

Conceptual Change or Conceptual Manipulation? How to Distinguish the Natural Evolution of Legal Concepts From Their Abuse

Legal language evolves – old concepts die out (“trial by ordeal), new ones are born (“genocide”), and many change their scope or referents (“discrimination”, “torture” or “the right to privacy”). This evolution is perfectly natural, as it mirrors changes in the world or our knowledge and beliefs about it. Sometimes, however, a new way of understanding a legal concept is proposed for spurious reasons and improper purposes. Propagandists, ideologues, and politicians all have a vested interest in manipulating legal concepts. This has nothing to do with making language better suited to describing and managing a complex and ever-changing world and everything to do with pushing an agenda.

Legal concepts are commonly manipulated, and even outright abused, in times of populism. There are plenty of historical and fictional accounts of language being misused to further populist, authoritarian ends. Orwellian “newspeak” and Klemperer’s “lingua tertii imperii” are the best-known examples of such language. If our concepts are hollowed out and replaced with ones that serve the interests of populist or authoritarian rulers, then language can be deprived of its ability to make the world better and our vision of it clearer.

Although a conceptual manipulation can be distinguished from a justified conceptual change intuitively, there is no rigorous, scientific methodology for doing so. For this reason, we often stand helpless when an EU country comes up with a new criterion for assessing “the rule of law” and appoints itself the sole arbiter of whether, judged on this criterion, it is in compliance. Similarly, there is no way of telling whether “sanitary segregation”, a term often used by the anti-vaccination movement during the Covid pandemic, is not a justifiable proposal to extend the scope of “discrimination”, just as “racial segregation” changed the way we thought about discrimination in the 20th century.

To some, applying the concept of “segregation” to qualify vaccination status can be as justifiable as extending the concept of “marriage” to include same-sex couples. And to some, a new understanding of the rule of law might be as desirable in 21st-century Central Europe as the change in understanding of the “right to privacy” in 1970s USA.

We set out to analyze precisely how such conceptual changes occur and to see whether we could determine what distinguishes a justified (“proper”) change in our use of concepts from an artificial, unjustified, and propagandistic (“improper”) change imposed on us. At this stage, we only have our intuition to guide us as to what is “proper” or “improper”. Hopefully, however, this project will equip us to identify the distinguishing features of both kinds of change and the argumentation that supports them. Our aim is to understand these terms in a functional sense. Language is an artifact with a clearly beneficial societal function. We want to discover how to improve it (“proper” changes) and determine what impairs its functionality (“improper” changes).

Our purpose is to assess the most promising theoretical approaches to concepts in order to identify those that best illustrate how conceptual change occurs in law, as this can be helpful in assessing whether a particular conceptual change is “proper” or “improper”, and to determine whether, and if so how, legal concepts can be made less vulnerable to populist assaults.

We also analyze the real-life discussions accompanying some bygone and ongoing conceptual changes (the “racial segregation” discourse in the US during the 20th century, which culminated in the judgment in *Brown v. Board of Education*, the current “rule of law” discourse between Poland/Hungary and European Union, and the “sanitary segregation” discourse waged by anti-vaccination movements during the COVID-19 pandemic). It is our tentative view that a “proper” conceptual change has to be accompanied by a discourse that examines the past use of the concept, and which analyzes and weighs the arguments on the benefits to be gained from changing it and the likely impact that this will have on the overall coherence of our conceptual framework. Only then can it be shown whether the proposed change will be favorable. We compare the past discourses leading to a justified conceptual change (“racial segregation”) with the current ones in order to identify any similarities and differences. We hypothesize that if the current discourses evince more differences than similarities, then they are most likely attempts to introduce an unjustified conceptual change.

The outcome of the project will be an improved theoretical model for analyzing and assessing changes in legal concepts. If proven valid, the model can serve as a tool to identify and prevent “improper” changes in the legal conceptual framework, including or especially - those promoted by populists.