New Approaches to Legal Methodology

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Summary[1]

The topics of juridical everyday-business are relatively short lived and the commentary on this everyday-practice frequently runs behind. Following the rapid development of High-Court jurisdiction, especially at the EU-level, we notice a setting of methodological standards that cannot be comprehended by the guidelines of classical interpretation. As jurisprudence is a practical discipline and as legal practice has developed its own inner dynamics, the role of legal theory becomes a matter of increasing necessity.

Introduction

Jurisprudence is essentially a *practical* discipline. Therefore, it has not been established as an institutional dualism of applied and theoretical jurisprudence at the universities, unlike e.g. mathematics or physics. However, a look at the previous history of the subject shows that there was a period (in West-Germany from about the 1970s to the 1990s) in which a self-confident legal theory sought to do genuine basic research.[2] It was a time of enthusiastic reception of arguments from neighbouring disciplines like philosophy and the social sciences, without concern for the aspect of practical utility.

Regrettably, this golden age of theory is over. The topics of juridical everyday-business are relatively short lived and the commentary on this everyday-practice frequently runs behind. Following the rapid development of High-Court jurisdiction, especially at the EU-level, we notice a setting of methodological standards that cannot be comprehended by the guidelines of classical interpretation. The distinction between *interpreting* and *developing* the law, essential in German legal methodology, has obviously become pointless. Legislation also appears to be a laboratory – first experimenting and then evaluating the outcome.

Of course, these developments are not accidental, but result from societal transformations, not chosen by courts and only partly intended by the legislator. Therefore, the fundamental criticism of political conservatism and economic liberalism is not correct. It is true that there are too many obscure legal regulations. And it is also true that probably half of them might not be needed at all. The problem is – quoting Henry Ford on the costs for advertising – we do not know which half.

As jurisprudence is a practical discipline, as I have pointed out, and as legal practice has developed its own inner dynamics, the role of legal theory becomes a matter of increasing necessity. I think there are basically three answers to that issue. Firstly, one could claim that with respect to the obvious self-sufficiency of legal practice, one should cease regarding the law as a suitable object of theorizing. Secondly, one could make the confusing complexity of legal practice an object of confusingly complex theories. Finally, you could follow the classical approach of theory, and thus focus on giving simple answers to the fundamental questions of the law. As long as we do not ignore the difference between "simple" and "as simple as possible" we should presumably prefer the third alternative.

1. The basic question of legal methodology

Regardless of the mutability of the legal "matter" legal theory still addresses the same fundamental questions. One of them refers to the right application of the law. We can consider this to be the basic question of legal methodology (as an elementary part of legal theory). In the following analysis I shall attempt to give an answer to that question and work out some of its implications. Referring the law to the question of its right application in the first place means to acknowledge the law as something to be grasped in some way before it is thought to be applied. That seems to be self-evident to the point of being almost trivial, but is by no means uncontroversial in the discourse of legal theory. As German legal theorists Mariele Dederichs and Ralph Christensen claim: *There is no law before the case* ("Es gibt […] kein Recht vor dem Fall").[3] The underlying argument of that statement – I assume – was expressed by the philosopher Hans-Georg Gadamer this way: *Understanding always is applying* ("Verstehen ist […] immer schon Anwenden").[4]

1 The text is based on a lecture I gave in Beijing and Brussels in 2005. As it seems to me, the arguments are still correct, even the speaking of new approaches, which of course is in some measure a hint at the dialectics implied in the widespread notion of Old Europe.

2 See e.g. E. Hilgendorf (2005), Die Renaissance der Rechtstheorie zwischen 1965 und 1985, Würzburg.

3 M. Dederichs and R. Christensen (2004), Die Rolle der Beobachtung zweiter Ordnung in der Rechtsprechung des EuGH, in F. Müller, Isolde Burr (eds.), Rechtssprache Europas, Berlin, p. 365.

This is the type of argument that one cannot easily disprove. After careful reflection, over and over again, at first thinking it to be right, I am now inclined to assume the opposite. Not that I disagree with it completely, but I believe it does not help in the progress of the fundamental question of legal methodology. That understanding always is applying somehow takes away the point of right application. However, Gadamer`s "axiom" gives a hint about how we need to proceed in treating the basic question of legal methodology. I have said that this question implies that the law is something to be grasped before its application. Following Gadamer`s axiom we can suppose that this "grasping" must demand some kind of understanding. As the notion of understanding the law as such is not sufficiently distinct, I propose to concentrate on a segment of the law, which works better as an object for understanding. I mean a very typical segment of the law, namely a *legal norm*. By that step we have reached a problem that can be put as follows: What does it mean to understand a norm before referring it to the question of its right application? It is important to see that there has to be a space between understanding and applying to make sense of the basic question of legal methodology. If application is taken as a single criterion of understanding, the question of right application is obscured. What we need is a theory that applies the idea of *"hermeneutic autonomy of the object"* (Emilio Betti) to legal norms. This concept would imply a context-transcendent meaning of norms, as opposed to the application of the norm, which always requires a context.

2. *The role of semantics in legal methodology*

I think in this question we could make progress with the aid of philosophical semantics. In particular, with the idea of *sentences* as the smallest meaningful units of language[5], connected with the notion that norms either appear in the form of a sentence or can be – like traffic signs for example – expressed in that form[6]. The claim that sentences are the smallest meaningful units of language has to be analyzed in two directions. For one thing, are single *words* not the smallest semantic unit? Let us see: If somebody says "house", we normally do not understand her as long as it is not clear whether the expression is true or false. But "true" and "false" are characteristics of sentences and not of words. Therefore the word "house" in our example is either a one-word sentence (as the American philosopher W.V. Quine calls it[7]) or it is meaningless.

Secondly, are *utterances* not the smallest semantic unit? Utterances are sentences in particular contexts of use. Can these contexts be part of a systematic theory of meaning? In philosophy of language this has been discussed under the title of "pragmatics". I cannot point out its various concepts and definitions here, I just want it to be considered that pragmatics must mean something more than the claim that meaning depends on the context of use. To deserve the name of a theory, pragmatics must achieve more than paraphrasing the fact that defining the meaning of a sentence merely depends on the context of usage. This conflates the problem with its solution. To draw a parallel: I do not offer a theory of justice by claiming that justice can only be defined in individual cases. Thus I say virtually nothing at all. In a theory of meaning every attempt to go beyond the significance of the context must require developing a typology of generalised situations of usage. These have to be correlated in some way with the form and the meaning of the sentences under analysis (one example is J.L. Austin's and John Searle's theory of speech acts). In order to achieve this, we need a model of conventional language meanings such as John Searle has used to exemplify his term of a "constitutive rule": *X counts as Y in context C*.[8] However, what is applicable for a game – in the game of chess (C) a draw of *this* kind (X) counts as a draw with the knight (Y) – obviously does not work with language utterances. Here the context of usage is more intricate. By saying *"it is raining"* I usually mean it is raining, whereas in an ironical context, I could mean *that the sun was shining*. What I want to point out is that pragmatics is not an easy task if you want more than the variation of the view that only context matters.

In philosophical semantics the concept of context-transcendent meaning of sentences has taken the contours of a veritable theory by the work of the American philosopher Donald Davidson.[9] The basic idea, certainly older than Davidson`s conception, is that what a sentence means can be specified by giving the conditions under which it is true (of course you could call this a context of a special kind).[10]

4 H.-G. Gadamer (1986) [1960], Wahrheit und Methode, Tübingen, p. 314. In drawing this parallel I do not mean to suggest that there are no significant differences between hermeneutics and "Strukturierender Rechtslehre".

5 Cf. L. Wittgenstein (1963) [1921], Tractatus logico-philosophicus, Frankfurt am Main, p. 24 (3.3): „Nur der Satz hat Sinn; nur im Zusammenhang des Satzes hat ein Name Bedeutung."

6 See J. Bung (2005), Die Norm im wahrheitskonditionalen Interpretationsschema, Rechtstheorie 36, p. 41.

7 Cf. W.V.O. Quine (1960), Word and Object, M.I.T. Press, Cambridge, Mass., p. 5.

8 J. R. Searle (1994) [1969], Speech acts, Cambridge University Press, p. 35.

9 D. Davidson (1984), Inquiries into Truth and Interpretation, Oxford University Press.

Sentences are semantically autonomous, because they have by their form a reference to conditions under which they are true. In accordance with the Polish logician Alfred Tarski, Davidson has exemplified this idea by interpreting sentences in the pattern of the bi-conditional "*s* is true if and only if *p*". The well-known paradigmatic example is: *"Schnee ist weiß"* is true if and only if snow is white. Obviously, interpretations of that kind express semantic content that cannot be restricted to a particular context. In other words, the truth-pattern expresses the semantic universality of the sentence-form.

I cannot go into the particulars of Davidson`s theory here. But I would like to respond to a possible objection that could affect its suitability for legal methodology in general. It is a widespread opinion that norms are in no way related to truth. *"You shall not kill"* is neither true nor false at first sight. I hold against this opinion, that it is obviously not mistaken to say that *"you shall not kill"* is true if and only if the person addressed with *"you"* shall not kill. In this context a further distinction is of great importance. I may know what the case must be for a sentence to be true, without having to know if it is really true. I may know that *"es regnet"* is true if and only if it is raining, without knowing if it is really raining or how to find out if it is raining. The impossibility of a verificationist theory of normative meaning does not affect the truth-conditional project. We need not forget that even in the natural sciences a vast number of sentences cannot be verified. So nothing prevents us from claiming that we understand a norm, when we know the conditions under which it is true. On the basis of a "truth-theory" of the Davidson-type we can develop a theory of autonomous norm-meaning that we needed to address the fundamental question of legal methodology: the right application of the law. This semantic discussion is not relegated to the philosophical ivory-tower, but has immediate relevance for the constitutive principles of every legal system. Semantic autonomy of sentences is the condition for the generality and universality of the rules of law.

3. The problem or the paradox of right application

Once we have worked out a concept of autonomous norm-meaning, we can refer the law to the question of its right application. Hence follows this problem: In the concept of application, the notion of rightness is already implied, because "application" is only intelligible with respect to the alternative of right or wrong application. Furthermore, this implies that there must be a criterion, with respect to which we can evaluate whether the application is right or wrong. In finding that criterion, however, the original problem of application returns. For the criterion itself can be conceived of as a norm, which must itself be analyzed with respect to the alternative of right or wrong application. The criterion of right norm-application itself requires yet another criterion for judging right or wrong application. Thus, we require a criterion for the right application of the criterion for the right application of the norm. And so on. But if it is true that we always needed criteria to evaluate the correctness of a norm`s application and if it is true that the notion of application can only be understood with respect to the alternative of "right" and "wrong", then it follows that the notion of norm-application seems to paradoxically imply its own impossibility. For in the *regressus* of criteria we do not come to an end. And this, together with the fact that we undeniably *do* apply norms, inevitably leads to the strange idea of a *non-criterial rightness* (as we could provisionally call it). Once more: If the rightness of norm-applications entirely depended on criterial reference, they would (because of the infinite regress) be impossible; but we *do* apply norms, so some kind of "non-criterial rightness" must exist.

It is interesting that the paradox of non-criterial rightness brings us back to the subject we started with, namely, the relation between theory and practice. It was Immanuel Kant who exposed the problem in these terms. Kant defines a theory as a set "of even practical rules […], if these rules […] are thought of in some general way, abstracted from a set of conditions which nevertheless have necessary influence on their application"[11]. "Vice versa", Kant continues, "not all operating is called […] a practice", but only one that can be described as the application of a rule.[12] With that, however, Kant comes across the aforementioned problem of the regress of rules via the constitutive aspect of rightness; the paradox that practice in the end cannot take place.

10 See G. Frege (2007) [1892], Über Sinn und Bedeutung, in M. Textor (ed.), Frege: Funktion – Begriff – Bedeutung, Göttingen, p. 30: „So werden wir dahin gedrängt, den *Wahrheitswert* eines Satzes als seine Bedeutung anzuerkennen. Ich verstehe unter dem Wahrheitswerte eines Satzes den Umstand, dass er wahr oder dass er falsch ist"; L. Wittgenstein (1963) [1921], Tractatus logico-philosophicus, Frankfurt am Main, p. 36: „Einen Satz verstehen, heißt, wissen was der Fall ist, wenn er wahr ist."

11 I. Kant (1983) [1793], Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nichts für die Praxis, Werke Bd. VI (Weischedel-Ausgabe), p. 127: „Man nennt einen Inbegriff selbst von praktischen Regeln alsdann *Theorie*, wenn diese Regeln, als Prinzipien, in einer gewissen Allgemeinheit gedacht werden, und dabei von einer Menge Bedingungen abstrahiert wird, die doch auf ihre Ausübung notwendig Einfluss haben."

12 Ibid. ("Umgekehrt, heißt nicht jede Hantierung, sondern nur diejenige Bewirkung eines Zwecks *Praxis*, welche als Befolgung gewisser im allgemeinen vorgestellten Prinzipien des Verfahrens gedacht wird.")

Kant attempted to solve the problem by introducing a third notion between theory and practice: *Urteilskraft* (power of judgement), by means of which we can distinguish, "if something is the case of the rule or not" ("ob etwas der Fall der Regel sei oder nicht")[13]. For this *Urteilskraft*, he proceeds, cannot be given rules all the time.[14] Following Kant, *Urteilskraft* is something which distinguishes the practical man, explicitly the practitioner of the law. There could be legal scholars "who can never become practical in their lives, because they miss the power of judgement"[15]. There is a rightness of the practice which is always a step ahead of its theoretical reflection, i.e. the attempt to say why the rightness is right. The English philosopher Gilbert Ryle talks of a *knowing-how* which he brings into contrast with the theoretical knowledge of *knowing-that*.[16] Here lies another possible conceptualization of the problem. Theoretical knowledge, in having the form of *knowing-that*, means *explicit* knowledge, knowledge of the kind enabling one – on demand – to name the criteria of one`s proceeding. This leads to the assumption of an *implicit knowledge* underlying our practical performances.

4. The problem of rationality

We must be aware that the talk of implicit knowledge or implicit norms[17] does not have more explanatory force than our paradoxical term of non-criterial rightness. These concepts are not intelligible, they are instead a final point for reasoning. Here theory has come to its end. But what are the consequences for the fundamental question of legal methodology? Does it possibly mean that our norm-applications are *irrational* in their origin? If we cannot define the criteria leading our decisions to "right" or "wrong", we have a *rationality-problem* indeed. What we do not *know*, we cannot *judge* and what is beyond our judgement might be deeply unreasonable. This problem is the reason why we cannot cease to keep on theorizing. We must realize that we cannot bring the paradoxical concept of non-criterial rightness to a solution. Nevertheless, we are urged into this direction, worried by the concern that we will possibly never know why we decided in this or that way, especially when it comes to execute the law.

To recapitulate the line of reflection so far, I have proposed, with respect to an increasingly non-transparent legal practice, neither to renounce any theoretical activity nor to react with non-transparent legal theory, but to see the virtue of theory in its capacity for delivering simple answers to fundamental questions. I have reasoned that the basic question of legal methodology results from the undertaking to refer the law to the question of its right application. Before we can concentrate on this question in the strict sense, we need to develop a theoretical argument for the semantic autonomy of the law. I have tried to achieve this with a theory of the semantic independence of the sentence-form, which is at least potentially the form of every legal norm. After this first step we were able to advance to the question of right application. Via the problem of the regress of rules we came to the paradoxical term of non-criterial rightness, which leads us to the problem of rationality. If our application of the law is finally not defined by criteria, these applications might be completely irrational, influenced by variables beyond our reach. Although the notion of non-criterial rightness is not intelligible and no object of meaningful theorizing, we are bound to continue the "theoretical job" because we regard ourselves as rational beings.

I would like to warn, however, against a kind of theorizing that turns around the paradox of non-criterial rightness, describing and re-describing it on and on. The result would not be a theory in the right sense, but essentially a linguistic merry-go-round. It does not explain anything, but causes giddiness. I recommend to leave the paradox in its place and try seriously to make the rationality-problem less ominous.

5. Antiscepticism and intersubjectivity

As I see it, there are two essential arguments contradicting the supposition that the problem of rationality actually leads to the irrational application of the law. The significant key-words in this context are *antiscepticism* and *intersubjectivity*. When we examine the basic question of legal methodology, it becomes evident that we cannot attain the criteria of the right application out of the imaginative faculty of one single person. The right application of the law is an intersubjective procedure. When I follow criteria I cannot explain to anybody, I have no criterion to distinguish the right from the erroneously right application. The application of the law as an intersubjective procedure, however, confines the paradox of non-criterial rightness. We can assume that the preconditions of my judgements and actions beyond my judgement are not exactly the unknown preconditions of another individual. Therefore our dialogue is a chance to mutually notice our "implicit criteria"

13 Ibid.

14 Ibid.

15 Ibid. "[…] da für die Urteilskraft nicht immer wiederum Regeln gegeben werden können […], so kann es Theoretiker geben, die in ihrem Leben nie praktisch werden, weil es ihnen an Urteilskraft fehlt [...]."

16 G. Ryle (1949), The Concept of Mind, London.

17 See R.B. Brandom (1994), Making it Explicit, Cambridge, Mass.

and challenge them by demanding reasons for them.[18] This is the basic idea of the theory of discourse, which was particularly applied to legal theoretical problems by the German philosopher Jürgen Habermas and legal theorists Robert Alexy and Klaus Günther.

But could it not be possible that we enlarge our errors through the exchange of our arguments and opinions and thus entangle ourselves even more deeply in the problem of rationality? No, this cannot be, for most of our beliefs and arguments must be true. The reason is simple: The more errors we suppose the less able we are to single out the objects of these errors. We have good reasons to believe that our view of the world to a large extent *is* true. Therefore fundamental scepticism of rationality has no grounds of its own. The argument against scepticism connected with the intersubjective restriction of *implicity* gives us strong reason to keep to our self-understanding as rational beings and rational appliers of the law.

18 I do not believe that we need special "transcendental arguments" to ensure that this interaction works and I also do not see the danger of a new regressus. All arguments and reasons must be suitable for *persons*, who are, at least as far as we know, *finite beings*.