

## **Idiosyncrasy of Judicial Intuition: Problem Statement “The need for expressing reasons is one of the most deep-seated of human necessities”**

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**ABSTRACT :** *The thesis generally adopted to date in the Polish legal discourse on judicial intuition, which describes intuition as an unconscious judicial decision making process, has not been confirmed by results of the latest studies carried out by American researchers. Contemporary discourse approaches intuition from a new, logical and linguistic perspective which has replaced the previous psychological perspective. Since the stance of judge Hutcheson on hunch has never been challenged, we are left with considerations that have become obsolete. The goal of the paper is to draw attention to the need to bring forward research that would identify new meanings for the concept of judicial intuition.*

**KEY-WORDS:** *hunch, judicial intuition, making-decision, judicial scientist.*

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### **I. FOREWORD**

All of us naturally aim at proving our reasons. Judges, who issue decisions, which exert significant impact upon human lives, pay special attention to how they justify their reasoning and prove it was right. In doing so they apply diverse argumentation and reasoning modes, as well as - as confirmed by the latest studies - intuition.

Intuition is an extremely interesting phenomenon that has been addressed by many disciplines of science, not only by law. These other fields include, mainly, logic, philosophy, mathematics, economics, linguistics and cognitive psychology. To a great degree, general interpretation of intuition reflects the meaning assigned to it by cognitivists who view intuition as a process of thinking, in which knowledge stored in long-term memory is used unconsciously. An element in the process of thinking that is referred to as “intuitive” represents the ability to process such knowledge. A decision is an outcome of such an intuitive thought process.

On the other hand, philosophy, linguistics, as well as the current American legal discourse take a different stance and seek to interpret intuition from the viewpoint of linguistics and logic, rather than in psychological perspective. In the new science currently emerging in American jurisprudence known as judicial science, intuition features as vital component of a decision-making model.

In the discourse conducted within the framework of psycholinguistics, we can see new, so far unknown meanings of intuition. An example can be the meaning assigned to it by Noam Chomsky, who understands intuition as a speaker’s linguistic competence. Also American linguistics contains the so-far unexamined idea of a stand-alone linguistic intuition.

Apparently, considering the current state-of-the-art knowledge about intuition, the term needs to be re-visited.

#### **Intuition: the notion**

Initially, before Augustine, in the times of Heraclitus and Parmenides intuition featured in philosophy in connection with science that helps in exploring the world. Heraclitus linked the understanding of intuition with phronetic, i.e. non-sensual, or visual cognition. Plotinus found moral cognition in intuition that was almost religious and mystical. By placing intuition within the theory of science, Aristotle made it a meaningful component of induction. Saint Augustine linked intuition with the doctrine of divine illumination, which brings together rational and sensual cognition of the world.

Saint Thomas attributed intuition to the source of knowledge about the outer world. He argued that everybody had direct intuition, referred to as intuition of being, which makes a vital component of reasoning. Through intuitive reasoning we make a rational assessment of reality. Moreover, according to Aquinas, intuition connects with the understanding of being as something that really exists. „Id quod primo cadit in intellectu, est ens, unde unicuique apprehenso a nobis attribuímus quod sit ens, et per consequens quod sit unum et bonum, quae convertuntur cum ente. [...] Accidentia et formae non subsistentes dicuntur entia, non quia ipsa habeant esse, sed quia eis aliquid est” (“That which is first seized by intellect is being: wherefore everything that we apprehend we consider as being and consequently as gone, and as good, which are convertible with being [...]),

accidents and non-subsistent forms are called beings not as if they themselves had being, but because things are by them”).

### **Intuition in economics**

The above presented classical approaches to intuition are not the only ones that we can come across. Attempts to define intuition have been being made continuously. Usually, they lead to the identification of a new type of intuition. When making an overview of contemporary stances that have given diverse meanings to judicial intuition, we need to take account of how intuition is understood in economic sciences. Economic sciences are the area within which judicial intuition began to acquire its generally approved interpretation of a tool used by experts in decision-making. This line of reasoning emerged in management theories. In one of his lectures Chester I. Barnard, an American economist, claimed that intuition draws the border line between logical and non-logical decision making. That earned him the name of the father of the term “expert intuition”. By logical processes Barnard means conscious thinking which could be expressed in words or by other symbols. In other words, logical thinking is reasoning. By non-logical processes he means those not capable of being expressed in words. They connect with judgments, decisions and actions. In logical decision-making goals and choices are explicable, outcomes are calculated, estimated and dressed in terms that reflect these goals. Non-logical decision-making is unconscious, it cannot be calculated. However, in the economist’s opinion, it is not less effective since, as he ascertains, the relevance of logical processes is overestimated. It follows from the above that the notion of intuition as described by Barnard is approved by entities who believe non-logical decision-making is more effective. Intuitive, non-logical thinking is applied, according to Barnard, in full recognition that a decision resulting from it may, perhaps, be irrational but consistent with beliefs, which are valued higher than rationality. Such an intuitively taken decision is more moral than logical. And, surely, it has got some sense. Critics of Barnard’s theory point to its weaknesses, such as the absence of scientific classification of logical and non-logical decision-making processes. This, however, does not justify the primacy of rationality over intuitiveness.

This criticised part of Barnard views has been brought forward by a logician and psychologist Herbert A. Simon. In his opinion, the critique of Barnard’s assumptions about intuition is ungrounded. Juxtaposing logical rationality with non-rationality understood as intuition has no logical grounds. The logician claims that irrationality is the only term opposite to rationality. Decisions discussed by Barnard, which are considered expert decisions (like a judicial decision taken by judges) in principle, cannot be irrational. Irrationality is connected only with emotions or feelings of experts and judges. Barnard considers physiological factors or the ability to adjust to new working conditions to belong to the catalogue of such factors. In his work, the economist does not say that experts make irrational or emotional decisions. They can control emotions better than an average person. From theoretical point of view, their decisions are either rational or non-rational but they cannot be irrational. Thus, intuitive actions of managers, judges, and other experts can be considered only within the framework of non-rational, not irrational, decision-making. One cannot justifiably attribute meanings that are emotional to decision-making processes, which are, after all, logical. The term featuring in cognitive psychology that describes expert intuition is incorrect. In principle, it could be replaced with the term recognition. Intuition cannot be emotion or feeling, it is recognition; it is reasoning. An intuitive decision is usually rapid, too rapid but it cannot be irrational by nature. Non-rationality is something different than irrationality. Judges and experts are people trained to make decisions which is why they apply intuition, a decision-making tool, not emotions or feelings.

### **Judicial Intuition – Hunch**

Polish scientists take a different stance on lawyers’ intuition. Most studies describe intuition, referred to as judicial intuition, as an equivalent of premonition that is called hunch. The concept of hunch, proposed by an American judge Joseph Hutcheson Jr. assumes that it can be found only in judges with many years of experience who are able to use it. In accordance with it, “...when adjudicating, a judge first relies on her/his intuition and each decision results from emotional, automatic, irrational (meaning, not resulting from a complex thought process) response to an incentive which embraces the facts of the case”. Hunch excludes the possibility to incorporate intuition into the justification of a decision. At the same time, from the works of Simon and Barnard we can conclude that experts use intuition also to justify their decisions. Jerome Frank, famous representative of American legal realism, maintains that intuition tells judges that “... Mrs. Jones should lose her case, Mr. Smith should pay the compensation while Mrs. McCarthy should be granted custody of her children”. An intuitive decision is tested against rationality when a judge has to justify a decision that has been made irrationally.

In the contemporary American legal discourse the idea of hunch is questioned and Hutcheson is accused of decoupling the justification of the decision from the decision-making process. Currently, it is believed that both processes are components of judicial adjudication. Intuition is a tool used in the process and

an element of judicial argumentation. The above presented interpretation of intuition implies the need to analyse links between judicial intuition and mathematical, philosophical or logical intuition. The above outlined selected stances on intuition are broad and encompass many aspects. Analyses of judicial intuition discussed in Polish research studies seem overly reductionist.

### **Intuitus – Syntactic Mistake**

To finalise these considerations, it is worth reminding that Wojciech Daszkiewicz questions the interpretation of intuition along psychological lines as he believes that from the outset researchers have been making a syntactic mistake that negatively impacts the methodology. The etymology of the term intuition suggests that it derives from the Latin *intuitus* which is a noun constructed of two expressions the prefix *in* and the noun *tuitus*. The first part of the expression is not semantically independent. Its semantic meaning can be identified only through syntactic analysis. The second element, *tuitus*, has got its own semantic independent value. This expression is a noun whose meaning is related to the concept of the vision, the view of reality. According to Daszkiewicz, the prefix *in* in the term *intuitus* indicates that intuition is the thing rather than an action. The term intuition interpreted as the thing means, in other words, that the expression belongs to the realm of being, to the reality that can be objectively recognised. Meanwhile, the etymology of the term intuition suggests it comes from the verb *tueor*. Semantically, *tueor* is understood as an expression describing activities such as: watching, observing but also thinking, or making insight into things. Psychology as a research perspective disregards the etymology of the term *intuitus* assuming a priori that intuition is the activity of the mind, a thought process not, as argued by St Thomas, a being that objectively exists. Stanislaw Ehrlich stressed that in the methodology of legal studies psychological perspective directs researchers to the world of feelings, types of emotional states, actions driven by impulses or taken as a result of volition. The list of thought processes and emotions described in psychology is endless. When researching law, as we read in Ehrlich, we need to deploy methods based on linguistics and logic. The theoretician of law, claims we should not disregard aspects of emotions and volitional processes when analysing law because they have got inherently integrated with human consciousness that makes part of the thought process, however, "A question can be raised how these general guidelines derived from psychology can be applied to the very substance of law?". In view of the above, drawing attention to the need to re-examine stances vis-à-vis judicial intuition on logical and linguistic grounds instead of psychological perspective seems fully justified.

## **II. CONCLUSION**

The goal of the paper is to herald the need to re-examine judicial intuition with a view to reveal its idiosyncrasy. As demonstrated in the paper, modern stances on intuition have introduced new meanings that have never been featuring in studies conducted by Polish researchers. In the American jurisprudence alone, which provides fertile ground for disputes as to which methods of justifying judicial decisions are the best, includes an intuitive model of legal argumentation. Intuitive argumentation is not based on emotions, it is a tool that justifies earlier (perhaps emotional) decisions.

When looking at the justification of judicial decisions one should not make references to intuition understood on grounds of cognitive psychology; this process requires logical and linguistic perspective. Moreover, we may risk saying that in this area intuition is a logical method of justifying judicial decisions.

The thesis concerning judicial intuition adopted in the Polish legal discourse is rudimentary and should be made more elaborate.

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