

CHAPTER 4

THEORIES OF LEGAL REASONING AND TYPES OF JUDICIAL CONSCIENCE

INTRODUCTION

As we have seen from the previous chapters, conscience is a complex phenomenon. Since conscience is presented as a human mind passing moral judgements, the problem of the variety of these judgements in its relation to legal reasoning becomes important for the purpose of the present research. Legal reasoning means a kind of reasoning which through finding relevant facts, appropriate legal rules, and good reasons for the application of these rules to the case, leads to a legal decision. There are many states of conscience and there are many types of legal reasoning. The basic presupposition of this book is that a theory of legal reasoning and judicial conscience are closely related to each other. To a certain degree, the variety of theories of legal reasoning represents the variety of moral judgements made by the judges.

The distinction between different states of conscience may help to understand not only why the same facts and rules are handled by the judges differently, but also why the whole process of judicial decision-making is interpreted differently by the theorists. In moral philosophy, there is a distinction between consequentialist and deontological moral judgements¹ which gives a help to grasp the fundamental differences between different theories of legal reasoning. Consequentialist conscience evaluates actions according to the consequences they produce, rather than any intrinsic features they may have. Deontological conscience holds that some actions are right or wrong because of the nature of the actions rather than because of the results they produce. However, deontological and consequentialist judgements are not the only types of moral judgements. In the

¹ Scheffler S. *Consequentialism and Its Critics*. - Oxford University Press, 1988. Parfit D. *Reasons and Persons*. - Oxford: Clarendon Press, 1984. *A Companion to Ethics*. - Ed. By P. Singer. - Oxford: Blackwell, 1991. Dancy J. *Moral Reasons*. - Oxford: Blackwell, 1993. Fried C. *Right and Wrong*. - Cambridge, MA: Harvard University Press, 1978.

following parts of the book, I shall consider a type of moral judgement which is based on the principle of love, which can be called a sympathy judgement which transcends the dichotomy of deontological and consequentialist ways of thinking.

This chapter concerns the difference between various theories of legal reasoning, which is caused by different moral reasoning underlying the basic propositions of those theories. In a way these differences will help us to understand why the judges often disagree with each other. My hypothesis is that the root of disagreement is that of different states of conscience, although it is possible that the judges with the same state of conscience may also give different weight to facts and reasons. Nevertheless, unlike the disagreements between the judges with the same state of conscience, the disagreement between the judges with different states of conscience cannot be reconciled in principle without full surrender of the moral position held by a judge who disagrees. The different states of conscience are not often clearly articulated in the law reports, but they find their clear formulation in theories of legal reasoning. Therefore the task of looking at the different kinds of theories of legal reasoning becomes important in order to understand the judicial process more fully.

The deontological, consequentialist and sympathy judgements may take a different role in the reasoning of judges according to whether a judge has a 'formalist' or a 'pragmatist' or a 'compassionate' moral character. Although these characters seem never to be met in their pure forms, it is true that one group of judges and theorists are more inclined to pass formal moral judgements, another - more pragmatic ones, and other - sympathy judgements. However, it seems more appropriate to speak about three states of conscience rather than to speak about three types of personalities, for a state of conscience is not something static but dynamic.

The theories which are chosen for consideration serve as a justification for a certain state of conscience as a whole. Nevertheless, they may contain elements of other patterns of moral deliberation which, however, do not change the essence of the state of conscience. In this part I consider four theories which represent different kinds of deontological and consequentialist moral reasoning which are now influential. I am not aware of any modern theory of legal reasoning which serves as a complete justification of sympathy conscience. Thus, I attempt to present its justification in my book. Therefore, all following theories of legal reasoning will be considered in relation to my defence of the model of judicial decision-making based on sympathy and compassion, which is partly derived from the theories of Aquinas and Petrazycki, and which will be referred as agapic casuistry.

MACCORMICK'S THEORY OF LEGAL REASONING

MacCormick's theory of legal reasoning does not represent a pure deontological form of legal conscience. Still, his theory is characterised by a strong adherence to the formalistic vision of justice shared by legal positivism as a whole.

The concept of formal justice takes a key position.² The principle of formal justice according to MacCormick requires that the judges have a duty to do justice according to law. Law itself is understood as a body of rules which judges must apply as long as the conditions set in the rules are found to be present. In short, justice is fulfilled if the judges do what legal rules prescribe. This formalistic kind of legal conscience is shared more or less by all positivists. Neil MacCormick is not an exception. However, his view slightly differs from the pure formalistic conscience. The latter is firmly based on a deontological moral basis: the basic command of the formalistic conscience is that a judge must do what legal rules require, while MacCormick appeals broadly to consequentialist moral reasoning, the basic command of which is that the judges must arrive at their decisions in the light of a public vision what is just, in the light of common sense, taking seriously public policy and expediency. Writing about legal reasoning MacCormick says: "It involves multiple criteria, which must include at least 'justice', 'common sense', 'public policy', and 'legal expediency'."³

It is not quite clear how MacCormick sees the solution of the problem of conflicting situations when a strict application of rules may contradict justice (equity), common sense, public policy, or legal expediency. It seems that MacCormick accepts consequentialist thinking as supplementary in the cases where pure deductive thinking does not work. He starts his consideration of consequentialist argument in the section of his book dealing with second-order justification stating the following: "It is sometimes possible to justify legal decisions by deductive arguments whose premises are valid rules of law and propositions of 'proven' fact. But we can run out of rules without running out of the need for legal decisions - because rules are unclear, or because the proper classification of relevant facts is disputable, or even because there is dispute whether there is or is not any legal ground at all for some claim or decision at law. The really interesting question about legal argumentation is: how can it proceed when in this sense we do 'run out of rules'?"⁴

MacCormick himself proceeds to consequentialist argument as the way of making choices when deductive reasoning does not work. However, even then the judges are restricted in making choices. The consequentialist argument must be consistent and coherent with other legal rules: "however desirable on consequentialist grounds a given ruling might be, it may not be adopted if it is contrary to some valid and binding rule of the system."⁵ It is clear that the consequentialist reasoning is restricted and subordinated to the primary judicial task of applying legal rules: judges are to do justice according to law, not to legislate for what seems to them an ideally just form of society. Although this does not and cannot mean that they are only to give decisions directly authorised by deduction from established and valid rules, this does and must mean that in some sense and in

² McCormick N. *Legal Reasoning and Legal Theory*. - Oxford: Clarendon Press, 1994. - P. 250.

³ *ibid.*, pp. 252-253.

⁴ *ibid.*, p. 100.

⁵ *ibid.*, p. 106.

some degree every decision, however acceptable or desirable on consequentialist grounds, must also be warranted by the law as it is.⁶

The type of legal reasoning which is drawn from the theories of Aquinas and Petrazycki is significantly different from that supported by MacCormick. The difference lies in the following aspects:

1. While MacCormick considers that the judge's primary task is to apply legal rules, both Aquinas and Petrazycki maintained that the main task of the judges is achieving justice (equity) and social harmony within society whereby the legal rules are an instrument, rather than a goal in themselves.

2. MacCormick thinks that the judges' duty is "to do justice according to law."⁷ The implication of agapic casuistry is that the judges' duty is to interpret and apply law according to justice. The main difference here lies in distinct vision of justice. MacCormick says: "The norms of the legal system supply a concrete conception of justice which is in ordinary circumstances - where deductive justification is sufficient in itself - sufficiently fulfilled by the application of relevant and applicable rules according to their terms."⁸ According to agapic casuistry, it is conscience which supplies a concrete conception of justice. The legal rules may more or less express the requirements of justice. However, they fail to express it in full in order to govern all human relations.

3. MacCormick considers that the right application of law is done through deductive reasoning, only if it fails should a judge then employ the second-order justification: consequentialist argument, requirements of coherence and consistency. According to agapic casuistry, the right application of law is through understanding the specificity of the case, through taking seriously the personalities of the parties involved, their needs and interests.

It does not appear that these differences can be reconciled, for they are based on distinct conceptions of law. MacCormick seeks in law consistent and coherent body of rules. The vision of law defended in this book is fundamentally different. Law is seen as a dynamic system, whose development is full of contradictions. Law is a matter of dialectic, rather than a body of rules neatly fitted to each other. The dynamic conception of law, however, does not reject the importance of the rules. The judges, doing justice, are also humans. They need established rules for guidance, for nobody can rely only on a personal sense of justice. This sense may be corrupted. However, the fear of exercising a corrupted sense of justice does not excuse them from failing to exercise it at all. Moreover, the blind application of legal rules may be seen as the worst state of corruption. As it will be shown in a more detail later, the essence of the approach defended in this book is that the judges should exercise their sympathy judgements using the rules as general guidance and constraint against possible abuses of their conscience.

I am far from the intention of labelling MacCormick's theory as a sort of corrupted legal reasoning. The approach of agapic casuistry completely agrees with

⁶ *ibid.*, p. 107.

⁷ *ibid.*, p. 74.

⁸ *ibid.*, p. 73.

MacCormick's view that justification of decisions in individual cases must be always on the basis of universal propositions to which the judge is prepared to adhere as a basis for determining other like cases and deciding them in the like manner to the present one.⁹ The difference is only that instead of trying to reach consistency and coherence by any means, the judges, according to agapic casuistry, should be governed by ethical love and compassion when appealing to the universal propositions. MacCormick's theory is a good exposition of what may and does take place in the courts. Nevertheless, nobody can claim, and MacCormick himself does not, that this is the only existing model of legal reasoning. However, unlike MacCormick,¹⁰ agapic casuistry calls on the judges to reject this model.

JUDICIAL REASONING IN BEYLEVELD'S AND BROWNSWORD'S THEORY

The book *Law as a Moral Judgement*¹¹ written by Deryck Beyleveld together with Roger Brownsword is mainly concerned with the fundamental question of jurisprudence: 'What is law?'. Nevertheless, it contains a certain kind of legal reasoning which the authors wish to have an impact on judicial decision-making. The particular feature of Beyleveld's and Brownsword's theory is that they stress the moral nature of legal reasoning, the impossibility of separating the legal and the moral. The authors of the book wrote the following: "The essence of the process of adjudication as we conceive of it is that the participants in this dispute settlement practice attempt sincerely and seriously to produce the correct legal-moral determination of the issue"¹². One can draw three major implications from this. Firstly, the process of adjudication has and should have a moral significance which cannot be separated from its legal meaning. Secondly, the process of adjudication is not the bare activity of a judge or a group of judges, it is a relationship between the judge(s) and those who are involved in the dispute. Thirdly, all the participants of the process, including the judges, ought to make a **sincere** and **serious** attempt to arrive at a correct decision. This third aspect puts the issue of conscience at the centre of the process of adjudication.

However, all these three aspects have not found equal development in the book *Law as a Moral Judgement*. The authors give a full consideration to how the legal and the moral correlate to each other, but they pay too little attention to the relationship between the judges and those who are involved in the dispute. The third implication of their vision of the nature of adjudication is left almost without any development. Nevertheless, all these three aspects have a great importance in constructing an effective model of judicial reasoning. The excessive interest in the first aspect of adjudication is explained partly by the preoccupation of the authors with the fundamental question of jurisprudence, and partly by the kind of

⁹ *ibid.*, p. 99.

¹⁰ *ibid.*, p. 250.

¹¹ Beyleveld D, Brownsword R. *Law as a Moral Judgement*. - London: Sweet & Maxwell, 1986.

¹² *ibid.*, p. 390.



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Shytov, A.N.

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