maintain power relations.[2] This chapter serves to discuss the participation gap assumed to exist in the normative space from a legal linguistics perspective and presents some of the current participatory challenges in Austrian law. Assuming that the investigation of legal language use is crucial for a deeper understanding of participatory challenges, this chapter provides theoretical perspectives as well as empirical examples relating to the Gordian knot of language and institutional power. It is assumed that institutional power is detectable in normative language which is evident in the divergence between ordinary language interpretation and institutionalised meaning-making processes, such as statutory interpretation. In the first section the general assumptions on the relationship between the language of the law and the concept of participation will be presented, making a case for empirical research conducted by legal linguists. While the second section will discuss linguistic indeterminacy in both ordinary and legal language use, the third section will relate this phenomenon to the participation gap in the

[1] Thanks to Luke Green for his kind and constructive feedback and his editing of this chapter; my colleagues at the Department of English and American Studies for their critical feedback; Professor Henry G. Widdowson for our lively discussions on language interpretation and discourse analysis; and Professor Barbara Seidlhofer for her encouragement and support.

[2] See John Gibbons, "Language and the Law," *Annual Review of Applied Linguistics* 19 (1999): 156-173.

normative space. The fourth section will then acquaint the reader with a qualitative example from Austrian tenant law and present current participatory challenges in the Austrian national curriculum relating to students' legal competence. In the fifth section, a discussion of the mandate procedure in Austrian criminal law will be provided with the aim to reveal potential issues not only concerning general legal aspects, but also relating to the role of the suspect in the juridical process. Finally, the last section argues that awareness building in Austrian secondary schools could be achieved by implementing legal education in the relevant national curricula. It will be argued how the participation gap can be reduced by tackling the lack of basic legal competence amongst Austrian students.

2. The language of the law and the concept of participation

The emergence of a participatory culture is linked to various meaning-making processes in the public space. Individuals are understood as agents of civic engagement who form the basis of a bottom-up development resulting in potential societal change. According to Jenkins, the notion of participatory culture may be related to

> a culture with relatively low barriers to artistic expression and civic engagement, strong support for creating and sharing one's creations. […] A participatory culture is also one in which members believe their contributions matter.[3]

This conceptualisation of participatory culture may be deconstructed with regard to three main aspects, namely the role of potential barriers to civic engagement, the opportunity to engage in forms of discursive productivity and individuals' collective belief in the efficacy and impact of participation.[4] The mediation of normative texts seems to display a considerable challenge in the construction of a participatory space for a number of reasons, some of which this chapter aims to shed light upon. At first, however, it appears necessary to demonstrate why research in the field of legal linguistics may be considered useful for a critical analysis of the processes underlying the mediation of the law and the concept of

[3] Henry Jenkins, *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century*. (London: MIT Press, 2009), 3.

[4] A critical discussion on participation and individuals' perceived passivity has been undertaken in: Stuart Weir, "Participation and Passivity: No Room at the Top," in *Promoting Participation: Law or Politics*, ed. Douglas N. Lewis and David Campbell (London: Cavendish, 1999), 101-112.

participation. As a second step, we shall attempt to narrow down the scope of the issues on which the following sections will elaborate.

Legal linguistics as a discipline is relatively young, but has been described as having undergone a coming-of-age process, which is visible in numerous works and articles and most prominently in the foundation of international research associations.[5] Following Johnson and Coulthard, I assume that a general distinction should be made for the sake of clarity "between the description of the language of the law (both written and spoken) and the work of the expert linguist".[6] While *forensic* linguistics often evokes associations with the work of experts specialised in the collection of linguistic evidence subsequently used in courts of law, the use of the term legal linguistics places the law at the centre of its inquiry. It is worth pointing out that some of the participatory challenges discussed in this chapter are not only related to the written language of the law generally but to issues in language interpretation specifically, which is why I have chosen to refer to the field as legal rather than forensic linguistics.

At this point, it should be noted that it is difficult to make a general distinction between language and law as all law reaches individuals in the shape of language.[7] Indeed, statutes, contracts, wills, judgements, restraining orders and many more instances of legal practice all share the property of being intrinsically *linguistic* in nature, which raises the question as to which role language plays and continues to play in the evolution of the law. Although there is no space here to pursue the relationship between language and the structural development of the law any further, it is crucial to stress the intimate linkage between legal practices and language interpretation. A discussion on the role of participation in the normative space, however, cannot halt in the mere acknowledgement of the linguistic nature of the law and legal meaning making processes. In fact, it seems as though it is precisely the linguistic structures of the law which seem to lie at the heart of the inquiry as to whether citizens are legal subjects or merely subjected to this normative

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[5] Alison Johnson and Malcolm Coulthard, "Current Debates in Forensic Linguistics," in *The Routledge Handbook of Forensic Linguistics*, ed. Malcolm Coulthard and Alison Johnson (Abingdon: Routledge, 2010), 10.
See *International Association for Forensic Linguistics* (IAFL, founded in 1993) the *Germanic Society for Forensic Linguistics* (GSFL, founded in 2012), the *International Language and Law Association* (ILLA, founded in 2007) and the *Austrian Association for Legal Linguistics* (AALL, founded in 2017).

[6] Johnson and Coulthard, "Current Debates in Forensic Linguistics," 7.

[7] See Gibbons, "Language and the law."

construct. Legal meaning-making mechanisms are established institutionalised processes conducted by a highly specialised professional community, which produces a social dichotomy of inclusion and exclusion: those who know how to read the law and those who do not. In *Legal Linguistics* Galdia describes this dichotomy as follows:

> The professional legal competence is necessary to interpret legally relevant language use. […] We must understand exactly which actions are allowed and which are forbidden […] before we formulate a certain claim. But can we do it without knowing the law and rely only on our linguistic competence as English speakers?[8]

In legal practice language thus becomes a tool of social power. Revisiting Jenkins's (2009) definition of participatory culture once again, one may assume that the exclusive element that lies in the various methods of statutory interpretation creates potential barriers to civic engagement, prevents opportunities to engage in forms of discursive productivity, and may possibly lead to a decrease in individuals' collective belief in the efficacy and impact of participation. It seems that what is perceived as the rule of law is in fact the rule of language. Accordingly, the term *participation* is thought of as a multidimensional phenomenon and is used in this chapter to refer to individuals' active and critical engagement with the texts, institutions and processes found in the normative space, that is a space where social prescription is at work.[9] In the next section, we shall discuss some of the issues arising from linguistic indeterminacy in the interpretation of normative texts such as statutes and how these issues may potentially maintain the participation gap in the normative space.

3. Language interpretation and the law

It is an established view that there is indeterminacy of meaning in language since "some linguistic structures simply do not specify particular information."[10] The ambiguous phrase *my aunt*, for instance, does not provide any information at all to which relative the language user intends

[8] Marcus Galdia, *Legal Linguistics* (Vienna: Peter Lang, 2009), 41.
[9] François Ewald, "Norms, Discipline and the Law," in *Law and the Order of Culture*, ed. Robert Post (Berkeley: University of California Press, 1991), 153.
[10] Lawrence M. Solan, "Vagueness and Ambiguity in Legal Interpretation," in *Vagueness in Normative Texts*, ed. Vijay Bhatia, Jan Engberg, Maurizio Gotti and Dorothee Heller (Bern: Peter Lang, 2005), 73.

to refer.[11] Such indeterminacy is in most cases easily resolved by reference to the context of the utterance. In the following two scenarios, however, the language user is left in a state of doubt regarding the meaning of an expression due to contextual ambiguity:

> [Y]our mom says *'you can have half the dessert in the fridge'* and you open the fridge and find a piece of chocolate cheesecake and a pot of yogurt.[12]

The problem faced by the language user opening the fridge is straightforward. It remains unclear whether the word *dessert* refers to the piece of chocolate cheesecake or the pot of yoghurt. Fortunately, the situation is likely to be resolved by asking the speaker's mother, as Endicott contends. Generally, one may assume that in spoken conversation such forms of indeterminacy occur frequently in language use and tend to be resolved too quickly to lead to actual problems in information exchange. The problem in the second scenario, in contrast, appears to be slightly more difficult to resolve as the option to ask the other language user is no longer available:

> [Your mom] wrote *'you can eat half the dessert'* on a sticky note on the fridge and went out to visit your aunt.[13]

Again the question is whether it is half the cheesecake or half the yoghurt the speaker can have, but this time there is no one to ask, no one to help resolve the contextual ambiguity which resides in the use of the word *dessert*. One attempt to recover the meaning of the note may be to turn to the literal meaning of the sentence *you can eat half the dessert.* The language user is a proficient speaker of the English language and knows its semantic code. Thus, he or she understands the conventional meaning of the individual words in the sentence. Nevertheless, it is unclear whether the pronoun *you* refers to the individual reading the note or someone else potentially living under the same roof, e.g. a sibling. The primary problem also remains, that is, which of the two sweet treats in the fridge were meant to serve as *dessert*. Another way of recovering the meaning of the utterance may be to look at other notes produced by the speaker's mother to find clues as to what the intended meaning of the note on the fridge may be. This could be summed up by the questions as to what *dessert* usually

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[11] Solan, "Vagueness and Ambiguity in Legal Interpretation," 73.
[12] Timothy Endicott, "Arbitrariness," *Canadian Journal of Law and Jurisprudence* 27, no. 1 (2014): 59.
[13] Endicott, "Arbitrariness," 59.

refers to or what dessert has referred to up to now. Finally, the reader of the note could also reflect upon the question as to what the reasonable purpose of the note may be. It seems that without reference to any extralinguistic context the language user is at least likely to make a wrong decision.

Such situations are typically encountered in statutory interpretation which may be conceived as a specialised form of language interpretation. The thought experiment above shows that there are multiple ways of recovering what is seen as the intended meaning of a linguistic expression since different interpretation methods may lead to different results. However, in order to arrive at a binding consensus on the meaning of a certain linguistic item an accepted authority is needed to determine that meaning. §6 of the Austrian Civil Code (ABGB) determines the following:

§ 6 ABGB Einem Gesetz darf in der Anwendung kein anderer Verstand beigelegt werden, als welcher aus der *eigentümlichen Bedeutung der Worte in ihrem Zusammenhang und aus der klaren Absicht des Gesetzgebers hervorleuchtet*.	**§ 6 ABGB** No meaning must be inferred from a law other than the meaning which is evident from the *genuine meaning of the words in their context and the clear intention of the legislator*.[14]

Accordingly, one may assume that there are three main perspectives which need to be taken into account when making sense of a provision in the Austrian legal system, namely the semantic meaning or conventional language code ("genuine meaning of the words"), the context of the norm and the legislative intent or purpose thereof ("the clear intention of the legislator").

Widdowson's distinction between text and discourse appears to be helpful to clarify a common misunderstanding related to textual meaning and language interpretation in general.[15] It is a widespread assumption that the meaning of a text is inscribed in the linguistic structures of which it is composed. While it is true that every text consists of linguistic units that carry the conventional meaning ascribed to them, the process by which individuals derive what they perceive as the meaning of the text cannot be reduced to a mere decoding of its semantic structures. Arguing that texts

[14] Translation provided in: Peter Eschig and Erika Pircher-Eschig, *Das österreichische ABGB: the Austrian civil code* (Vienna: LexisNexis, 2013), 1. (my emphasis).

[15] See Henry G. Widdowson, *Discourse Analysis* (Oxford: Oxford University Press, 2011).

are produced in order for individuals to "to get a message across, to express ideas and beliefs, to explain something, to get other people to do certain things or to think in a certain way", Widdowson assumes that "this complex of communicative purposes" may be referred to as the discourse underlying the text.[16] He goes on to argue that the term *discourse* may thus be conceived as "what a text producer meant by a text" (primary discourse), but may also refer to "what a text means to the receiver."[17] The issue at hand is that "the textual features that are activated in interpretation are only those which are perceived, consciously or not, to be contextually and pretextually relevant."[18] In this view, context is thus thought of as "an abstract representation of a state of affairs", that is, "the features of the situation that are taken as relevant."[19] The legislative intent referred to in the above quotation could in Widdowson's terms be understood as a discourse derived from a legal provision which may differ according to the method of statutory interpretation applied. In the following section we shall argue how the indeterminacy of language interpretation may be helpful to understand the relationship between the institutional power structures and the participation gap in the normative space, providing examples from statutory interpretation under Austrian law.

4. Linguistic indeterminacy and the participation gap

In the previous sections, two main issues were identified as relevant for a discussion of institutional power in the context of an assumed participation gap in the normative space, that is, the ubiquity of indeterminacy in language use and the variety of potential discourses derivable from a certain legal provision. In Austrian law, there are four methods of interpretation available to the legal community, namely the literal, systematic, historical and teleological approaches to statutory interpretation. In this section, we shall demonstrate why the lack of awareness towards these institutionalised processes of legal meaning-seeking may contribute to the consolidation of the participation gap.

[16] Widdowson, *Discourse Analysis*, 6.
[17] See Widdowson, *Discourse Analysis*, 7.
[18] Henry G. Widdowson, *Text, Context, Pretext: Critical Issues in Discourse Analysis* (Oxford: Blackwell, 2004), 166.
[19] Widdowson, *Discourse Analysis*, 19.

4.1 Literal meaning = literal interpretation?

The central assumption underlying literal interpretation is that there is a fixed meaning inscribed in the linguistic structures of a legal provision which simply needs to be recovered by the interpreter. The recovery of what is perceived as the literal meaning of a legal text is thus conceived as the formalistic deconstruction of word or sentence meaning.[20] For instance, the terms *male* and *female* refer to what is seen as the gender of human beings in the world. The fact that men are commonly referred to as male and women as female, however, is fixed by convention and often perceived as mirroring social reality. Being the method of interpretation with which all forms of legal meaning-seeking are assumed to begin,[21] literal interpretation is conducted to determine to which object in the external world a certain linguistic item refers. What is thought of as the core meaning of a linguistic item is perceived as surrounded by boundaries, which in turn leads to the assumption that the meaning of the item itself is blurry. Under Austrian administrative law, for instance, individuals are still classified as either male or female, as a recent case has confirmed. Forms of sexual ambiguity or intersexuality are not legally recognised and so individuals who seem to fit neither of the categories are, in the event that no medical interventions were pursued, nevertheless referred to and categorised as male or female.[22] It seems that the legal challenges in the context of intersexuality and sex assignment do not have to be discussed here in detail. However, what cannot be ignored is that the meaning of any text seems to be heavily context-dependent since the term *Geschlecht (sex)* as found in §2(2) of the Austrian *Personenstandsgesetz 2013 (Civil Status Act 2013)* remains linguistically indeterminate. The referential relationship between a linguistic expression and an object in the external world is largely founded on convention, which is evident in the distinction made by Endicott between legal and linguistic indeterminacy.[23] While the term *sex* under Austrian law has been conventionalised to refer to a dual split of humankind into men and women, in a more general

[20] See Christiane Wendehorst und Brigitta Zöchling-Jud, *Privatrecht: Einführung in die Rechtswissenschaften und ihre Methoden* (Vienna: Manz, 2015).
[21] See Peter Rummel and Meinhard Lukas, ed., *ABGB: Teilband §§ 1-43 ABGB – Einleitung, Personenrechte*, 4th edition (Vienna: Manz, 2015).
[22] See Sharon Preves, *Intersex and Identity: The Contested Self* (London: Rutgers University Press, 2005).
[23] See Timothy Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000).

discussion of intersexuality the notion of *sex* may in some cases remain linguistically indeterminate.

4.2 Legal applicability and legal accessibility

The divergence between legal semantics and everyday language use has been discussed in numerous works. Fjeld describes four interpretation situations in which the outcome of general language interpretation by laypersons and legal exegesis are compared:

(1) The layman and lawyer make the same interpretation, which means that general language interpretation strategies are adequate.
(2) The layman and lawyer make nearly the same interpretation, but the layman feels insecure about his interpretation because of unusual linguistic signals.
(3) The layman and lawyer make different interpretations because the text gives too few clues for the necessary recoverability of meaning.
(4) The layman can make no sense of the legislative text because of unfamiliar linguistic signals.[24]

In (3) there is a considerable divergence between the discourse derived by the layperson and the legal professional, which may be considered the ultimate issue as far as the participation gap is concerned. Bhatia notes that "draftsmen are almost universally criticised for making their provisions inaccessible to ordinary citizens, often questioning their loyalty to their so-called 'real reader'".[25] Normative texts appear largely inaccessible to the open public, which in part is related to the paradox that they are expected to "be maximally determinate and precise" and at the same time "cover every relevant situation".[26] Legislative drafting processes can thus be placed between the requirements of legal applicability and public accessibility. Linguistic indeterminacy certainly plays a crucial role in the making of laws since "the arbitrariness of vagueness is that it leaves power to officials who may apply a standard capriciously, or to private persons

[24] Ruth Vatvedt Fjeld, "The Lexical Semantics of Vague Adjectives in Normative Texts," in *Vagueness in Normative Texts*, ed. Vijay Bhatia, Jan Engberg, Maurizio Gotti and Dorothee Heller (Bern: Peter Lang, 2005), 170.
[25] Vijay Bhatia, "Specification in Legislative Writing: Accessibility, Transparency, Power and Control," in *The Routledge Handbook of Forensic Linguistics*, ed. Malcolm Coulthard and Alison Johnson (Abingdon: Routledge, 2010), 41.
[26] Vijay Bhatia, Jan Engberg, Maurizio Gotti and Dorothee Heller, eds., *Vagueness in Normative Texts* (Bern: Peter Lang, 2005), 10.

who may use it for purposes contrary to the purpose of the standard".[27] However, as will be discussed in the following chapter, the exegesis of the law is always tied to established institutionalised meaning-making processes largely unfamiliar to laypersons, which renders them particularly vulnerable.

4.3 Systematic, historical and teleological interpretation

In the example given in section 3 on the interpretation of the note on the fridge door, we also touched upon three other methods of statutory interpretation which seem to complicate matters even further. It was contended that the language user who is unclear about the meaning of a certain linguistic item could consider the following three questions:

(1) What does the word *dessert* usually refer to in our family?
(2) What has the word *dessert* referred to up to now?
(3) What could the reasonable meaning of the word *dessert* be at this point in time?

(1) and (2) seem to be related in that the meaning of the word dessert is derived from a pool of conventionalised meanings established by precedence. In other words, the language user's family is assumed to share a common idea of what they usually treat as dessert, the chocolate cheesecake or the yoghurt. While (1) focuses on the current state of what is usually regarded as dessert in the language user's family, (2) more specifically takes into account what the word dessert has denoted up to the point in time when the problem arises. The meaning of dessert would in (1) and (2) be deduced by reference to some kind of familiar knowledge about the customs of the speaker's family. In linguistic terms, the language user draws on mental representations or schemata, that is, what seems familiar to him or her when engaging in language interpretation.[28]

Widdowson describes the process of text interpretation as follows:

> What happens in text interpretation is that the language triggers off the recall of some familiar state of affairs, some schema or other, and this sets up an expectation of what is to follow.[29]

In legal terms, (1) and (2) are examples of systematic and historical approaches to interpretation respectively, which are conceptually related. While systematic interpretation aims to recover the meaning of a certain

[27] Endicott, *Vagueness in law*, 45.
[28] See Widdowson, *Discourse Analysis*.
[29] Widdowson, *Discourse Analysis*, 28.

legal norm by reference to other contemporary legal norms, historical interpretation seeks to elucidate the subjective legislative intent underlying the enactment of statutes.[30] The discourse derived from a legal norm is thus dependent on the frame of reference which guides the reader's expectations towards the intended meaning of the norm.[31] In contrast, (3) appears to be different to (1) and (2) since it is assumed that it is possible to deduce the reasonable purpose of the provision. It seems a relatively straightforward way to identify the purpose of a provision is to equate it with the underlying historical legislative intent. This approach is referred to as subjective-teleological interpretation and may be considered related to forms of historical interpretation.[32] However, this does not apply to (3) as this question refers to what the objective reader would infer as the reasonable meaning of the word. The discourse derived in the objective-teleological approach relates to what is perceived as the contemporary purpose of the provision. Here legal practitioners find themselves between the poles of exegesis and eisegesis, between determining what the primary or intended discourse might be and "the art of reading into a text more or less whatever [they wish] to find".[33] One must assume that the complexity of legal meaning-seeking techniques is largely unknown to the majority of the Austrian population and that most individuals rely on their subjective language interpretation when recovering what they perceive as the meaning of a provision. In the following section, we shall argue why the current lack of awareness must inevitably lead to a participation gap and which aspects seem to contribute to its preservation.

5. Upholding the participation gap in the normative space

Since 1998 the Legal Information System of the Republic of Austria (RIS) has been in operation "as an electronic database managed by the Austrian Federal Chancellery" to inform a broad audience about the law in effect.[34]

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[30] Wendehorst and Zöchling-Jud, *Privatrecht: Einführung in die Rechtswissenschaften und ihre Methoden*, 10.

[31] For a general discussion of language interpretation see: Widdowson, *Discourse Analysis*.

[32] See Wendehorst and Zöchling-Jud, *Privatrecht: Einführung in die Rechtswissenschaften und ihre Methoden*.

[33] Kenneth G. C. Newport, *Apocalypse and Millennium: Studies in Biblical Eisegesis* (Cambridge: Cambridge University Press, 2000), 4.

[34] Roland Traunmüller, "E-government: New Challenges Ahead", in *Technology-enabled Innovation for Democracy, Government and Governance: Second Joint International Conference on Electronic Government and the Information*

It is explicitly pointed out that the database is intended to provide a documentation of Austrian law only and does not provide any interpretation as to the meaning of statutes.[35] Since the subject *legal education* is not part of the national curriculum in Austrian schools, one is safe to assume that the plethora of provisions available online can only provide first guidance with regard to legal questions. This relates to Fjeld's four interpretation situations as the crucial question seems to be to which extent citizens are capable of deriving the institutionally accepted meaning of a word or stretch of language in a certain provision.

5.1 An example from Austrian tenant law

To illustrate the problem at hand it seems purposeful to provide an example of Austrian tenant law (*Mietrechtsgesetz 1981*)[36]. In §3 (1) MRG it is decreed that the landlord is obliged to maintain the property according to the customary standard. Furthermore, the landlord must take responsible measures to remove considerable health hazards for the inhabitants of the property.[37] Inevitably, the question as to what may be understood by the term *maintain* arises. §3 (2) specifies the term *maintenance* as follows:

§3 (2) MRG die Arbeiten, die zur Erhaltung der allgemeinen Teile des Hauses erforderlich sind, die Arbeiten, die zur Erhaltung der Mietgegenstände des Hauses erforderlich sind; diese Arbeiten jedoch nur dann, wenn es sich um die Behebung von ernsten Schäden des Hauses oder um die Beseitigung einer vom Mietgegenstand ausgehenden erheblichen Gesundheits-gefährdung handelt oder wenn sie erforderlich sind,	**§3 (2) MRG** the works which are necessary for the maintenance of the general parts of the property, the works which are necessary for the maintenance of the rental properties in the building; such shall only apply if these works are related to the repair of serious damage to the building or the removal of a considerable health hazard originating from the rental property or if necessary to ensure that the rental property can be handed over

Perspective, and Electronic Democracy, EGOVIS/EDEM, ed. Andrea Kö, Christine Leitner, Herbert Leitold and Alexander Prosser (London: Springer, 2013), 11.

[35] Homepage of the Legal Information system, accessed Dec 15, 2016, https://www.ris.bka.gv.at/.

[36] "Bundesgesetz vom 12. November 1981 über das Mietrecht (Mietrechtsgesetz - MRG)", accessed Dec 15, 2016, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002531.

[37] "§ 3(1) MRG 1981," accessed Dec 15, 2016, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002531.

um einen zu vermietenden Mietgegenstand in brauchbarem Zustand zu übergeben;[38]	in a useable condition;

The provision contains two adjectival phrases which are highly indeterminate in that they do not allow for any specification as to the quality of the noun to which they refer. In the expression *ernste Schäden* (*serious damage*), the reader is left unclear as to which criteria of seriousness the damage in question needs to fulfil so as to obligate the landlord to conduct the maintenance work. The same problem arises in the phrase *erhebliche Gesundheitsgefährdung* (*considerable health hazard*). Firstly, the term health hazard remains indeterminate as it is not clear whether the issue faced by the tenant can be referred to as a health hazard at all. Secondly, if it seems reasonable to the tenant that the nature of the issue appears to be a health hazard, the question remains whether it can also be classified as a *considerable* health hazard. Laypersons can thus only seek advice from legal professionals in order to resolve the uncertainty arising as a result of such linguistic indeterminacy. It becomes evident that general language interpretation is insufficient to solve the legal problems individuals face since they do not possess the professional competence, which in turn creates and sustains power hierarchies. The participation gap in the normative space can thus be primarily characterised by a tendency to maintain barriers for citizens and a general tendency to uphold established power structures. It has been argued that "legislative provisions are purposely written in a complex and convoluted manner, so as to keep ordinary readers out of accessible range and to perpetuate dependence on the specialist legal community."[39] While Bhatia identifies this view as belonging to conspiracy theory, it cannot be denied that the acquisition of legal competence is certainly a neglected child in the Austrian curriculum.

5.2 Legal competence and the Austrian curriculum

Unless secondary students decide to pursue a degree in law at one of the national universities, they cannot be expected to approach legal texts such as statutes or contracts analytically. While it is true that the Austrian curriculum for *Berufsbildende Schulen* (vocational schools) includes

[38] "§ 3(2) MRG 1981," accessed Dec 15, 2016, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002531.
[39] Bhatia, "Specification in Legislative Writing: Accessibility, Transparency, Power and Control," 41.

subjects such as *Wirtschaft und Recht* (Economics and Law) and *Politische Bildung und Recht* (Political Education and Law), there is no academic teacher programme available at national universities to educate and generate competent tutors for these subjects. As a consequence, the subjects are usually taught by pedagogically untrained lawyers and economic educators.[40] The competency model for the subject Economics and Law for year thirteen (18-year-olds) includes a number of descriptors which seem particularly related to analytical legal competence. Students are expected to depict and evaluate specific practical scenarios, such as contractual non-performance, the formation and termination of employment contracts as well as the formation of commercial contracts.[41] It seems that legal practice is largely constrained to economic aspects, which necessarily entails a chronic underrepresentation of other areas of the law, e.g. criminal law, tenant law or administrative law, to name a few. It also seems that students are not acquainted with any specific methods of textual analysis at all, which corroborates the assumption that the main focus seems to be placed on the uncritical transfer of legal knowledge rather than the interpretation of the law.[42]

The current discussion has so far focused on three main issues which may be assumed to uphold the participation gap in the normative space, namely the divergence between legal and ordinary language interpretation techniques, the highly specialised methods of statutory interpretation largely unknown to the majority of citizens, and the lack of possibilities to foster critical legal thinking in Austrian secondary schools. It appears that these factors do indeed contribute to the consolidation of the participation gap by creating barriers to civic engagement, preventing opportunities to engage in legal discourse and reinforcing individuals' collective belief that

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[40] Zentrum Polis – Politik Lernen in der Schule. "Politische Bildung unterrichten," accessed Dec 15, 2016, http://www.politiklernen.at/site/grundlagen/ausundfortbildung/ausbildunglehrgaenge.

[41] Bundesministerium für Kunst und Kultur. "Wirtschaft und Recht - 13. Schulstufe. Bildungsstandards in der Berufsbildung für Handelsakademien, Humanberufliche Schulen, Höhere Land- und Forstwirtschaftliche Lehranstalten, Höhere Technische Lehranstalten. Kompetenzmodell, Deskriptoren und ausgewählte Unterrichtsbeispiele," 5th edition, 2013, accessed Dec 15, 2016, http://www.berufsbildendeschulen.at/fileadmin/content/bbs/AGBroschueren/Pilotbroschuere_Wirtschaft_und_Recht_September2013.pdf.

[42] Due to space limitations a forthcoming study on the reading comprehension of normative texts by Austrian secondary school students could not be discussed here (results pending). The *Austrian Association for Legal Linguistics* is currently drafting the curriculum for a school subject entitled "Law and Justice" to be used in Austrian secondary school education.

they are merely subjected to the imposition of the law. The latter point may be supported by the recent amendments of Austrian criminal law in 2014, which brought about the re-enactment of the *Mandatsverfahren* (*mandate procedure*). The following section will address a number of potential legal, linguistic and participatory issues related to the mandate procedure.

6. In the name of the Republic! – Some observations on the Austrian Mandate Procedure

As of the 1st January 2015 Austrian criminal law permits the imposition of a sentence on individuals by means of a penal order (*Strafverfügung*) without a preceding oral trial (*Hauptverhandlung*). The decision of the court is exclusively based on the files provided by the parties involved. Applied by *Bezirksgerichten* (district courts) and *Landesgerichten* (regional courts), the mandate procedure may be described by the following legal requirements:

1. The suspect was interrogated by the police pursuant to §164 or §165 StPO;
2. they assumed responsibility for the unlawful act;
3. they abandoned explicitly the right to an oral trial pursuant to §491 (1) (2) StPO.[43]

After a legal assessment of the requirements above, the prosecution may decide to file a request with the court to issue a penal order. If the investigation should provide sufficient evidence so as to allow for an evaluation of the suspect's claimed criminal liability, the suspect accepts responsibility for the unlawful acts, and the rights and legitimate interests of the suspect are not prejudiced, the court may issue a penal order.[44] If a penal order is issued, it is to be dispatched to the defendant and, if applicable, to their legal representative. Penal orders may range from a monetary fine to a conditional sentence of imprisonment of not more than a year; the latter being only applicable if the defendant is represented by a lawyer. While certainly not toothless, the provisions on the mandate

[43] "Strafprozeßordnung 1975 (StPO)," accessed Dec 15, 2016, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=1000232.
[44] "§491 (1) (3) StPO," accessed Dec 15, 2016, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326.

procedure currently in effect decree much milder sentences. In comparison, a previous ministerial draft bill submitted in 2014 allowed for an unconditional sentence of imprisonment of no more than a year.[45] The draft provoked a considerable wave of criticism from academia and legal professionals eventually resulting in a reduction of the punishment originally intended.

The mandate procedure also raises a number of concerns related to the transcription of legal language use in police interviews. Holt and Johnson have pointed out that "[l]ay interactants are largely controlled by and at the mercy of questions from professionals in dyadic legal encounters".[46] Examples of empirical research conducted in this area have involved aspects such as turn-taking,[47] *and*- and *so*-prefaced questions,[48] formulations[49] and reported speech[50] in legal language use.[51] Conducted "to obtain accurate and reliable accounts from victims, witnesses or suspects",[52] police interviews are intrinsically goal-focused[53] and thus a

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[45] "Ministerialentwurf betreffend ein Bundesgesetz, mit dem die Strafprozessordnung 1975, das Jugendgerichtsgesetz 1988, das Suchtmittelgesetz, das Staatsanwaltschaftsgesetz, das Geschworenen- und Schöffengesetz 1990 und das Gebührenanspruchsgesetz geändert warden (*Strafprozessrechtsänderungs-gesetz 2014*)", accessed Dec 15, 2016, https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00038/imfname_349181.pdf.

[46] Elizabeth Holt and Alison Johnson, "Sociopragmatic Aspects of Legal Talk: Police Interviews and Trial Discourse," in *The Routledge Handbook of Forensic Linguistics*, ed. Malcolm Coulthard and Alison Johnson (Abingdon: Routledge, 2010), 21.

[47] See Max Atkinson and Paul Drew, *Order in Court: The Organisation of Verbal Interaction in Juridical Settings* (London: Macmillan, 1979).

[48] See Alison Johnson, "So… ? Pragmatic Implications of So-Prefaced Questions in Formal Police Interviews," in *Language in the Legal Process*, ed. Janet Cotterill (Basingstoke: Macmillan, 2002), 91-110.

[49] See John Heritage, "Analysing News Interviews: Aspects of the Production of Talk for an Overhearing Audience," in *Handbook of Discourse Analysis 3: Discourse and Dialogue*, ed. Teun Adrianus van Dijk (London: Academic Press, 1985), 95-119.

[50] See Renata Galatolo, "Active Voicing in Court," in *Reporting Talk: Reported Speech in Interaction*, ed. Elizabeth Holt and Rebecca Clift (Cambridge: Cambridge University Press, 2007), 195-220.

[51] See Holt and Johnson, "Sociopragmatic Aspects of Legal Talk: Police Interviews and Trial Discourse," 21.

[52] College of Policing, "Investigative interviewing," 2013, accessed Dec 15, 2016, http://www.app.college.police.uk/app-content/investigations/investigative-interviewing/.

quintessential component of criminal investigations. Spoken language is ephemeral which, in a legal context, leads to the necessity of making legal interactions such as police interviews last.[54] If the interviews are not recorded, a familiar problem arises which is also related to the general remarks on language interpretation made at an earlier point. Widdowson contends that written text "is typically designed and recorded unilaterally in the act of production" and is subsequently interpreted by other individuals, displacing and delaying its mediation.[55] He concludes that for this reason it is harder to achieve "a convergence between intention and interpretation".[56] It does not need pointing out that most methods of statutory meaning-seeking in forensic settings seemingly aim to arrive at this constructed convergence.

The potential challenges which go along with the transcription of spoken data and the relationship between medium and message remain largely unnoticed.[57] Importantly, the indeterminacy of language interpretation is likely to lead to problems regarding the question as to whether the subject really intended to accept responsibility or abandon the right to an oral trial. This would indeed be problematic as it is likely that the police interview is the only opportunity for a suspect to recount their own version of events as the court's final decision is exclusively based on the review of files. The extent to which suspects are enabled to engage actively in juridical processes may also be understood as legal participation, which in turn requires a sufficient degree of autonomy. More empirical research is thus needed to investigate the relationship between actual language use in legal settings such as police interviews and the phenomenon of linguistic indeterminacy. Such research could lead to the compilation of vast corpora of both spoken and written legal text in Austria which would be an invaluable source of reference for both the legal and the linguistic community. However, the empirical investigation of linguistic indeterminacy in juridical settings such as police interviewing

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[53] Malcolm Coulthard, Alison Johnson and David Wright, *An Introduction to Forensic Linguistics: Language in Evidence* (New York: Routledge, 2017), 58.
[54] Michele M. Asprey, *Plain Language for Lawyers*, 3rd edition (Sydney: Federation Press, 2003), 125.
[55] Widdowson, *Discourse Analysis*, 7.
[56] Widdowson, *Discourse Analysis*, 7.
[57] For a detailed discussion see: Kate Haworth, "Police Interviews in the Judicial Process," in *The Routledge Handbook of Forensic Linguistics*, ed. Malcolm Coulthard and Alison Johnson (Abingdon: Routledge, 2010), 172.