

INTRODUCTION.

THE CONSCIENCE OF JUDGES AND APPLICATION OF LEGAL RULES

The book is devoted to the problem of the influence of moral judgements on the result of judicial decision-making in the process of application of the established (positive) law. It is the conscience of judges that takes the central place in the research. Conscience is understood in the meaning developed in the theory of Thomas Aquinas as the complex capacity of the human being to make moral judgements which represent acts of reason on the question of what is right or wrong in a particular situation.

The reason why we need a theory of conscience in making judicial decisions lies in the nature of the positive law itself. On the one hand, there is an intrinsic conflict between the law as the body of rigid rules and the law as an living experience of those who are involved in social relationships. This conflict particularly finds its expression in the collision of strict justice and equity. The idea of equity does not reject the importance of rules in legal life. What is rejected is an idolatrous attitude to the rules when the uniqueness of a human being, his well-being and happiness are disregarded and sacrificed in order to fulfil the observance of the rules. The rules themselves are neither good or bad. What makes them good or bad is their application.

In the content of the book, a legal rule is understood as a regulation set up by a body having legal authority, which prescribes a certain action or forbearance under a certain state of facts. However, no human authority can set rules which are able to take into account all the varieties and complexities of social life. Often for a lawgiver it is enough to have one or few facts as the condition set for an enforcement of the relevant rule which disregards all other possible related facts. It is a natural defect of every legal rule that it fails to foresee all possible sets of facts. Trying to cope with this problem, the lawgiver may formulate a legal rule in very abstract terms leaving to those who apply the rule the task of adjusting it to particular situations. In certain areas of law the judges have significant power to interpret rules and even to choose them according to what they think is appropriate in the given situation. The way they deal with the rules is thus of paramount importance. A theory of conscience can contribute to a better understanding of how the judges interpret the rules, and at the same time it can set goals for judicial policy and give practical recommendations.

The modern development of the law attaches even greater importance to the problems of judicial conscience. On the one hand we can see the growth of technicality of the law. The law acquires features of a machine in which the judges become a part of impersonal mechanism of the perfunctory application of law.¹ As a machine it can be manipulated by those who are in the highest political authority, and can acquire characteristics of oppression and alienation. On the other hand, the law can be an instrument of social engineering which tries to adjust different human and environmental interests and to solve complex social problems of the contemporary era. Law can and must be used as the means to bring social harmony among the members of the society. This kind of law is open to change. It is not stuck into rigid legalism and fidelity to the letter of rules.

Thus, we can state that the importance of a theory of conscience in making judicial decisions arises from an intrinsic conflict which can be traced throughout the history of law, the conflict between the law as the body of rigid rules which are imposed in order to preserve the status quo in the interests of those who have power, and the law as an instrument of building a more just and fair society, an instrument which reflects the living experience of its subjects. A theory of conscience seeks to bring this antagonism to light, to articulate it and to make the truth evident: a judge as well as any human being is faced with the existential choice between being a slave of the impersonal coercive mechanism of oppression and alienation, or being a servant of those who are in need of care, compassion and love.

The thesis that conscience can play an important role in construction, interpretation and application of legal rules leads to the problem of the plurality of commands of conscience. It is true that the conscience of one individual can differ significantly from the conscience of another. Above all, the conscience of the same individual can experience doubt and perplexity about which moral action is correct. The plurality of judgements of conscience and its frequent uncertainty pose the question of whether there is a right judgement of conscience in every particular situation, and if there is, what are its criteria? The theory of conscience developed in this book is based on the presupposition that in the overwhelming majority of moral and legal cases, there is the right answer, and therefore it is possible to speak about good conscience and its criteria which allow us to distinguish good conscience from erroneous.

In this book I will attempt to show the meaning of good conscience, its content and also practical implications for judicial decision-making. A judge must have a good conscience which allows him or her to apply law justly and fairly. Judges must be aware that their conscience as well as conscience of other people involved can be erroneous. The concept of good conscience stresses the necessity of moral education of decision makers and the importance of their personal effort to arrive at a good moral judgement. The need for self-examination is one of the central topics of the book.

¹ Bankowski Z. 'Law, Love and Computers.' - *Edinburgh Law Journal*. 1996. 1. - P. 1.

THE STRUCTURE OF THE BOOK

The book consists of three parts. The first part is about the connection between the conscience of judges and legal reasoning. The second part is about one particular type of judicial conscience guided by the principle of love for one's neighbour. Finally, in the third part, the implications of the principle of neighbourly love are examined in different judicial contexts.

Part I. In this part of the book, the psychological theory of law of Leon Petrazycki and the Thomistic theory of conscience are presented as the attempts to expose theoretically the essential characteristic of a good conscience. Although the theory of Petrazycki is almost unknown in the West, it contains a variety of ideas which can contribute to a contemporary theory of judicial conscience. Both theories seem very different, but as it will be shown in the book, they approach the same essential characteristic of a good conscience from different view points. What unites them is not only the search for the essential characteristic of a good conscience, but also the result of their search. Both theories point at ethical love as the standard which allows us to distinguish good conscience from that which is erroneous. Their appeal to love was, however, inconsistent.

Despite their deep insights into the issue, both Aquinas and Petrazycki did not provide a clear and comprehensive theory of ethical love as the essential characteristic of a good conscience. Nevertheless, their theories represent one trend of thought which is very different from many contemporary theories of legal reasoning such as of MacCormick, Dworkin, Beyleveld and Brownsword, and Posner. All those theories represent different kinds of deontological or consequentialist reasoning which support a certain type of judicial conscience. It will be argued, that the theories of Petrazycki and Aquinas, although not fully, stand for a different type of reasoning based on ethical love towards one's neighbour.

It is easy to say that the judges when applying legal rules must be guided by the principle of love. However, when the practical issues arise it is not so easy to determine what the principle of love requires in a particular situation. Moreover, there are some issues where judges, even when willing to show love and mercy to their fellows, cannot do so simply because the issue is too technical, the judges are strictly bound by a rule, or (as happens very often) they have no time and opportunity to go into details. Therefore, the judges need a special discipline or an art of solving the problems of conscience. This discipline is called casuistry. The first part of the book provides an introduction into the method of casuistry based on the principle of ethical love (agape).

Part II. The method of agapic casuistry is displayed in detail in the second part of the book. The history of the method is deeply rooted in the Christian tradition which provides a good interpretation of the meaning of ethical love and the principle 'love your neighbour as oneself'. It is this tradition which allowed Lord Atkin to formulate the principle of non-contractual liability: "The rule that you are to love your neighbour becomes in law: you must not injure your neighbour."² This

² *Donoghue v. Stevenson* [1932] All E.L.R. (HL). 1. At p. 11.

Christian concept of love has several advantages in being used as the essential characteristic of a good conscience. First of all, its meaning is not sentimental, it signifies real care for others. Secondly, it fills the gap between the generality of legal rules and the particularity of specific legal cases.³ Thirdly, it possesses special non-verbal means of communication of the meaning of love. Christians see this in its ultimate form in the self-sacrificial life of Jesus.

The concept of ethical love as a standard of judicial conscience can reconcile the judge's fidelity to his moral convictions with the reality of moral pluralism. The Christian vision of ethical love, if accepted, should lead to a state of spiritual humility as opposed to one of spiritual arrogance. The Christian idea of love, mercy and understanding of fallenness of the whole of humankind can prevent a judge from imposing his own moral convictions as absolutely true, and leads him to an examination of his own conscience. As a result of this spiritual humility, two major implications for judicial decision-making arise: impartial sympathy and watchfulness.

However, the Christian understanding of ethical love can have only a restricted application in a non-Christian legal context. It may be true that everyone is able to love one's neighbour as oneself, whether he or she is a Christian or not. But Christians believe that love is something more than that; it is the mystery of God's Incarnation, Crucifixion and Resurrection which reveal the meaning of Christian love. Therefore, this book does not claim that judges can realise all the fullness of Christian love in the process of making their decisions. What it claims and tries to justify is, firstly, that Christian love is of great value for understanding what good conscience is; secondly, that the experience of such love both by Christians and non-Christians can affect the process and the result of judicial decision-making; and thirdly, that there is evidence that, in the form of neighbourly love, it does affect judicial decision-making, as we shall see in Part III of the book.

Impartial sympathy judgement is the major implication of the principle of love. It requires the judges to take the moral perspective of all the parties to legal process. A judge has to use all her or his ability of imagination and intuition to penetrate the inner world of those who will be affected by judicial decision. A judge must endeavour to understand their motives and emotions. Sympathy does not require the judges to deny or disregard their own moral beliefs and convictions. What it does require is that a judge should not accept his own moral convictions as the only true and correct ones, but be ready to engage into dialogue with the moral world of another. The essence of sympathy judgement lies in genuine willingness to do good to the persons affected by judicial decisions through understanding and critical acceptance of the moral perspective of those persons. Only through having such understanding and acceptance is a judge able to give a proper evaluation of the facts and interpretation of the relevant legal rules.

³ Apostle Paul stressed both the generality and particularity of Christian love: "The commandments: Do not commit adultery, do not murder, do not steal, do not covet, and whatever other commandments there may be, are summoned up in this one rule: Love your neighbour as yourself: Love does not harm to its neighbour. Therefore love is the fulfilment of the law." (Rom. 13:9-10).

At the same time, a judge must be watchful and examine himself with the purpose, firstly, not to substitute his own moral convictions for the convictions of the participants, and secondly, not to be trapped by his own prejudices and biases. This means that when interpreting legal rules and evaluating the facts through using their moral sense, the judges must examine the adequacy of their conscience. Agapic casuistry calls the judges not only to apply the rules in accordance with the principle of love, but to be themselves transformed into agents who bring love, peace and reconciliation.

Part III. That Christian love and its implications are always practical will be shown in the third part of the book. Four different aspects of judicial decision-making will be taken in consideration. The first aspect is how ethical love can affect application of a generally recognised legal principle. The English case of *Ridge v. Baldwin* ([1964] AC. 42.), which was about the scope of the application of the principles of natural justice, will serve as an example. I shall argue that the broad provisions of the principles and rules similar to those of natural justice always leave room for sympathy judgement. In fact, this case provides an evidence that sympathy judgement took place. As the result, the decision had a significant effect not only on the vital interest of the appellant in that case, but also on the whole state of administrative law in Britain.⁴

The second aspect involves judicial creativity in law. The declaratory power of the Scottish High Court of Justiciary will be taken as an example. This aspect helps us to understand the complexity of a sympathy judgement which can take different forms depending on the effects of a judicial decision. Because the use of the declaratory power involves punishment of criminal behaviour without explicit sanction of the positive law, and at the same time as an authoritative setting up of a criminal sanction in the terms of the positive law, sympathy judgement cannot be restricted only to the present offender and his victim(s), but also all the possible offenders and victims. This particularity will lead us to a distinction between retrospective and prospective sympathy judgements. Retrospective sympathy judgement looks back at the dispute which has already occurred, and therefore it is about sympathy for the specific individuals who are the parties to the process. Prospective sympathy judgement is about future disputes, and it springs from the law making or law clarifying functions of the judiciary.

The nature of prospective sympathy judgements will be clarified when looking at the third aspect of judicial decision-making. Constitutional review of legal rules by the Russian Constitutional Court is an example where the judges are virtually excluded by the positive law from examination of the facts and personalities of the parties, which are paramount for retrospective sympathy judgements. It does not, however, exclude judges from a sympathy judgement towards ordinary citizens who are affected by the rules under the review. This aspect of judicial decision-making is a good illustration of the nature of agapic love which cannot be restricted only to particular individuals but can and does embrace society as a whole.

⁴ Craig P. P. *Administrative Law*. - 4th edit. - Sweet & Maxwell, 1999. - P. 405.



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