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The (Ir)rationality of Judicial Decision-Making: the Typological Argument against a Rigid Separation between the Context of Discovery and the Context of Justification of Legal Decision

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Introduction

In accordance with legal argumentation theory the entire process of adjudication is divided into the process of discovery and the process of justification of a legal decision. The first phase of deciding, which concerns the process of establishing the upper premise as well as the lower premise of logical syllogism, and entails the discovery of all relevant information concerning both premises so that a logical conclusion is reached, is part of an internal process of a judge, which is usually not disclosed to the public. Such a process of discovery is often the subject of research into the psychology of decision-making. It is the phase of decision-making that importantly includes irrational elements (i.e. perception in the form of sensation and intuition) as well as rational elements (such as evaluation in the form of thinking).

The majority of legal theorists, especially those interested in legal argumentation, have claimed that only the context of justification, in which a judicial decision is justified in the reasoning of the decision by arguments or reasons, can be rationally reconstructed. Such scholars rigidly separate the context of justification from the context of discovery since they believe the latter includes (intuitive) hunches, which are non-rational and non-logical. For that reason, they have preferred to leave this subject to psychologists to study the entire process of reaching decisions. However, according to Bruce Anderson, here they have unfortunately been quite

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unsuccessful.[2] It seems that legal theorists' disinterest in the context of discovery and decision-making comes from the traditional notion that there is no place in law for irrationality and intuition, and that if we must admit that it actually exists it should be minimised as much as possible in the process of decision-making which is left to psychologists, while more law-oriented lawyers should deal with the process of justification as the core of rationality in decision-making.

In this article I also do not agree with a rigid separation of the two contexts of legal decision-making and support a more moderate separation between the two. I realise that in this perspective the outcome of my position is similar to that of Bruce Anderson; however, I use different arguments to support that.

Thus, in the first chapter I describe the traditional role rationality has played in the context of legal decision-making and law in general. However, this traditional picture of law as being predominantly a rational activity has been seriously attacked by the postmodernist movement that has also tried to deconstruct it, to which I refer in the second chapter. In this context I present the role of the Critical Legal Studies' perspective and that of its ancestors, the American Legal Realists.

In the third chapter I briefly outline the post-postmodern status concerning the role of rationality in law. I particularly refer to the contemporary relevance of legal argumentation theory which regarding the legal decision-making process has mainly emphasised the phase of the justification of legal decisions. However, in the fourth chapter I raise the issue of the importance of the process of discovery which stems from the fact that our decision-making process does not only include a rational part, but also an irrational part, most notably intuition.

It is intuition in particular that connects both parts, and from that it entails that both processes of decision-making could to some extent be connected. In order to emphasise the role of (irrational) intuition I then use an argument from psychological typology to prove that every decision-making process is partly irrational and that it is impossible to exclude it from decision-making. Finally, instead of claiming the rigid separation of the abovementioned

[2] B. Anderson, Context of Discovery, Context of Decision and Context of Justification in the Law, IVR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law, http://ivr-enc.info/index.php?title=Main_Page (26. 3. 2010).

two phases of decision-making, it is more important to recognise their connection and interrelation. However, it is also important to put intuition (in the discovery phase) and thinking (in the justification phase) in the right perspective and still argue their mild separation if we prefer reasonable legal decisions.

1. The Traditional Predominance of Rationality in Law and Judicial Decision-Making

Law has traditionally been considered a typical rational activity.[3] "Rational" usually pertains to the human faculty of reason,[4] which in philosophy is contrasted with experience. Being non-rational, such experience can thus exist in the form of religious revelation, sensory experience, emotion etc.[5] Moreover, there has traditionally been a distinction between two types of rationality, namely practical and theoretical (also practical and theoretical reason).[6] This distinction is recognised even in modern philosophy. Practical reason is considered to deal with normative questions, such as what one ought to do and what it would be best to do. These questions are interested in the matter of value and action. In contradistinction with that, theoretical reason deals with reflection, with matters of fact and their explanation. It is concerned with belief and, as such, is more typical of natural and social sciences.[7] Surprisingly, it is not that far from what in scholastic philosophy has been understood as the division between *ratio* and *intellectus,* the former being the ability of a discursive way of thinking, with the latter being the ability of direct intelligence.[8] To some extent, this would correspond to the division in the English language between reason and intellect (or intelligence).[9]

[3] The discussion concerning the rationality and irrationality of law is not new among contemporary legal scholars. For a discussion about that in Slovenia, see M. Cerar, Iracionalnost modernega prava [The (Ir)rationality of Modern Law], Bonex založba, Ljubljana (2001).
[4] The etymology of this English word is as follows: "ME [Medieval English] resound, fr. OF [Medieval Old French] raison, fr. L [Latin] ration-, ratio reason, computation, fr. reri to calculate, think; prob. akin to Goth rathjo account, explanation." See Merriam-Webster's Collegiate Dictionary, Merriam-Webster, Inc. (1993), p. 974.
[5] See, e.g., T. Mautner (ed.), The Penguin Dictionary of Philosophy, Penguin Books (2000), p. 470.
[6] Gr. practices pertaining to action, in contract with theoretical (gr. theōria viewing; speculation; contemplation) which relates to thought. Id., pp. 440, 563.
[7] R. J. Wallace, Practical Reason, http://plato.stanford.edu/practical-reason (14. 1. 2010).
[8] See J. Maritain, Man and the State, The University of Chicago Press (1951), p. 111.
[9] The etymology of these two words, i.e. intellect and intelligence, is as follows: "ME, fr. MF [Middle French] or L; MF, fr. L intellectus, fr. intellegere to understand"; and "ME, MF, fr. L intelligentia, fr. intelligent-, intelligens intelligent. Merriam-Webster's Collegiate Dictionary, op. cit., p. 608.

Furthermore, in a historical perspective, rationality in law has had at least two different meanings that have been reflected in various legal theories. First, those who have supported a metaphysical-rational epistemological approach to law, either in its older version (such as Lao-Tsze, Confucius, Aristotle, Cicero and Aquinas) or in its modern version (e.g. Geny, Dabin, Cohen, Fuller, Finnis),[10] have found true law in rational principles that have been accessible to persons through their ability to grasp and understand certain internal idea(l)s (such as God, nature, morality etc.). As mentioned, such a manner of the operation of the human mind that is directed to the overall connectedness of knowledge and the possibility of ideas has traditionally been considered as "intellect" (lat. *intellectus*). Below we will see that such rationality was mostly influenced by intuition, as a cognitive function, and might thus be called intuitive rationality.

The second understanding of "rational" refers to *ratio* or to the capacity of abstracting, differentiating, analysing, making concepts, of applying means to ends (so-called instrumental[11] or empirical rationality). Such approaches to legal theory have traditionally been labelled empiricist-positivist epistemological approaches to the understanding of the concept of law (especially positivist theories of law).[12] Such views mostly appeared at the beginning of modernity and have to some degree been extended to the present.

According to the modern understanding of the concept of law, the rationality that is typical of law today is predominantly considered to be of a practical character (i.e. practical reason). In practical contexts, rationality is the adaptation of means to ends.[13] From its social aspect, by its aspiring to (practical) rationality law serves important social goals, such as providing social order, stability and predictability, as well as serving as an important means for the resolution of major social disputes.

I accept the general framework of the already mentioned traditional distinction between *ratio* and *intellect* but understand it

[10] See S. Prakash Sinha, Jurisprudence, Legal Philosophy, West Publishing Co (1993), pp. v-xii.
[11] For a negative perception of such, see M. Horkheimer, Eclipse of Reason, Continuum International Publishing Company Ltd. (1974, 2004).
[12] S. Prakash Sinha, op. cit., ibid.
[13] For one of the strongest voices in contemporary legal thought on this, see N. MacCormick, Rhetoric and the Rule of Law, Oxford University Press, Oxford (2005), p. 470. Also see N. MacCormick, Practical Reason in Law and Morality, Oxford University Press, Oxford (2008).

in a different way. I view it according to the philosophic psychology concerning the understanding of cognitive functions or the psychological type theory that was developed by C. G. Jung in his Psychological Types,[14] and was subsequently empirically tested, and to some extent even extended, by K. Myers and I. Myers Briggs.[15] Myers and Briggs invented a special indicator to measure the predominance of certain cognitive functions in tested people. That indicator was then patented as the MBTI (Myers-Briggs Type Indicator).[16]

According to Jung, the four cognitive functions, i.e. thinking, feeling, sensation and intuition, are divided into two larger groups of which one is rational and the other irrational. In this manner, thinking and feeling are rational functions whereas sensation and intuition are irrational functions. With irrational functions we perceive objects, people, events and ideas, while with rational functions we evaluate what we have perceived. In every person, Jung argued, there is one superior function, one auxiliary function, and one inferior function.[17] Jung's theoretical inventions were empirically tested by Myers and Briggs and their contemporary followers.[18] According to such research, it has been proven that in the case of lawyers, the superior cognitive function is to a great extent thinking,[19] as a rational function. The auxiliary functions that to some degree direct and determine thinking are both sensation and intuition.[20]

From these findings and in line with the abovementioned trends in the history of legal thought, it seems that there have been two general types of thinking (and rationality) in law. The first is the mentioned empirical rationality in which thinking (evaluation) obtains relevant data or information (perception) mostly from sensation, by experiencing the facts of a case and the rele-

[14] C. G. Jung, Psychologische Typen [Psychological Types], Patmost Verlag GmbH & Walter Verlag, Duesseldorf (1921, 1971).
[15] See I. Briggs Myers, P. B. Myers, Gifts Differing, Davis-Black Publishing (1980, 1995).
[16] Id., p. xix.
[17] C. G. Jung, Psychological Types, op. cit., ibid.
[18] About the results of such research, see, e.g., S. S. Daicoff, Lawyer, Know Thyself, American Psychological Association (2004), pp. 32-36, 64-65.
[19] According to these results, the percentage of lawyers with their superior thinking function is around 75, in contrast with 25 percent of those with their superior feeling function. Ibid.
[20] According to all MBTI tests that I have managed to examine, the ratio between the predominance of intuition and sensation as an auxiliary function among lawyers is around 50/50. According to the results of the surveyed MBTI tests, it depends, however, on which kinds of legal professions were tested. In general, intuition was found to as prevail in the general group of lawyers and law students, while sensation prevailed in the event of judges. Ibid.

vant legal standards by the senses, evaluating such by thinking, and making a final decision. In the continuation, I will argue that today such empirical rationality is most typically applied in clearer cases. Further, there is a certain use of intuition but in such cases it is not determinate for the result of the decision-making process (so-called instrumental intuition). Secondly, there is also the mentioned intuitive rationality which is applied more in unclear cases through, e.g., moral legal principles. In this framework, the so-called creative intuition is determinate for the result of the decision-making. Here thinking obtains relevant legal information from intuition because sensation cannot help much as the text of the legal norm has gaps, is vague, ambiguous – in short, unclear.

Finally, everything mentioned above in connection with the predominance of rationality in law in general naturally also applies to judicial decision-making and the judiciary in general, as one of the most prominent legal professions. It is the judicial profession that I mostly focus on in the rest of this article, where I discuss in particular the extent to which judges embrace both rational and irrational aspects of the decision-making process, and that their ideal relation is the one in which the irrational is in the service of the rational.

2. A Postmodern Attack on the Essential Connection between Law and Rationality

2.1. The Critical Legal Studies Movement

A central goal of postmodernism was to deconstruct the "meta-narratives of modernity".[21] One such meta-narrative of modernity, especially of the Enlightenment, was certainly the authority of rationality and reason.[22] In comparison with the pre-modern world, through the scientific revolution modernity had empiricised reason by instrumentalising[23] it to become *ratio,* in relation to which reason's pre-modern intellectual (intelligent) dimensions were subsequently left to metaphysics.

In contemporary legal theory, one of the best known attacks

[21] J.-F. Lyotard, The Postmodern Condition: A Report on Knowledge, University of Minnesota Press (1984).
[22] T. Mautner (ed.), op. cit., p. 359.
[23] M. Horkherimer, op. cit., ibid.

on rationality in law came from the Critical Legal Studies (CLS) movement in the United States in the 1970s and early 1980s. To an important extent their deconstructionist approach to legal doctrine, exposing the "indeterminacy of the text and delegitimizing liberal legalism's claim about the existence of a knowable, objective, and value-neutral (and rational) law,"[24] certainly represented a postmodernist position in legal theory.[25]

In contradistinction with liberalism, which claimed that rationality distinguished legal discourse from other kinds of social force and that in law there is a rational foundation for doctrine and development, CLS rejected such a position as a myth claiming that passion[26] or will are not excluded from law. Moreover, CLS proponents argued that law was nothing but an expression of politics, or "an instrument of political propaganda that legitimates the class structure by masking exploitation with apparent fairness".[27]

This position of CLS concerning the critique of rationality in law was not surprising given that CLS adherents claimed to be descendants of the American Legal Realists (ALR). The ALR argued that law and legal reasoning often contain indeterminacy, subjectivism, non-formalism and irrationality, or that "legal reasoning can rarely require, in an objective sense, a particular result".[28] Moreover, CLS proponents also found support for their ideas in the deconstructivist movement regarding the interpretation of texts, claiming that texts have no objective meaning and that the founding of meaning in a text is the result of an act of interpretation by the reader and not of an inherent objective meaning of the text. In such a manner, the interpretation of a text or a social action is allegedly the function of power, not proof. This allegedly contributed to the indeterminacy of the text and the non-existence of a knowable, objective and value-neutral law.[29]

If CLS took from the ALR the idea that law is necessarily subjective, informal and irrational, they did not however accept from them the notion that the irrational in law is not necessarily something bad, negative and arbitrary.[30] This is even more so if we un-

[24] S. Prakash Sinha, op. cit., p. 310.
[25] Also see G. Minda, Postmodern Legal Movements, The New York University Press (1995), p. 126.
[26] See, e.g., R. M. Unger, Passion, Free Press (1986).
[27] S. Prakash Sinha, op. cit., pp. 312-13.
[28] Id., p. 306.
[29] Id., p. 310.
[30] B. Anderson, Context of Discovery, Context of Decision and Context of Justification in the Law, op. cit., ibid. Also see B. Anderson, "Discovery" in Legal Decision-Making, Kluwer Academic Publishers,

derstand the psychological typology of general decision-making, which also applies to the way in which judges decide cases, which I will be outlining below. For that reason I will briefly refer to their ancestors, the ALR. Given that many ALR were former judges at different American courts, their pre-postmodern reflection on how judges in concrete cases actually proceed and adjudicate can be very useful.

2.2. The American Legal Realists (ALR)

One of the protagonists of the intellectual movement of the American Legal Realists was Jerome Frank.[31] Frank, who at some point in his career was a judge, looked at the concept of law from a psychoanalytical perspective. In his work Frank explicitly mentioned Freud as a representative of the "new psychology", in dealing with certain psychological specialties of an individual that might affect the (excessive) emotionality of his or her judgments (e.g. impatience, irrational irritation when faced with unpleasant thoughts that refer to wishes, hatred, the sense of power, loyalty to certain groups).[32]

According to Frank, law is uncertain, indefinite and subject to unpredictable changes. However, such uncertainty about law is not an unfortunate fact but an important social value since otherwise society would be too tightly restricted and unable to adjust to the reality of incessant social, economic and political changes. What is also typical of Frank is his legally realistic thinking claiming that, from the perspective of an average man, law is represented by a court decision concerning certain facts of the case of a certain human being. For such facts there is no prior law until the court decides on them. What exist prior to such a decision are only the opinions of lawyers and attorneys, which are only speculations on how the court will decide.[33]

Furthermore, Frank asserted that in terms of psychology the process of adjudication rarely begins at the upper syllogistic premise, on the basis of which the judge only deduces or makes an inference. Quite the contrary, Frank opined that judges generally make their judgments in the opposite direction, i.e. stemming from

Dordrecht (1996).
[31] His fundamental work is Law and the Modern Mind, Bretano's, Inc. (1930).
[32] Id., p. 206.
[33] Id., pp. 207-208.

speculative conclusions made in advance. Judgments are thus based on judges' internal premonitions. He called such premonitions or stimuli hunch producers, which as political, economic and moral prejudices tell the judges to reach certain decisions that are formally based on rules and principles. According to Frank, there are also other hunches and premonitions that depend on the characteristics of an individual judge who is to make certain conclusions or decisions. Therefore, in Frank's opinion , a judge's personal traits, his or her psychological dispositions, prejudices, sympathies and antipathies (in relation to, e.g., witnesses or parties to proceedings) decide on what is to be the right decision in a particular case. From this perspective, the judge does not differ from other "mortals".[34]

Here we can find a similarity between the thinking of a former American judge, Hutcheson (in 1929), and a Slovenian law professor Furlan (in 1933),[35] to whom I will return later. The fact which seems to be decisive for their legal-realistic viewpoints is that in their earlier professional careers both were legal practitioners (Hutcheson a judge, and Furlan an attorney). Moreover, other American Legal Realists such as Holmes and Frank were also judges. By following such use of intuition, the judge *a posteriori* begins to apply rational arguments in order to check (or supervise) whether it is possible by such to justify the conclusion that was *a priori* made by virtue of his or her intuition. This entails that the conclusion made in advance, or *a priori,* essentially determines the arguments used in the reasoning. In Frank's opinion, if this is not possible then the judge will have to choose another conclusion except he or she is "arbitrary or insane".[36]

Following Frank if we wish to know something more about hunches that contribute to lawmaking we should know the judge's personality. Thus, law changes in accordance with the personality of a judge who decides on a certain case. However, such a distinction between judges cannot be disclosed in connection with the writing of their judgments particularly due to their ability to use different tricks in order to disguise disharmony between them. In such a manner, true irrational inclinations are hidden behind

[34] Ibid.
[35] B. Furlan, Problem realnosti prava [The Problem of Law's Reality], Pravna fakulteta in Cankarjeva založba, Ljubljana (2002), pp. 145-166.
[36] J. Frank, op. cit., p. 203.

the veil of a rational structure of reasoning. However, from time to time we learn something about judges' personal preferences only through their interviews, biographies, literary works about them, as well as from the brilliant and bad reasoning of their decisions. Although rules and principles are foundations of law they are only instigations for the activity of judges. Accordingly, Frank was certain that the main factor in the operation of law is a judge's personality.[37]

In such manner, Frank asserted that law cannot be reliable, certain and determinate, in the framework of which the wish to have fully determined law resembles a child's emotion or his or her longing for a father figure. In Frank's opinion it was a task of the modern person to overcome this father complex. The modern person must become pragmatic and free from this child's fear from his or her parents' omnipotence and exaggerated respect. According to Frank, such fear and respect are the main bastions of resistance to change. Frank's ideal was a fully grown-up lawyer (judge) who does not need external authority but possesses constructive doubt that enables him or her to create law in accordance with a developing civilisation. At the same time, such a judge is (to be) aware of his or her prejudices,[38] tak(es) them into consideration, and deal(s) with such rationally in order to achieve a decision that would be as just (and objective) as possible.[39]

Following Frank, judges necessarily have discretion when they apply abstract rules to concrete facts, i.e. they necessarily create law by making value judgments, since legal creativity is the essence of the life of law. According to Frank, the ideal judge would not abuse power but take care of the enforcement of justice by applying their knowledge of law and being aware of their potential prejudices and weaknesses (i.e. his or her human nature). Therefore, what seems to be one of the main tasks for society, Frank argued, is to seek powerful personalities who have enough knowledge and awareness as to their own personalities, which necessarily include certain prejudices, partiality and antipathies.[40]

In general the ALR have criticised legal formalists or legal positivists who claim that law or law application is (fully) determined

[37] Id., p. 206.
[38] Id., p. 212.
[39] Ibid.
[40] Id., p. 210.

by mere legal provisions, in the framework of which (according to the most extreme position, that of German mechanical jurisprudence) judges are to be completely neutral (even mechanical) "technicians" who merely apply abstract legal norms to concrete facts. The main tasks of the ALR were certainly to destroy the myth pointing to such full (even scientific) autonomy of law and the narrowly perceived empiricist's perception of the application of law.

I am very aware of the ALR's valuable contributions to disclosing the idea that law and a lawyer's psychological predisposition are interconnected, and that law is merely a result of the projection of lawyers' activities when creating or applying the law. I agree with their perspective that law can be indeterminate as it depends on, e.g., judges as human beings, and also on how the law is interpreted and applied in a particular case. This certainly proves the fact that a judge is necessarily subjective when adjudicating cases, but this subjectivity, such as a judge's hunches (intuitive ideas), are not necessarily bad if they are taken in the overall context of the profession of a judge as a responsible actor. It seems that CLS proponents did not take from the ALR the position that irrationality in law can also be positive, not necessarily negative.

I take into consideration everything that the ALR said regarding the subjective inclination of judges when deciding cases, and proceed with some additional (more objective) requirements that come up in this connection. As we will see in the section on typology and judicial decision-making, the issue of psychological typology and law addresses both irrational and rational elements in adjudication, and tries to put them in the right perspective so that the emphasis is on the value of thinking as the ultimate rational cognitive function.

3. The Post-Postmodern Return of Rationality in Law: Legal Argumentation Theory and the Justification of Judicial Decisions

The fact is that the postmodernist movement in law unmasked such as being merely objective, formal and rational in the direction of also proving its subjectivity, informality and irrationality. However, if it was very successful at criticising the traditional pic-

ture of rationality in law, it was unsuccessful in replacing it with some constructive alternative contents.

Thus, what remains for a post-postmodernist approach in law concerning the role of rationality in it, which entails that the irrational cannot finally supersede the rational in law if we would like to retain quality legal decision-making, is the fact that "hence in the context of law we must count with the irrational rationally".[41] It seems that a post-postmodernist approach in legal theory has brought the reaffirmation of rationality in law. A major contribution to that, especially in the field of public discourse, is Habermas' work. Habermas is one of the most prominent critics of philosophical postmodernism. Against postmodernism he tried to defend argumentative reason in inter-subjective communication against postmodern experimental strategies. In his view, postmodernism is nothing but an illicit aestheticisation of knowledge and public discourse. Against this, he sought to rehabilitate modern reason as a system of procedural rules for achieving consensus and agreement among communicating subjects. Insofar as postmodernism introduced aesthetic playfulness and subversion into science and politics, he resisted it in the name of a modernity moving toward completion rather than self-transformation.[42] Habermas strongly influenced some of the pioneers of contemporary legal argumentation, most notably Robert Alexy.[43]

Thus, one example of the "comeback" of rationality in law has been the (re)emergence of the theory of legal argumentation, as an integral approach that claims that a legal decision is neither just the result of a determinate text (the traditional – modern position), nor only the result of the will of an interpreter (the postmodernist position), but is the decision that must be reasonable.[44] In this sense, it seems that the theory of legal argumentation tries to reconcile the tension between the traditional and the postmodern approaches when the role of rationality in law is concerned.

In legal argumentation theory a perspective on adjudication

[41] A. Kaufmann, Rechtsphilosophie in der Nach-Neuzeit [Philosophy of Law in the Postmodern Period], Decker und Müller Verlag (1992), p. 25.
[42] G. Aylesworth, Postmodernism (2005), in Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/ (05. 02. 2010). Also see J. Habermas, The Philosophical Discourse of Modernity, Cambridge University Press (1987).
[43] Regarding his procedural theory of legal argumentation, see R. Alexy, A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification, Clarendon Press, Oxford (1989).
[44] Also see M. Pavčnik, L. E. Wolcher, A Dialogue on Legal Theory between a European Legal Philosopher and his American Friend, Texas International Journal 35 (2000), pp. 335-386.

has been established according to which such is divided into two phases: (1) the process of discovery of the premises and deciding thereupon; and (2) the process of justifying the legal decision.[45] The first phase of legal deciding concerns the reaching of a conclusion that appears in the operative provisions of the decision, and is carried out on the bases of a legal norm and a factual situation. Such a process of establishing the upper premise as well as the lower premise of logical syllogism, and of the thereby connected discovery of all the relevant information on both premises so that a logical conclusion is reached, is part of an internal process of the judge, which is usually not disclosed to the public. The mentioned process of discovery is often the subject of research into the psychology of decision-making.[46] It is the phase of decision-making that importantly includes irrational elements (i.e. perception in the form of sensation and intuition) as well as rational elements (such as evaluation in the form of thinking). Certainly, the mentioned irrational elements, most often intuition, do not appear in the reasoning of a decision in which the judge tries to justify his or her decision by using only rational means.

The majority of legal theorists, especially those interested in legal argumentation, have claimed that only the context of justification, in which a judicial decision is justified in the reasoning of the decision by arguments or reasons, can be rationally reconstructed. Such scholars rigidly separate the context of justification from the context of discovery since in their opinion the latter includes (intuitive) hunches, which are non-rational and non-logical. For that reason, they have preferred to leave the phase of discovery to psychologists to study the entire process of reaching decisions. However, according to Anderson, here they have unfortunately been quite unsuccessful.[47] It seems that legal theorists' disinterest in the context of discovery and decision-making comes from the traditional notion that there is no place in law for irrationality and intuition and that, if we must admit that such actually exists in law, it should be minimised as much as possible in the process of decision-making, which is left to being studied by psychologists while more law-oriented lawyers should deal with the process of justifi-

[45] See E. Feteris, Fundamentals of Legal Argumentation, Kluwer Academic Publishers, Dordrecht (1999), p. 10.
[46] Id., p. 10.
[47] B. Anderson, Context of Discovery, Context of Decision and Context of Justification in the Law, op. cit., ibid.

cation as the core of rationality in decision-making. Here it seems that legal theorists neglect the emphasis made by the American Legal Realists pointing out that hunches and intuition can play a positive and even an important role in law, not necessarily a damaging one.

I also do not agree with a rigid separation of the two contexts but support a more moderate separation between them. I realise that in this perspective the outcome of my position is similar to that of Bruce Anderson. He opposes the rigid distinction between the context of discovery and the context of justification by claiming that "his analysis of the context of discovery supports the claim that whether or not a legal decision is justified depends on whether the judge performed at his or her informed best – that the judge paid attention of the relevant data, intelligently grasped links among the data, made reasonable judgments grounded on sufficient evidence, made responsible value judgments, and reached a decision consistent with his or her value judgment about what is the most suitable solution to the legal problem."[48]

However, my arguments for supporting the mild version of the separation between the contexts of discovery and justification of legal decisions are different to Anderson's in that they are mainly embedded in psychological typology. Thus, in the continuation I will try to emphasise the importance of the context of discovery and decision-making, thereby focusing on judicial decision-making, by understanding the "operation" of psychological typology in this context. I argue that the context of discovery, in addition to rational elements, also includes important irrational elements of the human (judges') mind, and that such irrational elements do not only play a coincidental or even damaging role in judicial decision-making but can even be very crucial for good (even just or ethical) decision-making. Nevertheless, I insist that judicial decisions should not only be based on irrational elements since in such an event no supervision over judges' activity, such as examining their reasoning, would be possible. Therefore, the context of discovery (decision-making) must be connected with the context of justification (reasoning of the decision) by way of providing a translation of irrational elements into rational ones, i.e. in the manner of providing reasons for the decision in the reasoning

[48] Ibid.

which serves as a kind of rational experiment for the one who has made the decision.

4. Concerning the Process of Discovery and the Role of Irrationality in Judicial Decision-Making

4.1. Understanding Judicial Decision-Making through Psychological Typology

Although categorising people according to certain psychological types has an ancient origin, the most famous modern approach to psychological typology comes from Carl G. Jung.[49] According to Jung, the human psyche is divided into two different basic attitudes: (a) extraversion; and (b) introversion. These two attitudes determine from where a person obtains energy. While the extravert obtains it from the outside by dealing with external objects, activities, excitements, people and things, the introvert obtains it from the inside by reflecting about ideas, thoughts, interests, ideas and imagination. In addition to the two attitudes, what is typical of the human psyche are four basic cognitive functions: (i) thinking and feeling as rational functions, which are responsible for our evaluation; and (iii) sensation and intuition, which as irrational cognitive functions are the basis of our perception or the manner of taking in data. Our thinking analyses information in a detached, objective fashion. It operates from factual principles, deduces and forms conclusions systematically. It is our logical nature. Feeling forms conclusions in an attached and somewhat global manner, based on likes or dislikes, the impact on others, and human and aesthetic values. It is our subjective nature. Sensing notices the sights, sounds, smells and all the sensory details of the present. It categorises, organises, records and stores the specifics from the here and now. It is reality-based, dealing with "what is". It also provides the specific details of memory and recollections from past events. Intuition seeks to understand, interpret and form overall patterns of all the information that is collected and records these patterns and relationships. It speculates on possibilities, including looking into and forecasting the future. It is imaginative and conceptual.[50]

[49] See C. G. Jung, Psychological Types, op. cit., ibid.
[50] See, e.g., R. Reinhold, http://www.personalitypathways.com/type_inventory.html (5. 1. 2010).

In every person, one of these functions is superior or dominant, and one inferior. There is also an auxiliary function and a tertiary function, which have some influence on the dominant cognitive function. In accordance with that, Jung developed eight different types. His thought was further developed by the Americans Katharine Briggs and Isabel Briggs-Myers who added to the four Jungian cognitive functions another pair of opposites, judging and perceiving, which as two additional cognitive functions define the way we relate to the external world or determine the type of our lifestyle.[51]

Why is the abovementioned short description of psychological typology relevant to this article? It is important to demonstrate that every person is (ir)rational due to his or her basic cognitive functions. This certainly applies to the lawyer and their decision-making, as well as to the judge's deciding. However, the fact that in the lawyer's personality the rational part (i.e. thinking and judging as ideal psychological type preferences) prevails or should prevail certainly importantly contributes to the role that law has had throughout history in society, in which it has ensured at least a certain degree of the rationalisation of ever dynamic social relations. From that it follows that the lawyer's cognitive functions are both rational and irrational but the rational elements should predominate. This applies even more to the judge who, in my opinion, is the central figure in the legal profession.

Likewise, the process of discovery, as the initial part of the legal decision-making process according to legal argumentation theory, not only includes rational, i.e. evaluative, elements but also irrational elements since the judge's rationality (i.e. thinking as the predominant cognitive function in legal decision-making) needs certain data or material to begin its evaluation, which receives it through the operation of irrational sensation (i.e. the perception of facts and existing laws) and intuition (i.e. the recognition of the "right" legal norm that is based on certain facts, and the so-called "sense"[52] of justice).

As already indicated, intuition plays an important role in legal (or judicial) decision-making. First, it appears in the form of instru-

[51] See I. Briggs Myers, P. Myers, op. cit., ibid.

[52] I suggest that even in English we cease using the syntax "sense of justice" or "feeling of justice" but begin using the expression "intuition of justice," which is the only right expression according to the understanding of psychological typology by Jung, Briggs and Myers.

mental intuition, by virtue of helping the judge find or recognise the most appropriate legal standard (be it a legal rule or principle) in the legal system to be applied to certain facts of the case. In such an event, this instrumental intuition ("instrumental" hunch) is subject to the so-called internal justification of a decision, as the necessary rational experiment that is necessary for justifying the decision in clear cases. By "internal justification" I understand what MacCormick determined as the first-level or "deductive" justification in which the decision is defended by means of a legal rule and the facts of the case.[53]

Secondly, in the context of their decision-making judges often resort to so-called creative intuition, which is more creative than instrumental intuition as to some extent it exceeds the internal legal system in the event of gaps in the law, ambiguities, vagueness of legal text, implied meanings in it, which are all typical of unclear cases. In such an event, assisted with creative intuition that communicates the necessary information to the judge, he or she must necessarily step from the area of the internal legal system into the realm of the so-called external area of the legal system, whose outer boundaries are the requirements of justice, ethics, morality, legitimacy, (legal) certainty, predictability etc. In this case the decision is justified externally. Here I refer to what MacCormick understood by his second-order justification in which the arguments that are required are to defend the decision by demonstrating that the ruling is in accordance with the prevailing legal order (including in particular legal principles, and arguments from coherence and consistency).[54]

This entails that such a process often includes intuition – especially if the case at issue is unclear (or hard), which means that the combination consisting of sensation, thinking and instrumental intuition is insufficient to provide the decision-maker with the necessary material for making a conclusion.

However, the phase of justifying a decision is restricted to the thinking and empirical processes of providing rational reasons for the decision, by way of persuading the legal (and general) au-

[53] N. MacCormick, Legal Reasoning and Legal Theory, Clarendon Press, Oxford (1978). Cf. Alexy's position that internal justification is concerned with whether the decision follows logically from the premises adduced as justifying it. R. Alexy, op. cit., ibid.

[54] N. MacCormick, Legal Reasoning and Legal Theory, op. cit., ibid. Cf. Alexy's perception of external justification by which he understands the defending of the acceptability of the premises by interpretative methods and arguments. R. Alexy, op. cit., ibid.

dience that the decision-maker has decided reasonably. In such a case, the decision that was reached internally is reviewable externally. Thus, the elements of thinking as rational standards (arguments as reasons; as well as the elements of sensation making the experience of such reasons possible) play an important role as codes that are decisive for the external mediating and communicating function of law to be ensured. This phase of decision-making as the phase of reasoning is crucially conditioned by the use of rational codes. This is necessarily so as, unlike reason and rationality, intuition as an irrational cognitive function is incapable of being a mediator, common denominator, or common ground on which people can rely when social disputes are to be resolved.

Accordingly, it seems more than probable that the phases of discovery and justification are to some extent connected, as when one decides in a certain manner they simultaneously intuitively anticipate the justification of their selection of a decision. Nevertheless, it may occur when beginning to write down the reasons for a decision that a judge changes their mind, alters their decision, or selects other reasons than those that they anticipated in the initial reaching of the decision. Therefore, it would be very hard to defend the thesis that the process of discovery and the process of justifying a decision can be rigidly separated. This does not say, however, that certain intuitions, senses, perceptions or hunches concerning a legal decision must not be rationally justified or submitted to a rational "test".

Even though, as Frank alleged, in the process of decision-making the judge's personal (psychological) characteristics play an important role, the decision of the same judge must be reasoned or rationally justified. If this is impossible, they must reach another decision that can be justified (rationally).

If the process of justification is more formal and rational, which is reflected in the use of relatively autonomous legal canons (of positive law or legal texts), to demonstrate that the judge has not acted arbitrarily, the process of discovery is more informal and material. In such, as already stated above, intuition may play a greater role. As briefly mentioned above, the process of reasoning a judicial decision as the process of justifying such pertains to the type of thinking that is mainly supported by the senses in: (a) perceiving the facts of the case; (b) the norms of the legal text;

and (c) expressing the reasons for the decision in the reasoning. Such thinking mainly operates on the basis of codes of positive law or tries to be close to that or match that as much as possible. This is the world of more or less formal mechanisms of operative-analytical rationalism and legal logic, which enables a decision to pass the empirical and rationality test, in the context of which the judge tries to remain within the relative autonomy of the legal world. If the decision cannot pass such a test, then it cannot be a legal decision.

4.2. More on the Role of Intuition in Judicial Decision-Making

In order to achieve greater rationality of deciding, the process of deciding itself should be more rationally illuminated. In such a manner it would be easier to understand which psychological factors come into play in deciding. Thus, by also being aware of their irrational part, a judge would adjudicate more reasonably, impartially and objectively. According to Frank, it is in particular the judge who is exposed to emotional dynamism in the court since only an honest judge who is also aware of their competencies, but also of their prejudices and deficiencies, can be the best guarantee of justice.[55] Namely, according to the ALR, the processes of reaching a decision and justifying it includes the following steps: (a) learning the facts of the case and reflection on a just solution; (b) a hunch or intuition about the solution; (c) examining the possibility of such hunches and intuitions in the framework of an existing law (rules, principles and precedents); (d) reaching a decision; and (e) providing the necessary reasons for the decision.[56] Thus, as already indicated we can see that both phases (discovery and justification) are mutually related to a significant extent.

A Slovenian legal theorist, Boris Furlan,[57] who lived at the time of the American Legal Realists, has similarly emphasised in his treaties on a theory of legal inferring that, in the process of legal decision-making, a practicing lawyer initially derives from his or her internal (legal) sense. Namely, similarly to Frank[58] Furlan argued

[55] J. Frank, op. cit., p. 138.
[56] Ibid.
[57] B. Furlan, Problem realnosti prava, op. cit., ibid
[58] Given that Furlan began citing Frank in his articles after 1938, this suggests that, at the time of de-

that, in contradistinction with the predominantly accepted logical syllogism, a practicing lawyer in his or her logical inferring does not stem from the upper premise of the legal norm but actually from the lower premise of the actual case (state of facts). In this way, he or she uses intuitive recognition in order to find a common denominator between the state of facts and the legal norm which is to be applied. Such an act of intuition leads him or her to the upper premise which is then applied in the form of logical syllogism. However, according to Furlan, the judge must rationally justify or reason their intuition in the framework of logical syllogism since, as we perceive our world in modern times, *ratio* is the most reliable communicator in our external world, which ensures predictability and necessary frameworks for accepted social norms. If the mentioned recognition is an act of intuition, the syllogism is an act of reason. So that our intuition becomes accessible to other people we must translate it into the form of reasons and rationality. Through logical syllogism alone we cannot find appropriate legal norms that would lead to a solution of the case, but only prove the correctness of that which we found by means of intuition. However, deductive syllogism is the only means of rational proving. Finally, legal syllogism has an undisputed role as providing supervision over our intuitive findings so that they are translated into rational codes.[59]

From that we can see that the context of discovery in which, besides (rational) evaluation, (irrational) intuition also plays an important role, cannot be rigidly separated from the context of justification as the latter is often only the necessary result and translation of the former. In the process of deciding itself, when a dilemma occurs because we have addressed a hard or unclear case (with several possible solutions which could all be plausible or when "we run out of rules"), we usually pay attention to intuition to provide our thinking with an additional guide for resolving the case. Such intuition could lead to a legal rule, (unwritten) principle, (legal) value, policy, some other standard, helping us to find the legal solution in a thinking "obstacle". However, as mentioned above, such a decision that is supported by intuition still has to undergo the (empirical) rationality test, which entails that it is to

veloping this theory of inferring, Furlan did not copy Frank's thought and simply managed to catch the spirit of the age that was then permeating Western legal thought.

[59] Ibid.

be rationally and empirically justified in the legal reasoning of the decision.

Undoubtedly the role of (not strictly legal) psychological factors in the work of legislators or those who decide on the application of law (especially judges) is usually proportionate to the openness of legal standards that are the criteria for reaching the decision, as well as to the possibility of broadness of interpretation since such "open-texture" legal provisions can be reasoned in several ways, all of which can be rationally defensible.

Conclusion

In the process of legal decision-making, more narrowly in its process of discovery, it seems that the mentioned two kinds of intuition take place.

First, in deciding clear[60] cases so-called "instrumental intuition" seems to play an important role. In such an event, the judge stems from the given facts of a case (i.e. from the lower syllogistic premise) and uses their intuition (so-called "legal intuition") in order to find an appropriate legal norm under which the facts of the case will subsequently be subsumed. If the case is truly clear (e.g. when the facts of the case are well known and the legal norm substantially understandable and determinate, and quite easily found) the judge's intuition is instrumental since it operates as a means, an instrument or "short-cut" to find the relevant legal norm within the relatively explicit legal rules of the (internal) legal system.[61] Within such a decision-making process the judge's initial intuition (also "hunch"), which is irrational *per se,* is rationally evaluated in their mind before it is expressed as a decision, and subsequently also rationally justified in the form of reasons that are provided in the reasoning of the decision.

Second, in the event of an unclear case, the entire process is carried out at the beginning as was mentioned above: (1) the empirical perception (through the judge's senses) of the facts of the case; (2) rational evaluation in the manner of thinking what to do; (3) an intuition (or hunch) as to which legal norm is a possible

[60] Here I refer to MacCormick's determination of a clear case instead of an easy case as he argued that in a complex society there are no easy cases. See N. MacCormick, Rhetoric and the Rule of Law, op. cit., ibid.

[61] Such a clear case would, e.g., be when a thief is caught in flagranti, when stealing a coat from a supermarket given that his or her criminal intention was clearly established.

solution; (3) a rational evaluation as to whether such a legal solution is indeed possible given the facts of the case; (4) the internal decision made; and (5) the decision expressed and reasons for such provided in the reasoning.

However, if there is no clear upper premise of the legal norm the role of the judge and their intuition must necessarily be more creative. His or her intuition creatively extends beyond the explicit boundary of the legal text into the area of the implicit text[62] of the unclear legal provision, which still must remain within the legal system for otherwise it cannot be a legal decision. An example of such creative intuition is the implicit text of the American Constitution that was discovered in the case of *Griswold v. Connecticut* concerning the right to privacy.[63] The problem then is how to justify, rationally, such judicial creativity. It seems that the internal criteria of justification cannot be applied so we have to make use of the external criteria of justification,[64] the role of which is to help us establish a necessary connection between the solution and the legal system. Such creative intuition as a form of judges' irrationality is positive as long as it discovers hidden parts, develops undeveloped parts, or upholds or supports parts of the existing legal system. Such creative intuition must still remain within the legal system.

Finally, it follows from the argument from psychological typology presented above that the context of discovery and the context of justification of legal decisions cannot be rigidly separated since every person's decision-making necessarily includes irrational elements which importantly influence his or her rational evaluation. Nevertheless, in order for such irrationality of the judge *(via* intuition) to pass the test of the legal system, and therefore be considered as positive, it must be in the service of the internal and external criteria of the justification of judicial decisions, and thereby in the service of the rationality of law. If it departs from being in the service thereof it may be considered as dangerous irrationality.

[62] Concerning the meaning of implicit text see, e.g., A. Barak, Purposive Interpretation in Law, Princeton University Press (2005), pp. 104-106.
[63] It is well known that in this case the US Supreme Court found the previously not explicitly existing right to privacy in the US Constitution in the implicit text of the Constitution by virtue of discovering penumbras of certain other explicitly mentioned rights.
[64] On the internal and external criteria of the justification of legal decisions, see supra notes 52 and 53.