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THE IS-UGHT PROBLEM AND LEGAL RATIONALITY

The aim of this paper is to discuss the following issue: what is rational behaviour of a lawyer (mainly in the process of the interpretation of legal texts)? We are especially interested if the 'is-ought problem' affects the issue.

Two Meanings of Rationality

Those from countries in the west generally have a firm belief in rationality. They consider being rational as one of the most important of virtues. Thinking and behaving in a rational manner can be seen as an almost ethical value. However, the notion of rationality, as taken from natural language, is rather vague. "Rational" naturally means something like "being in accordance with reason". But what does it mean to be in accordance with reason? Philosophers, logicians and others try to make it clearer¹.

When searching for a clear understanding of rationality we initially discover that the expression "rationality" is an abstract term. It refers to a certain feature: the feature of *being rational*. So we should determine which objects the term "being rational" does refer to. Presently it is said that there are two independent meanings of "being rational": (i) as a feature of thinking ("rational beliefs") and (ii) as a feature of behaviour ("rational behaviours")². All other meanings of "being rational" can be defined in terms of the two above.

¹ A complex investigation of the idea and concepts of rationality can be found in: Ryszard Kleszcz, *O racjonalności. Studium epistemologiczno-metodologiczne* (in Polish; On Rationality. An Epistemological and Methodological Investigation), Wydawnictwo Uniwersytetu Łódzkiego, Łódź 1998.

² See: Ryszard Kleszcz, *O racjonalności...*, p. 39

Rational Thinking

When philosophers or logicians are talking about the rationality of thinking, they are declaring that rationality mainly consists in preserving three principles. Firstly: the language we use should be as clear as possible. We should avoid vague notions in science as well as in the humanities. Secondly: logical rules should be preserved in all considerations. The best way to achieve this is to be aware of every step of our argumentation: what the premises are, what rules are applied. In particular we should be aware of the logical status, the logical “force”, of the rules we are applying: are they deductive or merely giving us a probability of valid conclusion? Thirdly: being aware of the way science is developing over time, i.e., that old theories are continuously being replaced by new, we must be open to the arguments of others. We should be open to critique. And even more: self-criticism should be our motto.

Such understanding of being rational is quite clear. Undoubtedly anyone (including lawyers) should be rational in the above sense to be considered a rational being.

On the other hand, the meaning described above does not determine any exact way of thinking: what premises should be accepted, what rules of reasoning should be used. Certainly, we should accept facts, tautologies, logical rules, etc. But the above principles will not help us solve most of the real problems connected to a lawyer’s practice. Lawyers defending opposite views during a court trial can be equally rational in the above sense. So, maybe it is possible to put forward more principles of rationality? Principles not restricted to thinking.

Rational Behaviour

When philosophers or logicians are talking about the rationality of behaviour it is often connected to praxiology – the theory that deals with the efficiency of activities of any kind. An action is considered to be efficient if it is both effective (an action is or can be successful) and economic (goals are achieved at reasonable costs).

Conveying rationality of behaviour is also possible in terms of theories of choice, game theories, etc. Then, rationality can be defined in terms of expected gains.

Such concepts of rational behaviour are much clearer than the vague notion of rationality taken from natural language. However, there are still

many concepts of rationality, and no one among them is clearly a dominating concept.

We must also take into account that all such concepts are usually defined in natural language and so remain uncertain to a certain degree. If we want to be precise, we can restate the above in the following way: the term “rational behaviour” has several meanings (equivocality) and in every (or in most) of these meanings is also not completely clear (uncertainty).

Therefore, we do not have a “ready to use” notion of rational behaviour for classifying the deeds of lawyers as rational or non-rational. So, maybe lawyers have such a notion elaborated within the legal sciences?

Lawyers and Rationality

The notion of rationality is very important to lawyers. At least lawyers talk about rationality a lot. They talk about rationality investigating theoretical issues, as well as solving practical problems. We dare to say that the idea of rationality is one of the most important ideas connected to law.

On the other hand, any person who has learnt even a tiny amount of the practical aspects of law knows perfectly well that lawyers earn their money defending just about anything we want them to. And, they win as frequently as they lose. Theoretically, their understanding of law should be determined by legal texts and the rules of legal interpretation. In practice however, what we find is a complete sense of chaos whenever legal texts are interpreted. The same is true in relation to a court of law practice³. It is generally known that the same text is often interpreted in completely different ways by different courts. And every judge is convinced about her/his rationality. But could they all be rational giving various interpretations of the same text? Probably not. Nevertheless they all claim they are right, they are rational. This is possible because there is no commonly accepted set of criteria of rationality of legal interpretation. This means there is no commonly accepted concept of legal rationality. Is the above fact accidental? Or, is there a reason for this fact?

³ Anyway, it is true regarding the Polish system of courts of law.

The Lawmaker's Rationality

One of the most important issues regarding legal studies is the issue of choosing the best way for inferring legal norms from legal texts⁴. This issue is investigated within the theory of legal interpretation⁵. In their investigations, Polish theoreticians use concepts of rationality of the lawmaker.

The lawmaker is a fictitious person who is the supposed author of all legal texts. It is supposed that the lawmaker is rational in several aspects. Firstly, he is perfectly aware of the language he uses: he knows the precise meaning of every word, he understands all the grammar, etc. Having perfect knowledge of the language he is able to communicate all his ideas clearly and completely in accordance with his will. Such rationality is called “semiotic rationality”.

The lawmaker is also aware of what justice is. He knows the desired goals that should be achieved by humankind, i.e., he knows the value of every event or situation and is able to compare such values. Such rationality is called “axiological rationality”.

Among other “rationalities” there are suppositions that the lawmaker has a perfect understanding of factual situations and a perfect comprehension regarding the rules governing reality – including social reality. Finally, it is necessary to foresee all possible results of establishing any new regulation.

Two Models of Legal Interpretation

In legal theory, two key models of interpretation are considered. The first model is based on the idea that rules prescribed by the lawmaker, and somehow “concealed” by him in legal texts, should be derived from legal texts merely by semiotic procedures or at least – by procedures that prefer semiotic measures. This model is justified by assuming the semiotic rationality of the lawmaker.

The second model is based on the idea that rules derived from legal texts should be just. So, if a legal text implies something unjust, then we are supposed to abandon the direct meaning of the text and interpret the

⁴ Legal norms are rules of behaviour prescribed by authorities. Legal texts are sets of inscriptions from which legal norms can be inferred. A text to be a legal text must be accepted in a due course by a legitimated do to so authority of a state.

⁵ The theory of legal interpretation is the theory examining ways in which legal texts are understood by lawyers and formulating principles in accordance with which legal texts should be understood by lawyers.

text in such a way that the rules derived from the text are just. This model is founded on the supposition of the axiological rationality of the lawmaker.

So lawyers have two opposing models of interpretation regarding legal texts. Therefore, they are able to defend anything. If we want them to defend something that is in accordance with “the letter of the law”, they will use the model of interpretation based on the semiotic rationality of the lawmaker. However, if we want them to defend something that is in conflict with “the letter of the law” they can then use the model of interpretation based on the axiological rationality of the lawmaker. In both cases they can be seen as somehow being rational. But are they equally rational by using opposing models?

The Is-Ought Problem

It is Hume’s statement that moral distinctions cannot be derived from reason:

*Reason is the discovery of truth or falsehood. Truth or falsehood consists in an agreement or disagreement either to the real relations of ideas, or to real existence and matter of fact. Whatever, therefore, is not susceptible of this agreement or disagreement, is incapable of being true or false, and can never be an object of our reason*⁶.

*Laudable or blameable, therefore, are not the same with reasonable or unreasonable. The merit and demerit of actions frequently contradict, and sometimes controul our natural propensities. But reason has no such influence. Moral distinctions, therefore, are not the offspring of reason*⁷.

Presently, the above thesis of Hume can be restated in a more general way:

*Deontic statements are logically separated from non-deontic statements, i.e., neither can deontic statements be derived from non-deontic statements (simple Hume’s thesis) nor can non-deontic statements be derived from deontic statements (reverse Hume’s thesis)*⁸.

⁶ David Hume, *A Treatise of Human Nature*, Penguin Classics 1985, p. 510

⁷ *ibidem*

⁸ See: Jan Woleński, *Uogólniona teza Hume’a* (in Polish; A Generalized Hume’s Thesis), in: I. Bogucka, Z. Tobor (editors) “Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego” Zakamycze Kraków 2003, p. 293–303. Deontic statements are statements that describe norms, e.g., “John ought to open the window”.

Pursuant to the above thesis, it is impossible to infer obligations from facts or to infer facts from obligations. Intuitively, the thesis holds. Some formal argumentation is also possible⁹. The true meaning of the thesis is that the so called “positive sciences” cannot help us with moral dilemmas.

What is important here is that a similar thesis can be put forward in relation to axiological modalities: it is impossible to infer values from facts or to infer facts from values. But if so, then how can we put forward binding arguments for any model of legal interpretation?

Facts and Values

Several arguments based on intuition can be put forward to support the thesis that axiological statements and non-axiological statements are logically separated.

The first argument is based on the idea of *intractability of social phenomena*¹⁰. Since our ability to compute future states of society is limited, we are not aware of all the effects of our behaviour. Therefore, we are not able to value our behaviour. So, it is impossible to say if the final result of any action will be good or bad. This is reflected in a Polish proverb: “Nie ma tego złego, co by na dobre nie wyszło” (If an event seems to be bad, don’t worry. It may turn out that the event is good).

The second argument is based on the idea of *expected time horizon of events*¹¹. Let us suppose that we are able to compute future states of society. So, we are able to compute all the consequences of all possible (alternatively attainable) ways of behaving. The problem is as follows: how far should computations go and be acted upon? Is it enough to compute the future effects of present deeds for one year? Or, should we compute our future to take into account the lifetime of our generation? Or perhaps several generations? Let us suppose that we can act in a way such as A or (alternatively) in a way such as B. It may turn out that the consequences of A are better than those of B if we are say looking at a time scale of 5 years, but are worse if we are looking at a time span of 10 years, but are

⁹ *ibidem*

¹⁰ See: Witold Marciszewski, *Undecidability and Intractability in Social Science*, in: W. Marciszewski (editor) “Issues of Decidability and Tractability” University of Białystok 2006, p. 143–174.

¹¹ The idea of expected time horizon of events was used in literature by Stanislaw Lem in his famous novel *Powtórka* (in Polish; Repetition), Iskry 1979, p. 55–57. In the novel two scientists discuss how to re-create the world to make it perfect.

again better if we are looking at a time span of 20 years and so on. When should we stop our computation in order to have a *real* valuation of the effects of alternatively attainable ways of behaving?

The third argument is based on *the Ant and the Grasshopper Paradox*¹². The ant is working very hard all summer to survive during winter. The grasshopper in contrast is enjoying life as much as possible all summer long, aware that he will die during winter. In consequence, the ant survived the winter and the grasshopper did not. However, the grasshopper was happy during the summer, the ant was not happy either during the summer (since it worked very hard), nor during the winter (since the winter is a bad season to enjoy life). Who was right? Who was wrong? Are we able to answer the questions in a rational manner? Probably not.

Formal Rationality – Material Rationality

If we accept the thesis that axiological statements and non-axiological statements are logically separated, then we have to admit that it is impossible to establish a universal model of legal interpretation.

Of course, we can state some formal features of a good interpretation (like clarity of language, being in accordance with logical rules, etc.). If a legal interpretation has such features it is rational from the formal point of view.

On the other hand, we cannot put forward binding arguments concerning the choice between semiotic and axiological rationalities of interpretation. Therefore, if we try to define the material rules of legal interpretation, they have to have a hypothetical form: “if you choose semiotic rationality you should do A, but if you choose axiological rationality you should do B”. And there is no universal argumentation to choose between A and B.

Therefore the material rationality of lawyers is merely hypothetical.

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¹² The paradox was put forward by Martin Hollis in his *The Cunning of Reason*, Cambridge University Press 1987, p. 95–96.