



REDUCING IRRATIONALITY OF LEGAL METHODOLOGY BY REALISTIC DESCRIPTION OF INTERPRETATIVE TOOLS AND TEACHING THE CAUSES OF IRRATIONALITY IN LEGAL EDUCATION

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Annotation. *Lawyers pretend as if the process of application of laws, as well as its outcome, could be an analytic-deductive derivation; especially law students learn that legal decision-making is primarily a logic process. But we know that application of laws depends on analytic-logical as well as on voluntaristic (wilful) elements. Exact relations between these components are unknown and will be unknown. At most German law schools students as the most important imperative tool learn the so called “Auslegung” through the use of theoretical instruments, which do not reflect the interpretation of law practice. These mentioned causes result in irrationality of legal decision-making. In order to achieve more rationality in the process and result of legal decision-making, the contribution makes four suggestions regarding legal methodology and legal education. These proposals consist of few long-term pragmatic approaches to more rationality of legal decision-making.*

Keywords: *legal theory, legal methodology, legal education, legal decision-making, interpretive tools, application of laws, law practice, topic, jurisprudence as hybrid knowledge, legal clinic.*

1. Introduction

The aim of my contribution to the publication is not so much to provide helpful ideas for improving the actual legal methodology but to optimizing the training of law students concerning the knowledge of requirements and the process of implementation of legal instruments in practical application.

1.1. Thesis of irrationality of legal methodology

The thesis of irrationality of legal methodology is not only my thesis; other legal scientists support this thesis too. Here are two examples: The prominent German legal methodologist, Arthur Kaufmann, explained legal decision-making as not completely rational process.¹ Recently Jochen Bung raised the question: “Does it possibly mean that our norm-applications are *irrational* in their origin?”² I think that asking that question is accepting at least a bit of irrationality in the legal decision-making.

1.2. The meaning of the keywords of the title

Before entering the actual issue of my article I will explain the key words of its title:

I understand **irrationality** in this context in a double sense:

- Firstly, a process as well as its result could not be explicated solely by rational means, and
- Secondly, that one supposes the rationality of both, process and result, despite the mentioned inexplicability.

Legal methodology – sometimes also: judicial methodology or legal skilled crafts³ – means the instruments for finding rules and explaining the meaning of rules.

I do not use the concept in the sense of Anglo-American legal education system as comprehensive concept for finding, reading, analyzing and interpreting sources of law⁴, because this intermixes up legal methods with legal techniques.

1 Kaufmann, A. *Das Verfahren der Rechtsgewinnung. Eine rationale Analyse*. 1999, p. V.

2 Bung, J. *New Approaches to Legal Methodology*. *Ancilla Iuris* 2007, p. 83; emphasis in the original; Hailbronner, K. *Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz durch den EuGH?*. *NJW* 2004, 2185, reproaches to European Court of Justice „the end of rational jurisprudence“ (translation by H. P. P.).

3 Möllers, C. *Demokratie – Zumutungen und Versprechen*. 2008, p. 78, describes legal methodology as „juristisches Handwerk“ (legal skilled crafts).

4 Fainstein, L.; Hilder V. *Legal Methods. Syllabus 2006–2007*. [accessed on 2 January, 2009]. <<http://www.umanita.ca/law/newsite/Courses/legalmtds/syllabus.html>>. A very different

Legal methodology does not concern itself with the principles, doctrines and rules comprising a jurisdiction's substantive law in a specific field or at all. Although the theory of interpretation of law is not an integral component of the respective system of laws still today – neither at national nor at supranational level – we have to consider that “in Jurisprudence, the concept of method is closely related to that of legal sources”⁵, it depends on the respective legal system.

In the space of civil law, the way it works in the continental-European countries, the subjects of legal methodology are primarily written enactments by parliaments (statutes) or agencies of the executive branch (orders), not developed by courts.

However, I will argue that in the space of common law (sometimes court- or judge-made law) professional techniques and methods interpreting case law and statutes do exist (or precedent and statutory) too.⁶

Legal education means the academic training of future professional users of legal rules (lawyers and other legal professionals) – which the western legal tradition offers in the framework of law schools.⁷

2. The present situation

2.1. Reasons for the basic problem

Analyzing the reasons which blur the responsibilities between legislation and jurisdiction we find two main subjects:

On the one hand, laws do not provide certainty and predictability for individual citizens as well as social and economic actors; we note the overall poor quality of the legislation which is commonly recognized as complicated, contradictory and unclear. The thesis of Ronald Dworkin, that the diversity of legal decisions is less the result of the uncertainty of the rules but more of the inability of the lawyers is not really accepted.⁸

concept of “methods of the common law” is used by Davies, J.; Lawry R. P. *Institutions and methods of the law: Introductory teaching materials*. 1982, p. 14–123.

5 Linderfalk, U. *On the Interpretation of Treaties. The modern international law as expressed in the 1969 Vienna Convention on the Law of Treaties*. 2007, p. 13.

6 Legal Methods Group. *The subject of legal method*. 1997 [accessed on 2 January, 2009]. <<http://www.angelfire.com/pa4/cappalli/legal.htm>>.

7 Wacks, R. *Law: A very short introduction*. 2008, p. 9.

8 Neumann, U. *Theorie der juristischen Argumentation*. In Kaufmann, A.; Hassemer, W; Neumann U. (eds.). *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*. 7 edition, 2004, p. 341.

On the other hand, judges and other legal decision-makers, who have to decide or to prevent legal quarrels, are forced to resolve disputes or to find solutions for other case-questions.

Of course, laws have been well designed to provide better conditions to ensure the respect of the principle of legality and will provide an appropriate guidance to legal decision-makers. However the best designed laws still establish a framework within which an unavoidable dispute may be solved.⁹

This problem exists for rule-making as well as for legal decision making in particular cases. But in the following I will focus on the area of individual case solving.

2.2. Cladding of law practice

This heading seems like a serious offence, but Eike von Savigny wrote about “the trials to conceal deviations of the wording”¹⁰.

I put forward the description “cladding of law practice” not as a subjective reproachable behaviour, but rather as an objective circumstance. This matches the following description by Lawrence M. Friedman¹¹: “If you ask judges what they do and how they decide cases, they are still likely to tell a rather old-fashioned tale. They will say that they search conscientiously for the law, and that they are guided by existing law.”

2.2.1. Ignorance of elements of legal decision-making

Still today we have an inadequate understanding of the ensemble acting of formal and informal legal communication by application of laws. Neither we know all the elements in the process of legal decision-making nor can we analyze the relation between different elements during this process. According to Thomas Nagel, I think we presumably will never know all circumstances of decision-making.¹² In this context it is strange that on the one hand Ingeborg Puppe diagnoses a decreasing interest in the basics of legal methodology during the last years¹³ and on the other hand a new publication has resulted in the increase of concern for the dogmatism of laws¹⁴.

9 Wacks, R. *Law: A very short introduction*, p. 27.

10 Von Savigny, E. Konflikte zwischen Wortlaut und Billigkeit in der Rechtsprechung des BGH. In *Juristische Dogmatik*. 1976, p. 61.

11 Friedman, L. M. *American Law. An Introduction*. 2 edition, 1998, p. 104.

12 Nagel, T. *What does it all mean? A very short introduction to philosophy*. 1987, p. 52.

13 Puppe, I. *Kleine Schule des juristischen Denkens*. 2008, p. 13.

14 Pöcker, M. *Stasis und Wandel der Rechtsdogmatik. Von der rationalistischen Rechtsvorstellung zu einer rechtstheoretisch angeleiteten Dogmatik des Öffentlichen Rechts*. 2007, p. 1.

2.2.2. Irrationality of decision-making as overall problem

We know that application of laws – looking for rules as well as decision-making for particular cases – depends on analytical-logical as well as on voluntaristic (wilful) elements¹⁵.

I clarify this thesis by two examples:

On the one hand we know the importance of prejudice by decision-making since as late as John Locke’s “Essay concerning human understanding” published in 1690¹⁶. On the other hand we now see the influence of intuition to decision-making, but it is an open question in the field of brain-research whether intuition is superior to intellect¹⁷.

Since this is not a specific problem of legal decision-making, Chantal Mouffe formulates generally that political decisions are in principle not rationally answerable problems¹⁸.

2.2.3. Paths of supposed rationality of legal decision-making

Lawyers pretend as if a process of application of laws as well as its outcome could be an analytic-deductive derivation; especially legal students learn that legal decision-making is primarily a logic process, particularly in form of the subsumption or the so-called “Justizsyllogismus” (a special form of syllogism or syllogistic)¹⁹ containing two premises and a conclusion:

- First premise: A person who commits the crime of murder is liable to imprisonment for life.²⁰
- Second premise: M murdered F.
- Conclusion: M gets life imprisonment.

15 The Federal Constitutional Court, BVerfGE 34, 269 (287) – Soraya, explains the process of legal decision-making as “act of recognition valueing, which do not miss elements of will” (translation by H. P. P.); similar Federal Court of Justice, NJW. 2004, p. 1054 (1055).

16 Locke, J. *Essay Concerning Human Understanding*. 1690, volume I, chapter XIII: “It is not easy for the mind to put off those confused notions and prejudices it has imbibed from custom, inadvertency, and common conversation.” 2004. <<http://www.gutenberg.org/files/10615/10615.txt>>.

17 Roth, G. *Mit Bauch und Hirn*. Die Zeit of November 20, 2008, p. 43.

18 Mouffe, C. *Über das Politische. Wider die kosmopolitische Illusion*. 2007, p. 17.

19 Puppe, I. *Kleine Schule des juristischen Denkens*, p. 119.

20 Crimes Act. 1900, New South Wales, Australia, Sect. 19a.

A familiar model employed to explain extracting of the law from cases²¹ is the explanatory model in accordance with the Hempel-Oppenheim-model²². In this context it is remarkable that Markus Pöcker describes the law as hypothesis of normative truth²³.

These two models of rule-application-performance are based on the theoretical rationalism²⁴.

Of course decision-making in every day's cases is often very simple: "Thousands of cases are handled every day in court that a clerk could dispatch or a well-made machine"²⁵.

But can we really distinguish between the simple and the hard application of laws? Where is the borderline of this differentiation? The German Federal Constitutional Court describes the simple application of laws as finding, reading, reproduction and schematic use of law.²⁶

But we know that neither the logical nor the explanatory model really describes the law practice. Consistently we are sure that the concept of Ronald Dworkin of only one correct answer even in hard cases²⁷ does not reflect the reality.

This knowledge is congruent to the scepticism recently noticed by Rolf Spinnler and relativism as the mainstream-ground plans of modern times²⁸.

We should notice that the idea of government of laws, and not of men²⁹ may be an attractive political program but it describes the reality just as little as the famous sentence of Montesquieu describing the judge as the mouth of law³⁰. Consistently we can summarize this section by citing Oliver Wendell Holmes, Jr.: "The life of the law has not been logic: it has been experience"³¹.

21 Legal Methods Group, 1997.

22 Sometimes: deductive-nomological model.

23 Pöcker, M. *Stasis und Wandel der Rechtsdogmatik*, p. 53 (translation by H. P. P.).

24 *Ibid.*, p. 254.

25 Friedman, L. M. *American Law. An Introduction*, p. 94.

26 Federal Ministry of Justice. [accessed on 2 January, 2009]. <http://www.bmj.bund.de/enid/62c0d1e928fcc30f5d867097_00b841d6,bf16be636f6e5f6964092d0934373539093a095f7472636964092d0933313137/Pressestelle/Pressemitteilungen_58.html>.

27 Dworkin, R. *Bürgerrechte ernstgenommen (Taking rights seriously)*. 1990, p. 144-221.

28 Spinnler, R. *Ein Sieg über das Siegen*. Die Zeit of December 17, 2008, p. 54.

29 Constitution of Massachusetts. 1780, Part the First, Art. XXX [accessed on 2 January, 2009]. <<http://www.nhinet.org/ccs/docs/ma-1780.htm>>.

30 Montesquieu, C.-L. de S., *De L'esprit des lois*. 1748. In *Œuvres complètes*. 1964, book 11, chapter 6.

31 Holmes, O. W. Jr. *The Common Law*. 1881, 36 edition, 1944, p. 1.

2.2.4. Incidental remark

In the following I use the German word “Auslegung” to describe the process and the result of explaining of the meaning of a word (or of other signs). The German word “Auslegung” actually describes the process and the result narrower, more strictly to the word body than the word “interpretation”. The starting point of this narrow position is that “(a)ll we would have is words”³² or in the description of Jack Davies and Robert P. Lawry: “Legislation is words.”³³

The latter word describes meanings of words in both – narrow and broad (wide) senses; it includes “squeezing of meaning from the Constitution”³⁴, whereas such “squeezing of meaning” may not be recorded by “Auslegung”.

2.2.5. Classical “Auslegungs”- tools

The analysis of the meaning of a word or a concept within a rule should occur with regard to the following model:

According to Friedrich Carl von Savigny, a famous professor of Roman law and Prussian secretary in the middle of the 19th century in Berlin, the German dogmatics of law is arising from the following four methods of “Auslegung”:³⁵

- literal meaning of the words or of the grammatical structure of the sentence,
- legal history of the rule,
- systematic context of the law system,
- design or purpose of the legislator behind the rule.³⁶

These instruments are not legally defined; however they are meta-rules by which the legal system itself may be analyzed and evaluated. Because neither the methods nor their ranking are legally defined there is a hard struggle in the science of legal methodology regarding these subjects.

2.3 The law practice

Summing up, Jochen Bung describes the practical methods as “a setting of methodological standards that cannot be comprehended by the guidelines of classical interpretation”.³⁷ I will give two examples clarifying this conclusion:

32 Friedman L. M. *American Law. An Introduction*, p. 19.

33 Davies, J.; Lawry R. P. *Institutions and methods of the law*, p. 182.

34 Amar, A. R. *Intratextualism*, 112 *Harv.L.Rev.* 1999, 747, p. 448.

35 Zimmermann, R. *Introduction to German Legal Culture*, p. 20. In: Ebke, W. F.; Finkin, M. W. (eds.) *Introduction to German Law*. 1996, p. 1.

36 Von Savigny, F. C. *System des heutigen römischen Rechts*. Volume 1 (1840), reprint 1981, p. 213–214.

37 Bung, J. *New Approaches to Legal Methodology*, p. 80.

2.3.1. Overruling the borders of the literal meaning of the words by “Auslegung”

Although the German Federal Constitutional Court declared in 1986 the borders of literal meaning of words as limitation of “Auslegung”³⁸, we register many cases, by which “Auslegung” overrules borders of literals meaning of the words.

I will cite two examples for this thesis:

- In framework of § 80 Verwaltungsgerichtsordnung (Law relating to administrative jurisdiction) administrative courts interpret the word “police-officer” in the sense of “traffic sign”³⁹.
- In framework of § 35 section 2 Baugesetzbuch (Federal Building Act) the Federal Administrative Court declared, that “could be permitted” means “have to be permitted”⁴⁰.

In this context I remember a sentence of Lewis Carroll’s “Through the looking-glass”⁴¹:

“I don’t know what you mean by ”glory”, Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t - till I tell you. I meant “there’s a nice knock-down argument for you!”

“But “glory” doesn’t mean “a nice knock-down argument,” Alice objected.

“When I use a word, Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean - neither more nor less.”

“The question is,” said Alice, ”whether you CAN make words mean so many different things.”

“The question is,” said Humpty Dumpty, ”which is to be master - that’s all.”

Through the looking-glass is a fairytale, the judicial or administrative interpretation of legal concepts is social reality.

38 Federal Constitutional Court, BVerfGE 73, 206 (235) – Sitzstreikentscheidung: „Da Gegenstand der Auslegung gesetzlicher Bestimmungen immer nur der Gesetzestext sein kann, erweist sich dieser als maßgebendes Kriterium: Der mögliche Wortsinn des Gesetzes markiert die äußerste Grenze zulässiger richterlicher Interpretation“. One can translate by the following sentence of Lord Atkins: „If the language of a statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed.“ (Quoted by Wacks, R., p. 31.).

39 Cf. Ekardt, F.; Beckmann, K. *Polizeivollzugsbeamte und aufschiebende Wirkung – grammatische versus teleologische Auslegungsmethode im öffentlichen Recht*. VerwArch, 2008, p. 241, 258.

40 BVerwGE 18, 247 (250).

41 Carroll, L. *Through the Looking-Glass*. 1991, chapter VI, Humpty Dumpty.

But perhaps the core of interpretation in the fairytale and in the social reality is the same: Where Lewis Carrol speaks from “to be master”, Chantal Mouffe argues with the hegemonial character⁴².

2.3.2. “Auslegung” without texts

Sometimes the courts interpret the words that do not exist. In the case of “Brasserie du Pêcheur” the European Court of Justice made the following legal-methodical comment:⁴³ “Since *the Treaty contains no provision* expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164⁴⁴ of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.”

2.4. Solutions offered by legal theory (as part of legal philosophy⁴⁵) respective legal methodology

Regarding this methodological dilemma we expect help from legal theory respective legal methodology. Insofar it is more than remarkable that in an anthology “Legal philosophy in the 21st century” edited by a famous German publishing-house for scientific literature a theorist summarizes his explanation to the topic: “What lawyers really do”: “One has to develop a certain sense for the right thing. ... A sense whose content one can not describe exactly.”⁴⁶

I think this is a somewhat poor outcome of this high-level scientific discussion.

42 Mouffe, C. *Über das Politische*, p. 25. It may be remarked that she quoted Carl Schmitt who declares Caesar as lord over grammar (*Ibid.*, p. 114–115).

43 Case C-46/93, *Brasserie du pêcheur v. Bundesrepublik* [1996] ECR I-1029, para. 27 (emphasis by H. P. P.).

44 In today’s version: Art. 220 ECT.

45 To the differentiation of legal philosophy into legal theory on the one hand and ethics of laws on the other hand see Prüm, H. P. *Einführung in die Rechtsphilosophie – Rechtstheorie und Rechtsethik*. 2008, p. 35–39.

46 Lege, J. *Was Juristen wirklich tun. Jurisprudential Realism*. In Brugger W., Neumann U., Kirste S. (eds.). *Rechtsphilosophie im 21. Jahrhundert*. 2008, p. 226 (translation by H. P. P.).

3. Pragmatism as a new path for solving old problems

It could be helpful to accept the general position of scepticism regarding philosophical problems adopted by Thomas Nagel:⁴⁷ “My personal opinion is that most of these problems have not been solved, and that perhaps some of them never will.” If that is the fact, we have to accept it and to follow the path of pragmatism:

3.1. Starting point of pragmatism

*The starting point of pragmatism is that the philosophy seems to be absent from the contradictions of real life.*⁴⁸ But science – and also the scientific philosophy – has to develop contributions handling the everyday’s problems. That is the reason to follow new paths for solving old problems.⁴⁹ Here, in this place we are not looking for eternal truth but just for viable proposals to improve the respective problematic situation⁵⁰.

3.2. Admission of un-solubility of the legal-methodological problematic by legal-methodological tools.

For more than 2000 years lawyers try to solve the problem of extracting answers from laws by only logical ways. But we can not solve this problem by itself.

Justinian tried to avoid the problem by “a conclusive statement of the law that required no interpretation”⁵¹. But this way was a dead end.

3.3. “...let’s kill all the lawyers”

We know the famous sentence in Shakespeare’s “The first thing we do, let’s kill all the lawyers.”⁵² The below mentioned methods are not so bloody, but they add to the reduction of influence of the lawyers in legal decision-making.

47 Nagel, T. *What does it all mean?*, p. 6.

48 James, W. *Pragmatism. A New Name for Some Old Ways of Thinking*. 1907, release date: February, 2004, p. 8-9 [accessed on 2 January, 2009]. <<http://www.gutenberg.org/dirs/etext04/prgmt10.txt>>.

49 Cf. the title of the book of James, W.

50 Rorty, R. *Wahrheit und Fortschritt*. 2000, p. 29.

51 Wacks, R. *Law: A very short introduction*, p. 7.

52 Shakespeare, W. The second part of King Henry the sixth, Acte I. Scene 2. In *The Complete Works of William Shakespeare*. 1999.

The law practice bears the consequences from this dilemma by more and more decision-making without academic lawyer – the popular keyword is: “alternatives to law.”⁵³ Let me outline this development by three examples:

- Business companies increasingly turn to legal decision-making by private arbitral courts instead of public courts.
- The parties to the legal disputes increasingly choose private mediations instead of court proceedings in order to end disagreements.
- More and more non-lawyers enter public courts; in fact not only criminal or other specialized courts, but the constitutional courts too.

At first glance that way seems acceptable solving the above mentioned methodological problems, but it would be the wrong to try to solve this problem by exchanging the professional lawyers not enough sensitized methodologically with lay persons who are even less methodologically sensitized. This way will not reduce the irrationality of legal decision-making, but will increase it.

3.4. The current status of real education in legal methodology

The German legal academic education neglects the legal methodology.⁵⁴

Insofar the education in legal methodology at the law schools takes place it does not represent the current developments in this field. I want to demonstrate that by three examples:

In the legal education it seems as if:

- Laws would be **purely applied**⁵⁵
- “**Auslegungslehre** would exist”⁵⁶
- the process of “Auslegung” would be directed only by the four classical instruments developed by Friedrich Carl von Savigny in the 19th century⁵⁷ – take a look at what is stated in legal textbooks on private⁵⁸ or criminal law⁵⁹ and in the one of the many textbooks on legal methodology⁶⁰.

53 Blankenburg, E.; Klaus, E.; Rottleuthner, H. (eds.) *Alternative Rechtsformen und Alternativen zum Recht*. 1979.

54 Schneider, D. *Singularia non sunt extendenda*. 2008, p. 174.

55 In particular: Adomeit, K.; Hähnchen, S. *Rechtstheorie für Studenten*, fifth edition. 2008, ref. 64.

56 In particular Adomeit, K. *Rechtstheorie für Studenten Normlogik – Methodenlehre – Rechtspolitologie*, third edition. 1990, ref. 64.

57 Von Savigny, F. C. *System des heutigen römischen Rechts*, p. 213–214.

58 Köhler, H. *BGB Allgemeiner Teil*, 31. Aufl., 2007, § 4 Rn. 14: Vier Auslegungsmethoden.

59 Wessels J., Beulke W. *Strafrecht Allgemeiner Teil*, 36. Aufl., 2006, Rn. 57: Vier Auslegungsmethoden.

60 Even here we find this reduction of legal instruments; Cf. Puppe, O., p. 64–65. It is not uninteresting, that she does not list the historical instrument.

3.5. New words make new understanding – or words make politics

3.5.1. “Interpretation” instead of “Auslegung”

In almost all of German case books one can find the concept of “Auslegung” for the process and the result of looking for the meaning of a rule. These books present to the law students the above mentioned as the classical “Auslegungsmethoden”.

We know that this canon does not reflect the law in action.⁶¹

But training the law students primarily in using these methods, we educate the students the wrong way.

Looking for a new way, I first make two semantic suggestions:

As the first step it seems so much better to change the word “Auslegung” with the word “interpretation”, because the latter concept points out active, personal part of the interpreter by the construction of decision-norm (and decision-facts).

Increasingly introducing “interpretation” instead of “Auslegung” we demonstrate in this field that we belong together within the European history as well the European legal culture.⁶²

The concept of interpretation is used in Art. 220 of European Treaty: “The Court of Justice ... shall ensure that in the interpretation and application of this Treaty the law is observed.”

This concept of “interpretation” based not only in European history, it is founded in the German tradition too: The famous dictionary of the Grimm-brothers explained in the 19th century “Auslegung” as “Interpretation”.⁶³

In this context it seems very important that the German Federal Constitutional Court used in 2005 the meaning of “interpretation” instead of “Auslegung”.⁶⁴

3.5.2. “Topoi” instead of “Auslegungsmethoden”

By replacing the concept of “Auslegung” with “interpretation” in a second step it seems necessary to introduce another description for the four classic “Auslegungsmethoden”.

61 Zimmermann, R. *System des heutigen römischen Rechts*, p. 20.

62 The Federal Constitutional Court points out particularly the “European legal culture” (BVerfGE 75, 223 [243]).

63 Grimm, J. and W. *Deutsches Wörterbuch. Elektronische Ausgabe der Erstbearbeitung von 1854 seq.* 2004, keyword: Auslegung.

64 BVerfG NJW 2005, p. 2140 (2141).

In Germany this four-leaved cloverleaf is dominant in almost all textbooks although in law practice judges and other decision-makers use many other arguments which give reasons for the respective decision.

We can see it not only in Germany, but at the international level too: So for example the WTO Appellate Body stated in 1996 that “(a) fundamental tenet of treaty interpretation ... is the principle of effectiveness (ut res magis valeat quam pereat)”⁶⁵.

The classic denomination for all reasonable arguments in the framework of discussion or decision-making is “topos” (singular) or “topoi” (plural).

This way is embedded in the European culture too: Aristotle perhaps did not invent but he introduced the “topic” in the philosophy⁶⁶, Cicero continued this tradition⁶⁷, Gian Battista Vico reinvented this traditional methodology⁶⁸ and Theodor Viehweg tried to re-introduce them in the German legal discussion⁶⁹.

Josef Esser emphasised that topic does not work without classic “Auslegungsmethoden”; however it completes these methods by all legitimate forms of argumentation.⁷⁰

3.6. New understanding of jurisprudence as hybrid knowledge

Since the vivid description of the interaction of rule and facts during legal decision-making-process by the famous German lawyer Konrad Engisch in 1963 as the there and back of the look from facts to rules and the other way round⁷¹, we cannot understand jurisprudence exclusive of the part of the humanities.

Legal decision-making does not depend exclusively of interpretation of texts but of construction of facts too.

That is the deeper reason for categorizing jurisprudence not only as part of humanities, but as hybrid knowledge: it is part of humanities as well as of social-sciences.

65 Report of the Appellate Body of WTO WT DS 8/AB/R, 10/AB/R, 11/AB/R (Japan – Taxes on Alcoholic Beverages II). [accessed on 2 January, 2009]. <[http://www.worldtradelaw.net/reports/wtoab/japan-alcohol\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/japan-alcohol(ab).pdf)>.

66 Aristoteles (384 – 322 BC). *Topik*. In *Philosophische Schriften in sechs Bänden*. 1995, volume 2, p.1.

67 Cicero, M. T. *Topica* (44 BC).1993.

68 Vico, G. B. *Vom Wesen und Weg der geistigen Bildung*. 1708. Published by F Fritz Schalk, 1947.

69 Viehweg, T. *Topik und Jurisprudenz*. First edition: 1953; fifth edition: 1974.

70 Esser, J. *Vorverständnis und Methodenwahl in der Rechtsfindung*. 1972, p. 154–162.

71 Engisch, K. *Logische Studien zur Gesetzesanwendung*. 3 edition, 1963, p. 15.

3.7 New legal didactic ways

One result of understanding that a logical model does not really reflect the law practice, is the introduction of key qualifications in the academic legal education in the last decade in Germany.⁷²

This example proves the ability of the legal education system to change. In this respect I make the following suggestions for the education of future legal decision-makers.

This does not lead us outside of the scientific community, because sciences do not mean only episteme, theory and research but dissemination of knowledge too⁷³.

3.7.1. Mandatory courses in legal methodology and legal theory

Because there is no way either to avoid or to solve the problem of uncertainty of both – of the rules and of the legal decisions by administrations, courts or legal councils, we have to look for other paths to minimize the problem:

However we have to accept and to teach but not to clad it.

Within the framework of the Bologna process⁷⁴ study-programs are being modularised and every module has to be examined.

In order to involve the legal academic education in the Bologna process, the introduction of mandatory participation of all law students in the module “legal methodology and legal theory” is necessary for learning the legal topology on the one hand and the real conditions of legal decision-making on the other hand.

The basic discipline of “theory of law” can serve to the dogmatics of laws as critical reflection as well as practical help.⁷⁵ But this is not the primary intention of the idea of a mandatory module. The main background of my suggestion is the following:

72 Look for example in: Brinktrine, R.; Schneider, H. *Juristische Schlüsselqualifikationen. Einsatzbereiche, Examensrelevanz, Examenstraining*. 2008.

73 Stekeler-Weithofer, P. *Wie soll man heute die Philosophie verteidigen?*, p. 58. In: Sandkühler, H. J. (ed.). *Philosophie, wozu?*, 2008, p. 40. The fundamental mission of University of Edinburgh is “advancing and disseminating knowledge and understanding”. [accessed on 3 January, 2009]. <<http://www.ed.ac.uk>>.

74 Beginning with the Bologna declaration of June 19, 1999. [accessed on 3 January, 2009]. <http://www.ond.vlaanderen.be/hogeronderwijs/bologna/documents/MDC/BOLOGNA_DECLARATION1.pdf>.

75 Habermas, J. *Theorie und Praxis*. Sozialphilosophische Studien. 1971, p. 63. Habermas differentiates the concept of science in this context in “science in the sense of practical philosophy” and “science in the sense of empirical-analytic procedure” (translation by H. P. P.).

Learning about real circumstances of legal decision-making does not automatically result in rationality of legal decision-making, but we should remember Don Quixote, who said: “The beginning of health lies in knowing the disease and in the sick man’s willingness to take the medicines which the physician prescribes ...; besides, sinners of discernment are nearer amendment than those who are fools”.⁷⁶

Accordingly, the first step to minimize irrationality of legal decision-making is to explain future legal decision-makers this irrationality.

3.7.2. Learning by practical experience

Knowing that legal decision-making depends not only on legal rules, but on facts presented by the parties as well as on personal prerequisites of the decision-maker⁷⁷ and other circumstances, it is very important to include these elements of decision-making in the academic education.

Of course we can and we must systematically teach law students the interaction of legal decision-makers, laws and facts in the process of legal decision-making. But the best way to learn something is to apply the acquired knowledge and skills.

That is the inner sense of demands of teaching simultaneously legal methodology and establishing of issue of facts.

Arthur Schopenhauer knew the relationship between norms and facts: “Before a tribunal the dispute is one between authorities alone, - such authoritative statements, I mean, as are laid down by legal experts; and here the exercise of judgment consists in discovering what law or authority applies to the case in question. There is, however, plenty of room for dialectic; for should the case in question and the law not really fit each other, they can, if necessary, be twisted until they appear to do so, or vice versa.”⁷⁸

In other words:

Similarly to the legislator who often uses concepts not strictly defined, the applicants use not strictly defined concepts for constructing the facts. I quote

76 De Cervantes, M. *Don Quixote*. Part 2; 1615, chapter LX, Of what happened Don Quixote on his way to Barcelona. Translated by John Ormsby.

77 Cf. Wright, G. *First Exchange*. In: Wright, G. Cuzzo, M. S. W. (eds.), 2004, p. “For them, what the judge had for breakfast might determine his or her decision quite as much as the law and the lawyers on the other side of a case.”

78 Schopenhauer, A. *The art of controversy*, chapter 30. Edited by Julius Frauenstädt, 1864. [accessed on 2 January, 2009]. <<http://coolhaus.de/art-of-controversy/>>.

Ingeborg Puppe:⁷⁹ A subsumption is the conclusion that anything real, a thing, a characteristic of a thing, a situation, fulfils a certain concept. But this reality itself is also only in terms given; the things and their immediate knowledge we can achieve. The choice of words, in which the reality described, is in a certain extent arbitrary.

Preparing legal decision-makers to construct both the decision-rule as well as the issue of facts, these construction-parts are penetrating continuously during the decision-making-process.

But at the present time in Germany teaching and learning of legal matters works without or hardly with any teaching and learning of how to establish an issue of facts.⁸⁰

In this context I will not only remember the American system of legal clinics⁸¹ but I will present the SASLA (Students Advise Students in Legal Affairs)-model of Berlin Law School.⁸²

“Students experiencing problems in legal matters are interviewed by two SASLA members, and a record of the details is made. Each case is reviewed in the weekly sitting of the group, under the supervision of a member of the academic staff, with reference to laws, legal commentaries, and through the use of internet resources. This process is followed by an individual consultation. Here students are advised on how to proceed with their respective legal problems.”

In this way legal students immediately experience the permanent connection between the norms and the facts and learn to handle the resulting problems. The statement of Oliver Wendell Holmes, Jr., that “(t)he life of the law has not been logic: it has been experience”⁸³, is valid not only for law practice but for legal education too.

79 Puppe, I. *Kleine Schule des juristischen Denkens*, p. 49.

80 Schneider, E., Van den Hövel, M. *Richterliche Arbeitstechnik einschließlich Beweisaufnahme und Beweiswürdigung* 4 edition, 2007, p. 49.

81 Cf. American Bar Association, Section of Legal Education and Admissions to the Bar. *MacCrate - Report: Legal Education and Professional Development. An Educational Continuum. Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, July 1992. [accessed on 2 January, 2009] <<http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>> From the last time: Bücker, A., Woodruff, W. A. *Clinical Legal Education – eine Option für die deutsche Juristenausbildung?*. JZ, 2008, 1068.

82 See Prüm, H. P. (ed) “*Studentische Rechtsberatung –StuR*” an der FHVR Berlin – auf dem Weg vom Projekt zur Institution. 2008, p. 82.

83 Holmes, O. W. Jr. *The Common Law*, p. 1.

Conclusions

The irrationality of legal decision-making being both the process and the result that is not solely directed by rational tools is insoluble. However, we can stop the irrationality in the sense of not-disclosing this knowledge.

The second kind of irrationality we bring to a termination by legal methodological tools on the one hand and by legal educational instruments on the other.

- On the legal methodological level I suggest to replace the concept of “Auslegung” by “interpretation” and the concept of “Auslegungsmethoden” by “topoi”.
- Within the framework of the legal educational system I recommend two instruments:
 - The introduction of compulsory modules concerning topics “legal methodology” and “legal theory” teaching students the conditions of legal decision-making.
 - In a further step students should take part in law clinics or similar projects like SASLA developed at Berlin Law School⁸⁴.

My suggestions would make contribution to reduce the irrationality of legal decision-making, clarify the constitutional responsibilities and strengthen the rule of law. These instruments do not work in short and medium term perspectives, because they have no immediate effects; they could show effects step by step. But if there are no instruments working immediately, we have to go the way with the long term perspectives.

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TEISINĖS METODOLOGIJOS IRACIONALUMO MAŽINIMAS, TIKSLIAI APRAŠANT INTERPRETAVIMO PRIEMONES BEI ATSKLEIDŽIANT TEISINIO IŠSILAVINIMO IRACIONALUMO PRIEŽASTIS

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Santrauka. Tradiciškai manoma, kad įstatymai yra sukurti, kad užtikrintų geresnes sąlygas įgyvendinti teisingumo principą ir suteiktų tinkamas gaires įstatymų taikytojams. Bet net ir tobuliausi įstatymai palieka nevienodo teisės taikymo analogiškose bylose galimybę.

Teisininkai apsimeta, kad įstatymų taikymas ir jo padariniai yra logiškas analitinio proceso rezultatas. Teisės studentams mokymo procese diegiama, kad teismų sprendimai yra vien loginio proceso rezultatas. Bet faktai rodo, kad teisės taikymas, be analitinių-loginių, pilnas ir voliuntaristinių elementų. Tikslus šių elementų santykis yra ir liks nežinomas.

Daugelyje Vokietijos teisės mokyklų studentai mokomi, kad svarbiausias imperatyvus teisės taikymo įrankis yra vadinamasis „Auslegung“ bei keturi jo elementai:

- pažodinė reikšmė bei gramatinė sakinio struktūra;
- teisinė normos istorija;
- sisteminis teisės kontekstas;
- įstatymo leidėjo tikslas kuriant šią normą.

Bet mes žinome, kad šie keturi teoriniai instrumentai neatspindi tikrosios teisės aiškinimo praktikos. Taigi, šios priežastys lemia sprendimų iracionalumą. Siekiant didesnio sprendimų racionalumo teikiami:

- Du teisinės metodologijos tobulinimo pasiūlymai:
 - 1, 2) pakeisti terminą „Auslegung“ terminu „aiškinimas“, o „aiškinimo metodus“ terminu „topoi“ užtikrinant didesnę metodologinį aiškumą;
 - Du pasiūlymai dėl teisinio išsilavinimo:
 - 3) atsižvelgiant į aplinkybę, kad niekada neišsiaiškinsime tikrojo teisinių sprendimų priėmimo mechanizmo, ateities teisininkai privalomosiose teisės teorijos paskaitose turėtų būti supažindinami, kad sprendimų priėmimas tik iš dalies yra racionalus procesas;
 - 4) kadangi teismų sprendimai priklauso ne tik nuo įstatymų aiškinimo, bet ir nuo faktinių aplinkybių nustatymo, studentai turėtų įgyti teisės taisyklių

ir faktų susiejimo patirties teisės klinikose arba tokiuose projektuose kaip „Studentai pataria studentams teisiniais klausimais“.

Šie pasiūlymai, nors ir tiesiogiai nepadidins teismų sprendimų racionalumo, bet ilgainiui pragmatiškas požiūris į teismų sprendimus turės įtakos teismų sprendimų racionalumo didinimui.

Reikšminiai žodžiai: *teisės teorija, teisinė metodologija, teisės studijos, teismo sprendimų priėmimas, teisės taikymas, teisės praktika.*

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