

Bringing Emotions into Legal Education through the Experimental Learning Model: a Proposal

LIDIA RODAK*

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Abstract

The paper calls for the integration of theory and practice in legal education through integrating emotions into learning process. The ideas it aims to put forward have their roots in the work of the American educational psychologist, David A. Kolb. Using the Experiential Learning Theory Model, he elaborated on, the paper demonstrates how it can be adapted to suit legal education and what the benefits are for legal education.

Key words

Kolb's Model; Experimental Learning; Adults Learning; Legal Education; Emotional Aspects of Learning; Emotions in Legal Education

Resumen

Este artículo propone integrar la teoría y la práctica en la educación jurídica, a través de la integración de las emociones en el proceso de aprendizaje. La propuesta se sustenta en el pensamiento elaborado por el psicólogo de la educación norteamericano David A. Kolb. El artículo demuestra que se puede adaptar la Teoría del Modelo de Aprendizaje Experiencial que él construyó a la educación en Derecho, y las ventajas que implicaría.

Palabras clave

Modelo de Kolb; aprendizaje experimental; aprendizaje de adultos; educación jurídica; aspectos emocionales del aprendizaje; emociones en educación jurídica

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* Lidia Rodak is a lecturer at the Silesian University, Katowice, Poland. Her main research interest is the aesthetics of law. Contact details: University of Silesia, Faculty of Law, Bankowa 11b, 40 -007 Katowice (Poland). Email: lidia.rodak@us.edu.pl.



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1. Introduction

Recent debate on legal education (LE) is mainly focused on a criticism on its ineffective and outdated aspects, especially in the context of development of new styles and techniques of learning as an alternative to memory-based teaching.¹ In addition, digital revolution in all areas of life,² or fast economic and social transformation in the countries of Central Eastern Europe (CEE)³ challenge the traditional teaching methods of law schools. Finally, enormous development in psychology definitely changed our view on the process of learning, but the LE sector was totally unaffected. The critique which I would like to address in my paper is the predominant theoretical character of LE, based on the memory learning model, which keeps separated theory and practice (Zych 2016). The main claim of this paper is that this approach overlooks emotions in the process of learning. Applying mainly memory-based system of learning instead of skill-based model (Rakoczy 2016), results in consequences going far beyond just only poor preparation for the legal profession. A memory-based model does not provide tools for understanding social reality and taking responsibility for its co-creation, which results in the loss of academic character by law schools and of ethos by the legal profession (Czarnota 2013). As a consequence, the memory-based model produces passive and reproductive students finalizing very often their careers as lower level black letter lawyers, or employed as cheap labour by international companies mushrooming in CEE (Czarnota 2013).

This paper proposes the introduction into legal education of a psychological theory of education for adults, and especially a model based on experience, known as the Experimental Learning Model or Kolb's Learning Style.

Specifically, I will suggest the application of a well-grounded knowledge of psychology of learning as beneficial and supportive to legal education. Adapting Kolb's model of experimental learning to LE in fact could be a way to foster integration of theory and practice and also dismantle the negative consequences of memory-based models of teaching in LE sector. I will provide two examples of how to apply Kolb's model by analysing two practical examples, one related to teaching legal philosophy using the approach of law and literature, and second on a simulation of the trial.

2. A Call for integration

In everyday life lawyers deal with practical cases, which is the core of legal work, while during their university training law students receive mainly theoretical background. The situation of disjunction between theory and practice, strongly criticized in the literature, was never seriously considered by law schools in terms of effective reforms. One of such attempts was supplementation of law schools' curriculum with legal clinics. This change, however appreciated by students turned out to have only cosmetic meaning.⁴ Duality of theory and practice is commonly

¹ Traditionally, curriculum of legal schools is based on dogmatic subjects thought by the memory based learning, in which legal provisions are to be memorized in its literal meaning, alternatively its judicial interpretation. More on the critique memory based learning in LE: Rodak and Kielb 2013. On new methods of learning mostly focused on developing skills and competences using active methods. See more: Stix 2004.

² Digitalisation of most legal resources, both legislation and jurisprudence of the courts, facilitates immediate access to most of the legal materials which questions utility of the memory-based model of legal education.

³ Lack of effective reforms in law schools since communism maintains the gap between the demands of a fast developing market, which creates new demands for market of legal services and the offer of law schools. Also joining EU brought only limited impact with its main reform so called 'the Bologna process', see more: Dobbins and Knill 2009.

⁴ Reports on legal clinics introduce the results of their activity: in all Polish Law Schools in 2016 there were 8,424 cases in which 1,912 students were engaged. In the pick year of 2011/2012 there were 13,379 cases with 1,994 students involved. These numbers show the symbolic meaning of legal clinic

criticized, yet as a matter of fact the relation between theory and practice should be perceived as complementary rather than being in opposition. Law schools need to educate future lawyers so as to provide them with the necessary skills for legal practice and not just a theoretical perspective. Success in this task depends mainly on changing the way law is taught to encompass both theory and practical skills, rather than on any radical reform of the subject matter.

In my view, not only the strong need for an integration of theory and practice (for more, see Kielb and Rodak 2013), but also other mentioned negative consequences of memory based model can find its remedy. There is a way to integrate or make closer these separate fields of legal education. The topic is not new, and as it turns out it can well be adapted to all areas of education. However, psychological theory of education, and especially a model of education based on experience, involving emotions into education, known as the Experimental Learning Model or Kolb's Learning Style has never been considered as a possible application to legal education.

By referring to the psychological theory of education of adults⁵ one cannot only indicate the reasons why the process of legal education is so highly ineffective but also obtain effective models of learning which can then be successfully adapted to legal education.

3. The Experiential Learning Model

In the literature there exist various models of learning.⁶ However, the most popular is the model elaborated by David Kolb (1984) built on theory of Dewey, Lewin and Piaget. Kolb's model of teaching is well-established in the field of education since it greatly contributed to the general theory of education (Svinicki and Dixon 1987), and it is valued mainly for its high effectiveness of learning, developing skills of students to think independently and integrate what can be called two types of epistemologies (see below no 6). Psychological knowledge of the process of learning clarifies the reasons why a memory-based model results with such a low effectiveness. As it is claimed in the literature on a theory of education (andragogy), adult people's learning is a process that looks completely different from what we know from traditional schools, not only law schools. The main and most important difference is considering the fact that persons in the process of learning are adult and have already gathered some dose of experience in their lives. That is why the proposed method of learning is directly based on the experience of learning persons. According to the model of Malcolm Knowles, adults approach learning in the same way that they solve problems and learn in the most effective way when a topic is of immediate value to them. All this means that acquiring knowledge is necessarily linked to shaping skills that make it possible to implement this knowledge. When there is no correlation of this kind, the process of learning does not take place. Experiential learning thus involves a

direct encounter with the phenomena being studied rather than merely thinking about the encounter, or only considering the possibility of doing something about it. (Borzak, quoted in Brookfield 1983)

He indicates that adult persons learn on the basis of their own experience, modifying it according to the new experiences that occurred thereafter. As a result, people compare or verify new knowledge on the basis of their previous experience:

activity. Only at Faculty of Law and Administration at Silesian University there are 457 students (2016). Reports on legal clinic are available at University Foundation for Legal Clinics n.d.

⁵ The most important scholars conducting psychological research on adult education are Malcolm Knowles, Gordon Allport and David Kolb.

⁶ Psychology of learning and learning theories investigate the ways knowledge is absorbed and processed. Among many theories and methods of learning, here are some relevant to LE: Problem based learning, more: Norman and Schmidt 1992; Instance based learning: Dietterich and Michalski 1983; adults learning, more: Mezirow 1991 and Tennant 2006.

emotions, feelings, performed actions (their own actions on/with objects, personal contact with others, observing actions of other people).

A mind of an adult person cannot be perceived as a blank slate or empty cabinet, since everybody has previously gained opinions and conceptions. That is why the main task of the teacher is to interact with the experience of a student, that is to say with what the person in the process of learning is bringing into it. The process should proceed by referring to the potential of an individual student and optimizing its utility. If, however, there is no previous experience of a student in a given domain, a teacher should create one, which could be an opportunity for students to gain new experience. The preferable methods of teaching are then based on interaction, on the constant involvement of the participants working on their existing experience and on its transformation.

The cycle described by Kolb is composed of four main stages through which every learner must undergo to be able to say that a learning process has taken place:

1. *Concrete experience* – This stage involves individual personal experience or reinterpretation of existing experience. Alternatively, when there is no previous experience, the performance of a group task takes place. Here – and – now concrete experience can validate and test abstract concepts. It gives life, texture and subjective personal meaning to abstract concepts and provides common reference point for testing the implications of ideas created during the learning process (Kolb 1984).
2. *Observations and reflections* – At this stage the observation of experience takes place followed by conclusions based on individual experience. Here any inconsistencies between experience and understanding can be identified and analyzed.
3. *Formations of abstract concepts and generalizations* - At this stage one deals with the generalization of internalized experience. Its role is to make theory out of practice through reflection that can offer new ideas, or alternatively, modify existing ones that used to be merely abstract before. At the same time the confrontation with other theories, if they exist, may take place at this stage.
4. *Testing implications of concepts in new situations* – This is a final stage in which the application of a new theory in practice is made possible. It must be planned in advance in order to test its feasibility. In this way, once at this stage we can plan to enter into another cycle with new experience, in order to get new reflection, draw new conclusions, and create or verify a new theory that can be made applicable, etc.

4. Theory and practice go together

Experience is the basic and most important part of Kolb's model, but not the only one. As we can observe, Kolb's Cycle is not based on the dichotomy of theory and experience, but tries to combine and integrate these two perspectives. Experience is needed in order to verify theory through internalization and in the further stages it is generalized experience that may lead to a new theory. What is more, experience can also be supported by a theory from previous cycles and previous experience. Thus, one can say that experience is preceded by a theory, which also occurs after it. There is then a stable and sustainable link between one and the other element, theory and practice, which enables balanced development.

Kolb's cycle is represented graphically by a circle, beginning with experience and ending up with the opening on next new experience. This can suggest that the process of acquiring knowledge requires one to go through all the four stages and that it really has no beginning and no end. It is embedded in the context of our present and past experience to which it must be related.

The application of the Kolb's model is also supported by the general level of knowledge of a given person, which affects the quality of transformed experience. In this sense, the cycle described by Kolb reminds us of the hermeneutical circle.

Going through all the four phases of Kolb's cycle with personal individual involvement one can create and/or verify theory independently. The theory acquired in such a way is not easily forgotten since it is the result of individual experience and it becomes part of ourselves as human beings. In contrast, the theory that has not been assimilated or internalized does not stay in our memory at all, or is kept there only for a short time.

5. And beyond...

David Kolb formulates the definition of learning as "the process whereby knowledge is created through transformation of experience" (Kolb 1984, 38). However, Kolb's model of learning is based on combining elements of experience, perception, cognition, and behaviour (Kolb 1984, 21) in order to reach the transformation of the output experience (previous). It means that what we consider here is learning in a broad sense, so it demands from the student different forms of activity: passive absorbing of knowledge, active internalization of theory, abstract and concrete ways of approaching information. Gaining experience is possible by creating one's own notions (theory) which are then confronted with scientific knowledge. In the Kolb's model there are two poles which are essential if we wish to understand it fully: concreteness and abstractness on the one hand and experimental activity and passive observation on the other hand (Kolb 1984, 21). This shows that Kolb was trying to broaden the process of learning through extending it into four different forms of cognitive activities. In relation to this, he also enumerated four diverse ways of acquiring knowledge, skills and experience: through feelings, observations, thinking (reasoning) and acting. All that means that it basically referred to the individual potential of one's personality. This, in turn, implies that people with different types of personalities tend to learn in different ways, have different skills and different problems with acquiring knowledge. So, assuming that there are at least four types of tendencies typical of each personality: empirical, analytical, theoretical or pragmatic, everybody encounters difficulties of his/her own type. In the cycle devised by Kolb, people with empirical tendencies prioritize taking action and are basically focused on their experience, which makes them very often stop at the first stage of Kolb's model. People with analytical skills have tendency to analyse their problems in detail and make them central. Those who are theorists are used to drawing conclusions from what they have experienced and generating theory but only pragmatists easily change their behavior and are able to complete Kolb's cycle.⁷ As one can see, each type of personality has a propensity for a certain type of behaviour, due to which the learning process may be brought to an end or, alternatively, remain far from complete.

6. Integration of two types of epistemologies: including subjectivity

The learning process as we know it in the Western world is based on dualistic scheme, i.e. what is objective and external to us in relation to what is subjective and inside us. Our mind learns what is outside through various methods which are to lead to cognition, and as a consequence obtains results which are characterised by objectivity and scientific reliability. The problem, however, is that in that process the subject becomes the tool of cognition and is treated as if it did not exist. Positioning the mind in a way which does not allow for self-focusing forces one to perceive, to know and to learn the world in „an absent way.“ Directing one's attention to what is external while rejecting at the same time the internal does not

⁷ Kolb's typology of personalities is the following: converging (doing and thinking - AC/AE), accommodating (doing and feeling - CE/AE), assimilating (watching and thinking - AC/RO).

lead to gaining knowledge about the world, as it necessarily is related to the development of the subject itself, which through being engaged in the world is to undergo change. For sure, there is no education cycle happening here, as the fact that the mind slips through the external world does not leave a trace.

The mode of education in the post-Cartesian world is based on methods of objectivity, impartiality and futility. Subjectivity has been completely fended off and treated not so much as undesirable but rather as disturbing, obscuring the cognitive process, leading to subjectively and individually significant results which are – what is most important – universally valid. Such reasoning is based on the assumption that there is one truth about the world which is possible to be discovered.

In the meantime only the individually significant results and experiencing them personally and subjectively may lead to learning something, i.e. in effect to the change of subject, and thus – speaking the language of education – may result in the education process taking place.

It is the process of engaging the mind which undergoes changes when in contact with the external, thanks to which learning something not only about the world (i.e. on the external level) takes place, not only about oneself (i.e. on the internal level), but also about *oneself in the world* and *the world with oneself*. Only if one excludes the subjective perspective, is it possible to get in touch with oneself, i.e. to recognize one's truth about the world thanks to the current interpretation taking place.

Acceptance of the subjectivity, in spite of appearances, gives possibility of subjectivity, because as such subjectivity is fended off, the interpretation of the world is inadequate, artificial, non-experienced, providing description of something that the subject does not see, as the subject is concentrated on blocking, suppressing and calming the message given by the body.

If the attention is directed exclusively to the external, we unintentionally focus on what we want to learn. If the attention is drawn to ourselves included in cognitive process, then it is possible to enter the process of understanding, interpretation and sense-generating processes on the basis of our own experience and thanks to careful observation of ourselves. This is when we experience the learning process.

The education process is the skill of observing where I am at a given moment of time in relation to the point where I have been, what has changed, how I feel about such change. The skill of observing oneself offers possibilities of entering into the process of learning the outside world in a conscious way synchronised with getting to know oneself.

Concluding, the learning process should be based on a deep inner commitment, emerging of subjectivity and trusting it in going through this process. It means that the student as a subject – thanks to his/her skills – transgresses himself/ herself, and thus that he/she learns.

Absence of Kolb's model in legal education practice of learning is not very surprising. The common scheme of education is based on the strong categorization into subjects engaging intellectual aspects of human perception, and those working with our emotions and aspects of socio-emotional life (Kolb 1981). Humanistic university education, and legal education is not exception, used to be perceived as purely intellectual discipline. Since Kolb's model integrates this two approaches, indicating that there is no substantial difference between the intellectual and emotional domains, it can be successfully applied to fields considered as purely intellectual. This division, inherited by the Cartesian dualism separating reason and emotions, has a long tradition, however recent neuroscience research highlighted the relevance of the basis of Kolb's theory, as it is discussed in the section.

7. Emotions as drive for actions

The current renaissance of research on the role of emotions in humans life run mainly by neuroscience indicates that empathy, as a state of co-experiencing with others, is not only the most significant way of communicating with others, but also understanding others and learning. In accordance with classic, but revalidated views, empathy played an important role at the early stages of child development and as we tended to think we gradually refrain from emotional communication when socialisation occurs. As it is observed by the latest neuroscientific research, emotional communication is a basic and dominant form of interhuman communication and interaction with environment during lifetime. First of all, neuroscience redefines emotions and their role in human life as the main drives for action. Anthony Damasio, in *Descartes's error* (Damasio 2008), claimed that "the reasoning system evolved as an extension of an automatic emotional system with emotions playing diverse roles in the reasoning process". It denotes that emotions play a central role in cognition, communication and communication with others. Attention, perception and memory are directed by emotions. They also influence reasoning and decisions (Winkielman *et al.* 2007, Damasio 2008).

Two accounts to emotions in the process of processing information are known mainly in psychology and cognitivism. They are named as follows: *modal* and *amodal*.

The amodal account, which symbolic mind theories are based on (Fodor 1975, Newell 1980), assumes that the mind encodes information in an analogue way in different conceptual systems (sight, hearing, smell, etc.). Subsequently, information is processed into abstract notional form, functionally and structurally separated from primary sources in which it was stored. As a result, amodal symbols (notions) occur, which take part in high level cognitive processes such as categorising, deducing and language.

Most generally speaking, the amoral account assumes that digesting emotional information is done in exactly the same manner as each different kind of information. On the other hand, embodied cognitive theory assumes amodal account. According to it, high cognitive processes (thought, language) involve partial reactivations of states in modality-specific.

These theories assume that high cognitive processes are based on partial reactivations of sensorimotor states. According to these theories, human knowledge requires, in a sense, a recurrent "experience" of a given event via sensual processes, which took part in the primary perception of this stimulus. It also means, that there is no redescription into abstract symbols.

Sensorimotor/affective states are captured and stored in modality specific association areas and then partially reactivated (Winkielman *et al.* 2008, 26). In accordance with embodied theory during the experience of some emotional stimulus, the record in association areas takes place, thanks to which during the recurrence to this state (recovery of the experience in consciousness), e.g. while thinking about it, the area is reactivated. Therefore this phenomenon is called embodied simulation, because a part of experience is regenerated or even recreated in such manner as if the individual was re-affected a given experience but in real time (Gallese 2003). What is worth emphasizing here is that simulation is regarded as an active process, not a passive one.

This dynamic aspect of embodiment, or body reactivations during a cognitive process demonstrates that body is strongly connected with a cognitive process (hence a name - *embodied theory*).

To conclude, embodied theory demonstrates that emotions are involved not only in emotional terms but even in the act of processing information and in abstract terms.

Under the examination is the ability to connect simulation with more abstract knowledge depending on the current goal people can represent, no matter whether a given concept is more modal or amodal. People can engage different amount of perceptual simulation to more symbolic forms of knowledge representing and processing of abstract information (social, legal concepts, e.g. contract, expropriation or e.g. logical notions such as eminent domain) [Barsalou 2003].

8. Kolb's Cycle and Legal Education

Discussed here model of learning can be adopted in legal education as what allows for the integration of theory and practice. In fact, part of academic legal education is based on legal case studies.

In many countries this notion of integrating theory and practice (or at least changing an equilibrium between theory and practice) has already been introduced into legal education as far as the techniques and methods of legal case solving are concerned (Schmitz 2010). However the way they are presented to a student brings to mind another set of external rules that must be applied to all cases in a mechanical way. They remind one of standards of performance based on repeating patterns. This still differs from Kolb's cycle, which basically relies on internalizing an exercised case. How then will legal case study look like when it is reformulated according to Kolb's model and what is the new quality that it can offer and bring into legal education? Last but not least, what would be the consequences of its application?

The main difference between the traditional way of solving cases and the one based on Kolb's model is that the latter relies on enacting the situation, experiencing, e.g. a decision-making process from different points of view; that of a judge, a prosecutor, an advocate, a litigant, etc. By taking on various roles one can create an authentic experience and feel the specific aura surrounding a particular legal profession. This type of experience opens up and enhances communication between the legal authorities in the complex process of applying the law. Therefore, acquisition of knowledge will mainly be based on the "work on an experience" as a method of teaching, even though it is practiced on the basis of an already acquired theory and general knowledge. Solving every legal case is preceded by theory that has to be known by the student in advance, like, e.g. normative regulations. So before the cycle, described by Kolb, starts, there is the space for absorbing theory that the student must get to know in order to be ready to enter the cycle.

However, as it has been said before, the core of the exercise is to make an experience out of a sample case. The student has to apply the already known legal regulations that should be supported by his/her general knowledge and then try to solve the case as if he/she is a judge/prosecutor/defendant/litigant, etc. Alternatively, if there is a group of students, everyone can take the role of a different party in order to create courts like a situation. What follows is the experience that should be discussed by the whole group.

1. *Concrete experience* – The student receives the case to solve as if he/she were i.e. a judge, has to take a final decision and justify it in three ways: morally, legally, and intuitively (e.g. legal realism). Alternatively, in the case of a group task, each student puts himself/herself in the shoes of a chosen legal party and experiences their point of view.

2. *Observations and reflection* – The student needs to check to what extent the theoretical knowledge he knew in advance is applicable, and what the basis of his/her decision really is. How does he feel about taking the decision? Whose decision was it? What does he think about the consequences for the legal subject? The student can compare the extent of applicable knowledge he possesses and become aware of any *extra legem* elements affecting *legal decisions*.

3. *Formations of abstract concepts and generalizations* – At this stage the verification of a previous theory takes place, which means that the student needs to specify what he/she thinks about the results of the stage 2 and to evaluate them. Also, any inconsistencies between experience and understanding can be singled out and analyzed here, including the question of how the student confronts his/her position with those of the others, drawing theoretical conclusions from both his own work and that of the others.

4. *Testing implications of concepts in new situations* – At this stage the student makes his/ her own plan of how to deal with the next cases, answering the question: what can he/she take from the experience for himself/herself? What does he/she consider to be the best way to deal with legal cases, as an already verified theory?

9. An Example: 'The Reader'

The use of Kolb's model may take place by gaining experience by working on cases as the authentic court cases. However, we may also use work methods propagated by Law and Literature movement. Watching a film or reading a book presenting legal problems has the advantage over solving a hypothetical court case when much stronger involvement of emotions take place, identification with one of the parties and as a result support one party in a dispute, closer to that which is reflected in reality. The example of work with a film in accordance with Kolb's model may be provided by work with a part of the film *The Reader*.

Before the projection a group receives preliminary information about the film and explicitly clarified objective of the task.

The film was made based on a book titled *The Reader*, written by Bernhard Schlink (2001), a German philosopher of law and an active judge. The very fragment concerns the participation of a group of students attending seminar classes from philosophy of law in Nuremberg trial. One of the students, Michael Berg, during the interrogation of the defendant in a courtroom, recognises a person he personally had a love affair with in the past, Hanna Schmitz. The court scene demonstrates the interrogation of the principal defendant, Hanna Schmitz, and reports from the witnesses of events, who survived Death March.

The objective of the task: The assessment of the judgment pronounced by a judge and identification of the character's attitudes in terms of law concepts, the assumptions of which are the explication for the views presented by them about the case and undertaken activities. The references to the concept of responsibility corresponding to particular law concepts may be used in the background. A student is supposed to answer the questions: what decision would he make being in a judge's shoes, in what way would he clarify it and the students should explain the relations of his decision and explanations with particular law concepts (law of nature, different formulas of legal positivism, Radbruch formula).

1. *Concrete experience* – A group is watching a court scene from the film *The Reader*. Six female warders, employed in Siemens plant, were accused in a trial of death of 300 people. During the trial the victims were interrogated as well, who survived as the witnesses of events and wrote a book depicting tragic events of a death march in Auschwitz concentration camp, and simultaneously this book was a reason for instituting a trial.

During the interrogations Hanna Schmitz admits her specific role in a case, which she did not fulfil. She admits making reports, drawn by shame before revealing that she is an illiterate person. The judge accepting her pleading guilty as the main reason for evidence, sentences her to life imprisonment.

Michael Berg, realizing that he has some news about the defendant, which could change the course of the trial, tormented by pangs of conscience, eventually makes a decision not to reveal it to court.

While following the court case, a student becomes involved emotionally in the case, playing a role of a judge, who is supposed to make a decision. Simultaneously, he has an emotional approach towards the defendant Hanna Schmitz.

2. *Observations and reflection* - In the first place a student answers the questions at the level of emotions, what he felt towards particular characters, what emotions did they evoke simultaneously analysing the reasons of particular impressions. He answers the questions: What do I feel towards the defendant? What do I feel towards the remaining defendants? At what emotional and intuitive level do I perceive the judgement announced by the judge?

Subsequently, he proceeds to a reflection stage, the aim of which is realising what the reasons are, that a. he stands up for the defendant, b. condemns her, c. stands up for her and condemns her as well due to different possible reasons.

The subsequent stage is the explication of the reasons of accusation or standing up, or realising what he is driven by at the intellectual (cognitive) level.

The reasons may be: a) the necessity to bear responsibility for doing extreme evil at the moral level; b) Law, at the moment of committing an act did not condemn the activities of warders working in Auschwitz; c) Diminished responsibility, which causes that Hanna does not comprehend in an *ordinary* way – she comprehends by rules, but she does not take the opportunity to make a decision. This situation causes doubts or we may use the concept of a *reasonable man* to assess her case; d) What sense does the trial instituted for six warders have if everybody knew about concentration camps in Auschwitz?

The next stage concerns the identification of views related to concepts of law. How the particular arguments should be combined with the specific theoretical-legal standpoints together with a critical reflection concerning their functioning in practice. The approaches of the characters participating in a watched trial may be helpful. The representative of a legal-naturalistic stance is a student from a seminar group, who expects *justice* from a trial and accuses all Germans as co-responsible for crimes on Jews. The judge makes a decision based on Radbruch formula, or evaluates cause extreme evil from a moral position, despite law, which did not forbid such acts at the time of their execution. Simultaneously, preserving the frameworks of a positivist trial he tries to combine the defendant's motive with the consequence, which is possible only in his opinion. Michael, being the closest to the case and knowing all the truth, although he felt morally responsible due to complicity, by not revealing the truth, respects Hanna's will, simultaneously not forgiving her what she did. Hanna in her rather naïve, almost childish approach, demonstrated by absent-mindedness, resembles a positivist approach, which is brought to non-reflective obedience of rules. The personality of naïve Hanna may connote the naivety of the so-called *hard legal positivism*.

As Bernhard Schlink said in one of the interviews, the construction of the character of Hanna was inspired by many characters which the author observed in his life.

3. *Formations of abstract concepts and generalizations* - This is a stage, in which a critical reflection takes place towards approaches of legal positivism, legal naturalism or Radbruch formula. It is possible to formulate critical arguments towards particular standpoints at the theoretical-legal level. The confrontation of different planes of reasoning within the made judge's decision, may also lead to reflection on its complexity at the moral and legal level and complicities at the personal level. The constraint of legal reasoning is particularly observable in the so-called hard cases. Legal reasoning, as too simplified model of making a decision,

does not include the entire complexity of situation at the moral, social or individual level.

As a result, positive law may be defined as the only premise out of many premises contributing to making a decision. Unfortunately, this premise is the only one revealed in the process of clarifying judgements.

This stage also comprises the generalized reflection done from the individualized level. It may concern, for instance, engaging emotions in the process of making decisions, difficulties of eliminating one's own view related to the case and hence formulating conclusions concerning neutrality or impartiality in the process of making decisions.

4. *Testing implications of concepts in new situations* - The specific postulates to function in the future are formulated at this stage of Kolb's cycle, in this case making court decisions. Two postulates: concerning the way of applying law and engaging emotions at the personal level, may occur with reference to the conclusions formulated above.

At the first level the postulate may concern the awareness what legal concept underlies the decisions and the awareness which *non-legal elements* are involved in the case: moral decisions, evaluative decisions, the judge's responsibility for the decisions becoming the part of law (*chain enterprises*), the judge's professional responsibility for making a difficult or controversial decisions (career planning), etc.

The next of postulates for the future court decision-making in the so-called hard cases may be reworked of one's own views and emotions related to them. Objectification and neutralization of the person making decisions is related to the awareness of emotions and feelings, which we are driven by and revealing needs which underlie them. Such work at the level of own emotions and convictions may lead to neutralization and objectification, which concern the person making decisions.

10. A Legal Case

As Kolb's cycle is the method integrating information and emotions, which is the central aspects of learning based on experience, below I will describe a simple case of its application in LE.

The case concerns a Polish couple, Maria and Alojzy, who were married for thirty years (Judgement of the Court of Appeal in Katowice, 21 November 2006 III AUa 1547/06). In everyday life, Maria was working as housewife being responsible for maintenance of their house and bringing up their disabled son. Alojzy, being on a disability pension, received 750 zł per month. However, he spent 300 zł on alcohol and 350 zł to support the household. Maria exercised physical violence against him, by trying to choke him and poking. Alojzy never exercised violence on her. On the contrary: "When he was not under the influence of alcohol, he took care about the household, it means, he cleaned and cooked" (Judgement of the Court of Appeal in Katowice, 21 November 2006 III AUa 1547/06).

As determined in the judgement of the Court of the Appeal (III AUa 1547/06) Maria killed her husband and kept his body three months after his death in a home closet. For the offence she was sentenced to seven years of imprisonment, then she applied to the Social Insurance Institution (ZUS) to grant her a pension after the death of her husband.

After hearing the basic information about the case, a group of students received instruction to start the exercise, which is structured as followed. Each student needs to decide which role he/she wants to play. The available roles are: judges, legal defenders, prosecutors, the person who plays Maria and witnesses-neighbours. After taking decision each student received a properly prepared

materials with the description of the case from the point of view of the role she/he is going to play. For example, instructions for defenders were as follows:

“During a conversation with Maria get all the information needed to conduct the case. Prepare the defence of Maria and deliver a defence speech to the court. Remember that lack of a clear legal regulation gives the court a discretionary power to decide”.

After familiarizing with the facts the simulation of the trial began, in which each student plays its role: so Maria and witnesses are cross-examined, the defender delivers a defence speech, the representative of ZUS expresses its position and the judges decide whether to grant a pension to Mary.

At the same time, students receive a form about their emotions, helping them to verify what they personally feel towards Maria and their emotional drive for the final decision. The aim of the form is to support impartiality of the decision-making process and helping them to understand how their reasoning and the use of arguments is emotionally influenced. To do so, it's necessary to (1) identify the involved emotions (cognitive empathy, relevant and not relevant empathy) [Załoski n.d.] in order to develop awareness of the emotional aspects of the decision; (2) to identify motives which constitutes negative or positive emotions towards Maria; (3) to understand what is helpful and what is disturbing in defending/condemning Maria. Going through this process gives an opportunity to evaluate the facts of the case and the legal regulations to be applied, being fully aware of the emotional engagement. This means taking personal responsibility for it and using personal creativity to recognize the influence on the situation.

Then, after completing the trial simulation, students shall complete any missing parts in their forms if needed. As next, one can proceed with discussing students experience according to the Kolb's cycle. This is to derive a theory from the experience of the simulation, and to process students' emotional work.

An example of a student work:⁸

1. How do you feel about Maria?

- *Mercy, since she was living with alcoholic husband and grow up disable child.*
- *Disappointment – how she could have killed her husband, nevertheless he drunk and harassed her.*
- *Admiration – she sacrificed herself totally.*

2. Identify motives which constitutes negative or positive emotions towards Maria.

- *I have mercy towards her, since she had such a hard life with alcoholic husband and growing disabled child. My mum has alcoholic father, and she told me many times how hard her life was due the family situation.*

3. What helps you and what disturbs you in defending/condemning Maria?

- *What made me feel disturbed is that mercy I have towards her, since it is also a sensitive topic for me. I can suspect that her life was strongly determined by her family and very poor social condition, so I perceive her also as a victim not only a perpetrator.*
- *I also think about Maria and Alojzy as a couple who were happy together when they were young, but through years, started to harm and hate each other.*
- *What helps me is probably that I don't have a direct personal experience of that kind, so I might be sensitive to her story, but hopefully objective.*

⁸ The material comes from the classes that were given in the winter semester 2016/1017 *Emotions in the Law* held by the author with the group of 14 students. The name of the students were modified.

4. List the elements of cognitive empathy

- *I understand that Maria could have felt powerless in her situation, probably being in a vicious circle of violence. She hasn't got any support from anybody, any institutions, friends or family. There might be "no way out" of this situation in Maria's head.*

5. List the elements of relevant empathy

- *I could imagine that she felt furious seeing again her husband drunk again. I would feel the same, and I am actually angry at Alojzy, that he was such an irresponsible person! For Maria, it could simply be "the drop that spilled the cup".*

6. List the elements of irrelevant empathy:

- *When I stand in Maria shoes, thinking that she was in such a poor situation I feel only mercy to her and rage and disgust toward Alojzy. This is what I personally feel towards them.*

7. The final decision

- *Taking into account that what, I realized, I feel towards Maria is strongly driven by my sensitivity and identification with the topic I tend to take emotionally Maria's side.*

- *However, weighing all the emotions of this case from the one side mercy to Maria and disgust to Alojzy, I can also feel condemnation of the fact that she killed a man. The last aspect seems to me much clearer right now.*

- *In the end, I would not grant her the pension after Alojzy. There were ways out of this situation, surely not easy, but less evil than what she did. She killed a man who was her husband and the father of their common children.*

- *After knowing this, I can consider legal regulation, because now I know that my research is not biased. At least, I am honest with myself and the doors to objectivity or impartiality are open to me.*

In the analysed case of the student's work it can be observed that he went through the following process: from unaware identification with Maria through involving empathy for her as a victim, to seeing her in a more aware way as both the perpetrator and the victim.

After simulation of the trial the discussion with students should follow according to Kolb's scheme of four steps: experience, individual feelings, theory, new action (as you can see in section 9.).

11. The Benefits of Kolb's cycle to LE

Law schools teach mainly theory, and the education is based on traditional educational methods, mostly grounded in rationalist epistemology which involves abstract symbols and the idea of acquisition. In particular, it rests on a passive model of memorizing abstract and general legal rules. The methods of verification check mostly what has been memorized by students, without paying attention to the skills necessary to transform or use what is called *knowledge*. Legal education, in the times of open access to legal information does not require memorising information, but the need of processing the skills of using and processing them. Only the process of applying information can be called *knowledge*.

However, there were no attempts to apply Kolb's experimental model to legal education, but its applicability may bring important changes.

First of all, it can be a great response for the criticism of disjunction between theory and practice in law schools. It could be also a remedy for what follows from theoretical model of *learning*: passivity of students, lack of independent thinking, absorbing ideology, obedience. Bringing together theory and practice changes the

perception of students themselves of what is learning. The application of Kolb's model, necessarily starts from experience and leads to making theory out of the personal practice. Thanks to this students integrate theory and practice by themselves. This process basically develops skills of coping independently with a case, through active and personal engagement. Transforming individual experience into theory is to realize how one experience the case and how to rationalize it. Every new case might be a new challenge, since one needs to approach it reflexively, but through the practice the skills are built and might be use in every new case.

Working in a group gives students additional chance to make a comparison of their results with others. Through this they can have insight into the emotional system and types of rationalisation made by other people, which is extremely beneficial in the legal profession.

As a result, students recognize themselves as contributors to the decision they made. This implies absorbing a broader and more complex understanding of what is law, which is not based on mechanic application of legal rules, simply derived from the law, but on the complex set of moral, socio-emotional and legal dimensions. Such a vision entails the development of a personal attitude to the case based on individual responsibility, which contributes to reinforcing the legal ethos. This combination of necessary creativity that has to be applied to the case with the right dose of rationality, represented by legal and social constrains, is a very powerful tool in educating good lawyers.

Last, but not least, Kolb's model shows that integrating theory and practice means that humans' emotions are deeply involved in the process of learning. Dealing with humans' emotions seems to be the very first step to get engaged in deciding in legal cases. Applying law from a practical perspective (legal realism doctrine) means to take a decision on few possible levels: emotional, moral, social and legal.⁹ Curricula in law schools, as they are mainly dominated by dogmatic courses, take prescriptive character (Wojciechowski *et al.* 2015). However, as the legal practice indicates, an interaction between parties in trials is dynamic and involves emotional aspects (Wojciechowski *et al.* 2015). Despite, judges are recognized as having emotional work (Hochschild 2003, 147), the rule taught in a law school is unambiguous: "judge should not express any emotions, unless it's of a clear interest of judiciary system".¹⁰ This is a part of hidden program in legal education, which introduce a judge as the dispassionate, unemotional official, who magically transforms from a human being into a civil servant who delivers a judgement on behalf of the country. These requirements, even though challenged repeatedly in the literature,¹¹ put lawyers in a situation which is difficult to accomplish. It may result in emotional displacement or by taking decision driven by emotions very often suppressed by believe that emotional impartiality is possible. Due to this unrecognised part of legal education, the application Kolb's Cycle may bring profitable change to legal profession, since it teaches that the only way to become impartial is not to eliminate emotions but being fully aware of them and tune them with the case.

12. Conclusion

The postulates indicating the directions of a reform of legal education unanimously emphasize that we need to include practice in the currently dominating theory and

⁹ Legal Realism presents the judging process as complex process, where legal factors are only one among others influencing a final decision.

¹⁰ The therapeutic jurisprudence approach promotes a different model of judging, where revealed emotions can serve both the parties and the judge himself. See more: Slobogin 1995.

¹¹ Jerome N. Frank (Legal Realism Movement) between 1920 and 1930 insisted that judges' psychological and personal characteristic influence judicial decision-making. See Frank 1930.

a point of reference should be transferred from a memorized education model into shaping skills.

However, the above postulates, although unquestionably appropriate, may not fully lead to improve a system of legal education, because they still rely on an educational model based on the targeting a total student's attention outside.

The teaching process based on shaping skills, analysing information appearing from outside favours a passive approach of a student.

This is what a model of adult education suggests, incorporates internal work, profoundly activating a student. To go through Kolb's cycle, a student must make an effort to refer to his interior, relying on at least elementary insight in himself and self-cognition. To be able to answer the questions from each stage of Kolb's cycle, he has to have access to his emotions, be able to recognize them, indicate their source, subsequently conduct honest reflection on them and then from such a level to formulate theories and draw conclusions as for the potential work. The focus on interior and self-cognition are the essentially necessary elements to shape skills and orientation in the world.

The education model based on Kolb's cycle, if it was hypothetically applied in law schools, is certainly a way of elimination of the implementation of 'a primitive version of legal positivism' mainly emphasizing the application of 'ready-made external rules'. It suggests, instead, emphasizing the role of responsibility and ethos, which play an important role in decision-making.

An adult learning cycle resembles an old truth handed down to us by the Greek philosophers. They perceived a process of gaining knowledge as a mere practical activity. Therefore, ancient philosophical schools were open to students who wished to practically test a given philosophical system and not just to get familiar with specific theoretical views. Enrolling in an ancient school, e.g. the sect of Pythagoras, was followed by the practice of a particular style of living which involved translating numbers into the rule of the universe, such as a numerical expression of the phenomena occurring in nature.

Taking a more picturesque example, Diogenes of Sinope demonstrated the doctrine of Cynical philosophy by exercising a particular lifestyle which meant living in a barrel. According to the Greeks understanding certain concepts was tantamount to acting according to them. As we read in Pierre Hadot's book - philosophy is a spiritual exercise (Hadot 2000):

Spiritual exercises are based on the transformation of the perception of reality and metamorphosis of personality. The word "spiritual" can be understood not only as referring to the work of thoughts, but to the whole individual psyche.

As a matter of fact, these (...) are parallel to transforming the world view and a metamorphosis of personality. The word 'spiritual' allows to perceive not only a work of thought, but the entire psyche of a unity, most of all it presents the appropriate dimensions of these exercises; thanks to them a unity is lifted up to the life of objective Spirit, or it is transferred to the dimension of the Whole [Immortalize oneself by exceeding oneself]. (Hadot 2000)

Therefore, the practice of spiritual exercises was meant to verify the doctrine of a philosophical school, and practical reliability was an evidence of the truth of a theory.

With the beginning of the Middle Ages, the way of acquiring knowledge and practicing philosophy has changed. It has become a field of a purely theoretical discussion. The change can be expressed by a metaphorical representation of the philosopher who is like a sign standing at the road that points the way to the city, but he himself is not following it. This style of studying philosophy and science in which theory is detached from practice has spread all over Europe and remained valid to the present day. It seems that the metaphor of the sign standing by the

road is an accurate diagnosis of the condition of today's law schools which indicate what should be learned, but themselves do not follow the practical consequences of the argument.

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