CRITERIA OF ADEQUACY FOR JUDICIAL REASONING

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Gidon Gottlieb states that "The history of the study of the function of reason in the judicial process is the story of an epistemological inferiority complex. Legal theory surrendered uncritically to the prevailing notions of rationality. The judicial process was successively disguised in a variety of attires to secure the appearance of conformity with respectable forms of analytic and scientific reasoning. Judicial reasoning was equated with deductive thinking comparable in its certainty to Euclidean geometry. It was later adorned with the trappings of scientific reasoning and was said to follow the successful method of physics and chemistry. It was also presented in the shape of pragmatism and was even put forward as an altogether non-rational process. In all the various appearances it was made to assume, judicial reasoning was anything but itself" ([1]).

There is a great deal of truth in these remarks. The history of jurisprudence shows that efforts have been made to encapsulate judicial reasoning in one model after another — all of which have been shown to be inadequate. The deductive, mechanical model of judicial reasoning has proved to be inadequate for several reasons. Though deduction of a conclusion from premises may be all that is required for some judicial decisions, it is plain that more than deduction is required when a judge must choose between alternative and competing major premises. What is the relevant major premise(s) of a judicial argument ? If there are competing ones, what "weight" should be assigned to each ? Such questions cannot be answered merely by deductive logic, and yet a decision on these issues is necessary before any part of judicial reasoning can be cast in syllogistic form. Nor can deduction provide us with the relevant empirical facts which comprise the minor premise(s)

in a judicial argument. And not the least problem with the formalistic, deductive model is that the mechanical application of rules can (and frequently does) lead to great injustice, the very antithesis of the objective of legal reasoning. Holmes is surely correct that a proper judicial decision amounts to more than just "adding up one's sums correctly".

Nor is the ordinary inductive model an adequate one for judicial reasoning. Judicial decisions are not inductive inferences of empirical generalizations from instances or particular occurrences. Although both judicial decisions and empirical generalizations may share on occasion the predicate "probable", the grounds for the former is not assimilable to empirical data. Nor are the functions of judicial reasoning and inductive reasoning the same. The former is designed to guide (and perhaps "goad") normative decisions of a type, while the latter is designed to guide or direct inferences about facts. And though inferences about facts is an element in making a judicial decision, it does not comprise such a decision.

The model of reasoning which is closer to what is actually engaged in, especially at the appellate level, and the model which is the most adequate for the purpose (and, I think, ought to be used) is what some call the "good reasons" approach (particularly identified with Stephen Toulmin in moral philosophy) ([2]), what Chaim Perelman calls the "rhetorical" method or mode of argument ([3]), and what some call the "dialectical" model of argument ([4]). This model does not reject the deductive or inductive methods but stresses a kind of probability obtained not by mere induction but by "weighing" the accumulative force of several points of view, each of which may be inconclusive but which together support a conclusion or decision as the "best" or the "wisest". (Stone properly points out that this new "rhetoric" approach to legal reasoning has its roots in Aristotle's *Organon* where he distinguished "apodeictic" inference and certainty from "dialectical" inference and probability ([5]).

Let me now indicate why the dialectical model is more adequate for judicial reasoning than other models, and at the same time indicate what are criteria of adequacy for judicial rea-

soning. These two issues, though logically distinct, are intricately related.

The object of judicial reasoning is justice or a just decision. Just decisions frequently require judicial creativeness, the creation of new categories, the stretching and reinterpretation of other categories, the reduction of others — by a kind of analogical reasoning. Such creativeness results in new versions of rules or new meanings of rules. The problem is whether or not this judicial "law-making", as some call it, or judicial analogizing can be circumscribed by criteria — criteria for legitimate analogizing. Even John Austin, who on occasion seems to extol the formalistic model but who on careful reading is far more sophisticated, saw clearly the need for analogical reasoning. However, he criticized judges "not for innovation, but for working it under false pretences, and without system" ([6]). The requirement of "system" in extending analogies and creating new categories of judicial relevance seems to be the insistence that innovative analogies and extensions be guided by certain principles, and that careful attention be given to the full implications of their use. Austin's insistence on "system" has its contemporary counterpart in Herbert Wechsler's insistence "that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved" [7].

Wechsler explicitly recognizes, however, that the test of being "genuinely principled", which he also calls "the principle of neutral principles", does not provide a judge or a court with "a guide to exercising its authority, in the sense of a formula that indicates how cases ought to be decided" ([8]). This criterion he characterizes as "minimal" and as "no more than a negative requirement". It is an important criterion but a judicial decision, in order to be adequate, must also face "the other and harder questions of its rightness and its wisdom..." ([9]).

Let us focus briefly on these several criteria of adequacy for a judicial decision — it must be principled, it must be right,

it must be wise. Surely Wechsler is correct that the former alone is insufficient. For (at least in a sense) a judicial decision could be principled or have general or impartial applicability and yet be a bad or incorrect decision. It is true that if a judge or court is not now willing to apply a previous ruling to other cases which cannot be distinguished from the former ones, something basic is wrong. Such a decision smacks of whim, bias, and caprice. It is not a decision of principle, and failing this test, it is necessarily an inadequate judicial decision. But if it meets this test, it is not necessarily adequate; for it could be principled in the sense of being applicable to all cases of a certain type, and it could be consistently applied, and yet be an inadequate decision.

(A) To take the extreme case, the principles employed in the decision could be unjust or iniquitous. This is perhaps the guts of the thesis of those who clamor for justice as opposed to mere law and order. The principled decisions applied to certain classes of persons and classes of acts are based on irrelevant, inappropriate criteria. Discrimination on the basis of race is one example of this. (B) Or a judicial decision could be principled and yet inadequate if the principles or criteria invoked and applied are given the wrong "weight" — if the proper priority of relevant rules are not observed — or if only some of the relevant rules and principles are considered. For example, if a judicial decision bearing upon the disposal of wastes by industries were made solely on the basis of the right to private property and perhaps the old "public nuisance" law, and did not take into consideration other values and principles — the effects of pollutant disposal on the environment and on human beings, other norms embodied in the constitution, such as equality (In Dworkin's language, "principles" as well as "rules" are properly invoked) ([10]), and laws whose meaning and application can be appropriately extended (such as the Refuse Act of 1899), then that decision would be inadequate. (C) A decision could also be principled and yet inadequate if the empirical facts related to the decision are unknown or not properly understood. Thus, if Kenneth Clarke's thesis is true — that separate but equal schooling facilities for whites and

blacks are impossible by virtue of the fact that mere separation by race, in spite of comparable school facilities, precludes equality of educational treatment — then plainly a principled judicial decision which operated on the separate but equal principle would be inadequate — as has now been judged to be so.

In the examples cited, the rightness and the wisdom of the decisions, not their principled nature, is basically what is at stake. I say "basically" because although we can distinguish for analytic purposes the formal aspect of a principle from its material or substantive aspect, this is not easy to do in practice. The meaning and extension of principles changes as we, through our decisions, change the meaning of the concepts and criteria which constitute them. And we constantly make these changes in both moral and legal rules. R. M. Hare makes this point quite well: "On no account must we commit the mistake of supposing that decisions and principles occupy two separate spheres and do not meet at any point. All decisions except those, if any, that are completely arbitrary are to some extent decisions of principle. We are always setting precedents for ourselves. It is not a case of the principle settling everything down to a certain point, and decision dealing with everything below that point. Rather, decision and principles interact throughout the whole field" ([11]). Although Hare argues this thesis for moral reasoning, it applies equally to the process of judicial reasoning. In both realms (to the extent that we can distinguish them as separate realms) we constantly modify our principles. This modification, or interaction of decision and principle, is necessary for the vitality and growth of both law and morality. But Hare is correct that these modifications must be "decisions of principle". When exceptions or extensions to a principle are made, we must be able to offer sound reasons for them and then be willing to apply the altered principle to all similar cases.

But what constitutes sound reasons for exceptions and extensions of principles ? Are "sound reasons" in the last analysis merly "persuasive reasons", so that the emotivist model of Ayer and Stevenson is the most accurate one ? ([12]) An affirma-

tive answer here is a premature move to irrationalism, as Wasserstrom points out ([13]), for all rationality is not encased in the deductive or inductive models. There are problems in Toulmin's "good reasons" model for moral reasoning, but surely he is correct that "The real problem of rational assessment — telling sound arguments from untrustworthy ones, rather than consistent from inconsistent ones — requires experience, insight and judgment, and mathematical calculations... can never be more than one tool among others of use in this task" ([14]). As was indicated earlier, one is quickly pressed out of the deductive model in judicial reasoning by the need and demand to choose between competing major premises, and by the need and demand to alter the concepts and criteria which give rules and formal principles their substantive meaning and application. The basic issue for judicial reasoning is this: What is the model of rationality when a judicial argument reaches the point where one is pressed outside of a deductive framework ? Are there any rules of rational proceeding which let us distinguish sound legal reasoning from unsound or pure rhetoric (in the bad sense) and persuasion ? There is no simple answer to this question. Judges must deal with conflicting interests, conflicting empirical accounts, conflicting rules and principles, and new and changing societal needs and objectives. In making a principled decision, problems may arise on a variety of levels — on the accuracy of empirical facts, the meaning of a rule or law, the application or coverage of a law, the priorities of laws when they conflict, the extension or "creation" of new law when there is no precedent", the interpretation of broad constitutional rights and values (and priorities if there is conflict at this level), and on the meaning of justice itself. Judges may and, of course, frequently do disagree in their decisions because they disagree at one or more of these levels. Rationality requires somewhat different procedures of resolution at these various levels. But rationality is possible here. Final or absolute premises which let us resolve everything for all time are not possible, and the request for such is absurd. Hare is correct that "books on 'The Whole Duty of Man's are no longer written or read" ([15]). *Mutatis mutandis,*

books on "The Complete and Final Judicial Decision" are not written or read. But more is possible than what Hare suggests. He thinks that all that can be done is "the complete specification of the way(s) of life" of which alternative decisions of principle are a part ([16]) .Then one pays his money and takes his choice.

If more than Hare's answer is possible, what is it? We have noted that the purpose of judicial reasoning is just decisions, and although many factors are involved in reasoning to just decisions (and hence several layers of "discretion" and possible disagreement), what is ultimately necessary and of the utmost importance in judicial reasoning is an adequate criterion of justice. Admittedly there are a number of theories of justice and controversy has raged over the meaning of this term for centuries. To conclude a paper on criteria of adequacy for judicial reasoning by simply introducing the problem of what constitutes an adequate criterion of justice performs little service. But it is essential to keep in mind that an adequate explication and definition of justice is necessary for proper judicial reasoning and decision. Existing laws and precedents are not enough. The judge must ask when a law or a precedent is a worthy or just one. And to answer this, especially at upper court levels, he needs an adequate criterion(s) of justice.

Now in providing that criterion the philosopher can do more than describe alternative of justice and the "ways of life" associated therewith and say. "Take your choice". He can articulate and justify a definition of justice and a theory of rights which are cross-cultural and internationally acceptable. That definition of justice and theory of rights must to some extent be general and formal, but not entirely so. Space prohibits a full explication of it here, but I will briefly indicate the drift of it ([17]).

Basically, the concept of justice can be explicated in terms of the principle of equality, which prescribes that all similar cases are to be treated alike, and that no person is to be given better treatment or special consideration or privilege unless justifying reasons can be given for such differentiation. It does

not prescribe that all human beings are to be treated alike but that individuals of unequal endowments and conditions are to be given equal consideration, that the same relative contribution, not necessarily an identical one, is to be made to the goodness of each person's life. The principle can be fruitfully viewed in a negative form: Human beings are not to be differentially treated unless there is some relevant and sufficient reason to do so. At this stage of explication, the equality principle is somewhat vacuous. It emphasizes the moral value of each and every human being, that each person has an equal right to fulfill his interests and needs, and that the social and legal order must respect (provide the framework for) each man's right to formulate and fulfill his interests, as long as it is consistent with the same right for all.

Since equality of treatment does not mean identity of treatment and since there are relevant and sufficient reasons for the differential treatment of men (given the fact that men have different talents, needs, capacities, and circumstances), then both the social and legal order requires the formulation of justified criteria of relevance for differential treatment. What should the moral and legal limits be in man's struggle to fulfill his interests ? Only when this question is answered do we have some sort of *substantive* criterion of justice.

Although highly specific criteria of relevance for differential treatment must be relative to context and purpose, it is possible to make the formal principle of equality substantive and directional to some extent by providing general criteria of relevance and an order of priority among them. All human beings have basic needs which must be fulfilled if they are to exist and enjoy even a minimally satisfactory human life, and there are good reasons for treating criteria of need as more basic and as morally prior to criteria of merit, worth to society, and so on. As I have noted elsewhere, this position seems to be held implicitly by Plato in the *Republic,* where it is held that differential treatment on the basis of merit is inescapable, but that fairness requires that all human beings be given the opportunity to develop meritorious qualities. William Frankena recently argued this point more explicitly. Merit cannot be

the most basic criterion for differential treatment or distributive justice because "a recognition of merit as the basis of distribution is justified only if every individual has an equal chance of achieving all the merit he is capable of..." ([18]). The point is that if merit-criteria are given priority, it is like pretending that everyone is eligible for the game of goods-distribution, while knowing that many individuals, through no fault of their own, through circumstances and deficiencies over which they have no control, cannot possibly be in the game. Distribution of goods, then, *primarily and basically* on grounds of merit, is unfair. This does not mean that merit-criteria should be abandoned.

In regard to need-criteria, all human beings fit, so to speak; so in this sense they are not gradable. This is not to deny that needs and capacities vary widely and call for widely varying treatment. The point is that all humans meet the need-criteria while only some meet the merit-criteria, and to have any chance to meet the latter the former must be met ([19]).

Granted that the notion of "need" requires considerable explication, still this articulation of equality, while not providing highly specific guidelines for practice, is far from being vacuous, and it has clear implications for the adequacy of constitutions and laws, and precedents in law, and consequently clear implications for most of the burning problems of all societies.

Formulated in terms of a theory of rights, the above thesis declares that there are some rights which are human or natural, rights which each person possesses qua the fact that he is human. In regard to the *possession* of these rights, human beings are not "gradable", although the modes of treatment required to instantiate these rights might differ widely from one person to the next, depending on time, place, conditions, and circumstances. The basis for the universal possession of human rights is not a Thomistic-like natural law but simply that there are no relevant grounds for excluding any human or group of humans from the opportunity to develop their capacities (freedom and rationality) as humans. Space does not permit further explication of this theory of justice and theory of rights, but

such an account is absolutely essential for an adequate theory of judicial reasoning ([20]).

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NOTES

([1]) Gidon GOTTLIEB, *The Logic of Choice,* New York (1968), 14.

([2]) See Stephen TOULMIN's *An Examination of the Place of Reason in Ethics,* Cambridge (1950).

[3] See PERELMAN's "Pragmatic Arguments',, *Philosophy,* Vol. 34 (1959) and his *The Idea of Justice and the Problem of Argument,* London (1963), and his *The New Rhetoric* with L. Olbrechts - Tyteca, Notre Dame, Indiana (1969).

([4]) See Julius STONE's *Legal System and Lawyers' Reasoning,* Stanford (1964), 327.

([5]) *Ibid.,* 328.

([6]) John AUSTIN, *Lectures on Jurisprudence* (1885, 5th ed.), 995.

([7]) Herbert WECHSLER, "The Nature of Judicial Reasoning," in Sidney Hook, ed. *Law and Philosophy,* New York (1963), 293-4.

([8]) *Ibid.,* 299.

([9]) *Ibid.*

([10]) Ronald DWORKIN, "The Model of Rules", *The University of Chicago Law Review,* Vol. 35, No. 1 (1967).

([11]) R. M. HARE, *The Language of Morals,* Oxford (1952), 65.

([12]) A. J. AYER, *Language, Truth and Logic,* London (1936) and Charles STEVENSON, *Ethics and Language,* New Haven (1953).

([13]) Richard WASSERSTROM, *The Judicial Decision,* Stanford (1961).

([14]) Stephen TOULMIN, *The Uses of Argument,* Cambridge (1958), 188.

([15]) HARE, *op. cit.,* 72.

([16]) *Ibid.,* 69.

([17]) For a detailed treatment see my articles "On The Meaning and Justification of the Equally Principle, *Ethics: An International Journal of Social, Political and Legal Philosophy,* Vol. 77, No. 4, July, 1967, and "Equality and Human Rights, *The Monist,* Vol. 52, No. 4, October, 1968.

([18]) William FRANKENA, The Lindley Lecture: *Some Beliefs About Justice,* Lawrence, Kansas (1966).

([19]) W. T. BLACKSTONE, "Equality and Human Rights", *op. cit.*

([20]) See my "Human Rights and Human Dignity", in *Human Dignity: This Century and The Next,* edited by Erwin Laszlo and Rubin Gotesky, New York (1970).