The role of personal values in legal reasoning*

> 'Values spring from the immediate and inexplicable reaction of vital impulse, and from the irrational part of our nature.The rational part is by its essense relative; it leads us from data to conclusions, or from parts to wholes; it never furnishes the data within which it works.'
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> George Santayana, The Sense of Beauty, 1896, 19.

I. Introduction. The layman and the judge deciding cases

Thinking of the role of personal values in legal reasoning in an impressionistic way, one view of the cathedral would be the thought: what is the legal dimension of reasoning when solving a question of law, compared to a layman's reasoning in solving that same question? This is meant as a pragmatic, down-to-earth question, which I would like to pose, before turning to the more traditional jurisprudential views which are, by its nature, of a more abstract and lofty character. For the investigation of the layman's way of legal reasoning I will rely on a study which we carried out recently in The Netherlands, directed at judges and laymen[1]. Part of this research-project on the role of personality traits in judicial decision making was the presentation of the same legal cases decided by the participating judges to laymen. The last category consisted of law students and of faculty members of language departments of several universities. Before discussing the results, I would like to give some information on the set-up and the conceptual basis of this study.

[14] The basic philosophy was that in hard cases, where the personality of the judge counts most, there is the characteristic situation that the judge in making his

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[1] The project has been carried out by Peter J. Van Koppen, psychologist, and Jan Ten Kate, J.D. and psychologist, both of the Rotterdam Faculty of Law, Institute of Legal Decision Making, under the supervision of Willem K.B. Hofstee, Professor of Psychology at the University of Groningen, and the present author. The report of the project as presented to the minister of Justice (January 1982, in Dutch) and an English version of it, presented for publication, can be obtained from the authors, Van Koppen en Ten Kate (Erasmus University Rotterdam, Postbus 1738, 3000 DR Rotterdam, The Netherlands). The jurisprudential backgrounds of this research are treated by the present author in papers presented at the Oxford meeting of the Research Committee for Comp. Jud. Studies, of IPSA, 1981 (publ. forthcoming), and at the meeting of the Law and Society Ass., Toronto, 1982. Copies are available from the author.

decision has to choose between two positions: that of the one party having a strong position from the point of view of the law, or that of the other party having a strong position when considering his personal interest at stake. Therefore, there are good arguments to decide for either party: in a more formal, legalistic approach the first party will succeed, whereas in an more 'principled', result-oriented approach, the second party will win. For the purpose of our project the first party is labelled as having a stronger 'legal construction' at her disposal (statutory rules, contractual rights, rules of precedent, etc.), the second party as having a stronger 'interest' than her opponent, thus having equity on her side (principles of good faith, reasonableness, rules of equity, etc.).
On this basis 9 cases have been selected and presented to the judges; the cases were not too complicated (one page length) and were derived from common practice (e.g. contract, tort, rent, unfair dismissal). In selecting the cases the interests of the one party were thought to be in balance with the legal construction (arguments) of the other party.

I will not go into the results regarding the correlation between personality characteristics of the judges and their decisions, but will return to the comparison between judicial and lay decision making. Surprisingly, although the cases had been so constructed that the interests of the one party were in balance with the legal construction (arguments) of the other party, in every case (with one exception, which can be explained), the judges chose with an approx. 4 : 1 majority for the same party. This outcome became even more puzzling, when we found that the students and laymen decided in almost the same way. Apparently, in deciding these cases, where principles and rules of conduct were involved, it made no difference whether the judging person was a law-trained judge, a law student, or a layman with university training. In reflecting this outcome, one must keep in mind that the type of cases presented to the respondents all had to do with so called 'open norms': the principles of good faith (contract), and duty of care (tort), which are also known as legal standards, a category a shade vaguer than the legal norms. Therefore, the decision asked for had much to do with what is thought to be fair and reasonable in the given case, with general principles of equity, norms of conducts, and the like. [15]

II. 9 Theses on legal reasoning and the role of personal values

The striking similarity we found in decision making by judges and laymen is challenge to any student of the role of legal reasoning in the decision making process and its character. Thinking of a possible explanation of this phenomenon, several suggestions can be made. There seems to be, as a first impression, a certain form of inter-subjectivity between persons judging legal cases. But then many questions are coming up, like: what basis is there for this inter-subjectivity? Do people have the same value-system, for instance, when deciding these cases? Why has legal training so little to do with it all, and what role is played by legal reasoning anyhow? Looking for a possible solution, I would like to present some theses:

1. General norms in private law, or as I would call them, open norms, are basically norms of conduct, that is to say, they can always be concretised into norms of conduct in a specific case. In disputes concerning rights (in the realm of property or of contracts) one finds a similar tendency to deal with

rights as a problem of rules of conduct. In this sense the judge is not taking rights seriously.

2. A person asked to judge a situation and the legal controversy arising from it, in establishing the concrete norm(s) of conduct for the party or parties in questions, is basing his judgment on his own value-system. This means, that he is taking his own personal norms of conduct as standard for the decision ('what would I, as a reasonable man, do in this situation?').
3. The personal value-system of the judging person regarding rules of conduct is derived from two sources, which are being tapped in the dynamic process of decision making:
   a. Person-originated values: values provided by his subjective value-system, taken as part of an inter-subjective system of his social group or society.
   b. Situation-originated values: values provided by the situation, the facts and circumstances of the case presented for judgment to him.
4. In the process of judging a legal controversy, of deciding legal questions, the process is essentially a two-way process, characterised by dialectics: in a confrontation of the person and the case, the concrete norms for decision stemming from the person judging, on the one hand, and from the case, on the other hand, are inter-related [16] and inter-dependant, influencing each other. (It thus is hard to say what comes first or what is dominating). From this fusion the concrete norm(s) for the instant case is born.
5. The finding of the concrete norm as a product of *Persona* and *Res* occurs in the confrontation of the judging person with the facts and arguments of the presented case, and can be seen by him in one flash, in an intuitive vision of the solution of the legal controversy. This insight can be characterised as a *Gestalt*.

   Thus, a basic similarity may be observed between the judging person and an artist, or a scientist, a manager (or perhaps any person), looking for a solution of a complicated question. The Roman maxim, law as an '*ars aequi et boni*', may hold a profound truth.
6. Intuition plays a central role in legal decision making, but is no antipode of reason. The separation of reason and intuition is an apriorism, arbitrary und unnecessary. Reason cannot do without intuition. (Compare the relation, etymologically, between 'reason' and 'reasonable', the latter being the common description of normative rules of conduct).
7. The solution found by the joint operation of reason and intuition, seen at the initial stage of the process as a Gestalt, does not have to be final. In addition to the flash-insight, further scrutiny is necessary, in a system of checks and balances. For the need for this procedure two reasons may be submitted:
   a. The average judging person is no philosopher-king or kadi, and usually is not accepted as such by society. He needs to give argumentations to support his decision, in order to live up to the expectations in regard of his role in the community. The character and extension of this legal argumentation depend on culture and traditions (compare the continental style, e.g. Cour de Cassation, France, contra the anglo-american style, e.g. the House of Lords, England).
   b. The decision has to fit into a system of law, considering the reasonable expectations in society regarding such a system. This will have an impact on the legal argumentation of the decision and on the checking of the

(initial) solution as well.
Policy reasons may influence the decision, e.g. security of the law, and bend it into a different direction.

8. The rational-intuitive reasoning involved in the legal judgment is not only operating in a (internal) value-based system, but simultaneously, in a (external) societal system. [17] Both systems are not strictly internal and external respectively, but are exposed to the contrasting sphere on the one hand, and, at the same time, influence each other in a *dialectical process*, on the other hand.
9. Thus, a legal judgment is the product of *Persona*, *Res* and *Societas*. The characteristic of a right judgment is, that it contains intrinsic harmony, wherein all component parts are in balance.
This is the common characteristic, as a matter of fact, of cognitive, ethic and aesthetic judgments. There may be a transcendental component involved too, being the source of this harmony.

III. Discussion of some theses

There is not much room left for discussing the above theses. I will concentrate, therefore, on three main issues: a. the relation rationality-intuition, and as corollary, the *Is-Ought* dichotomy; b. the situational values; c. the flash or Gestalt part. With my brief remarks I will give some references which may be helpful in clarifying my views.

a. Rationality-intuition. Is-Ought

Considering the famous debates in Jurisprudence (like Hart - Fuller of the late Fifties, and before: Frank - Salmond, Gray - Austin) or the prolific discussion of the philosophy of a John Rawls of the last decade, one cannot but see one person at the centre of the stage: Kant.
In essence, the Kantian division of Reason (*Vernunft*) and Understanding (*Verstand*) is at stake, concerning respectively, the intelligible and the empirical character of man. This well known dichotomy is of crucial importance for the Kantian ethics and for law as well. Leaving aside the *jumelage* of both fields which is, to my opinion, only increasing in the last decades, we find in law the strongest Kantian influence in the well-known concept of the *Is-Ought* dichotomy. Looking for the underlying purpose of the use of this dichotomy, for instance in the work of Kelsen, one finds the need for the formulation of norms as objective standards of value, separated from subjective value-judgments. When explaining the distinction between positivism and natural law Kelsen states: in his school of thought ‘value judgments are subjective and hence relative only, because they are not a description of facts, but, in the last analysis, the expression of wishes and fears’ (Kelsen, 1971, 174). Characteristic for a norm as an ‘ought’, is its being valuable for everybody and being determined by objectively verifiable facts (p. 229 seq.). As a consequence, ‘Judgments of justice cannot be tested objectively. Therefore a science of law has no room for them’. [18]
The remark once made by Fuller on Kelsen, seems appropriate: ‘His whole system might well rest on an emotional preference for the ideal of order over that of justice’. Here we meet the core of positivism and Kantianism: an emotional and arbitrary preference for a certain form of rationality. At this stage I would like to refer to the citation of Santayana at the heading of this paper, on the relative character

of rationality ('reason' is, by the way, rooted in 'relations'). The part which follows is even more interesting for our purpose:

> 'The ideal of rationality is itself as arbitrary, as much dependent on the needs of a finite organization, as any other ideal. Only as ultimately securing tranquillity of mind, which the philosopher instinctively pursues, has it for him any necessity. In spite of the verbal propriety of saying that reason demands rationality, what really demands rationality, what makes it a good and indispensable thing and gives it its authority, is not its own nature, but our need of it both in safe and economical action and in the pleasure of comprehension' (o.c).

There is no room to elaborate this theme[2], therefore, only some concluding remarks. As far as I am concerned, my analysis of the needs for 'safe and economical action' in law and the 'pleasure of comprehension' of the law-making process, makes some post-Kantian philosophers far more attractive than Kant. One may think of Schopenhauer, who, inverting the Kantian system, puts Understanding (discovered in intuition) on the first place, at the cost of Reason (for Schopenhauer 'all intuition is intellectual'). Compare Whittaker, 1934 (1977), 90.
Even more important is Hegel's contribution in this field, solving the subject-object split with this concept of dialectics in which the personality of the reasoning person is at a central place. To my judgment the dialectic model for legal reasoning is best suited to our needs. We cannot go further into this topic either (compare e.g. Kubes 1980-1, -2, discussing the view of Alfred Verdross).
It will be understood, that in my opinion the traditional *Is-Ought* dichotomy is best criticised by authors using a dialectical method, albeit implicitely. Compare Fuller, 1940 (1978); 1969, 145; Brecht, 1954, 102; 1976; 320; Jaffe, 1960, 30; d'Amato, 1978, 513; Van Dunné, 1981.
Reason is a fascinating subject for lawyers; what to think of Whittaker's view: reason divided into two categories, intuitive and discursive reasoning, restituting Kant's Reason and Understanding, respectively? The first category is seen as the total grasp, the 'synoptic' view of things; the second category as the procedure from point to point. [19] The former is higher, but unavailable till it has been mediated by the latter (o.c., 29). The 'practical reason' of the 'harmonious personality', developed by Hobhouse, is even more exciting. This process of 'mediation' is described as follows:

> 'The problem of the practical reason is to develop the elements of a working consistency, mutual support, or, as I call it, Harmony, within the entire sphere of impulsive feeling, and the 'force' of the rational is the summed energy of the felt needs acting as an organized whole. Rational aims focus the felt wants of man so far as they are consistent. Reason operates on the primary impulses by purging them of mutual inconsistency and shaping them into contributory elements in a system of life by which in turn they are in their modified form sustained and furthered' (Perry, 1926, 664).

The word of William James comes to mind: 'Consciousness is at all times primarily a selective agency'. On the other hand, there is the reminiscence of Plato's philosopher-king whose knowledge of justice is derived from the balance and

[2] Illustrative for the choice for rationality by authors of the school of Hart, is MacCormick, 1978, 269 (also: 5, 239, 288, 292). By this choice he seeks to transcend Hume's dilemma of Reason and Passions.

harmony of his personality. We will return to the aspect of harmony later (sub *c*).
Insight in the character and functioning of reason and rationality may lead to a re-evaluation of the so-called 'intuitive law theories' or 'feeling of justice theories'. Special attention is deserved by the followers of Bergson ('creative intuition'), like Gény, Del Vecchio, Cardozo, and further the adherents of the *Wertphilosophie* of Scheler and Hartmann (a priori consciousness of values, structured in a hierarchy).

b. Situational values

In the theses 3 and 4 I referred to values inherent in the facts and circumstances of the case presented for judgment, discovered in an intuitive way by the judging person. When looking for a backing in jurisprudence, the *Natur der Sache* ('nature of the thing') school, revived in post-war Germany, seems a natural ally. In this school, an off-spring of the phenomenological value philosophy and a good neighbour of the natural law philosophy, the contribution of Maihofer is interesting four our topic. In his view the Natur der Sache serves as an extra standard bringing the abstract rules of law in accord with the norms of conduct prescribed by the social situation of a concrete legal condition ('concrete law of nature'). An illustration is found in general norms as 'good faith' and 'reasonableness'. This view is helpful in our search for an explanation of the concurrence of lay and judicial judgments; as will be remembered, the cases presented for judgment dealt with open norms like 'good faith'. In this context, reference can also be made to Llewellyn's 'situation sense', a concept borrowed from the 19th century European Natur der Sache-adherents. It is interesting to note that a [20] comparable line of thought has been developed in *Gestalt* theory in the Thirties: values are taken as a product of objective 'requiredness' in a definite situation or field (*Gestalt* = configuration). This is seen as a required response to a 'lacuna' in such fields, as a release of forces directed towards the 'right' filling of that lacuna, thus 'closing the configuration, or perfecting the equilibrium' (Wertheimer, Köhler, Koffka, see Perry, 190; Brecht, 1954, 110; 1976, 332).
The instrumentalist approach should also be mentioned, the followers of Dewey. In their view it is the situation which supplies an implicit normative premise: that ought to be done which meets the requirements of the problem (Jaffe, 160, 30, and, in general, Summers, 1981, 880). In this 'psychology contextualism', that what solves the problem is also 'right' for the situation. In this way, the *Is-Ought* split is overcome. The ultimate end is the norm of self-development, the development of the individual as problem-solver (Jaffe, o.c., 102 seq.).
Finally, support can also be found in hermeneutic theory. The hermeneutic redefinition of *Verstehen* by Gadamer, made accessible to jurists by Esser, presents an attractive view of the role of situational factors. The 'hermeneutic circle' stands for the balance, or dialectics, between the prejudices we hold in the approach of a case, and, on the other side, an openness for the object, allowing it to speak for itself (Esser, 1970, 134; Wolff, 1975, 104).

c. Flash or Gestalt

We came across the concept of Gestalt (configuration or wholeness) several times now. It is also used in the work of the last mentioned author, Gadamer; talking of aesthetic experience, he argues that any experience is united, by its intentional content, in an 'unmediated relationship with the totality of life'; it is 'the represen-

tation of the whole in a moment' (Wolff, 127). The concepts of 'the hunch', or 'the intuitive jump', and the like, used in jurisprudence in the description of judicial decision making, can be explained, to my judgment, as the appearance of a Gestalt: a lightning moment of insight in the legal question, in a flash of higher consciousness (Compare the same experience of composers, poets, scientists).
Compare for a related view, Bihler's study on the feeling of justice, where reference is made to the work of Eberhard, a theory of value judgments based on developmental psychology. From early childhood on, objects obtain a certain 'Wertton' (value-tone); thus a sub-conscious value-structure is formed in the form of Gestalts. A paradigm for Gestalt here, is the melody, which is more than the total of the notes involved (Bihler, 1979, 59, 121, 142). [21]
Returning to the moment of illuminating insight, there is some relation to the discussion on truth as an immediately evident judgment (Brentano, 1973, 129). Compare Leibniz' statement that certain truths establish themselves as valid 'dans une manière lumineuse'.
Many authors stress the relation between wholeness and harmony or balance. Essentially, this is a Stoic tradition: a thing of value must be in harmony with nature (Cicero). An example is Bosanquet's definition of the principle of value, as the 'character of wholeness and non-contradiction' (Perry, 46; cf. also 96, 120, 120, on Bradley, McIntyre, and Meinong). The role of harmony in the view of Hobhouse has already been mentioned (supra, sub *a*).

In conclusion, it might be valuable for the science of law, to reconsider the relation between the True, the Good and the Beautiful.

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