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ON JUSTIFICATION OF LEGAL DECISIONS – EFFICIENCY OR CORRECTNESS

Abstract

Certain epistemological, logical and social problems of the justification of legal decisions are analyzed in this paper. The thesis is upheld that their efficiency is more important than logical correctness or objective truth -.with efficiency having procedural, moral and economic dimensions. There are two main types of legal decisions – establishment of empirical facts and classification of actions under certain norms. The establishment of empirical facts is faced up with the problem of objectivity of knowledge. Certain specific features of judicial knowledge make it differ from scientific knowledge. There exists an objective duality of institutions of judicial evidence and legal decision-making. The search for material truth is its main task according to the rules of procedure. It relies on established empirical facts and not only on interpretation and language context. But it is possible to have a logically correct decision that is not truth. The results of court proceedings come up as arguments in a reasoning game. Objective truth and creativity are indispensable in the court game. It is impermissible to go beyond its rules: they are enacted in texts of law. Some arguments are forwarded saying that court cases have not only one correct decision. Several competing correct ("right") solutions can be in clash in a given court game within a framework defined by existing rules of procedure. Very important is the economic aspect of a case – it can be successfully analyzed by means of the decision-theoretic methodology of the Law and Economics School.

Key words: *Decision theory, Law and Economics School, Legal Decisions, Efficiency, Correctness*

In this paper are analyzed certain epistemological, logical and social problems concerning justification of legal decisions. The thesis is upheld that their efficiency is more important than logical correctness or objective truth. These decisions could not be considered as correct in a logical, political or moral sense. Their epistemological and legal justification determines their efficiency. The efficiency of legal decisions has procedural, social and economic dimensions. The decision-theoretic methodology of the School of Economic Analysis of Law is a good instrument of exploration of the economic layer of the social existence of law. Both positivist and natural-law legal philosophy theories have underestimated this very important aspect of the general knowledge of law.

1. Legal Decisions in Logical and Epistemological Perspective

There are two main types of legal decisions – establishment of empirical facts and classification of actions under certain norms. They are made in trials but we can add here the following: extraction of legal norms in action, derogation, resolution of conflicts between norms and establishment of hierarchy of norms. They are performed by legislators and judges, but on a limited scale.

The establishment of empirical facts is faced up with the problem of objectivity of knowledge. There are certain specific features of judicial knowledge in trials in comparison with scientific knowledge – the first of them is limited by rules of procedure, has a time limit, is based on definite sources, and needs a definite conclusion.

There exist an objective duality of judicial argumentation and legal decision-making. We could define their two aspects as real and pragmatic.[2] The first of them is based on the

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search for truth by means of logical arguments and objective study of facts. The search for material truth is the main task of trials according to the rules of procedure. It relies on established empirical facts, not only on interpretation and language context, opinions or subjective views. The second aspect of legal argumentation could be illustrated through all argumentative instruments used in trials. The results of court proceedings come as arguments in a reasoning game. Objective truth and creativity are indispensable in court game. The objective duality of legal decision-making finds an expression in views on the justification of legal decisions.

There are three basic approaches to the analysis of legal decisions and their justification: logical, rhetorical and dialogical. The first of them is expressed in the application of definite logic and logical rules in their consideration – deductive, classical or deontic logic. A criterion for their logical justification is the ability of their reconstruction as a valid logical argument.[3]

The logical approach mentioned is faced with the problem of mismatch of logical correctness and factual truth. It is an evidence of the relative autonomy of rational knowledge: it is not a copy of reality; it imposes on it certain forms of its understanding. There are legal arguments, sentences or conclusions that may be logically correct, but are actually false. Juridical propositions and court sentences are false when they do not correspond to *de facto* circumstances in passing a sentence on someone who did not commit an offense.(trespass law) The system of legal knowledge collapses if a court errs in any of these areas – invalid logical argument or false conclusion[4]. Correspondingly, the American epistemologist Larry Laudan has recommended techniques for elimination of false decisions.

It is necessary to point out that the arguments on which legal decisions are based need to be true: - that is, they should contain truthful premises and truthful conclusion. There is no other correct road leading to a justified decision and elimination of errors. Let us recall here that the classical legal principle of objective truth is associated with this type of credibility.

The second type of justification of legal decisions can be referred to the School of H. Perelman. According to this theory rationality of justification of legal decisions is determined by the ability to convince audience to accept a certain legal decision. Such decisions should be correlated with certain reasons and values of judges and audience.[5] The rational acceptability of a legal decision is an important factor in its justification.

Certain dialogical theories of justification are developed in the analytically oriented legal hermeneutics. For their followers rationality of legal decision depends on the ability to present and defend it in the context of the rules of a rational discussion.[6] Law-abiding argumentation is a specific form of rational communication leading to consensus, coherence or certain form of rational acceptability.

These three approaches are based on the idea of primacy of logical correctness over efficiency. It has been interpreted differently – as a logically valid argument and as a pragmatically acceptable argument that can be defended in dialogical game. But all of them miss the fact that there is no one and only one "right answer" or correct solution of court

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[2] Vihren Bouzov, *Filosofia na pravoto i pravna logika v globalnata epoha* [*Philosophy of Law and Logic of Legal Reasoning in the Globalization Era*] (Velik Turnovo: Abagar, 2010), 117-124 (in Bulgarian)

[3] Jan Wolenski, "Context of Discovery and Context of Justification and Analysis of Judicial Decision-Making", in: *Reasoning on Legal Reasoning* (ed. A. Peczenik) (Lund and Helsinki: 1979), 115-120

[4] Larry Laudan, *Truth, Error and Criminal Law. An Essay in Legal Epistemology* (Ney York: Cambridge University Press, 2006), 12-14

[5] Chaim Perelman, Lucie Olbrechts-Tyetca, *The New Rhetoric: A Treatise on Argumentation* (Notre Dame: University of Notre Dame Press, 1971)

[6] Aleksander Peczenik, *On Law and Reason* (Berlin: Springer, 2008), 105-130

cases.[7] This belief is a very dangerous delusion leading to distrust in the judiciary. The principle of material truth has kept its value as a regulator of juridical knowledge and as a requirement for judgments to be based on credible arguments or justified evidence.

The practice of court proceedings has questioned the thesis of a sole "right answer".[8] In the hard cases this solution is an exception and, in fact, even solutions of similar cases could be different! Indeed, a right decision is not made in court-.in many cases it could be found in difficult negotiations, through pretrial agreement or mediation. Moreover, we often have more than one "right decision" in hard cases."

A legal decision could not be correct in a logical sense because logically valid arguments may differ from a factual truth. Furthermore, logical schemes and structures are not sufficient to justify rational acceptability of certain justified decision of the litigation. Legal decisions should not only be considered as "correct" or "right", but as rational and efficient. The approach offered by the Law and Economics School gives us an opportunity to make an account of this aspect.

2. Legal Decisions in Political and Moral Perspective

Legal decisions could not be right in political or moral sense because there exists no moral and political doctrine commonly accepted by a certain society. According to Ronald Dworkin the "right" answer to a case is determined by its conformity to accepted political morality.[9] Judges must base their conclusion on such conventional system of views. Moral and political reasons applied to certain judgment could be justified in this way. Such view means wrong fully placed liberal optimism.

Dworkin is right in saying that some moral or political principles could be justified at one and the same time, while legal norms could be applied to a given case, but cannot be applied to another case. Economic and social standards are more important and severe than moral and political values. Therefore, the efforts of the Law and Economics School to develop a theoretical account of their importance should be assessed positively.

3. The Economic Analysis of Law and Decision Theory as Methodology

The Law and Economics School is one of the influential trends in contemporary legal philosophy of the last decades of the 20th century. Thinkers in the School would like to see "application of the theories and empirical methods of economics to the central institutions of the legal system"[10]. They ask "what would the law look like if efficiency were its sole purpose, and does the law, in fact, look like that?" There have been significant debates on the normative aspect of this question…: "should efficiency be the goal of law"[11]. In a philosophical context the Law and Economics School is a follower of J. Bentham's utilitarianism[12]. J. Bentham was the first author who tried to apply some decision-theoretic principles to the interpretation of court proceedings[13].

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[7] Ronal Dworkin, *Da se otnasjame kum pravata seriozno [Taking Rights Seriously]* (Sofia: Kritika i humanism, 2003), 81 (in Bulgarian)

[8] Jerzy Stelmach, *Kodeks argumentacyjny dla prawnikow* (Krakow: Zakamycze, 2003), 20-22

[9] Ronald Dworkin, *Da se otnasiame kum pravata seriozno*, 44-48

[10] Richard A. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995), 759

[11] John Hanson, Kathleen Hanson and M. Hart, "Law and Economics", in: *A Companion to Philosophy of Law and Legal Theory* (ed. Dennis Patterson) (Malden: Blackwell, 2010), 300

[12] Klaus Mathis, *Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law*, (Berlin: Springer, 2009), 103-122

[13] Jeremy Bentham, *Rationale of Judicial Evidence. The Works of J. Bentham V. VI* (London: Simpkin, Marshal&Co, 1834), 227

Unfortunately, this school has failed to develop a coherent research program[14]. There are indeed some theses accepted by all representatives of the Law and Economics School. All of them believe that law could be reduced to economic facts. Law and its application must be effective in certain sense. The Creator and subject of law is *homo oeconomicus*– seeking for maximization of his benefit or minimization of losses. The existence of legal obligation could be justified by means of theories applied in economic analysis. Legal economists believe that it is possible to evolve a coherent theory of justice by means of using economic instruments ---coherent at least in an instrumental sense.

The cost-benefit analysis of legal decision-making has a significant drawback – it pertains to all actors of the same measure. As K. Mathis points out "it makes no difference which social groups are the beneficiaries of a legal regulation and who will have to bear the likely costs."[15] For this reason the economic analysis of law should be supplemented with social and moral analysis. Law and judiciary alone could not eliminate social injustice in society. To achieve this we need policies and certain active actors of social transformation.

The decision theory is well developed to explore individual and collective political behavior[16]. It is now making headway in interpreting political decisions overcoming some of these critical considerations – internalism, abstract and subjectivist approach. The Law and Economics School has tried to apply this theory to the process of legal decision-making. This approach is justified by the fact that jurisdiction is very often faced with situations where there are few actors making decisions and whether an action is optimal for an actor - depends of actions of others.[17] Court proceedings have a form of game. The process of legal decision-making could be modeled by means of game theory as a part of decision theory.

The decision theory offers simple models of human choice.[18] A decision is always a decision to do something; it can be presented as a choice among possible alternative courses of action. A strategy is a sequence of interconnected decisions leading to the realization of definite aims. Models shape up the structure of choice in particular choice situations. They are idealizations and can be used as critical instances for an analysis of decision-making practice. According to the information possessed by the agent we can distinguish three different choice situations: a) certainty, b) complete uncertainty (complete indefiniteness), and c) risk (relative indefiniteness).

A strategy of choice of highest-value option is recommended in situations of decision-making with certainty and definiteness. In situations of decision-making with risk the recommended strategy is -to choose an action with maximum value of expected utility. The decision logic postulate of maximization is the principal criterion of rationality of action. It requires a choice of action maximizing the result-oriented function of a decision-maker. In the situation of making a choice one has to accept an alternative that is the best one with regard to the aim leading to maximum efficiency.

In situations of decision-making with complete uncertainty we are completely uncertain of what "state of the world "might come up. We can rely on different rational principles, such as the *minimax principle* – to choose an action minimizing maximal possible loss. Another principle is the *sure thing principle* for choice of" the certain in the uncertain" – choosing an action that brings a result not so bad as other comparable results. The first recommended strategy in the situation of decision-making with uncertainty is choosing the best option among available possibilities. If such option does not exist, one can search for an

[14] Jerzy Stelmach, "Spor o ekonomiczna analize prawa" – in: *Analiza ekonomiczna w zastosowaniach prawniczych* (eds. Jerzy Stelmach, Marta Soniewicka) (Warszawa: Oficyna a Wolters Kluwer, 2007), 13
[15] Klaus Mathis, *Efficiency*, 210
[16] Kenneth Arrow, *Social Choice and Individual Values* (New York: J. Wiley&Sons,1963)
[17] Robert Cooter, Thomas Ulen, *Law and Economics* (New Jersey: Pearson Education, 2008, V edition), 43-45
[18] Frederic Schick, *Making Choices*. A Recasting of Decision Theory, (Cambridge: Cambridge University Press, 1997)

option with satisfactory level for the decision-maker. If there is no such option, one can accept a definite type of gambler's strategy to choose an action with the highest-value of certainty.

All of these models treat human choice in an individual aspect. How can they be applied to explain political behavior and the process of decision-making in court proceedings? The decision theory seeks to create adequate models of social choice and to encompass a new logic of sociality. It is becoming confirmed as a methodology of interpretation of political and legal decisions. In court proceedings the goal is the finding of a solution to a conflict or achievement of consensus at the lowest social price. Legal decisions are oriented to solution of conflicts leading to optimal social benefit.[19]

Efficiency has procedural, moral (social) and economic dimensions. Several competing "right" solutions can fight in a court game within a framework set up by the rules of procedure. It is impermissible to go beyond its rules: they are enacted in the texts of law – the procedural aspect of efficiency. The moral aspect comes down to sharing the benefits of legal justice as specific rights and obligations. Very important is the economic aspect of the case connected to an individual and the social benefits and losses. It can be successfully analyzed by means of the decision-theoretic methodology of the Law and Economics School. It makes an account of the instrumental rationality of legal decisions.

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[19] Vihren Bouzov, "Modernism and Postmodernism in Philosophy of Law **(**The Globalization Era Challenges: Technological vs. Dialogical Theories)" – in: *Significance and Interpretation within the Knowledge-Based Society*, (ed. Dan Simbotin, Petru Dunca) (Baia Mare; 2013), 203-209;

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