"TRIAL AND ERROR" IN JURISPRUDENCE[1]

REINHOLD ZIPPELIUS
Alemania Federal

I. A methodical approach

Enlarging knowledge by "trial and error", i.e. by experiment, has hitherto been the most successful method of human understanding. There are some reasons to suppose that this is a fundamental pattern of human world-orientation, not only in the field of natural sciences but also in those of ethics and law.

Law, of course, is not a field in which to experiment unsteadily without consideration and circumspection; it would lose its ability to provide for order, especially for reliable rules of conduct, and to preserve society from chaos. In a more cautious way, however, there has always been "experimentation" in the field of law –trying a proposed solution for a problem by putting it to the test of practical experience and by modifying it or replacing it entirely if necessary. Along these lines Roman and Anglo-Saxon law, the two most important original legal systems, developed as case-law systems, solving actual problems. Especially Anglo-Saxon "reasoning from case to case" has apparently something to do with "trial and error". Corresponding to this idea, Oskar Bülow thought that "law is the product of experience. It had to be discovered by experimentation".[2] And in Karl Popper's opinion only a tentative approach to justice is possible[3]

Popper offered his widely accepted theory of tentative thinking originally for the field of science. In his "Logic of Scientific Discovery" he described the scientific method as a process of problem-solving, proceeding by "trial and error" or, more precisely, by "conjectures and refutations": When faced with a problem we tentatively propose

1 An enlarged essay on this subject will be published in: Festschr. f.H. Huber, 1981.
2 O. Bülow, Gesetz und Richteramt, 1885, p. 17.
3 Interview by Bayrischer Rundfunk, broadcasted Dec. 28 , 1979.

a solution and expose it to criticism. If it stands the test of argument and experience, we accept the proposal preliminarily. If not, we discard it and replace it with an other one. The latter may be a totally new proposal or merely a modification of the former. Modifications of principles and rules play an important rôle, especially in the development of law. We will elaborate on this later on.

As already said, this pattern of reasoning is not restricted to the natural sciences. R.M. Hare recommended Popper's method for the field of ethics. Moral reasoning, too, is "a kind of exploration. . . What we are doing in moral reasoning is to look for moral judgements and moral principles which, when we have considered their logical consequences and the facts of the case, we can still accept". We find here a way of reasoning similar to that of the sciences, where we are required "to propound hypotheses, and then look for ways of testing them", always ready to abandon them, if experience refutes them.[4]

II. "Standing the test"

So far we have merely discussed a certain pattern of reasoning. The question remains what our criterias should be when we inquire whether or not a scientific hypothesis or a principle of ethics or of justice[5] is "standing the test". In different fields we must probably use different criteria in order to decide whether we can accept the conclusions drawn from a hypothetical proposition, and we will suppose. that a proposition of justice cannot be "tested" in the same exacting manner as a scientific hypothesis.

Even the choice of scientific hypotheses is not made in a completely "exact" methodical manner. Of course falsification necessarily means the end of a hypothesis; but his does not also mean that a hypothesis can only be eliminated by falsification. Even if neither of two alternative hypotheses if falsified in a strict sense, we can prefer one of them, holding, e.g., that it explains some facts more plainly and persuasively than the other or that it fits better in the context of other prevailing conceptions– in short, that it seems to be more plausible than the alternative hypothesis. Thus, the preference given to one hypothesis which competes with another, likewise non-falsified one is the result of a prevailing consensus among scientists and not the result of cogent arguments.

But when selecting principles of law and justice we are confronted

[4] R.M. Hare, Freedom and Reason, 1963, ch. 6.2.

[5] N. MacCormick, Legal Reasoning and Legal Theory, 1978, p. 232 suggests that we should not overestimate the difference between principles and rules.

with an additional uncertainty. This is contained in the question: By what criteria shall we decide whether a principle is "standing the test"?

In the field of natural sciences the hypotheses, especially the conclusions (predictions), which are drawn from them, must be in accordance with immediate, actual experiences which everybody can realize.

In order to test an ethical principle Hare proposed to inquire, whether I can accept it if it is actually applied against me.[6] But this inquiry, which is related to the "Golden Rule", can only provide a necessary but not a sufficient criterion of the acceptability of ethical principles, just like Kant's question as to whether a rule can be accepted as a general principle,[7] and like Rawls' mental experiment, using the idea of a "veil of ignorance".[8]

Instead of using one of these approaches, I shall propose as a premise that our legal concepts have an empirical base, which is supplied by our sense of justice.[9] If we accept this premise, principles of justice can be tested by experience. The question, then, is whether or not the conclusions drawn from such a principle are in accordance with the immediate, actual experience of the individual sense of justice.[10]

This "test", however, cannot be applied as stringently as the one applied by the natural scientsts: All without exception can, for instance, realize that, according to the law of gravity, apples which separate from a tree fall to the ground;[11] but in the field of justice we often reach only a smaller rate of concurring (evaluative) experiences. Admittedly, most people would find it unfair if a hungry child were sentenced to death for stealing food; but in other questions of justice we may not find such a broad basis of congruent evaluative experiences. Evaluations often diverge as soon as we have to choose between different purposes and to weigh different interests.

Sometimes rational discussions and analyses of decisions can remove those divergences, e.g., by showing the consequences which follow from one or another decision.[12] But often some disagreements

[6] R. M. Hare, l.c., ch. 6.3 ff.

[7] R. Zippelius, Das Wesen des Rechts, 4th ed. 1978, ch. 18 c.

[8] R. Zippelius, Zur Praktikabilität der Gerechtigkeitstheorie von J. Rawls, AöR 1978, p. 248 ff.

[9] R. Zippelius, Das Wesen des Rechts, 4th ed. 1978, ch. 21, 22.

[10] R. Zippelius, The Function of Consensus in Questions of Justice, ARSP Beiheft 11, 1979, p. 118 ff.

[11] We leave it undecided whether statements of this kind also have a conventional character; cf. W. Stegmüller, Hauptströmungen der Gegenwarthsphilosophie, 3rd ed. 1965, p. 449.

[12] R. Zippelius, Das Wesen des Rechts, 4th ed. 1978, ch. 22 d; N. MacCormick, l.c. pp. 129 ff.

remain open, especially those which result from different evaluative dispositions of different individuals.

The insight into this dilemma has often led to positions of resignation: Since we cannot attain here a generally accepted cognition to the extent desired, we abandon all efforts to obtain rationality and so much consensus as may be achievable. In this way the field of science is restricted to nonevaluative statements.[13]

We should, however, abandon the alternative that, whatever is not a matter of generally accepted cognition can only be a matter of subjective decision. Aristotle was more deliberate on this point: In each field of endeavour we can only require as much accuracy as the nature of things allows.[14] And: With regard to some problems, we must be content to accept solutions which seem to be reliable "if not to all, then to most of us, or to the prudent ones; and among the prudent ones, either to all or to most of them, or to the most distinguished ones, without being inacceptable (to the common sense)."[15]

We leave it open whether such a partial consensus reveals any "truth". If it does not, there are at least the following reasons of practical legitimacy which justify our taking the broadest obtainable consensus as a touchstone for the question as to whether we are or are not to accept a legal principle or rule: In this way the achievable maximum of ethical insight and moral autonomy is given the greatest possible chance to become effective in the fields of law and politics. Rules which are acceptable to the greatest possible number have also the best chance of gaining general observance; and this in turn facilitates a reliable normative orientation for social behaviour.

To advocate searching for legal evaluations which are in accordance with the greatest possible consensus is not to say that legal decisions should be based on an offhand polling of public opinion which might be manipulated or guided by special interests. In order to achieve a detachment from manipulations and interested engagements the consensus must be "purified", especially by institutions and fair trial.[16]

A rational purification of the consensus can be promoted by analysing the consequences of the decision and by inquiring whether or not the decision fits into the context of the legal order, and especially

[13] Cf. M. Weber, Gessammelte Aufsätze zur Wissenschaftslehre, 3rd ed. 1968, pp. 500 ff., 598 ff.; R. Carnap, Erkenntnis, vol. 2 (1931), pp. 236 ff.
[14] Aristotle, Nicomachean Ethics, 1094 b.
[15] Aristotle, Topics, 104 a.
[16] R. Zippelius, l.c., ch. 23 b.

into the context of the generally accepted principles of law ("rechtsethischer Kontext").[17]

III. "Experimenting" by Comparison

The act of proposing a hypothesis in the field of science has its equivalent in the field of jurisprudence in the act of establishing a rule or principle by which a problem of living together is to be solved in an equitable, fair way. Such rules and principles must also "stand the test". If the deductions drawn from a rule or principle are not acceptable to the sense of justice prevailing in the given society, the rule or principle must either be modified or abandoned totally.

If, for instance, the principle "pacta sunt servanda" turns out not to be an adequate answer in the case of wilful deceit, it must be abandoned –not in whole, but in part, i.e., it must be restricted. The case of wilful deceit has to be excepted from it. A further exception has to be made if one of the contracting parties is a minor, etc.

Such corrections of a rule or principle in turn may need a further correction, for instance in the case of the minor as a contracting party. If he pays the agreed price out of his allowance, the contract in all fairness should be valid.

In this manner "trial and error" takes place in practical jurisprudence especially upon comparing similar types of cases. Comparison leads on the one hand to generalizations, and on the other it leads to differentiations of principles and rules which are overgeneralized.

This is the way by which legislation as well as judicial decision-making "experiments" with the criteria of a type, varies them, and examines whether or not the differences are relevant, that is to say, whether or not the principles and considerations which justify the regulation of a certain class of cases (type 1) in a certain way are also appropriate for a second class of cases (type 2), which is in some points equal and in others different from the first one.[18] This is the way by which the characteristic criteria of rules and principles are developed in accordance with a developing ethical insight.

The findings of a methodically guided sense of justice can be summed up in more general concepts; at the same time excessive generalizations can be restricted by subsequent juridical experiences.

[17] R. Zippelius, Einführung in die juristische Methodenlehre, 3rd ed., 1980, ch. 10 c; N. MacCormick, l.c., pp. 103, 119 ff., 152 ff.

[18] Cf. N. MacCormick, l.c. pp. 185 f., 190. f., 219 ff., R. Zippelius, Einführung in die juristische Methodenlehre, 3rd ed. 1980, ch. 12.

This "groping along" in the field of judicial insight is a continual process of "trial and error". In this way a thesaurus of rules and principles can be found, which is at least acceptable to the sense of justice prevailing in the given society.

A tentative method can be applied not only to questions of day to day jurisprudence but also to questions of a wider scope. Even the sequence of legal philosophies which replaced one another by critizizing one another can be understood as a process of "conjectures and refutations", by which concepts of law and criteria of justice were tentatively offered, were then criticized, and, if they did not "stand the test", were replaced by other solutions.[19]

[19] This is the methodical concept of R. Zippelius, Das Wesen des Rechts, 4th ed., 1978, cf. ch. 1 a, 14 c.