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A Few Questions Concerning Photographs in Court Decisions[1]

1. Introduction

The best way to start the analysis of the practice of inserting photographs in court decisions (judgment justifications – using a continental European nomenclature and court opinions – referring to an American or common law practice)[2] is to refer to one of its examples. Consider a selection from the US Supreme Court's Judgment prepared by Justice Kennedy in Brown v. Plata, a case concerning the issue of overcrowded prisons in California. The already highly controversial issue of overcrowding in prisons is made even more drastic and thought-provoking in this document with the statement that

> [p]risoners in California with serious mental illness do not receive minimal, adequate care. Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets. See Appendix C, *infra*. A psychiatry expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had "no place to put him"[3].

However, it can be assumed that few practicing lawyers will react to such a description with much emotion and outrage. Rather, what is most likely to be intriguing to them in this description is the reference to the appendices section at the end of the whole document. Because, when the reader does turn to Appendix C, what she or he finds there is not another section of written text, but a black and white photograph that depicts the described telephone-booth-sized cages[4].

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[1] The previous version of this article was presented at the 11th Conference on Legal Translation, Court Interpreting and Comparative Legilinguistics (Legal Linguistics) combined with the 17th International Roundtable for the Semiotics of Law (IRSL 2016), 24–26.06.2016, Poznań, Poland. Taking this opportunity, I would like to thank the organisers as well as the participants for their inspiring comments. Naturally, it does not change the fact that only I am responsible for all of the possible substantive shortcomings of this article.

[2] Due to the aim of the article – to discuss the practice in question in general – and for the sake of brevity, hereinafter the more general term of court decisions instead of judgment justifications or court opinions will be referred to consistently.

[3] 131 S. Ct. 1910 [2011].

[4] The whole referred document is available here: https://www.supremecourt.gov/opinions/10pdf/09-1233.pdf, accessed: 19.01.2017. The cited segment on telephone-booth-sized cages and the photograph of them are on pages

Although the use of images in court decisions is still a rather minor phenomenon, it has received some (but definitely still not wide) attention from legal scholars, including Hampton Dellinger[5], Nancy S. Marder[6] and Elizabeth G. Porter[7]. Their studies are definitely pioneering and to a certain extent ground-breaking, but they all seem to follow a single questionable pattern of argument. Firstly, in one sitting they analyse the different kinds of visuals used by judges (maps, diagrams, reproduced documents and, last but not least, photographs), whereas it seems that each of them should be analysed separately as, ultimately, different kinds of images[8]. Secondly, these studies also seem to be significantly case-specific. Although they try to formulate some generalisations about the phenomenon in question, they still seem to stick to particular cases and case study methods and do not present the problem in a more general, and even universal, way. Thirdly, this leads to omitting or simply not seeing some other problems connected with the outlined phenomenon than the ones already explicated in the mentioned studies and failing to present one coherent and clear list of all the noticed problems.

Against this background, the aim of this article is as follows: to discuss in a more general, universal and to a certain extent even analytical manner the practice of putting photographs concerning case-relevant facts in court decisions, not only by reconstructing the previously noted problems, but also by presenting other issues. An effort has been made to present all of this in an explicit, organised manner, without leaving any substantive issue buried under the weight of other arguments. Accordingly, the following is concerned not so much with the descriptive diagnosis of the practice (an attempt to determine its size and frequency among the totality of judicial decisions in a given country and in a specific time period). It is, rather, a critical examination, which aspires to be adequate not only in respect to one particular state jurisdiction. In the end, the inclusion of photographs in court decisions is possible across different national justice systems. In such a case, what is needed then is a more general, less nationally specific framework, through which one can analyse and assess the practice in question, in its various particular manifestations.

Naturally, the purpose of this article is not only to provide a tool or tools to look at photographs in court decisions, but also to try to formulate a response to this practice, on the basis of the hitherto findings on it and conducted analysis. Because of problems connected with the phenomenon in question, most notably the problem of choice criteria addressed at the end of this article, this practice is extremely controversial. Specifically, it bears the marks of something quite irrational and emotion-driven and, finally, is hardly explainable or even non-explainable, and on these grounds, it seems it should be abandoned. All the arguments and identified problems connected with

11 and 58 of the electronic document. Brown v. Plata is analysed in the context of photographs used in it also by Nancy S. Marder (N.S. Marder, *The Court and the Visual: Images and Artifacts in U.S. Supreme Court Opinions*, "Chicago-Kent Law Review" 2013/2, mainly pp. 349–357), briefly commented by Elizabeth G. Porter (E.G. Porter, *Taking Images Seriously*, "Columbia Law Review" 2014/7, pp. 1745–1746) and mentioned in Colette R. Brunschwig's note (C.R. Brunschwig, *Legal Visualizations in Court Judgments – Reflections and Questions*, "Beck-Community «Multisensory Law»", 8.06.2011, http://community.beck.de/gruppen/forum/ visual-law/legal-visualizations-in-court-judgments-reflections-and-questions, accessed: 19.01.2017.

[5] H. Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, "Harvard Law Review" 1997/8, pp. 1704–1753.

[6] N.S. Marder, *The Court*…

[7] E.G. Porter, *Taking*…

[8] This particular flaw can also be found in other relevant studies, which focus not on court decisions explicitly, but on legal briefs. See: A.L. Rosman, *Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs*, "Journal of Legal Education" 2013/1, pp. 70–81.

the use of photographs in court decisions are hereinafter organised around a series of questions that come to mind when one thinks about judges who not only write down their statements but also include photographs in court decisions in favour of the decision in a particular case. In this context, no one should be surprised by the decision to begin with a question concerning the judges' motives behind putting photographs in court decisions.

2. Why do judges include in court decisions photographs concerning the case-relevant facts? General approach

It seems that the easiest and, most probably, the most adequate way to grasp the practice in question is to assume that its rationale is to simply enhance a given written statement – to prove one point even more decisively and definitely than is possible for the printed or displayed strings of words[9]. In the end, if the reader of a court decision receives from the document a sort of multimodal[10] message consisting of text and its photographic illustration, then she or he does not have to simply believe the words of the judge and try to personally imagine "what it looked like". Instead, at a first glance she or he will have a definitely better understanding of the reasoning behind and a reference for the given written statement in the document, and consequently, to a certain extent, the whole decision. There is definitely a significant difference between a written statement that refers to some facts, which were not experienced by the reader and thus for which she or he has to imagine the point of reference (signified) of linguistic expression, and a statement that is accompanied by a photograph that gives a visual context for that statement.

Naturally, there are some problems connected with the assumption of the persuasive function of photographs in court decisions. First of all, one has to admit that the above conceptualisation of the persuasive function is quite vague and can and perhaps should be made more specific, as exemplified in one of the arguments below.

Second, the exact character of that function is not specified: Is it a description of what is actually accomplished by the practice in question, or is it only a normative demand concerning what should be done through the use of photographs by judges? This problem is justified by noted instances of photographs included by judges that paradoxically undermined their own arguments, because they have been simply wrongly chosen by judges unfamiliar with the specifics of this particular visual medium[11]. In the end, as will be also stressed later, due to the continuing, fairly traditional legal education, which still only occasionally addresses visual media, lawyers (including judges) have a rather poor understanding of images in general and photographs in particular with all their relevant peculiarities[12].

Third, one can ask whether photographs can in fact play any other role than the assumed persuasive function. One can argue that next to the broadly understood function of persuasion, what is or can also be realised through the inclusion of photographs in court decisions is a distinguishing one, whose sole beneficiary is the judge who has

[9] Cf. H. Dellinger, *Words*…, pp. 1706–1707; N.S. Marder, *The Court*…, pp. 357–360.

[10] Generally, on multimodality, see, for instance: G. Kress, *Multimodality: A Social Semiotic Approach to Contemporary Communication*, Abingdon 2010.

[11] H. Dellinger, *Words*…, pp. 1711–1728.

[12] H. Dellinger, *Words*…, p. 1710; E.G. Porter, *Taking*…, pp. 1687, 1696, 1756.

decided to illustrate some of her or his written statements. Some of the judges may simply feel the need to distinguish themselves against the background of the rather highly standardised practice of preparing court decisions realised by the majority of judges. Those who want to in a way individualise themselves even more than the writing style or argumentation strategies allow, can use photographs.

Naturally, this is not the only way to conceptualise the controversy about the function of the practice in question. For instance, in cases concerning the destruction of property or some historical monument, how one can understand the inclusion of a photograph of that destruction? Is it strictly an informative action that simply certifies the written statements concerning the damage under scrutiny, or does it go beyond this role of bearing witness and therefore should be treated as a not-so-innocent tool of rhetoric, which tries in advance to negate the possible counterarguments of some unconvinced readers[13]?

Although one can quite easily multiply similar, very detailed doubts concerning the persuasive function, it seems it would be much more valuable for the examination of the practice in question to try to address the even more pressing issue of the potential addressees of photographs included in court decisions. As already suggested, the issue of a more specific understanding of the persuasive function will be addressed later. Now, however, the question concerning addressees must be examined, because hitherto it has to a great extent been neglected.

3. Who are the addressees of these photographs?

It seems justified to analytically distinguish addressees according to three categories: the general public, legal professionals and parties to the proceedings. When it comes to the first category, it can be simply argued that the inclusion of a photograph is meant as a way to make a particular decision more convincing to the general public, than would be the case of relying on the traditional text-only form of document. This seems quite self-explanatory but only on the surface. There are some significant issues with this idea that the general public is meant as an addressee of the practice analysed in this article. First of all, it is quite hard not to formulate the following question: Is the general public really so interested in court decisions that it actually reads them and is exposed to any of the arguments and rhetorical strategies, including photographs, that are employed in these documents[14]? Moreover, even if the case in question raises some general public interest, any visual materials, including photographs from the case files, can in fact be provided by the court to journalists and different media and through them to literally anyone who is interested in the decision. In these circumstances, the practice of putting photographs in court decisions either misses its intended audience (court decisions are not read by the general public) or is unnecessary (visual materials from the case can be provided to the public more conveniently than through the court decision, according to some legal procedures, if the public expresses some legally recognised interest in the details of the case in question).

The second possible category of addressees of photographs consists of legal professionals (participating as well as not participating in the specific case). A photograph is meant to enhance the power of persuasion of a court decision with respect to lawyers

[13] The suggestion of a distinction between conveying an item of information and supporting an opinion can be found in: N.S. Marder, *The Court*…, p. 343.

[14] Similarly, N.S. Marder, *The Court*…, p. 359.

and legal scholars. For a number of reasons, this assumption is questionable and seems to be even more controversial than the idea that the general public is the addressee of photographs. First of all, it should be stated clearly that the inclusion of photographs by the judge can turn out to be a double-edged weapon, which can be in the end detrimental to the very judge who decided to use it. A photograph is simply another point or element of the decision that can be challenged and criticised, and through it the whole argumentation of the judge can be questioned. There are reported instances of photographs, which, due to their specific features like size, quality, placement in the document, perspective used in their making, whether they are in color or black and white or whether their source or authorship is revealed or not[15], can be strongly criticised, for instance, by the legal professionals representing the parties in the case. Judges, due to their lack of knowledge and skills concerning photographs connected naturally with rather persistent narrow legal education programs (with some notable exceptions)[16], may simply not notice some problematic features of a photograph they want to use and still include it in the decision. In such a situation, legal professionals who are better acquainted with the medium in question can legitimately criticise the included photograph, undermining the standpoint of a judge and creating a rather unpleasant surprise for her or him.

The idea that legal professionals are the intended addressees of photographs in court decisions, which are meant to enhance the persuasiveness of these documents, also can be criticised in the following way. The practice in question can be deemed to a certain extent as unnecessary for lawyers and legal scholars. Namely, the legal professionals participating in the case are most likely already familiar with the visually presentable facts of the case and the collected evidence. They saw the points of reference of various written statements in the court decision either with their own eyes or through the collected visual evidence. At the same time, legal professionals not involved in the case in the first place have some possibilities and abilities to investigate the case in more detail than the contents of a given decision allow – they can simply try to get access to the case files, of course, under the condition of meeting some requirements, specified in given legal procedures.

On the more positive side, one can also argue that photographs play a significant and positive function with respect to legal professionals, that of raising their sensibility. Legal professionals, especially legal practitioners, can be considered mostly as "creatures of written texts" that seem to understand the world mostly through words, even though the world to which a given case under the scrutiny of these lawyers belongs is also or mostly visual. To try to convince that this statement is not an exaggerated claim, one should consider once again the segment of Brown v. Plata concerning the notorious telephone-booth-sized cages for inmates. It can be safely assumed that the description of these devices without the accompanying photograph would have a much lesser impact for the majority of contemporary lawyers, than the multimodal mixture of text with photograph of what the written statement refers to. Photographs seem to make lawyers realise (or re-realise) that behind the texts concerning case-relevant facts, which are very often compressed in comparison to the actual details of the situation they address, there is another world, not only richer than what the text can express, but experienced by the people involved in the case in the first place, who above all see the surrounding

[15] Cf. H. Dellinger, *Words*…, pp. 1707, 1711, 1725–1727; E.G. Porter, *Taking*…, pp. 1744, 1779.

[16] See, for instance: Visual Persuasion Project in New York Law School, http://www.visualpersuasionproject.com/, accessed: 19.01.2017.

reality and do not read about it. In other words, photographs allow the lawyers to take a look at a fragment of the case at its most basic level, to see what the given situation constituting the case was, or, to be more precise, looked like, which is later only obscured by the written formulations of legalese[17]. Naturally, to say that behind the words about persons, objects and places there are actual persons, objects and places can be criticised as stating the obvious. However, perhaps just because of this obviousness, the most basic, but also most complex, not entirely representable by text, human dimension of the cases dealt with by the courts seems very often to be overlooked by many lawyers.

The idea of a function of raising sensibility in the above sense may then seem convincing to some, but actually it also is flawed, at least with respect to legal professionals participating in a given case. On the ground of their active role in a given case, they most likely have the opportunity to see the case-relevant facts with their own eyes or through the collected evidence. Their sensibility can be raised just through that. Also, in the rather specific context of a sensibility-raising function, photographs prove to be unnecessary, at least with respect to the legal professionals participating in the case. The argument of a sensibility-raising function is then only partially adequate, and thus the whole idea that legal professionals are the addressees of photographs in court decisions is once again undermined.

Consequently, attention can be drawn to the third possible category of addressees – parties to the proceedings. In this approach, photographs – an additional element of decisions – are meant to enhance the persuasiveness of the documents with respect to the people involved in the case, whose rights, obligations and responsibilities are determined by the court. However, it should be said quite clearly or even bluntly that in the case of parties to the proceedings, the photographs can be considered as even more unnecessary than in the case of the previous categories of addressees. In the end, facts, which are the subject of the court decision and are addressed in it, were experienced first-hand by the parties involved[18]. On this ground it can be said that they already saw what is presented by the included photograph. Moreover, they most likely experienced it in much more detail, than any photograph can reproduce through itself. A question comes to mind: Why then insist on attempts to repeat their own experience, using a medium that can embrace only a very small part of the actual experience? A photograph presents one particular perspective of a given scene, which humans can see and is most often actually seen by them from many different perspectives.

The above discussion on a few analytically distinguished potential categories of the addressees of the practice in question does not seem to justify any decisive answer to the question of who is the addressee of photographs included in decisions. It is hard to analytically determine exactly who is the most important here. Naturally, in contrast to such an analytical discussion, one can also adopt a different approach and try to empirically determine who is the addressee of the practice in question by interviewing judges who put photographs in court decisions and asking them for whom they are doing this. Leaving aside this particular suggestion for future research and the shown controversies connected with the identification of addressee of photographs in court decisions, the conducted analysis brings up another problem with the practice under scrutiny here.

Namely, from what was said about the three potential categories of addressees, one can draw the following conclusion. There is at least one common controversy for all three

[17] Similarly, N.S. Marder, *The Court*…, p. 353.
[18] Similarly, H. Dellinger, *Words*…, pp. 1749–1750.

kinds of addressees – the redundancy of including photographs concerning case-relevant facts, when they present the facts as experienced by the people involved in the case (not only parties to the proceedings but also legal professionals participating in the case) or when they are already included in the case files. Naturally, any redundancy in any human communication situations can be assessed either positively or negatively, depending on the used criteria for evaluation. The same is the case for redundancy in the above sense. Putting photographs in court decisions, in circumstances where they are attainable from the case files for those who are interested or when their contents were actually seen by the parties to the proceedings or involved lawyers, can be diagnosed in significantly different ways, for instance, as a means to facilitate understanding, or, in contrast, as a systemically and professionally unnecessary repetition. However, what is even more important here is that the redundancy problem leads quite naturally to another question.

4. Are all photographs used by judges redundant in the above sense?

In comparison with the majority of questions formulated in this article, the question whether all photographs put in court decisions are redundant in the sense that they either repeat what was actually seen by some people involved in the case or are simple copies of some of the visual evidence collected in the case files, can be answered quite confidently and definitely – no. Not all photographs used by judges are redundant.

There are some reported instances of used photographs, which, although they presented something from the case, were not included in the case files[19]. Consequently, putting such photographs in the decision does not constitute the repetition of some content to be found in other documents and collected evidence concerning the case.

Moreover, used photographs can only generally illustrate some description but not come from the particular case, not present exactly the same scene that is described in a given written statement. To understand this better, consider, with another reference to Brown v. Plata, a significant difference between the photograph of the overcrowded prison that is the subject of the court decision and a photograph of any other but similarly overcrowded prison[20]. If the used photograph only generally resembles the reference of the segment of text that it illustrates and thus does not depict what the given written statement actually refers to, then it is not redundant in the above sense. In the end, such a photograph most likely is not in the case files (why would it be, if it does not present a setting from the case?) and also does not show anything actually seen by the parties to the proceedings or lawyers involved in the case – they experienced something similar, but not exactly the very same thing as in the used photograph.

However, while this very brief discussion on redundancy may seem to be much too detailed and technical to have a more profound meaning for the practice in general, it actually leads to another very significant issue.

5. What is the source of used photographs and are all sources allowable?

If photographs can be non-redundant in the above sense when, for instance, they do not repeat or copy the contents of case files, then the question arises: Where do the

[19] E.G. Porter, *Taking*…, p. 1690.
[20] Similarly, N.S. Marder, *The Court*…, p. 354.

photographs used by judges come from? What is their source? This question can be addressed in the following way, using once again a method of analytically distinguished categories.

The first and actually most obvious source of photographs used by judges consists of case files and most notably the collected visual evidence[21]. For judges to select photographs from this particular source seems most understandable and in a way most natural. Usually, judges in court decisions are referring to some case-relevant facts, which are covered by the collected evidence, including visuals such as photographs. The judge who wants to prove her or his point even more decisively than the text and text only allows, can accompany a given written statement about some case-relevant fact with an appropriate photograph taken from the case files. Although the judge's way of dealing with photographs as described here is definitely the most straightforward, it leads to the redundancy problem outlined above, naturally, along with other problems connected in general with putting photographs in decisions, which are indicated in this article.

This second possible source one can distinguish is the Internet[22]. Judges can look for, find and then include photographs out of various sources on the Internet, photographs that in their opinion illustrate well some point they have made in the court decision. However, although the use of these photographs most likely will not lead to the problem of redundancy, it can be questioned for other reasons, additional to the other problems connected with the practice in question in general. Next to some additional, technical but still significant issues of authorship or copyright connected with the used photograph taken from the Internet, it seems that the use of a second source leads to an even more pressing problem – a sort of controversial expansion of reasoning by analogy by the judge[23]. Here, the judge is not using a photograph explicitly from the case, but a photograph she or he found somewhere in the Internet, which presents something similar to what is relevant for the case, but was not the subject of a separate photograph taken during the collection of evidence.

The third source one can distinguish consists of photographs that are simply made by or for the judge who wants to visually enhance her or his argument[24]. However, these photographs will not be redundant with respect to what is collected in the case files (why prepare another photograph if in the collected evidence there is already a photograph needed by the judge?), they can still be redundant with respect to what was actually seen or experienced by the parties to the proceedings or legal professionals participating in the case. Naturally, this more complex image of the redundancy problem connected with the discussed source of photographs is not the most important issue here. Namely, the use of this particular kind of photograph can be questioned for a much more serious reason (again, additional to other problems connected with the practice in question in general) – the controversial expansion of the judge's role in the case. If the judge is making a photograph or is asking someone else to make a particular photograph concerning the case under scrutiny, then this judge seems to literally collect the evidence, while this particular role should be about applying law to the personally assessed, but not personally collected, evidence (in the civil law tradition), or about the application of

[21] E.G. Porter, *Taking*…, p. 1692.
[22] E.G. Porter, *Taking*…, p. 1692.
[23] Generally, on analogical reasoning in law, see, for instance: L.L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge 2005.
[24] E.G. Porter, *Taking*…, p. 1692.

law to the case-relevant facts determined by the jury (in the common law tradition). In other words, a judge who makes photographs or specifically orders photographs seems to be much too active and thus transcends certain well-established "who does what" roles in the justice system[25].

Some may react to the second and third sources with disbelief or even disregard these, thinking that they are in fact only analytical constructions and not statements about the actual, real-life practice realised by some judges. Contrary to these possible reactions, one has to say: well, it happens. Taking already-existing photographs from the Internet and putting them directly into court decisions or, for the same purpose, for the judges to create them or have someone else do so at their request are not hypothetical issues. These actions have actually been taken in contemporary judicial practice, as evidenced by none other than Richard A. Posner.

He is known not only for using photographs he found on the Internet – consider the example of the Gonzalez-Servin v. Ford Motor Co. case[26], where Posner criticised a lawyer for omitting one particular precedent, compared this lawyer to an ostrich hiding its head in the sand and accompanied such a statement with two photographs from the Internet: one with an ostrich with its head in the sand and the other with a human wearing a suit who was also hiding his head in the sand[27]. Moreover, there is a controversy, which even reached more popular media than academic books and law journals[28], concerning another case where a photograph used by Posner can be regarded as having been staged and made specifically for him as a means to try to prove one of his points even more decisively. With respect to the question whether workers who put on hard hats and other working outfits are "changing clothes" or "donning gear", which is of significance for the US Fair Labor Standards Act, in the case of Sandifer v. US Steel Corp.[29], Posner argued in favour of the former and also included a photograph of a man wearing such an outfit leaning against the doorframe, who evidently was posing for that photograph[30]. Leaving aside the discussion concerning the assessment of that photograph (whether and if, how exactly it was orchestrated by Posner), it can be safely said that the use of a second and third source of photographs is controversial, to say the least, as evidenced, for instance, by some comments made above or its critique made by Porter[31], who constantly returns to Posner's case in her analysis. As one can easily guess, her critique was the subject of a rather strong response by Posner himself[32], who seems to say that the use of photographs in question, from the two sources outlined, is still within judicial discretion.

Without going into details whether his approach is correct or whether his use of photographs fulfils a different function than the realisation of judicial discretion, such as, for instance, the already suggested distinguishing function, one can venture to identify what is the most basic source of controversy here. It seems that the judge who uses such photographs can be considered as undermining her or his truthfulness. If the words of

[25] Similarly, E.G. Porter, *Taking*…, pp. 1694, 1743, 1752, 1766–1768.
[26] 662 F.3d 931 [7th Cir. 2011].
[27] See also: E.G. Porter, *Taking*…, pp. 1773–1774.
[28] J. Gershman, *Eight Provocative Passages from Judge Richard Posner's New Book*, "Law Blog – The Wall Street Journal", 9.09.2015, http://blogs.wsj.com/law/2015/09/09/eight-provocative-passages-from-judge-richard-posners-new-book, accessed: 19.01.2017.
[29] 134 S. Ct. 870 [2014].
[30] See also: E.G. Porter, *Taking*…, pp. 1688–1690.
[31] E.G. Porter, *Taking*…, pp. 1688–1690.
[32] R.A. Posner, *Divergent Paths: The Academy and the Judiciary*, Cambridge 2016, pp. 279–283.

a judge are commonly understood as referring to the facts of the case, are commonly associated with the truth or something that is nearest the truth, then the used photographs should also refer to the very same thing and visually present the point of reference of the written statement concerning the case-relevant fact with which they are associated. Accordingly, the only tentatively allowable source of photographs to be put in court decisions is case files, most notably the collected visual evidence[33]. Such photographs can be regarded as another signifier used by the judge, next to written statements, and they should refer with the text they accompany to one common (for the text as well as for the photograph) signified. From the perspective of this very specifically understood truthfulness, it is possible and even necessary to come back to the issue of the assumed persuasive function of photographs in court decisions.

6. Why do judges include in court decisions photographs concerning the case-relevant facts? Truthfulness approach

The above account of the persuasive function can be criticised as being much too vague, as said earlier. However, it seems that it can be understood in more detail through the issue of truthfulness as follows. When in the court decision there is a photograph concerning a case-relevant fact, which actually comes from the case (from the first source discussed above) and accompanies a written statement concerning the very same case--relevant fact (two signifiers referring to one signified), then the reader does not have to trust in the judge's words and words only, but has a glimpse through the photograph to what the judge is writing about (how it actually looked like). It is then a situation in which the presumably true written statement can be regarded as being made even truer through the presumably true photograph.

On the one hand, through such a conceptualisation the persuasive function can be seen as becoming more nuanced, specific and perhaps more convincing than previously. On the other hand, as needs to be stressed right now, this particular account allows to start highlighting the ambivalence that appears to be inscribed in the practice in question and its assumed persuasion enhancement function. Namely, a true written statement accompanied by a true photograph can in fact lead to a specific weakening of the power of persuasion. Judges who use photographs in the discussed way can be considered by some people as paradoxically undermining their own authority as well as the truthfulness that is generally assumed with their role. If one assumes with full conviction that judges as a rule write true statements concerning the case-relevant facts in documents prepared by them, then the judge who additionally includes a photograph to prove her or his point even more decisively can raise doubts. A believer in the truthfulness of judges – a person who actually treats this assumption seriously – who sees a photograph in a court decision can react to it in the following way: "Why is the judge doing that!? I believe in judges' words themselves! I do not need any additional confirmation that what the judge is writing about is actually true! I believe in what is written because the judge is in the end who she or he is – a judge!". This particular reaction can be understood as a very specific example of an answer to question about more general, social or cultural evaluations of putting photographs in court decisions.

[33] Similarly, H. Dellinger, *Words*…, p. 1751.

7. How to evaluate the practice in question?

It should be stressed that the social or cultural evaluation of the practice in question can be addressed in a more general manner than the hypothetical reaction to it outlined above. Namely, it seems that inserting photographs concerning case-relevant facts in court decisions can be seen through the following alternative. It can be regarded either as evidence of the shallowness of contemporary culture in general and legal culture in particular[34], or a commendable and praiseworthy openness of the latter, professional culture, to the former, popular culture, which is simply inconceivable without images[35]. Accordingly, judges who follow the discussed practice can be seen by some as testimony of a shameful loss of seriousness of their profession today, while others may consider them worthy of imitation by the rest of the judiciary and legal professionals in general, who seemed for too long to treat a specific immunity to cultural changes as something of value for them and their social position. Naturally, any of these approaches (with which one can characterise any group of addressees mentioned above) is based on some deeply held personal beliefs and opinions and most likely they will determine the assessment of particular instances of the practice in question.

However, what is even more interesting here is that the suggested ambiguity not only can define the experience of the inclusion of photographs in a court decision of the general public, legal professionals and parties to the proceedings. One can also see some evidence that the ambivalent assessment of the practice in question can even be noticed or identified in actions of the judges who include the photographs themselves. Consider once again the relatively recent case of Brown v. Plata. Looking at the decision in this case and, more specifically, the photographs used therein, it is hard to avoid asking the following question: Why, when text-editing software commonly allows the text as well the visual record to be placed on the same page, are the photographs illustrating some written statements included at the end of the whole document as appendices? Do judges themselves consider photographs in court decisions as something that is, to a certain extent, shameful or unworthy, so that they do not include them right in the relevant segment of the decision, but outside of it, in the appendix section? Leaving aside the issue of the particular motive behind the specific placement of photographs in the document, the presented puzzle raises yet another problem. That is, there is a significant difference between the question of why judges put photographs in particular sections of court decisions, and the question of where exactly they should put them.

8. Where to put photographs?

The latter question can be addressed through the following alternative. Photographs can be put either right next to the relevant segment of the text, on one page, or as appendices at the end of the document[36]. Obviously, it is hard to determine with full certainty which option is the right one. This particular problem about the placement of photographs in court decisions concerns not only the above-mentioned ambivalent assessment of the practice in question, but also other, no less important details. For

[34] Suggested by E.G. Porter, *Taking*…, pp. 1694, 1752–1753, 1768–1774.
[35] Suggested by N.S. Marder, *The Court* …, p. 358.
[36] Cf. H. Dellinger, *Words*…, p. 1737; A.L. Rosman, *Visualizing*…, p. 80; E.G. Porter, *Taking*…, pp. 1716, 1724–1725, 1745.

instance, embedding photographs right next to the relevant segment of the text can be criticised not only as a distraction for the reader who is likely to be more concerned with the photographs than with the written statements[37], but also as a source of technical problems with the proper dissemination of such documents through text-focused legal information databases[38]. At the same time, although putting photographs in the appendix section of a court decision can be much less problematic from the perspective of the needs and possibilities of legal information systems, not only can it raise doubts about the judge's attitude towards the practice in question, as shown earlier, but also it is very uncomfortable for the reader. For instance, one has to go to the very end of the document in order to actually see what is referred to in the beginning or in the middle of a given court decision, which also can be deemed as distracting but in a slightly different way than the one mentioned above.

In the face of these perfunctory remarks, it is quite clear that even such a seemingly trivial (to some) or overly detailed (to others) question poses a serious challenge. However, no matter how it will be addressed, there still is another, previously not explicitly noticed, only barely hinted at problem with putting photographs in court decisions – the already mentioned choice criteria problem, which can be formulated as another question.

9. How is it that some segments of court decisions are accompanied by relevant photographs and others are not?

Anyone who has even the slightest idea of what court decisions look like and hears about putting photographs in them illustrating some case-relevant facts described in them, may wonder what criteria determine that some segments of the text are visually enhanced while the rest is not accompanied in such a way[39]. While this particular puzzle can be considered as an element constituting the above-mentioned doubts and suspicions with which people assuming the truthfulness of judges may react to photographs in court decisions, it is not restricted to that issue. The question about the criteria of choice made by judges is naturally more general. It concerns the whole discussed practice and is not a matter of some particular and secondary problem that one might notice.

The choice criteria problem can then be conceptualised as follows. As far as one refers to written statements in a court decision, it can be safely assumed that the judge who actually authored them, who wrote them down, when asked to explain the particular rationale or motive behind a given segment of her or his text, can quite easily do so. However, what can be regarded as most interesting in the context of the discussed practice is whether judges can similarly explain themselves when it comes to the photographs they choose. The court decisions prepared by them often cover many characteristics of case-relevant facts, but only a very small part of them have accompanying photographs. In comparison to text-only court decisions, the inclusion of photographs bears the marks of something irrational and emotion-driven that is a nearly completely unexplainable random choice. Consider the case files with collected visual evidence consisting of 60 photographs concerning numerous facts of the case. All of the facts presented by the photographs are addressed in written statements included in the court decision,

[37] Cf. H. Dellinger, *Words*…, pp. 1711, 1748; N.S. Marder, *The Court*…, p. 361.
[38] H. Dellinger, *Words*…, p. 1708; N.S. Marder, *The Court*…, pp. 342, 348, 356; E.G. Porter, *Taking*…, p. 1718.
[39] Hinted by H. Dellinger, *Words*…, pp. 1748–1749.

but the judge decides to illustrate only three facts she or he has written about with only four photographs from the case files. Why does the judge choose to do such a thing? How can she or he justify and explain this very specific choice out of the very rich set of possibilities that could be used as well? Is the judge aware of what actually made her or him take such and no other decision about which photographs to include?

Naturally, the above accusation that the practice in question is emotional, irrational and nearly completely unexplainable for those individuals who actually perform it, can be criticised as being only a sort of reformulation of well-known arguments about the subjectivity of judicial decision-making. However, the choice criteria problem should not be considered as a simple repetition of the critique of subjective factors co-determining or even determining judicial decision-making and legal indeterminacy, known at least since legal realism[40], not to mention the recognition of the subjectivity of the free assessment of evidence[41]. The choice criteria problem is different because references to case-relevant facts in a judge's written statements constitute a form of narrative[42], whereas photographs accompany only a few particular segments of the court decision and thus their use is far from constituting a more or less consistent telling of a story. In the noted instances of the practice in question, photographs simply pop up without any noticeable regularity or logic explaining why some segments of the text are illustrated but most of them are not.

This unexplainability of such choices is already evident in the use of photographs from the first source discussed above – the actual case files. In the case of the use of second (Internet) or third (photographs made by or for the judge) sources it becomes even more puzzling. When all is said and done, what can be the explanation for the choice of a particular photograph from the Internet or taking one specifically for or by the judge and then illustrating with it one particular part of the court decision while leaving the rest of the text non-illustrated? "Honestly, I don't know why I did that"; "It seemed like a good idea at the time"; "Well, I didn't think about it like that while I was doing it"; or "It was all in a sort of the heat of the moment way". All of these can be regarded as probably the most honest answers one could get when confronting the judges who put photographs in court decisions, whether from case files, the Internet or any other source. However, one can assume that such answers are at the same time statements not many people would like to hear from judges talking about their work.

What should be asked now on an even more serious note is the following question: Is allowing and recognising a practice that seems only to add further elements of subjectivity, emotionality and irrationality to the judicial decision-making process, which is already to a certain extent marked by these features in its traditional text-only form, a good decision? In other words, should the judges engage in a practice that in the end can prove to be unexplainable to themselves, not to mention to other people? After identifying the choice criteria problem as well as all the above-mentioned issues connected with the discussed practice, it seems appropriate to conclude the conducted analysis.

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[40] Compactly on legal realism, with the emphasis on realist approach to adjudication, see: B. Leiter, *American Legal Realism*, in: D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Chichester and Malden 2010, pp. 249–266.

[41] On this principle, against the background of other approaches to evidence assessment, see: J. Sladič, A. Uzelac, *Assessment of Evidence*, in: V. Rijavec, T. Ivanc, T. Keresteš (eds.), *Dimensions of Evidence in European Civil Procedure*, Alphen aan den Rijn 2016, pp. 107–132.

[42] Referring loosely to some ideas in law and literature, more precisely, so-called narrative jurisprudence, see: K. Dolin, *A Critical Introduction to Law and Literature*, Cambridge 2007, pp. 29–32.

10. What conclusion can be drawn from all of this?

The outlined diverse and significant problems connected with the practice in question seem to justify the demand to actually stop it, not continue it. Naturally, this particular demand should not be understood in terms of a postulate to prepare specific legal regulations forbidding this practice. The above arguments can also be understood as an attempt to try to convince the judges themselves that the practice they can potentially realise is controversial to say the least. On this particular ground, they should not engage in it, because they can see for themselves its significant problems, puzzles and paradoxes, and not because of the imposition of another top-down regulation concerning their profession. Certainly, this scenario of judges omitting the practice in question due to their own professional culture, and not because of some particular legal rule, can be regarded as nothing more than the ideal situation. Although the cold realistic assessment of contemporary judicial practice justifies the prediction that some judges still will put photographs in court decisions, it does not change the clear critique of the discussed practice.

The proposed unequivocal demand to stop this practice differs from the majority of opinions concerning it, which seem to allow it under certain specific conditions[43]. This particular approach can be criticised for at least two significant reasons. First, by proposing many additional standards or criteria to evaluate judges' use of photographs, the whole judicial process is further complicated and made even harder to actually control. In the end, who will determine whether a particular photograph used by a judge meets some highly technical standards or whether it was not amended ("photoshopped") in a way that is forbidden? Leaving aside these and other practical problems connected with the realisation of attempts to regulate the use of photographs in court decisions, there is a second, maybe even more pressing, issue.

Those who found the discussed practice appealing before reading this article as well as those who still, after the analysis above, consider it as something worthy of continuing, can and should try to defend and argue in favour of it, by addressing the following question: If trying to stop this practice is wrong, then exactly what value, not for particular judges or any other specific persons, but for the whole judicial system and practice and the addressees of law in general, can be achieved by allowing, maintaining, encouraging and developing the practice of including photographs in court decisions? Namely, it seems that in the debate about the practice in question there is a significant overrepresentation of critical remarks and propositions of how to overcome some problems in comparison with actual attempts to show that photographs in court decisions can in fact be valuable for judges, other lawyers, parties to the case and the general public. This is surprising because this overrepresentation is evident in the writings of those who would like to allow the practice to a greater or lesser extent. Accordingly, supporters of the discussed practice should expand their argumentation about it and focus on showing and elaborating on its assumed inherent comprehensive positive aspects. However, they should also try to address the already noticed problems, including these presented in this article.

Naturally, it should be made clear that the decisive conclusion of this paper is based on arguments and problems discussed above which hitherto were addressed in more or

[43] Cf. H. Dellinger, *Words*..., pp. 1751–1753; N.S. Marder, *The Court*..., pp. 363–364; E.G. Porter, *Taking*..., pp. 1775–1781.

less detailed way by other commentators or merely suggested by them, and thus needed some elaboration. It should be obvious then that the discussed practice – still rather minor among judges and still being discovered by various scholars and quite far from constituting a subject of more widespread interest – can, should and hopefully will be analyzed from different perspectives, also those much more focused and defined. In the end, rhetorical studies, legal culture research, semiotics, cognitive science and many more can investigate it, provide their own specific opinions on it and address the above issues (if they are actually relevant for them), show completely different, previously unseen problems or point out its positive aspects. Until then however, it simply seems safer and more reasonable to propose avoiding the commented practice in the face of its currently easily noticeable problems and lack of presentation of serious, strong, not conditional arguments in its favor, than to even only allow it in the name of its possible advantages, which naturally can be assumed according to different scientific disciplines and their previous experience, but which – until this practice in its very specific context is actually analyzed by given specialized disciplines – are only hypothetical as well as their compensation effect for already observed controversies.

A Few Questions Concerning Photographs in Court Decisions

Abstract: The aim of this article is to discuss the infrequent, but noticeable, practice of inserting photographs in court decisions. Against the background of the few existing studies on this practice, which seem to be overly case-specific, this article proposes a more general, even universal list of problems connected with it. It addresses a short list of questions about the inclusion of photographs in court decisions, such as, for instance: "Why do judges include in court decisions photographs concerning the case-relevant facts?"; "Who are the addressees of these photographs?"; "What is the source of the photographs used and are all sources allowable?"; and "How come that some segments of court decisions are accompanied by relevant photographs and others are not?". A discussion of these and other questions enables the conceptualisation of many problems connected with inserting photographs in court decisions – most notably, that of the criteria of choice, which previously has not been explicitly addressed, but barely hinted at – and leads to the conclusion that the practice in question, surrounded by many controversies, should be discontinued.

Keywords: law, visuality, court decisions, photographs

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