# LEGAL REASONING AND VALUE AMBIVALENCE

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## I

The key problem of legal reasoning, it is ventured, concerns the functional adequacy of its mode of rationality. One mode is not intrinsically better than another. Functional adequacy depends on consequences, not essences. Thus the nature of legal reasoning may change correspondingly with changes in social needs. Unlike traditional societies, modern industrialized societies need bureaucratic efficiency in the production and allocation of scarce goods. Correspondingly, the nature of legal reasoning has changed from a diffuse, expressive groping towards substantive rationality to a specific, cognitive demonstration in terms of formal-logical rationality ([1]).

The question, however remains whether formal-logical rationality is functionally adequate in performing all essential legal tasks in a modern society, specifically that of limiting legislative discretion under a written Bill of Rights as well as in a federal system. In constitutional adjudication, a substantive mode of rationality seems more suitable. The difficulty is that in constitutional adjudication substantive rationality cannot derive its end values from custom; it has to do so from ideologies which compete for political legitimacy. Judges are consequently faced with the realist dilemma. Pretending that formal-logical rationality works when it cannot ([2]) leads to "squid jurisprudence" ([3]). But for judges to avow that they make policy impugns the integrity of their role by embroiling them in political controversy.

This paper advances the thesis that understanding the character of constitutional values as ambivalent, rather than discrete, if it does not provide a way out of the realist dilemma, at least moderates it. Before elaborating that thesis, it will be useful to restate the problem just outlined in more systematic terms. We begin with the place of legal reasoning in the legal process.

## II

Law as a process is at once the unconscious product of society and the instrument for deliberately shaping it. Its structure may be seen broadly as consisting of three interacting stages (4). General rules spontaneously emerge by custom, find implicit expression in case law and explicit articulation in statutory law. Some are produced in much the same way as language, others are consciously made, while many simply undergo interstitial change. All this takes place in the *prescribing stage*. The general rules are interpreted and applied to concrete cases with more or less discretion in ascertaining the scope of the rule or the facts of the case. This takes place in the *invoking* stage. Sanctions for punishing or remedying infractions of the general rules are carried out in the *enforcement* stage, diffusely as by social disapproval or specifically as by imprisonment.

Legal reasoning takes place in the invoking stage. It is the discursive activity for showing that the general rules have been violated or complied with in concrete situations. This activity is essential for two reasons. It satisfies the *moral function* of the legal process by infusing the decisions to use coercion with the legitimacy that emanates from the general rules as derived from custom, precedent, or legislation (5). And it satisfies the *predictive function* by clarifying and resolving present doubts as to how the general rules will be invoked in the future (6). Both functions of legal reasoning mutually contribute to the peaceful settlement of disputes and to facilitating conformity to the general rules.

In a traditional society, legal reasoning manifests itself in diffuse, expressive ways. General rules inarticulately exist as customs communicated orally and acted out in rituals. The three stages are not specifically differentiated. Invocation takes place mainly by common knowledge of right and wrong, legitimized by tradition. Violations are largely sanctioned by social disapproval. The judicial role, if it is at all discernible, rarely goes beyond the Islamic Kadi. Legal reasoning is a groping effort to connect the way disputes are settled with the

end values that are immanent in custom and collective sentiments. Its mode of rationality, insofar as it slowly achieves it over centuries, is substantive; and has best been displayed in the common law of pre-Christian Rome and medieval England (7). Its dominant function is the moral one of using the legitimacy generated by custom and tradition for peacefully settling disputes.

In contrast, legal reasoning in a modern society assumes a specific, cognitive character that is responsive in satisfying the social need for bureaucratic efficiency. A modern society has a highly differentiated, complex structure especially in its industrialized economy. Its main task is productivity for an affluent economy, not allocating losses nor apportioning goods in a scarce economy. The dominant function of legal reasoning thus shifts from infusing moral force into judicial decisions for preserving peace and order to the accurate prediction of how coercive sanctions will be officially employed. Predictability of legal consequences is essential for maximizing production. Businessmen need to know in advance how they can pursue their interests without becoming involved in costly, wasteful litigation. The general rules they need to know, which deal with commercial transactions, credit, securities, taxation, anti-trust and the like, are technically complex. Successful lawyers become professional specialists in such highly technical fields of law. Most of their time is spent in offices advising clients of what they may do and devising ingenious plans for protecting their financial interests. Even in conflict situations, which they try their best to avoid, they prefer to negotiate rather than litigate. The bulk of the activity of legal reasoning thus shifts from judges in courts to lawyers in offices.

In response to the bureaucratization of the invoking structure within the legal process, the mode of rationality in legal reasoning shifts from substantive rationality to formal-logical rationality. Substantive rationality in legal reasoning is the rationality of devising means (rules and standards) for best attaining given ends (social values). It is best manifested in case law which takes its ends from custom and develops standards

and rules basically through reasoning by example (8). Their viability for settling disputes is tested by experience. The "first-come, first-serve" and apportionment rules of riparian rights in western and eastern United States, and the development of the doctrine of manufacturers' liability are examples of how this mode of legal reasoning has worked (9). However apt it may have been for devising organic bases for settling disputes over scarce goods in less complex societies, the case law approach for achieving substantive rationality has proven highly inefficient for providing the predictability of legal consequences needed by an industrialized, expanding economy.

Formal-logical rationality satisfies this need. It presupposes in the prescribing stage the policy-directed enactment of general rules whose terms are specifically defined by ordinary usage so that concrete cases can be deductively subsumed or not in clear-cut fashion under them. The content of such general rules is largely irrelevant to the need for bureaucratic efficiency. Political choice of ideologies may favor laissez-faire capitalism, state capitalism, socialism or variants of them. Within broad limits, it does not matter which ideology politically prevails as long as an affluent, industrialized economy is sought where all is subordinated and rationalized in terms of productivity. What matters is that the invocation stage makes predictable official interventions in using coercion. Judges and lawyers mutually participate to achieve this predictability. They engage in conceptual reasoning which purports to find all the answers within the four corners of the system of general rules. In this way they isolate their roles from the ideological controversy over the content of general rules which is supposedly settled in the prescribing stage in politically legitimate ways. Thus the uncertainty and fluidity in achieving substantive rationality in the political settlement of ideological conflict does not result in expensive bureaucratic inefficiency. Business and society can go on as usual while governments and parties rise and fall.

## III

The difficulty with formal-logical rationality is that it fails to work perfectly. Its functional adequacy depends on the public belief in the myth that the general rules that have been prescribed are a complete, coherent and clear system from which decisions to all concrete disputes can be logically deduced, which of course in fact is impossible ([10]). In the area of economic productivity where the value of security is more important than fairness, the imperfections of this mode of rationality are tolerable. For businessmen are more concerned with certainty in predicting legal consequences than with justice in giving everyone his due. Usually for them any rule is better than no rule. When they have been treated unfairly, they simply make it a cost of doing business.

In constitutional adjudication, however, the same myth becomes dysfunctional. It satisfies neither the predictive nor the moral function of adjudication. The predictive function fails because of the nature of the general rules prescribed by the constituency power for limiting legislative discretion under a written Bill of Rights. They are open-ended standards, such as "freedom of speech", "equal protection of the laws", and "due process of law", that invite judges to extend or contract their scope in accordance with their implicit policies depending on circumstances that cannot be adequately anticipated in advance. The moral function fails because it is so obvious that the open-ended standards, which constitute the core of constitutional law, cannot satisfy the presuppositions of logical-formal rationality. For judges to act as if they do, invites the exposé of legal realism that they make political policy while disavowing that they are doing so.

Thus arises the realist dilemma. If judges do not obfuscate their role in constitutional adjudication, must they abdicate it in order to avoid becoming embroiled in political controversy over ideologies ? If they do obfuscate, will not their deceptions be disclosed and will not the public lose respect for the judiciary ? Far from facilitating predictability or sustaining the moral force of judicial decisions, primary reliance on formal-

logical rationality in invoking "open-ended standards" of constitutional law encourages uncertainty and disrespect.

The way out of the dilemma would appear to be the use of substantive rationality in constitutional adjudication. The difficulties, however, are two-fold. One is the well-known difficulty of interpreting an enacted provision in terms of its "spirit" or implicit policy instead of its letter or plain meaning. But this difficulty of *vertical choice* is pervasive throughout the various fields of law, including the economic fields where security is highly valued, as is illustrated by such standards as the *bona fide* purchaser and the prudent investor. In theory, vertical choice presents no problem for substantive rationality, only the practical one of discerning the implicit policy of an "open-ended standard" and adjusting the scope of its remedy accordingly.

The special difficulty that makes substantive rationality problematical in constitutional adjudication has to do with the *lateral choice* of the values that the "open-ended standards" have been enacted to promote. These values are equally desirable. It is impossible to rank them hierarchically. Freedom from arbitrary restraint, freedom of speech and press, religious liberty, freedom from invidious discriminations, privacy, and the like are all essential to the dignity and moral autonomy of the individual. Nor are the values discrete in the sense that they can be singly pursued without diminishing others. Values dealing with the security of person, property and promise which are promoted by punishing or remedying murder, theft, fraud, failure of performance, negligence and the like are discrete. But fundamental freedoms constantly exist in a state of tension. Pursuing them too far sacrifices the essentials of public order as well as neighboring freedoms and rights ([11]). It is impossible for the constituent power by general rules to anticipate all possible circumstances where such values may clash and draw the line in all possible cases for striking the viable balance. The best it can do is that which it has done that has proven viable over the last century or two ([12]). It can focus on broad areas where experience has shown there is such pressing need for specific policies to protect liberty from

too much order that political agreement on the proper balance in gross is feasible.

This leaves a substantial area where judges must make lateral choices among the ambivalent constitutional values when they invoke "open-ended standards" in concrete cases. The problem, in theory, is whether substantive rationality is possible in making lateral choices. It would appear not. Substantive rationality is the choice of more apt means to given ends. Vertical choices accord with this rationality since they adjust the scope for applying the remedy of a rule or standard so that its implicit policy is promoted. But lateral choices are between equally desirable end values which by definition cannot be subsumed under a higher, inclusive value of which judges may legitimately avail themselves. Thus lateral choices by judges in adjudicating the limits of legislation discretion would appear to involve them in the substantive irrationality of politics contrary to their invoking role.

An empirical analysis of the problem, however, shows that lateral choice in constitutional adjudication is not necessarily a matter of substantive irrationality. One among many examples has to suffice. In *Everson v. Board of Education,* 330 U.S. 1 (1947), state action reimbursing the transportation costs of parents of Catholic school pupils as well as public school pupils was held not an infringement of the First Amendment prohibition against the "establishment of religion". The coercive machinery of the state was used to collect taxes some of which relieved Catholic parents of a cost that otherwise they would have to pay unless they sent their children to public schools. Catholic parents, compelled by state law to send their children to an accredited school, would thus view the reimbursement as justly removing a cost of exercising their religious liberty to choose a sectarian education for their children. Yet other taxpayers would be coerced to support a religion against their will. The judicial problem is a lateral choice between two fundamental freedoms. Can the decision facilitate one without diminishing the other ?

The answer depends on what it is exactly that the nonestablishment clause protects against. If it prohibits financial aid

*per se* in support of religious faith, then the problem is one of vertical choice as to whether the religious liberty of the Catholic parent as protected by the First Amendment requires the reimbursement. If it does not, then liberty is nonetheless diminished in the view of Catholic parents. If it does, then the problem is an arbitrary choice of competing constitutional values. The Court instead reasoned that the mischief of established religion concerned not state financial aid *per se,* but who made the determinative choice to use tax money for religious support. When elected officials make that choice, it invites religious lobbying by way of dogmatic influence and religious coercion over voters and officials. But in *Everson* the determinative choice was made by parents, who could individually choose to support religion without co-opting the choice of others. Thus the lateral choice in *Everson* found rational basis in the principle that individual choice to support religion with tax money is not an "establishment". The rationality depended not on a ranking of religious liberty over nonestablishment, but on the *procedural* end that one equally desirable value should be protected as long as it does not diminish the other.

Thus contrary to initial expectations, it can be concluded that substantive rationality is possible when the values which general rules promote are ambivalent in nature. Vertical choices present no problem since they naturally accord with the means-end relations. Lateral choices by definition lack given ends with material content that can serve to resolve value ambivalence by an hierarchical ordering. In this case a procedural end serves as the basis of substantive rationality. Competing values of liberty v. order or liberty v. liberty can be rationally reconciled when it is possible to devise ways to promote one without diminishing the other.

Admittedly such substantive rationality lacks the compelling intellectual force of formal-logical rationality. But it has the advantage of realism. Disclosures of its assumptions present practical problems in the exercise of discretion; but they do not discredit belief in the validity of legal reasoning as is the case when reliance is misplaced on the logic of subsumption, in constitutional adjudication especially. More importantly,

substantive rationality is functionally adequate. In coping with general rules based on ambivalent values, it provides all the predictability that can be honestly expected. In addition, it infuses judicial decisions with the moral force of legitimately prescribed rules not by deception, but by an appeal to reason that can withstand public scrutiny, however difficult that may be.

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## NOTES

(1) WEBER, *Law in Economy and Society*, esp. 349-56 (Rheinstein, ed., 1954).

(2) POUND, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908); FRANK, *Law and the Modern Mind* (1930); STONE, *The Legal System and Lawyers' Reasoning*, esp. 241-81 (1964).

(3) MILLER, *On the Choice of Major Premises in Supreme Court Opinions*, 14 J. of Pub. Law 251 (1965).

(4) For different views of the structure of the legal process, see, *e.g.*, PARSONS, The Law and Social Control in Evans, *Law and Sociology* 56 (1965); FRIEDMAN, Legal Culture and Social Development, 4 *Law and Society Rev.* 29 (1969).

(5) FULLER, *Anatomy of the Law*, esp. Part II (1968).

(6) Still the most sophisticated theory of the predictive function of adjudication is Holmes, The Path of the Law, 10 *Harv. L. Rev.* 61 (1897).

(7) The point is well illustrated in Holmes, *The Common Law* (1881).

(8) LEVI, *Introduction to Legal Reasoning* (1949).

(9) *Ibid.*

(10) *Supra*, notes 2 and 3.

(11) See, *e.g.*, Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

(12) The best short review of the viability of constitutional adjudication in American history is McCloskey, *The American Supreme Court* (1960).