CONSCIENCE IN MAKING JUDICIAL DECISIONS

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THESIS

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ABSTRACT OF THE THESIS.

If this thesis has to be expressed in one sentence and not in many thousand words, it is the following: Judges should love all those who are affected by their decisions as they love themselves. This is the key idea of the whole thesis. The argument for the importance of the principle of love starts from the consideration of two theories: the psychological theory of law developed by a Polish-Russian academic, Leon Petrazycki, and the moral theology of Thomas Aquinas. The theory of Petrazycki, which is almost unknown in the West, is important because it grounds the principle of love in the emotions and impulsions of those who are involved in the legal process. He sees the whole law as a complex interaction of individual impulsions, among which love is the most noble. The theory of Thomas Aquinas is important because it contains a developed idea of conscience. His search for the essential characteristic of a good conscience also points to love, even though he did not articulate it clearly. The combination of both theories allows us to look at the principle of love as the essential characteristic of a good conscience from different angles, and helps us to see that the whole process of judicial decision-making is a complicated phenomenon which comprises both moral intuitions and rational deliberations.

The central place in the thesis is devoted to elaboration of the method of agapic casuistry which is a complex of skills and techniques of application of the principle of love in particular situations. The meaning of the principle of love is clarified through drawing on the traditions of Christian ethics. Love is understood as a care for another, as a genuine willingness to do good to others for the sake of the others. The method requires that the judges apply legal rules in a flexible way after reaching as deep an understanding as possible of the motives and moral views of the parties to the process, and after examining themselves with the purpose of neutralising moral prejudices and biases. Based on this method, the practice of impartial sympathy judgement and watchfulness are considered paramount in order for the principle of neighbourly love to operate effectively in the process of judicial decision making.

The practical character of agapic casuistry is illustrated by examples of judicial decisions in four different courts: the House of Lords, the Scottish High Court of Justiciary, the Russian Constitutional Court, and the European Court of Human Rights. Four different aspects of judicial decision-making are taken in order to demonstrate that the judges can and do love their neighbours actively

even under the legal constraints on their activities. Defining the scope of the right to a hearing, judicial activism in punishing criminal behaviour without the explicit sanction of the positive law, constitutional control over legal rules and interpretation of human rights are all considered through the perspective of agapic casuistry. In all those aspects, the judge's act of love is manifested in their sympathy towards the parties. Sympathy based on agapic love is impartial, and it transforms not only the lives of the individuals but the whole institutions and practices. Although sympathy judgement is not the only type of moral judgement in judicial decision-making, it is not uncommon. The ultimate goal of this thesis is, however, not only to understand the common practices of the courts, but to show that love can transform the present and future decision-makers who still do not know the power of love.

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INTRODUCTION.

The conscience of judges and application of legal rules.

The thesis 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 thesis, 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 becomes 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 thesis 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 thesis 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

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

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 thesis.

The structure of the thesis.

The thesis 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 thesis, 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 thesis, 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 thesis 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 thesis. 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 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,

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

[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).

this thesis 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 thesis.

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.

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 thesis. 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.

The fourth aspect of judicial decision-making is interpretation by the courts of the meaning and scope of protection of human rights. This aspect has become very important with the incorporation of the Convention of Human Rights into the domestic law of England and Scotland, and also into the domestic law of many other countries including Russia. The practice of the European Court of Human Rights will be examined in the light of the principle of ethical love. Special attention will be paid to the ways a sympathy judgement relates to different kinds of legal arguments. It will be shown that the concept of human rights allows significant room for sympathy

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

judgements, and vice versa: the principle of love, and based on it, sympathy judgements provide the best model of interpretation of the legal rules protecting human right.

The method of agapic casuistry can be used for the analysis of other aspects of judicial decision making. However, the descriptive potential of the method is subordinate to its prescriptive purpose. Agapic casuistry is not so much about description and understanding of judicial process as about its transformation to meet human needs and goals.

PART I.

CONSCIENCE

AND LEGAL REASONING.

1. LEGAL REASONING

IN THE THEORY OF PETRAZYCKI.

Introduction.

The theory of a Russian scholar of Polish descent, Leon Petrazycki, contains interesting ideas, which can help us to clarify the intrinsic connection between legal reasoning and the conscience of judges. This connection is left unnoticed in many contemporary writings about judicial decision-making[1], which makes it necessary to consider a theory which paid attention to the relationship between legal reasoning and conscience, even though this theory is almost a hundred years old and is not well known in the Western legal thought.

One reason why the theory of Petrazycki has been left unknown was the First World War and the October Revolution in Russia which interrupted his academic life. After the revolution Petrazycki was forced to emigrate leaving much of his materials in Russia. His life tragically ended after futile attempts to find a new homeland abroad. Apart from a few articles[2], no solid academic work on his theory has been yet carried out. Almost all the books of Petrazycki (his heritage amounts to 35 volumes) are still inaccessible to an English speaking reader. There is only one shortened translation of his

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[1] Some of them will be considered in chapter 4 of the thesis.

[2] *Sociology and Jurisprudence of Leon Petrazycki.* - Ed. by Jan Gorecki. - Chicago: University of Illinois Press, 1975; Rudzinski A. W. 'Petrazycki's Significance for Contemporary Legal and Moral Theory.' in: 21. *American Journal of Jurisprudence.* (1976). pp. 107-130; Sadurska R. 'Jurisprudence of Leon Petrazycki.' in: 32. *American Journal of Jurisprudence.* (1987). pp. 63-98.

two volume work *Theory of Law and State*, published by the Harvard University Press and entitled *Law and Morality.*[3]

Despite his obscurity, Petrazycki offered insights in the nature of law and legal process which can be of great interest for a researcher of judicial decision-making. Three basic ideas in the theory of Petrazycki give the key to his whole theory of legal reasoning.

1. The law is not what is fixed in numerous statutes, precedents, customs. The law is what is experienced by the human consciousness as an imperative or impulsion to discharge a certain duty in order to satisfy a certain right. Every participant in the legal process has already got pre-given expectations about what the law requires in the given situation.

2. The origin of such imperatives and expectations cannot lie exclusively in the formal sources of law like statutes, precedents or customs dominant in a particular society. It is necessary to go further to the phenomena of conscience and intuition.

3. In order to explore the life of law in such a way as it exists on the level of the ordinary participants in legal processes it is not enough to make a logical analysis of the legal rules. Because the reality of law has to be discovered in the imperatives and expectations of the individual consciousness, it is psychology and, in particular, moral psychology, which should provide efficient methods to explore this level of legal reality.

In this chapter, these three basic ideas of Petrazycki will be examined in their relationship to judicial reasoning. The implication of his theory is that judicial reasoning is determined not so much by the abstract content of the legal rules applied as by the psychological experiences of the judges. There are many similarities between the theory of Petrazycki and the later expositions of the Legal Realists. This comparison will be made, and the need for further development of the ideas of Petrazycki and Legal Realists on conscience, love, and natural law will be posited.

Petrazycki's theory of intuitive law.

For Petrazycki, conscience appears as a moral intuition, that is a direct and spontaneous perception of an obligation to act in a certain way or abstain from certain behaviour. Petrazycki's thesis that conscience is the source of intuitive law is fundamental for exploring the moral aspects of judicial decision-making. Having given

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[3] Petrazycki L. *Law and Morality.* - Transl. by H. Babb - Harvard University Press. 1955.

a theoretical exposition of the problem of conscience as intuitive law, Petrazycki did not move further to the implications of his theory concerning judicial decision-making, particularly the moral experience of judges. Nevertheless, his theory of intuitive law may be of significance in revealing the influence of conscience on the results of judicial process.

Petrazycki developed his theory of intuitive law on the basis of psychology of moral impulsion. He identified the intuitive law with the commands of conscience although the concept of conscience itself was not his primary concern.[4] The particular feature of his theory was a distinction between the intuitive law of conscience and the positive (state-established) law. The distinction was based on the different sources of the intuitive and positive law. The rights and duties of the positive law, according to Petrazycki, are set by the normative facts, that is a legislative directive, a legal custom, a judicial precedent.[5] The intuitive law cannot be reduced to such facts.

The separation of the intuitive law and positive law is not identical to the separation of law and morals drawn by Petrazycki. Although both law and morals are seen within the realm of ethics they are different on the basis of how the ethical obligation is conceived by the human consciousness: "Obligations conceived of as free with reference to others - obligations as to which nothing appertains or is due from obligors - we will term moral obligations. Obligations which are felt as compulsory with reference to others - as made secure in their behalf - we shall term legal obligations".[6] The legal obligations are expressed in, as he called it, attributive imperatives, and the moral obligations are expressed in non-attributive imperatives, because such imperatives are not accompanied by a right of the other person involved to the action caused by the imperative. It is important to notice that the commands of conscience have a legal nature as far as they ascribe to other person any right. Like the positive law, intuitive law contains imperative-attributive imperatives. But unlike the positive law they are formed by the individual conscience freely without reference to the normative facts. The latter include statutory provisions, decisions of the courts, customs and all that which the consciousness of the individual perceive as the source of the imperative-attributive imperatives. The intuitive law has a different source of the imperatives, which lies in the convictions and beliefs held by conscience.

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[4] Petrazycki L. *Teoria Prava i Gosudarstva.* - St. Petersburg: Merkushev, 1910. - P. 486-487, 573..
[5] ibid., - p.477.
[6] ibid., p.49-50.

The intuitive law and the positive law comprise what Petrazycki calls 'the official law'.[7] They have equally binding force on its subjects. Thus, the intuitive law is identified with the official law: "Insofar as they concern objects within the cognisance of official law, the axioms of intuitive law are acknowledged also by state courts and other organs of state authority. In general the corresponding intuitive law is a constituent part of official law and a fundamental and essential element thereof".[8]

Petrazycki perceives the positive law as a product and manifestation of the intuitive law of those who establish it. At the same time, he stresses that not all positive law is derived from the intuitive law (conscience). "Legislative enactments may be based on considerations of interests and the like, which contradict the intuitive law conscience of the legislators themselves - or of the masses - and nevertheless bring to life the corresponding positive law".[9] Apart from this, there are many parts of the positive law which are irrelevant and neutral with respect to the intuitive law: questions of formalities, technical arrangements, and so forth. Yet Petrazycki maintains that conflict between positive law and intuitive law is inevitable, and that it is in the court room where this conflict has to be settled. Not only may the intuitive law of one of the parties collide with the positive law, but so may the intuitive law of the judges, and Petrazycki talks even about collision with the intuitive law of the public.[10]

However, the relation between the positive law and the intuitive law may be one of relative harmony. Petrazycki affirms that the greater the accord between the intuitive law of the public and the positive law, the more correctly the law functions in general in a given nation, and the more uniformly it is observed. So one of the primary tasks of judges is to achieve this harmony. The intuitive law of the judges plays an important part in the application of positive law. "It exerts pressure upon the interpretation and application of positive law in the direction of securing decisions in accord with (or as little as possible divergent from) the directives of the intuitive law conscience."[11]

According to Petrazycki, the positive law gives only a general pattern within which the intuitive law (conscience) of the judges operates. The adaptation of general rules to concrete circumstances, the choice of the degree of punishment, or of the sum of an award, the evaluation of facts, - all these are governed by the intuitive law of the

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[7] Petrazycki L. *Law and Morality.* - Transl. by H. Babb - Harvard University Press. 1955. - P. 292.
[8] ibid., p. 293.
[9] ibid., p. 235.
[10] ibid., p. 234.
[11] ibid.

judges.[12] He writes: "In the official criminal law of civilised nations, the positive standardisation of punishments ordinarily indicates only the minimum and maximum limits of punishments, and definition of the specific punishments within these limits is left to the conscience of judges - that is to say, to their intuitive law. Even the decision as to whether or not the prisoner deserves punishment and should be recognised guilty (of an act which has been proved) depends on the conscience of judges and the jurors. Civil codes likewise entrust the decision of various questions requiring individualisation to the discretion of the judges, enjoin the interpretation and fulfilment of contracts and the decision of other questions, 'according to good conscience'".[13] Thus, Petrazycki's theory of conscience as intuitive law gives great importance to the judges. Judgements of conscience appear as a necessary element of judicial decision-making, and these judgements have a legal authority.

Law and love.

As we have already observed, the distinctive characteristic of Petrazycki's theory is that he tried to explore law from the point of view of subjective consciousness. Petrazycki understood law as a social-psychological phenomenon.[14] The main function of law is to facilitate conflictless and benevolent co-existence between members of society. The main stream of legal impulsions of the individual is characterised by, firstly, a desire to secure one's own position in society; and secondly, a desire not to harm as far as possible the position of other individuals. If the desire is based on a claim of mutual reciprocity it is a legal (attributive) impulsion, if not it is mere a moral (non-attributive) impulsion.

A cultivated impulsion to meet the needs of other people in order to secure the interests of all the members of society forms the core of the Petrazycki's concept of rational and active love[15]. This concept is central in one of his earliest works: *Introduction to the Science of Legal Policy* (1896) in which love is presented as the ultimate goal of law. The concept of rational and active love was not developed in his latter and the most influential works. However, the idea of ethical love is implicit even there, although it is not clearly articulated. Moreover, the latter works of Petrazycki can

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[12] ibid., p. 293.
[13] ibid.
[14] Petrazycki L. *Teoria Prava i Gosudarstva.* - St. Petersburg: Merkushev, 1910. - P. 3.
[15] Sorokin P. *The Ways and Power of Love.* – Boston: Beacon Press, 1967. – pp. 66-67.

serve as the key to a better understanding and full reconstruction of his idea of love as the ultimate goal of law.

The meaning of the idea of active and rational love can be adequately understood if, and only if, the whole psychological approach of Petrazycki has been taken into an account. It is important to stress that love as the ultimate goal of law **is** derived from psychological experience, or rather it is a rationalisation of legal experience. The latter becomes more evident when the connection between love on the one hand and the motivational and educative effects of legal impulsions on the other is established.

The essential significance in human life of legal impulsions is that they "(a) operate as motives of conduct and stimulate the accomplishment of some actions and to abstention from others (the motivational effect) and (b) produce certain changes in the mind of individuals and masses, developing and intensifying some habits and propensities and weakening and eradicating others (the pedagogical and educational effect)."[16] Both effects, usually but not necessarily, aim to promote the common good. "They act in general in favour of conduct socially desirable and against conduct socially harmful, and educate in the direction of developing and intensifying socially desirable habits and propensities".[17] At this point love can be perceived as a characteristic of legal motivation to act for the common good and for the good of one's neighbour. Love is not the only characteristic of legal motivation, but it is the most important one. Only in this context can we understand why Petrazycki set love as the goal of legal policy. Love is a certain condition of the human mind which makes a person act in a socially desirable way and abstain from what is socially harmful. Therefore, legal policy which carries out the pedagogical and educational effects should do everything possible in order to stimulate legal impulsions based on love.

It is necessary to point out two implicit ideas in Petrazycki's theory: firstly, the meaning of ethical love lies in the deep psychological experience of a duty to act in the interests of society, its members and the bearer of the duty himself. Secondly, ethical love in legal impulsions is different from the ethical love in moral impulsions. The duty born by legal impulsions is conceived as obligatory because the individual consciousness recognises the right of the other person to claim the fulfilment of this duty. On the contrary, the duty born by moral impulsion is conceived as free because it has no such corresponding right on behalf of the other person. So, love in legal

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[16] Petrazycki L. *Law and Morality.* - Transl. by H. Babb - Harvard University Press. 1955. - P. 93.

experiences is different from love in moral ones. The difference lies not so much in the content of the duties but in the way they are conceived by the consciousness of individuals. Consequently, legal policy acquires great importance because it can directly affect the legal experiences of individuals and therefore affect the whole life of the law.

Love in legal impulsions is a driving force to fulfil a duty to another person because of the understanding that this person has a right to claim it. Thus, love is a psychological readiness to recognise and to meet the claims of other people. Love in moral impulsions is different. It is not something which binds and forces an agent to meet the interests of the others, as in legal impulsions. Love in moral impulsions is conceived as free from enforcement. Nevertheless, both kinds of ethical love have a common nature: a psychological experience of obligation to meet the needs and the interests of the others. Therefore, the criticism of Petrazycki's concept of love made particularly by Romana Sadursca is based on a misunderstanding. She affirms that his concept of love is "an unverifiable meta-value distinct from actual practice" [18] to which Petrazycki himself would clearly object.

Because Petrazycki did not consider love as a kind of primary good, the thesis that his theory represents a moral monism does not appear correct either.[19] Petrazycki would deny that his concept of love disregards such primary goods as freedom, equality, fairness, self-respect, the sanctity of life and so on. It seems that when critics try to examine his theory, they easily fall in the mistake of substitution of their own understanding of love for that of Petrazycki's. Another commentator on Petrazycki's theory, Peczenik, was closer to the truth when he observed that according to Petrazycki, active love for the neighbour represents the nature of the historical evolution of law.[20] Still, it is necessary to notice that for Petrazycki, love is not an abstract end of law, it is the sum and substance of legal impulsions. At the same time Petrazycki sees the necessity for legal theory to rationalise love through clarification of its nature, and on the basis of that to conduct a correct legal policy which leads to the maximum possible well-being of people. In this respect the theory of Petrazycki stands close to the idea of utilitarianism.

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[17] ibid., p. 94.
[18] Sadurska R. 'Jurisprudence of Leon Petrazycki.' - P.74.
[19] Gorecki J. 'Social Engineering through Law'. in: *Sociology and Jurisprudence of Leon Petrazycki.* - P. 129.
[20] Peczenik A. 'Leon Petrazycki and the Post- Realistic Jurisprudence' in: *Sociology and Jurisprudence of Leon Petrazycki.* - Ed. by Jan Gorecki. - Chicago: University of Illinois Press, 1975. - P. 6.

Thus, Petrazycki believed that a clear understanding of law and its nature would help to conduct a proper legal policy in order to increase the effectiveness of legal institutions and practices. For him, legal theory should not restrict itself only to the description of what law is; in addition, it should provide all law-makers with the normative ideal of law. Only in this context does the importance of concept of rational and active love become obvious. The need for the concept of love in a general science of law was stressed recently by Zenon Bankowski.[21] Petrazycki himself, however, would go much further through the thesis that law and love are not destructive of each other, to the thesis that they are opposite sides of the same coin. His main idea, though undeveloped, was that love is a rationalisation of legal impulsions.

Judges and law.

The promotion of active and rational love in legal relations is seen by Petrazycki as the primary goal of law. It seems that the impulse for such promotion should come from the legislator. This led Jan Gorecki to maintain that Petrazycki opposes the idea of judicial social engineering and favours strict, deductive, quasi-mathematical construction of statutes.[22] However, a closer consideration of the view of Petrazycki on the role of judges leads to rather different conclusions. It is possible to maintain that the psychological theory of Petrazycki gives the judges much more importance than, perhaps, any other theory of law. The necessity for the institution of the courts lies in the need of the members of society to adjust their different ideas of law[23]. For the law is but the ethical experiences of the individuals involved in social relations.

In order to understand the importance of the judges it is necessary to mention that Petrazycki strictly distinguishes between law and normative fact. "Law is to be understood as those ethical experiences whose impulsions have an attributive character. All other ethical experiences - those connected with pure imperative impulsions - we shall call moral phenomena".[24] Normative facts are the bases of obligation in positive law: legislative acts, court decisions, customs and so forth. Therefore, the real law is not the previous decision or the provisions of statutes, the real official law is the opinions of

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[21] Bankowski Z. 'Law, Love and Computers.' - *Edinburgh Law Journal.* 1996. 1. - P. 1. Bankowski Z. 'Parable and Analogy: the Universal and Particular in Common Law' in *Acta Juridica.* 1998. - pp. 138-163.

[22] Gorecki J. 'Social Engineering through Law'. - Note 3, p. 130.

[23] Petrazycki L. *Law and Morality.* - P. 138.

[24] ibid., p. 62.

the officials, and the judges in particular, based on the normative facts. Court decisions themselves are mere manifestations of law. "They are evoked by the legal opinions of judges".[25]

Court decisions can be based on different normative acts or even on the intuitive law (conscience), but the decisions themselves are determined by the legal impulsions of the judges. In a sense the judges do not make the law. They just apply the positive law or the intuitive law in the form conceived by their consciousness. As the administrators of law, the judges have great importance independently of whether it is a statute, a custom, or the judgement of their conscience they are applying. If the judges apply the law in a different way from what they think themselves would be right (for example, under political pressure,) they violate the law.[26]

Petrazycki distinguishes three kinds of law related to court activities. Firstly, there is the law of court practice in a strict sense.[27] It is the general, prolonged, uniform application of a certain norm of law. Petrazycki defines it as a general line of behaviour. It can be defined also as a judicial custom of law. The courts apply a norm of law because of adherence to the long tradition of its application. The second kind of law he called 'the law of separate praejudicia'[28], which is based on the principle of a precedent. It includes the previous decisions which a judge should follow. The law of separate praejudicia came into existence because of the lack of normative facts fit to tackle the issues arising before the courts. Petrazycki combines both the law of court practice and the law of separate praejudicia under one general term: 'the law of praejudicia'.[29] This kind of law is identical to the common law which exists in Britain and the USA, though it can be found elsewhere. "This law is manifested and flourishes chiefly where there is no proper legislation and, in general, no other positive pattern which is appropriate, adequately complete and developed."[30] Although Petrazycki insists that this law is subsidiary, auxiliary, and complementary positive law, it is still widely applied where there is no other positive law solution to the relevant problems. Moreover, even under a developed legislature, it may acquire greater importance in conflicts between the positive and intuitive law (conscience) of judges: "Decisions deviating from the existing

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[25] ibid., p. 271.
[26] ibid., p. 272.
[27] ibid., p. 271.
[28] ibid., p. 272.
[29] ibid., p. 273.
[30] ibid.

(but seemingly unjust) positive law pattern, handed down by courts acting according to their intuitive law conscience, are then raised to the degree of independent normative facts, with the result that a corresponding new positive law destroys and supersedes the former positive law pattern".[31] Thus, even in modern times, the law of praejudicia may play an important role in the development of the positive law as a whole.

It is the third kind of law which takes the most prominent position in the theory of Petrazycki. He calls it 'judicial law'[32]. It embraces all the decisions of the courts concerning material issues of law, excluding those belonging to the law of praejudicia. "Of judicial law it may be said that it is the most powerful and authoritative of all species of positive law, or, more exactly, of all the species of law in general (not excluding intuitive law). By the widespread principle of official law, *res judicata pro veritate accipitur*, whether or not it is essentially correct or in conformity with statutes, a judgement of the court, which is final and has taken on legal force, is recognised as the plain and unqualified truth. For that particular case it overrides the statutes, customs, and so forth, and possesses a significance which is alone decisive and absolute".[33]

Thus, the psychological approach to law leads Petrazycki to affirm the superiority of judicial law even if the judges have only the power to apply the statutory law. Petrazycki comes very close to the conclusion that the official law is what the courts decide. The whole theory of Petrazycki has as its implication the recognition of judicial activism as a form of the existence of official law. If considered from the point of the ultimate goal of the law, judicial activism should serve the cause of the promotion of rational and active love.

Petrazycki and the Realist school of law.

The Realist school of law represents a large variety of thinkers and no less a variety of ideas. It is problematic to give a full comparison between Petrazycki's theory and the tradition of Legal Realism. A critical attitude to legal practice seems to be the only thread which binds together the different adherents of the tradition of Legal Realism. "These so-called realists have but one common bond, a negative characteristic: scepticism as to some of the conventional legal theories, a scepticism stimulated by a

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[31] ibid.
[32] ibid., p. 274.
[33] ibid.

zeal to reform, in the interest of justice, some court-house ways."[34] The sharp criticism of a purely logical approach to the problems arising in the judicial decision-making was undertaken in the works of Karl Llewellyn, Walter Cook and Jeremy Frank.[35] The American critical stream in jurisprudence has its continuation in the Scandinavian countries where Knut Hans Olivecrona, Anders Lundstedt, and Alf Niels Ross developed the Realist approach to the law[36] partly influenced by Axel Hagerstroem's philosophy[37] and partly by the American Realist school.

Petrazycki shared this general scepticism of established legal concepts. Moreover, he would definitely subscribe to the famous aphorism of Justice Holmes that "the life of the law is not logic, but experience",[38] the aphorism which was to become the credo of the Realist approach to the law. The resemblance between Petrazycki's theory and the American Realist school consists particularly in the understanding of law not as an abstract body of general rules but as spontaneous and dynamic social life full of contradictions and paradoxes. Petrazycki went even further: to the depth of the psychology of law experienced by an individual involved in social life.

The distinctive feature of Petrazycki's theory, however, is the fact that he did not restrict law (as some Realists did) to what the courts do. He took into account not only the conscience of the judge but also the conscience of ordinary participants. There is no doubt that the main stream of Petrazycki's ideas was directed to the justification of legal policy based on the recognition of the right of all the participants in the judicial process to take an active part in it. The general approach of Petrazycki allows him to escape the extreme judge-centrism which is characteristic of the American Realist school. It also allows him to obtain a key to the problem of fact-finding, which so bothered Jerome Frank in his search for judicial certainty. According to Petrazycki, what is important is the facts as they are conceived in the consciousness of the participants in a legal process, rather than the facts as they are.

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[34] Coher F. 'Transcendental Nonsense and the Functional Approach.' In: *American Legal Realism.* - Ed. by W. Fisher. - Oxford University Press, 1993. - P. 226.

[35] Llewellyn K. *Recht, Rechtsleben, und Gesellschaft.* - Berlin: Duncker, 1977. Llewellyn K. *The Brumble Bush.* - N.Y.: Oceana Publications, 1969. Cook W. *The Logical and Legal Bases of The Conflict of Laws.* - Harvard University Press, 1942. Frank J. *Courts on Trial.* - Princeton University Press, 1949. Frank J. *Law and the Modern Mind.* - Gloucester: P. Smith, 1970.

[36] Olivecrona K. *Law as Fact.*- London: Stevens, 1971. Lundstedt A. *Superstition or Rationality in Action for Peace.* - London: Longmans, 1925. Ross A. *On Law and Justice.* - London: Stevens, 1958.

[37] Hagerstroem A. *Inquires into the Nature of Law and Morals.* - Stockholm: Almqist, 1953.

[38] Holmes O. W. *The Common Law.* - Boston: Little, 1881. - P. 1.

It seems that the theory of Petrazycki and the theory of the Legal Realists suffer opposite shortcomings in relation to the problems of the conscience of judges. For Petrazycki it is a lack of development of the implications of his general view of conscience for judicial decision-making. For the Legal Realists it is a reluctance to draw the general conclusions which would link their analysis of judicial activities with other areas of legal theory. If the theory of Petrazycki did not include any practical illustration of the moral experience of the judges, the Legal Realists portraying such experience were reluctant to develop a thorough doctrine of conscience and intuitive law. The primary goal of the Realist approach in the law was not the elaboration of the theory of conscience and its influence in the practice of law but the all-round criticism of the law. The representatives of this approach tried to make their contribution in "conscious ethical criticism of law"[39] through cleansing legal rules, concepts and institutions of the compulsive flavours of legal logic and metaphysics. At this point, theory of Petrazycki and the tradition of Legal Realism meet each other. But there are also other similarities.

Intuitive law and judicial hunch.

Petrazycki believed that every individual who is involved in the legal process possesses the intuitive law in his consciousness. In relation to his theory the expositions of the American Realist school may serve as an illustration of how the intuitive law operates in consciousness of judges. The idea that judges are guided by their intuition is one of the basic presuppositions of the Legal Realists.[40] The concept of intuitive law developed by Petrazycki has some parallels to the hunch theory of judicial decision, which is found particularly in the works of Jerome Frank. Unlike Petrazycki, it does not appear that Jerome Frank maintained a strong bond between conscience and judicial hunch, though Frank recognised that the decisions of judges may be conditioned by their conscience.[41]

The concern of Jerome Frank was quite practical: to see what the connection is between the intuition of the judges and their reasoning. Frank noted that a judge is guided not only by logic, and even not so far by logic, as by impulsions: "His decisional process, like the artistic process, involves feelings that words cannot ensnare. A large

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[39] Llewellyn K. N. *The Bramble Bush.* - N.Y.: Oceana Publications, 1969. - P.73.
[40] See: Justice J. Hutchetson. 'The Judgement Intuitive.' - In: *American Legal Realism.* - Ed. by W. Fisher. - Oxford University Press, 1993. - P. 202-204.
[41] Frank J. *Law and the Modern Mind.* - Gloucester: P. Smith, 1970. - P. X.

component of a trial judge's reaction is 'emotion'[42]. Frank said that the hunch of a judge cannot acquire a logical verbal form without distortion: "His ineffable intuition cannot be wholly set down in an R[ule] and an F[act]. There are overtones inexpressible in words".[43]

Frank showed a great interest in psychology, particularly, gestalt psychology.[44] Petrazycki would definitely have subscribed to the Frank's statement that "The decision of a judge after trying a case is the product of a unique experience".[45] Emotions of judges take one of the central positions in the hunch theory of Frank. He noted: "We could not, if we would, get rid of emotions in the administration of justice".[46] This, perhaps, is the strongest similarity between Petrazycki's and Frank's theories. In fact, the English word 'impulsion' in the English translation of the Petrazycki's work stands for the Russian word 'emotzia' which can also be translated as emotion.

There are, however, some differences. The relations between the hunch of a judge and his legal reasoning in Frank's theory does not assume exactly the form of relations between conscience and legal reasoning as seen in the theory of Petrazycki. For the latter, conscience represents an intuitive grasp of moral obligation, while for the former, the hunch of a judge may include, apart from the perception of moral obligation, a grasp of facts, their finding, selection, and reconstruction. Frank thought that intuition reigns in the process of determining what facts are relevant and what rules are applicable. The intuitive search for relevant facts and justified reasons is not a simple process. It is rather a series of hunches, where a previous hunch may be rejected if a judge has failed to develop a proper argumentation and justification.[47]

Like Petrazycki Frank maintained the importance of educating the intuition of the judges. He wrote: "Our judicial process is based upon the trained intuition of the judges".[48] In his vision of conscience as a tool of such education, Frank displays a similar approach to that of Karl Llewellyn. Conscience appears as prudence, or wisdom, rather than a mere psychological source of ethical imperatives: "Every judge unavoidably has many idiosyncratic leanings of the mind, uniquely personal prejudices, which may interfere with his fairness at a trial... . Frankly to recognise the existence of

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[42] Frank J. *Courts on Trial.* – P. 173 -174.
[43] Ibid., p. 174.
[44] ibid., p. 170.
[45] ibid., p. 171.
[46] Frank J. *Courts on Trial.* – p. 412.
[47] Frank J. *Law and the Modern Mind.* - Gloucester: P. Smith, 1970. - P. 100.
[48] ibid., p.113.

such prejudice is the part of wisdom. The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect".[49] Thus, being conscientious means something different from merely having moral prejudices.

The recognition of the fact that the judges are influenced by their own intuitions and unconscious prejudices is the starting point both for Petrazycki and the Realists to develop a prescriptive theory of judicial decision-making. Frank, for example, saw the task of a such theory in educating emotions of the judges to be sensitive, nicely balanced, and subject to their own scrutiny: "The honest, well-trained trial judge with the completest possible knowledge of the character of his powers and of his prejudices and weaknesses, is the best guarantee of justice".[50] The real meaning of this statement is about the significance of conscience in making judicial decisions.

Thus, we may conclude that the 'hunches' in Frank's theory are not exactly the intuitive law of the theory of Petrazycki. At the same time the idea of conscience which can be drawn from the theory of Frank differs from the Petrazycki's idea of conscience identified with the source of the intuitive law. Hunches are seen primarily as any feelings related to the facts and rules, while the Petrazycki's concept of the intuitive law is restricted to one kind of normative feelings: normative-attributive impulsions. Conscience, in Frank's meaning, is an ability of self-examination and judging one's own feelings and prejudices. Conscience in Petrazycki's meaning is an inner experience of duty. It is natural to raise the question to what degree the theory of intuitive law is compatible with the theory of judicial hunch. It is obvious that both Petrazycki and Frank accept the importance of normative feelings of judges. Both of them conceive the task of their theories as rationalisation of these feelings in the interests of justice. The real difference lies only in the meaning of the concepts used for articulation of their theories. If these differences are removed, it is clear that the both theories can enrich each other in many points. As for their different concepts of conscience, it can be said that the idea of conscience as the source of the normative impulsions, and the idea of conscience as a judge and overseer of the same impulsions do not exclude each other. Both concepts of conscience, however, need further development.

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[49] ibid., p. XXIII.
[50] Frank J. *Courts on Trial.* - p. 412.

Ethical love and the Legal Realists.

One of the weak points of the Legal Realists in general is that, claiming to explore the experiences of judges, they have not made a deep analysis of their ethical impulsions. In this respect, Petrazycki's concept of active and rational love can partly remove this shortcoming. Petrazycki's understanding of love is determined, firstly, by his psychological approach, and, secondly, by his broad vision of the tasks of legal theory. Unlike him, the Legal Realists were absorbed in their critical approach to what had been maintained by traditional jurisprudence without giving a clear vision of what law should be. This has been a major shortcoming of the Legal Realism: undertaking a sharp criticism of the traditional legal doctrine and practice, it has not provided the goals and patterns according to which the existing legal practices can be changed.

The concept of active and rational love in Petrazycki's theory has been elaborated in the interests of conducting a proper legal policy. For Petrazycki, love is an abstract concept which generalises the sound legal experiences of the subjects of law. Unlike Petrazycki, the Realists were very reluctant to use such general concepts. However, the need to develop a prescriptive theory of law with its associated concepts has been felt by many of them. An idea of love similar to Petrazycki's is present at least in the works of one of the most prominent American Realists: Jerome Frank. Although he preferred instead of the term 'love' to use the terms 'charity' and 'mercy', his ideas are not very different from those of Petrazycki. The difference is that whereas Petrazycki developed the concept of rational and active love within the framework of legal policy applicable on the level of the whole official law, Frank was concerned basically with decisions on the level of trial courts. Thus, the ideas of Frank may be seen as a particular case of the general system which Petrazycki tried to elaborate.

Like Petrazycki, Jerome Frank maintained that the judges when arriving at their decisions are to be governed by ethical motivations. He wrote: "Mercy, charity, compassionateness, respect for the unique attributes of the men and women who come before our trial courts - these would seem to be needed components of civilised judicial process. I find some solace in the fact that, in spite of contrary pretensions, those are actual components of many decisions".[51] However, it is questionable whether Legal Realism as a whole has managed to bring to light such ethical motivations of judges as love, mercy, and so on. Jerome Frank did not go much further than asserting that the

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[51] Frank J. *Courts on Trial.* - Princeton University Press, 1950.- P. 389.

judges do follow their sense of mercy and charity, and the criticism of "that miserable fear of being sentimental, which is the meanest of all the modern terrors",[52] which can be found among the judges. Frank put the questions like: "Why our judges must continue to do merciful justice by stealth?". But he did not go further than expressing his doubts as to whether such stealthiness may produce a sound administration of justice. Frank neither gives any analysis of that fear of being sentimental, nor shows the reasons why the openness in such matters is essential for a sound administration of justice.

Frank took some steps exactly in the same direction as Petrazycki had done previously in maintaining a necessity of legal policy based on love. He agrees that "when one wants to know, not what maintains society, but how it must be improved..., it is to charity , to the spirit of devotion, to the spirit of brotherhood, that one must look".[53] Because Frank's main concern was how the courts operate, he moved even further than Petrazycki who treated active and rational love in quite general terms. He came to conclusion that the judges need to employ the casuistic method in order to improve the administration of justice. He maintained that the individualisation of cases "should be the aim of our own legal system".[54] According to Frank, such individualisation is opposed to rigid application of legal rules. He criticised the traditional image of justice as "a blindfolded goddess, who treats all persons alike, disregarding extenuating circumstances".[55] In his opinion, the casuistic method which was adopted in the ancient Greek and the Chinese cultures, is a more sincere and effective for doing justice that that one which is based on an exact following of legal rules. It is interesting to observe that a general idea of rational and active love draws Petrazycki's theory closer to the ideas of the natural law tradition, and also that the implications of the same idea in a more specific judicial context draws the theory of Jerome Frank closer to the tradition of moral casuistry. It is well known that the method of moral casuistry has been developed within the tradition of natural law, as we shall see in later discussion.[56]

We may conclude that the concept of ethical love in relation to the judicial decision-making has been sufficiently developed neither in Petrazycki's theory, nor in Legal Realism as a whole. Nevertheless, both theories contain the potential for such a

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[52] ibid., p. 389, note 1.
[53] ibid., p. 391.
[54] ibid., p. 378, 383.
[55] ibid., p. 391.
[56] See chapter 5 of the thesis.

development. The zeal for equitable administration of justice makes the position of Petrazycki and the Legal Realists much closer to the natural law tradition than they themselves would suppose. This common concern makes it possible for us to employ all these traditions together in justification of the rule of conscience in making judicial decisions.

Criticism of Petrazycki's theory.

The content of intuitive law, according to Petrazycki, varies with each individual,[57] and therefore it is extremely subjective. At this point the main difficulties arise. First of all it is not clear what is the content of the intuitive conscience of the public, the existence of which Petrazycki recognises.[58] The distinction between the positive law and the intuitive law is based on the way the legal obligation is conceived by the individual consciousness. Why this consciousness cannot vary in conceiving and interpreting the commands of the positive law as it takes place in conceiving of the intuitive law, Petrazycki did not explain. Because Petrazycki recognises the fact of influence of the intuitive law on the interpretation of the positive law, it is logical to draw the conclusion that the positive law should vary also with each individual, unless we have to admit that there is an intuitive law common to all society. It seems that the main difference between positive and intuitive law in the theory of Petrazycki lies not in the variety of the intuitive law, but in the different sources of legal norms ascribed by human consciousness. As to positive law it is the will of state, in the case of the intuitive law it is conscience. But it does not automatically follow that all intuitive law is subjective and varies with each individual.

The second difficulty is that his judgements relating to the content of the intuitive law are not consistent. Petrazycki believes on the one hand in the different content of the intuitive law for every individual and on the other hand he maintains that the commandments of the Gospel, for example, cannot be legal because their nature is non-attributive. They embrace duties but not the reciprocal rights. He disapproves of those who consider the Gospel's commandments as legal in the sense that they establish not only duties but also reciprocal rights.[59] However, if the content of the intuitive law varies with every individual why then cannot its content include the Gospel's

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[57] Petrazycki L. *Teoria Prava i Gosudarstva.* - P.480.
[58] ibid., p. 234.
[59] ibid., p.58.

commandments? Secondly, the concept of active and rational love developed in Petrazycki's theory resembles, to a significant degree, the Christian understanding of love. The Biblical commandment: "whatever you wish that men would do to you, do so to them"[60] - acquires all the attributive qualities which are characteristic for legal impulsions according to the psychological theory of Petrazycki.

One can agree with Petrazycki that the intuitive law of conscience is more changeable and more adaptable to the specific circumstances of a particular case than the positive law. But it is difficult to see any consistency with his belief that intuitive law is more meagre and simple than the positive one.[61] Petrazycki could argue that this meagreness and simplicity relates to a particular subjective intuitive law, while the positive law includes the experience of many law-makers. However, the relationship between the intuitive law of the judge and his interpretation of the common experience of the law-makers was left by Petrazycki undeveloped.

Another shortcoming of the theory of Petrazycki is that he did not really try to examine the pluralism of the intuitive law. It is not enough to assert that this plurality is caused "by each person's individual conditions and life circumstances: by his character, upbringing, education, social position, profession occupations, personal relationships and so forth."[62] That all these factors do have influence is beyond any doubt. However, the intuitive law can be a more complicated phenomenon. The different intuitive grasp of legal duties may take place not only within a group of persons having a similar background or character but even within one person, as takes place in cases of doubt and perplexity.

It seems that the theory of Petrazycki lacks a thorough criticism of the content of intuitive law. Without such criticism any psychological and moral theory of law is doomed to be a mere justification of subjectivism. It seems that Petrazycki' subjective vision of the intuitive law cannot explain the situations observed by Petrazycki himself, when people being involved in legal relations solve their problems without appeal to a third party or to the positive law. Such situations prove the existence of a uniform intuitive law shared with all members of the society: "In those numerous fields of life where the relevant problems of conduct are foreseen and decided by positive law (such as renting a lodging, hiring a servant, or buying things in shops), people are in fact

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[60] Matt. 7:12; Luke 6:31.
[61] Petrazycki L. *Teoria Prava i Gosudarstva.* - P.480-482.
[62] ibid., p.480.

ordinarily guided not by what is enjoined in this regard by the civil or criminal laws (which are ordinarily unknown to the vast majority), but by their intuitive law and the directions of their own intuitive law conscience. In other words, it is not positive law but intuitive law that is the actual basis of the corresponding "legal order" and the power which actuates the corresponding part of social life"[63]. If the whole intuitive law was subjective, then there would be no ground for the legal order.

It is clear that the theory of Petrazycki would undoubtedly profit if he recognised the existence of a uniform intuitive law. Moreover, if he were consistent in his psychological approach, it would lead him to the conclusion that it is a characteristic of social consciousness to share some values and norms as absolute and immutable, and that the legal consciousness still preserves this belief in its historical development. All these points show clearly that Petrazycki's theory needs further development. In the following discussion it will be shown that the psychological theory of Petrazycki can be supported by and developed within natural law tradition.

Towards the psychological theory of natural law.

Romana Sadurska was quite right when she observed the similarities of the theory of Petrazycki with the doctrine of natural law. In particular, this is the case when Petrazycki considered that active and rational love is an axiom of practical reason.[64] Petrazycki's view of natural law was determined, firstly, by his psychological approach to legal phenomena, and secondly, by his desire to perceive the science of law not only as describing what law is, but also what law ought to be. He wrote: "It is possible and necessary, on the basis of the psychological study of law and its motivation and cultural-educative action, to create a special science of legal policy dedicated to the working out of the principles of desirable rational law and legislation... . The earlier doctrine of natural law fulfilled the function of a legal policy, indicating the paths of progress and ways the law could be made better".[65]

Thus, natural law is conceived as the ideal of correct and appropriate law. Instead of a division between the positive and natural law Petrazycki insisted on division of the positive and intuitive law, taking as his basis the psychological experience of the individuals. As far as conceiving natural law by the individual

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[63] ibid., p.486-487.
[64] Sadurska R. 'Jurisprudence of Leon Petrazycki'. in: 32. *American Journal of Jurisprudence.* (1987). - P. 74.

consciousness involves attributive ethical impulsions, natural law is a part of the intuitive law. "The psychological method of study applied to the content of the treatises expounding the norms of natural law shows that their various propositions are nothing but reflections and expressions of intuitive law processes in the minds of the authors, who are setting out the content of their intuitive law convictions and of the corresponding projections".[66] So, natural law, according to Petrazycki, contains both intuitive law and considerations of legal policy.

Petrazycki's general approach to the classical theory of natural law is critical. He argued that the weak point of the natural law doctrines of the past was the same as that of the modern science of law - to seek the source of law everywhere but not in the psyche of the individual.[67] Nevertheless, his theoretical propositions give a different support for natural law thinking. The existence of a uniform natural law does not exclude the variety of the intuitive law experiences. It says only that apart from the differences in our intuitive law impulsions we have something in common, and only this common element makes possible the dialogue between different nations, countries, traditions, and cultures.

There are many similarities in the vision of natural law between the theory of Petrazycki and the tradition of Legal Realism. It is probably one of the most established preconceptions that the tradition of natural law and Legal Realism have nothing in common. As for the Realists themselves, many of them would clearly reject such a view. For example, Jerome Frank, rejecting the idea that his theory is opposed to the Thomistic theory of natural law, wrote: "I do not understand how any decent man today can refuse to adopt, as the basis of modern civilisation, the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas".[68]

Nevertheless, it is true that the Legal Realists shared a significant degree of scepticism towards the theoretical propositions of the natural law school. Frank himself gave a good example of a "twofold" attitude to natural law: it "yields, at best, a standard of justice and morality for critically evaluating the man-made rules, and, perhaps, for ensuring a moderate amount of certainty in those rules; but it furnishes no helpful

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[65] Petrazycki L. *Law and Morality.* - P. 223.
[66] ibid., p. 245.
[67] ibid., p. 246.
[68] Frank J. *Courts on Trial.* - p. XVII.

standard for evaluating the fact-determinations of trial-courts in most law-suits, and no assistance in ensuring uniformity, certainty, or predictability in such determinations".[69]

However, even if one assumes the fact-scepticism of Frank as a basis for the criticism of natural law theory, the answer of Frank to the question: "Why cannot Natural Law yield a standard of justice and morality for critically evaluating the fact determinations of trial courts as it does for evaluating man-made rules?" does not look very persuasive. Frank's answer is that he himself cannot see that "natural law principles operate on and control the subjective, often unconscious, and unstandardized ingredients of trial-court fact-finding, when oral testimony is in conflict as to crucial issues of fact".[70] It does not look as if Frank saw the potentiality for the individual to grasp intuitively the principles of natural law and then to apply them on the level of fact-finding. It seems that natural law was conceived by Frank as an abstraction reached after rational reflection, rather than a moral experience of the individual involved in the legal process. As for Petrazycki, he saw natural law, firstly, as the expression of ethical experience, and secondly, as a formulation of legal policy.

It is clear that the theory of Petrazycki is more open to taking the idea of natural law seriously than the theory of Frank. If natural law is understood as the intuitive law of the judges then it can and does influence the process of fact-finding and their evaluations either indirectly through interpretation of the positive law, or directly through following the rules required by conscience for the fact-finding. Moreover, the doctrine of judicial hunch developed by Frank may indirectly support the psychological vision of natural law. If natural law is understood as a formulation of legal policy then its influence on the process of fact-finding becomes even more evident, for this can prescribe such procedural safeguards as hearings, giving reasons, rules against bias. It is clear that these rules of natural justice do affect the process of fact-finding.

Thus, we may conclude that the theory of natural law as it is found in the theory of Petrazycki may answer the objections of Frank that natural law is useless on the level of evaluation of the fact-determinations of trial courts. A different approach to natural law is found in the works of another prominent Legal Realist: Karl Llewellyn. He, however, has not elaborated a detailed theory of natural law. Llewellyn has given only a sketch of his conception of natural law. His vision of natural law has some common features with that of Petrazycki. As has been already described, Petrazycki's

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[69] ibid., p.XX.

concept of natural law comprises two ideas: the idea of the intuitive law and the idea of the model for legal policy. Both ideas are to a greater or lesser degree present in Llewellyn's theory.

Karl Llewellyn distinguishes between the philosophical concept of natural law and a lawyer's concept of natural law. Although Llewellyn does not reject the philosophical concept, it is the lawyer's concept which is at the centre of his attention, and is portrayed by him in the form similar at some points to Petrazycki's idea of the intuitive law. The first similarity is that Llewellyn understands natural law as "an urge for right, or decency, or justice, a drive toward an ideal attribute which men may well conceive as a proper and indeed the proper ultimate objective of all law and of all legal institutions".[71] Although Llewellyn has not specified the nature of this urge or drive, it is clear that it can easily fit in the psychological framework of Petrazycki's theory. Secondly, according to Llewellyn, the content of the lawyer's natural law, unlike the philosopher's one, is changeable because it is specific and related to concrete issues of the positive law.[72] This recalls Petrazycki's vision of the intuitive law. The third common characteristic is that both Petrazycki and Llewellyn see a great impact of the natural law of the judges on the interpretation of the positive law, and its adjustment to the changes in society.

Apart from this, Llewellyn like Petrazycki, understands natural law thinking as a search for a more effective set of guides for conduct and for judging in the course of making decisions.[73] Thus, he considers natural law in the terms of an ideal for conducting appropriate legal policy. Despite these similarities between Petrazycki's and Llewellyn's concepts of natural law there is a significant difference between them. Llewellyn sees natural law in the terms of applicable rules derived from the philosopher's natural law general principles: "A lawyer's Natural Law is an effort to bring the philosopher's Natural Law to bear in lawyerlike actual regulation of the multitude specific problems of human conflict".[74] It seems that Llewellyn's understanding of natural law stands close to the Thomistic vision of natural law as a body of primary and secondary rules, in which the secondary rules are more specific derivations of the primary rules determined by concrete historical and social conditions.

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[70] ibid.
[71] Llewellyn K. *Jurisprudence.* - The University of Chicago Press, 1962. - P. 111.
[72] ibid., p. 114.
[73] ibid., p. 115.
[74] ibid., p. 112.

The lawyer's natural law is formed through thinking and discourse of the first principles of natural law, rather than through intuitive ethical impulsions as it appears in the theory of Petrazycki.

If Llewellyn had said more about his idea of conscience in relation to natural law, it seems it would have resembled even more the Thomistic approach than that of Petrazycki. In *The Bramble Bush* he points out that a judicial decision without consideration of conscience or what is just, is made often by the weaker, the less skilful judge.[75] As for Petrazycki, he thought that nobody can escape from considerations of conscience. The only qualification is that conscience can be ill-developed: a desire to apply strictly a provision of statute disregarding thereby special circumstances may also be caused by a judgement of conscience.

However, Petrazycki agreed with the idea that the intuitive (natural) law of the judges, that is their conscience, should be examined through rational reflection and discourse. The confusion may only come at the point when the idea of natural law is used as a set of rational principles for the reflection on intuitive law which is also denoted as natural. The inconsistency between the natural law as the intuitive law on the one hand and the natural law as a rational model of law as it ought to be on the other, might be solved through a recognition of the intuitive origin of this model as well. This leads to a complicated problem of the relationship between the intuitive law of those who form legal policy and the rational model of law as the goal of this policy. It is not clear in the theory of Petrazycki how the intuitive law of legal policy-makers acquires the form of a rational ideal of the future law. In the following chapters we shall see that the Thomistic concept of *synderesis* can give some help to solve this problem. Another thing which smoothes significantly the differences between Petrazycki's and Llewellyn's view is that Llewellyn does not exclude the influence of ethical impulsions on the process of formation of a lawyer's natural law. This explains the variety of natural law ideas found among the lawyers.

Thus, one may conclude that, despite some differences, Petrazycki's idea of natural law stands close to the vision of natural law found among American Legal realists. It seems that the missing element in both theories is an elaborated concept of conscience which would allow us to solve difficult problem of relationship between intuition, natural law, and rational reflection in judicial reasoning.

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[75] Llewellyn K. *The Brumble Bush.* - N.Y.: Oceana Publications, 1969. – P. 73.

Conclusions.

The main thesis of this chapter is, firstly, that the theory of Leon Petrazycki and the theory of Legal Realism offer a significant insight into the process of legal reasoning, and particularly into the problem of influence of the moral impulsions and intuitions of the decision-maker on the result of the legal process. Secondly, having shown the significance of moral impulsions and intuitions, both Petrazycki and the Realists stopped before undertaking the task of examining the moral nature of these impulsions, their moral assessment, and drawing practical conclusions on how the judges ought to sift through their moral impulsions and weed out those impulsions which are caused by bias and prejudice. Although Petrazycki and the Realists clearly understood the importance for the decision-makers of examining their conscience, this did not lead to elaboration of the practical theory of conscience in making legal decisions. Nevertheless, both Petrazycki and the Realists made the first steps in the direction of elaborating a prescriptive theory of judicial decision-making on the basis of the ethical values of love.

In their criticism of the established legal concepts, Petrazycki and the Legal Realists were driven by dissatisfaction with how justice is carried out by legal institutions. Although the social context of these institutions was quite different, the reason for miscarriages of justice, as they thought, was the same: the conventional legal theories which distort the real picture of life of the law. The conventional legal theories paid their main attention to the established external procedural constraints of the judicial activities. At the same time, they paid too little attention to the inner world of the judges.

The merit of the Realist school is that it has shown that the external constraints, in fact, do not work so effectively as was thought. However, neither the realists nor Petrazycki elaborated the idea of conscience as inner constraint on judicial decision-making, and its full application because of the moral relativism widely shared among them[76]. Moral relativism is a very shaky ground on which to build a sustainable critical theory of the law, which does not merely unproductively criticise, but transforms legal institutions in the image of justice. In this respect Petrazycki goes further. He understood that in order to carry out any reform it is not enough to criticise, it is

necessary to have a positive programme of change. It is not even enough to justify a broad judicial discretion in order to correct the existing law. It is necessary to go further to formulate legal policy based on the idea of active and rational love which would guarantee a proper use of discretion.

Finally, the need to elaborate a prescriptive theory of judicial decision-making based on an understanding of conscience as the foundation of the inner constraints of judicial discretion and as a driving force of the policy of active and rational love makes it appropriate to draw on the tradition of Christian ethics in which the concepts of conscience and ethical love have found their full development. Within this tradition the theory of Thomas Aquinas is of great interest not only because his theory of natural law has contributed significantly to the development of modern legal theory, and not only because the theory of Petrazycki accepts the idea of natural law, but also because Thomas Aquinas offered a highly developed concept of conscience. In the next chapters we shall see how Thomistic theory of conscience can contribute to the insights of Petrazycki and the Legal Realists.

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[76] See: Ross A. *On Law and Justice.* - London: Stevens, 1958. - P. 367ff.

2. THOMAS AQUINAS ON CONSCIENCE.

Introduction.

The advantage of the theory of Petrazycki is that it takes seriously the moral impulsions and intuitions of the judges. It allows us to look behind legal arguments directly into the depth of judicial conscience. Petrazycki's theory provides also an ideal of judicial intuitive law expressed in the terms of ethical love. However, as it was shown in the previous chapter, his theory of conscience, and especially his vision of ethical love, were left undeveloped. There are several questions in his theory to which Petrazycki did not give sufficient answers. Firstly, is there a common content of the intuitive law which is shared by members of the society including the judges? Secondly, how to explain and solve the conflict of intuitive laws amongst the members of society? Thirdly, what is the relationship between ethical love and the intuitive law? And finally, how should the judges use the principles and rules of the positive law which point at different decisions than does their intuitive law?

In resolving these issues, the theory of Thomas Aquinas can contribute significantly. It was noted already that the theory of Petrazycki represents a sort of psychological theory of natural law, and therefore the natural law theory of Aquinas can provide further insights to the issues. It may be also the case that Petrazycki's theory would not only benefit from the assistance of Thomistic thought, but the latter itself can be understood better in the light of psychological interpretation of natural law. In this chapter it is not my intention to produce a hybrid of two theories which were written in different ages and in different social and intellectual contexts. My purpose is to combine the advantages of these two approaches to explore and to educate the conscience of judges. It is beyond doubt that both theories possess a rich potential for fulfilling the task of this thesis.

The moral theory of Thomas Aquinas was developed as a part of his theological doctrine which has had a great impact on the whole of moral and legal philosophy. Thomistic doctrine has influenced much of the present vision of conscience and its problems. It continues to be considered among the highest authorities in modern Roman Catholic thought. Some of the most fundamental ideas of Aquinas have found revision and re-establishment in the works of modern Roman Catholic theorists of natural law

such as Grisez and Finnis.[1] In his important work *Natural Law and Natural Rights* John Finnis offered the theory of practical reasonableness which originates in the Thomistic doctrine[2]. It seems that Finnis' concept of practical reasonableness is broader than the concept of conscience. Finnis elaborates the notion of practical reasonableness in detail but he said only a few words about conscience. The merit of Finnis' works is that he tried to maintain the relevance of Aquinas's thought to modern legal theory, although he asserted that this relevance might be maintained without Aquinas's appeal to God as the ultimate authority. I shall maintain that the idea of God is essential for understanding of what Aquinas has written about conscience.

The basic underpinnings of the moral theory of Aquinas in their relevance to the concept of conscience.

First of all it is necessary always to keep in mind that Thomas Aquinas developed his doctrine as theology. God as revealed in the Scriptures takes the central position. All the other concepts are treated in the doctrine in so far as they relate to God.[3] It is arguable in fact how much his theory contains theology and how much philosophical Aristotelianism which does not necessarily require knowledge of God. This point is crucial, for the answer to this first question could lead to different theoretical implications. The way the theory of Aquinas is interpreted at this point determines the whole vision of conscience: whether conscience is an application of moral knowledge acquired by the activities of the human intellect alone or is an application of moral knowledge given us by God through revelation.

I would argue that although Aquinas experienced the strong influence of Aristotle, his vision is mainly theological. He wrote: "We always need divine assistance in order to take thought about anything, inasmuch as it is God who moves the intellect into action".[4] Aquinas believed that there are two means of God's assistance to know the moral truth: the first is by natural illumination, the second is by grace. Although every human being is able to know the moral truth through one's use of intellect, in practice everyone can hardly escape from making errors of moral judgement. Because of sin a human being is not able to grasp moral truth completely only through his natural

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[1] *Natural Law.* - Ed. by J. Finnis. - In 2 Vol. - Aldershot: Dartmouth, 1991.

[2] Finnis J. *Natural Law and Natural Rights.* - Oxford: Clarendon Press, 1980.

[3] Thomas Aquinas. *Summa Theologiae.* I. 1. 7.

capacities. Reason is subject to sin, and it may be corrected only by grace of God who reveals the moral truth supernaturally in His Son, Jesus Christ.[5] "Man can in no way rise up again from sin by himself without the assistance of grace".[6] Thus, the problems of conscience cannot be separated from the issues of sin and grace. This leads us to the problem of how Aquinas's theological concept of conscience can address unbelievers.

It is very important to note that according to Aquinas, moral truth is already given to everyone. Conscience does not need to discover what is already revealed naturally to it. But to a certain extend, sin prevents a human being to grasp and especially to follow the moral truth. The ability to know the moral truth and follow it is deeply enshrined in the nature of a human being.[7] Man is a part of the created world, and his position is determined by the fact that he is a dependent creature, whose last end, his beatitude, consists in achieving the unity with God which is lost as the consequence of the original sin. The particular feature of the moral theology of Thomas Aquinas is the stress on the acts of virtue which direct the human being to salvation from sin and eternal death.[8] Like the knowledge of the moral truth, the acts of virtue are possible only through divine grace which embraces not only the supernatural revelation of the truth but also the supernatural power to live a virtuous life[9]. Because the condition of grace is belief in Lord Jesus, Aquinas addressed the problem of whether the unbelievers can do any good at all in accordance with what is revealed naturally to their consciences. He came to the conclusion that unbelievers can do some good, but not everything that God requires from a human being.[10]

The idea that unbelievers can do what God's law requires is based on the writings of Apostle Paul who wrote that unbelievers not having the law do by nature things required by the law: "They show that the requirements of the law are written on their hearts, their consciences also bearing witness."[11] Aquinas following Augustine maintained that unbelievers can do what God's law requires also because of the Spirit of

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[4] ibid., I-II. 109. 1.

[5] ibid., I-II. 109. 8.

[6] ibid., I-II. 109. 7

[7] ibid., I. 9.

[8] ibid., II-II. 4. 3-5; *De Charitate, 11:* "Without charity no one can attain eternal salvation, and with charity one does reach eternal salvation". (Cited by T. C. O'Brien in the commentary on the p. 113. Vol. 27 of the *Summa.)*

[9] *Summa Theologiae.* I-II. 13. 8-9.

[10] ibid., I-II. 109.2.

grace.[12] That implies that a theory of good conscience cannot be restricted only to believers but also to unbelievers. Nevertheless, that does not deny the importance of the supernatural revelation. Aquinas stood firmly on the position that "Man's ultimate well-being cannot be achieved save through Christ".[13] God's grace is important not only for grasping moral truth which then shall be applied by the act of conscience. The act of conscience itself needs divine assistance. Aquinas wrote: "Man needs the assistance of God in two ways in order to live rightly. Firstly, as regards a certain habitual gift by which spoiled human nature is healed, ... secondly, man needs the assistance of grace so as to be moved by God to act."[14] It is worth stressing that the importance of receiving God's grace through faith in Christ does not exclude those who do not believe in Christ from receiving God's grace at all. Those who do not believe that Jesus is the only begotten Son of God can acknowledge that his life and teaching contain the highest moral standards, and even those who never heard about Jesus can do what Jesus commanded to his followers.

From this theological vision of human nature and the need of God's grace for man's moral well-being springs the importance of conscience in the life of human beings and society as the whole. The chief contribution of Thomas Aquinas to the problems of conscience is his idea that one must act in accordance with one's conscience. Finnis, commenting on this, wrote that Thomas Aquinas seems to be the first theorist who has formulated this requirement "in all its unconditional strictness".[15] This requirement is fundamental when approaching the ethical aspects of judicial activities. Aquinas's doctrine not only formulates this requirement, it tries to answer the crucial question: "why should one follow one's conscience?" Finnis' interpretation of Aquinas is that acting according to conscience is a realisation of human nature as a reasonable being. This reasonableness which finally finds its form in judgements of conscience "is not simply a mechanism for producing correct judgements, but an aspect of personal well-being, to be respected in every act as well as 'over-all' - whatever the consequences".[16] That is correct. But this is not the whole picture. For Aquinas,

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[11] Rom. 2, 14-15.

[12] *Summa Theologiae.* I-II. 109.4.

[13] ibid.,. I-II. 91. 5.

[14] ibid., I-II. 109. 9.

[15] Finnis J. *Natural Law and Natural Rights.* - Oxford: Clarendon Press, 1980. - P. 125.

[16] ibid., p. 126.

following one's conscience is the way to relate to God, and any personal well-being without God is impossible. Conscience is a relational category. It is not about following **my reason**, it is about obedience to **God.**

Finnis's contribution is that he has brought into focus the relationship between the question 'Why should one follow one's conscience?' and the nature and the sources of obligation. However, he incorrectly opposes Aquinas's position to the one held by Grotius and Suarez. According to Finnis, moral and legal obligation is derived by Grotius and Suarez from God's will, while Aquinas saw the foundation of the obligation in "one's understanding of the basic forms of human well-being as desirable and potentially realised in one's action, action to which one is already beginning to direct oneself in this very act of practical understanding".[17] However, Aquinas emphasised that in the cases of conflict between the commands of our own reason and God's precepts, the latter must be obeyed[18]. Finnis's attempt to confront obedience to God and understanding of basic forms of human well-being is easily understood in the context of his desire to get rid of Aquinas's theology. For Finnis, consideration of the basic forms of human well-being does not necessarily involves the idea of God.

Taking away a theological argument from Aquinas's theory of conscience would be, however, an incorrect representation of his views. Aquinas stressed that our understanding (whether of the basic forms of human well-being or whatever else) is moved by God's will. We need the assistance of God's will because of our nature corrupted by sin: "We always need divine assistance in order to take thought about anything, inasmuch as it is God who moves the intellect into action".[19] Though one may agree with Finnis that the theory of the basic forms of human well-being and the theory of basic requirements of practical reasonableness and their legal implications can be developed without appeal to the theological concepts, it seems that in this case the contribution of the doctrine of Thomas Aquinas to the theory of legal reasoning would be insignificant. Without his theological inheritance Thomas Aquinas finally appears as just one of the successful commentators on Aristotle.

Theology is an essential part of the moral doctrine of Thomas Aquinas, and it can contribute to the theory of law in several ways. Thomas Gilby commenting on the significance of the Thomistic doctrine wrote that: "The relationship between theology

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[17] ibid., p. 45.

[18] *Summa Theologiae.* I-II.19.5-6.

and the positive science of law is like that between general philosophy and the particular sciences", and that "theology provides law with an 'outside' test for what may be held and done"[20]. The question of relevance of the Thomistic theology to legal theory is a part of a broader problem of the contribution of theological reflection to the solution of matters of law. The latter problem requires general consideration which exceeds the limits of this thesis. However, we do need to outline the problem of the possible contribution of the theological vision of conscience by Aquinas to the issues related to the application of positive law carried out by the judges.

Aquinas's theological argument for the supremacy of a judge's conscience.

The main difficulty lies in the fact that modern legal reasoning is primarily secular while the general moral principles are based in the theory of Aquinas mainly on theological presuppositions. A judge even believing in God will be very reluctant to use a theological argument for justification of his decision; even so his belief might be crucial for the outcome of the legal process. Therefore, if one has to justify a theological argument, one has to show that this argument can and should be accepted even by the person who does not believe in God. Although it is a task which I can hardly solve within this thesis, I would like to point at some advantages of the theological argument of Aquinas even for a secular mind.

First of all, the advantage of the theological argument of Aquinas is more evident for those who accept the supremacy of conscience in making judicial decisions. One can argue in favour of the supremacy of conscience using either a general philosophical justification, for example, that following one's conscience is a realisation of human nature as a reasonable being, or a theological justification. The theological justification shared by Aquinas is that the judges must follow their consciences because God requires them to do so. The theological argument is more simple. It appeals to self-evident truth. It is already available for those who are ready to follow their consciences. It does not necessarily require the judges to have a further rational reflection similar to the one of Shakespearean Hamlet: 'to be or not to be'. The philosophical argument depends on acceptance of the idea of what is rational in order to justify the supremacy of conscience. Therefore it is conditional. The theological argument is unconditional,

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[19] ibid., I-II. 109. 1.

especially, if faith in God is seen not as a set of beliefs or opinions about the transcendental, but as an inner experience of the absoluteness of moral imperative. This is where the psychological theory of Petrazycki brings a new input to the theological argument. The theological idea of God's sovereignty in moral lives of the individuals can be equally well expressed in the terms of the invincible nature of moral impulsion, which Petrazycki dealt with in his theory.

In addition, Aquinas's theological argument is more open to accommodate the principle of equality. The philosophical argument in favour of the supremacy of conscience depends on ability of a moral agent to find a reason to comply with the principle of following one's own conscience. The ability can vary from one moral agent to another. The theological argument states that the principle is self-evident, and its validity is not dependant on the amount of individual intelligence. Moreover, philosophical reflection may hinder natural and spontaneous acceptance of the principle of following one's conscience.[21]

The second advantage of the theological argument is that it is more consistent with the vision of a judge as an administrator of law. In the theory of Aquinas, as we shall see later on, conscience is related primarily to the act of application of moral knowledge which is self-evident. Following one's conscience in the context of Aquinas's theory means obedience to natural and positive laws whose ultimate authority resides in God. The philosophical argument exalts the reason of the judge as the ultimate source of authority, and consequently it has tendency to exalt the judge himself rather than the law which he must apply.

The third advantage lies in the kind of responsibility which is supported by the theological argument of Aquinas. In the philosophical argument, a judge is responsible only before his own conscience. There is no need to answer to anybody for the acts of conscience. In the theological argument a judge must answer to God for everything what he has done. The philosophical argument lacks the relational characteristic of responsibility. Therefore, the emotional strength of the theological argument is higher because it contains, using Petrazycki's terminology, an attributive imperative.

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[20] Gilby T. Commentaries. - In: Thomas Aquinas. *Summa Theologiae.* - In 61 vol. - London: Blackfriars, 1960- 1981. - Vol. 28. P. 159.

[21] "Jesus said, 'I praise you Father, Lord of heaven and earth, because you have hidden these things from the wise and learned, and revealed them to little children". (Mat. 11:25.)

The fourth advantage of the theological argument is that it offers a better mechanism for overcoming errors of conscience. It is a major contribution of Aquinas who offered a developed concept of erroneous conscience which will be considered later in this thesis. It is worth noting now that, if we accept the view of Petrazycki that conscience plays the key role in judicial decision-making and that conscience can be in conflict, then we need a method which would help to point at the essential characteristic of a good conscience. The theological argument of Aquinas appeals to Revelation as an authoritative, explicit and accessible source of moral truth which is not exposed to the errors of an individual reason, even though this reason can make an error in interpretation of Revelation. The fact of existence of an outward source of the essential characteristic of a good conscience makes it easier for the moral agents including judges to be engaged in the search for the right answer to the moral issues arising in the course of application of legal rules.

The fifth advantage of the theological argument of Aquinas is that it fits very well with, and supports, the idea of the rule of law. Thomas Aquinas starts from the elements which constitute the just character of the law. There are three elements: the law should be ordered to the common good; the lawgiver should not exceed his power, and finally, the distribution of burdens among citizens must be placed in equitable proportion. If the law does not correspond to these requirements, than its commandments "do not oblige in the court of conscience, unless perhaps to avoid scandal or riot".[22] Man should obey an unjust law unless it is against God's precept.[23] Aquinas cites St. Paul: "There is no authority, that is, human authority, except from God, and therefore he who resists the authorities, that is in what lies within the order of their power, resists what God has appointed, and consequently is made guilty in conscience".[24] Apart from the reason of avoiding scandal or riot Aquinas held that man may be called to obey also on the ground of Christian morality. In other words, the principle of following one's conscience does not mean the liberty to defile the rules of positive law. Moreover, the theological argument provides a further justification of obedience to the positive law.

At the same time, Aquinas's moral theology offers the conditions under which disobedience to the positive law is justified. It is not left to a private judgement of the

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[22] ibid., I-II. 96. 4.
[23] ibid., I-II. 96. 4.

individual, whether he is a judge or not. Revelation is the only basis which can give a ground for disobedience to the positive law. It is not enough for an individual to reach a conclusion that a certain positive law is unfair. If the unjust law appears more than being against what is fair in human terms, and it is against God's commands expressed in the Scriptures, then disobedience to such a law is firmly prescribed.[25] The human laws which are directed against God's commandments "go beyond the order of power, and are not to be submitted to".[26] Aquinas cites the *Acts*: "We must obey God rather than men."[27] Disobedience is justified only on theological grounds. Because the precepts of God are formalised in the Bible, the latter becomes an important safeguard against the abuses of the positive law. The problems of disobedience require special consideration which is outside of the limits of this work. It is important to stress, however, the way of solving the conflict between the positive law and the intuitive law which constitutes the conscience of judges. Unlike Petrazycki, Aquinas saw clearly the mechanism for resolving the conflicts of conscience. A decision maker must find out the content of the precepts expressed in the Scriptures as the only ground for disobedience to the positive law.

The theological presuppositions of Thomas Aquinas would appear to be irrelevant to our subject unless the outcome had a direct influence not only on the understanding of the place of conscience in the moral life of the human being, but also on the whole morality of judicial decision-making. The Word of God contained in the Scriptures becomes paramount for identification of moral truth and testing our intuitive knowledge of it. The Scriptures also become a guiding book full of examples how moral truth should be applied by the acts of conscience. Thus, the relevance of Aquinas's theory of conscience to modern legal theory consists in that it can contribute to the exposition of what good conscience is, and offer theological justification for the standards of good conscience. The theological argument is important because it provides more specific limits to the requirement to follow one's conscience. The absoluteness of this principle may break the rule of law. The solution of this problem by Aquinas was dependent on his vision of justice rather than his vision of conscience.

Aquinas's theological vision of conscience relates directly to the approach of this thesis. It provides the answer to the fundamental question of why a judge should obey his conscience. If judge's conscience is one of many subjective experiences which differ with every individual, there is no sufficient moral ground for why this judge should choose a command of his conscience and not the command of the conscience of someone else. If it is a command of conscience of a law giver, let say Stalin, then there might be no moral ground to disobey the command of the sovereign. The picture dramatically changes if one assumes, as Aquinas did, that a command of good conscience is based on a rational comprehension of the will of God. The command of conscience becomes invincible, and even if Stalin may command anything else, a judge must follow good conscience.

There are two main implications of Aquinas's theological idea of conscience for judicial decision-making. Firstly, there is the absolute moral truth which is established by God, which lies in nature of things, and which is independent of human will. Therefore, there is always a right answer to the moral problems which the judges face. The second idea is that although a judge through using his reason can find a right answer to the moral problems he is fallible in doing that. This is why he needs principles and rules. But human rules are fallible as well. Therefore a judge needs something which transcends the mistakes and imperfections of the positive law. A judge needs the knowledge of natural law revealed naturally to every human being and supernaturally through incarnation of God through His Son - Jesus Christ. The idea of natural law and the way of grasping it becomes central in the whole moral theory of Aquinas.

Natural law and conscience.

Thomas Aquinas considered natural law as a kind of law which possesses certain characteristics. Some of these characteristics may be common to other kinds of law. In order to clarify the relationship of natural law to conscience we need briefly to describe them.

1. As a kind of law, natural law represents a "direction (*regula)* or measure for human activity through which a person is led to do something or held back".[28]

2. The sovereign who issues natural law is God Himself.[29]

3. The precepts of natural law have a binding force for every human being[30].

4. Like other kinds of law, natural law exists in two ways: firstly, in the reason of the sovereign, secondly, in those who are ruled by the law.[31] Natural law, as far as it is conceived by human beings, is their sharing in the Eternal Law by which "all things are regulated and measured".[32]

5. Human beings owe this sharing to super-rational intuition by which we discern what is good and what evil, and which is "the impression of divine light on us."[33]

6. This impression of divine light is located in conscience in its broader sense which includes *synderesis,* that is intuitive grasp of the moral principles.[34] I shall consider the concept of *synderesis* later in detail.

7. Possessing the knowledge of natural law, conscience (*synderesis)* informs us of the ends of human existence, and it directs our activities to these ends.[35]

8. Through setting these ends natural law through the acts of conscience establishes the limits and functions for any human laws. "Every law laid down by men has the force of law in that it flows from natural law."[36] And it is conscience (*synderesis)* which contains the criteria of consistency of human law with the content of natural law.

This, not exclusive, list of the features of natural law helps us to understand the place and significance of conscience as a moral faculty. It is conscience in a broader sense including *synderesis* or, in the biblical language, the human heart, which possesses knowledge of natural law. Because natural law starts its functioning as direction and rule of human behaviour from the moment when the knowledge is grasped, conscience appears as an engine of natural law. Thomas Aquinas maintained that this ability to possess knowledge of natural law belongs to everybody.[37] He stressed the self-evidence of this knowledge.[38] Thus the possession of natural law by conscience

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[30] ibid., I-II. 94. 4.
[31] ibid., I-II. 90. 1; I-II. 91. 2.
[32] ibid., I-II. 91. 2.
[33] ibid.
[34] ibid., I-II. 94. 2.

is a result of intuition, rather than philosophical reflection. Not only philosophers or lawyers possess knowledge of natural law. It is given to every person through grace of God whether a person believes in God or not. "Everybody in some manner knows truth, at least as regards the general principles of natural law."[39]

Natural law according to Aquinas contains not only general principles but also, based on them, secondary precepts. The problem is only that Thomas Aquinas, apart from the first principle of natural law, did not say much about the content of the other first principles and the secondary principles of natural law held by conscience. The first principle of natural law grasped by conscience is "that good is to be sought and done, evil to be avoided; all other commands are based on this".[40] The other precepts of natural law are found in different places of the *Summa* where they are treated indirectly as an example or illustration: we should act according to reason[41]; you must do harm to nobody[42]; crime has to be punished[43]; robbery is wicked[44] and so on. Whether they fall in the rank of first principles or secondary principles is unclear. Aquinas did not elaborate the theory of natural law as a system of the first and secondary principles of human behaviour, as can appear at first glance. All the precepts are not systematised. According to Aquinas, the precepts mentioned above are self-evident, and it seems that he thought that any systematisation and their justification is not necessary. Instead, Aquinas concentrated on the clarification of how these self-evident principles should be applied to particular situation of human life.

Even a short description of the concept of natural law in the theory of Aquinas allows us to question a conventional understanding of his concept of natural law as a body of static principles and rules. In fact, his theory may stand very close to the psychological vision of natural law presented in the theory of Petrazycki. To prove this suggestion one has to look more carefully at Aquinas's idea of conscience.

The narrow definition of conscience.

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[39] ibid., I-II. 93. 2.
[40] ibid., I-II. 94. 2.

The term *conscientia* in the theory of Aquinas has a specific and technical meaning. Aquinas defined it as "a sort of decree of the human mind".[45] Its role is "to witness, to bind, to incite, and also to accuse, to torment, or to rebuke. And all these depend on applying some of our knowledge to what we are doing."[46] At the same time *conscientia* is not responsible for finding this knowledge. In the understanding of Aquinas it is a mere application of the general knowledge of moral truth to the concrete situations of life. Only by taking into an account such a narrow definition of conscience is understanding possible of his idea that conscience is a sort of act.[47] As a mere act, conscience does not give any guarantee in itself that the decision which is carried out by it is right or wrong. For the task of *conscientia* is the application of the general moral norms and nothing else. Aquinas included in this application different moral experiences: "The application is threefold. First, in that we acknowledge that we have done something or not done something, as we read in *Ecclesiastes, Your conscience knows you have frequently cursed others.* In this case, conscience is said to witness. Knowledge is applied in the second way when through our conscience we judge that something ought to be done or ought not to be done. In this case conscience is said to incite or to bind. A third application is when by conscience we judge something already done or have been done well or ill. In this case we speak of conscience excusing or accusing or tormenting. It is obvious that all these things follow actual application of knowledge to what we do. Hence strictly speaking conscience is the name of an act."[48]

Because conscience appears in the writings of Aquinas first of all as an application of moral knowledge to the various activities of human beings, it made some commentators conclude that conscience itself does not have great importance in the whole moral doctrine of Thomas Aquinas. One of the commentators on the *Summa,* Timothy Sutter, maintains that "though St Thomas has isolated passages which show his awareness of the importance of the concept of conscience in the mind of the New Testament writers, the total architecture of the system does not do it justice."[49] Some scholars argue that the Thomistic theory of conscience has too much intellectualism. In fact the judgements of conscience are much more spontaneous, habitual or impulsive

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[45] ibid., I.79.13.
[46] ibid.

than the result of a conscious application of the natural law to the particular situations[50]. Conscience can pass its judgements guided by an intuition rather than by reflection.

In order to find out how far these arguments of the critics are true we need to look more carefully at the idea of conscience which is expressed implicitly rather than explicitly. Providing that the whole of the moral thought of Thomas Aquinas is taken into consideration it becomes clear that his moral doctrine does not exclude the conscientious experience of the individual from consideration. The particular feature consists only in that this experience is considered not in the terms of conscience, but in the terms of practical reason, and more specifically in the terms of *synderesis* and prudence. The technical reason why the notion of conscience in the moral theory of Aquinas is not more prominent is that the analysis of the acts by which man attains to his last end is based on the Aristotelian ethics, which did not use the term 'conscience' at all. The word συνειδησις (syneidesis) - conscience is not found in the writings of Plato and Aristotle.[51] It is prudence which takes the central position in the moral philosophy of Plato and Aristotle, and it is taken as such by Aquinas as well. Thus Aristotelian ethics prevented Aquinas from the using term conscience as an autonomous moral experience which cannot be reduced only to the application of the moral norms held by reason. Apart from the notion of *conscientia* Thomas Aquinas used several notions closely related to it like *synderesis* and *prudentia.* The narrow concept of *conscientia* does not lead to the conclusion that the doctrine of Aquinas ignored the problem of moral intuition.

Synderesis and conscience.

In its moral deliberation the conscience of the individual applies the principles of natural law grasped intuitively by *synderesis.* Sometimes Aquinas preferred to use the concept of the human heart rather than *synderesis*[52] It stresses again that the process of passing moral judgement is not a mere intellectual process. In fact, Aquinas did not deal very much with the concept of *synderesis,* especially if we compare how much he paid attention to matters of prudence or even his own ideas of conscience. At least in one

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[49] Sutter T. Commentary. In: Thomas Aquinas. *Summa Theologiae.* - London: Blackfriers, - Vol. 11. P.192.

place he even identified *synderesis* with conscience.[53] Thomas Gilby relates this confusion to the sources used by the *Summa*[54], noting that "For the *Summa* their meanings are quite distinct. *Synderesis* is the habit of knowing the first principles of moral conduct, and corresponds in the practical reason to the understanding, *intellectus, nous,* of the first principles of thought in the theoretical reason, whereas conscience is an act of moral judgement about the prosecution of a particular course of action."[55]

Aquinas himself was concerned directly with *synderesis* in asking whether it is a habit, or a power.[56] In all other places he treated *synderesis* indirectly, trying to distinguish it from other habits.[57] There is an impression that Aquinas had to treat it because of the tradition which he was bound to follow rather than inventing something new. In its relation to conscience Aquinas wrote of *synderesis* the following: "Though the habits which inform conscience are many, nevertheless they all take effect through one chief habit, the grasp of principles called synderesis."[58] Therefore many scholars refuse to consider the Thomistic concept of conscience without the concept of *synderesis*. According to O'Connor, Thomas Aquinas used two conceptions related to conscience: *synderesis* - the intuitive grasp of the first moral principles, and *conscientia* - the rational (conscious and logical) process of applying these first principles to particular acts. Aquinas understood *synderesis* as a disposition of the human mind "by virtue of which men are enabled to grasp the most general principles of morality".[59] After grasping the principles they should be applied to concrete cases. And this is task of *conscientia* . For Aquinas the making of a moral judgement is "the outcome of a process of reasoning analogous to theoretical reasoning."[60]

Bernard Haering thought also that *synderesis* is the key concept which helps us to understand not only the teaching of Thomas Aquinas on conscience, but his moral doctrine as a whole. The presence of the concept of *synderesis* in the teaching of Aquinas makes all the accusations of intellectualism made against his theory,

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52 Thomas Aquinas. *Summa Theologiae*. I-II. 94. 6; I-II. 94. 2.

53 ibid.,. I-II. 94. 1.

54 Aquinas mentioned St. Basil. Gilby himself refers it to St. John Damascene: *De fide orthodoxa.* IV. 22. PG. 94. 1200.

55 Thomas Aquinas. *Summa Theologiae*. vol. 28. P. 75.

56 He thought it is a habit. *Summa Theologiae* I. 79. 12.

unjustifiable.[61] Haering considered that *synderesis* is what makes Thomas Aquinas's doctrine biblical in the deepest sense. "The *synderesis* is the practical intellect's inborn endowment with the highest moral principles, insofar as they are immediately perceived as binding one's self and every human being. The moral principles are not abstractions, good only for drawing conclusions, although they enter as the main subjects into all moral reflection. *Synderesis* tells the person that "the good is to be done", or "love your neighbour as yourself."[62] Haering stresses particularly the religious sense of knowing the first principles: "It is a knowledge that comes from the depth of the heart, a knowledge of the salvation, of wholeness."[63]

Thus, the judgements of conscience in their relation to *synderesis* are the application of knowledge grasped by intuition. However, this would be an incomplete picture of Aquinas's theory of moral reasoning. It is prudence which takes the central position in making moral judgements, pushing back not only *synderesis* but conscience itself. The relations between *synderesis*, prudence, and conscience are not so clear as one might wish.

Prudence and conscience.

The consideration of the concept of *prudentia* helps to meet the objection that the account of conscience given by Aquinas is a simplification of what conscience really is. It is evident that the idea of conscience in the Thomistic theory cannot be taken seriously without consideration of prudence as the way that moral judgements are made. For it is *prudentia* which according to Aquinas culminates in the moral imperatives, the imperatives which are the subject of this thesis.

According to Thomas Aquinas prudence is one of the four cardinal virtues (three others are justice, temperance, and courage). Aquinas regarded prudence as an intellectual virtue which directs the human person to the choice of the right means for an end.[64] One cannot understand why Aquinas preferred to put the concept of prudence at the centre of his doctrine, and not the concept of conscience, without considering the intellectual context of his work. The reason for the supremacy of the concept of

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60 ibid., P.41.

61 Haering B. 'Conscience: The Sanctuary of creative Fidelity and Liberty. // *Introduction to Christian*

prudence, as it was said already, was the influence of Aristotelian ethics which did not use the concept of conscience. Apart from this, prudence had already been one of the key concepts in the patristic literature. It is very important to note that prudence in the theory of Aquinas is not separated from morality, as it could appear to the modern mind. We owe this separation to Francis Hutcheson and David Hume. This separation found its completion in the moral theory of Immanuel Kant who viewed prudence as a rational guide to self-interested action rather than a moral virtue[65]. For Aquinas prudence is a moral concept. This view can have far-reaching consequences for the whole theory of legal reasoning.

Aquinas considered prudence as a basis for all other virtues, because prudence enables us to see in any given juncture of human affairs what is virtuous and what is not, and how to seek the one and avoid the other. Its function is to point out which course of action is to be taken in any round of concrete circumstances. The relationship between prudence and conscience in the theory of Aquinas is not very clear. The functions of prudence are to a considerable degree similar to these of conscience: to take council, to judge the moral fitness of the means suggested, to command their employment.[66] Thomas Aquinas stressed that the moral imperative is the chief act of prudence.[67] But if so, even taking into an account his narrow concept of *conscientia* as an act of application of moral rules, both the prudence and conscience become inseparable. He wrote on prudence that it "is well and truly imperative".[68] If we compare his vision of prudence with his vision of conscience as "a certain dictate of reason"[69], the close relationship between them becomes clear.

Although Aquinas himself would distinguish prudence and conscience, the former as a habit, and the latter as an act, in fact he treated conscience as something which commands and judges,[70] and therefore he had a broader concept of conscience which looses the quality of a mere act of reason. Another common feature possessed by both prudence and conscience in the Thomistic theory is that they both belong to the intellect rather than the will, although the usefulness of the distinction between intellect

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64 *Summa Theologiae.* I-II. 57. 5.

65 See: Kant I. *Groundwork of the Metaphysics of Morals.* - N.Y.: Harper, 1964. - Chapter 2.

66 *Summa Theologiae.* II-II. 47. 8.

and will in relation to conscience drawn by Aquinas can be questioned, particularly when Aquinas talks about *voluntary* mistakes of conscience[71].

It is interesting to look at how the both concepts of *prudentia* and *conscientia* are related to the concept of *synderesis*. It was already said that in the relations between *synderesis* and *conscientia* the first informs the second about general moral principles which then conscience should apply to the specific cases. It seems that the relations between *synderesis* and *prudentia* are the same. Thomas Aquinas considering the functions of prudence wrote: "Natural reason determines the ends of moral virtue by what is called *synderesis,* not by prudence."[72] Then he stressed the practical orientation of prudence: "The prudent character must needs know both the general moral principles of reason and the individual situations in which human actions take place."[73] If we compare this with the picture drawn in I. 79.13 of the *Summa*, where *synderesis* appears as the only habit which directly informs conscience, then we should conclude that either conscience is a dynamic aspect of what is called *prudentia,* or that human reason takes two forms of making moral decisions, and *synderesis* takes its own place above and between these two faculties of reason. A more sustainable answer would be the first, for Aquinas did not consider conscience as a habit like prudence, but as an act of reason. However, it could be that the act of application of general moral rules that is conscience can be without prudence. For we should not forget that prudence is a virtue. But it is hardly possible to imagine that Aquinas could think about an act of prudence without conscience.

Conclusions.

Thus, we are faced with a complex idea of conscience which can be drawn from the theory of Thomas Aquinas. The **first** aspect of conscience is an application of moral rules to particular situations, and as such, conscience is identical with reason passing its judgements. The **second** aspect is that conscience is a special ability to know what is good and bad *intuitively* and to guide reason in application of the moral knowledge. The **third** aspect is that conscience is a moral will to virtue.

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70 [illegible]

The first meaning is explicit and dominant in the deliberation of Aquinas. The second is implicit and hidden in the concept of *synderesis*. The third is contained in the concept of *prudentia.* It seems that the narrow understanding of conscience by Thomas Aquinas, as an act of reason, does not necessarily contradict the understanding of conscience as a moral intuition - *synderesis*, and conscience as a drive to act morally - *prudentia.* Aquinas wrote on conscience in the first meaning that "it is said to witness, to bind, to incite, and also to accuse, to torment, or to rebuke"[74]. However, the same could be easily said of conscience in its second and in the third meanings. All these three aspects of conscience are closely related to each other. Conscience appears as a complex capacity to pass moral judgements which includes, firstly, an intuitive grasp of moral principles, secondly, a deliberation on how these principles have to be applied in a particular situation, and thirdly, an imperative to act accordingly. Thus, moral reasoning becomes an important element of conscience which binds together moral intuition and moral imperatives.

Above all, the concept of conscience developed by Aquinas allows us to see the link between the intuitive law grasped by conscience and the further process of moral deliberation. This link was not explained clearly by Petrazycki. The reason was that, unlike Thomas Aquinas, Petrazycki did not solve the problem of finding the basis of common intuitive law. Aquinas found this basis in the divine Revelation which takes two forms: either naturally through reason, or supernaturally through God's acts of love in the person of Jesus Christ. The finding of Aquinas allows us to claim the supremacy of the commands of conscience, but it does not itself solve the problem of conflict and error of conscience, or speaking in Petrazycki's language, the conflict of the intuitive laws of those involved in the legal process. In order to see what is the answer to this problem provided by Thomistic theory, we have to look at his concept of erroneous conscience in the light of a modern theory of legal reasoning.

3. AQUINAS'S THEORY OF CONSCIENCE AND LEGAL REASONING.

Introduction.

A typical definition of the concept of legal reasoning has been given by Neil McCormick. Legal reasoning for him "is the process of argumentation as a process of justification".[1] Bengoetxea who is influenced by MacCormick insists on the separation of moral and technically legal argumentation.[2] Although legal argumentation can contain moral argumentation there is still an area of judicial decisions which is free from moral judgements. Therefore, legal reasoning does not necessarily involve moral arguments, and consequently, can be carried out without judgements of conscience. But the problem arises of whether, in the course of arriving at a legal decision, the judge's resolution to disregard any moral reasons is already a sort of moral judgement?

To clarify this point, let us consider an example of application of a Traffic Offences Code, which is full of technical rules, by three separate judges. They have to apply the same rule when fining a person for non-observance of a speed limit. All three judges when giving their judgements use the same justification - they refer to the same rule of the Code which sanctions the measure against the offender. An external observer would say that they use the same legal reasoning, and they do not resort to any moral arguments except that a sanction is established by law, and they must apply it. Nevertheless, they have different motives for applying the rule. One judge applies the rule because he believes that it is his duty as a judge to apply rules correctly, and in his opinion the rule he is applying is relevant. Another judge applying the same rule thinks that the application of the rule would be better for him, and allows him to escape from the criticism of those on whom his position and promotion is dependent. He understands that there is another rule which it would be more correct to apply, but because of the fear of causing criticism he prefers a safer way. Finally the third judge who applies the same rule applies it because he just does not like the face of the offender, for example his beard. He thinks that the rule he applies is severe enough to make the offender unhappy. This judge thinks also that the rules exist only for fools and he is not bound by any of

them. He uses his intellect to deceive an external observer that he is rigidly applying rules which he in fact despises.

If we take the internal side of legal reasoning, the intentions and motives of the judges, it becomes clear that the legal reasoning of these three judges differ significantly from each other. In this example the first judge followed his conscience, the second being aware of the requirement of conscience did not obey it. The third judge did not even pay attention to his conscience at all. Nevertheless they use the same legal argument. I allow myself to make a judgement that among these three judges the first judge who applies the law for conscience sake is the best, and his legal reasoning is better than the reasoning of two others. Another might agree with this or not, but everyone has to draw the same conclusion: legal reasoning can be guided and moved by conscience.

The relevance of Aquinas's theory of conscience to legal reasoning consists particularly in that it provides a justification of legal reasoning based on the judgements of conscience. One can draw the implication from Aquinas's ideas on conscience that legal reasoning without conscience is bad reasoning, or rather it is a perversion of reasoning. For Aquinas, legal reasoning is a sort of practical reasoning which is based on general moral principles and which pursues the good of people. Every judgement which is guided by willingness to achieve any good is a judgement of conscience. It is an essential characteristic of legal judgements that they must pursue the good of people. Legal reasoning which does not pursue common good in fact is against conscience for, according to Aquinas, it is the fundamental requirement of conscience that every legal decision can be directed to the good of people.

Interpretation of legal rules and conscience.

There are at least two major implications of Aquinas's theory of conscience considered in the previous chapter of the thesis. The first implication is that the judicial duty to apply the law is itself a requirement of conscience. It is based on his fundamental presupposition that every positive legal rule which is just is binding on the conscience of the individual.[3] Because a judge is not just an ordinary citizen but a magistrate whose position is established by positive law, he has an additional duty to

observe positive law. A judge is obliged by his conscience to administer the law in good faith.

The second major implication of Aquinas's theory of conscience is his teleological vision of law as an instrument towards good. Any legal rule to be applied must be interpreted in the light of the ultimate goal which that rule pursues. The grasp of the ultimate goal is done by conscience, and consequently, any act of application of a legal rule must involve a judgement of conscience in relation to the suitability of that rule in the given situation. Before law is administered it must be correctly interpreted by the judge in relation to the circumstances of the case. Because the validity of positive law is dependent on its correspondence to natural law[4], the interpretation of legal rules must be in accordance with natural law. A judge cannot apply a rule of positive law whose application to the case would be unjust.[5] The function of adjudication lies not so much in determination *in abstractio* whether the rule is just or not, as determination whether the application of the rule would be just in a particular case. This approach to legal rules constitutes the substance of the method of casuistry adopted in this thesis.

The doctrine of Aquinas helps to meet the problem of how far the judges should go in their interpretation of the legal rules. The basic requirement is that the application of a rule should be a realisation of the idea of justice and equity as it is expressed in natural law. This requires a judgement of conscience on what would be just and equitable in a particular situation. But in order to do that, a judge must already have conceived the idea of justice and equity in his or her conscience. When a strict application of a legal rule would lead to injustice the task of the judges is to give an interpretation of the rule which would prevent the negative effect of its application.

The meaning of a teleological interpretation of legal rules can be well illustrated on the example of *Elmer's case*[6] discussed in detail by Ronald Dworkin in his *Law's Empire*.[7] Were Aquinas one of the judges of the highest court in New York, he would be apparently among the majority of the judges who decided that a man who had murdered his relative in order to get the inheritance should not have right to get it even if he had been named in the will. Giving their decision the judges of the court appealed to the teleological argument: "It would be absurd to suppose that the New

York legislators who originally enacted the statute of wills intended murderers to inherit, and for that reason the real statute they enacted did not have that consequence".[8] Aquinas himself would prefer to appeal directly to the secondary precepts of natural law, such as 'none should profit from his (her) wrongdoing'. However, this does not change the essence of the reasoning of the judges in this particular case. Whether they wanted to or not, they appealed to the conscience of the legislators which would not allow them to issue an unjust rule. Of course, many judges even do not come near to the idea that their reasoning found one of its first justifications in the theological writings of a mediaeval scholar. They probably would be even more surprised to find that even on a such specific question as abortion their approach reflects one developed by this theologian seven centuries ago.[9] The essence of this approach consists in finding a just balance which has to be struck between different rights and claims, interests and responsibilities. This search for the balance is one of the characteristic features of the decisions made by the European Court of Human Rights and many constitutional courts of the world.[10]

Thus, in relation to the interpretation of the positive legal rules, Aquinas's teaching on conscience provides an interpreter with a distinct approach to assessing the applicability and limits of the force of legal rules in a particular situation. This approach is called *casuistry*, which has unfairly acquired a pejorative meaning since the times of Blaise Pascal.[11] Casuistry is a moral science which deals with cases of conscience and with the problem of application of general moral norms to particular situations. The contribution of Aquinas to casuistry consists particularly in developing concepts of natural law, natural reason, prudence, circumstance, and conscience itself.[12] The method of casuistry, its brief historical outline and essence will be developed in Part II of the thesis.

The teleological approach of Aquinas has to solve several difficulties. There might be a conflict between a general principle of natural law as it is conceived by the conscience of a judge and the explicit requirements of a rule of positive law. A judge

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[7] Dworkin R. *Law's Empire.* - Harvard University Press, 1986. - P. 15ff.

[8] ibid., p. 19.

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who is required by a state law to apply a certain rule might find that his conscience requires the opposite. The conflict would not be so sharp providing that the judge has a discretion to deviate from application of the rule in certain situations. However, in the situation where the judge is compelled to apply an unjust rule the issue of disobedience may arise. This issue is related to the problem of the moral responsibility of the judges.

Another difficulty is a possibility of error of conscience, that is a wrong comprehension of what natural law requires in a particular situation even if we accept Aquinas's idea of natural law. Aquinas dealt sufficiently with both problems: moral responsibility and erroneous conscience, and this is exactly where his theory can fill the gaps in the psychological version of natural law developed by Petrazycki. We shall start first with the consideration of the problem of moral responsibility.

Conscience and the moral responsibility of the judges.

The main suggestion of Aquinas's concept of conscience for judicial decision-making is that the conflict between the moral convictions of a judge and the requirements of a legal rule to be applied is not so much a conflict between conscience and law, as a conflict of two moral duties of the same conscience. Therefore a judge is *morally* responsible for both following his moral convictions and obedience to the requirements of his office. It is necessary to note that the term *responsibility* is apparently not what was used by Thomas Aquinas. For this term came into broad use in the languages of Western culture only in the seventeenth century. It does not mean, however, that Aquinas was unfamiliar with the idea of responsibility which related to the consequences of a moral act. The idea of moral responsibility was conceived as expressing a special relationship of the moral agent to his or her actions which bring about moral consequences in the form of praise and blame imposed by the conscience of the judge himself or by the conscience of the society.[13]

According to Aquinas, one of the features of conscience is that it does not pass its judgement only on what must be done, it passes its judgement also on what has been done. In other words the role of conscience is to blame and to praise. When a judge follows his conscience, his conscience approves his behaviour, when he acts against his conscience then conscience accuses him, and even, as Aquinas wrote, can torment

him.[14] At this point, there is identity between Petrazycki's vision of a moral imperative and Aquinas's concept of conscience. The commands of conscience are invincible. It does not mean, however, that if the conscience of a judge comes into conflict with the explicit requirement of a legal rule, he must reject this rule in favour of his conscience, for as we have seen, Aquinas thought that conscience obliges the subjects of the positive law to obey that law faithfully. The problem arises of how far the judges must be faithful to the positive law even though they have different moral convictions.

It might be that the role of conscience in making judicial decisions would not be so strong if the responsibility of the judge to his own conscience is not supported by his responsibility to society, which is directly based on the public nature of judicial office. The relationship between social responsibility and the conscience of a judge is another important aspect where the theory of Aquinas may contribute. The connection between conscience and social responsibility, according to the Thomistic theory, is based on the idea that the judgements of conscience represent the experience which is known to every moral person. The moral experience of the judges is not totally unfamiliar to other members of the society, for every human being shares the knowledge of natural law. The difference may lie only in how this law is applied. Because everyone does share or ought to share a similar experience of conscience, especially in relation to grasp of the first moral principles, and moreover, because everyone does share, although ought not to, a similar experience of sin, especially in relation to disobedience to the commands of conscience, everyone is able to understand more or less the motives and intentions of the other person. The moral responsibility of the judges is not split into two parts: responsibility before the individual conscience and the conscience of society. The Thomistic vision of moral responsibility is holistic. It does not mean that Aquinas did not see that the conscience of the individual and public conscience may dissent, and it is not necessarily the individual conscience which is wrong. He pointed at the way the conflict can be solved.

The first implication of Aquinas's idea of moral responsibility in respect of the judges is that the judges can be praised or blamed for following their own moral convictions only if they possess a certain degree of freedom in exercising their judicial duties to apply those convictions. The Thomistic approach to moral responsibility is characterised by the stress on a moral link between personal freedom and his (her)

action. "For to be praised or blamed is nothing else than to be charged with the accountability for a good or bad deed. This arises when it lies within the power of the doer, namely it is under his control"[15]. Therefore, when encountering the conflict between one's own moral convictions and the duty to apply the law, a judge must consider his freedom to follow his own moral convictions. In some cases, law can provide ways of reconciling the conflict. A judge who is a Roman Catholic, and who strongly believes that divorce is wrong, may be prescribed by the law to grant divorce if certain conditions of the law are met. This judge must obey law, but if there are legitimate ways to make divorce more difficult for the parties who try to obtain it, Aquinas would recommend employing those ways. Thus, for a judge, obedience to his conscience requires reasoning. A good judge is the one who is able to obey the law remaining at the same time faithful to his or her moral convictions. But having moral convictions only and the mere ability to apply law in accordance with them are not enough to make a judge good.

The second implication of the theory of Aquinas is that the rightness of judicial decisions is determined by correct intention, which means a certain moral orientation applied by the acting subject, more than by the objective correctness of the action. The goodness or badness of judicial decisions is primarily based on the intention of the decision-maker.[16] The discussion of the intention of moral acts entails the complicated problem of the relationship between conscience and will. According to Thomas Aquinas the attitude of conscience determines the nature of the act of will, which implies that men should be judged not so much as by their behaviour but by what their heart is set on.[17] It is only conscience which can make the judgements on what is in the heart. Thus, the most important thing for conscience is the motives by which a judge is guided. In a sense conscience is an envying husband of the human soul, and as soon as the human soul chooses to follow anything else but not the commands of conscience the latter begins to accuse and torture the moral agent. Conscience may rebuke also when there is a mistake in moral deliberation. But this rebuke cannot be compared with the reaction of conscience when the moral agent acts according to other motives than commitment to conscience.

Consequently, a judge who faces the conflict between his moral convictions and the content of a legal rule to be applied must *sincerely* try to resolve this conflict through moral reasoning. What counts is the intention to fulfil one's moral duties faithfully through the consideration of the circumstances, careful deliberation and responsible action. Aquinas was absolutely assured that the conflict can be resolved if not by more careful reasoning, then through the assistance of divine Revelation.[18] When reasoning cannot help a judge to reconcile the conflict between his moral convictions and the requirement of the positive law, the judge must bring his case to the highest moral authority, or speaking theologically, to God.

Because Aquinas was a Christian, and he lived in a society which acknowledged the authority of God's Revelation, his appeal to God, that is to the Scriptures and the tradition of the Church, was a natural way to solve any moral conflict. In the contemporary European context, this appeal by no means looks as natural as it was for Aquinas. I shall, however, argue later in this thesis that the appeal to the message of Christ can be indispensable in solving a moral conflict in making a judicial decision. The difference of my position from Aquinas is only that this appeal cannot be considered as extra-rational, but must be interwoven into the process of moral reasoning.

Thus, legal reasoning can be considered not only as a process of proceeding from principles and rules held by conscience to the solution of particular legal cases, but also as a process of justification of the legal decision taken before the conscience of the judge and of the sovereign (society in a democratic state). The theory of Aquinas shows a direct connection between conscience and moral responsibility in the meaning described above. The compliance of a judge with his conscience is what makes a judicial act good. Nevertheless it does not guarantee that this act will be good in the moral judgement of the sovereign.

The advantage of Aquinas's theory is that in the cases of moral conflict between the judges' conscience and conscience of the sovereign it offers a mechanism which allows the judges to reconcile their consciences with the conscience of the sovereign expressed in the legal rules. It is done through moral reasoning. That requires the judges to possess certain skills and knowledge of how to handle legal materials and justify the

moral application of legal rules. If, however, no justification is possible, a judge may be called to disobedience within the limits of God's Revelation.

It would be a mistake to represent Aquinas's teaching as a handbook of how to deceive an immoral sovereign or to pacify the judges' conscience when they have to obey the commands of the sovereign. The first thing which the judges must do when they encounter the conflict with the will of the lawgiver is to examine their own consciences and the conscience of the lawgiver, that is the underlying purposes of the legal rules to be applied. When consciences disagree, according to Aquinas, at least one of them is in error. The mechanism of determining whether there is an error of conscience requires special consideration.

The problem of erroneous conscience of the judges.

The implication of Aquinas's theory of conscience is that legal reasoning is an essential part of moral judgements made by the judges. Good legal reasoning is based on principles held by conscience. One of them is that the judges have to apply positive law. Nevertheless, there are certain limits with which conscience has to comply. In the application of the positive law the judges have to follow natural law. However, natural law as well as positive law is a matter of interpretation. "Eternal law cannot err, but human reason can. Consequently an act of will corresponding to human reason is not always right, nor consonant with the Eternal law."[19] The principles of natural law grasped by conscience are self-evident. What is not self-evident, however, is how these principles should be applied in a particular situation. For it is a characteristic of reason "to proceed from common principles to particular conclusions".[20] Therefore the mistakes of conscience happen not on the level of grasping first principles, but in the course of applying these principles to the various situations of life. It means that the judges can make their mistakes precisely in the course of legal reasoning. The basic presupposition of the concept of erroneous conscience as erroneous moral reasoning is based on the proposition that to every moral problem there must be a correct answer.

Thomas Aquinas was quite clear when he was writing on the causes of errors of conscience, that the main cause is ignorance. The common feature of all kinds of errors of conscience is that what is neutral is taken by conscience as good or bad, or what is

good is taken as a bad, or otherwise. The cause of erroneous conscience is "the way an object is apprehended by mind ".[21] It is ignorance which brings about errors of conscience. It may be ignorance of facts, and it may be ignorance of rules. The latter may be a wrong comprehension of rules because of lack of knowledge of interpretative skills. Aquinas tried to distinguish the different kinds of ignorance. If the problem was only a wrong apprehension of an object, all ignorance might be held as being involuntary. Considering the problem of ignorance, however, Aquinas's main concern was the responsibility of the person for the wrong apprehension. Although the cause of the errors is a wrong apprehension of an object by the mind, what makes conscience guilty is will.

What is morally good and bad in human acts comes from an act of will.[22] So, it is a good will which makes conscience good, and it is a bad will that causes voluntary errors of conscience. The ignorance may take different forms in its relevance to moral will. It could be directly voluntary, indirectly or involuntary. Ignorance may be deliberately chosen, either to serve as an excuse for what a person wants to do or so that the person will not be held back from doing it.[23] Thomas Aquinas maintained that "the goodness of an act of will properly depends on the objective. This is presented to the will by the mind, for the objective proportioned to will is a good as intelligently perceived, not a good as sensed or fancied - this corresponds to our powers of emotion... . Accordingly an act of will depends on the mind [*a ratione*] in the same way that it depends on the objective."[24]

Thus, erroneous conscience as a mind passing its judgements is caused by ignorance. In its turn voluntary ignorance, unlike involuntary ignorance, is caused by the will's objective which has been supplied by the mind. Aquinas, when explaining his theory of natural law, did not give any list of the principles of natural law grasped by conscience. But he formulated clearly only one fundamental requirement of natural law: "good is to be sought and done, evil to be avoided; all other commands are based on this".[25] If examined in relation to erroneous conscience, it becomes clear that this requirement addresses the person's will: good is to be **sought**, and evil to be **avoided**. It

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21 ibid., I-II. 19. 5.

seems that the content of voluntary ignorance is that the moral agent does not do his best in seeking what is good and does not do his best in trying to avoid evil. All these have direct relevance to judicial ethics. The implication is that in order to arrive at correct decisions the judges should not only examine their objectives and their intentions, but that they should wholeheartedly seek good and try to avoid evil. If a judge does not take seriously the principles of natural law he makes a voluntary error of conscience. Moreover, if a judge does not examine carefully the facts of the case, and does not look carefully at legal materials, he again makes a voluntary error of conscience. The voluntary element of an error of conscience appears wherever a judge has failed to exercise the possible degree of care and good will in making a particular decision. A voluntary error of conscience is not uncommon, although it is difficult for an external observer to establish whether a judge was guilty of a voluntary error of conscience. Some cases give, however, a sufficient evidence that a judge has failed to exercise the possible degree of care and good will[26].

The kind of erroneous conscience caused by ignorance is important for establishing the moral responsibility of the judges when they apply the law. "The sort of ignorance that causes an act to be involuntary takes away the character of moral good and evil, not so, however, the sort of ignorance that does not cause an act to be involuntary, namely the ignorance that in some manner is willed, whether directly or indirectly. We say that ignorance is directly voluntary when it is directly intended by the will, and indirectly voluntary when from negligence a person does not will to know what he ought to know."[27] The distinction is important not only for establishing the responsibility of a judge for his or her erroneous conscience (reason), but also for establishing the limits of obedience to erroneous conscience on the part of its subjects. The whole problem of erroneous conscience is discussed by Aquinas in the context of disobedience to the command of reason. Commands of reason are identified with conscience.[28]

The main issue for Aquinas when considering the problem of erroneous conscience is whether or not erroneous conscience binds the individual. Eventually, he concludes that erroneous conscience is binding in general. Nevertheless, from his consideration of voluntary and involuntary mistakes of conscience, it seems that

Thomas Aquinas rejected any justification of obedience to conscience in voluntary error. He maintained that everyone is guilty if he follows conscience which is in voluntary error.[29] Consequently, one should not obey his conscience which is in voluntary error, because in this case the moral agent obeys the will which perverts conscience rather than obeys conscience itself. However, in the cases where a judge has sincere doubts whether his conscience is in error or not, or he does not want to follow his conscience, the implication of Aquinas's thought is that this judge should still follow his own conscience. It is not the same if the judge employs his intellect in order to find a moral justification for what he does not want to do.

If there is a conflict between conscience and will then as a rule one should obey conscience even if there is real danger that conscience is in error. Disobedience is evil, for it is reason which says what is good. "The act of will, then, will be bad, since it is willing evil, not indeed what is evil in itself, but what is evil by another factor, namely the reason casting it in that part".[30] But "if a person is aware that the course his reason is dictating is against God's precept then he is not obliged to follow it."[31] This is where the importance of theological reflection comes forth.

The only external tool for the test of errors of conscience, which is clearly formulated in writings of Thomas Aquinas, and to which he appealed when considering the examples of erroneous conscience was that of the commandments of God articulated in the Scriptures. The examples of the erroneous conscience are following: conscience says that fornication is good, that belief in Christ is bad, or it commands committing adultery.[32] Even if not everyone is ready to admit the binding power of God's Word on his or her conscience, the implication of the Thomistic teaching on erroneous conscience is clear: a judge has to examine his own conscience on the matter of whether conscience is erroneous or not.

Having observed what are Aquinas's view on moral responsibility and erroneous conscience, one may conclude that the requirement that one must follow one's conscience in practice means the requirement to reason on the purpose of a moral act, and on the means of serving the purpose. But this is not enough. One has to look at one's

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[28] ibid., I-II. 19. 5.

deepest intentions and motives. In order to identify their moral nature one may need a sort of 'moral mirror' which for Aquinas was the teaching and life of Christ Jesus.

The appeal to life and teaching of Christ is thus important because the requirements to reason on the purpose and means of moral act and to examine one's intention and motives may not be sufficient. They are too broad for determining exactly what good conscience requires in this or that particular situation. It would be tautological to say that the main characteristic of good conscience is a correct application of general moral principles to particular situations, for this is the fundamental question: what is, or is there at all, one correct answer to the problems which the judges can face? There are many situations where the moral principles may collide with each other, where the circumstances are so complicated that it seems that there is no one correct answer. If there is no one correct answer the whole distinction between erroneous and good conscience cannot be clear. Therefore, it is not enough to say that good conscience is a correct application of general moral principles. It is necessary to find a substantive criterion which may specify the difference between good and erroneous conscience.

One could argue that the appeal to the life and teaching of Christ is not so important as the rest of Aquinas's thought. It could be maintained that even without his theological argument, Aquinas's theory gives general guidance in determining what good conscience is about. First of all, it stresses the importance of rational discourse in weighing all circumstances and consequences. It implies that good conscience that is the mind passing moral judgements is the mind which examines carefully before prescribing a particular course of action. Secondly, it emphasises the importance of intention. The decision-maker should not only look at the principles, circumstances and consequences. He or she should pay attention to his or her own intentions and motives. As for the third main point of Aquinas's theory that because the human mind is corrupted by sin one needs an external source of correction of moral reasoning: the Word of God contained in the Scriptures, one could say that the concept of sin and the idea of God are merely metaphysics, and the modern theory of judicial decision-making can be built without them.

It is not my intention in this thesis to argue for or against the use of the concept of sin and the idea of God for describing a state of judicial conscience or for prescribing

contribute to the development of a theory of judicial conscience at least in one point: to put forward and promote a certain moral experience which in Christian ethics is described as love.

Aquinas's vision of love.

The amount of Aquinas's writing on love - Latin word: *caritas* - is enormous. In his *Summa Theologiae* alone, the theory of love was presented in twenty three chapters[33]. In comparison, his theory of law and politics was presented in seven chapters[34]. However, these chapters on love are given little attention by moral and legal theorists. The main shortcoming of the chapters on love are not rooted even in Aquinas's attempt to compose a 'science' of love with all its systematisation, which is very questionable in itself. The weakest point lies in the root of the whole Aquinas's enterprise: to join what is incompatible: the message of the Gospel and Aristotelian philosophy. The analysis of the whole enterprise of Aquinas, and the problem of compatibility of the Christian message and Aristotle thought would draw us away from the subject of this thesis. My point is not that the ideas of the Gospel and the ideas of Aristotle may not be combined for development of a moral theory. Instead my point is that they are not equal, and that both thoughts are not exactly about the same things. This point becomes clearer when the issue is about ethical love.

When the Gospel and other writings of the New Testament speak about perfect love they speak about unconditional and undeserving grace: Christ died for sinners.[35] When Aristotle speaks about perfect love he speaks about reciprocal friendship of men who are good, and alike in virtue.[36] They even use different words. The New Testament uses *agape*. Aristotle speaks about *philia*[37]. Aquinas uncritically confuses both concepts designating both types of love as *caritas* which sometimes is translated as charity. In order to reconcile the differences Aquinas maintains that we should still love sinners, but only for God's sake, that is because they belong to Him. We should love sinners exactly in the same manner as we love bad children of our friends or bad servants of the

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33 *Summa Theologiae*. II-II. 23-46.

master who is our friend.[38] That explains the strange (at first glance) statement that "Love of neighbour includes love of God, but love of God does not include love of a neighbour".[39] The main implication of that is that no one can love one's neighbour unless he or she loves God.[40] If so, how can Aquinas rely on Aristotle's writings on love (philia) as he was a pagan?

Even if one has to agree that only those who love God can love their neighbours, there appear further difficulties and inconsistencies. Love is understood by Aquinas as a virtue. In fact, it is a special virtue. It is at the centre of all others virtues including prudence, justice, courage, temperance, hope and faith.[41] Aquinas stated that all the moral virtues are infused together with love[42]. If one does not love God, does it mean that he cannot be just, prudent, courageous, moderate, hopeful and faithful? It seems that this conclusion does not agree with the rest of Aquinas's moral theory. Aquinas believed that a man is capable of acts of virtue by his own efforts without the knowledge of God's grace, although he cannot be perfect in doing that.[43] It seems clear from the whole context of Aquinas's doctrine that every one must have at least a restricted capacity to love one's neighbour, for love appears as the engine of any virtuous act. If one has to accept the rest of Aquinas's moral teaching on prudence, justice and natural law, one must reject his presupposition that "love (*charitas)* is based on a communication of a supernatural kind".[44]

The second weak point of Aquinas's theory of ethical love is the adoption of the Aristotelian view on *philia* as reciprocal and partial love. In a way, the Aristotelian idea is correct as long as it concerns the area of friendship, and is not extended to the relationships outside personal affection. Aquinas stressed that *caritas* must be mutual. It cannot be unilateral.[45] Love is based on knowledge of each other's moral character. Consequently, ethical love cannot exist among strangers. This vision of love does not correspond the Christian concept of *agape* which can be unilateral and can be shown towards a stranger. Jesus, when explaining the command *love your neighbour as*

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[38] *Summa Theologiae.* II-II. 23. 1.
[39] ibid., II-II. 27. 8.
[40] ibid., II-II. 23. 5.
[41] ibid., II-II. 151. 2.
[42]

yourself, gave a parable of a good Samaritan who met a wounded and robed stranger, gave him help and took care after him.[46] The other point which makes Aquinas's vision of ethical love different from the one found in the Gospel is the partiality of Aquinas's *caritas*. He believed that one's neighbours must be loved more than others depending on their moral character.[47] This may be true about friendships between particular individuals, but Christian love breaks the limits of partiality. God does not know partiality in his love.[48] God's love does not mean that the evil are left unpunished, but involves God's compassion and mercy.

In the Christian message, love, mercy and justice come together, and they are inseparable. On the contrary, Aquinas tried to separate them. Not only justice and love are distinct virtues,[49] but even mercy is a different virtue from love. Love (*charitas)* is, according to Aquinas, directed towards God. Mercy, on the contrary, is directed towards others.[50] The reason for such a distinction is that mercy is conceived by Aquinas as an emotion or feeling not regulated by reason, "wandering away from the path of justice",[51] while love is thought not to be a stranger to reason.[52] This conception of mercy not only contradicts his observation that the wise people are more prompt to feel mercy, but the whole Christian teaching on God's love which Aquinas claimed to present in his description of *caritas*.

Further explanation of what is the Christian conception of love and mercy is far beyond of the task of this thesis. There is an extensive literature concerning this problem.[53] It is necessary to note, that the theory of Aquinas would have much more relevance to the contemporary problems of legal reasoning if he had developed his concept of ethical love on the basis of The Gospel rather than trying to reconcile his Aristotelian views with Christian ethics. There is great potential for doing that. His idea of natural law, conscience, errors of conscience and the search for the essential

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[46] Luke 10:25-37.
[47] *Summa Theologiae.* II-II. 26. 6.
[48] Eph. 6:9. Mat. 5:43-48.
[49] *Summa Theologiae.* - II-II. 33. 1.
[50] ibid., II-II. 30. 3-4.
[51] ibid., II-II. 30. 3.
[52] ibid., II-II. 23. 1.

characteristic of a good conscience - everything points at love as the key foundation for developing a modern theory of legal reasoning which meets the contemporary needs of judicial decision-making. There are certain key points in the theory of Aquinas which may contribute to that. First of all, Aquinas noted that there can be no true justice without love (*caritas*).[54] Secondly. that love is not a stranger to reason.[55] This allows us to see the link between legal arguments and love. Thirdly, Aquinas saw the direct connection between love and conscience. Love "issues from a pure heart and a good conscience and unfeigned faith".[56] Aquinas stressed that love goes with well-wishing to someone else. The weak point of his theory is only that he tried to distinguish it from good will, and by doing this he build a wall between natural law as accessible to everyone and love as possessed by the chosen lovers of God. However, if the artificiality of the distinction of love and good will is acknowledged, and love is conceived as an unselfish good will towards the other then the link with natural law and good conscience is firmly established, and love becomes paramount for correct legal reasoning.

There are several points in Aquinas's theory which point in favour of understanding of love as unselfish good will. Aquinas assigned the will as a seat of love.[57] He stressed that love *(caritas)* is unselfish.[58] If we agree that even those who do not experience the love of God in their lives are able to experience the love of a neighbour as unselfish well wishing, then Aquinas' concept of love acquires great potential for solving the problems of conscience in making judicial decisions. There may be an argument that we do not need to adjust Aquinas's concept of love to identify it with good will, and to refer to the latter as it is, without calling it love which may draw unnecessary ambiguity. In addition, Aquinas' understanding of love as an unique experience of those who love God as a friend differs from a mere good will towards neighbour. That may be true. However, there is a stronger reason for invoking love as the essential characteristic of a good conscience relevant to judicial decision-making.

The concept of love conveys a more specific meaning than the concept of good will can do. Christian love, which Aquinas tries to explain through his concept of

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Niebuhr H. R. *Christ and Culture.* - N.Y.: Harper, 1975. Ramsay P. *Basic Christian Ethics.* - London: SCM Press, 1950. Tillich P. *Love, Power and Justice.* - Oxford University Press, 1954.

[54] ibid., II-II. 23. 4.

caritas, is sacrificial and unconditional. Love is good will, but not all good will is unselfish. Aquinas understood that very well. His problem is only that he tried to bind this love with the friendship with God. But history knows enough examples of people who were not lovers of God, but were able to act sacrificially and unselfishly towards the others. Whether we call such acts love or not, it is clear that they have similarities to the sacrificial love of Jesus. The importance of referring to such acts as love lies in the potential of using the Christian idea of *agape* as providing the essential characteristic of a good conscience. In the following chapters I will give further arguments for using the Christian vision of love as an ideal state of conscience of the judges. As for Aquinas's presentation of Christian love, it is worth saying that he understood the significance of unselfish love in social relationships when he wrote about social peace and harmony: "Peace is only indirectly the work of justice, in that justice removes the obstacles to it. On the other hand it is directly the achievement of *caritas*, which of its nature causes peace."[59]

Apart from serving the ultimate end of human lives, ethical love has another link with Aquinas's concept of natural law. It was said in a previous chapter that natural law is conceived by conscience. Love in its turn, according to Aquinas, flows from good conscience and pure heart, and, therefore, can be presented as an adequate expression of natural law. Another evidence of this connection is that the first precept of natural law which prescribes pursuing good and avoiding evil is identical in its nature to the biblical commandment: 'You should love your neighbour as yourself'.[60] Thus, the idea of love as the essential characteristic of a good conscience is a natural implication of Aquinas's theory of natural law and conscience. Although left undeveloped due to the confusion of Christian love and Aristotelian concept of friendship, the idea of love can contribute significantly to the solution of ethical problems of judicial decision-making. It needs reinterpretation. It does not mean, however, that the Aristotelian moral philosophy has nothing to contribute to the theory of good conscience. In fact, Aristotle's ideas on equity are one of the primarily sources of the method of casuistry which will be expanded later on in this thesis.[61]

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[59] ibid., II-II. 29. 3.

[60] ibid., I-II. 107. 1.

Conclusions.

Aquinas's theory of conscience has several implications for judicial reasoning. It stresses the fact that judgements of conscience are the beginning and the end of the whole process of making judicial decisions. Even when a judge refuses to take any other moral considerations into account on the basis that his duty is to apply a law, his decision to follow strictly the law is a judgement of conscience in its nature. Interpretation of legal rules is a complex process. A judge when interpreting a legal rule discovers its meaning by means of general moral principles called natural law. These principles are grasped intuitively by conscience. Aquinas did not give a list of the principles of natural law, and my interpretation of Aquinas's vision of natural law is that the content of natural law is indeterminate and can vary from case to case. It does not mean that the content is purely subjective. The indeterminacy of the principles of natural law arises because of the changeable conditions of human existence. However, what is unchangeable is the basis principle that a man must seek what is good and avoid what is evil.

It is the will for good which constitutes good conscience and allows a decision-maker to discover what natural law requires in a particular situation. It is true that the principle of seeking good and avoiding evil is too general. Nevertheless, Aquinas's theory provide a more specific standard of good conscience expressed in the commandment: 'You should love your neighbour as yourself'. Although Aquinas himself did not elaborate the theory of love applicable to judicial decision-making, his ideas contain all the potential for doing that. His doctrine of erroneous conscience leads to ethical love as the necessary component of good conscience. Aquinas pointed at the life and teaching of Jesus as providing a specific image of what ethical love is about. The idea of Aquinas that natural law is open to understanding by every human being, makes the Christian concept of love appealing even to the non-Christians.

The problem of how much a secular legal mind can contain the Christian teaching on unselfish and sacrificial love will be dealt in the subsequent parts of the thesis. One may conclude that through the general contribution of Aquinas to the theory of interpretation of legal rules, moral responsibility of the judges, the problems of the errors of judicial conscience and finding the essential characteristic of a good conscience

of the judges, his theory helps to answer the questions left unanswered by Petrazycki. It affirms the existence of common intuitive (natural) law on the basis of shared human nature. Then Aquinas pointed at the source of the conflict of the different interpretations of natural law: voluntary and involuntary ignorance. His theory supports the insights of Petrazycki on love as the rationalisation of the intuitive law, and as the way of escaping from voluntary errors of conscience. It also contributes to finding a solution to the conflicts of intuitive law of the judges with positive law through stressing the importance of examining one's conscience and the rules to be applied. The most valuable implication of Aquinas's theory of conscience, perhaps, is that the conflict between the intuitive law of the judges and positive law is presented not as a conflict between intuition and reasoning, but as a conflict between different types of reasoning. The uniqueness of Aquinas's and Petrazycki's approaches to the problems of the conscience of the judges will become more apparent after considering some influential contemporary theories of legal reasoning.

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 thesis 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 judgements[1] 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 following parts of the thesis, 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 prepositions 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 thesis. 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 requires, 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 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 thesis 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 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 thesis 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 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 transcendental thinking employed. The latter draws the major interest of Beyleveld and his colleague to the role of principles, rules and standards, promoting thereby a sort of deontological model of legal reasoning.

The deontological character of Beyleveld's and Brownsword's theory is based on their vision of law which is understood as a morally legitimate power or a moral right to enforce rules.[13] Strict observance of rules has a paramount importance. For "law only

exists where it is obligatory to obey rules."[14] Law itself is the enterprise of subjecting human conduct to the governance of rules. Beyleveld and Brownsword follow here the ideas of Lon Fuller[15]. They maintain that the practice of adjudication imposes certain standards of proper behaviour which all the participants should strictly follow.[16] The deontological character of their theory is better seen in the prescribed model of adjudication. The process of adjudication includes four phases[17]: firstly, setting a procedure, or choosing a design for adjudication, secondly, identification and interpretation of normative materials, thirdly, application of the materials to the facts, fourthly, making a particular order and giving the reasons for the decision.

Thus, the model of judicial decision-making is deductive in principle. A judge has to apply the rules as soon as the facts of the case sufficiently permit the application of rules. Nevertheless, the authors leave room for consequentialist judgements. In treating the issue of whether one should comply with immoral rules, they maintain that the consequences of compliance should be weighed: "as we say that non-compliance will be justified only where, in the practical circumstances, it will have the best consequences."[18] At the same time Beyleveld and Brownsword reject the Utilitarian approach of weighing the consequences. The decision-maker should weigh the interests protected by law in general rather than pains or pleasures suffered. Beyleveld and Brownsword insist that the interests protected by law are moral ones[19]. Applying the rules, a judge should look at competing moral interests expressed in legal rights and duties, and consider the real effect of the rules on the persons. "The correct action is that which has the least damaging effect on any one individual".[20]

It seems that Beyleveld and Brownsword accept consequentialist reasoning mainly in resolving conflicting duties, particularly the duty to resist immoral rules and the duty to apply the established rules[21]. In other cases they maintain a direct obligation to comply with the legal rules, pointing out, however, that legal rules are not restricted only to those imposed by people in a position of official authority. Thus, we may conclude that the type of moral reasoning supported by Beyleveld and Brownsword is mainly deontological. However, the consequentialist approach is permitted in the matter

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[14] ibid., p. 160.
[15] Fuller L. *The Morality of Law.* - Yale University Press, 1969.
[16] Beyleveld D, Brownsword R. *Law as a Moral Judgement.* - p. 390.
[17] ibid., pp. 394ff.

of compliance with immoral rules. The deontological nature of Beyleveld's and Brownsword's theory becomes clearer when we look at their concept of PGC - the Principle of Generic Consistency borrowed from Gewirth's theory.[22]

The PGC is the central concept of Beyleveld's and Brownsword's doctrine. The basic duty of the judges is to apply this principle[23]. The PGC is an absolute moral principle. "Every agent, on pain of contradicting his status as an agent and hence of irrationality, must accept the PGC as governing all his interpersonal actions."[24] The PGC is a "principle to which every agent is logically committed, irrespective of his purposes, of what he actually happens to think is good or right, simply by conceiving of himself as a prospective agent with purposes".[25] It seems that Beyleveld and Brownsword saw the essence of the principle in the requirement to act rationally. Every legal act, including judicial decisions, should have a purpose which must be rationally examined and justified. But at the same time, the authors reject the assumption that the PGC is a formal principle. It has its own content. It is possible to determine the content of the PGC only under concrete circumstances. Unfortunately, Beyleveld and Brownsword do not consider the problem of how much the intuition of the judges plays a role in finding the content of the PGC. They admit only that working out the content of the PGC is a complex and controversial matter, and that "there is no reason to infer from this that it does not produce determinate solutions, in principle, to moral problems".[26]

Although there are not much said on how the judges in particular circumstances find the content of the PGC, the supposition that the primary task of the judges is application of the PGC has far-reaching implications. When applying positive rules the judges should examine the correspondence of these rules to the PGC. This correspondence makes the rule legal, the failure to correspond to the PGC makes the rule illegal. For, "the Rule of Law quite simply is the Rule of the PGC."[27] It means that the positive rules are legal so far as they correspond to the absolute moral principle, and it is the task of the judges to examine the rules they are applying. The authors reject the orthodox view that the judges sit in the courts to decide questions of law not questions of morality. "A judge must make a moral judgement as an essential part of his

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[22] Gewirth A. *Reason and Morality.* - The University of Chicago Press, 1978.

[23] Beyleveld D, Brownsword R. *Law as a Moral Judgement* - p. 436

determination that some material is legal material."[28] According to Beyleveld and Brownsword the judges cannot escape from passing moral judgements.

The second important implication is that the judges are not bound in their decision-making only by the established rules. Because "the idea of a Legal Order is not confined to the orbit of state regulation and control"[29]. Consequently, the judicial decision-making is not confined only to the application of state rules. The judges should apply also those moral principles and rules which also have not got a positive law formulation, but nevertheless are derived from the PGC.

Thirdly, Beyleveld and Brownsword justify the existence of judicial discretion. Nevertheless they reject strong discretion maintaining that the judges have only a weak discretion within the limits of the PGC.[30] The judges are restricted in the exercise of their discretion by the absolute moral principle which determines specific moral acts under particular circumstances.

All these three implications are very important and fit well the approach of agapic casuistry with few, but important differences. A casuist would share the view that the judges should not be bound only by formally established rules, that they are restricted in the exercise of their discretion by the absolute moral principle, and that when applying the legal material to the specific case, a judge interprets this material in the light of the absolute moral principle supplied by conscience within the given circumstances of the case. The difference is only that, according to the method of casuistry, a judge does not need necessarily to pass his judgement on the legal material *in abstractio*. He interprets it creatively through adjusting the legal material to the specificity and peculiarity of a particular case.

There are other differences between Beyleveld's and Brownsword's theory and the one supported in this thesis. The main difference lies in the vision of the PGC. A casuist who accepts the principle of love agrees wholeheartedly with Beyleveld and Brownsword that there is a fundamental principle which must underlie the practice of adjudication, and that this principle is derived from the concept of voluntary acting for a purpose, and finally is based on human nature.[31] However, the content of the principle will be different from one of Beyleveld and Brownsword..

It seems that Beyleveld and Brownsword follow Gewirth's vision of the PGC in distinguishing the PGC from the principle of ethical love. The difference between the PGC and principle of ethical love is that the latter, according to him, is indeterminate as to content, that this content depends upon individual will and psychology.[32] Gewirth believes that his vision of the PGC gives a specific content of rights to freedom and well-being "according to three ranks of importance - basic goods, non-subtractive goods, and additive goods".[33] I shall present later in this thesis that the vision of the principle of ethical love as something arbitrary and uncertain is not correct at least in respect of love derived from Christian ethics.

Moreover, Gewirth-Beyleveld's and Brownsword's vision of the PGC is more uncertain and difficult to grasp than the biblical principle of love. In real judicial decision-making, the PGC may suffer even more from arbitrariness than the principle of ethical love. Beyleveld and Brownsword state that the content of the PGC is specified and provided with an ordering "according to three ranks of importance - basic goods, non-subtractive goods, and additive goods. Within each of these ranks there is an hierarchy of importance, so that e.g. the basic goods are headed by life".[34] It is very questionable that an effective doctrine of judicial decision-making can be built on the rigid hierarchical system of the goods. The highly abstract system of the basic goods, non-subtractive goods, and additional goods is an over-complicated tool for an ordinary judge to use to arrive at a correct decision in the real context of the modern process of adjudication. Though Beyleveld's and Brownsword's vision of the PGC might be true, an ordinary judge would hardly be able to find time and be willing to reflect on the highly abstract content of the PGC, contemplating the whole hierarchy of the basic goods, non-subtractive goods, additional goods and their interrelations. The existence of a written constitution might partly meet the problem of specification of the abstract content of the PGC. But even then a judge would hardly be willing to examine the morality of the constitutional provisions. His main concern is to decide on a particular case effectively enough to meet the restrictions of time and effort. To do this the judge has to rely to a certain degree on his intuition, and his ability to grasp the context of the case, and then to be able to justify his findings in the light of existing legal materials.

Another weakness of binding the PGC to the rigid system of the goods is that the social goals of judicial decision-making are obscured. One of the examples of that can

be seen in the statement that "a court is an institution designed to facilitate adjudication, not therapy, mediation, or conciliation".[35] The authors, however, did not explain why social therapy, mediation and conciliation are excluded by the PGC from the goals of judicial decision-making. Thus, the highly abstract Principle of Generic Consistency in Beyleveld's and Brownsword's theory cannot contribute much to education of the moral intuition of the judges. From the practical point of view, the speculative system of absolute moral goods can hardly lead to the development of an effective model of judicial decision-making, and be a real challenge to legal positivism.

The philosophical criticism of legal positivism undertaken by Beyleveld and Brownsword, and their attempt to uphold the tradition of natural law in the modern times deserve respect. The root and danger of legal positivism lies in alienation, mechanisation and the process of dehumanisation caused by the exaltation of rules above all and everything. At the same time, the strength of the natural law tradition is based on ethical love for humankind rather than in constructing any abstract principles like the PGC. Love is the strongest weapon against legal positivism.

Dworkin's theory of legal reasoning.

Dworkin's work *'Law's Empire'* deserves special consideration, for it marks a watershed in the development of a deontological theory of legal reasoning. The book contains a strong criticism of consequentialist model of legal reasoning through employment of both natural law and legal positivist deontological arguments. Although Dworkin considered his theory of legal reasoning to be a challenge to legal positivism, still he develops a model of legal reasoning which contains many similar characteristics to that of the positivistic legal conscience. Nevertheless, there is an important difference between them. The classical positivistic model of legal reasoning is based on a presumption that the judges' job is to find out whether the facts of a particular case match the provisions of legal rules. The attitude of the judges to the rules to be applied is passive. Though there might be empirical disagreement about real content of the rules, nevertheless the judges should apply these rules exactly in the intention of the lawgiver.

Legal positivism assumes that the judges should strictly apply the law without the imposition of their own moral convictions: "The law is the law. It is not what the

own ethics or politics".[36] The peculiarity of Dworkin's theory lies in the vision that the law is not, and can never be, a factual given. Every part of the legal phenomenon - procedure, principles, concepts, values, and so forth is a product of interpretation. According to Dworkin, legal reasoning is an exercise in constructive interpretation.[37] The attitude of the judges to the established rules is active. "Judges normally recognise a duty to continue rather than discard the practice they have joined. So they develop, in response to their own convictions and instincts, working theories about the best interpretation of their responsibilities under that practice".[38]

Dworkin tries to develop his theory of legal reasoning - the doctrine of 'Law as Integrity' - through opposing it to two other rival theories: conventionalism and legal pragmatism. It is not difficult to note that when considering conventionalism Dworkin means mainly legal positivism[39], and when considering legal pragmatism the main point of his criticism is against the Realist school of law[40]. Nevertheless, Dworkin maintains that these theories including his own are deliberately constructed by him. He says: "Perhaps no legal philosopher would defend either of the first two exactly as I describe".[41]

In order to understand better his doctrine of judicial decision-making, one should look also at his account of conventionalism and legal pragmatism. For the doctrine of Law as Integrity is constructed mainly in opposition to both of them. Dworkin describes the first rival conception as 'Conventionalism', because interpretation of law depends on distinct social conventions; in particular on conventions about which institutions should have power to make law and how.[42] The essence of conventionalism consists in the requirement that the judges sanctioning the use of public force should be guided by the idea of law and legal rights. The content of the law is discovered in the past political decisions *only*. A judicial decision should be strictly consistent with the past political decisions which usually appear in the form of legislative act or a previous court's decision. If nothing can be drawn from the past political decisions there is no law. In this case the judges must exercise their discretionary power. It is this idea which

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[36] Dworkin R. *Law's Empire.* - Harvard University Press, 1986. - P. 114.
[37] ibid., p. VII.
[38] ibid., p. 87.
[39] Dworkin still distinguishes between conventionalism and legal positivism. The first is an interpretative theory of law, the second is a semantic theory. The first theory is an approach to the law, how it should be interpreted. The second is a description of the law, it is about the criteria which allow us to separate what

Dworkin chooses for his criticism of conventionalism. He considers that strict conventionalism does not provide enough consistency with previous decisions because strict conventionalism claims that judges are liberated from legislation and precedent in hard cases[43]. Dworkin concludes that "Our judges actually pay more attention to so-called conventional sources of law like statutes and precedents than conventionalism allows them to do."[44]

Dworkin also criticises the technique of reading legal materials employed by conventionalism. The main point of criticism is that a strict conventionalist judge finds the meaning of the words without consideration of the context. The judge is satisfied with the assurance that this meaning is what the law-giver intended to give, that the text is understood by all members of the public to whom it is addressed, and that it does not violate any of the Constitutional provisions or any widely held view about fairness or efficiency in legislation. This technique, according to Dworkin, does not allow us to make any further extensions to our reasons of law apart from those explicitly given in the legal materials.[45] Nevertheless, without making such implicit extensions of legal materials the judges cannot decide hard cases. "We must accept that the positive part of conventionalism - that judges must respect the explicit extension of legal conventions - cannot offer any useful advice to judges in hard cases. These will inevitably be cases in which the explicit extension of the various legal conventions contains nothing decisive either way, and the judge therefore must exercise his discretion by employing extralegal standards."[46]

Instead of the conventionalist technique of reading legal materials Dworkin promotes the technique based on constructive interpretation. Like the conventionalists he insists that the judges, when making their decisions, should be guided by the idea of law and legal rights.[47] However, the source of legal rights is portrayed quite differently. If conventionalism sees the source of rights in past political decisions, Dworkin's theory of law as integrity identifies legal rights and duties on the assumption that they were all created by single person - the community personified. "Propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process as accepted by the community".[48]

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[43] ibid., p. 135.
[44] ibid., p. 130.

Unlike in conventionalism, Dworkin defends an active attitude of the judges to past political decisions. Interpreting statutes or previous cases, a judge has to treat previous judges or legislators as an author earlier than himself in the chain of law, and he will see his own role as the fundamentally creative one of a partner continuing to develop it, in what he believes is the best way.[49] The difference between the conventionalist judge and the judge who follows the principle of integrity, according to Dworkin, is that the latter is not satisfied with drawing from the legal materials what is only explicitly given. The principle of integrity requires from the judge when faced with the hard cases to find the implicit principle underlying the past decisions, and on the basis of this principle to make a fresh ruling.

However, there is much in common between conventionalism and Dworkin's theory of legal reasoning. He himself recognises that both accept the idea of legal rights wholeheartedly.[50] Secondly, whether Dworkin wanted it or not, he pictured the principle of integrity as a *conventional* principle when he wrote that "our political life recognises integrity as a political virtue".[51] Unless Dworkin confesses himself a natural law theorist one could say that there is not much difference between a conventionalist and his view that law is a coherent normative system. The slight difference is only is that a conventionalist popular view, which "seems initially to reflect the ordinary citizen's understanding of law",[52] might emphasise the coherence of previous political decisions, whereas Dworkin stresses the coherence of the underlying principles. When Dworkin writes that "Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles"[53], he stands very near to one of the fundamental beliefs of popular conventionalism.

The assumption that legal rights and duties were all created by a single author - the community personified, is also a convention. Because Dworkin puts this assumption at the foundation of constructive interpretation, it is become clear that Dworkin in fact defends an improved sort of conventionalism. His whole thesis is based on this assumption: "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process *as accepted by the community.*"[54] The proximity of Dworkin's theory to conventionalism is recognised

[49] ibid., p. 313.
[50] ibid., p. 95.

even by himself when he describes a soft form of conventionalism, which does not restrict law only to the explicit extension of previous political decisions. He describes soft conventionalism as an "undeveloped form of law as integrity".[55]

This draws us to a conclusion that the main opponent of Dworkin is not conventionalism but legal pragmatism. One may agree with Dworkin that legal pragmatism is opposed to conventionalism. When dealing with the former, Dworkin presents the most extreme form of legal pragmatism: "It encourages judges to decide and act on their own views. It supposes that this practice will serve the community better - bring it closer to what really is a fair and just and happy society - than any alternative program that demands consistency with decisions already made by other judges or by the legislature."[56]

The other features of legal pragmatism are described as follows. There is no link between judicial decision and political decisions of the past. A pragmatist "denies that past political decisions in themselves provide any justification for either using or withholding the state's coercive power".[57] The idea of law and legal rights is rejected by a pragmatist.[58] The pragmatist "denies that people ever have legal rights; it takes the bracing view that they are never entitled to what would otherwise be worse for the community just because some legislature said so or a long string of judges decided other people were."[59] These are strong accusations, particularly if we take into account the previous judgements of Dworkin that no judge can wholly ignore the practice of precedent, and that "Every community has paradigms of law, propositions that in practice cannot be challenged without suggesting either corruption or ignorance."[60] I am far from suggesting that under the title of legal pragmatism Dworkin criticises corruption and ignorance. The whole criticism of legal pragmatism cannot be clearly understood without looking at his doctrine of principle against policy. By criticising legal pragmatism, Dworkin offers another attempt to defend his thesis that the legal conflict between a principle and policy must be settled in favour of principle.[61]

The approach of agapic casuistry would not deny Dworkin's idea that there is a real conflict in making judicial decisions between what Dworkin calls principle and policy. But a casuist would hardly consider adjudication as characteristically a matter of

[55] ibid., p. 127.
[56] ibid., p. 152.

principle rather than policy. In reality, the judges can and do employ both goal-based and rights-based arguments. In his work *Law's Empire* Dworkin tries to move further from the simple claim that judges should follow principle rather than policy through the development of the doctrine of law as integrity. "Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretative judgements and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative".[62] A casuist's vision of law is similar to Dworkin's picture of law as a dynamic system and the picture of legal reasoning as a constructive interpretation. It is true that the judges when they make their decisions are limited in their interpretation of the law by certain paradigms of law, by practice of precedent, and by the general intellectual environment, common language and etc,[63] and that within those limits the judges can and do exercise their moral reasoning in the course of making their decisions.

The differences from the approach of agapic casuistry appear when Dworkin begins to insist that the judges should enforce only those moral convictions which they believe, in good faith, can figure in a coherent general interpretation of the legal and political culture of community. "A judge who accepts this constraint, and whose own convictions are Marxist or anarchist or taken from some eccentric religious tradition, cannot impose these convictions on the community under the title of law, however noble or enlightened he believes them to be, because they cannot provide the coherent general interpretation he needs".[64] There are weak points in this statement from the point of view of a casuist. First of all, a casuist can say that the legal and political culture of the community is not, and can never be, a factual given exactly in the same way as the law can never be a factual given. This culture requires a sort of interpretation similar to that which the law requires. One finds a closed circle: a judge, applying the law, has to interpret it in the light of the legal and political culture of the community. But the latter also needs interpretation. Secondly, even if one assumes that the content of the culture is clear enough, the requirement to adhere to the dominant moral convictions of the society

in interpretation of the law would not bind the conscience of a casuist if those convictions are apparently immoral.

A casuist would definitely sympathise with the willingness of Dworkin to build a prescriptive theory of judicial reasoning. However, the difference is that the method of casuistry is not restricted to any particular legal culture. Dworkin in his turn develops his theory mainly within Anglo-American legal culture only. Although sharing Dworkin's understanding of the law as interpretation, the vision of judicial decision-making within the tradition of agapic casuistry is based on different presuppositions. Dworkin puts integrity as a virtue at the centre of interpretation. Agapic casuistry stands for ethical love as the fundamental principle of judicial decision-making.

The principle of love developed within Christian ethics goes beyond conventionalism. The author of moral law is God (for He is the Creator of all things), rather than community. Propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process as revealed by God's power to human conscience. Accordingly, by revelation, the essence of moral law in respect to the relations between human beings is to love one's neighbour as oneself.[65] This is the fundamental principle of every human society. Whether the community recognises love as a political virtue or not it does not affect its validity. The emphasis of agapic casuistry is, however, not on philosophical justification of the principle of love, but on the real problems the judges face when they apply this principle. Christian ethics is very realistic in the sense that it helps the judges to understand that they are not 'Herculeses', and they can and do mistakes in the interpretation of legal rules. The method of casuistry which is based on the theory of Thomas Aquinas, and reinterpreted in the light of the biblical vision of neighbour's love can contribute significantly to improvement of judicial decision-making..

Judge Posner on legal reasoning.

Judge Posner's economic theory of law represents a consequentialist type of judicial conscience which is quite different from the theories of MacCormick, Beyleveld and Dworkin who endorse different kinds of deontological reasoning. Moreover, Dworkin has developed his theory of legal reasoning as constructive interpretation partly in opposition to Posner's economic theory of law. The writings of Posner on legal

at all. He writes: there is no such thing as 'legal reasoning'. Lawyers and judges answer legal questions through the use of simple logic and the various methods of practical reasoning that everyday thinkers use."[66] He is not, however, always consistent with this idea. Earlier, he affirms that the process of arriving at the decision is quite different for a judge and for an ethicist: "The ethicist and the judge are subject to different ethical principles. The latter is, and the former is not, a decision-maker in a system of government, and such a decision maker must be concerned not only with doing substantive justice in the case at hand but also with maintaining a legal fabric that includes considerations of precedent, of legal authority, of the framing of issues of counsel, of the facts of record, and so forth."[67] If there is legal reasoning at all, it is characterised not by the way the judges arrive at their decisions, but by the special consideration of consequences. Posner directly states that "Consequences are never irrelevant in law. If they are sufficiently grave they can sway decision, whatever the balance of conventional legal arguments".[68]

Posner believes that political factors are paramount in judicial decision-making. He thinks that the judges apply the rules not because of fidelity to the rule itself, but because of the negative consequences of disobeying it.[69] It appears that apart from the negative consequences of disobeying, the judges are not bound to enforce the established legal conventions if these conventions are against the moral beliefs of the judges. "A person should not surrender deeply held beliefs on the basis of a weak argument just because he cannot at the moment find a stronger one in defence of those beliefs".[70] The established legal conventions are the circumstances under which a judge should reach the most reasonable result. It is legal conventions which mark the peculiarity of judicial reasoning. Thus, Posner does not reject the idea that the method of arriving at legal decision is distinct from the other forms of moral deliberation. The distinction, however, is seen quite differently from the representatives of deontological theories of law. The latter may maintain that by the means of a special technique the interpreter may arrive at a correct legal decision which can be predicted beforehand. On the contrary, Posner discards the model of legal reasoning which endorse the idea of determinacy of law and its objectivity.

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[66] Posner R. *The Problems of Jurisprudence*. - Harvard University Press, 1990. - P. 459.

According to Posner, the justification (akin to scientific verification) of legal decisions - the demonstration that a decision is correct - is often impossible.[71] This statement is based on his different understanding of law. The deontological theories of law hold the view that a judicial decision is correct if it is rightly derived from the principles and rules, although these theories differ on the content and scope of the principles and rules. Posner rejects the whole scheme of deontological reasoning. Law is not a system of rules or principles. It is activity. "No bounds can be fixed a priori on what shall be allowed to count as an argument in law. The modern significance of natural law is not as a body of objective norms that underwrite positive law but as a source of the ethical and political arguments that judges use to challenge, change, or elaborate positive law - in other words to produce new positive law. There are no moral 'reals', but neither is there a body of positive law that somehow pre-exists the judicial decisions applying".[72] This vision of law also is different from Petrazycki's theory which also considers law in a dynamic perspective - as an experience. Posner maintains a different vision of law: "The law is not interested in the soul or even the mind. It has adopted a severely behavioristic concept of human activity as sufficient to its ends and tractable to its means".[73]

The behavioristic concept of law leads to the conclusion that the guiding principle of judicial decision-making must be economic efficiency or wealth maximisation.[74] Posner states: "Even if judges have little commitment to efficiency, their inefficient decisions will, by definition, impose greater social costs than their efficient ones will. As a result, losers of cases decided mistakenly from an economic standpoint will have a greater incentive, on average, to press for correction through appeal, new litigation, or legislative action than losers of cases decided soundly from an economic standpoint - so there will be a steady pressure for efficient results".[75]

The principle of efficiency or wealth maximisation is not only the key to an accurate description of what the judges decide, but according to Posner, it is "the right benchmark for criticism and reform".[76] He offers the following conception of sound judicial decision-making[77]: Firstly, the judges should extract an overall concept of the relevant branch of law (according to the principle of wealth maximisation) to guide their

[71] ibid., p. 459.
[72] ibid., p. 459-460.
[73] ibid., p. 460.

decisions. They extract it from existing legal materials and social vision. Secondly, they should canvass the relevant precedents and other sources of information that might help in deciding the case at hand. The third step is to make a policy judgement - resolving the case in accordance with the overall concept of law, which is the principle of wealth maximisation. Finally, the judges have to assure themselves that the decision is not ruled out by authoritative precedent.

Therefore, the principle of wealth maximisation becomes paramount in Posner's theory of judicial decision-making. This principle marks the main difference from the approach of agapic casuistry. Although a casuist may agree that the principle of maximisation may take its part in judicial deliberation, he or she would disagree that it is and must be the guiding principle of adjudication. There are several reasons for this:

1. The main objection against the Posner's vision of the principle of wealth maximisation is his logical conclusion that "The law is not interested in the soul or even the mind. It has adopted a severely behavioristic concept of human activity as sufficient to its ends and tractable to its means".[78] Unlike Posner, both Aquinas and Petrazycki considered the soul and mind of the individual as the heart of the law.

The danger of the impersonal economic approach to the law is particularly seen in the area of criminal law. It seems that Posner is quite satisfied with the implications of the fundamental principle of economics - the inverse relation between price charged and quantity demanded - to judicial policy in criminal law cases: an increase in either the severity of the punishment or the likelihood of its imposition will raise the price of crime and therefore reduce its incidence.[79] It means that the economic approach demands from judges to be guided by the overall efficiency and impact on the society. The approach of agapic casuistry is that the judges should be guided first of all by the care for the destiny of the people affected directly.

2. Posner claims that an essential characteristic of the principle of wealth maximisation is a requirement to behave rationally. There is no difficulty with that. The difficulty arises when considering his idea of the principle of wealth maximisation that "behaviour is rational when it conforms to the model of rational choice, whatever the state of mind of the chooser".[80] In my view, the judges when deciding cases must and do pay attention to the state of mind of the participants in the legal process. When Posner

tries to replace attention to the particular state of mind of the chooser with the emphasis on efficiency and external consequences of human behaviour which lead to wealth maximisation, he tries to impose an impersonal standard on the whole variety of human relationships. He considers that the criterion for rational choice and the measure of efficiency is increasing satisfaction. However, he does not say exactly how judges should measure satisfaction. He definitely identifies it with self-interest, the achieving personal ends in life.[81] But he escapes from identifying which ends. Any ends? It looks that he leaves this task to the judges to decide which ends are preferable to others in its maximisation.

Posner does not give any reliable guidance to the judges for evaluating ends in life. Natural law, in his opinion, cannot give answers. "It is hopeless in a society that is morally heterogeneous".[82] Nor is positive law reliable. It is "often vague, open-ended, tenuously grounded, highly contestable, and not only alterable but frequently altered"[83]. Posner repudiates an interpretative theory of law and the theory of distributive justice as giving little help. Whether Posner wants to or not, he endorses a model of judicial decision-making which promotes nothing but judicial arbitrariness.

3. The considerations of efficiency made Posner conclude that "judge-made rules tend to be efficiency-promoting while those made by legislatures tend to be efficiency-reducing".[84] Posner postulates an inherent conflict between the legislature and the judiciary in which he takes the side of the judiciary. The legislators are enslaved by 'the yoke of interest group pressures', imperfections of legislature procedure, dependence on the result of next elections. All these make the work of legislation efficiency-reducing. In this situation the judges appear as correctors of the efficiency-mistakes of the legislatures. Although conflict between the legislature and the judicial powers can take place, it is not a universal characteristic of judicial reasoning to be efficiency promoting and the mind of legislators efficiency reducing.

One may agree that the judges may take the function of correctors sometimes. But what is difficult to agree with is Posner's idea that when creating a rule the judges' approach is more impersonal than the legislator's one[85]. This is an incorrect picture of judicial reasoning. If there is a corrective function of the judiciary, it expresses itself in a more personal approach in which the judges try to smooth over the possible deprivation

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[81] ibid., p. 3

of individuality caused by abstractness of legislative rules. The reason for that lies in the nature of adjudication. The judges deal with particular cases and they face particular individuals. A legislator, when posing a rule, deals with an abstract situation which embraces a more or less indefinite range of persons and circumstances. In fact, it is the task of the judges to ensure that the application of rules is individualised to a sufficient degree to meet the requirements of justice and fairness. In the next chapters of the thesis I shall consider in detail how the personality of the litigants and the circumstances of the particular case affect judicial interpretation of legal rules.

4. It calls for question Posner's extension of the principle of self-interest to the domain of public law and the area of judicial decision-making in particular. The economic approach of Posner might be correct in some areas of private and commercial law, but the activities of the judges are based on different moral foundations. According to the Posner's approach the judges, like other people, seek to maximise their own self-interest. Although Posner recognises that the rules of the judicial process are designed to break the link between judicial policies and their economic interests, it looks as if he is more ready to admit that the judges maximise their self-interest through imposition of their personal values on society.[86] To admit that this can take place is one thing, but to maintain that this is what the judges ought to do is completely another. The tradition of Christian ethics, to which I adhere, insists that the judges should not impose their own beliefs on other people. Moreover, before passing their judgements they should examine their conscience in order to eliminate their own prejudices. They should be guided not by the desire to maximize their own interest but by genuine care for the interests of other participants in the legal process.

However, there are some points in Posner's theory which can be used in the building of a theory of legal reasoning based on ethical love. For example, Posner's general formulation of the task of the judges; that of reaching the most reasonable result in the circumstances taking into account statutory language, precedents, and all other conventional materials of judicial decision-making.[87] Despite our different vision of what constitutes a reasonable result, I fully concur with Posner that the task of the judges is not just settling disputes authoritatively but also generating cogent answers to social questions. But the agapic way to answer those questions is very different from the one promoted by Posner. Although one can agree with Posner that under legal

constraints there is an area which is open to judicial discretion, and that the judges have to make a choice which is not arbitrary, a casuist sees the most efficient constraint for judicial choice not in sound economic policy but in good conscience.

From legal reasoning to agapic casuistry.

It is interesting that none of the four theories of legal reasoning considered above uses the concept of conscience when considering the reasoning of the judges. This is also the case for other theories of legal reasoning.[88] But it is worth noting that although they do not explicitly refer to the idea of conscience, implicitly they do so. For if we understand conscience in its Thomistic meaning, of a human mind passing moral judgements, then when the authors are considering the process of how judicial decisions are arrived at and justified, then, in effect, they are dealing with matters of conscience.

Nevertheless, there is a need for the concept of conscience. First of all the concept of conscience gives a better opportunity for looking at processes which might be hidden from the public. Not everything that the judges think is apparent in law reports. Also, the concept of conscience automatically draws our attention to what is behind the words. It calls us to reinterpret judicial decisions in the light of moral views held by the judges. The concept of conscience helps us to understand legal reasoning in a broader perspective. It links legal reasoning to the personalities of the judges, their intuitions. It questions whole models of legal reasoning. All theories of legal reasoning considered are based on certain requirements of conscience which the authors often take for granted. MacCormick's theory is based on the requirement that the judges in their adjudication should apply legal rules. Beyleveld's and Brownsword's theory is based on the requirement that the judges should follow an absolute moral principle. Dworkin's theory is that the judges should adhere to the moral principles shared by the community. Posner's assumption is that the decisions of the judges must be efficient. All of them are requirements of conscience which must be questioned in order to understand their value and significance in judicial decision-making.

The concept of conscience gives us additional resources for inquiring into judicial reasoning. It allows us to encounter the fundamental questions such as why a judge should follow legal rules, why he should be guided by the moral principles shared

by the community, why his decision should be efficient, why it should comply with absolute moral principle. Deontological and consequentialist theories of legal reasoning cannot address these questions, because these are the fundamental principles which are taken for granted. The theological argument allows us to go further, and to enquire into the depth of these moral principles.

The Christian vision of love represents a more developed state of conscience. It does not reject the principles above. But it rejects the claim for their absoluteness. A judge should follow legal rules, absolute or conventional moral principles, efficiency or whatever else - as far as all these principles are directed to the fulfilment of love. To act according to love is not an easy task. It requires special skills and experience. To meet this need the ethicists of the past developed the science of casuistry. It deals with cases of conscience, with doubts and dilemmas, perplexities and moral disagreements. It is the way of applying the general moral requirements held by conscience to the particular situations of life. Not all casuistry leads to the fulfilment of love. A theory of legal reasoning requires the agapic casuistry, the general characteristics of which will be considered in the following chapters of the thesis.

PART II.
AGAPIC CASUISTRY
IN JUDICIAL DECISION-MAKING.

5. THE METHOD OF CASUISTRY.

Introduction.

Conscience in making judicial decisions is a particularly complicated phenomenon which requires a special approach. Throughout the centuries moral philosophers and theologians have developed a discipline which deals with description and resolution of cases of conscience, that of casuistry. "The term 'casuistry' is derived from *casus*, Latin for 'case' and refers to the study of individual 'cases of conscience' in which more than one settled moral principle (or perhaps none) applies. More broadly, casuistry is the use of the 'method of cases' in the attempt to bring ethical reflection to bear on problems requiring the decision and action of some moral agent."[1]

The casuistic method by its nature combines prescriptive and descriptive elements which are difficult to separate. The casuistic method is a much larger enterprise than just a description of cases of conscience and the process of moral reasoning. It is directed to educate people to make the right moral decision. Therefore it seems problematic to develop and apply the casuistic method in researching the conscience of judges as a pure descriptive method. Sooner or later it inevitably draws us to make value judgements on how judicial-decision making is carried out. However, despite its mainly prescriptive character the casuistic method can be helpful in achieving a better understanding of what is going on in the courts because the casuistic technique of tackling legal cases has been to a considerable degree adopted by the judges. The method of casuistry is important not only for advising a judge how to reach a just and fair decision under the given circumstances. It can also help to throw light on existing judicial practices.

It may be problematic how far the specific features of judicial casuistry can help us to understand the existing practices in the courts. It is true that not every judge is a casuist, and not every casuist wants to identify himself as such. The judges may be reluctant to show the moral conflicts in the process of the administration of law. All these faults lead to a conclusion that the descriptive value of the casuistic method may not be so great as its prescriptive significance. Nevertheless, the descriptive significance of the casuistic method may differ from country to country. In countries where the judges give an extensive justification for their decisions, where they can publish their dissenting opinions, and are allowed to make their moral views known to public, the casuistic method has great potential as a tool of exploration of the *'is'* of judicial decision-making. In the next parts of the thesis we will take several courts in which casuistic thinking can be more or less observed. Those observations may be helpful for understanding practices in other courts where the casuistic thinking is not so obvious.

Although the casuistic method was neglected for many decades the impact of casuistry on law was very significant throughout of the Western Europe including Britain.[2] Up to now the method of casuistry has been applied by judges who never suspected that they have the privilege of being called 'casuists'. The casuistic method has been especially widely adopted in the common law countries where the judges have had and continue to have more discretion in the administration of law, and where the principle of equity has been always respected.

The casuistic method provides a researcher with an ideal pattern of judicial reasoning. Though this pattern can sometimes stand too far away from the real state of affairs it allows him or her to assess the current judicial practice in an already established theoretical framework. The place of abstract moral and legal principles in making judgements, attention to the circumstances, appeal to reason, different ways of interpretation of the established legal rules and new situations which were not envisaged by the lawgiver, - all these have originated in the casuistic thinking.

The history of the casuistic method.

The casuistic method has a long history. As a method moral casuistry finally got its own form shaped in the 14-16th centuries, and reached the peak of its

flourishing in the 17th century, after that its influence rapidly declined, and the word 'casuistry' became pejorative. The reasons for rise and decline of what is called High Casuistry will be examined later. It is worthy to notice that the sources of casuistry can be found in Aristotelian philosophy, the rhetoric of Cicero, Roman and canon law, Patristic and Thomistic theology.

The first source of casuistry is Aristotelian moral philosophy. There are several basic ideas of Aristotle which are paramount for the casuistic method.[3] Aristotle, following Plato, believed that the social behaviour of persons to a considerable degree is determined by their grasp of the principles of right conduct. Then, disagreeing with Plato, he thought that it is impossible to secure theoretical precision in practical matters, and so ethical reasoning should not aspire to the rigour appropriate to a science in a strict sense of the word. In order to judge what is a right conduct it is necessary to possess a virtue such as *phronesis* (practical wisdom), the virtue obtained through critical reflection on moral practice. Another important idea was that observance of the rules is not sufficient to do justice. Justice can be done if the law as a body of rules - *nomoi* - is supplemented by equity - *epieikeia* - as a correction of the law in a specific situation according to the exercise of *phronesis*. These major ideas of Aristotle became a theoretical basis for the casuistic method.

The next source of casuistry is the rhetoric of Cicero, particularly his idea that a moral problem has to be resolved by putting forward all relevant arguments and counterarguments in which various moral principles and solutions to analogous cases should be interpreted for maximum persuasive effect. The rhetoric works of Cicero[4] contained a sample of the future casuistic analysis of the case: concentration on the issue, establishment of relevant moral principles and rules held by conscience, presentation of a set of arguments, and the emphasis on particular circumstances of the case. The influence of Cicero was prominent on casuistry also because his works already contained a set of clearly formulated cases of conscience: that is when a person experiences a moral conflict in application of a certain moral principle or rule[5]. Compiling such a set of cases would become later a primarily task of the casuists.

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[3] Aristotle. *Ethica Nikomachea*. Oxford: Clarendon Press, 1925. VI, V, 1-4, 1140 a-b; VI, VIII, 9

It was Patristic theology through which Christian moral values were brought into casuistry. The ideas of love, compassion mercy and forgiveness become an integral part of Christian casuistic thinking. The contradiction between the Mosaic law and the New Testament teaching already provided a good soil for developing the casuistic approach. Realising the conflict among them, the Fathers of Church, in order to find a solution to the conflicts arising in many aspects of life (marriage, war, commerce, political authority), made a clear distinction between 'commandments' and 'counsels of perfection'[6]. This distinction was to become one of the major interpretative principles of subsequent casuistry.

The contribution of Roman and canon law consisted mainly in developing a systematic approach which was later applied to cases of conscience. A deeper analysis and classification of moral problems by the casuists was directly influenced by the lawyers of Roman and canon law. The casuists accepted the methods of comparison and analogy. Apart from this, Roman and canon law contributed to developing the concept of equity for resolving legal and moral issues. The way the concept of equity was employed in Roman and canon law would be adopted by the later casuists. Its peculiarity consisted particularly in the use of certain interpretative tools in order to make the application of rules equitable. These tools were listed in the *Panormia* of Ivo of Chartes (1092): a) determining the authenticity of a text which contains a rule; b) locating it in a hierarchy of sources; c) examining the sense of the words; d) discovering the local and temporal circumstances that prompted the legislation; e) finding out whether the rule is immutable or mutable; f) finding a just cause not to observe a mutable rule. (PL 161, 50A; 162, 218; 162, 256).[7] All these tools can be used to adjust the application of rules according to the principle of equity.

The most significant contribution to casuistry was, perhaps, made by Thomas Aquinas. He managed to synthesise all the previous theoretical sources of casuistry. Through development of elaborated set of concepts and notions Thomas Aquinas

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[6] Clement of Alexandria. *Texts*. - Transl. by G.W. Butterworth. - Cambridge, MA: Harvard University Press, 1919; Ambrose. *On Virginity*. - Toronto: Peregrina Pub., 1980; Gregory of Nyssa. 'On Perfection'. in: *Ascetical works*. - Transl. by V. Callahan. - Washington: The Catholic University of America, 1967.

managed to harmonise different philosophical and ethical traditions. The concepts of 'natural law', 'natural reason', 'conscience', 'prudence', and 'circumstance' were taken by the latter casuists exactly in their meaning in Thomistic theology. Thus, Thomas Aquinas came into the history of casuistry as a great systematiser.

All these historical sources gave finally rise to what is called High Casuistry. The term 'High Casuistry' is used to describe a period in development of practical theology from the composition of confessional books in the 13-14th centuries until the work of Alphonsus Ligouri (1696-1787), one of the most prominent theologians in the post-Reformation period of the Roman Catholicism. Apart from in the Catholic countries, casuistry flourished in England in the seventeenth century. The rise of casuistry which took place in Western Europe in that period was caused by historical reasons. The detailed examinations of these reasons would lead us too far away from the subject of our interest. Nevertheless, it is necessary to take into notice of them. The first main reason was the confessional needs of the Roman Catholic Church. According to her doctrine, the Church has power to bind and loose, that is to forgive sins and impute a penance for their committing. This has to be done through the practice of confession - the acknowledgement of one's guilt to other persons or to God. In the Roman Catholic Church it finally led to the appearance of the sacrament of penance. Willing to introduce an order and regularity in administration of the sacrament, the Church moved to establish specific rules concerning the penitent absolution, counsel, and penance. However, because of the variety of sins and related mitigating and aggravating circumstances, the Church needed a practical method which would help priests administer the sacrament of penance. The second main reason for the rise of casuistry was due to social changes in the Western Europe which happened at this time when the Church had still a moral monopoly. Economic and social changes led to the growth of social conflicts which often acquired a religious form. The necessity to solve these conflicts, to reconcile the old moral values with the new historical conditions also promoted the rise of casuistry, especially in England.

Historical changes brought the rise of casuistry, but they also brought its eventual decline. The social transformation in the end of the seventeenth and eighteenth centuries led to the growth of secular tendencies and weakening of the

'The practice of confession lost its previous significance especially in the public life of society. Cases of conscience became more and more a matter for the private life of the individual. As a result, the need and desire to describe and analyse cases of conscience was significantly diminished. Although the tradition of casuistry never completely died out, it is clear that its influence on moral thought in the nineteenth to the first half of the twentieth centuries was reduced to the minimum. The whole social mentality of that time did not favour its adoption and development. The core of the casuistic method lies in the idea that general rules, whether religious or legal, should be applied in a flexible way. Circumstances affect the applicability of the rules. Casuistry gives more freedom to the decision-makers to determine how far the application of the rules matches particular situations. It so happened that casuistic thinking itself was not acceptable in the world of absolute states in which an individual should obey without any reserve the commands of the sovereign whether embodied in a monarch or collective will.

However, apart from the unfavourable historical context for the development of casuistry, there were also theoretical weaknesses. Firstly, Catholic casuistry considered cases of conscience within the scholastic categories such as the concepts of mortal and venial sins. This scholastic thinking contained the danger of extreme intellectualism and formalism. One of the consequences of the Reformation was the decline of scholasticism. Secondly, the casuistic method degenerated to the unfruitful discussion about a formal principle which allows one to determine the choice between conflicting authoritative opinions on freedoms and obligations[8]. The attempt to solve this problem in the abstract was basically a deviation from the nature of the casuistic nature which is about the merits and individuality of a particular case.

Despite the theoretical weaknesses there are some ideas of Catholic casuistry which can positively contribute to the use of general casuistry in judicial decision-making: Firstly, the primary attention of the casuists concerns the circumstances in which a rule has to be applied. As Juan Azor wrote: "In law, circumstances change everything so that from circumstances the equity of the case can be grasped" (*Institutionum Moralium*, I.XVIII. pp. 43-44. Cologne 1602).[9] The second important idea is that when there is a serious diversity of opinion about what is the right course of action casuists use a technique of marshalling, comparing, and contrasting

different opinions. Thirdly, the main interest of Catholic casuistry lay in exploring cases of doubt. Doubts were understood as inability of the moral agent to give assent to either of two contradictory propositions. Under such a doubt the judgement of conscience was suspended. The task of casuistry was to resolve the doubt by investigation of the circumstances and by recourse to an authoritative texts. Fourthly, the consideration of cases causing doubts was done in the context of a confrontation between rules that were thought of as long settled and emerging conditions that apparently challenge those rules. In order to solve the conflict between established rules and new conditions, the casuists tried to find a basic principle which would allow moral agents to choose the way of action. Finally, the method of casuistry had an educational purpose: the development of the conscience of members of society.

The decline of High Casuistry had already started in the middle of the seventeenth century for the reasons described above. Nevertheless the necessity of a sound casuistic method never disappeared. Among moral theorists, the casuistic approach in this century was actively defended by Kenneth Kirk (1886-1954; bishop of Oxford from 1937). Another powerful defence of the casuistic approach was made recently by Albert Jonsen and Stephen Toulmin[10].

I shall consider here more closely the theory of Kenneth Kirk because he was one of the few academics in this century who, in developing the casuistic method, tried to combine theological and legal approaches. Although his main writings were not concerned directly with judicial decision-making, his work *Conscience and Its Problems* is potentially very useful in explicating judicial casuistry. *Conscience and Its Problems* is an authoritative re-establishment of the casuistic method in the modern time. Written in the first half of the twentieth century the work continues to be attractive through the relevance of its ideas.[11] Bishop Kirk accepts generally the Thomistic doctrine of natural law[12], and by doing that he retains the continuity of the tradition of Christian casuistry which was developed within the natural law theory.

The value of Kenneth Kirk's book lies in the fact that he sees the essence of the casuistic method in the equitable application of moral rules. In this respect his account of casuistry rests on the Aristotelian vision of equity: "Equity is a correction of the law. Every law is expressed in general terms, and there are some matters which cannot be accurately dealt with in general terms... . In such cases the law lays down

what is right for the majority of cases, without loosing sight of the consequent inaccuracy - an inaccuracy which springs neither from the law nor from legislator, but from the nature of the case, as an inevitable condition of human action. When, therefore, a law is laid down generally, but manifest ground for exception appears in a particular case, it is right that failure of the legislator should be made good exactly as he would make it good if he were present, or would amend his law if he took the case into account".[13] Kenneth Kirk draws important conclusions from this theoretical thesis made by Aristotle: the task of casuistry is firstly to adjust the law for a particular case, and secondly: to work for an amendment of the law so that cases which ought to be excluded should be excluded.[14]

The main idea which underlines the thinking of Kirk is, firstly, that the casuistic method is fundamental for the right application of any moral rule or principle, and secondly, that it is conscience which is a driving force for such an application[15]. Thus, the ideas of Kenneth Kirk are a logical continuation and specification of the tradition coming from Aristotle and Thomas Aquinas. In relation to judicial decision-making the approach developed by Kenneth Kirk has the following implication: judicial acts can be understood only in the light of the applied legal rules as the process of adjusting and amending these legal rules according to circumstances. As a casuist Kirk is not only describing cases of conscience, he is teaching how this cases should be resolved. There are some practical recommendations which can be helpful to those who apply legal rules and principles. For example, in the situation where the officials have to apply a law which seems to be unjust in a particular situation they are advised in order to escape the open conflict and disobedience to look for the exceptions allowed by the law-giver himself or to undertake detailed scrutiny of the formula in which the law is expressed. The purpose of such a scrutiny is adjusting and factual amendment of the law.[16]

The work of Kirk is important not only because he was one of few in the twentieth century who understood the importance of casuistry, and not only because his theory is open to the fundamental questions which stand before human conscience, but also because he tried to show the potential of the whole tradition of

casuistry for solving cases of conscience in the modern times. In outlining the general features of the method of casuistry, I rely primarily on Kenneth Kirk's work.

The general features of the method of casuistry.

The meaning of casuistry consists in an analysis of cases with the purpose of yielding insight into moral problems. Since our main subject is the position of conscience in making judicial decisions we are particularly interested in what can be called judicial casuistry. As a branch of the general science of casuistry, judicial casuistry possesses common and at the same time particular features. The common features might be represented as following:

First of all, from the consideration of the history of the casuistic method and particularly the work of Kenneth Kirk it becomes clear that casuistry does not reject the importance of moral principles and rules in arriving at a decision, although it admits that one should not blindly follow the rules. Casuistry deals with the way general moral rules are applied to a situation where the appropriateness of the applicability of the rules is questioned. Casuistry presupposes, firstly, a belief in the existence and importance of general moral rules, and secondly, an idea that man or rather a human being is able by using his or her natural capacities to apply and where necessary to avoid the application of the rules. In this respect, conscience, as has been already noticed when considering the Thomistic theory of conscience, can appear both as a keeper of the general moral rules, and as a process of moral reasoning, that is weighing and considering the circumstances in which the general moral rules should be applied. Here, casuistry deals mainly with the second function of conscience. It is the process of reaching moral judgement through conscientious deliberation rather than an abstract reflection on the nature of the general moral rules.

The second feature of the casuistic method is the fundamental idea that the effects of general moral norms depend on circumstances: what is morally good under one set of circumstances may not be equally good under the other. It is opposed to rigid moral reasoning. The main emphasis of casuistry rests on the way of evaluation of circumstances, their appraisal, and weighing which does not exclude the guidance of general rules. In the following parts of the thesis this idea that circumstances alter cases will be considered in greater detail.

its significance in the situation where a decision-maker has freedom to choose the course of action. The need for casuistry comes out from the fact that the decision maker faces a choice between courses of action to take and the rules to be guided by. The paramount task of casuistry is not only to find out the way of application of a rule to a particular situation, rather to determine which rule of those available is preferable under the given circumstances.

Casuistry is not only about special circumstances which may affect the applicability of the rules. It is a matter of a governing principle on how to treat the rules. It would be a mistake to consider casuistry as a mere technique of application of general rules. There is a governing general principle which makes the application of general rules casuistic. In different theories of the casuistic method this principle can find explicitly or implicitly a different expression. Nevertheless, there is at least one idea which is common for understanding the principle for every casuist. This principle provides a justification of why the rigid application of rules is not desirable. The way the casuistic method operates to a large degree depends on the understanding of the casuistic principle. It is not enough to say that circumstances change cases or that there is a constant choice between different moral duties. Casuistry tries to determine a general principle which helps to evaluate the circumstances and conflicting moral duties. In other words casuistry is such an application of rules in which the rules are corrected and adjusted to the particular circumstances in the light of the governing principle.

The history of casuistic method represents a constant attempt to find such a governing principle. The ethics of the New Testament offers love as the governing principle. The Greek word for Christian love is *agape*. Casuistry which is based on this principle is called agapic. Not all casuistry, however, was agapic. The weak point of many of the theories of casuistry, which were developed even within the Christian tradition, was that the importance of love was not understood. This omission led eventually to the abuse of casuistry. From the middle of the sixteenth century the casuists sought for the fundamental principle to solve cases of conscience anywhere else except through Christian love. Instead of love they tried to formulate a formal principle such as: in case of doubt the one in possession has the better claim (Alphonsus Ligouori)[17]; or the law in question obliges when the argument in its

oblige and remains uncertain even when it has more probable opinions on its side (Bartolomeo Medina)[18]; or the law in question obliges unless the opinion in favour of liberty is so exceedingly probable as to be morally certain. The schools of casuists: Equiprobabilism, Probabiliorism, Probabilism, Tutiorism appeared as a result of a polemic on the content of the basic principle of casuistry.[19] The problem with all these schools was that they tried to find a formal principle which would allow them to solve cases of conscience. The result was a kind of legalistic ethics which in itself is contrary to the nature of casuistry.

This thesis is an endeavour to develop the method of casuistry on the basis of the principle of love in the area of judicial decision-making. The need for the method of casuistry arises in judicial decision-making as long as the judges have discretion either in selecting the facts, or choosing the rules, or in determination of exact legal consequences of the dispute. Therefore, whether the judges acknowledge it or not, they have to be casuists in a certain degree and they have to rely on a certain principle or principles in weighing the facts and choosing the rules. In modern legal theory, the importance of such a principle is reflected in the discussion on the nature and scope of judicial discretion. One notices a search for the principle which would help the judges weighing the circumstances and choosing legal rules. For example, Beyleveld and Brownsword appealed to the Principle of Generic Consistency,[20] Dworkin talked about the Principle of Integrity,[21] Posner endorses efficiency as the governing principle.[22] Each of these theories promotes a kind of casuistry, and each of them, although in a different way, displays the characteristics of casuistry outlined above.

The sort of casuistry presented in this thesis is fundamentally different from the methods developed in the theories of adjudication considered in chapter 4. Ethical love cannot be squeezed either within an intellectual principle of generic consistency, or absorbed by self-orientated desire to be consistent and coherent, or sacrificed to efficiency. It is true that not all casuistry is agapic, but the principle of love necessarily involves a casuistic approach. At the same time, one can argue that the principle of love matches the method of casuistry much better than any other principle. For the essence of casuistry is about making "equitable allowances for the

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[18] Jonsen A., Toulmin S. *The Abuse of Casuistry.* - P. 164 ff.

[19] For more about these schools of casuistry see the articles in: *A New Dictionary of Christian Ethics.* -

subtle individual differences among otherwise similar circumstances"[23]. In the following chapters we shall see that ethical love and equity have close bonds. The underlying idea of the thesis is that the principle of love does fit better with the nature of law as an instrument of bringing equity and justice into social relationships.

Conclusion.

The advantage of casuistry is that it gives a ground for interaction of legal and theological approaches. Historically, casuistry was developed as a science of the application of moral rules fixed in the Scripture. Nevertheless, it contains a potential to contribute to the improvement of the process of judicial decision-making. The casuistic approach to the moral rules consists in finding a way which allows a moral agent to solve the conflict of different duties expressed in the rules, which inevitably occurs in real life. The general approach shared by any casuistic theory is that one cannot decide which rule has to be followed until the circumstances of the case are taken into consideration. However, the way the circumstances are considered determines to a large degree the choice of a rule. Therefore, there are must be a governing principle which guides the decision makers in their fact finding and fact evaluation. In the next chapter we shall consider in detail the principle of love which underlies the method of agapic casuistry. Before doing this, it is worth outlining the general implications which the method of casuistry has in the context of judicial decision-making.

Whatever the content of the governing principle of looking at the circumstances may be, one can speak about some common implications for judicial ethics. Firstly, the method of casuistry deals with the way the legal principles and rules are applied by judges to a particular situation. The essence of the casuistic approach is that the decision made by a judge is not a result of mechanical application of a legal rule, rather it is a result of moral deliberation on the value of the facts presented and the circumstances considered.

The second implication for judicial ethics consists in the idea that the fitness of a legal rule is determined by the circumstances of the case. It maintains that despite all the facts foreseen by the rule, the legal consequences prescribed according to it may not be endorsed through the decision because of special circumstances.

considered as guide-lines rather than as strict prescriptions of what to do under a certain set of the facts. When approaching case-law this feature of the casuistic method gives us an opportunity to explain some differences which come about in the course of application of the same rule.

Thirdly, casuistic method is directed to the solution of the moral conflict which may occur in the process of application of legal rules. It allows us to explore the cases of the collision of different moral duties held by a judge. The casuistic method is related also to the collision of the legal rules. As far as legal rules are considered as a species of moral rules the collision of legal rules is a direct concern of judicial casuistry. Even if the colliding rules appear as morally neutral, casuistry affirms that the conflict of moral duties arises there as well, for it is a fundamental principle of judicial casuistry to see the application of legal rules as a moral duty on behalf of the judges and officials.

The fourth implication of casuistry is derived from the requirement of an equitable application of law. It requires from the judges that the application of the legal rules should bring justice in social relations. If the application of a rule is contrary to justice a judge tries to find a way to deviate from endorsing the rule in the particular case. When the judges do so they appeal to the fundamental principle which justifies the deviation from the application of legal rules. All these implications, however, depend on the governing principle which justifies a flexible handling of rules and special attention to the circumstances, the principle which guides the decision makers in the preference of duties to be met, and which is vital for bringing justice and equity in human relationships.

Before looking at ethical love as the principle which justifies and empowers judges to make equitable allowances in application of general rules, it is necessary to underline the importance of casuistry for solving the problems dealt by Thomas Aquinas and Petrazycki. Both authors, although in a different way, came to the conclusion that a judge must follow his conscience. This is the essence of the psychological argument which can be derived from the theory of Petrazycki, and this is the essence of the theological argument developed by Thomas Aquinas. The requirements of conscience, however, may be unclear, and often are in conflict with each other. The method of casuistry is the way of making the requirements of

theories require casuistry for solving cases of conscience, and both theories point at love as the fundamental principle of the method of casuistry.

6. LOVE AS THE SOURCE OF AGAPIC CASUISTRY.

Introduction.

The essence of agapic casuistry is that cases of conscience are solved by applying the principle of ethical love. This principle requires that *you should love your neighbour as yourself.*[1] From the point of view of natural law it is an universal commandment which binds every moral agent, independently of occupation, religion, race, gender, class and etc. Every conscience is able intuitively to grasp the content of this requirement. The cases of judicial conscience are legal cases. Therefore, this principle if applied inevitably affects the existing law. The *Donoghue v. Stevenson* case[2] which will be considered later in more detail, is a good example of it.

Despite the possible criticism that this principle is too relative and subjective in order to become the major tool for application of legal rules, the principle of ethical love may have a great impact on judicial decision-making. The major argument of this thesis is that a good judge should apply this principle. Apart from *Donoghue v. Stevenson*, there are a number of important and less important cases in which the judges followed this principle. However, in the majority of the cases it is difficult to observe the presence of ethical love. Nevertheless, it does not mean that the majority of the judges are deaf to the voice of their conscience. Love operates on a deeper level than the wordings of legal argumentation; on so deep level its influence may be unconscious even for the decision-maker. The task of a researcher of judicial conscience is to disclose the deepest ethical impulsions of the judges in order to help them to solve moral dilemmas which they face in their decision making, and which affect their own lives and the lives of ordinary citizens.

There are several questions which this chapter has to deal with. Firstly, why should a judge follow the principle of love? Secondly, can the principle of love solve the problems of judicial conscience? In order to answer these questions one has to look at the meaning of ethical love.

Ethical love as the essential characteristic of a good conscience.

In the previous chapters we considered the teaching of Thomas Aquinas on conscience. One of the major statements of his moral theory is that the goodness or badness of an act depends on will or intention. Consequently, the goodness of conscience is determined basically by the intentions of the action. Aquinas's theory of conscience, as it was shown in chapter 3, points at love as the essential characteristic of a good conscience. Aquinas, however, was captured by the scholastic endeavour of distinguishing sharply moral virtues whilst love is only one of them[3]. Nevertheless he admitted that all the moral virtues are infused together with love. Aquinas grasped also the importance of love as the cause of moral action. "Love, inasmuch as it directs man to his last end, is the source of all the good works that are directed to the last end".[4] In order to understand the implication of the thesis that love is the source of moral action and the characteristic of good conscience we need to look at the Christian roots of Aquinas's moral theory.

John Finnis has given a good exposition of the moral teaching of Aquinas through stressing the Aristotelian roots of his thought[5]. I will endeavour to interpret and complete Aquinas's teaching on conscience through stressing the evangelical roots of his theory. The support for this I find in the idea of Thomas Aquinas that Christ is Himself the Eternal Law.[6] Because conscience cannot be separated from the knowledge of natural law which is, according to Aquinas, human participation in the Eternal Law that is in Christ Jesus,[7] it is consistent to look at the teaching and life of Christ as the manifestation of good conscience.

The need to provide interpretation and completion of Aquinas's theory by direct appeal to the teaching of Christ flows from Aquinas's vision of erroneous conscience. Conscience is not an absolutely independent and isolated capacity of the human mentality. It cannot be separated from the rational and voluntary parts of human soul. The first class of errors of conscience lies in erroneous knowledge[8]. But if inaccurate knowledge is the only cause of the errors then conscience is innocent. For it is reason which is responsible for the errors and reason, not conscience, which needs correction. The second class of the errors of conscience lies in the will, that is intentions and

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[3] Thomas Aquinas. *Summa Theologiae.* II.II.33.1.
[4] ibid., I.II.65.3.

motives[9]. Although conscience may resist immoral motives of behaviour such as pride, covetousness, envy, greediness and so on, these motives may distort and pervert human conscience.

Good conscience may mean that the judgements and commands of conscience are directed either by a full knowledge of all circumstances, or by a good moral will. It seems, however, that every command of conscience is justified as good not so much through the full knowledge of all circumstances, which are always impossible to know, as through the presence of good will.[10] But, human will is corrupted by sin. Therefore, man is doomed to make errors of conscience unless the grace of Christ, according to Aquinas, removes any sin which corrupts human conscience[11]. Whether one would agree with Aquinas's theological assumptions or not, to him it is obvious that the essential characteristic of a good conscience should be discovered in the teaching and life of Jesus Christ. The idea that Christ represents a paradigm of good conscience is a coherent conclusion to Aquinas's theory of conscience. Thus, according to his theory, the Gospel of Christ is the most important source for discovering the essential characteristic of a good conscience. It contains both the teaching and practice of Christ, and both cannot be understood separately.

The theory of Leon Petrazycki, in whom none can suspect of theological bias, also points at the necessity to find a paradigm of good conscience. As it was said in the first chapter Petrazycki considered rational love as being what should govern the decision-makers, admitting by this that it is rational love which makes conscience good.[12] Although he did not articulate this idea clearly in his later writings the importance of a paradigm of good conscience flows from the meaning of his psychological theory of law. From the formal point of view both a good conscience and an erroneous one appear as impulsion, as invincible moral imperatives to act or abstain from a certain actions[13]. Both can justify and condemn with the same force. From this point of view there is not much difference between good and erroneous conscience. Neither can the material content of the judgements of conscience, that is a specific prescription or prohibition, be helpful, for the material content is boundless and so culturally and individually variable that it is absolutely impossible to find out any

[9] ibid., I-II. 19. 2.
[10] ibid., I-II. 19. 5.

permanent standards of good conscience through appeal to its contents[14]. One can add to this idea of Petrazycki that the material point of view takes into account concrete moral goods pursued by conscience and the goals used for their achievement. However, there is a great variety of the goods as well as the means of their achievement, which come into conflict every time with other goods and means; and it is conscience which must decide what to choose. Thus, the material criteria cannot be very useful in determining goodness of conscience.

Petrazycki did not elaborate a theory of good conscience partly because he did not want to leave the framework of his psychological theory of law, and partly because he deliberately tried to exclude the commands of the Gospel from legal experience. He correctly thought that the precepts of Christ like "If someone strikes you on the right cheek, turn to him the other also" cannot rule legal relationships. The spirit of Christian ethics "is that people are bound to a very great deal with regard to their neighbours which it is extremely difficult to fulfill, but the neighbours neither have - nor should have - claims to the fulfilment thereof."[15] However, not every commandment of the Sermon on the Mount is non-attributive. Jesus said: "In everything, do to others what you would have them do to you, for this sums up the Law and the Prophets".[16] Thus, Christian ethics, at least in part, is not irrelevant to legal ethics.

Petrazycki's understanding of the Christian precepts as non-attributive made him exclude Christian love from the domain of legal practice. As a result, the idea of love in his psychological theory of law has been left undeveloped. Nevertheless, Petrazycki's concept of conscience points to love as the essential characteristic of good conscience, and it is open potentially to the Christian vision of love as the experience of good will.

The Christian concept of love - the reason for preference.

There might be two positions against using the idea of the Christian concept of love as the essential characteristic of a good conscience in judicial decision-making. The first position is based on rejection of the uniqueness of the Christian concept of love. One might argue that the definition of Christian love as the will to do good to other people does not significantly differ from any other conception of ethical love. For it seems that all ethical love can claim that it contains the will to do good to the other person. The second position is that Christian love can be experienced only by those who

have committed themselves to Christ. Both positions make unnecessary the appeal to Christian love as the essential characteristic of a good conscience for every judge, either because any form of ethical love may be useful, or because there are only a few judges who are Christians, and therefore none can claim that Christian love is universally binding.

Christians believe that the fullness of Christian love is conceived through the revelation of Jesus Christ, the only Son of God, who took all the sins of the world on himself, and to those who believe in him, God has given eternal life of righteousness, peace and joy through the Holy Spirit. But does that mean that the content of Christian love can say nothing to those who are non-Christians? This issue was one of the central themes in the book of Michael Perry *Love & Power.*[17] The main argument of Perry is that Christian love is political love, and as such it affects the process of law.[18] It is impossible to escape from the influence of religion on law and political life in general. The more appropriate task is to try to educate this influence through dialogue and tolerance. It is important to listen to what the religious conscience says in order to strengthen political community and relationships within it[19]. However, that does not give a privilege to Christian ethics to represent the essential characteristic of a good conscience.

Another possible argument in support of importance of the principle of love is that law cannot be properly understood without historical influence of Christian message on law in general and lawyers in particular. Ditlev Tamm, professor of legal history at the University of Copenhagen, writes the following: "The influence of Christianity on the law in the late Antique made mutual love and fraternity part of the lawyers' universe. The so called golden rule - that you shall love your neighbour as yourself and do to others what you want them to do to you - was a starting point of deliberations as to right and wrong in the law"[20]. Professor Tamm sees a continuation of the influence of Christian vision of love on the practices of pardon, mitigation of punishment and remission of debt[21]. Another author, barrister David Harte stresses the influence of Christian judges on the modern British case-law. He mentions the names of Lord Atkin,

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[17] Perry M. *Love & Power.*- Oxford University Press, 1991.
[18] ibid., p.7

Lord Cairns, Lord Selborne, Lord Denning and Lord Mackay of Clashfern who were committed Christians and who contributed much to the development of the case-law.[22]

I do not reject political and historical arguments in favour of the Christian concept of love. It is important to take into account what, if not the majority, a large number of people including judges do believe, and what are the historical roots of contemporary legal institutions and practices. Nevertheless, my argument is different from those arguments. It is derived from the vision of natural law as the law which, firstly, is open for understanding by every reasonable being, secondly, as upheld by conscience, thirdly, as binding on every human law and its application. Apostle Paul wrote: "he who loves his fellow-man fulfilled the law. The commandments, 'Do not commit adultery', 'Do not murder', 'Do not steal', 'Do not covet', and whatever other commandment there may be, are summed up in this one rule: 'Love your neighbour as yourself'".[23] Therefore, I examine Christian ethics not so much as regards to its religious foundations, as to the moral content of the commandment 'love your neighbour as yourself'. Christian ethics is helpful not only for pointing that it is love which constitutes good conscience, it helps also to explain the meaning of love for one's neighbour. As the moral principle, the commandment: 'love your neighbour as yourself' is universal and cannot be restricted only to Christians or to the followers of any particular religion. It binds the judges as well.

The thesis which I assert here is that neighbourly love is and should be the fundamental principle which informs the moral disposition, both of judges and their judgements, and Christian ethics can significantly contribute to the problem of the relevance of neighbourly love to judicial decision-making. The Christian precept that one must love one's neighbour as oneself can be seen as a version of the Golden Rule: "Whatever you wish that men would do to you, do so to them".[24] The Golden Rule is echoed in virtually all of the sacred scriptures of the world, and cannot be considered as uniquely Christian. The advantage of Christian ethics is that it emphasises the importance of love in the relationships between persons. It is not so much about external deeds as about internal motivation and attitudes. In this respect, Christian ethics does not contradict any other religions or ethical doctrines which maintain natural law, but it

completes them through stressing the personality of Jesus Christ who fulfilled the law through love.

There are several important aspects in the personality of Christ. First of all, Jesus represents the ideal human being, who loves the world and who sacrifices himself for the sake of the world. Secondly, Christ, according to Christian beliefs, is God Himself who became a human being. This exactly represents the process of passing sympathy judgement which will be described in the next chapter, and which can and is used in judicial decision making. Jesus takes the place of humankind with all its moral conflicts, temptations, suffering and death. A judge who is guided by the principle of love should take the perspective of those affected by his or her decision. Jesus did even more than that. He, who is believed to be the Judge of the universe, became in reality one of those who is subject to the judgement. The third aspect is that Jesus is not only fulfilled the law, he called every human being, including judges, to follow him.

Thus, the personality of Jesus Christ helps us to bridge the gap between love and law. The thesis that love represents the essence of natural law is derived explicitly not only from the teaching of Christ and the Apostles, and implicitly not only from the moral theory of Thomas Aquinas, and even not only from the psychological insights of Leon Petrazycki. It can be discovered in the legal authorities like the writings of Lord Stair, who remains of the highest authority in Scotland and in default of contrary legal authority is deemed to settle the law[25]. Lord Stair affirmed that the principle of love is the key principle of natural law, that is moral law.[26] The proposition that all moral law depends on this principle has important implications for the whole way of applying the positive law, because being identified with the law of nature, equity and the law of conscience, the moral law is presented in Stair's *Institutions* as "the absolute and adequate rule of the manners of men for all times, places, and persons".[27] Viscount Stair believed that Christian teaching sets clearly the content of the moral law. Therefore, positive law and its application should correspond to the Law of God: "if human laws impinge upon the perfect Law of God they are not only dangerous, but also useless and unprofitable".[28] He also maintained that human laws should not alter the moral law but declare it. They should stand as near as possible to equity.

The authority of Stair's statements may not go beyond the borders of Scotland, but his view represents the understanding of the importance of ethical love for maintaining justice in society. Christian teaching on love is important not just because of the necessity of political dialogue in the pluralistic society, or for understanding the Christian influence on the law, it is important for the clarification of the normative basis and the condition of existence of any society independently of whether this society share Christian beliefs or not. Although one can argue that love, being the key principle of natural law which binds positive law, does not necessarily involve the Christian vision of love, the latter can bring some clarity into the otherwise obscure idea of natural law. The great authority on English law, William Blackstone wrote in his famous *Commentaries on the Laws of England* that without acceptance of the moral truth revealed by Jesus human beings cannot escape contradictions and differences in their experiences of natural law: "Undoubtedly, the revealed law is of infinitely more authenticity than that moral system, which is framed by ethical writers, and denominated the natural law".[29] The reason for this is that "every man now finds the contrary in his own experience: that his reason is corrupt, and his understanding full of ignorance and error."[30] In other words if the natural law and principle of ethical love must be taken seriously, one has to find an authentic explanation of it which would help to protect them from the danger of subjectivism. The principle of ethical love is too important for judicial decision-making for it to be left to an arbitrary rendering.

One of the strongest arguments in favour of the Christian vision of love is that the whole narrative of the life and teaching of Jesus is a powerful way of communication of the meaning of not only what ethical love is about, but also of law itself. Hanne Peterson, professor of law at Ilisimatusarfic, University of Greenland, maintains that written language of law is not its only language. Law can and must be understood by visual and oral means as well as written.[31] He stresses that emotions including love play important role in law and its process. He appeals to the Christian tradition which maintains that love is the fulfilment of law.[32] If one has to accept the importance of non-written means of communication of law, then the image of God, who being the Creator of natural law out of his love became a human, suffered and died in order to save the whole world, then one has to admit the legal importance of the Gospel

[29] Blackstone W. *Commentaries on the Laws of England*. - Oxford: Clarendon Press, 1778. - par. 42

narrative on the evidence of its influence on beliefs and behaviour of the millions of people.

It is interesting to see what exactly the Gospel narrative conveys. It binds ethical love with particular characteristics of a moral agent, which make the general idea of love more precise and specific. These characteristics or attributes if applied to the judges may to a larger degree contribute to elaboration of the ideal of a good judge. These characteristics are contained in the beatitudes spoken by Jesus in the Sermon on the Mount:

- humility (poverty of spirit);[33] A judge who acts with Christian love acts with awareness of his imperfection. He is particularly aware that his prejudices may lead to a judicial error. Such a judge may be seen as an opposite to the ideal of superhuman intellectual power like Dworkin's Hercules. In the following chapters, I will explain that a judge who understands his imperfection is more capable of a correct legal decision than a judge who presumptuously relies on his extra ordinary intellectual powers. To be humble does not mean to reject intellect, but to understand that judge's intellect alone does not automatically bring along a correct solution to legal cases.

- compassion;[34] A judge who acts with Christian love acts with compassion. It means that he feels sympathy for all those who are involved in the legal process. In the next chapter it will be explained how a judge can act with impartial sympathy, and that is much better for doing justice than an impartial indifference.

- gentleness;[35] A judge who acts with Christian love feels respect for the dignity of the parties involved, however wicked they might appear. This characteristic relates closely to compassion. Nevertheless it is different. Compassion as the characteristic of ethical love is more an inward quality while gentleness is outward.

- striving for justice;[36] A judge who acts with Christian love has a strong sense of justice in the meaning of the Greek word *δικαιοσυνη* (dikaiosyve)which may be translated also as righteousness. A judge who strives for justice wants earnestly to realise what is right.

- mercy;[37] A judge who acts with Christian love is able to accept a person whatever his background. It does not mean that such a judge is always lenient. Striving

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[32] ibid., pp. 22-23.

[33] Mat. 5, 3

for justice gives a proper balance to forgiveness. The strivings for justice and for mercy can collide with each other.[38] The problem requires a special consideration which exceeds the limits of this thesis. The general approach of agapic casuistry is that the balance between justice and mercy should be struck in the light of the circumstances of a particular case.

- purity of intentions;[39] A judge who acts with Christian love does not pursue his own selfish ambitions and interests. His decision-making remains untouched by his political or individual preferences.

- striving for peace;[40] A judge who acts with Christian love tries, where appropriate, to restore broken relationships between the parties. His main purpose is promotion of peace and harmony among members of the society. This image of legal policy was particularly shared by Leon Petrazycki whose theory was discussed in an earlier chapter.

- the readiness to suffer for justice;[41] A judge who acts with Christian love is ready to suffer persecution because of his steadfastness in just application of law. A judge is a political figure as soon as his decision may affect any political interest. Therefore, he might be influenced by different political forces to make a favourable legal decision. Human history knows many examples when the judges come under political pressure expressed even through threats and violence.

- non-conformism.[42] This characteristic of Christian love is similar to the readiness to suffer for justice's sake. The only difference is that a non-conformist judge is able to do what is just even under the pressure of public opinions, or other judges, or friends to make a decision which is unjust, and not only under the threats of persecution.

The relevance of these characteristics for judicial decision-making is self-evident. No reasonable man would deny that a judge who is not proud, and is compassionate, merciful, gentle, just, able to suffer for justice sake, is a good judge. It may be true that not many judges display all these characteristics. In Nazi Germany we know that only a few judges were ready to suffer for justice's sake and resisted the threats of persecution and all kinds of pressure. One of them was Dr. Lothar Kreyssig, a judge at the Court of Guardianship in Brandenburg. Before the Nazis came to power he had always been considered a good judge by his superiors. During the Nazi regime,

[38] Tasioulas J. The Paradox of Equity, in: 55(3) *Cambridge Law Journal* (1996), pp. 456-459.

when Dr. Kreyssig learned that inmates were secretly removed from the mental hospital in Brandenburg-Goerten and killed, he openly protested and issued injunctions against several hospitals in his capacity as judge of the Court, prohibiting them from transferring wards of his court without his permission. In addition, he brought criminal charges before a public prosecutor against a local Nazi leader as the man responsible for the acts of euthanasia. Dr. Kreyssig experienced huge pressure from the political and legal authorities to succumb. At the end of this struggle Dr. Kreyssig declared that since his conscience would not allow him to withdraw the injunctions against the hospitals, he was requesting permission to retire. This was granted. As Ingo Muller noticed that the non-conformism of Dr. Lothar Kreyssig among German judges was an exception rather than rule.[43] The fact that the overwhelming majority of the German judges did succumb to the political pressure and the fear of persecution does not affect the validity of their moral and legal obligation to do justice. This example shows that the principle of love if followed by the judges can serve as an engine for the fulfilment of justice. The experiences of the Third Reich made another former German judge in the Berlin Court of Appeal, Dr. Konrad Braun, who was dismissed by the Nazis, affirm that law needs love.[44]

Dr Kreyssig was a committed Christian. One may ask, therefore, whether a non-Christian judge is able to exercise Christian love or not? The answer is yes. For history knows examples where non-Christians sacrificed themselves for the sake of the others. The commandment: 'Love your neighbour as yourself' binds everyone. The principle of neighbourly love does fit in judicial ethics, and therefore its Christian interpretation is appropriate within certain limits. The characteristics, outlined above, can be applied normatively to the judges only in the context of the principle of neighbourly love.

The meaning of love in Christian ethics.

In the previous section of this chapter, I have described nine characteristics of love in Christian ethics: humbleness, compassion, gentleness, striving for justice, mercy, purity of intentions, striving for peace, readiness to suffer for justice, non-conformism. It might be argued that these nine characteristics, firstly, are not exhaustive, and secondly, they are vulnerable to arbitrary interpretation. The first argument, however, does not depreciate the importance of those characteristics whose presence will be sufficient to

distinguish good conscience from an erroneous one. The difficulty may appear only from the point of view of an external observer who wants to see whether those characteristics are present in a particular case. Although upholding of the characteristics of good conscience does not apparently affect their prescriptive value, an external observer may face certain difficulties in their appraisal. But if even, one is able to assess the state of the conscience of judges, the problem of objectivity of those characteristics remains. Only through specifying the meaning of love can we grasp the nature of the characteristic of good conscience.

Another reason why we need Christian ethics to clarify the meaning of love is that its characteristics themselves cannot solve the complicated issues of jurisprudence. The conflict between justice and mercy is one example of those. Both justice and mercy are seen in Christian ethics as manifestation of love. However, justice can conflict with mercy and compassion, and especially with mercy, for it is possible to do justice having at the same time compassion, while the call for mercy can come into conflict with the call for justice. Christian ethics of love offer a solution to the conflict, which may be of interest for legal ethicists.

The Christian concept of love expressed in the Greek word αγαπη(agape) which is usually translated as *love* and sometimes as *charity*[45] must not be confused with love as a sexual affection - eros(ερος) or even with love as liking for something or somebody, philia (φιλια). Probably it is better to translate it as 'care'. Agape is the essence of the Christian faith, and this is the essence of the law given by God to rule over the relations in human society. Being asked by a lawyer on what is the greatest commandment in the law, Jesus answered: 'Love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the first and greatest commandment. And the second is like it, 'Love your neighbour as yourself.'[46] Because judicial decision-making deals mainly with the relationship between human beings I will concentrate on the meaning of love for one's neighbour.

One could argue that the commandment to love your neighbour cannot be accepted as a principle applicable to legal practice. First of all, because this commandment does not determine clearly who has a reciprocal right to claim love from those having the obligation to love (this was the Petrazycki argument), secondly the whole obligation to love cannot be legal at all, it cannot be legally materialised, and it is

extremely vague and uncertain, thirdly, it is a nonsense to sue or to be sued because of non-observance or improper observance of this commandment. All these arguments are proved unsustainable in the light of the case *Donoghue v. Stevenson.*[47] In this case Lord Atkin drew the following implication from the principle of love: "The rule that you are to love your neighbour becomes in law: you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonable foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[48]

The case of *Donoghue v. Stevenson* is interesting not only from the point of direct appeal to the teaching contained in the Gospel, but also from the point of the influence of the application of the principle of love on the whole law. The facts of the case were that a person drank part of the contents of an opaque bottle of ginger-beer. When she poured the reminder into her glass, she discovered a decomposed snail which had been in the bottle. As a result the person suffered from shock and gastric illness. The House of Lords by a majority of three against two decided that the manufacture of the bottle of ginger-beer is liable for negligence despite strong opinion that there was no enough authority in the previous case-law to support the claim of the plaintiff. As the dissenting Lord Buckmaster said: "The authorities are against the applicant's contention, and apart from authority it is difficult to see how any common law proposition can be formulated to support her claim".[49] Lord Atkin, however, interpreted the previous case law in a way as giving support to the principle of neighbourly love. This fact moved William Twining and David Miers to conclude "that even the allegedly strict doctrine of precedent in England allows a considerable leeway for varying, sometimes conflicting, interpretations of prior cases".[50]

Thus, this case serves a good example how the principle of love may bring a different interpretation of the existing case-law. The majority of the Lords appealed to a general public sentiment of moral wrongdoing for which the offender must pay, and to

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[46] Mat. 22, 38-39

sound common sense.[51] In other words, they appealed to conscience. The significance of the Lord Atkin's *dictum* is that requirement to love one's neighbour is fundamental for law. The principle of love expressed through the category of care and justified as necessary for the re-interpretation and filling of gaps in the written law in order to achieve justice acquires its full legal significance. Because it is absolutely impossible to set by written law the legal responsibility of a person before his fellow (neighbour) and before the society in all the cases of life, acknowledgement of the general principle of love (or care) is necessary for maintaining justice in society.

The Christian principle of neighbourly love, however, is not restricted only to the dictum that 'You must not injure your neighbour'. It includes a moral obligation to help the needy within one's own power. A clear exposition of the positive aspect of love as active care rather than passive abstention from wrongdoing has been already given in the Gospel when Jesus was asked by a lawyer about the commandment to love, and whom the latter should consider as a neighbour. It is interesting that Jesus did not try to give any philosophical definition of love and neighbour, he just gave an example:

> "A man was going down from Jerusalem to Jericho, when he fell into the hands of robbers. They stripped him of his clothes, beat him and went away, leaving him half-dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too, a Levite [who was apparently a lawyer[52]], when he came to the place and saw him, passed by on the other side. But a Samaritan, as he travelled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, brought him to an inn and took care of him. The next day he took out two silver coins and gave them to the innkeeper. 'Look after him' he said, 'and when I return, I will reimburse you for any extra expense you may have'. Jesus asked the lawyer: 'Which of these three do you think was a neighbour to the man who fell into the hands of robbers?' The lawyer replied, 'The one who had mercy on him'."[53]

This story not only identifies who has a right to claim love-care, but also what this love actually means. That is to take reasonable care of the other person who is in need. The parable about Samaritan helps us to grasp the nature of the principle of

neighbourly love and its relation to the duty of care. Neighbourly love requires one person to take care of another to the same degree that he would wish to be cared by the another if he found himself in the same situation. In other words the ground for the duty of care is equal respect for another person. The positive law cannot make a person liable for every failure to take reasonable care. There is always a limit to deriving legal liability from the principle of love. This limit lies in the essence of the principle itself. It takes into account the fallenness of human beings, their inability to always exercise the duty of care. The judges have an important task of deciding when and under which circumstances a person owes duty of care to another one. Therefore, the principle of love becomes paramount not only for establishing liability in the law of negligence, but also as an important tool for handling the matter of fact and the matters of law by the judges themselves.

The arguments that the principle of love is inapplicable in judicial decision-making are not sustainable if the meaning of love is expressed in the category of care, and, secondly, if it is maintained that the function of this principle is something different from direct application of it, like with a statutory legal rule. It is true that in the area of judicial decision-making the principle of love puts limits on the exercise of care and even self-sacrifice. In other words a judge who follows the principle of love should do so in the bounds of his or her office. Judge Kreyssig issued the injunction being in authority to do it. The principle of love in a judicial context means that the judges should give care, within the legal rules, to those who are affected by judicial decisions.

In order to understand the importance of the contribution of Christian ethics to legal practice it is necessary to stress that Christian love is not something irrational, is neither a passion, nor affection, nor liking. It is a care for any created being. And it is a result of personal commitment and life-stance. Through the meaning of care, the principle of love escapes from the danger of the intervention of sentimentality into legal practice. It is necessary to stress that Christian love leads to courage and integrity rather than to sentimental softness. It is true that Christian love cannot be expressed as a specific legal duty. For in this case the principle of love would be under the law, but in fact it is above it. It is the genuine source of social and individual freedom, the complete fulfilment of which is possible only in the community of people who mutually render love-care to each other. The fact that modern society still stands far away from this ideal

Love within law.

The relationship between agape and judicial decision-making depends not only on grasping the principle of love and commitment of the judges to follow it, but also on the sort of law which the judges have to apply. The major idea of the thesis is that the judges in exercising agape are bound by legal restraints. The task of the judges is not to solve the dilemma between love and law, but to administer the law according to love. In other words, a judge should exercise agape where law gives an opportunity to do this. In the following chapters we shall consider this matter through the examples of some practices of British House of Lords, Scottish High Court of Justiciary, Russian Constitutional Court and the European Court of Human Rights.

The idea that the principle of love finds a restricted application in the domain of law has support in Scottish legal authority. Lord Stair maintained that the principle of love has a restricted application in the area of positive law: "Though by the moral law we are obliged to love our neighbour as ourselves, from whence arise the duties of charity and mercy, assistance and relief, yet for the most part of men do not compel for the negative of these commands, but only for the contrary acts of injury by doing evil instead of good"[54]. In relation to the legal rules of judicial decision-making this can have several implications.

Firstly, there cannot be a coercive mechanism enforcing the judges to exercise agape. No one can be compelled to love. Love is manifestation of moral freedom. However, the rules of judicial decision-making should prohibit acts contrary to love, like condemnation without a hearing, or bias. We shall consider the relationship between love and natural justice later on.

Secondly, the legal rules of judicial decision-making cannot and should not prevent the judges from exercising agape. I will argue later through the example of several cases that there is always an opportunity to interpret legal rules in a way consistent with the principle of love. If one takes the perspective of natural law it becomes clear that, firstly, the main function of the positive law is pursuing what is good for the all members of society, and secondly, the nature of positive law is the freedom of the law-givers to choose normative tools for achieving the good of the society. Because doing good is what ethical love requires, and because the judges

directly or indirectly participate in law-giving there is always a place within legal rules for loving action.

Thirdly, if the legal rules are apparently evil in themselves, and do not serve the good of the society, pushing the judges to participate in the evil acts of political authority, the judges have moral responsibility to resist them. The third implication involves public disobedience. In my thesis I will not consider this aspect of ethical love in judicial decision-making. I will concentrate on the judicial practice within law which is generally good, and which does not prevent the judges from exercising ethical love.

There are two main ideas through which Christian ethics may contribute to the reconciliation of the demands of love with demands of law. The first idea is apparently seen already in the concept of love as care for one's neighbour. The second idea lies in the Christian concept of political authority. It is a fundamental feature of Christian love to be obedient.[55] In relation to the judicial decision-making, the judges, according to Christian ethics, should administer the law with love, that is with good conscience. Nevertheless, some Christian ethicists considered the law of the state as absolutely opposite to the law of love[56]. Church history knows the examples of sectarian movements which rejected the state as intrinsically evil. However, the general point of Christian stance towards the state and its law is acceptance. Even Brunner who subscribed to the opposition of law of state and law of love has admitted that it is possible to love even working within state institutions: "The man of love can only serve the state with justice. He must transform his love entirely into justice for as long and insofar as he acts in the state... . But because no man, as a member of an institution, is only a member of an institution, but always and only a person, there is room for love even in the most impersonal of institutions, not in the actual activity of the institution itself, but 'between the lines'."[57] However, the smuggling of love into the activities of social institutions is not what Christian teaching is about. Love is the foundation, not the negation of state power.[58] It is easy to prove this statement if one looks at the teaching of the Bible which has normative authority for every Christian.

Jesus recognised the political authority of the Roman empire which was in the eyes of Jews nothing but institution of oppression[59]. He recognised the divine source of

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[55] Ramsay P. *Basic Christian Ethics*. - London: SCM Press, 1950. - P. 388.

this authority even being unjustly condemned to death by Pilate.[60] In *Romans* Paul maintained the goodness of political authority. He wrote that it is a direct duty of the officials to do good and punish the wicked:

> "Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgement on themselves. For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience".[61]

Paul himself, being persecuted by Jewish religious fanatics appealed to Caesar for protection.[62] The key idea of Christian ethics is that no institution can be an obstacle to the exercise of agape. Even such an institution as slavery was considered by Paul as area where love must operate:

> "Slaves, obey your earthly masters with respect and fear, and with sincerity of heart, just as you would obey Christ. Obey them not only to win their favour when their eye is on you, but like slaves of Christ, doing the will of God from your heart. Serve wholeheartedly, as if you were serving the Lord, not men, because you know that the Lord will reward everyone for whatever good he does, whether he is slave or free."[63]

One can summarise the implications of Christian love for judicial decision-making as following: firstly, the main purpose of judicial office is doing good to the persons involved in the legal process; in this context love is the will to do good and avoid evil, the will which the judges must possess. Secondly, the judges should apply the legal rules in good faith; a judge has to submit himself to the rule of law, not only because of possible reprimand, but also because of conscience, as the Scripture says - 'with sincerity of heart'. Thirdly, when applying the rules they should presume the good

will of the lawgiver and they should seek the goodness of the content of the legal rules which they apply. Forthly, the principle of love requires the judges to punish those who do wrong and commend those who do what is right; a judge is "an agent of wrath to bring punishment on the wrongdoer".[64] Fifthly, even the most oppressive legal framework cannot prevent the judges from exercising love-care within this framework. The limits of obedience lies in the love-care. As soon as love-care requires resistance to evil, the Christian obedience takes form of disobedience.[65] But even being disobedient, good conscience has to be compliant with the principle which has a higher moral validity.

In the real world, the public authorities cannot satisfy every social need. They must make priority choices, and the way they choose is crucial for achieving the right moral decision. It is not enough to have only love-care to arrive at the right decision, for there may be many competing claims for care. Therefore, one can add another important implication - the need to weigh the effect of judicial decisions on the rights and interests of the parties.

Thus, agape in judicial decision-making means that a judge should pursue good and avoid evil within the limits of law and in accordance with the responsibilities of judicial office in relation to the persons involved in the legal process. It is not a matter now of considering the limits of how far a judge should go in doing good, and what this good means in itself. This depends on the circumstances of a particular case, and should be a result of careful deliberation. However, the first condition of proper consideration of the circumstances and a correct outcome of judicial deliberation is a good conscience of the judges. It is necessary to emphasise that love in the Christian meaning is an essential criteria which allows to distinguish good conscience from erroneous conscience. "Love is patient, love is kind. It does not envy, it does not boast, it is not proud. It is not rude, it is not self-seeking, it is not easily angered, it keeps no record of wrongs. Love does not delight in evil but rejoices with the truth. It always protects, always trusts, always hopes, always perseveres. Love never fails".[66]

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[64] Rom. 13, 4

The work of agapic casuistry: from general to particular through love.

The central idea of agapic casuistry is that when a decision maker tries to find a solution to a particular case on the basis of general rule he or she must be guided by the principle of love. Love is the power which moves the general principles and rules of law to govern particular cases. Paul Tillich wrote: "Justice is expressed in principles and laws none of which can ever reach the uniqueness of the concrete situation. Every decision which is based on the abstract formulation of justice alone is essentially and inescapably unjust. Justice can be reached only if both the demand of the universal law and the demand of the particular situation are accepted and made effective for the concrete situation. But it is love which creates participation in the concrete situation".[67] Agapic casuistry contains much potential for the solving the problem of reconciliation between the generality of the legal rules and particularity of the judicial case.

In modern jurisprudence an attempt to reconcile the conflict between the generality of legal rules and the particularity of specific situation through drawing attention to the idea of love has been made recently by Zenon Bankowski, Professor of Legal Theory at the University of Edinburgh.[68] The problem of the relationship between law and love is considered by him in the general context of the problem of when it might be appropriate to apply a legal rule. "The problem here is how the judge can, in adjudicating the case, link the atemporal law with something that happens at a particular time: with something that exists in time and space".[69] Professor Bankowski bases his argument in favour of love on the fact that the legal rules cannot govern the particular automatically. It is humans that make use of them. Consequently, the picture that the system of adjudication should work as an impersonal machine is not correct.

According to Bankowski real adjudication swings between the generality of law and the concreteness of love. Love relates to insistence on the specificity of the person. In applying law, "we need, through our explosions of love, to get to the particular and be able to see the things behind the rule".[70] Bankowski tries to resolve the conflict of universality maintained by law and particularity maintained by love. His search for linking them without destroying either, leads eventually to the method of analogy used

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[67] Tillich P. *Love, Power, and Justice.* - Oxford University Press, 1954. - P. 15.

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

in common law tradition. The method of analogy allows to find the middle way between creative autonomy of love and machine - like heteronomy of law.

The advantage of the theory of Professor Bankowski is that he has pointed to the importance of love in the process of adjudication. There is, however, one point which calls for question: it is his limitation of love to the area of the particular only[71]. Bankowski considers that love involves a retrospective approach in judicial decision-making. The understanding of law and love as opposites is emphasised even more strongly by others writers[72]. It is based in its turn on the antithesis of the general and particular. The theory of Detmold is built on the strong antithesis of generality of legal rules and particularity of love. He writes: "Agape knows only particulars".[73] The appropriateness of such antithesis has been questioned in a number of writings[74].

One of the strongest repudiations of the antithesis of the general and the particular is found in the article 'Judgement and Mercy' by N.E. Simmonds.[75] The centre of his argument is against Jeffrey Murphy's vision of mercy as a free act of grace, love, or compassion, transcending the bounds of right and justice.[76] In Simmond's view, Murphy detaches mercy from the context of judgement. The interesting aspect of Simmond's article is the emphasis that mercy is inseparable from the framework of juridical thinking,[77] and that Christian teaching is a good example of such thinking. "Mercy and judgement are closely linked within Christian thinking. It is conventional to think of God's mercy as directly linked to his role as judge".[78] Simmond notes that radical contrast of mercy and justice is of the same nature as contrasting love and law, particularity and generality.

When writing about the antithesis of the general and the particular, Simmonds is correct when he says that the absolute particular is abstraction,[79] and that the real conflict is not as much between the general and the particular as between different levels

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[71] ibid.

[72] Christodoulididis E.A. 'Law, Love and Contestability of European Community'. - In: *Love and Law in Europe.* - Ed. By H. Peterson. - Dartmouth: Ashgate, 1998. - pp. 52-61; Detmold M.J. *The Unity of Law and Morality.* - London: Routledge, 1984. - pp. 7-8.

[73] Detmold M.J. *The Unity of Law and Morality.* - London: Routledge, 1984. - p. 105.

[74] Peterson H. The Language of Emotions in the Language of Law'. - In: *Love and Law in Europe.* - Ed. By H. Peterson. - Dartmouth: Ashgate, 1998. - pp. 12-26; Veitch S. 'Doing Justice to Particulars'. - In: *Communitarianism and Citizenship.* - Ed. By E. A. Christodoulidis. - Aldershot: Ashgate, 1998. - pp. 220-234.

[75] Simmonds N.E. 'Judgement and Mercy'. - In: *Oxford Journal of Legal Studies.* (1993) 13. - pp. 52-68.

of abstraction. However, his assumption that our grasp of the world is always mediated by concepts,[80] may be interpreted as if Simmonds misses the rich phenomena of intuition. It is true that our intuitions can be expressed in linguistic concepts and abstract ideas. But it is different thing to say that our grasp is always mediated by concepts. This is an advantage of Detmold's theory, for it takes into an account the experiences of the judges which cannot be simply reduced to logical generalisations. His idea of 'particularity void' though not clearly defined means a certain intuitive experience of those who face the uniqueness of the particular. In Detmold's view, it is experience of love.[81] He writes: "Respect for any particular is respect for the mystery of the existence of the world."[82] Detmold understands the importance of love in law which he understands as a practical reason as opposed to purely theoretical: "There is no escaping, in law or under moral thought, the necessity of passionate commitment, for only passionate commitment can provide the weight of reasons and principles".[83] However, Detmold's vision of love is different from Christian agape. He apparently confuses love with eros[84], and this is the root reason for his inability to accept the idea that agape not only knows particulars.

If one takes the concept of love as developed in Christian ethics, it becomes clear that love can include both the general and the particular. A judge deciding a hard case and being guided by love, may not necessarily be limited to the particularity of the case. Agape is all-embracing. This is why Apostle Paul wrote that "The commandments, 'Do not commit adultery', 'Do not murder', 'Do not steal', 'Do not covet', and whatever other commandment there may be, are summed up in this one rule: 'Love your neighbour as yourself'".[85] Thus, love does not exclude generality. My point is that the particular and the general are reconciled through application of the principle of love, for love can be expressed in general rules, also general rules can never take love fully in. Consequently, love can be prospective as well as retrospective.

I completely share the view of Bankowski that in the process of adjudication a judge cannot rely only on his sense of what love requires. He needs to check his intuitive finding of what love requires in the particular case with the established rules and principles. It requires a process of moral reasoning. A judge who follows agapic

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[79] ibid., p. 65.
[80] ibid., p. 64.
[81] Donald M.J. Jones, Practical Reason, in: Cambridge Law Journal (1989) 48, p. 457.

casuistry looks at the established legal rules as guidance which directs him to do what is good for the participants in the legal process. He looks at the rules presuming their goodness. Nevertheless, he may find a rule that does not meet his moral intuition. If so, he has to look for another rule or principle checking at the same time the correctness of his intuition whether or not it stems from love. It is fundamental to the casuistic method that no legislator can provide sufficient rules to govern all the situations of life. Therefore, a judge should not be discouraged by inconsistency between his moral intuition and established legal rules. At the same time, moral intuition can be misleading. That is why the judges should examine their moral intuitions. A judge should be watchful of his moral impulsion.

Thus, there are two major problems: the first is finding a rule or principle to solve the particular case in accordance with ethical love; the second is the examination of moral intuitions on which the search for the rule is based. The first involves the issue of sympathy judgements which reconcile the uniqueness of the particular with the universality of the general. The second is about the need to be watchful in order to prevent the influence of moral prejudices and anti-sympathies. These two problems have to be considered in a more detail in the following chapters.

Conclusion.

We may conclude that the necessity to use the principle of ethical love in order to solve the problems of judicial conscience is caused, firstly, by the idea that the goodness of conscience cannot lie in anything else except the will to do good to another; this is the fundamental principle of neighbourly love. The psychological approach gives support to the view that the basic need of man as a social being is to love and to be loved. This need becomes particularly obvious if the psychological impulsion of the subjects of law is taken into consideration, as was done in the theory of Leon Petrazycki.

Secondly, the idea of agape is important for the decision of particular cases on the ground of general principles and laws. Expressed in terms of care for the needs of the others the principle of love (agape) secures the best application of general legal provisions which take into account the uniqueness of a particular situation and its participants.

Thirdly, if we are convinced of the importance of conscience in making judicial

Realists, who all, despite their differences agree that moral judgements are paramount in application of law, then it is extremely important to educate the conscience of the decision makers in such a way to secure the proper administration of law. For this purposes and in order to make the idea of love more explicit one has look at the ethics of love, and particularly at Christian ethics.

Forthly, the Christian teaching on love is not sectarian. It is open to the people of all religions and cultures. It is true that the requirement to love your neighbour can be discovered in many religions and ethics. Every human being is able to grasp the principle of love, whether he or she is a Christian or not. The reason why Christian moral thought is chosen for elucidation of agape and not any other ethical tradition is that the idea of ethical love is central in Christian ethics. The other ethical traditions either put their stress on something else, or the idea of love is too intellectual or too sentimental, while in the Christian thought love appears in the meaning of commitment to do good towards the other people, the meaning which gives it significance for judicial decision-making.

Thus, ethical love considered as the will to what is good constitutes the foundation of the law. It was the famous Roman lawyer Ulpian who said that *Ius est ars boni et equi.*[86] In order to be a correct application of law the judicial decision-making must pursue the same goal: what is good and equitable. The Christian concept of love can and should be used in the interpretation of the legal rules in order to determine what equity and justice requires in the particular case. It is a powerful tool for criticism of existing judicial practices. Such a criticism is necessary for improving the whole system of the administration and adjudication.

7. IMPARTIAL SYMPATHY AS AN IMPLICATION OF AGAPIC CASUISTRY.

Introduction.

Impartial sympathy is the main implication of agapic casuistry in judicial decision-making. The principle of love implies that judges administering law should pursue the good of the people affected by their decisions. No one can do good to the other without the knowledge of the other's needs, therefore sympathy judgement is based on the knowledge of the personality of the people affected by decision. It is opposed to judgements which disregard the uniqueness of the individual.

The main theme of this chapter is that the principle of love in judicial decision-making leads to a sympathy judgement. We shall consider the general characteristics of sympathy judgement, the way the judges may arrive at the decision based on sympathy. The problem of compatibility of sympathy and impartiality is one of the central issues. In this chapter I will argue that the requirement of impartiality does not exclude the requirement of sympathy, providing that the judges have sympathy for all the parties of the legal process. It is possible only if the judges are guided by the principle of ethical love which, as it was said in the previous chapter, is neither an emotion nor an intellectual idea. Love is the will to do good to the other people. A judge who is willing to do good to the participants in the legal process sees in them the persons whom he ought to love as himself. This attitude to the participants leads the judge to a sympathy judgement.

There can be several objections to the use of sympathy judgements in judicial decision-making. One of the possible objections against exercising sympathy in judicial decision-making is that sympathy of the judges is too personal. The place for sympathy is dependent on the ability of the judges to feel, for example, compassion and pity. Therefore, it is too subjective and unreliable. It is open to manipulation, and strong feelings of sympathy may lead to incorrect judicial decisions. There are four possible counter-arguments to this objection. Firstly, although it is true that there is a danger of subjectivism and over-involvement in the feelings of others, a judge exercising his sympathy is acting under legal constraints. A judge has a duty to make his decision

manipulation of the feelings of the judges only if there is no impartiality. On the contrary, impartial sympathy is guided not so much by feelings as by knowledge of the feelings of the people involved. Thirdly, in exercising sympathy judgement, a judge should take into account the moral perspective of the society in general, though it may be difficult to do so because of an absence of any strong moral consensus on the issue at stake. The duty to respect public conscience constitutes another restraint on judge's sympathy. Finally, the negative influence of personal beliefs and personal feelings, which affect the partiality of the judges, can and should be eliminated by watchfulness of the judges to their inner world. In this chapter the first three counter-arguments will be considered in a more detail. Watchfulness as the implication of agapic casuistry will be considered in the next chapter.

The concept of the sympathy judgement.

In chapter 4, we have seen that the doctrines of judicial decision-making considered are based either on deontological or consequentialist arguments. Depending on which argument is predominant these theories represent either deontological or consequentialist conscience. Following the tradition of Thomas Aquinas, conscience is defined as a human mind passing moral judgements. Consequently a deontological conscience differs from a consequentialist one in relation to the type of moral judgement. The difference between them is that the former evaluates actions according to the consequences they produce, while the later evaluates according to the intrinsic nature of the action. In the next chapters we shall consider the conflict between deontological and consequentialist judgements in judicial decision-making.

It is useful to observe how the ethicists have had difficulties in assigning a place of love either in deontological or consequentialist ethics. The adepts of both systems tried their best to support the thesis that agape has either a deontological or a consequentialist nature. John Stuart Mill sought in Jesus' teaching a justification for Utilitarism.[1] Paul Ramsay stressed the deontological character of agape.[2] In fact, agape surpasses pure deontological and pure consequentialist ethics. In a way it removes the conflict between consequentialist and deontological moral reasoning. Both deontological and consequentialist reasoning involves what can be called a universalisation of the situation. Let us take an example. According to the *Criminal*

Code of the Russian Federation[3] a judge has the discretion to sentence a convicted murderer either to capital punishment, or a term of imprisonment. A judge might sentence him to capital punishment because he is convinced that everyone who commits murder must be punished with death, or because he is convinced that it will deter other possible offenders. In the first case he passes a deontological moral judgement, in the later case it is a consequentialist moral judgement. Both judgements have in common considerations of a general character. The destiny of the offender is determined by the general moral convictions of the judges.

Moral judgement based on agape differs from both deontological and consequentialist judgements by its individualisation. The punishment is inflicted after the personality and circumstances of each of the participants in the legal process has been taken into consideration. The intrinsic feature of moral judgement based on agape is sympathy. As such sympathy assigns value to every individual. It opposes the utilitarian demand that the interests of the individual should be sacrificed for the sake of remote and grandiose goals of the society at large. At the same time it opposes rigid application of principles and rules which deontological thinking generally favours. Sympathy judgement maintains the dignity of each person. However, it is more than this.

Sympathy relates primarily to the human ability to understand and to share the feelings of other human beings. A judge arrives at his decision being aware of the feelings of the offender and the feelings of those who suffer from the offence. A judicial decision based on sympathy should not depend on the feelings of the judge himself, but on his ability to understand the feelings of the persons involved. The task of agapic casuistry is not to exclude the feelings of the judges from judicial decision-making, rather to educate them, to prevent the judges from passing a partial sympathy judgement. Sympathy judgement requires from a judge both attentiveness to the feelings and experiences of the litigants, and to his own moral experiences.

Having a sympathy judgement requires a special way of treatment of the facts of the case. A judge should grasp the context, social and legal settings in which the parties of the process were acting. He has a duty not just of hearing what the parties try to say, but trying to understand their motives. The understanding is reached through imaginatively putting himself in the place of the litigants. In order to comprehend the

behaviour of the litigants and their motives, the judge has not only to grasp the circumstances of the case, but also to take into account his own moral experience. The task of the judge cannot be reduced to elimination of his own moral convictions on what it is right to do in this particular situation. He should be aware of the possible differences of moral experiences between him and the litigants.

The fundamental presumption of the sympathy theory is that a judge can understand the behaviour of the other despite all possible differences he has in relation to their culture, education, background and so on. The presumption is based on the natural law idea that we all as human beings share one fundamental nature. We have the same basic needs and have in common the basic moral requirements of social coexistence and co-operation.[4] Sympathy between two individuals is possible only if they have common comprehension of what is good or bad. If I have sympathy for somebody who has suffered through the loss of parents, it is because I share his understanding of how it is good to have parents alive. If people have sympathy for the women who were raped in Kosovo it is because they share the same moral ideas condemning any act of rape. Therefore, sympathy is not just a sharing of any feelings. It is first of all mutual understanding based on a sharing of common moral beliefs. Any moral belief is based on grasping what is good or evil through conscience. For judicial decision-making, it has the following implication: if a good judgement of the court is based on an understanding of the motives of the behaviour of those involved, then it follows that the judge has to look at the conscience of the parties. This is because it is conscience that determines moral behaviour which it is possible to observe. And because a judge is able intuitively to share the moral experiences of the other parties at least in relation to some basic moral principles, that he can enter the conscience of the participants.

Not only the facts, but also legal principles and rules are comprehended differently through a sympathy judgement. The evaluation of the circumstances can hardly be separated from the vision of the principle to be applied. In a way the value of the circumstances and strength of the facts are seen through the perspective of the relevant rule or principle, and otherwise the relevancy of the principle or rule is measured through the value of the circumstances and strength of the facts. This is a hermeneutic circle. Each of the types of legal reasoning breaks this circle in a certain

way. Deontological and consequentialist types of reasoning sacrifice the uniqueness of the particular either to an abstract principle or rule, or to general consequences or social and political goals. Sympathy reasoning meets the particular face to face. It does not sacrifice the particular to the principles and rules, but is prepared to adjust the former in order to do justice to the latter.

The sympathy face to face approach can be seen in the parable of the entering shepherd spoken by Jesus: "I tell you the truth, the man who does not enter the sheep pen by the gate, but climbs in by some other way, is a thief and a robber. The man who enters by the gate is the shepherd of his sheep. The watchman opens the gate for him, and the sheep listen to his voice. He calls his own sheep by name and leads them out. When he has brought out all his own, he goes on ahead of them, and his sheep follow him because they know his voice. But they will never follow a stranger; in fact, they will run away from him because they do not recognise a stranger's voice". Jesus used a figure of speech, but people did not understand what he was telling them. Therefore Jesus said again, "I tell you the truth, I am the gate for the sheep. All who ever come before me were thieves and robbers, but the sheep did not listen to them. I am the gate; whoever enters through me will be saved. He will come in and go out, and find pasture. The thief comes only to steal and kill and destroy; I have come that they may have life, and have it to the full."[5] Jesus is incarnated love, and He exemplifies not only the genuine relationship between a human being ('sheep') and his Creator (the shepherd) but also relationship between human being themselves based on love and forgiveness. Therefore, the personality of Jesus can symbolise the distinct way of treating legal rules and circumstances in the light of neighbourly love.

This parable points to the closeness which a judge guided by sympathy has towards the other parties to the process. The participants "recognise his voice", that is the participants who feel a sympathetic attitude of the judge trust him and his judgement. Another interesting aspect is that the judge is ready to sacrifice himself for the sake of the participants. He is not pursuing his selfish or somebody's else ambitions, but vigorously strives to bring justice into relationships between human beings.

It is true that sympathy judgement favours more mitigation of punishment rather than its aggravation. This is what John Tasioulas called the paradox of equity[6]. But this bias in favour of mitigation is not necessarily the case. In chapter 10 on the declaratory

power, we will consider the cases where sympathy judgement leads to imposition of a more severe sanction than was imposed before. It is necessary to stress here that sympathy judgement is constrained by the adjudicative principle of legality. However, the tension between equity, to which sympathy judgement often appeals, and legality is not necessarily solved through choosing the least severe punishment within legal constraints. Sympathy judgement may lead to the imposition of the severest punishment.

The essence of equity is not so much to mitigate, as to differentiate. To clarify this point let us imagine a case in which two people participated in act of murder: a wife of a man who committed adultery and a killer whom the wife hired to perpetrate the murder. A judge who is passing a sympathy judgement tries to establish the motives of the criminal act, the moral experiences of the criminals. In the case of the hired killer the judge sees that the murderer has no respect for the life of any human being. The motive was to get payment for murder. The judge putting himself at the place of the killer nevertheless is convinced that everyone should have respect for the life of the others. Therefore, even passing sympathy judgement the judge does not find any moral excuse for the criminal act. Sympathy may lead even to a greater sense of condemnation than mere mechanical application of the rules. It might be different in the case of the wife. The judge might share the feeling of pain experienced by the betrayed spouse. Although compassion for the wife does not lead to legal justification, the judge can find there a mitigating circumstance. If the moral experiences of the offenders are taken into account as a result of sympathy judgement it is natural to expect that punishment would vary according to grossness of moral guilt. In other words sympathy judgement not only involves understanding the *moral* experiences of those who involved in the legal process. The judge sentencing for a murder should distinguish whether the murder is a result of disregard for human life or a result of moral injury as in the example of adultery. In a way the judge has to take the place of the conscience of the offender passing the judgement on the criminal act, and if necessary to correct the offender's conscience. From this one derives the importance of giving reasons for judicial decisions.

Sympathy judgement involves not only taking the perspective of the persons at the moment of the dispute arising. It also takes into consideration the litigants' expectations of the behaviour of the judge himself. A judge who is guided by sympathy

do to others what you would have them do to you'.[7] This is the meaning of the principle of 'love your neighbour as yourself'. Gene Outka stressed that "Agape enjoins one to identify with the neighbour's point of view, to try imaginatively to see what it is for him to live the life he does, to occupy the position he holds".[8] The Golden Rule has a direct relevance to the making of judicial decisions. It appeals not only to the conscience of judges, but also to those who are affected by their decisions. It requires that the relations between those who administer the law and the subjects of the law should be based on mutual understanding. The duty of the officials to give the reason for their decisions and the right of the subjects to be heard by the officials acquires a deeper meaning in the light of the principle of love.

Thus, a judicial sympathy judgement is characterised by a clear understanding of the motives affecting the behaviour of the parties, and the willingness of the judges to settle the case in a way acceptable even if they were themselves to be in the place of the litigants. The judge guided by sympathy perceives the duty to persuade the party who is losing that in the given situation its claim is not appropriate. The justification of the decision under a sympathy judgement has a primarily task to show why the losing party was wrong. It has a task to mitigate the moral effects of the decision on emotions and feelings of the losing party. Sympathy judgement aims at education and correction of conscience of the parties involved. This is particularly true for criminal cases, but it is also relevant to other areas of litigation providing that the matter is about right and wrong behaviour.

Sympathy judgement and case-law.

In the following chapters we shall consider how sympathy judgements may influence the decisions of the courts. However, among all moral judgements, sympathy judgements are the most difficult to observe. The reason for this is that the judges only occasionally show their moral feelings. In the meaning of moral judgement in this thesis, one can surely state that every legal decision must be based on the form of a moral judgement. This presumption is based on the whole relationship between conscience and legal reasoning as it is described in the third chapter of the thesis. In the present chapter I will consider the issue not so much as of whether a legal decision should be based on a moral judgement at all, as which moral judgement is allowed. In

this context it is necessary to ask whether a sympathy judgement as a kind of moral judgement is permissible in the administration of law. This is the problem of *the ought*, as for the problem of *the is* it is inevitable that the judges do feel sympathy, although it does not mean that their feelings always result in sympathy judgement. In the following chapters I will consider several cases where sympathy judgement is evident. However, it does not solve the problem of whether or not the judges ought to pass sympathy judgements.

The duty to pass sympathy judgement can be justified, nevertheless, not only on the level of abstract moral principles like 'Love your neighbour as yourself', but also be supported by the practical experience of adjudication. One can argue that having sympathy serves for the best interpretation of legal rules. The administration of rules without sympathy leads to injustice, because the spirit of law is lost in this case. For the spirit of the law is to serve the needs of people.[9] In that or another form this idea is expressed in many theories of law in democratic society despite all differences in the ways these needs can be seen to be met[10].

Consequently, sympathy judgements in case-law stand in the context of their practicality in the course of application of legal rules rather than in their pertinence to abstract moral principles. Justification of the decisions is not so much about goodness or badness of a particular act, as about how the given facts of the case match relevant legal rules. It is natural then that in the law reports there is detailed discussion of the rules being applied under certain set of facts but not much is said concerning sympathy. Moreover, sympathy is not so easily expressed in words as legal rules can be.

If one would like to approach case-law in order to find out how much there is sympathy in judicial decision-making, one should not be discouraged by the lack of information in the law-reports. Sympathy is not on the surface. It is deep in the heart of the judges. Nevertheless, it can and does affect the result of legal process in a number of cases. A judge passing his judgement goes from sympathy to a rule in order to justify his decision. A researcher of judicial decision-making has to understand the rule and the way it was interpreted in the light of the circumstances of the case in order to see whether there was sympathy. A researcher has to look at the alternatives, and try to find out whether there were moral dilemmas. The dissenting opinions of the judges are of great importance. For they point at the alternatives and expose the dilemmas. However,

the absence of dissenting opinions as well as their presence does not mean necessarily the absence or presence of sympathy judgements.

Thus, sympathy judgement should play an important role in application of legal rules and also understanding of judicial decisions. Sympathy binds together the facts of the case, relevant legal rules and the spirit of law according to which the rules must be applied to the given facts. Sympathy judgement is a key for understanding the ways of judicial reasoning.

Types of moral arguments.

No kind of moral judgements can be made without moral arguments. Although moral judgements and moral arguments come together it is necessary to distinguish them, because judgements of conscience can be hidden beyond moral arguments. The distinction between judgement and argument is important because sympathy judgement uses arguments similar to those of deontological and consequentialist judgements. But at the same time the use of these arguments is quite different. What makes the difference in the use of these arguments is the process of reaching a judgement of conscience. As we have seen in the sixth and especially in the seventh chapter of the thesis, sympathy judgement is based on the will to do good to the particular person, on the understanding of his or her situation reached through moral intuition and imagination, and based on compassion.

The length and depth of moral argument may differ according to the nature of the issue and the abilities of judges. The moral arguments can have different aspects. Accordingly, one can speak about several types of moral arguments: normative arguments, effects arguments, and personal arguments. Neither of the three states of conscience exclude any type of arguments although deontological judgements favour normative arguments, consequentialist judgements favour effects arguments, and sympathy judgements cannot be passed without personal arguments. A judge can hardly escape from considering all types of arguments, but he or she can escape from making judgements of a particular kind. Therefore, it is not enough to consider the types of moral judgements as manifestations of the states of conscience. We need to define the types of moral arguments in order to understand how sympathy judgement can operate.

A normative argument is a kind of moral argument which justifies a particular

effects of the observance of the principle. For example, one says what is true because of following the principle which forbids lying. Although the effects of saying the truth may be negative, the value of honesty may overweigh the effects arguments. In this example a statement that it is not right to lie is a normative argument. It is important to distinguish a normative argument and deontological judgement. For a person may employ a normative argument without passing a deontological judgement. For example, when a person says that it is not right to lie, he may do it not because he wants to be honest, but because he wants to acquire a good image in the eyes of the other people.

Effects argument is a type of argument which involves consideration of the consequences of a judicial decision on particular state of affairs. There may be many kinds of effects argument. They may be, for example, about the effect of the decision on the uniformity of application of legal rules and principles. They may involve broad political and social considerations. Unlike a normative argument, an effects argument accentuates an actual relationship between the subjects of law rather than an ideal representation of such a relationship embedded in a legal rule. At the same time, being absorbed with general corollaries of the decision on a broad range of social relationships, an effects argument can miss the value of the particular individual.

Personal arguments are related to the personality of the participants of the legal process and also the special circumstances around the dispute. When a judge decides the case he may consider not only the normative value affected in the abstract, and not only the general consequences of possible decisions, but also the individual characteristics of the persons involved, their status, background, needs and life-style. If he uses these considerations to support his opinion, they become what can be called personal arguments. These arguments will not necessarily lead to passing a sympathy judgements. A judge can use personal arguments without sympathy towards the persons involved. On the other hand, a judge who passes a sympathy judgement may not necessarily appeal openly to a personal argument, although for an observer it is important to see how personal arguments are handled in order to identify sympathy judgements.

In the chapter on sympathy judgements in the European Court of Human Rights, we shall consider in more detail a complicated interface between different types of moral judgements and moral arguments. It is important to stress that any kind of

sympathy judgement cannot be passed without personal considerations. Although in an official report of the decision based on a sympathy judgement, a personal argument may not be present, the reports which contain such an argument are of special value for a researcher who stands outside the court room. In Part III of the thesis such reports will be considered in depth.

Sympathy and empathy.

Sympathy relates very close to another phenomenon called empathy. Empathy involves putting oneself in the place of the other, understanding and sharing the other's emotional experience. As was said above sympathy judgement also involves putting oneself in the place of the other. Empathy may seem different from sympathy not so much in the approach as in the depth of penetration into the inner world of the other person. However, both sympathy and empathy are directed to understanding and acceptance of the personality of the other individual. Nevertheless, there is an important difference. Empathy is feeling the emotions of the other. Sympathy is rather an understanding of the emotions. It means taking the moral perspective of the other. It is not necessarily agreeing with the behaviour of the other. It may take form of compassion and even regret for the behaviour of the other person, but it is not exactly feeling the emotions of another. Empathy means complete absorption in the emotions of the other person. Sympathy relates more to the acknowledgement of the emotions of the other persons as equal in their importance to the emotions of the agent of sympathy. Moreover, sympathy is understanding of the emotions of another on the basis of reference to the emotions of the agent of sympathy.

Lynne N. Henderson, in her article 'Legality and Empathy',[11] considered empathy as specific psychological phenomena, closely related to sympathy. Although she argued for the distinctiveness of empathy, she did not clearly distinguished the concept from that of sympathy. She identified three basic phenomena inherent in the concept of empathy: (1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively; (3) action brought about by experiencing the distress of another.[12] If we compare the concept of sympathy judgement outlined above, one can say that the difference is that (1) sympathy is not necessarily feeling the same emotions of another. One can feel compassion for the other

who might not even realise his or her deprivation; (2) sympathy is understanding of the experience of another on the basis of the moral beliefs and impulsions of the agent of sympathy; (3) sympathy is brought about by the will to do good to another through understanding the other's needs. It is not dependent on experiencing the distress of another.

Both sympathy and empathy can take place in judicial decision-making. I do not argue that empathy should influence judicial decisions. Therefore, it is important to distinguish between them. Moreover, in my opinion empathy poses greater danger to impartiality than sympathy judgement may pose because empathy excludes the detachment of judge's stand point. Very often the authors fail to distinguish between sympathy and empathy. An example of that can be seen in the argument of Henderson. The positive characteristic of her article is that she tried to examine the influence of empathy on judicial decisions using the examples of specific cases held before the Supreme Court of the United States. However, in the analysis of the cases *Brown v. Board of Education*[13] and *Shapiro v. Thompson*[14] the author could not support her argument that it was empathy which guided the judges. Commenting on the first case in which the Court ruled that racial segregation in schools is illegitimate, Henderson claimed that "In *Brown,* legality in its many forms clashed with empathy, and empathy ultimately transformed legality".[15] Henderson stated that "the Court's opinion itself speaks of feeling, of human pain, and of moral evil. The recognition of human experience and pain - of feeling - is obvious", then she cited the court's opinion: "To separate [schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone".[16] But is this enough to claim that the judges were guided by empathy rather than by mere sympathy?

The distinction between empathy and sympathy is important because of the author's insistence on the conflict between empathy and legality, while sympathy and legality can work together in a co-operative way. Does empathy in *Brown* case transform legality as Henderson insists on, or rather did the judges act within the principle of legality but at the same time were guided by sympathy? It is true that the answer will depend on how the principle of legality is understood. "The adjudicative

principle of legality requires adjudicators to resolve disputes by applying legal rules that have been declared beforehand to the parties involved, and not to alter the legal situation retrospectively by discretionary departures from established law."[17] Henderson acknowledged that legality does respond to human pain at times, but generally she stressed the hostility of the principle of legality to empathy. The whole approach of Henderson is against legal categories: "Legal categories - whether created by doctrine, statute, or constitution - will define legal discourse, will indicate what is relevant and what is not. Thus, legal discourse determined by category will often foreclose the narrative of experience of outgroups affected by a legal rule or doctrine. A stereotype embodied in a legal category can most certainly block empathic knowledge".[18]

The doctrine of impartial sympathy supported in my thesis is opposed to the empathy doctrine at this crucial point: the place of legal categories when passing sympathy judgement. My argument is that sympathetic experience is based on moral categories which include the legal concepts. If we come back to the case of *Brown v. Board of Education* one can see clearly that the central concept in the opinion of the judges, on the basis of which the judges passed sympathy judgement was the legal category of harm. The judges who came to conclusion that racial segregation does harm to the children of coloured races acted within the principle of legality. "The Supreme Court unanimously held that the plaintiffs, by reasons of the segregation complained of, were deprived of the equal protection of the laws guaranteed by the 14th Amendment".[19] In other words the judges applied the category of the equal protection of the laws. It is true that *Brown* case had a great impact on the case law of the Supreme Court. At the same time it did not completely overrule the previous case law, particularly the doctrine of "separate but equal" stated in *Plessy v. Ferguson.*[20] This doctrine permitted segregation provided that equal opportunities are given to all races. *Brown* did not reject this view. It just stated that it is not applicable to education. Because "the sense of inferiority caused by segregation affects the motivation of a child to learn."[21] Thus, *Brown* case is not so much a good example of how empathy can overcome legality, it is rather about how sympathy judgement is possible within the limits of the principle of legality.

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[17] Tasioulas J. The Paradox of Equity, in: 55(3) *Cambridge Law Journal* (1996), p. 460.

I share the criticism of mechanical application of legal rules without taking seriously the experiences of those affected by the decision. However, the abuses in the application of legal rules should not lead to the rejection of the rules. In this respect I see a danger in stressing empathetic knowledge at the expense of legal categories. To be empathetic means a complete taking of the perspective of the other. But it is difficult to take completely the perspective of all participants in the legal process. Sympathy has a more moderate claim then empathy. It can be impartial as long as the decision-maker tries to understand the moral experiences of all the parties. Impartial sympathy is an alternative to empathetic understanding which aimed at reconciliation of the tension between legality and equity and their integration into the operation of a legal system.

Sympathy and equity.

The idea of equity has a much larger meaning than that in English law where equity is understood as 'the body of rules which evolved to mitigate the severity of the rules of common law'.[22] Equity is not so much the body of rules as a special approach in dealing with them. "We need to be reminded that equity requires not the imposition of uniformity or equality on all relevant cases, but rather reasonableness or responsiveness in the application of general rules to individual cases. Equity means doing justice with discretion: around, in the interstices of, and in the areas of conflict between our laws, rules, principles and other general formulae. It means being responsive to the limits of all such formulae, to the special circumstances in which one can properly make exceptions, and to the trade-offs required where different formulae conflict".[23]

Equity needs sympathy, firstly, because without sympathy it is very difficult be responsive enough to the special circumstances of the particular case; secondly, impartial sympathy provides a method of weighing the circumstances, a way of distinguishing the cases where a rule can be applied and the cases where the same rule cannot. Sympathy is the way the principle of agape affects application of general rules to the particular cases. The idea that equity is brought about by agape has been maintained by Francis Gladstone who identified agape with charity.[24] "Because charity has equal concern for every being it requires equity - a justice that transcends the strict letter of the law and upholds what is reasonable and fair rather than what is merely legal".[25]

The concept of sympathy judgement as a means of achieving equity can be justified historically. Equity was developed exactly in those situations where the decision-makers felt sympathy for those who could not find protection within established legal rules. This claim requires separate consideration which would exceed the limits of the present research. The relation of sympathy to equity is considered here only concerning the channels through which the principle of agape can affect judicial decision-making. It is important to establish this link because equity is considered as a legitimate principle of adjudication, not only in the countries of common law.[26] In Scotland, Lord Clyde stated: "Unlike England we have no distinction between common law and equity, and never had. Our common law is equity."[27]

Thus, the judges who are determined to apply the principle of agape in their decision making can do so legitimately through appeal to equity. The idea of sympathy judgement is helpful not only for binding agape and equity together. Through this idea the principle of agape can solve some complicated problems which stand on the way of the advocates of equity. A concise formulation of these problems is given in the article of John Tasioulas 'Justice, Equity and Law'.[28] The first problem is of the 'decadence' of equity. In Roman law and English law equity became incorporated into formal processes of legal adjudication in the form of 'maxims' of equity or equitable 'doctrines', it acquired the generality of positive law. "This creates the problem that the so-called equitable maxims or doctrines may themselves then be applied in a strict way that leads to injustice in the particular case, which is precisely the problem equity is meant to remedy."[29] The second problem is that equity justifying a discretion to apply rules in the particular case threatens an injustice. It collides with the principle of legality. "In being adversely affected by the retrospectively operative discretion of the adjudicator, the party who would have benefited from the strict application of the law may regard the resort to equity as itself unjust".[30] The idea of sympathy allows us to resolve these problems. If equity is understood as not something restricted only to the maxims but an expression of the principle of agape, then the idea of equity is saved from the threat of becoming inflexible. Establishing equity on the principle of agape expressed through a sympathetic attitude to the parties makes equity dynamic and flexible. The potential of

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[26] *Equity in the World's Legal Systems: A Comparative Study.* - Ed. by R. A. Newman. - Brussels: Etablissements Emile Bruylant, 1973.

[27] Lord Clyde, Equity and Human Edinburgh RRC 1964 p. 19

sympathy to reconcile the conflict between legality and equity has been considered briefly above. It is worthwhile stressing again that sympathy involves not so much a rejection of a rule as a way of weighing the relevance of the facts foreseen by the rule and the choice of the rules. The idea that sympathy can act within legal rules requires special consideration.

Sympathy and legal constraints.

The moral requirement to have sympathy for the parties involved in the legal process and the moral requirement to apply legal rules supplement each other. This statement is derived from the internal fallibility of the judges and the external characteristics of the Rule of Law. The technique of arriving at sympathy judgement does not prevent the decision-making from possible abuses. A judge who tries to put himself in the place of the others may fail to exclude his own bias and to take the perspective of the litigants seriously. Apart from involuntary failure to follow the Golden Rule there is always danger of its voluntary abuses. No judicial system has an absolute immunity from abuse. If every judge were a saint then, perhaps, the judges would not need many legal constraints in exercising their discretion under the Golden Rule. Since not many judges are saints they must be monitored in their judicial activities. Even an honest judge can make mistakes. He might feel pressure of time or be too tired to make enough effort to understand the motives of the litigants. Therefore, the legal constraints are important for securing the correct decision.

The second reason why judicial sympathy requires legal constraints lies in the nature of the Rule of Law. Even if the judges were capable without any error of passing a sympathy judgement, they still need rules. As Lon L. Fuller put it: "There are must be rules".[31] This necessity of rules, according to Fuller, springs from the internal morality of the law. The rules serve as the channels of communication. A certain experience of life, and possessing high moral character are not enough to administer justice. Rules are natural characteristics of law. "The internal morality of the law demands that there be rules, that they be made known, and that they be observed in practice by those charged with their administration".[32] The Rule of Law itself is a requirement of conscience. The natural characteristics of the Rule of Law are the following: firstly, restriction of arbitrary uses of state power; secondly, promotion of certainty and predictability in legal

administration, so that people will know what laws and, in particular, what sanctions they will be subject to in various circumstances, thus enabling them to plan their affairs; thirdly, respect for human dignity, in particular for the right of the individuals to plan and control their lives without having their rational expectations frustrated by retrospective judicial law-making or disorderly application or enforcement.[33] All these characteristics lead to a necessity to exercise sympathy judgement within a framework of rules.

On the other hand, all these characteristics of the Rule of Law require sympathy judgements for its fulfilment. The reasons for these are following: firstly, the requirement to pass sympathy judgement expresses the ultimate significance of law as the instrument to meet the needs of people. Sympathy judgements take into account not only material needs of the participants in legal process, they are open to psychological emotions and impulsions of the parties involved. The deepest meaning of sympathy is respect for another, recognition of the other's importance and value. Thus, sympathy is not what is in conflict with the Rule of Law. It is the engine for bringing the Rule of Law into the solution of real social conflicts.

Secondly, the existence of legal rules does not exclude automatically an arbitrary use of state power. For it is one of the aspects of arbitrariness that a decision is taken without considering the needs and interests of others. The application of legal rules can be arbitrary because of the inherent ambiguity and complexity of legal rules. Sympathy judgements restrict an arbitrary use of legal rules. It requires from the judges that they apply legal rules after examining the circumstances of the particular case, reaching an understanding of the motives and needs of the parties involved, and trying to do good to those parties.

Thirdly, the illusion of the belief that the rules themselves provide predictability of their application has been shown already by the Legal Realists[34]. This view is acknowledged more or less by almost every school of jurisprudence. H.L.A. Hart wrote that it is impossible to foresee all the possible combinations of circumstances which the future may bring.[35] Consequently, there will be always cases which are not regulated by established rules. But even if there is a rule its content may be indeterminate for the particular case.[36] H.L.A. Hart admitted also that application of rules depends on capacity

to recognise particular acts, things, and circumstances as instances of the general classifications which the law makes.[37] It seems, however, that Hart would not include sympathy as an essential capacity to identify relevant facts and relevant rules for a particular case. He followed the main stream of Legal Positivism, whose fundamental presumption is "A law has a source if its contents and existence can be determined without using moral arguments"[38]. The use of moral judgements is regarded not as a special case of applying law or legal argument, but is contrasted with them.[39] Applying law involves technical skills in reasoning from legal sources and does not call for moral acumen. This approach prevents the judges from making moral evaluation of the facts, and as a result passing a moral judgement. Sympathy judgements are moral judgements because they pursue the good of the people affected by them. Sympathy is important because it helps to weigh the significance of the facts and the rules. Consequently, the repudiation of sympathy judgements by legal positivists makes the application of law less predictable. A decision of the judge who is guided by sympathy is more predictable than one without sympathy. The reason for this is that there are more chances to predict which facts will be correctly taken as relevant by the judge who through a sympathetic attitude reaches a better understanding of the behaviour of the parties involved.

The approach of agapic casuistry differs significantly from H.L.A. Hart's approach in another respect. It seems that Hart allows the judges to exercise their discretion only when the rules run out or when there is the "open texture" of law. The open texture of law means that there are areas of conduct where much is left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests. However, according to Hart, in the majority of cases the meaning of rules is definite, and does not require from the judges a fresh judgement.[40] If there may be sympathy it can affect the decision only when there is no rule or its meaning is not definite. This is different from the agapic approach according to which the rules never run out, and at the same time the judges are never deprived of power of discretion to adjust rules in the light of circumstances. This approach also differs from Dworkin's theory. A judge when exercising his discretion is not bound by dominant political morality in the given community. If he finds a rule which he believes in good faith solves the case according to justice, he is obliged to apply that rule even despite

opposition on behalf of public opinion. The relationship between the legal rule and sympathy requires special consideration.

Legal rules as providing reasons for sympathy.

It is true that there are some areas of law in which having sympathy for the parties does not much affect the result of legal process. For example in matters of admissibility of cases there can be strict rules which judges must apply. A judge may feel sympathy or not, but if there is a certain set of facts the judge may be required to apply a rule. For example, according to the European Convention on Human Rights, the European Court of Human Rights may only deal with the matter after all domestic remedies have been exhausted, and within a period of six month from the date on which the final decision was taken.[41] This is a strict rule. The interviews conducted by the author of this thesis have shown that the members of the European Commission of Human Rights felt considerable sympathy for the applicants, but their applications were rejected because they could not meet the requirements on admissibility[42].

However, even the strict rules cannot prevent effective sympathy judgement if the judges can find a legitimate reason to re-interpret the strict rule in such a way to decide the case in accordance with conscience. For example, in the *Mentes and Others v. Turkey*[43] the case was declared admissible even though domestic remedies were not exhausted. The Court considered the circumstances and found that in the situation of military actions in south-east Turkey, the applicants did not approach any domestic authority with their grievances because of their insecurity and vulnerability following destruction of their houses. The Court also held that the Turkish public prosecutors were aware of the allegations, and failed to carry out any meaningful investigation. In other words the Court interpreted the strict rules on admissibility as non-applicable on the basis that domestic remedies were ineffective. It supports the thesis that even strict rules may be interpreted as not applicable if the judges being guided by sympathy can find a legitimate reason not to apply them.

English case law with its doctrine of binding precedent can provide other examples of how skilful interpretation of a previous decision may bring a different legal answer to the issue from the answer apparently favoured by the previous decision.

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[41] *European Convention on Human Rights*, Art. 35 (1).

According to the doctrine of precedent, a previous decision is to be treated as an authority, if it is analogous to a present dispute before a court. The judicial practice of precedent is, however, not so rigid as its doctrine[44]. The judges employ a number of techniques to avoid following the precedent. Basically, they consist either in overruling or in distinguishing. Overruling means an abolition of the previous decision, declaring that the previous decision is wrong.[45] Only a higher court can overrule the decision of a lower court. Prior to the making of its Practice Statement on Judicial Precedent in 1966, the highest English court - the House of Lords was not able to overrule its own decision. Since that time the practice has changed. There were a number of cases where the previous decision was overruled.[46]

In the case *Oldendorff v. Tradax Export,* the Lords used several techniques to avoid following a precedent.[47] The case was about the dispute between owners of the ship and its charterers as to demurrage which depended upon the time when the vessel became an "arrived ship". The ship arrived in port but was not allowed to arrive at the berth, waiting 17 days and wasting the money of owners, because the berth was not available. The arbitrators failed to agree. The Court of First Instance and Court of Appeal, except Lord Denning who invoked common sense[48], decided in favour of the charterers because of the decision in *The Aello* where the House of Lords in similar case decided in favour of the charterers[49]. The House of Lords reversed their decision and unanimously overruled the precedent on the basis of its Practice Statement on Judicial Precedent.

The case *Oldendorff v. Tradax Export* is remarkable because the House of Lords both distinguished and overruled *The Aello.* They followed the opinion of Lord Denning when stating that the circumstances were not absolutely the same, that there was an older authority in law,[50] that the deed was a port charterparty and not a dock charterparty nor a berth charterparty, and that the wording of contract was in favour of the owners. Unlike Lord Denning, the House of Lords avoided direct invocation of common sense. However, it was stated by Lord Reid that: "A main objective of the law should be that it should appear *sensible* and easy of application by those whose affairs it governs. I would

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[43] *Mentes and Others v. Turkey.* - Judgement of 28 November 1997. - European Court of Human Rights. RJD 1997.

[44] Twining W., Miers D. *How To Do Things With Rules.* - 4th edit. - London: Butterworth, 1999. - P. 331.

[45] Cross R. *Precedent in English Law.* -Oxford: Clarendon Press, 1991. - P. 129.

not think that it sufficient to justify our intervention that the criterion approved in *The Aello* is illogical but if in addition we find that it causes uncertainty in practice then I think we ought to intervene."[51] Thus, the House of Lords found it necessary not only to distinguish but also to overrule the precedent after the perspective of those who were affected by the precedent had been taken into account.

Miliangos v. George Frank[52] is another example where the judges being guided by sympathy decided to avoid following a binding precedent. Unlike *Oldendorff v. Tradax Export*, there was no opportunity to distinguish the facts set in previous decisions. The facts of the case were as follows: a Swiss seller agreed, by written contract, to supply English buyers with goods at a price expressed in foreign currency. The price was not paid. The seller started action. The buyers intimated that they would submit to judgement. The judgement was given for the moneys due expressed in sterling, holding that the rule that the English courts express their judgements only in sterling had not been altered either by Parliament or by any decision of the House of Lords. The Court of Appeal reversed the decision stating that English Court was entitled to give judgement in foreign currency. The Court of Appeal declined to follow the precedent, not for the first time in this type of cases.[53] The House of Lords in its judgement agreed that English Court was entitled to give judgement in foreign currency, and overruled its previous decision *In Re United Railways of Havana and Regla Warehouses Ltd*[54].

There are two things which deserve attention. The first is that the Court of Appeal avoided following the precedent laid by the House of Lords on the ground that the situation in the currency market had changed so significantly that the decision *In Re United Railways of Havana and Regla Warehouses Ltd* did not meet the interests of justice any more. The second thing is that although the House of Lords reproached the 'unceremonious' handling of the Lord's decisions by the Court of Appeal, they virtually agreed that refusal to give judgement in foreign currency would be unjust: "Justice demands that the creditor should not suffer from fluctuations in the value of sterling".[55] Thus, if the judges find that following binding precedent causes injustice, they can employ different means to avoid application of the precedent. Sympathy is crucial in

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[50] *Leonis Steamship Co. Ltd. v. Rank Ltd.* [1908] 1 K.B. 499.

[51] *Oldendorff v. Tradax Export* [1974] A.C. 479, at 533. (emphasis added)

deciding whether the precedent should be followed or not. Nevertheless, if the judges cannot find *a* legal reason to avoid the precedent they must follow it.

One may agree with Twining and Miers that "the doctrine of precedent does not, and probably could not, prevent judges and other interpreters from re-interpretation of past cases".[56] The reason for this is that there is always indeterminacy as to when a previous decision is to be regarded as analogous to the case at hand, or what criteria are to be used to determine the extent of an analogy between one case and another.[57] Not every court can overrule every precedent, however, every court may have enough power to avoid application of the precedent, which causes injustice, by distinguishing the cases. If a judge finds that the circumstances of the given cases are different from those of the precedent he is entitled to make a different decision. This is what happened in the American case *Brown v. Board of Education*, commented above, which was distinguished from *Plessy v. Ferguson.*[58] Apart from distinguishing the circumstances the judge can justify his departing from previous precedent by supporting his decision with another valid legal rule which can be of either statutory or common law origin. The rule can be derived also from an international treaty, although in the UK, it requires an Act of Parliament incorporating the provisions of an international treaty into domestic law. A recent incorporation of the European Convention on Human Rights into domestic law in Britain will undoubtedly affect the role of precedent[59].

A certain freedom of judges in tackling precedents has a parallel with the judicial interpretation of statutory rules. "As with precedent, the judges have given themselves a good deal of leeway as to what are considered to be legitimate techniques of interpretation [of the statutes]."[60] It is true that literal meaning of many statutory provisions may be clear in the majority of cases. However, a literal interpretation of a statutory text often is not sufficient, and requires a purposive approach. When the judges interpret statutory rules, context, language and purpose are all relevant, but there are still no settled priority rules for weighing these factors.[61]Although a judge is not free from constraints when he constructs the meaning of the rules, there are many opportunities to

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[56] Twining W., Miers D. *How To Do Things With Rules.* - 4th edit. - London: Butterworth, 1999. - P. 325.
[57] Ibid.
[58] *Plessy v. Ferguson.* 163 U.S. 537. (1896).
[59] There is an extensive literature on the effects of incorporation of the Convention on domestic law in England and Scotland. The consideration of this problem in detail is beyond scope of this thesis. For general study the effects of incorporation on judicial decision-making see: Coppel J. *The Human Rights*

choose different interpretations. The principle of ethical love and the requirement of sympathy judgement as its natural implication can serve as a guide in making choices between different interpretations of legal rules.

In many cases, there is more than one legal rule which can be applied in a particular case. A judge guided by sympathy approaches legal rules as the source of reasons for deciding the case. The vision of legal rules as the providers of legal reasons rather than results has been developed recently by Steven Burton.[62] The rules themselves do not determine the result of the case, as a 'mechanical' judge would believe. Burton maintains that "Abstract rules, like other legal standards, can be understood in a model of *reasons* rather than necessarily results".[63] The difference is that a reason "may have some but not necessarily absolute force; it is the reason for action to be weighed together with other competing reasons."[64] In other words a judge deciding the particular case has often a multiplicity of reasons expressed in legal rules.

Burton represents legal reasoning as a gauging of the weight of the legal reasons invoked by the context of action.[65] The process of weighing is following: firstly, "all of the relevant reasons in case must be identified before any are assigned a weight";[66] secondly, a judge identifies legal reasons among them and determines their relevancy. "The weight of one reason ultimately depends on the justification for the other reasons involved by the circumstances".[67] This is where sympathy judgements can and do take their role. However, Burton himself maintains that the weight cannot depend on such extra-legal standards as morality or policy. Considerations of morality and politics are excluded because they contradict the legal duty to uphold the law.

There are two main problems which Burton's approach faces. First of all, how to explain the fact that moral intuitions and impulsions of the judges do affect the process of weighing legal reasons, and secondly, how the judges decide which reasons are admissible and which are not. It seems that Burton does not want to admit that moral intuitions and impulsions influence the gauging of the normative power of legal reasons applied to the particular circumstances of the case. It is not a matter of drawing a line between legal deliberation and other types of moral deliberations. Burton himself understands the process of weighing of different legal reasons as distinct from moral

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[62] Burton S. *Judging in Good Faith.* - Cambridge University Press, 1992.

[63] ibid., p. 28

deliberations.[68] But it is not clear from his consideration of the normative force of legal reasons how this force is exactly measured.[69] The other point is that Burton insists that a judge should act only on reasons provided by the law. But who shall determine which reasons are legal and which are not? Burton believes that it is a matter of convention. However, any convention is subject to interpretation, convention can be indeterminate. Convention is changeable, and it may be changed by the judges as well. For example, it was once held that a judge should ask himself whether enforcing a particular claim made against a background of criminal behaviour, would shock the public conscience. This test was used, for example, in cases where equitable property rights were acquired as a result of an illegal transaction[70]. This test was later rejected by the House of Lords.[71]

Despite these difficulties the thesis that legal rules provide the judges with reasons to decide the case, not necessarily results, gives more space for exercising sympathy judgements, even if the narrow 'positivistic' view on law is taken which restricts legal rules only to those warranted by authorised political authorities. If, however, legal rules are found not only in official law, but can be derived from universal principles of justice[72] then the possibility for sympathy judgements become enormous.

Sympathy and impartiality.

The main objection against sympathy judgements in judicial decision-making is that they affect the impartiality of the judges. It is beyond any doubt that the principle of impartiality is fundamental for judicial decision-making. John Finnis saw this principle in the terms of the requirement of practical reasonableness that there should be no arbitrary preferences among persons.[73] He maintained that the Golden Rule is its classical expression.[74] The Golden Rule is a normative expression of the principle of agape. Thus, the principle of impartiality relates to agape on the deepest level. If sympathy is an implication of the principle of agape, consequently genuine impartiality should imply sympathy judgement. It can sound paradoxical, for impartiality is assumed often as a complete detachment from personal considerations while sympathy is a sort of

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[68] ibid., p. 224.
[69] ibid., pp. 38-43.
[70] See: Buckley R. 'Law's Boundaries and the Challenge of Illegality.' in: *Legal Structures: Boundary Issues Between Legal Categories.* - Chichester: Wiley, 1996. - P. 236.

involvement in the interests and needs of others. However, involvement may be impartial if it is involvement towards all parties.

It is true that there is a danger of partiality in exercising sympathy judgement. This is another reason why we need the standard of good conscience derived from agape. It is the fundamental feature of agape that it is void of self-interest.[75] Paul Ramsay stressed that a person guided by agape seeks not his own good, but the good of his neighbour.[76] Therefore, sympathy judgement as an implication of the agapic casuistry is free from partiality.

There are two important features of agape which make it indispensable for judicial impartiality. The first is that agape excludes the possibility of requital[77]. In other words a person who is guided by agape in doing good to the other person does it not because he hopes to get some compensation for his behaviour. An act of agape is an act free from self interest. This affects the core of the idea of judicial impartiality, and this agrees with the view that impartiality does not allow personal reasons to take any part in judicial decision-making.[78] A judge when acting on the basis of love is free from any mercenary interest. At the same time the meaning of acting 'without respect to persons' does not mean that there should be no personal considerations. Acting 'without respect to persons' means acting without favouritism.

The second feature is that agape "depends on the direction of the will, the orientation of intention in an act, not on stirring emotion".[79] It implies that the sympathy judgements of the judges are not dependent on their emotions, but on their will to do what is right. The sign of good conscience is present when conscience is moved by love not only for friends and family, but for everybody, even for enemies. The unity of impartiality and agape is expressed in the words of Christ: 'You have heard that it was said, Love your neighbour, and hate your enemy. But I tell you, Love your enemies, bless those who curse you, do good to those who hate you.'[80] This is the truest meaning of impartiality, which is opposed to the impartiality of alienation and insensitivity.

Nevertheless, agape presupposes a certain detachment though not indifference. Agapic casuistry offers an alternative to both exclusion of sympathy for the sake of impartiality and rejection of the idea of impartiality as illusory. The first tendency is

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[74] ibid., p. 107.
[75] D'Arcy M.C. *The Mind and Heart of Love.* - London: Faber, 1947. - pp. 9ff.
[76] Ramsay P. *Basic Christian Ethics.* - London: SCM Press, 1950. - P. 92.

generally shared by the adherents of what Roscoe Pound called 'Mechanical Jurisprudence'.[81] 'Mechanical' judges are impartial in a sense that they apply the same rules without taking into account the individual differences and particularities of the cases. The second tendency represents a reaction against such an approach. It is characteristic of Feminist Jurisprudence. Martha Minnow stated directly that "human partiality is inevitable. The only possible impartiality - to allow the differences to flourish".[82] I completely agree with Minnow's argument on the danger of the pretended impartiality. It is also true that "Judges often see difference in relation to some non-stated norm or point of comparison and fail to acknowledge their own perspective and its influence on the assignment of difference".[83] However, it is not correct to reject the possibility of the judges being impartial. The fact that the judges fail to be genuinely impartial does not justify the view that impartiality is a sort of pretension which hides judicial arrogance. In the next chapter I will argue that genuine impartiality is achieved by the judges through examination of their conscience and deliberate attention to the moral impulsions and the choice of legal reasons.

It is possible to be impartial and at the same time to take the perspective of the other people involved in the legal process providing that a judge is guided by agape. Sympathy does not exclude detachment. There is nothing wrong in using categories to classify people and cases. I argued above that sympathy is possible only on the basis of sharing moral standards of what is good or bad, what is right or wrong. Thus, classification of people and cases is not unjust providing that this classification is based on the understanding of the people attained through sympathy. One of the aspects of impartiality is to treat like cases alike, and alternatively to treat unlike cases unlike. A judge who applies the same rule to unlike cases violates the principle. On the other hand a judge who fails to notice the likeness of the cases violates the principle as well. The problem is what criteria should be used by the judges to measure likeness and unlikeness of the cases. Agapic casuistry gives the answer: a judge should take the perspective of all the parties involved through a sympathetic attitude. Only by doing this can a judge reach a better understanding of the case. A sympathetic attitude does not mean that the judge has to exclude his own moral beliefs, but be prepared to their challenge and undertake a dialogue with the conscience of the parties and his own. This

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[80] Mat. 5, 43-44

is where the judicial duties to hear and to give reasons acquire their complete moral significance.

Judicial sympathy and public conscience.

Sympathy judgement is reached through confronting and entering into dialogue with the moral stances of the parties with the active involvement of the moral reasoning of a judge. Legal rules serve as accessible and ascertainable providers of the reasons to which the judge must adhere. In the search for the right legal reasons in deciding the particular case a judge should take into account not only the moral perspective of the parties and his own, but also consider the moral perspective(s) of the political community. The adherence to political morality of the community is one of the central ideas in Dworkin's theory of adjudication. He maintained that a judge when interpreting the law should enforce only those moral convictions which are coherent with the legal and political culture of the society.[84] It was noticed in the chapter 4, however, that this culture also requires interpretation, moreover, there might be no clear moral conviction on a particular issue, or even opposite and conflicting views, like, for example, in cases involving abortion. On the other hand general moral convictions of the society may not be necessarily appropriate to implement. If society generally approves the idea of racial discrimination or slavery, a judge if he has a legal reason to make a decision against racial discrimination or slavery may not necessarily follow the general belief.

However, in making his decision a judge should take into consideration the perspectives of not only the parties involved but also the dominant moral views of the society. It does not mean that he must always conform to public opinion on what is right at the particular case. If there is a prevailing legal reason to act in a contrary way the judge should act according to his conscience. Taking into consideration the public view is important for identifying legal reasons relative to the particular case, but it does not determine the weight of the reason automatically. The general public view might be very hostile, for example, to illegal immigrants, but the task of the judge is to do justice in the particular case, and if there are circumstances which are in favour of an illegal immigrant and which involve a sustainable legal argument, then a judge can make a decision which does not please the public in general.

It is important that the judges should take into account the general effect of their decisions on members of the society. This duty is derived from the general moral obligation of the judges to promote peace in the society.[85] For this purpose they should take the moral perspective of the ordinary citizens. The pursuit of moral consensus lies in the essence of law whose objectives are order, peace and brotherhood[86]. The attempts to find moral consensus is particularly characteristic of the judges of the European Court of Human Right whose activities will be considered in the final chapter. The European Human Rights case-law is full of examples where the judges took the moral perspective of the public seriously. In the following chapter we shall consider some of the examples where the judges took the perspective of public conscience.

The requirement to respect the public conscience is another restraint on exercising sympathy judgements by the judges. On the other hand, the judges have an important function to form and express the public conscience. This function they share together with the legislators and the political leaders. The judicial way of expressing and formation of the public conscience, however, is very distinct. It is about how the rules should be applied and how legal reasons are chosen. There are also situations when the judiciary has to take the role of the rule-makers. When choosing legal reasons for deciding cases or formulating legal rules, the judges should act on behalf of political community. In other words, it is not so much the individual sympathy of the judge that matters as his ability to acquire a sympathetic attitude shared by the community as a whole. Adam Smith stressed in his *Lectures on Jurisprudence* that infliction of punishment through the judicial system is caused by sympathy for the injured person on the side of society.[87] Therefore, a judge in exercising his sympathy judgement has to strive for an authentic expression and formation of the public conscience.

Thus, a judge should pass sympathy judgement in accordance with the public conscience. However, that does not mean that the judges should not be critical of the dominant moral views of the society. The judges' moral view should be open to the future. As people the judges are or ought to be recruited from the most gifted and honest members of the society. As such they have another task to take their active part in building up the goodness of their community. There may be cases where the good of the society would require a judge to go further in implementing a more humane law.

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[85] *Law - Some Christian Perspectives*. - Ed. by J. Cundy. - Leicester: Christian Lawyers Fellowship, 1988.

Conclusions.

One may conclude that the judges when applying the law should take into account the moral perspective of all those who will be affected by their decisions. This is important not only for a better understanding of the facts of the case but also for rendering justice to those who appeal to law. A good judge is not only he who hears the litigants but he who listens to them. Understanding of the participants in the process and desire to help them is essential for the just and equitable application of law. This is achieved through sympathy judgement described above.

The concept of impartial sympathy judgement meets the objections to the exercise of sympathy judgement on the ground of subjectivism and prejudice. When passing a sympathy judgement a judge does not tackle the law so as to warrant his own moral beliefs. His task is to apply the law to serve the people through the promotion of peace, order and friendship. Application of law by the judges consists in finding a legal reason for deciding a particular case. Sympathy judgement gives not only a better way of selecting the facts and considering the circumstances, it provides the method of choosing correct legal reasons. The method of measuring legal reasons is carried out through sympathy for all the parties involved. Sympathy judgement gives an opportunity to combine both moral intuition and moral deliberation. It is the place where the theories of Thomas Aquinas and Leon Petrazycki meet and co-operate for developing a better model of judicial decision-making.

Sympathy judgement is a complex phenomenon. It includes moral intuition, compassion, and moral deliberation. It requires many skills. The knowledge of law is only one of them. Above all it requires love for those who are affected by judicial decisions. Nevertheless, ethical love is not enough, for there are many obstacles on the way of arriving at sympathy judgement. The judges need a special virtue in order to pass a sympathy judgement. This virtue can be called vigilance or watchfulness. Without it an impartial sympathy judgement will be a rare occurrence even in the hands of loving judge. Watchfulness deserves a special chapter within the limits of this thesis.

8. WATCHFULNESS AS AN IMPLICATION OF AGAPIC CASUISTRY.

Introduction.

The concept of Christian love consists not only in the description of moral experience, but also has the advantage providing practical recommendations. The concept of conscience was developed by Christians not for the sake of pure academic interest, but it was born in the pangs of practising virtue. The concept is a result of reflection on this practice. John of Damascus described conscience as a power fighting against the irrational part of soul.[1] The Christian vision of conscience reflects all the complexities and struggles which are inherent part of moral life of the human being. The judges are human, and as such they are also affected by the struggle to be moral. Every judge has irrational desires which may affect the outcome of the judicial process. The task of agapic casuistry is to make the judges more aware of their presence in order to neutralise their affect on judicial decisions in the process of passing an impartial sympathy judgement.

A judge cannot pass an impartial sympathy judgement without overcoming his prejudices, favouritism and propensities. A judge has to exercise agape even towards the person whom he may dislike. The major problem is that the negative effect of prejudices, favouritism and propensities is very often hidden from the eyes of the decision-maker. Therefore, it is important for the judges to examine their own conscience on whether it is affected by any prejudices. The decision-makers should be attentive to their own thoughts and feelings. A former judge in the Berlin Court of Appeal, Konrad Broun wrote: "The good judge must be permanently on his guard lest he is subconsciously influenced by personal preferences or class prejudices, lest some feeling of fatigue, or perhaps the anxiety caused by his own private troubles should weaken his attention and concentration on the case at hand".[2] The need to be attentive to one's own feelings leads to the necessity to develop theoretically and apply practically the idea of watchfulness.

Judicial bias.

Bias and prejudice are ideas which are closely related to each other and which can hardly be separated. Kent Greenawalt suggested the difference. He sees prejudice involving a judgement or opinion formed before the facts or even held in disregard of facts; whereas bias is a mental leaning or inclination, a propensity that does not leave the mind indifferent.[3] According to Greenawalt, the variance is that 'prejudice' involves a degree of wilfulness that need not be present for 'bias'. It might be difficult, in fact, to separate prejudice from bias, as it is difficult to separate prejudgement from a mental leaning to make such a prejudgement. However, what is interesting in Greenawalt's description of bias and prejudice is their relevance to the human will. This directly leads us to the ideas of Thomas Aquinas about erroneous conscience and the Christian ideal of good conscience governed by love. According to the teaching of Aquinas, the judicial decision which is affected by prejudice or bias is a bad decision as far as the decision-maker was not willing to neutralise the effect of his prejudgements and inclinations. The ignorance of one's own prejudices can be not only involuntary, but very often appears as an act of will not to examine one's own conscience[4]. In other words it is the will of the decision-maker which allows prejudgements and inclinations to influence his decision and it is his will which has ability and power to neutralise their effect. We shall consider later how ethical love can serve as the power which neutralises the influence of prejudices and biases.

The idea that, as for judges, the degree to which prejudice affects their decisions, depends on their will is not only important in establishing their responsibility for a biased decisions. But it is also important in relation to the whole concept of judicial neutrality. If one acknowledges that the judges can effectively eliminate the influence of their prejudices then it is possible to speak about judicial neutrality. This is what was at the centre of academic dispute between Griffith and Devlin. According to Griffith, a judge cannot be said to act neutrally, because, when sitting in court, a judge is required to make decisions which involve his or her own assessment of where the public interest lies, and so to make a political decision.[5] Griffith says that there cannot be a homogeneity of interest among the different classes within society[6]. Thus, the judges are inevitably prejudiced in their assessment of public interest in favour of their own class.

The response of Patrick Devlin is that: "What matters after all is not whether judges have the political prejudices of their age and upbringing, but whether or to what extent they allow the prejudices to get into their judgements".[7] Patrick Devlin stressed the importance of self-examining of judicial conscience, stating that "The judge who is confident that he has no prejudices at all is almost certain to be a bad judge. Prejudice cannot be exorcised, but like a weakness of the flesh it can be subdued. But it has first to be detected".[8]

The need for a judge to detect his own prejudices arises from a danger of being potentially biased in favour of or against one of the parties to legal process. In legal literature there are two major conceptions of bias. The narrow view of bias covers only the judges who decide the case in a dishonourable fashion, knowingly by reason of their partiality or dislike for one litigant or his cause. The eighteenth-century English judge, Mr Justice Buller can be a good example of such a judge. He "was said always to hang for sheep-stealing, avowing as a reason that he had several sheep stolen from his own flock".[9] The narrow conception of bias relates basically to the judges who have some personal or institutional interest in the outcome of the legal process[10]. The personal interest is reduced primarily to either pecuniary interest, or family relationship, or business connections. Therefore, the main attention has been paid how to exclude the judges who have personal or institutional interests from taking decision.

Because it is almost impossible to get evidence that a particular judge has been biased, the British courts moved in the direction of elaborating a test which would help to minimise a possibility of bias through exclusion of the suspected decision makers from hearing a matter. Until the case of *R. v. Gough*[11] the test appeared in the two forms: reasonable suspicion of bias and real likelihood of bias. There was a large body of authorities supporting each of the tests. The fundamental differences between them was that the first test tried to take the external perspective (that is of a litigant, or society, or a reasonable man) on whether in the given case there is a possibility of bias, while the second test obliged the judges to inquire in the given case whether there is a probability of bias. In the *R. v. Gough* the House of Lords formulated the test of a real

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[7] Devlin P. 'Judges, Government and Politics'. in: *Modern Law Review*. 41 [1978] - P. 507.
[8] ibid., p. 511.
[9] Pannick D. *Judges*. – Oxford University Press, 1987. - P. 39.

danger of bias, which claimed to unite both tests.[12] Although the court stressed the importance of upholding public confidence in the integrity of administration, the 'real danger' test lays more emphasis on the court's view of the possibility of bias in the given case rather than upon public perception of the irregular incident. However, in the famous *Pinochet* case[13], one can see a tendency to recover the test of reasonable suspicion of bias.[14] A narrow conception of bias already calls the judges to examine themselves on the matter of whether they have any personal or institutional interest in the outcome of the case.[15]

The issue of self-examination becomes more important if one takes a broader conception of bias which does not require from judges to disqualify themselves from hearing the case.[16] The broader conception of bias includes the whole complex of moral beliefs and social interests which the judges possess. The main idea of the broader conception is that even without any personal or institutional interest a judge is not free from bias which is understood as a preconceived opinion of the decision-maker. In his book *Natural Justice*, Flick wrote that "If lack of bias is defined to mean the total absence of preconceptions in the mind of a judge, then no one has ever had a fair trial and no one ever will"[17]. The US Supreme Court judge, Felix Frankfurter noticed also that because judges are men, 'not disembodied spirits', their judgements are inevitably influenced by judicial character and experience. Such 'bias' necessarily affects all judges.[18] This sort of bias very often is left unnoticed by the judges. Lord Justice Scrutton spoke of this unconscious partiality that that "the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgements as you would wish".[19] The US Supreme Court judge, Benjamin Cardoso also spoke of subconscious forces which may affect the outcome of judicial decision-making. Among them he counted likes and dislikes, predilections and the prejudices, the complex of instincts and emotions, and habits and convictions.[20]

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[12] ibid., Lord Goff of Chieveley at 660.

[13] *R. v. Bow Street Metropolitan Stipendiary Magistrate and others. - ex parte Pinochet Ugarte* (No 2). [1999] 1 All E.R. 577.

[14] See: Jones T. 'Judicial Bias and Disqualification in the Pinochet Case'. in: *Public Law.* Autumn, 1999. - pp. 391-399.

[15] *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] 1 All E.R. 65. - At 75, 76, 86.

[16] Ibid., at 77.

In the modern literature on the topic of biases and prejudices in judicial decision-making, attention is focused particularly on three kinds of prejudices which are related to class[21], gender[22] and race[23]. Nevertheless, categories of biases and prejudices cannot be restricted only to these three. Some of them even cannot be clearly classified. For example, in 1952 the US Supreme Court was asked to decide whether it was unconstitutional for a street railway company to install loudspeakers in its passenger vehicles for the transmission of music and advertisements. Mr. Justice Frankfurter felt so strongly prejudiced against the company because he did not like the whole idea of broadcasting that he decided not to take part in the case.[24] One can say that there are as many kinds of biases and prejudices as the number of likes and dislikes which the human beings possess.

The fact that the judges are also human and that they can experience the influence of all sorts of prejudices leads us to recognise the importance of self-control and self-attentiveness of the judges when they weigh the relevance of the facts and consider applicability of the rules. In this respect the idea of watchfulness elaborated by the Orthodox moral theologians may be of interest.

The idea of watchfulness.

Although it is possible to establish a variety of rules in order to insure impartiality of the judges and officials, these rules cannot guarantee that bias and partiality which are often unconscious are completely excluded. That is why the concept of watchfulness is so important. It is a necessary element in reaching a just decision. Watchfulness is not only attentiveness to one's own inner world of moral preferences and ideas, it is a way of reaching an impartial decision. To be watchful means seeking something as well as escaping from something. Thus, the idea of watchfulness presupposes both positive and negative elements. The first one involves a neutralisation as far as possible of prejudices and emotions which can affect the impartiality of the decision. The second element involves searching and finding the moral source which would help to weigh correctly the facts and circumstances of the case and correctly interpret relevant legal rules.

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[21] Griffith J.A.G. *The Politics of the Judiciary*. - London: Fontana Press, 1997.

The idea of watchfulness related to the ideas of agape and sympathy may also be derived from Christian ethics. The complete concept of watchfulness can be found in writings like *Philokalia*[25] one of the most famous collections of spiritual works of the Greek Orthodox monasticism. The purpose of the collection was to train the monks on how to attain virtue. Watchfulness (in Greek: nepsis) takes one of the central places in the writing because it is seen as the method to achieve virtue. According to the Greek authors passions, prejudices and desires do not stop affecting the reason of the human being, trying to turn it from the righteous way. Watchfulness is seen as a spiritual method of inward examination which aims at purity of heart. It, "if sedulously practised over a long period, completely frees us with God's help from impassioned thoughts, impassioned words and evil actions"[26]. Watchfulness is believed to enable us to fulfil every commandment of moral law. It leads the person who practices it to well-being.

Watchfulness is considered as the opposite to a state of drunken stupor, hence spiritual sobriety, alertness, vigilance. It signifies an attitude of attentiveness whereby one keeps watch over one's inward thoughts and fantasies. The authors of *Philokalia* stressed the danger of self-satisfaction and warned not to be finally content with the results achieved. For judicial decision-making, the idea of watchfulness may imply, firstly, that when making his or her decision a judge or administrator should detect possible sources able to affect negatively the outcome of judicial process, and should neutralise them; secondly, that a judge should not feel completely satisfied with the results achieved, and should seek to improve his decision-making in the future. It is worth noticing, meanwhile, that the purpose of the authors of *Philokalia* is far beyond reaching a just decision. Its concern is the whole inner world of the decision-makers, their salvation from sin.

Until this point the authors of *Philokalia* follow the main stream of Christian ethics. However, the way watchfulness can be carried out is quite different from the rest of Christian thought. Apart from alertness to inner thoughts and motives, watchfulness was also presented by the Orthodox monks as a breathing technique similar to meditation found in yoga[27]. In the Christian tradition, however, there are at least two alternative ways to develop the art of watchfulness different from the mystical way of complete stillness elaborated by the Orthodox monks.

The first alternative was later advanced by Descartes as the method of doubting[28]. The basic principle is never to accept anything as true if there is no evident knowledge of its truth. Descartes called for avoidance of any precipitate conclusions and preconceptions. The way of doubting is an intellectual examination of all premises on which our moral decisions depend. Descartes was not a sceptic. His method of doubt was a procedure for arriving at the truth.[29] For judicial decision-making, Descartes' method has the implication that the judges should examine their presuppositions on which they interpret the facts and the rules. This way, despite all its merits and as being more acceptable for a critical mind, has at least one disadvantage. Watchfulness is restricted only to the negative aspect of criticism and exclusion of some prejudices. It leads to rationalisation of the process of passing judgements at the expense of moral intuitions. The Cartesian method of doubting can without doubt be used in judicial decision-making. The question is only whether all judges are able and have enough time and intellect to go through deliberation on every moral and legal principle and presupposition of their decisions.

Another way watchfulness can be carried out is based on the principle of love. The essence of this method is that a decision maker should be attentive that his decision is based on the will to do good to those who are affected by it. It is different from the monastic ideal of stillness and passionlessness, and it is different from Cartesian intellectualism. It stresses the positive element of watchfulness. A decision maker might have no time and ability to reach a state of stillness of soul, or to examine every of his presuppositions. He turns directly to the will to do good to the other, leaving other motives and impulsions without special attention. This type of watchfulness one can compare with tuning a radio on the wave sought without necessarily listening to the voices on the other waves.

Watchfulness and legal reasoning.

The authors of *Philokalia* had one distinct feature in comparison with Aquinas' thought. Although both promoted ethics of virtue, Thomas Aquinas paid special attention to prudence among the cardinal virtues, and, as for watchfulness, he did not include it in the list of the virtues, while the authors of *Philokalia* considered watchfulness as the most important one. Some authors did not even include prudence in

the list of the virtues.[30] A Russian Orthodox author, Theophan the Recluse tried to correct this shortcoming of his Greek colleagues by stating that watchfulness without accurate moral reasoning is of little help: "Attention to what goes on in the heart and to what comes from it is the chief work of a well-ordered Christian life. Through this attention the inward and the outward are brought into due relation with one another. But to this watchfulness, discernment must always be added so that we may understand aright what passes within and what is required by outward circumstance. Attention is useless without discernment."[31] The concept of watchfulness warranted by Theophan the Recluse fits much better into the pattern of legal reasoning which one can derive from the Thomistic theory of conscience.

The concept of watchfulness can make a significant contribution to the theory of legal reasoning. In order to understand its full significance it is necessary to outline briefly the pattern of legal reasoning defended in this thesis. Legal reasoning is the process of arriving at, and justification for, legal decisions. This process has certain moral requirements which are intuitively grasped by conscience. These requirements deal with the choice of legal rules to be applied, with the consideration of facts, with treatment of the participants in the legal process, with the behaviour of decision-maker and so on. If these requirements are held by conscience as universally binding they may be called natural law. Interpretation of legal rules should meet the precepts of natural law. There may be many precepts of natural law and many circumstances which can lead to the conflict of conscience, to moral doubts and perplexities. There are can be several ways of resolution of the conflicts of conscience. One of them is the principle of agape which is supported in this thesis. The principle of agape requires that one should love his neighbour as oneself. In the context of judicial decision-making, it implies an impartial sympathy judgement which directs a judge to place himself imaginatively in the place of the persons affected by his decision. The principle of love requires also that the judge should take into an account the perspective of the affected persons together with his own perspective on what is right in the given circumstances. His knowledge of legal rules serves as guidance for arriving at the correct decision.

If agape is considered as the principle which guides a decision-maker, and sympathy judgement is the result of following this principle, then watchfulness may be

considered as the way of arriving at a sympathy judgement. A judge should be attentive firstly to the moral perspectives of the litigants. Secondly, in applying legal rules he should be attentive to his own moral views. Thirdly, he should pay attention to other moral views circulating in the society. Watchfulness means the willingness of the judge to listen to what are the others' moral views on the due application of legal rules in the given circumstances. It is not merely listening but it presumes a readiness to acknowledge the rightness of another's moral perspective. Watchfulness is a result of the humility of the judge who having his own prejudices does understand them, and therefore is open to the different comprehension of the situation. A watchful judge when arriving at his decision is aware that his own legal reasoning is limited, his justification is imperfect, because his knowledge of the facts can never be complete, and his interpretation of legal rules is only his own. Watchfulness is a way of transcending the limitation of the subjective legal reasoning of the judge.

King Solomon as an example of a watchful judge.

The idea that watchfulness presupposes the openness to the moral perspective of the others can be well illustrated by an example from the judicial activities of Solomon, King of Israel. This example, as well as the description of Solomon's life is taken from the Bible[32]. I am concerned here not so much with whether all what is written about Solomon happened in fact, as with the moral image of a watchful judge. Solomon was a humble man. The Bible says that God appeared to Solomon in the dream and said: "Ask for whatever you want me to give you".[33] Solomon confessed to God that he was immature, that he was ignorant and did not know how to carry out his duties. Therefore, he did not ask God to give him a long healthy life or wealth, nor did he ask for revenge on the enemies from which Solomon suffered, but he asked for discernment in administering justice.[34] So, as the story indicates, God gave Solomon wisdom and very great insight, and a breadth of understanding as measureless as the sand on the seashore. He was wiser than any other man. Men of all nations came to listen to Solomon's wisdom, sent by all the kings of the world, who had heard of his wisdom.[35] Indeed, if there were ever a judge 'Hercules', described by Dworkin as an imaginary judge of

[32] 1 Kings 3ff.
[33] 1 Kings 3:5.
[34] ibid., 3:10.
[35] ibid., 4:29-33.

superhuman intellectual power and patience,[36] it had to be Solomon. The Bible reports one case adjudicated by Solomon:

"Now two prostitutes came to the king and stood before him. One of them said, 'My lord, this woman and I live in the same house. I had a baby while she was there with me. The third day after my child was born, this woman also had a baby. We were alone; there was no-one in the house but the two of us.

During the night this woman's son died because she lay on him. So she got up in the middle of the night and took my son from my side while I your servant was asleep. She put him by her breast and put her dead son by my breast. The next morning, I got up to nurse my son - and he was dead! But when I looked at him closely in the morning light, I saw that it wasn't the son I had borne'.

The other woman said, 'No! The living one is my son; the dead one is yours.'

But the first one insisted, 'No! The dead one is yours; the living one is mine'. And so they argued before the king.

The king said, 'This one says, My son is alive and your son is dead, while that one says, No! Your son is dead and mine is alive.'

Then the king said, 'Bring me a sword'. So they brought a sword for the king. He then gave an order: 'Cut the living child and give half to one and half to the other.'

The woman whose son was alive was filled with compassion for her son and said to the king, 'Please, my lord, give her the living baby! Don't kill him!'

But the other said, 'Neither I nor you shall have him. Cut him in two!'

Then the king gave his ruling: 'Give the living baby to the first woman. Do not kill him; she is his mother.'

When all Israel heard the verdict the king had given, they held the king in awe, because they saw that he had wisdom from God to administer justice".[37]

Solomon would not reach his wise ruling unless he took the inner perspective of the mother of the living child. He discerned that one of the women was lying and felt jealous towards the mother of the living child, who tried to preserve her own child by every means. Understanding of their inner feelings helped Solomon to put them in the situation in which the feelings of both became apparent.

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[36] Dworkin R. *Law's Empire.* - Harvard University Press, 1986. - P. 239.
[37] 1 Kings 3:16-28.

Being attentive to the perspectives of the litigants is only one aspect of watchfulness. The book of Proverbs which is ascribed to Solomon himself[38] helps us look at its other aspects. This collection of sayings may be of interest for those who administer justice, for very often it addresses its maxims to judges and to rulers. The sayings are presented as the maxims of Wisdom herself. She says: "Blessed is the man who listens to me, watching daily at my doors, waiting at my doorway."[39] The Proverbs contain the call for searching wisdom or discernment[40]. Thus, watchfulness means a constant search for wisdom and discernment. To be watchful means to apply one's mind to understanding, to call out for insight, to search for wisdom "as for hidden treasure"[41]. The idea of guarding one's heart, so prominent for the authors of *Philokalia*, also takes one of the central places in the book of Proverbs. It says: "Above all else, guard your heart, for it is wellspring of life".[42]

In a sense, watchfulness is a result of awareness of one's own imperfection. The author of the Proverbs warns: "Do not be wise in your own eyes",[43] and in the other place, "Do you see a man wise in his own eyes? There is more hope for a fool than for him".[44] The danger of pride is one of the main themes of the book: "Pride goes before destruction, a haughty spirit before a fall".[45] Therefore, a watchful judge should humble himself and guard his heart from pride. "Before his downfall a man's heart is proud, but humility comes before honour"[46]. From the awareness of one's imperfection comes the advice of postponed judgement as a result of careful deliberation and advice[47].

The Proverbs are full of instructions which can be used in judicial decision-making. Apart from general advice to guard one's heart, to seek discernment, not to take quick decisions and so on, there is a stress on accurate weighing of the facts[48], the importance of self-control,[49] integrity in taking decisions,[50] carefulness in giving reasons and remarks,[51] gentle treatment of the litigants,[52] patience.[53] The author of the Proverbs

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[38] ibid., 4:32. Proverbs 1:1.
[39] ibid., 8:34. (empasis added).
[40] ibid., 2:1.
[41] ibid., 2:1.
[42] ibid., 4:23.
[43] ibid., 3:7.
[44] ibid., 26:12.
[45] ibid., 16:18.
[46] ibid., 18:12.
[47] ibid., 12:15; 14:12,15.
[48] ibid., 11:1.
[49] ibid., 14:17,29.
[50] ibid., 11:3.
[51] ibid., 12:18.
[52] ibid., 15:1,8.

calls the judges to observe the basic moral requirements of judicial decision-making: "It is not good to punish an innocent man, or to flog officials for their integrity", [54] or "It is not good to be partial to the wicked or to deprive innocent of justice".[55] One can say that watchful judge takes every care to do what is right, which is important for him not only for passing a right judgement, but also for his whole well-being: "The highway of the upright avoids evil; he who guards his way guards his life".[56]

The book of Proverbs helps us to grasp watchfulness in its unity with love as the will to do good to the other people: "Do not withhold good from those who deserve it, when it is in your power to act".[57] This saying may be seen as a fundamental call for the judges and all those who are in authority to use their power for the good of the people. Wisdom urges judges: "Let love and faithfulness never leave you; bind them around your neck, write them on the tablet of your heart".[58]

Stages of watchfulness.

In the times of Solomon judicial process was not so complicated as it is in modern times. Although what was written in the book of Proverbs may have relevance to judicial ethics, there are many procedural and substantial points which shape the way the judges arrive at their decisions without necessarily using the wisdom of Solomon. Nevertheless, in order to make a good decision, a judge still needs to be watchful. Generally, one can speak about three stages of the process which require a judge to be watchful. The first stage relates to the time when a judge has to take a decision on admissibility of the case and also whether he is in authority to hear the case. The second stage relates to hearing the case, collecting information, weighing arguments of the litigants, and examining the meaning of rules in the given situation. The third stage relates to taking the decision and giving reasons to the litigants. All of these stages have their particular characteristics which require a certain type of watchfulness. We shall consider them here in brief, taking into account that much depends on the nature of the legal case, the system of adjudication and the kind of law. Nevertheless, all these three stages are common to almost every modern process of making judicial decisions, and

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[53] ibid., 16:32.
[54] ibid., 17:26.
[55] ibid., 18:5.
[56] ibid., 16:17.
[57] ibid., 3:27.
[58] ibid., 3:1.

they have some general characteristics which allow us to draw a few common features and point to some basic guidelines in the art of watchfulness.

(A) The first stage when a judge has to decide on admissibility of the case may seem very technical, where the main task of the judge is just following procedural rules without any need for moral self-examination and attentiveness. However, that is not the case. Even when the judge follows procedural rules he must be attentive not to deprive the participants of justice. In *Perez de Rada Cavanilles v. Spain*[59], a Spanish court in Lumbier declared an appeal application inadmissible according to the procedural rules for being out of time. But the court did not pay any attention to the fact that this happened without fault of the applicant who lived in another city (Madrid), where the initial judgement was served. The applicant firstly lodged an application in that city which was invalidated because according to procedural rules it must be lodged in Lumbier. The appeal application was sent by post and arrived late than the rules require. Further appeals were dismissed, and the application was not considered. The European Court of Human Rights held that there was a violation of the Article 6 (1) which protects the rights of the individual to a fair and public trial. The applicant was deprived of justice: "The particularly strict application of a procedural rule by the domestic courts had deprived the applicant of the right of access to a court".[60] The judges should be aware of the danger of the blind following of procedural rules.

In the English case *Al-Mehdavi v. Secretary of State for the Home Department,*[61] an Iraqi student was appealing against an extradition order. During appeal proceedings he was deprived of the opportunity to be heard by adjudicator because of the negligence of his solicitor who did not inform him about the date of hearing through sending the notice to an incorrect address. The adjudicator dismissed the appeal. The solicitor again did not inform the appellant about dismissal for the same reason, and it was too late for the appellant to appeal further. When the appellant complained to the court, certiorari was granted. The decision of the court was affirmed by the Court of Appeal, but was overruled by House of Lords. The Court of Appeal followed its own prior case.[62] In a similar case certiorari was granted where the negligence of the applicant's solicitors had deprived him of an oral hearing. The reason for granting certiorari was the following: a

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[59] *Perez de Rada Cavanilles v. Spain.* - Judgement of 28 October 1998. - European Court of Human Rights. RJD. 1988.
[60] ibid.
[61] *Al-Mehdavi v. Secretary of State for the Home Department.* [1989] 3 All E.R .(HL) 843.
[62] *R. v. Diggenes, ex p Pahmani* [1985] 1 All E.R. 1073.

party to a dispute who, through no fault of his own, has not in fact been heard has been denied natural justice. This premise was rejected by the House of Lords.

The Lords unanimously held that there was no breach of natural justice, although they acknowledged that there was injustice.[63] They agreed with the argument of the Secretary of State that rules of natural justice concerned solely the propriety of the procedure adopted by the decision maker. In particular, the rule expressed in the Latin maxim *audi alteram partem* requires no more than that the decision-maker should afford to any party to a dispute an opportunity to present his case. This is was done by the adjudicator. From the point of view of watchfulness, three things are of interest in this case. The first is the willingness of the Court of Appeal to smooth away the injustice caused by negligence of the solicitor. Secondly, the Lords took the perspective of the Secretary of State and also of the public interest, in particular, they took into account the consequences of the decision for future cases. And finally, the Lords, in deciding in favour of the Secretary of State, considered that the immigrant was not left without a remedy, because the Secretary of State has a discretion under par. 21 (1)a of the Immigration Act 1971 at any time to refer for consideration any matter relating to the case which was not before the adjudicator. One can say that the Lords were more watchful than the judges of the Court of Appeal. The Lords took the perspective of both litigants, and particularly that the finding of no breach of natural justice does not lead to depriving the immigrant of a remedy. This particular decision of the House of Lords calls for attentiveness in choice of remedies when a judge is faced with injustice caused by strict application of the procedural rules.

The first stage involves also meeting the other requirements of natural justice relating to whether the judge is competent to decide the case from the point of view of his impartiality. This requires that the judges should examine themselves on whether they have some personal interest or if they are biased in such a degree that it is better for the interests of justice not to take their part in the proceedings. Mr. Justice Frankfurter when he did not took part in the case *Public Utility Commission v. Pollak*[64] is a good example of a self-examining judge. However, the rules against bias are considered not even so much as to exclude every biased judge from proceeding, as to create trust in the fairness of the proceeding on behalf of those who are parties in the process. Judge Lush said about the rule against bias: "The law in laying down this strict rule, has regard, not

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[63] *Al-Mehdavi v. Secretary of State for the Home Department.* [1989] 3 All E.R .(HL) at 849.
[64] *Public Utility Commission v. Pollak.* 343. U.S. 451. (1952). 466-7.

so much perhaps to the motives which might be supposed to bias the judge, as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal and so to promote the feelings of confidence in the administration of justice which is so essential to social order and security".[65]

The importance of watchfulness in upholding public confidence in the administration of justice can be well illustrated in the recent case *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others. - ex parte Pinochet Ugarte* (No 2).[66] In this case the applicant was the former head of State of Chile. His extradition was sought by the government of Spain so that he could be tried for various crimes against humanity allegedly committed whilst he was head of state. The warrants for his arrest were quashed by the Divisional Court. An appeal was lodged to the House of the Lords. Amnesty International (AI), an organisation which argued for the extradition, was party to the appeal. The appeal was allowed by a majority of three Law Lords against two. Subsequently, the applicant discovered that one of the Law Lords in the majority, Lord Hoffman, was a director and chairperson of Amnesty International Charity Ltd, connected closely to Amnesty International. It was the first time in history that the House of Lords reconsidered their previous decision. The Lords quashed their previous decision on the ground that the requirement of natural justice against bias was not fulfilled in this particular case, and the matter was referred to another committee of the House for rehearing.

The Lords held that Lord Hoffman was automatically disqualified from hearing the appeal because of his close connections to one of the parties on appeal. The issue in the *Pinochet 2* was not whether Lord Hoffman was biased or not, but whether he had an interest in the outcome of the present proceedings. However, it was more than that. It was about the public confidence in the administration of justice by the British courts. The Lords took the perspective of the public when they affirmed that "the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits upon it, the decision cannot stand".[67] Restating the principle that "justice must not only be done; it must also be seen to be done", the court acknowledged, on the one hand, the requirement to take the perspective of the public, and on the other hand, the requirement

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[65] *Serjeant v. Dale.* [1877] 2 Q.B.D. 558. - at p. 567.
[66] [1999] 1 All E.R. 577.
[67] ibid., at 593.

for the judges to examine themselves as to whether they may hear the matter. It is clear that in the eyes of the court, Lord Hoffman did not fulfil these requirements.

Thus, the first stage of the judicial process requires in particular two kinds of watchfulness from the judges: the first is that the strict application of procedural rules on admissibility of the case would not deprive the appellants of justice, the second is that the judges should examine themselves on the matter of bias, and how their involvement is seen by the public[68].

(B). The conclusion of the judge reached at the first stage of the judicial process, that he has no any pecuniary or personal interest in outcome of the case, does make this judge automatically unbiased in the course of hearing the litigants, collecting information and weighing different arguments. There is a deepest link between two major precepts of natural justice. It is widely accepted that the first precept of natural justice requires that the judge should be unbiased, the second precept requires that each side be heard. If we take the broader conception of bias which means not only having a personal interest in the outcome of the case, but the whole set of prejudgements which every judge possesses, than it becomes clear that the requirement to hear all parties is essential to neutralise the negative influence of the judge's preconceptions and prejudices. Mr Justice McKenna stated that hearing both sides means actually listening to what they say and listening with a mind that is not made up.[69] In order to make a trial fair it is not enough to provide the litigants with a formal right to a hearing. It is necessary that the judges do listen to what the litigants say. Listening requires a certain amount of attention, especially if the litigant or a witness is not skilful in making speeches. At this stage of judicial process, a judge should be watchful to not to loose attention to what the parties are saying.

The importance of the continuing watchfulness against bias even at the second stage of decision process may be well illustrated in the example of the case *Remli v. France* before the European Court of Human Rights.[70] In this case the Court found a violation of the Article 6 (1) of the European Convention of Human Rights which guarantees a fair hearing because, according to the opinion of the Court, during criminal proceedings before a French court the latter did not take seriously the fear of partiality on the part of the applicant who was a French national of Algerian origin and who was

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[68] For general discussion of the contemporary issues of natural justice, see: Craig P. P. *Administrative Law.* - London: Sweet & Maxwell, 1999. - Chapters 13 & 14.
[69] Cited by Shetreet Sh. *Judges on Trial.* - Amsterdam: North-Holland Publ., 1976. - P. 296.
[70] *Remli v. France.* - Judgement of 23 April 1996. - European Court of Human Rights. RJD 1996-II.

an accused person in the trial. The basis for the fear was a remark made by one of the jurors outside the courtroom and witnessed by a third person. The juror said "What's more, I'm a racist". The French court refused to take a formal note of the remark, as was requested by the counsel for the accused. The refusal was made after deliberation on the ground that the remark was not made in the presence of the judges.

It is difficult to say by what motives the French judges were guided when refusing the request, perhaps they thought exactly the same as Judge Vilhjalmsson thought later that this complaint of the accused was so trivial that it had nothing to do with human rights. However, the majority of the judges in the European Court of Human Rights found that it was the French court whose behaviour had led to the violation of the rights of the accused. The Court held that the French court should check its own impartiality, and that in order to secure its own impartiality it should take note also of what was happening outside the courtroom. One may assume that the French judges were not watchful, and such an insignificant detail in the eyes of the French judges as a remark of a juror resulted in a negative effect on the force of the whole decision. If the French court had taken seriously the remark of the juror and checked his impartiality, the same outcome of the proceedings would not have cast doubt on the fairness of French criminal justice.

The decision of the European Court of Human Rights is interesting from another point of view which is closely related to the requirement of watchfulness. When considering the correctness of the criminal proceedings the Court took as a decisive circumstance the belief of the applicant in the fairness of the process and the objective justification of the belief.[71] The judgement of the Court actually implied that the fault of the French judges lay not so much in the failure to be watchful of what is going on outside the court room as to be watchful of the inner attitude of the accused, his trust in the fairness of the proceedings. It happened because the French judges did not take seriously enough the interests of the accused to such a degree as the principle of ethical love would require, and which has been required by the European Court of Human Rights in this particular case. Since the Convention is incorporated in the domestic law of many countries, this case can give a useful lesson not only to the French judges.

Thus, at the second stage of the judicial process, a judge should be watchful of the inner perspective of the participants, which implies attentiveness to what they say, what they think, and what they feel. The words of the litigants have a direct link to their

[71] See: Par 46 of the Decision.

motives and intentions, and therefore they are the key to their inner world. Using this key requires from the judges skill and experience.

Apart from these basic requirements at the stage of hearing and collecting information, a judge should exercise watchfulness in relation to both time and efforts spent on this stage of process. This stage of the process does not have a purpose in itself, but serves the cause of justice. A judge should be aware that "Justice delayed is justice denied". The judges are faced with the permanent problem about how much they should go into the facts. This particularly important for an inquisitorial system of judicial process. This is not only a problem of time and speediness of the process, but also it may be a matter of the privacy of the litigants, and in some cases the secrecy of state affairs. Above all, the judges should examine the procedural rules on the issue to determine whether or not they are protective enough. In the circumstances, where judges and adjudicators have discretion to choose the way the procedure will go, they should make every effort to meet the goals of justice. "What is crucial in the choosing of a procedure is that those affected by the decision should as far as possible feel confidence in, and willingly accept the validity and authority of the outcome of, whatever procedure is adopted".[72] The second stage of judicial process requires from the judges watchfulness both of the inner perspective of the participants and of how the objective of the judicial system to render justice without delay is met. The judges have to strike a balance between the demand to spend sufficient time examining the facts and motives of the litigants, and the demand to decide the case without delay.

(C) The third stage of the judicial process includes passing a judgement and its communication to the participants. The correctness of the judgement depends on the previous stages of judicial process. There are many examples, some of which have been considered above, when the mistakes made during the previous stages led finally to the invalidity of the whole judgement. However, the judges should continue to be even more watchful at the final stage of the process. The reason for this lies in the nature of the sympathy judgement supported in this thesis. The stage of the hearing serves for the purpose of taking the perspectives of the litigants. But the stage of passing judgement should be the result of the correct apprehension of what is fair in the particular situation.

The correct apprehension of fairness is a result of moral intuition guided by love for all parties in the process. Therefore, there are several dangers in passing judgement. The major one is that the decision-maker may fail to pass an impartial sympathy

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[72] Cane P. *An Introduction to Administrative Law.* - 3d ed. - Oxford: Clarendon Press, 1996. - P. 167.

judgement. The consideration of the first litigant's perspective can overweigh the perspective of the others. The judges should watch that their sympathies are properly balanced. This is a difficult task, especially if the experiences of one litigant are more similar to the experiences of the judge than the experiences of the other. For example, a female judge deciding case on sex discrimination in which a plaintiff is a woman and a defendant is a man can be expected to have more sympathy to the plaintiff than to the defendant, particularly if she had faced this sort of discrimination before.[73] Such a judge should be particularly aware of the danger of a partial sympathy judgement. In fact, the biases which are based on gender, class, subculture are always present. Without special attention to their influence a judge can hardly be impartial, because the operation of the biases is often hidden and unconscious.

The difficulties in passing an impartial sympathy judgement does not mean that a judge should flee from any sympathy. The practice of watchfulness and examination of one's own sympathies may serve as a good guarantee against errors in passing judgements. Another safeguard of correct apprehension are the principles and rules of law. When passing a sympathy judgement a judge must base his decision on a legal reason. If the moral intuition of the judge does not find expression in a legal reason, there is either an error in his moral intuition or error in his reasoning. Examining one's own sympathies helps to check the rightness of moral intuitions. But this is not enough. The judge has to be able to grasp the range and content of relevant legal reasons contained in the principles and rules. Here, however, a judge should also be watchful to take into account all relevant principles and rules. There may be a variety of legal principles and rules, and each of them is open to interpretation and reinterpretation. Consequently, when dealing with principles and rules, the judges should be watchful to find real content of the principles and rules in the light of the particular case. Dworkin's account of *Elmer*'s case gives a good introduction to the problem of finding the real content of the rules.[74] Dworkin's idea is that: "Judges before whom a statute is laid need to construct the 'real' statute - a statement of what difference the statute makes to the legal rights of various people - from the text in the statute book".[75] However, according to Dworkin, the judges are constrained in constructing the 'real' statute by adherence to legal and political culture of their community. A judge, when interpreting legal rules,

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[73] Pannick D. *Judges*. – Oxford University Press, 1987. - P. 41.
[74] Dworkin R. *Law's Empire*. - Harvard University Press, 1986. - P. 15ff.
[75] ibid., p. 17.

should not impose his own convictions on the community, unless his interpretation does fit into the set of ideas about justice and fairness accepted by the community.[76]

It was noticed in chapter 4 of the thesis that appeal to the general beliefs of the community is not the best solution for finding what is fair and just in the particular case. Nevertheless, the merit of Dworkin's concept of law as integrity is that the judges should flee from imposition of their own beliefs labelling them as a law. Dworkin comes very close to the idea of watchfulness in the course of constructing the meaning of existing rules. He points that law as integrity consists in questioning rather than answering.[77] This is the method of watchfulness. A watchful judge questions the correctness of his own moral intuitions in the light of the existing rules. It is true that the judge should look at the established legal rules as providers of what justice requires in a concrete situation.[78] But at the same time, he has also to question his correct understanding of the rules themselves. In a way, there is a closed circle: on the one hand, in order to find what is fair in the particular case, a judge should not rely only on his own intuition of fairness and should use the existing legal principles and rules as guidance; on the other hand, the interpretation of the rules laid out in statutes or precedents may be distorted through the errors of reasoning or conscience in the Thomistic sense of the word. This problem can be solved through the appeal to the universal moral principle which should guide comprehension of the rules and the situation. However, this principle, whether expressed in the idea of natural law or a certain abstract moral principle like the principle of neighbourly love, is not clear enough to provide a specific answer to problems of conscience. This principle itself needs interpretation. In chapter 3, we have seen that Aquinas's teaching points at the solution of the problem.

The life and teaching of Christ provides a pattern through which we can grasp the meaning of love both intellectually and intuitively. The principle of love as it is revealed in the Scriptures can serve as an ultimate test of correct interpretation of the existing rules. The message of love which the personality of Christ conveys does not reject legal rules. Rather, it empowers the decision makers to see in the other person someone who has dignity and deserves compassion, and apply the rules correspondingly. The principle of love makes the decision makers watchful of their prejudices and propensities which undermine the dignity of the another person. Here, we

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[76] ibid., p. 225.
[77] ibid.
[78] MacCormick N. *Legal Reasoning and Legal Theory.* -Oxford: Clarendon Press, 1954. - P. 74.

come back to the other aspect of watchfulness: it is always to keep in focus the meaning of love, whether it is done for extracting general and abstract meaning of legal principles and rules, or trying to apply these rules to the particular case. The principle of love becomes a light in which the legal instruments should be used, whereas watchfulness is a constant and enduring effort to keep using these instruments in the light of love.

Thus, watchfulness in the third stage of the process means that when applying a specific legal principle or rule to the particular case, the judge should discover the meaning of the rule and the facts of the case in the context of the principle of 'Love your neighbour as yourself'. This requires a determined effort on the part of decision-makers. It is natural to expect that a judge who is guided by agape is willing to give the reasons for his decision. The judges' obligation to give reasons for their decisions is held generally as an implicit part of a fair hearing.[79] However, it is not enough just to give any reasons, but to give reasons which are adequate. The court should ignore none of the points considered by a litigant to be fundamental. This is hardly possible without taking the perspective of the litigants at the stage of the hearing. Giving reasons is important not only for the litigants but also for the judges. For a judge, who is acting in good faith, and is trying to do justice to every party of the process, finding a legal reason is a result of both moral intuition and guidance by legal principles and rules. Giving reasons is a way of communication of moral intuition through the semantics of legal rules.

From the point of view of Christian ethics, there is not only a relationship (though it is often broken) between the litigants, there is also a relationship between the judge and litigants. People are in court because they cannot solve the problems of their lives without the assistance of law. A judge representing law enters a relationship with each participant in the process. The basis of this relationship is that a judge has to resolve the dispute according to the law. The principle of love makes it explicit why a judge should give reasons for his decision. Firstly, the litigants expect it because they acknowledge the jurisdiction of the judge on condition that their dispute is solved on the basis of legal reason, and they want to know what is this reason. In this respect, even if there were no written law which establishes duty of the judges to give reasons, it would not abrogate this duty. The principle of love requires giving reasons because of the expectations of the participants in the process. Secondly, if a judge acts according to the principle of love, communication of the reasons for the decision becomes the way of

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[79] Jacobs F., White R. *The European Convention on Human Rights.* - Oxford: Clarendon Press, 1996. - P. 125.

sharing the judge's experience and knowledge of the law with those who need the assistance of the law. Love in a Christian meaning is always sharing. Through giving reasons, a judge not only shows respect to his fellow being, but also tries to edify, teach and discipline. The importance of watchfulness increases even more at this final stage, particularly if giving reasons is accompanied by the judge's remarks and comments. The judge should watch over the words which have a tremendous effect on the lives of the participants, their trust in justice and righteousness. Only then will the mouth of the judge become "a fountain of life"(Proverbs of Solomon 10:11).

Conclusion.

Watchfulness as an implication of agapic casuistry can be completely understood only through its relation to the principle of ethical love. Agape becomes a power which moves the conscience of the moral agent to willingness to do good to the other person. Watchfulness is a virtue which makes the moral agent attentive and to seek what are the needs of the other person, and also make him aware of the danger of assuming that his vision of good is always correct. Watchfulness as a virtue calls the judges to examine their own moral presuppositions and conceptions which affect the process of judgement. It is hardly possible to transcend one's own moral horizon unless the person is guided by love. Love and watchfulness come together. It is impossible to be watchful enough to the needs of the other without loving the other, and it is impossible to love in its Christian meaning without being attentive at the same time.

The precept: 'Love your neighbour as yourself' calls a judge to acknowledge the importance of the other persons involved in the legal process, and at the same time to humble himself by acknowledging that the judge's own personality has no greater value than the personality of a person affected by judge's decision. The principle of love calls for understanding of the other, for sharing and helping. A watchful judge asks himself about what it means to love the people standing before him in the courtroom, and whose future may strongly depend on the decision which he has to take. For the judge, it means that he must be just and fair to them. A mechanical applying of certain legal rules may not render them justice. There will be always a time when a conscientious judge will understand that a strict application of the rule is unjust. The principle of love calls for finding another solution to the case. This is where the judge must be particularly watchful.

This thesis does not pretend to provide a technique of watchfulness. It is a result of experience of applying the principle of agape to a particular sort of judicial decision-making. It is also a result of the individual experience of every judge who follows agape in the exercise of judicial functions. Watchfulness is the way of arriving at sympathy judgement through applying the principle of love. One can give only a general description of what watchfulness is about, but it is only through practice that the way is completely known. In the following chapters we will consider some examples of judicial decision-making in order to make the general points outlined in this part of the thesis clearer.

PART III.

AGAPIC CASUISTRY IN ACTION.

9. NATURAL JUSTICE AND CONSCIENCE OF THE JUDGES IN CASE *RIDGE V. BALDWIN*.

Introduction.

In this chapter we shall consider an example of how agape and sympathy judgements can operate in the application of a general legal principle to a particular situation. The way the judges evaluate the facts and decide whether a principle is applicable or not is at the centre of our attention. In this chapter, we shall see the potential of love and sympathy in interpretation of a broad legal principle and weighing of the circumstances when deciding a particular case. The present example is taken from English administrative law. The principle which is at stake is a principle of natural justice, and the context is the necessity to take a decision whether or not to dismiss a chief constable for omissions in carrying out his responsibilities. Before looking at the details of the case it is important to clarify the meaning of natural justice.

Natural justice can have a double meaning. Firstly, it can be almost identical to the concept of natural law.[1] The second meaning has got much more definite content: the phrase natural justice encapsulates two ideas: that the individual be given adequate notice of the charge and an adequate hearing (*audi alteram partem*), and that the adjudicator be unbiased (*nemo judex in causa sua*).[2] This chapter deals with the second meaning of natural justice. Both the rule of hearing and the rule against bias originated in common law. The rules of natural justice have a long history[3], and undoubtedly, their existence in modern positive law is one of the legacies of the natural law tradition. "They have some objective validity and in these rules the law is simply giving effect to certain self-evident moral truths about how decisions ought to be made".[4] The significance of both requirements of natural justice, *audi alteram partem* and *nemo*

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[1] Jackson P. *Natural Justice.* - London: Sweet & Maxwell, 1979. - P. 1.
[2] Craig P. P. *Administrative Law.* - 4th edit. - Sweet & Maxwell, 1999. - P. 400.
[3] *Bagg's Case* (1615) 11 Co. Rep. 93b.
[4] Cane P. *An Introduction to Administrative Law.* (3d ed.) - Oxford: Clarendon Press, 1996. - P. 160.

judex in causa sua, becomes much more obvious if we look at them through the perspective of the principle of love. In Part II of the thesis, the importance of hearing and taking the position of the other participants in the process was already noted. Hearing and listening is essential for reaching an impartial sympathy judgement. The principle against bias was also examined when considering the importance of being watchful and making sure that justice is not only done but also is seen to be done. In other words, the principle of love contains the ultimate justification for the rules of natural justice.

The task of the present chapter is to show how a general legal principle or rule is to be applied through sympathy judgement and in accordance with the principle of love. It is true that both precepts of natural justice, as derived from the principle of love, can be held as the commandments of natural law in the meaning of Thomistic theology. However, these precepts are also established by the positive law and they are often seen as formal grounds for legal action. We are not concerned now with the fundamental moral justification of the precepts of natural justice. In this part of the thesis, the precept *audi alteram partem* will be considered only as a formal ground which determines specific legal rights and responsibilities. As a formal ground it may overlap and collide with other formal grounds; for example, when the established positive law allows an administrative body to take decisions without hearing the people affected, but the nature of the affected interest is such of importance that a judge may come to conclusion that a hearing must be granted. The law is full of examples where the judges have to weigh the legal reasons and the outcome of the process depends heavily on how the circumstances of the case were considered. This is where agapic casuistry offers the method of finding a just and equitable solution. The case *Ridge v. Baldwin* may serve as a good example of it.

The background of the Ridge v. Baldwin.

The case *Ridge v. Baldwin* in the House of Lords[5] may be considered as a watershed in the development of British administrative law in relation to the scope of application of the rules of natural justice, particularly in relation to the rule requiring a hearing. After giving an analysis of the previous case law, Craig noted that "it would be correct to say that the application of natural justice was at a low ebb prior to the decision

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[5] *Ridge v. Baldwin.* [1964] A.C. 42.

of the House of Lords in *Ridge v. Baldwin.*"[6] In the first half of the twentieth-century, the rule of natural justice which requires hearing the person affected by an administrative decision had a very restricted application. Unlike in some nineteenth-century cases, the courts began to draw a strict line between administrative and judicial or quasi-judicial decisions with the effect of limiting the application of a right to hearing. The importance of the *Ridge v. Baldwin* is seen, firstly, in rediscovering the nineteenth-century jurisprudence which had applied the principle to a broad spectrum of interests and a wide variety of decision-makers, and secondly, in discarding the dichotomy of administrative and judicial for the purpose of determining whether or not the rule of natural justice as applicable[7].

In *Ridge v. Baldwin,* a chief constable was dismissed by a borough watch committee on the ground of misconduct. He challenged the decision arguing that the watch committee dismissing him did not observe the rule of natural justice which requires that an applicant is given an opportunity to be heard before the decision of dismissal is taken. The borough watch committee had a duty to uphold the professional and moral level of the borough constables, as it was put in the relevant legal rule - "through appointment, suspension or dismissing any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same".[8] In the present case, the chief constable had been on trial in connection with conspiracy to obstruct the course of justice, the watch committee thought that it should take the appropriate course of action.[9] Thus, the issue was not whether the watch committee can dismiss or not but whether the watch committee is restricted in the exercise of its functions by the rules of natural justice. The watch committee, as soon as the charge became known to them, immediately reacted and suspended the chief constable from his position. Although the chief constable was finally acquitted by a jury on the criminal charges against him, the watch committee decided that he had been negligent in the discharge of his duties as chief constable and dismissed him from that office. No specific charge was formulated against him, although his solicitor was allowed later to address the committee. However, the decision had been already taken and the watch committee refused by a majority to reconsider its decision. The chief constable brought

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[6] Craig P. P. *Administrative Law.* - P. 405.
[7] ibid., p. 406.
[8] *Municipal Corporation Act.* 1882. Sec. 191 (4). Cited in: A.C. [1964]. 43.
[9] A.C. [1964]. 95.

an action against members of the watch committee for a declaration that his dismissal was illegal, ultra vires and void because the dismissal was contrary to natural justice.

The judge in the court of first instance held that the watch committee was restricted by the principles of natural justice, but that in this case these principles were observed[10]. The Court of Appeal took a different view and held that the watch committee was not bound by the principles of natural justice to hold an inquiry of a judicial and quasi-judicial nature in taking the executive action of dismissing their chief constable. Finally, the House of Lords held that the dismissal was null and void. Lord Reid, Lord Devlin, Lord Morris of Borth-y-Gest and Lord Hodson maintained that when dismissing the appellant on the ground of neglect of duty, the watch committee was bound to observe the principles of natural justice by informing the appellant of the charges made against him and giving him an opportunity of being heard.[11]

The circumstances and their evaluation.

It is interesting to observe that taking into account the same set of facts the judges of three courts reached different conclusions. In the matter of the relevance of the rules of natural justice the source of disagreement lies in the weighing of relevant circumstances and comprehension of the force of relevant rules. None of the judges questioned the content of the rule of natural justice which prescribes hearing the affected party. It was basically disagreement on whether the rule was applicable in this case, and, if it was, then in what way. It is clear that the different conclusions reached by the judges are a result of different evaluations of the circumstances of the case.

The differences in evaluation of the circumstances in *Ridge v. Baldwin* illustrate very well the different states of conscience: deontological, consequentialist and sympathy conscience, described in the previous chapters. At the same time, there is also a different evaluation of the principle of natural justice, though there was no question about its content. The issue may be not only whether the present circumstances justify application of the principle of natural justice, it may also be how far the principle of natural justice should be implemented whatever the circumstances are. The primarily interest for sympathy conscience lies in the uniqueness of the situation and the personalities. It looks firstly at the circumstances and then whether the principle of natural justice can work or not. Unlike the sympathy approach, strictly deontological

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[10] ibid., at 127.

reasoning concentrates on general conditions for the application of the principle of natural justice. It tries to lay down specific rules when the principle can be applied. Although the sympathy approach does not exclude the use of the rules and principles for guidance and justification, the way the rules and principles are used is very different. The sympathy approach grasps the uniqueness of the situation and seeks to understand the motives of the persons involved. The deontological approach expresses a commitment to apply a principle or rule whatever the consequences.

The method of agapic casuistry which underlies a sympathy judgement is also different from a consequentialist approach. The latter is directed to achieve the maximum of efficiency, the former is much more personal: it is based on sympathy with the parties affected by the decision. Though agapic casuistry does not exclude prospective considerations, it is always specific and is directed by the will to do good to actual people. It is true that in the world of real decision making it can often be difficult to distinguish all three approaches. Deontological and consequentialist argumentation can be mingled together with sympathy in many cases. It might be very difficult for a researcher and even for a self-examining judge to identify the nature of his reasoning.

Ridge v. Baldwin may serve as a good example where different judges, not only of the same court but the courts of three levels, indicate clearly different legal reasoning. Deontological reasoning can be traced in the decision of the court of the first instance (Streatfeild J.). In the law report of the case before the House of Lords the reasoning of Streatfeild J. is not articulated clearly enough, because the respondents' main contention in the House of Lords was that they were not under a duty to act according to the principles of natural justice. Yet, because they claimed that even in this case the rules of natural justice were not violated, the position of Streatfeild J. is presented partly in their argumentation. This position is seen clearer from its criticism by Lord Reid[12] and its justification by Lord Evershed.[13]

There is at least one circumstance which was given primary value when Streitfeild J. was deciding the case. After dismissing the chief constable the watch committee met again in order to hear the appellant's solicitor and to decide whether to adhere to the previous decision or not. This was evaluated in such a way that the respondents' failure to follow the rules of natural justice on the day of dismissal was

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[11] A.C. [1964]. 42.
[12] A.C. [1964]. 79.
[13] ibid., at 81.

made good by the meeting of the watch committee on the other day when the appellant's solicitor was heard[14]. From the point of view of deontological reasoning the requirement of a hearing was met. What was missed, however, by this reasoning, was the real impact of it on the decision and effect on the applicant. Also, no specific charge was formulated at this time as well, and the committee refused to reconsider its own decision. The majority of the members of the committee were quite satisfied that a formal requirement was met, and therefore the matter was closed. There was no sympathy, compassion and mercy to the applicant.

Consequentialist reasoning can be seen in the decision of the Court of Appeal. Although it also analysed the circumstances in favour of the watch committee, it was different from the deontological reasoning of Streitfeild J. It maintained that when deciding on the case the watch committee was not bound by the rules of natural justice. The primary circumstance lies in the nature of the acting body. There was authority saying that the principles of natural justice are not applicable to bodies similar to the watch committee.[15] This authority maintains that the principles of natural justice are relevant only where the body has the duty to act judicially.[16] The adherence to this authority itself also has deontological overtones, but the underlying reason of that authority is of a consequentialist nature. It is not practical to burden administrative agencies with such rules which endanger their administrative efficiency. Therefore, the legislator has given an unfettered discretion to the watch committee to dismiss anybody whom they think negligent in the discharge of his duty, or otherwise unfit for the same.[17]

Dissenting in the House of Lords, Lord Evershed put the consequentialist argument in the following form: because the watch committee had a duty to the citizens of Brighton "to act and to act at once so as to give effect to what the trial judge had after so long a hearing in effect determined"[18], the requirement of natural justice was not applicable. The conduct of the appellant had been the subject of a public trial lasting 19 days, and the observations of the judge during this trial contained the charges of misconduct. Thus, in the opinion of Lord Evershed who accepted the position of the

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[14] ibid., at 79.
[15] *Nakkuda Ali v. Jayaratne* A.C. [1951]. 66.
[16] A.C. [1964]. 78.
[17] ibid., at 59, 94.
[18] ibid., at 95.

Court of Appeal, everyone was aware of the content of the charges, therefore it was not practical to give a hearing to the appellant even though he was acquitted by the jury.

Sympathy reasoning is, however, clearly articulated in the opinion of Lord Reid. The main evidence of the fact that sympathy judgement took place, is a clear indication that Lord Reid understood and accepted the appellant's motives for challenging the decision of the watch committee. Lord Reid noted that "the appellant's real interest in this appeal is to try to save his pension rights".[19] It was considered as an important circumstance that at the moment of dismissal he was within 14 months of the age on which he would have been entitled to retire voluntarily with full pension, the pension which the appellant would loose because of the dismissal. It is expressed clearly enough that the fact that the appellant did not seek to be reinstated as chief constable, and that his whole concern was to avoid the serious financial consequences, played a key role in Lord Reid's call to allow the appeal.[20]

Sympathy reasoning by Lord Reid becomes even more explicit in the consideration of the appellant's previous service. It was particularly taken into account that the appellant had, at the date when he had been suspended from his office, served more than 33 years and had risen from the rank of police constable to that of chief constable[21]. During this long period of service there had never been any criticism of his work in the police force.

The passionate tone of Lord Reid's opinion points at sympathy too: "Dismissing a chief constable who has not been convicted of any criminal offence is not a thing to be done lightly"[22]. He rejected the authority which allowed the watch committee to escape from the observance of the rules of natural justice. He argued that that there is older authority which confirms the duty to act according to natural justice.[23] Lord Reid acknowledged that the existing law concerning the principles of natural justice within administrative law was contradictory and defective.[24] In other words the existing law did not prevent administrative bodies from applying the principles of natural justice. By stating this, Lord Reid rejected the consequentialist argument. There was nothing in the nature of the acting body which excused it from not complying with the rules of natural

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[19] ibid., at 68.
[20] ibid., at 81.
[21] ibid., at 63.
[22] ibid., at 80.
[23] ibid., at 79.
[24] ibid., at 77.

justice. As for the argument that the watch committee had the second meeting where the appellant's solicitor was given a chance to be heard, this circumstance, according to Lord Reid, did not make good the failure to follow the rules of natural justice on the day of dismissal, because no specific charges were made.

However, it is not passion which makes the arguments of Lord Reid strong. His judgement is a good example of the way a judge with compassionate conscience deals with legal reasons which do not support his moral intuition. According to the positive law as it was conceived by Lord Reid there were several possible grounds for considering the rules of natural justice as not applicable: the activities of the acting body are purely administrative[25], or the body acts in a public interest of great importance[26], or there are special circumstances like war[27], or the applicability of the rules of natural justice is excluded by the lawgiver[28]. He puts these reasons in the context in which they had been made. Lord Reid tried to find a historical explanation for the restricted application of the rules of natural justice during war-time, and made a contextual analysis of the situations when a minister acting in the public interest cannot apply the rules of natural justice.[29] He found that both types of reasons cannot be applied to the circumstances of the *Ridge v. Baldwin.* The statutory law concerning the dismissal on the ground of neglect of duty was interpreted so that the authorities should inform the appellant of the charges made against him and should give him an opportunity of being heard.[30] As for the idea that the rule of natural justice is not applicable to any administrative case, that was held not to correspond an older line of authorities.[31]

It is difficult to say how much exactly a sympathy approach helped to Lord Reid to bring clarity into confused state of case law on the right to hearing. It is true that, beside sympathy, a judge needs a deep knowledge of the law in order to handle the case law in the same way as Lord Reid did. Whether it is sympathy which helped Lord Reid to understand the previous case law better, or good knowledge of the previous case law which allowed Lord Reid to pass a sympathy judgement, does not matter much. What is important is that the possibility of exercising sympathy judgement depends on the judge's knowledge of law, and at the same time a deep understanding of case-law is

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[25] ibid., at 72.
[26] ibid.
[27] ibid., at 73.
[28] ibid., at 74-77.
[29] ibid., at 72-73.
[30] ibid., at 66, 79.
[31] ibid., at 66.

promoted if one looks at it with sympathy conscience. Sympathy and knowledge of law go hand in hand.

The opinion of Lord Reid illustrates better the difference between consequentialist and sympathy judgements. Both judgements can invoke consideration of the effect of a particular act or omission, both can and do employ normative arguments, but the vision of the circumstances and the meaning of the rules are different. Sympathy judgement makes a decision maker look at the circumstances and rules through the perspective of those who are affected by them. Consequentialist judgement disregards the affected individual in the interest of general effect on society, law and etc. In comparison, deontological judgement disregards the affected individual in a similar way. It does that only in the interest of keeping an established rule or principle without paying much attention to the real effect of these rules and principles on the individual.

Thus, the difference between all three positions which appeared in the case (one is the court of the first instance, another is the Court of Appeal and Lord Evershed in the House of Lords, and the third is the majority of the House of Lords), lies in the type of legal reasoning. All the judges dealt with the same set of circumstances and the same principle. The content of the principle was not questioned, and there were no disputes concerning the facts. What was different is a distinct comprehension of the scope of the principle in relation to the given circumstances, which leads us on to consider is whether in the given circumstances it was possible to give one correct legal answer.

Error of conscience.

Whether or not there is always one legal answer to hard cases in law is a huge question of jurisprudence which deserves a separate book[32]. In this chapter we shall consider whether there was only one legal answer in the present case and whether the majority of the Lords reached it. In the House of Lords there was only Lord Evershed who took the perspective of the Court of Appeal, and accepted that the decision of the judge (Streatfeild) at the first instance might be correct. He said that "having considered the whole matter with the greatest care of which I am capable, I conclude that justice was here done - or, at least, that there was no 'real substantial miscarriage of justice'".[33] The dissenting opinion of Lord Evershed is not only interesting because it contains both

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[32] Dworkin's *Law's Empire* (Harvard University Press, 1986) is one such book.

the deontological argument of the judge at the first instance, and the consequentialist reasoning of the Court of Appeal, it is also interesting that he admits that there is no certain answer whether the rule of natural justice was broken or not.[34] The underlying logic was the presumption that the scope of the principles of natural justice cannot be precisely defined.[35]

Quite a different approach can be seen in the judgement of Lord Reid: "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried and nicely weighed or measured therefore it does not exist".[36] In other words Lord Reid maintains the possibility of finding a correct legal answer even though the scope of the principles of natural justice is indeterminate. Willingly or unwillingly, the Lords touched on one of the most difficult issues of jurisprudence. Lord Reid held that in the given case the circumstances favoured application of the principle of natural justice. Lord Evershed held that the same circumstances were not so strong to justify a definite positive answer, and because there was some doubt it was better not to apply this principle for consequentialist reasons.

A matter of giving one or several answers to one legal question draws even more difficult questions about the conscience of judges and its errors. In order to clarify this point let us take the examples of the types of legal reasoning outlined in chapter 4. MacCormick's theory supports the view that the judges should apply established legal rules as long as there is a situation where the rules give a definite answer. In the present case, however, it was not clear enough whether the rule of natural justice was applicable. Recent authorities were in favour of not applying the rule requiring a hearing to the activities of administrative bodies[37], nevertheless, there were some authorities in the nineteenth century which held a different line.[38] But if even one decided to apply the rule that there is no hearing required in administrative cases, one would have to be absolutely sure that the process of dismissal of the chief constable is a purely

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[33] A.C. [1964]. 97.
[34] ibid., at 97-101,
[35] ibid., at 85.
[36] ibid., at 64-65.
[37] *Errington v. Minister of Health.* [1935] 1K.B. 249; *Offer v. Minister of Health.* [1936] 1 K.B. 40; *Frost v. Minister of Health.* [1935] 1K.B. 286; *R. v. Metropolitan Police Commissioner, ex p. Parker.* [1953] 1 W.L.R. 1150; *Nakkuda Ali v. Jayaratne.* [1951] A.C. 66.

administrative one. If it was an administrative act then the majority of the House of Lords did not arrive at the correct decision as MacCormick's theory prescribes. If there is some doubts on the nature of the process, then MacCormick employs a consequentialist argument in order to get a clear answer. Consequentialist argument is restricted, however, by the requirement to be consistent and coherent with other rules[39]. But how does it work in this particular case? Whatever decision is taken one can draw a line of consistency and coherence with both competing lines in the case law. There are enough authorities which can support contrary decisions. If this does not work MacCormick may appeal to 'justice', 'common sense', 'public policy' and 'legal expediency'.[40] But all these require a further interpretation, and as we can see the judges fundamentally disagreed with each other whether or not the chief constable was deprived of justice. The theory of MacCormick does not provide a specific answer to this case, or rather it can potentially justify any outcome of the process.

Beyleveld and Brownsword also believe that their theory can provide a correct legal determination of the issue.[41] In a sense this is true. Their theory is rich and sophisticated. However, it is so sophisticated that it seems that it is possible to draw from it several and contradictory determinations. Their theory contains an important idea that when taking a decision, a judge should look at competing interests expressed in legal rights and duties, and consider the real effect of the decision on the persons involved. They maintain that a correct legal answer is that which has the least damaging effect on any individual.[42] This approach has, however, the difficulty of measuring damaging effects, particularly in the matter of natural justice. The members of the watch committee took a decision to dismiss the chief constable for alleged misconduct in accordance with legal rules in pursuing the public interest. Although the decision was taken without bringing specific charges and a hearing, the committee argued that they had allowed the solicitor for the chief constable to be heard later, the applicant was aware of the content of the charges, and, anyway, a hearing would not change their decision because of the public interest in having a trustworthy chief constable. The

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[38] *Cooper v. Wandsworth Board of Works.* (1863) 14 C.B.N.S. 180; *Hopkins v. Smethwick Local Board of Health.* (1890) 24 Q.B.D. 713.
[39] MacCormick N. *Legal Reasoning and Legal Theory.* - Oxford: Clarendon Press, 1994. - P. 184.
[40] ibid., p. 250.
[41] Beyleveld D, Brownsword R. *Law as a Moral Judgement.* - London: Sweet & Maxwell, 1986. - P. 390.
[42] ibid., p. 146-150.

committee argued that strict observance of the rules of natural justice itself would not change the original decision.

The theory of Beyleveld and Brownsword puts the Principle of Generic Consistency - PGC as the cornerstone of adjudication[43], which requires that judges should apply the rules rationally. They insist that the PGC can provide a determinate solution to legal cases. But if we try to apply it to *Ridge v. Baldwin,* it is difficult to see one answer. Beyleveld and Brownsword suggest finding a solution through an intellectual process of weighing the interests and goods involved in this case. But the answer to the question whether in this particular case the chief constable has a right to be heard remains open because the exact evaluation of the goods in the given circumstances cannot be predicted. As we have seen, the same circumstances were evaluated differently by the judges of the three courts, and all of them could appeal successfully to the PGC.

Streatfeild J, the judges of the Court of Appeal and Lord Evershed all could argue that the decision of the committee was a rational decision, because there was a need to uphold the moral prestige of police forces. That the chief constable was aware of the charges, and although he had been acquitted by the jury in criminal proceedings, did not prevent the committee dismissing the chief constable because its decision did not require the criteria of 'beyond reasonable doubt' in establishing his misdeeds. Above all, these judges decided this case in accordance with existing legal materials, and this is exactly what the PGC requires.[44] Although it is true that the existing legal materials were in confusion these judges attempted sincerely and seriously to produce the correct legal-moral determination of the issue. The sincerity and seriousness are presented by Beyleveld and Brounsword as the essence of the process of adjudication.[45]

Thus, rationality of the decision, its correspondence to the legal materials, the sincerity and seriousness of the judges make the decision of dismissing the chief constable correct in the light of the PGC. But the problem is that the same requirements of the PGC makes the opposite decision of the majority of House of Lords correct as well. Apart from other reasons in favour of the decision against dismissing the chief constable without a hearing, the latter could argue that giving an opportunity to the chief constable to be heard before the decision concerning dismissal fits better into the ideal

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[43] ibid., p. 436.
[44] ibid., pp 394ff.
[45] ibid., p. 388.

of legal order as community of friends promoted by Beyleveld and Brounsword with their stress on importance of open, participatory, and accountable government.[46] It is clear that a bare rationality of the decision, consistency with legal materials and the commitment of the judges to produce the correct decision are not enough to ensure that the PGC can provide a definite answer in all cases. In fact, Beyleveld and Brownsword acknowledge that.[47] They try to neutralise this weakness of the PGC by developing the institutional requirements of the PGC: a legally valid constitution, accountability of officials, certain procedural principles including promulgation and clarity of legal rules, their stability and prospectivity, and demand for congruence between official action and declared rule.[48] Undoubtedly, all these requirements are of great importance for the whole legal order. But they alone do not provide a specific answer to the question of the applicability of the principle of natural justice in the present case. The principle of love has greater potential for helping the judges to produce the correct legal answer in cases similar to *Ridge v. Baldwin*. It does not contradict to the institutional requirements of the PGC. Moreover, it supports and completes them. The principle of love gives a more stable basis for the vision of the society as the community of friends, defended by Beyleveld and Brownsword.

Dworkin's theory may claim it provides fuller assistance in finding a correct decision in the given case. The advantage of his theory is the vision that the meaning of legal rules is not apparent, and that the judges have to give their interpretation of the rule of natural justice in respect to the particular circumstances.[49] However, the problem is how they should interpret it. He insists that the judges when making their decisions should be led by the idea of law and legal rights. But once again, there is the question of whether the chief constable has a legal right to be heard. Dworkin says that we have to take the perspective of the community. But whose community? Dworkin thinks that it is an ideal community of rights or the model of principle.[50] What is then the difference between the ideal community of Dworkin and the real community of Lord Evershed? The latter defended the position of the watch committee because it took the perspective of the citizens of Brighton "to act and to act at once so as to give effect to what the trial

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[46] ibid., pp. 316-319.
[47] ibid., p. 190.
[48] See Chapter 7 of their book.
[49] Dworkin R. *Law's Empire.* - Harvard University Press, 1986. - p. VII.
[50] ibid., p. 214.

judge had after so long a hearing in effect determined"[51], and he rejected the position of the rest of the Lords because he thought that compassion to the chief constable was just a sentiment.[52] It seems that Dworkin's ideal community fits well into the community defended by Lord Evershed. Dworkin wrote: "If we can understand our practices as appropriate to the model of principle, we can support the legitimacy of our institutions, and the political obligations they assume, as a matter of fraternity, and we should therefore strive to improve our institutions in that direction. It bears repeating that nothing in this argument suggests that the citizens of a nation state, or even a smaller political community, either do or should feel for one another any emotion that can usefully be called love".[53]

It would be a mistake, however, to assert that Dworkin's ideal community favours indiscriminately the efforts of the watch committee to improve the work of police in community of Brighton. His theory of principle against policy can be interpreted in a different way in favour of the chief constable providing that the chief constable indeed had a right to a hearing and that right had been violated. This was the central issue of *Ridge v. Baldwin.* As we have seen the authorities did not provide one specific answer. This situation is exactly of the kind which the theory of Dworkin claims to solve through the process of constructive interpretation. Dworkin puts emphasis on the principle of integrity when deciding a hard case. It requires the judges to find the implicit standard underlying past decisions, and on the basis of this standard to make a fresh ruling. But the case law on the rules of natural justice does not contain one standard: if so, does it mean that the principle of integrity cannot be applied in this particular case? Surely, Dworkin would not agree. He would say in this situation the judges should take their decision what fits the best in or follow the principles of justice, fairness, and so on. But is it fair and just to dismiss the chief constable in the circumstances of the present case? Apparently, there was no one answer for the judges. Although Dworkin believes that his theory can provide the correct answer to legal issues he has to admit that the judges may disagree on the results of their constructive interpretation[54].

Thus, neither the theory of MacCormick, nor that of Beyleveld and Brownsword, nor that of Dworkin can give one definite answer to what the judges should decide in the

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[51] [1964] A.C. at 95.
[52] ibid., at 96.
[53] Dworkin R. *Law's Empire.* - P. 214-215.

case of *Ridge v. Baldwin.* Rather, all of them can potentially justify any of the positions taken. All the judges who disagreed on the issue could argue that they were applying the law, that they used the best consequentialist argument, that their decisions are in compliance with the PGC, and that they figure in or follow from the principles of justice, fairness, and procedural due process as accepted by the community.

Posner's theory may provide a specific answer to this case even though Posner says that the demonstration that a legal decision is correct often is impossible.[55] However, if we take economic efficiency or wealth maximisation as the guiding principle for judicial decision-making,[56] then it is clear then no hearing should not be allowed because it is expensive both in time and money. Therefore, the majority of the House of Lords took the wrong decision. In chapter 4, I have given the reasons why the principle of wealth maximisation cannot be the guiding principle of adjudication. The implications of agapic casuistry are the opposite. It will be shown later that the decision reached by the majority of the House of Lords was correct. Before that it is worth noticing that the theory of Posner is similar to other three theories considered above, at least in one point.

The similarity between the theories described is that they miss the voluntary source of judicial errors. According to Thomas Aquinas the error of conscience is a result of ignorance[57]. Ignorance may be either of a rule, or a principle, or circumstances. It is ignorance which is responsible for wrong comprehension of an object. All theories considered above deal directly or indirectly with involuntary errors. MacCormick may think that the cause of incorrect judicial decision was a wrong apprehension of a legal rule in relation to the given circumstances, Beyleveld and Brownsword may think that it was a wrong weighing of the circumstances in the light of the principle of the PGC. Dworkin's source of ignorance may be more fundamental: ignorance of the principle of integrity. A judge can make an error because he is a conventionalist or consequentialist. Posner, who is a consequentialist, may say that the source of error is ignorance of real economic effects of the decision on the whole society.

All these theories in presenting the errors of judicial conscience in their own way may be right. It is true that the judges can make mistakes in their apprehension of a legal rule in relation to the given circumstances, or in weighing the circumstances in the light

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[54] ibid., p. 239.
[55] Posner R. *The Problems of Jurisprudence.* - Harvard University Press, 1990. - P. 459.
[56] Posner R. *Economic Analysis of Law.* - Toronto: Little, Brown and Company, 1992. - P. 534.

of fundamental moral principle, or a judge can be a conventionalist or consequentialist, and even being a consequentialist he still can make mistakes in considering the real effect of his decision. Judges are human beings, and they can make mistakes. However, there are some errors which the judges cannot be excused, and this kind of errors are neglected by the theories considered above. I am talking about the errors caused by willing ignorance, which in the context of agapic casuistry is a failure to take seriously the principle of neighbourly love. The advantage of Aquinas's vision of erroneous conscience is his stress on the importance of good will of the decision makers. It is the will of the judges which makes their decisions good or bad.[58] The consideration of the moral teaching of Thomas Aquinas and Petrazycki's psychological theory of law led us to make a conclusion that it is love which makes a decision correct.

Thus, although a deontological or a consequentialist theory of judicial reasoning can point at certain errors of judicial reasoning in general, such theories cannot give a clear answer to whose judgement is correct in the particular case like the one of *Ridge v. Baldwin*. The sympathy theory of judicial reasoning presented in this thesis does not pretend to possess always one definite answer to all legal cases. What it claims only, is that it has more potential in solving the cases of conscience then the theories of legal reasoning outlined above, because it emphasises the internal attitude of the judges towards the people affected by their decisions. It maintains that the judges are fallible and make errors because of ignorance. However, the judges can overcome one particular sort of ignorance which has roots in their will through practising sympathy judgement towards all the parties to process.

Impartial sympathy as a test of judicial errors.

According to agapic casuistry a decision is correct if a judge is guided by the principle of loving one's neighbour when evaluating the circumstances and choosing a legal reason. Because a judicial process involves at least two parties, a judge has to apply the neighbour love principle to all the parties involved. Therefore, if it is established that a judge failed to exercise sympathy judgement at least towards one party, one can speak about voluntary error which makes the whole decision morally bad. It is important that the observer has enough materials to draw a conclusion that the

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[57] Thomas Aquinas. *Summa Theologiae.* - I-II. 19. 5.
[58] ibid., I-II. 19. 2.

judges succeeded or failed to exercise an impartial sympathy judgement. Many reports do not offer enough evidence. *Ridge v. Baldwin* is, however, an exception.

In Part II of the thesis it was said that impartial sympathy is arrived at through imaginatively putting of the decision-maker in the context of the behaviour of all the parties, then an intuitive grasp of what is the right answer to the issue, and then a search for the appropriate legal reason which supports the finding. If no reason is found then a judge has to re-examine the adequacy of his evaluations of the circumstances and accuracy of his moral intuition. The basic idea of agapic casuistry is that the correctness of a legal decision is determined not so much by the result, as by understanding the motives of the parties and the intention to do good towards them.

If we use the method of agapic casuistry in finding out whose position among the judges is correct in the decision *Ridge v. Baldwin,* then we have to ask whose position reflects the ways of sympathy. It was already shown that the majority of the Lords experienced sympathy towards the chief constable. There may be a question of whether the majority of Lords passed an *impartial* sympathy judgement in relation to watch committee. There are some indications that the perspective of the watch committee was taken into account and found inadequate. There were arguments that following the procedure prescribed by natural justice would be unnecessary because firstly the case was clear that the chief constable should be dismissed,[59] secondly, there was a grave emergency requiring the Committee to act promptly,[60] and thirdly, the dismissal was the only reasonable decision[61]. All these arguments were finally rejected by the majority of the Lords as we have seen when considering how the circumstances were evaluated by the judges.

There was also an argument that the watch committee in fact complied with the rule of natural justice. Lord Reid commented on the fact that the watch committee finally agreed to hear the applicant's solicitor, the fact which was thought by some judges as a ground to affirm that the rules of natural justice had been complied with: "But here the applicant's solicitor was not fully informed of the charges against the appellant and the watch committee did not annul the decision which they had already published and proceed to make a new decision. In my judgement, what was done on that

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[59] A.C. [1964]. 68, 128-129.
[60] ibid., at 98.
[61] ibid., at 126.

day was a very inadequate substitute for a full hearing."[62] Given the attention which the majority of the Lords paid to the motives of the watch committee when dismissing the chief constable without a hearing, one can conclude that the Lords passed an impartial sympathy judgement.

We have to examine whether or not in dissenting Lord Evershed reached also an impartial sympathy judgement. He took the perspective of the committee: "In my judgement the watch committee had a duty - a duty not only to the corporation of which they were the committee but also to the citizens of Brighton - to act and to act at once".[63] However, it is not enough to take a perspective of the parties, it is important to pass a judgement whether the evaluated behaviour is correct. It is not difficult to note, that in the given circumstances the committee's duty to act and act at once did not necessarily come into conflict with requirement of a hearing. The mere fact that after making its decision the watch committee agreed to hear the applicant's solicitor, stresses this point.

It is difficult to find in the opinion of Lord Evershed any sympathy towards the dismissed chief constable. Moreover, he directly condemned any, what he called, sentiment towards him, which he observed on the part of the other Lords. Commenting on the circumstances which to a considerable degree influenced the majority of the Lords to allow the appeal, Lord Evershed noted: "It is undoubtedly a striking fact that the appellant had at the date when he had been suspended from his office of chief constable served some 331/2 years... . During this long period of service it does not appear that there had ever been any criticism of his work in the police force". Moreover, on day of dismissal "he had attained the age of 58 years and 10 months - in other words he was within 14 month of the age on which he would have been entitled to retire voluntarily with full pension". And after that Lord Evershed made very interesting statement: "To insist on the invocation of natural justice in such situation seems to invoke what may often be in truth little more than sentiment".[64] This comment of Lord Evershed is interesting because it shows that taking personal considerations into account does not necessarily mean passing a sympathy judgement. Lord Evershed agrees with the rest of the Lords that the personal circumstances are important, but he refuses to follow the same treatment of these circumstances as the rest of the Lords did. Thus,

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[62] ibid., at 79.
[63] ibid., at 95.
[64] ibid., at 96.

Lord Evershed refused to take the perspective of the chief constable. His opinion shows clearly the lack of impartial sympathy, and therefore one can speak about the presence of voluntary ignorance in his judgement, ignorance in the meaning of Aquinas's theory outlined in chapter 3 of the thesis.

It is true that not every case report can give us sufficient evidence that impartial sympathy took place or that there was an error of conscience. However, that does not devalue the importance of the test of impartial sympathy. First of all, this test has a greater value for those who are directly involved in legal process: the judges, lawyers and litigants. All of them are in a better position than a reader of a case report to see whether the judges are guided by a sympathy judgement. The judges applying that test to themselves can improve their work. The lawyers and litigants can help the judges by stressing the factors of sympathy and appealing to judges' conscience. This test is also important for the public. Although they have less possibility to observe the sympathy of the judges than the participants in the legal process themselves, the public through adherence to the pattern of impartial sympathy can indirectly affect the attitude of the judges.

Conclusion.

The case of *Ridge v. Baldwin* helps us to see the way the judges can use their powers in the situation when the legal authorities do not provide a one answer to the matter. It is true that the legal authorities are not in confusion in every case. However, the other aspect of the *Ridge v. Baldwin*, that is an application of a general rule to the particular circumstances, makes it a valuable example of operation of sympathy judgement even in the cases where legal authorities are more certain on the question of law.

This particular case is a good example of how sympathy judgement can operate when the matter is about whether or not a general legal provision is applicable. Sympathy judgement appears not only as a means of understanding the circumstances of the case and the situations in which the parties of the process found themselves. The opinion of Lord Reid also shows that a sympathy judgement can be an effective means of understanding previous case law, its context and how the scope of the previous case-law can be applied to the present matter.

Above all, one can see that the method of agapic casuistry gives an opportunity to look behind the articulate argumentation at the depth of moral reasoning. The method

allows us to see not only a deeper conflict between different kinds of moral reasoning of the judges, it also indicates the way to be a judge and to be a human being at the same time. For to feel compassion to other fellow beings is essential part of being human. *Ridge v. Baldwin* can be seen as unusual case not only because it left a remarkable mark on the whole case-law concerning natural justice, it is an unusual case where the judge's compassion can be clearly seen in its open conflict with a formalistic approach. Deontological and consequentialist types of reasoning alone contain a danger of making a judge an impersonal machine which applies legal rules and pursue social goals. *Ridge v. Baldwin* teaches how the judges can render justice to the particular and at the same time not rejecting general propositions of law.

10. SYMPATHY JUDGEMENTS AND THE DECLARATORY POWER OF THE HIGH COURT OF JUSTICIARY.

Introduction.

This chapter will deal with the operation of sympathy judgements in cases of exercising broad judicial discretion. The criminal cases of Scottish High Court of Justiciary are taken as examples of how sympathy judgements are passed when the judges are faced with the shortcomings of formal law to protect the interests of individuals or society in general. The exercise of the declaratory power by the High Court of Justiciary is interesting as an example of where discretionary power can result in the aggravation of legal consequences for the individual compared with the formal law established previously[1], and what is more interesting, that this aggravation takes place in criminal law in which the requirement of non-retroactivity is one of the most important and universally recognised principles of law.[2]

The High Court of Justiciary is the superior criminal court of Scotland. It consists of the Lord Justice-General of Scotland as president, the Lord Justice-Clerk as vice-president, and the Lords Commissioners of Justiciary. The decisions of the High Court of the Justiciary on appeal are final. Unlike civil cases, no further appeal lies to the House of Lords. Scots criminal law is uncodified and has both statutory and common law origins. The declaratory power originated in Scots common law. Often it is defined as "the power vested in the High Court to declare conduct to be a crime, even if it has not be previously been considered to be criminal".[3] However, this understanding of the declaratory power, which is generally shared almost by every academic work on Scots criminal law[4], is not completely correct if we take the view of Scots common law. Hume in his authoritative book *Commentaries on the Law of Scotland*[5] defined the declaratory power as "an inherent power as such competently to punish (with the

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[1] Tasioulas J. The Paradox of Equity. in: 55(3) *Cambridge Law Journal* (1996), pp. 456-469. - P. 457.
[2] See: *European Convention on Human Rights.* Art. 7.
[3] McCall Smith R., Sheldon D. *Scots Criminal Law.* - Edinburgh: Butterworth, 1992. - P. 6.
[4] Gordon G. *Criminal Law.* - Edinburgh: Green, 1978. - P. 23 (1-15). Gane Ch., Stoddart Ch. *A Casebook on Scottish Criminal Law.* - Edinburgh: Green, 1991. - P. 15. Jones T., Christie M. *Criminal Law.* - Edinburgh: Green, 1996. - P. 18.
[5] Hume D. *Commentaries on the Law of Scotland Respecting Crimes.* - Edinburgh: Law Society of Scotland, 1986. - I, 12.

exception of life and limb) every act which is obviously of a criminal nature, though it be such which in time past has never been the subject of prosecution." It is clear that Hume did not mean that the High Court has "the power to criminalise what was not formerly known to be criminal", but that the High Court has the power to punish those crimes which were never punished before and the punishment of which was not foreseen by the legislation.

The misunderstanding of the nature of the declaratory power has resulted in its unjustifiable criticism, and it springs from an assumption that crime is an act or omission which is punished according to a formerly identifiable legal rule. There is a presumption that if there is no formally recognised legal rule there is no crime. Lindsay Farmer noted that the modern legal theorists failed to expose the inherent characteristics of crime.[6] It is worth noticing, however, that the use of the declaratory power is based on a non-positivistic vision of law. If one looks at law, which apart from positive law includes natural law, it becomes clear that crime is not only what has been held by the state authority to be criminal but that, which has some inherent characteristics. The idea of natural law offers a theoretical basis for the legal concept of crime and fits better the legal practices of the courts than the positivistic concept of crime can do. It is possible to draw two characteristics of crime from the idea of natural law: it is grossly immoral; and it is injurious to a particular individual or society in general. This view was generally shared by David Hume and other authorities on Scottish criminal law.[7] As we will see later, this view on crime was shared also by the judges who exercised the declaratory power.

In this chapter we will look at the phenomenon of the declaratory power not as something which belongs exclusively to Scottish High Court of Justiciary, but as an inherent characteristic of applying broad legal definitions and procedures to various social situations. The declaratory power is an essential element of judicial creativity. It lies in the nature of judicial process, and it can be observed in the activities of the other courts.[8] In English criminal law a sort of the declaratory power was exercised for

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[6] Farmer L. *Criminal Law, Tradition and Legal Order.* - Cambridge University Press, 1997. - P. 175.
[7] Alison A. *Principles of the Criminal Law of Scotland.* - Edinburgh: Butterworth, 1989. - I. 624. Macdonald J. *Practical Treatise on the Criminal Law of Scotland.* - Edinburgh: Paterson, 1867. - P. 2. Erskine J. *An Institute of the Law of Scotland.* - In 2 Vol. - Edinburgh: Law Society of Scotland, 1989. - IV.4.2.
[8] See: Cadoppi A. '*Nulla Poena Sine Lege* and Scots Law: A Continental Perspective'. in *J.R.* 1988. 73.

example in *Shaw v. Director of Public Prosecutions*[9]. Although in *Knuller*[10] the idea that the English courts have some general or residual power to create new criminal offences was rejected[11] it was acknowledged at the same time that the English courts still have "the power where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare".[12] As we shall see this is not very different from the understanding of the declaratory power in Scotland. The difference is only that the declaratory power of the High Court is recognised on the level of legal doctrine and was referred to more often. This reference makes it particularly valuable for examining the operation of judicial conscience which otherwise is hidden beyond a bare references to the statutory provisions. The advantage of the Scottish doctrine of the declaratory power is that it does acknowledge the realities of judicial decision-making.

The declaratory power as application of the unwritten law.

The discussion of the declaratory power by the High Court of Justiciary is, to a large degree, influenced by the fact that the High Court decides criminal cases, and secondly, the decisions of the court directly and inevitably affect the future decisions of the court. The first particularity leads, on the one hand, to a larger amount of sympathy judgements because the decision of the judges affect significantly the future of the accused, and affect the moral sense of the victims and society in general who demand a just retribution. On the other hand, there are more legal restrictions on exercising judicial discretion in relation to determining what sorts of behaviour are criminal. Although the judges in criminal cases still have often a broad discretion in conducting the process of hearing and in sentencing, it is assumed that the judges should not punish acts which were not punished before. The principle *nullum crimen sine lege* is a moral principle which is deeply enshrined in the modern criminal law. Therefore, the exercise of sympathy judgement by the High Court of Justiciary can be understood only through realising the importance of the principle *nullum crimen sine lege*. This principle

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[9] *Shaw v. Director of Public Prosecutions.* [1962] A.C. 220.
[10] *Knuller v. Director of Public Prosecution.* [1973] A.C. 435.
[11] ibid., at 457, 460, 484.
[12] ibid., at 464-465.

prohibits not only retrospective penal legislation but also prohibits extension of the application of the criminal law through interpretation by analogy.[13]

The use of the declaratory power is justified only if either it is done in accordance with another moral principle and there is a legal ground for doing it, or if the use of the power is in compliance with the principle *nullum crimen sine lege.* In the former instance, the modern legal conscience is so much against retroactive law making in criminal cases, that it would be hardly possible to find such a principle, although much depends on particular circumstances and the nature of the criminal act. In the latter instance the use of the declaratory power can be justified only if the judges apply other law than that which is formalised on the moment of commission of crime and which does not contain a sufficient legal reason for punishment. This other law can be either international law or natural, that is unwritten, law. Unwritten law has been recognised, for example, by the German judges when the Nazis were brought to criminal responsibility.[14] The existence of unwritten law and the authority to apply it by the judges in criminal cases were acknowledged by the European Court of Human Rights. For example, in the case *SW v. UK; CR v. UK* it was stated that "The Court thus indicated that when speaking of 'Law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseebility".[15]

It can be maintained, however, that the condition for using the declaratory power, that is acting on the basis of some moral principle which has a legal significance, and complying with the principle *nullum crimen sine lege,* are two sides of the same coin. For example, if the judges as they have done in the *Strathern v. Seaforth*[16], decided that a person who drove a car without permission of the owner deserves punishment, although the written law of Scotland does not contain either a statutory or common law rule which would clearly enough justify imposition of punishment, the judges might appeal to a principle which can be seen of such great importance that it should be taken into consideration along with the principle *nullum crimen sine lege.* In this situation the principle would be the need to protect the vulnerable property of the owners whose cars

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[13] Jacobs F., White R. *The European Convention on Human Rights.* - Oxford: Clarendon Press, 1996. - P. 164.
[14] ibid., p. 169.
[15] *SW v. UK; CR v. UK.* - [1995] 21 E.H.R.R. 363 at 399.
[16] *Strathern v. Seaforth.* [1926] J.C. 100.

were left openly parked in the public streets. Or it could be the principle which requires that an offence should not be left unpunished. Although the modern development of criminal law makes the principle *nullum crimen sine lege* almost invincible there can be some other principles which may compete and under certain circumstances and in a particular historical situation may prevail. It could be an urgent need to protect the interests of society when the legislature does not fulfil its function for political reasons.

In the *Strathern v. Seaforth*, the judges could claim that their decision is in conformity with the principle *nullum crimen sine lege.* For it was obvious that every reasonable man knows that it is not right to use a car clandestinely, without the permission of the owner, and further, knowing that that permission, if asked, would have been refused. It can be argued further that the offender should foresee that he might experience negative consequences because of his wrong behaviour. In other words, when the judges decided joy-riding to be a punishable offence it was not a criminalisation of an act which was not a crime before, for the judges only formalised what was already known to everybody. In other words they applied the unwritten law.

Because the content of unwritten (natural) law is comprehended by conscience, in the meaning clarified in chapter II of the thesis, it is important for the judges to be able to exercise their conscience in a correct way. This is where the theories of Thomas Aquinas and Leon Petrazycki respond to the problem of the use of the declaratory power. The theory of Aquinas puts forward the issue of good conscience, that is examining one's own conscience in the light of general moral principles. The theory of Petrazycki puts forward the emotional part of moral experiences. Both of them lead to the necessity of applying the principle of love and exercising sympathy judgements.

In the context of use of the declaratory power it means that the judges, when applying unwritten law or the overlapping general principles of common law, should act in the light of love for one's neighbour. The judges when having a strong moral impulsion to punish the offender but not having adequately formalised legal reasons to do so, should invoke the unwritten law only if they decide it is in accordance with the principle of neighbourly love. Sympathy judgement is one of the implications of the principle of love. Because the use of the declaratory power will have consequences far exceeding the effect on the parties of the particular case, it is not enough to have sympathy for the particular offender and for the particular victim only. The judges have to take into an account all possible situations where the same offensive act may take place. Unlike ordinary cases, where the judges apply a formally established law and

where sympathy is to a large degree retrospective, the cases which call for the use of the declaratory power require a prospective sympathy judgement along with the retrospective one.

Although prospective sympathy is different from retrospective sympathy, they do have certain things in common. In a way the ability for a sympathy judgement to be prospective stresses the difference which lies between sympathy and empathy[17], that is the ability for a judge who exercises a sympathy judgement not only to be detached but also to be involved. Both retrospective and prospective sympathy requires imagination. In the first instance a judge has to imagine himself in the place of the litigants, trying to put himself in the place both of the offender and a victim who are involved in the present case. In the second instance, the judge along with retrospective sympathy has to imagine himself in the place of the potential offenders and victims. Prospective sympathy involves generalisation of the situation. A judge has to take a picture of an ordinary offender and an ordinary victim. But doing this he may start from retrospective sympathy, that is from a clear understanding of what constitutes the general and what constitutes the particular in the case before him. After the general and the particular are singled out a judge is able to make a prospective sympathy judgement which would allow him to find and formalise a correct legal reason.

The vision of the declaratory power as the way of application of unwritten law in criminal cases brings along with it the problem of enforcement of morals, for the source of unwritten law abides in the public conscience. That leads directly to the problem of the limits under which the courts may enforce public morality. The debate between Hart and Devlin can be of interest to clarify the problem. The debate was started in 1959 by Patrick Devlin, who was at that time a High Court Judge. In his public lecture, Devlin stated: "It is wrong to talk of private morality of the law not being concerned with immorality as such or to try to set rigid bounds to the part which the law may play in the supervision of vice... . There can be no theoretical limits to legislation against immorality".[18] Hart responded with the article 'Immorality and Treason' (1959) where he insisted on separation of law and morals.[19] The separation thesis was developed in Hart's famous book: *The Concept of Law*.[20] Hart did not argue that there is no

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[17] See earlier discussion in chapter 7.
[18] Published in: Devlin P. *The Enforcement of Morals.* - Oxford University Press, 1968. - P. 14.
[19] Reprinted in: *The Philosophy of Law.* - Ed. By R. Dworkin. - Oxford University Press, 1977.
[20] Hart H.L.A. *The Concept of Law.* - 2nd edit. - Oxford: Clarendon Press, 1994. - Ch. IX.

connection between law and morals. But he insisted that law and morals are different spheres of human activity.[21] The key difference of Hart's thesis from Devlin's is that Hart claimed that "there is no important necessary or conceptual connection between law and morality".[22] However, a remarkable thing is that both Devlin and Hart were able to think about law and morals in their duality, which was hardly possible at the time when the doctrine of the declaratory power was formed, that is the end of the eighteenth century.

In fact, both Hart and Devlin could offer almost the same justification of the use of the declaratory power. Hart supported J.S. Mill's claim that "the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others"[23]. Hart's theory of minimum content of natural law justifies the use of the declaratory power as an application of unwritten law as long as it is done for the prevention of harm.[24] At the first glance, Devlin opposes minimalistic enforcement supported by Mill and Hart. Devlin's thesis supports a broader scope for application of the declaratory power. In his comment on *Shaw v. Director of Public Prosecutions,* he welcomed the use of residual power to punish immoral behaviour which corrupts public morals[25]. However, Devlin rejected what he called Plato's ideal of enforcement of virtue[26]. Instead, he suggested that the criteria or enforcement of morals must be preservation of society.[27]

Paradoxically, Devlin's preservation thesis which was criticised by Hart, fits very well Hart's doctrine of a minimum natural law. Devlin would definitely subscribe to Hart's view, that "unless certain physical, psychological, or economic conditions are satisfied..., no system of laws can function successfully",[28] and that those conditions must be enforced by law. Thus, disagreement between Hart's and Devlin's thesis is not so much about the basis for the declaratory power, as about the scope of the conditions which it is necessary to enforce for the preservation of society.

If one looks at it from the point of view of agapic casuistry, it becomes clear that the basis for enforcement of moral legislation cannot lie exclusively in self-preservation

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[21] Ibid., p. 202.
[22] Ibid., p. 259.
[23] Hart H.L.A. *Law, Liberty and Morality.* - Oxford University Press, 1963. - P. 1.
[24] Hart H.L.A. *The Concept of Law.* - 2nd edit. - Oxford: Clarendon Press, 1994. - pp. 193ff.
[25] Devlin P. *The Enforcement of Morals.* - Oxford University Press, 1968. - P. 86f.
[26] ibid., p. 89.
[27] Ibid.
[28] Hart H.L.A. *Law, Liberty, and Morality.* - Oxford University Press, 1963. - P. 193.

of the wholeness of society. The duty of enforcement of morals is based on the fundamental principle of human existence: "love one's neighbour as oneself". It is different from Hart's doctrine of a minimum content of natural law, for the purpose of natural law is not only self-preservation. Fuller, in his criticism of Hart's view, noted that the aim of law, which is communication, is "something more than a means of staying alive. It is a way of being alive".[29]

The approach of agapic casuistry is also different from Devlin's view at least in another point. The weakness of Devlin's position is the implication of his view that a society may legitimately enforce whatever shared moral beliefs bind its members together.[30] The principle of love does not support any moral belief being generally enforced but only those beliefs which are in accordance with the principle of love in relation to the particular person(s). The approach of agapic casuistry offers a different interpretation of the declaratory power than was ever done before. I shall attempt such an interpretation beginning with one of the most remarkable uses of the declaratory power.

Bernard Greenhuff.

Bernard Greenhuff is one of the most famous criminal cases in which the declaratory power was used.[31] In fact it is the only case where the court acknowledged that it was exercising the power. In this case, Greenhuff had been convicted of running a gaming house in which cards were played. He was sentenced to two months imprisonment. The decision was taken by a majority of four to one. Lord Cockburn dissented.

The particularity of this case is that there were neither case-law nor legislation which would justify conviction and imprisonment for running a game house. The court acknowledged that in convicting and punishing the accused it exercised the declaratory power. It was held that the reason for punishment was not that the offence was a weak or bad habit. "It has a direct tendency to spread and encourage a most mischievous habit. The defendant was punished not so much for gambling as for keeping a common or public house for play".[32] It was particularly stressed that keeping a gambling house threatened destruction of private morality and public security. In other words the court

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[29] Fuller L. *The Morality of Law.* - Yale University Press, 1969. - P. 186-187.
[30] Devlin P. *The Enforcement of Morals.* - Oxford University Press, 1968. - P. 114.
[31] *Bernard Greenhuff.* [1838] 2 Swin. 236.

found it necessary to intervene in order to protect public order and morals. The court emphasised that games of chance for money was grossly immoral. Nevertheless, it held that playing these games was not punished if it was done in private, but only in public. It was found that the keepers of the house pursued their own profit at expense of private and public interests.

There are several points which are important for the purpose of the present research. The first is that the judges approached their task of protecting private and public morals not by penalising behaviour which was not seen to be criminal, on the contrary they saw their task was to punish every act or omission which was, beyond doubt, of a criminal nature. Lord Mackenzie held: "In order to bring any act within the jurisdiction of this court, as a crime... the act must either in itself be so grossly immoral and mischievous on the face of it, that no man can fairly be ignorant of its nature, or it must have been settled by a course of experience, and become notorious, that such is its nature".[33] One should stress here that the court adhered to the principle *Nullum crimen sine lege* in the sense that the law was identified with the prohibition of a specific act, the prohibition which is generally known, even if there is no formal declaration by state authority.

The second important point is that the judges considered their exercise of the declaratory power as legitimate. They thought that the declaratory power rests in common law.[34] Thus, imposing a penalty on the keepers of a gambling-house was formally within the principle of legality. The act was held to be known as having a criminal nature, and the court had authority to punish such an act. The maxim of common law was invoked: "no overt act, deeply injurious to individuals and to society, can be considered as beyond the reach of punishment by the common law of Scotland".[35]

Thirdly, the court found that, in the given circumstances, opening a public house for play threatened social security. "A common gambling house is not only a source of infinite danger to those who may be seduced to frequent it, but as a nuisance to the neighbourhood, is a proper subject for the interference of the police".[36] The offence has a public nature which allowed the court to employ measures of public prosecution.

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[32] ibid., at 240.
[33] ibid., at 268.
[34] ibid., at 239.
[35] ibid., at 243.
[36] ibid., at 241.

The fourth point is that the court appealed to the fact that the act of opening a gambling-house, at the time when it was committed, was recognised as criminal in England.[37] It would be wrong to see in this use of English law a sign of dependence of Scottish legal thought on the English. It is clear that the Scottish lawyers and jurists were proud of their national identity and uniqueness of Scots law. The appeal to English law was rather an affirmation that the court when punishing the wrongdoer does so in accordance with the general principles of law recognised by civilised nations.

Finally, the use of the declaratory power was a brave act even in the circumstances of the thirties of last century. The dissenting opinion of Lord Cockburn is a key to understanding the whole opposition to the use of the declaratory power. In fact the opposition used the same arguments which are employed nowadays. The exercise of the power was considered as declaring new crimes. This was seen as an intervention in the prerogative of Parliament. Lord Cockburn did not reject a moderate judicial activism. The court could not declare new crimes, but it had power to determine that an act, which had never occurred before, came within the range of a known term case, or principle.[38] The decision of the court did not conform to the already firmly established stereotype that the task of the judges is to apply formal law only. The main objection to the decision was that there had been no statute or judicial precedent which would justify the conviction. As for the common law, Lord Cockburn insisted that since introduction of Parliament the task of the courts was left exclusively to applying formal law.

In modern legal literature, there has been much criticism of the judges' decision to exercise the power.[39] However, there have not been many who have tried to understand why the judges decided to exercise the power despite the absence of any formal grounds for punishment. An analysis of the judges' opinions in the case points at a sympathy judgement. The judges were guided by sympathy for those who could suffer if open gambling houses were allowed. The content of sympathy judgement in *Greenhuff* case is very different from the content of sympathy judgement, for example, in *Ridge v. Baldwin* discussed in the previous chapter. In *Greenhuff*, sympathy is exercised towards a certain category of people rather than towards one particular person who is a party in the process. The Lord Justice Clerk said: "An establishment of the

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[37] ibid., at 243.
[38] ibid., at 274.
[39] Gordon G. *Criminal Law.* - Edinburgh: Green, 1978. - Para.1-15 to 1-43 . Gane Ch., Stoddart Ch. *A Casebook on Scottish Criminal Law.* - Edinburgh: Green, 1991. - Para 7-27. Jones T., Christie M. *Criminal Law.* - Edinburgh: Green, 1996. - Para. 2-21 to 2-36.

nature here described, the doors of which are open at all times to the young and to the thoughtless, is necessary productive of the greatest evil, and must tend to the corruption, not only of individual, but of public morals".[40] Lord Monrett expressed the same feeling in the following words: "Gambling is an odious vice, calculated to excite the worst passions of our nature, bringing with it misery and ruin to its victims, and to all connected with them, and frequently terminating in self-destruction."[41] Thus it was the perspective of those who were directly or indirectly affected which moved the majority of the judges to exercise the declaratory power in a such bold manner.

Although the decision in *Greenhuff* contains effects arguments as well as normative ones, which may be an expression of either consequentialist or deontological reasoning, taking the perspective of the affected persons points to a sympathy judgement. Later in this chapter, we shall look more closely at the particular features of sympathy judgements exercised under the authority of the declaratory power. It is worth noticing, however, that from the point of view of agapic casuistry, the decision of the judges in the *Greenhuff* case is justified because, firstly, the judges took the perspective of those who were affected by the decision. Sympathy can be seen not only towards the young and thoughtless but even to the accused. It appears that because of the absence of any formal ground for punishment the court passed a lenient sentence on the accused. Secondly, the judges found a legal reason to prosecute basing their power in common law. They appealed to the authoritative writing of David Hume. There were also some precedents for using the declaratory power. Lord Meadowbank arguing in favour of conviction put an earlier example of exercise of the power: Rachael Wright was convicted of child-stealing (1808) at Glasgow. The High Court passed sentence on 25 January 1809. "Though there had never been a case of child-stealing before, they would have had no difficulty in finding it a capital crime".[42] And thirdly, the judges took the moral perspective of the society. It is obvious that the community's view on moral behaviour was strictly opposed to gambling. The evil nature of gambling was in the view of the judges self-evident and indisputable.

The social view of gambling in Western society is much less negative nowadays. This is another reason for misunderstanding the case by its critics. Were *Greenhuff* about using the declaratory power in the situations of wife rape or child stealing the

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[40] *Bernard Greenhuff.* [1838] 2 Swin. 236. at 258.
[41] ibid., at. 266.
[42] ibid., at 262.

logic of the nineteenth century judges would not appear so strange to the twentieth century critics. Later in this chapter the twentieth century perspective on wife rape in its relation to sympathy judgement will be examined in a more detail. It is of interest for the purpose of present research to look now at the development of the doctrine of the declaratory power after the *Greenhuff* case.

Later development of the declaratory power.

Since *Greenhuff* the judges repeatedly acknowledged that they have the authority to use the declaratory power but they refused to exercise it. The case *H.M. v. John Ballantyne*[43] is one of the examples. John Ballantyne was accused that he clandestinely, inorderly, and irregularly celebrated marriages. He was neither a priest or minister of any church. The prosecution claimed that such celebration is a criminal offence both at common law and under the statutory law of Scotland. The court held that it was not an indictable offence at common law, but there was a violation of the statutory provisions on marriage. A quite ancient statute (1661) was invoked. There was doubt whether this statute was applicable or not. That was, perhaps, the reason why the prosecution tried to resort to common law as well as to the statute. The Lord Justice Clerk in his opinion stressed that a person can be prosecuted on the basis of common law only if there had been a precedent or there are conditions for exercise of the declaratory power. These conditions are that the acts or omissions for which a person is prosecuted are *mala in se* - i.e. evils in themselves, and they involve injurious consequences to the individual or society[44]. The Lord Justice Clerk said that it was hopeless to defend the common law charge on the ground that clandestine and irregular celebration of marriage is obviously of a criminal nature. Neither did he find any injurious consequences to persons or property, or any distinct violation of public morals. Therefore, the present case was not like those where the declaratory power could be used. Though the court held that there were no facts which justify the use of the power, and there were even no common law precedents, the accused was still found indictable for a violation of an ancient statutory provision. The old statute (1661) was interpreted as forbidding any marriages without previous proclamation of banns or done by a person who is not invested with the office of a minister of religion.[45]

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[43] *H.M. v. John Ballantyne.* - [1859] 3 Irv. 352.
[44] ibid., at 359.
[45] ibid., at 369, 371.

The attempts of the prosecution to invoke the declaratory power for the purposes of conviction did not disappear in the twentieth century. A recent example is the case *Grant v. Allan.*[46] In this case an accused was prosecuted on summery complaint on a charge that he feloniously, and without the authority of his employers, made and detained copies of computer print-outs containing valuable confidential information relating to their business with intent to sell them to trade rivals, and that he attempted to sell them to two named persons. The defence objected to the complaint on the ground that it is not relevant as it disclosed no crime recognised by the law of Scotland. The sheriff repelled an objection to the relevancy. The High Court, however, decided that the complaint was irrelevant. This case is noteworthy for the way the prosecution and the court treated the declaratory power. The power was conceived in the form of discretion to invent a new crime and to prosecute a person for an act or omission which had not been considered as a crime before, rather than a duty to penalise the offenders for the acts which are obviously of criminal nature. In other words the issue about the declaratory power was not so much about the judicial duty of suppressing behaviour dangerous for society and which has all the essentials of crime, as about judicial discretion to invent new crimes.

There is a difference between the vision of the declaratory power found in *Greenhuff* and the one in *Grant v. Allan.* What makes the difference is not only a formal approach to the power found in the latter case, but the types of conscience and moral judgements which underlie the decisions. In *Greenhuff* we see agapic conscience and exercise of sympathy judgement. There was a real desire on the part of the judges to make society better, to protect morally vulnerable people. In *Grant v. Allan* one can see an example of a formalistic approach. The discourse of the Lord Justice Clerk revealed neither any personal considerations nor the considerations of the consequences for the people affected by the decision and society in general. The main concern was to distinguish stealing confidential information with the purpose of selling it from the crime of theft.[47] As for the declaratory power, the court refused to exercise it leaving to Parliament to decide whether or not this particular sort of dishonesty is a crime. Although the court admitted that it has the power, the court maintained that the act disputed was not so obviously of criminal nature to use it.

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[46] *Grant v. Allan.* [1988] SLT. 11.
[47] ibid. at 13-14.

One can see a double approach to the declaratory power in *Grant v. Allan*. The court did not reject the possibility of convicting on the basis of the declaratory power, maintaining still that if an act is so obviously of criminal nature, the offender can be convicted. But at the same time the court disregarded both elements of criminal nature: gross immorality and injurious consequences. The Lord Justice Clerk said: "The fact that conduct is reprehensible or indicates moral delinquency is not sufficient to bring it within the scope of the criminal law".[48] On the other hand, the fact that the act of stealing confidential information with intent to sell to trade rivals is harmful to the interests of the employers and the society in general was left without any consideration. It seems that the main reason why the act was not declared as deserving punishment in the criminal law of Scotland was the potential difficulty of establishing the fact of dishonesty: stealing information can occur without taking any objects like print-outs, as it happened in the present case. The judges took into consideration all aspects of the wrongdoing, even the possibility that information could be stolen by memorising. However, it seems that the moral perspective of the participants in the legal process and of society in general was left ignored.

It is not a task of this research to pass a judgement whether the power should be exercised in that particular case or not. The judges are much more competent and knowledgeable in this matter. The task of the thesis is to show that the judges have a duty to administer law in accordance with the principle of neighbourly love which requires both a sympathy attitude towards the affected persons and good faith in fulfilment of judicial duties. *Grant v. Allan* was a case where the judges had a duty to decide whether a particular act of dishonesty was a crime in accordance with the law of Scotland. The formal sources of law did not contain a clear indication whether the act is a crime or not. There was some authority in the common law of Scotland which could favour the conviction of the accused. Apart from the academic authorities like Baron Hume with his broad definition of crime as a doleful or wilful offence against society in the matter of violence, dishonesty, falsehood, indecency, irreligion[49], there were at least two cases in which persons were prosecuted and found guilty for taking dishonestly receipts-books and copying them in order to sell information.[50] In any case in which the

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[48] ibid., at 14.

[49] Hume D. *Commentaries on the Law of Scotland Respecting Crimes.* - Edinburgh: Law Society of Scotland, 1986. - I. 21.

[50] Case *Dewnar* [1777] was cited by John Burnett. *Treatise on Criminal Law.* - Edinburgh: Constable, 1811. - P. 115. Another case is *H.M. v. Mackenzies.* - [1913] 7 Adam. 189.

use of declaratory power is contemplated there must be a serious consideration of the nature of the act, and this is exactly what the court failed to do in *Grant v. Allan.*

The point of my criticism is not that the offender was not convicted, and even not that the declaratory power was not used, rather that the decision in *Grant v. Allan* was not made by the judges on the basis of sympathy judgement. There is nothing in the report which indicates that the judges took into consideration the interests of the victim and the potential victims in the future. They were quite satisfied with finding that there was no statutory ground for prosecution, and left it to Parliament to decide whether the indicted act of dishonesty is a crime. The acknowledgement by the court that it possesses the declaratory power only stresses the failure of the judges to examine the nature of the indicted act. The whole reasoning of the judges is formalistic. They were absorbed with the problem of a 'proper' labelling of the act rather than looking at its nature and inquiring whether or not this particular behaviour of that person constitutes a breach of a duty to the community, and, if it does, looking at the legal ways to bring the person to responsibility. It might be right that stealing of the confidential information with intent to sell it does not constitute a breach of duty to the community, that this particular act is not a crime at all, but a civil wrong. If so the judges should have justified their opinion, and this is what they did not do. Their view was that this was not their job but that of Parliament.

It is clear that the judges have a duty to apply the common law. The declaratory power is based on common law. Even if the validity of a duty to exercise the declaratory power is questioned on the basis that this power is contrary to the principle of separation of powers, or the principle of the supremacy of Parliament, or the principle of non-retroactivity of criminal law there are still two fundamental questions. If the judges are still obliged to pay attention to the previous legal decisions and doctrines, how far should they go in interpreting the definitions and old decisions made in a different social context? When applying statutory or common law, what is the use of moral principles and concepts? Although these questions are relevant also to statutory law, the presence of common law makes it much more knotty. Those are issues which became the flesh and blood of judicial decision-making. The judges do not have often much time to philosophise about these issues in general. They just solve them in every particular case often tacitly, and sometimes unconsciously. The use of the declaratory power by the

High Court of Justiciary is one of the examples. In the case like *Greenhuff, John Ballantyne,* or *Grant v. Allan* the issue of the declaratory power was discussed openly. But in many cases the declaratory power was used without any reflection on it, as it appears form the case reports. Mainly, it was done by recognising that a particular act was a novel form of criminal conduct according to existing principles of criminal law. A few cases can serve as a good example of that.

In already mentioned case *Strathern v. Seaforth,*[51] in which an accused drove a car without the permission of the owner, the judging sheriff found that the *species facti* libelled in the charge did not infer any crime known to the law of Scotland. The High Court reversed the decision of the sheriff stating that the charge was relevant to the law of Scotland. Lord Justice Clerk after considering the circumstances of the case as that the accused used a car clandestinely, without permission of the owner, and further, knowing that that permission, if asked, would have been refused, said the following: "Speaking for myself, I should not have required any authority to convince me that the circumstances set out in this complaint are sufficient, if proved and unexplained, to constitute an offence against the law of Scotland". He then added: "I am satisfied that our common law is not so powerless as to be unable to afford a remedy in circumstances as these".[52] It is not difficult to notice the difference in reasoning in this case from that in *Grant v. Allan.*

The case of *Khalid v. H.M. Advocate*[53] again was about whether or not the charge labelled a crime was known to the law of Scotland. In this case the accused supplied 'glue sniffing kits' to a number of children, which they used for the purpose of inhalation. After the court agreed that the act of supplying caused injury to the health of the children it was held that the charge relevantly averred a crime known to Scots law. It was merely a new way of libelling an established crime, that of causing a real injury to the person. Thus, the court expended further the range of acts which can be punished for causing a real injury to people. It was done before Parliament subjected solvents to statutory control, supported by criminal penalties. Hume's dictum was employed for justification of the decision: if a deed "amount to a real injury, it shall be sustained to infer punishment..., no matter how new or how strange the wrong".[54]

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[51] *Strathern v. Seaforth.* [1926] J.C. 100.
[52] ibid., at 102.
[53] *Khalid v. H.M. Advocate.* [1984] SLT 137.
[54] ibid., at 140.

Strathern v. Seaforth and *Khalid* are only a few examples where the court used the declaratory power without acknowledging it. The way it was used is very different from the way of attempted use in the *Grant v. Allan.* The difference is not even that in the first instance the power was used for declaring specific acts a new form of old crimes, while in the second instance there was an attempt to distinguish a new category of crimes on the basis of common law (dishonest exploitation of the confidential information of another person). The difference lies that in the first instance the declaratory power was used as the way of filling form with content, it was an adjusting of the existing legal reasons to new situations. In the second instance the declaratory power was seen as the way of producing new forms of crime, it was an attempt to give a new legal reason for suppressing the old vice.

If one could give a general observation of the development of the declaratory power since *Greenhuff,* it can be shortly characterised as the continuation of the use of the declaratory power by way of adjusting old legal reasons to new circumstances, and decline in its use as a way to produce new legal reasons for deciding criminal cases. The latter aspect of the power has become the prerogative of the legislation.

The declaratory power and sympathy judgement in Stallard *case.*

Stallard v. H.M. Advocate[55] is an interesting case from several points of view. First of all, it is a comparatively recent case, and unlike *Greenhuff* it is easier to understand this case in the context of moral beliefs predominant in to-day's society, which in a more or less degree were shared by the judges. Secondly, in this case immoral behaviour was punished for the first time even though the positive law of Scotland not only left it unpunished before, but on the contrary stipulated explicitly that this sort of behaviour should not be punished. In *Stallard* case an accused person was charged with raping his wife while they were cohabiting. The accused argued that since the time of Hume it had been accepted that no charge or rape lay in these circumstances. Hume's reason given for husband immunity was that the wife, through contract of marriage, had surrendered her person. However, the court refused to follow the old authority. The judges decided in this case that whether or not the reason for the husband's immunity from a charge of rape committed upon his wife was a good one in the eighteenth and early nineteenth centuries, it had since disappeared altogether.

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[55] *Stallard v. H.M. Advocate.* [1989] SLT 469.

The issue before court was not so much about whether or not the accused was guilty of rape of his wife (eventually found not proven), but about whether he could be prosecuted for it. Therefore, the content of sympathy judgement would inevitably be affected by the constraints imposed on the court in relation to the issue. The question arises whether or not under such restrictions associated with the consideration of the circumstances of the case it was possible to pass a sympathy judgement at all. The answer will be positive provided that a sympathy judgement can be not only retrospective, but also prospective. Retrospective sympathy judgement is based on examining the real circumstances which occur in a particular case, and taking the perspective of the real persons involved in them. A prospective sympathy judgement is based on the consideration of those circumstances which are likely to occur in the future, and taking the perspective of those persons who will be involved in it. Both kinds of sympathy judgements have in common the way the decision is made, in that a judge uses his imagination to put himself in the position of those who are or will be involved in a similar case. But putting himself in the position of the other does not mean that the judge substitutes the other's beliefs and opinions for his own. Initially, the judge has to take seriously the perspective of the real persons who are involved or likely to be involved in the future. Then he tries intuitively to grasp the correct solution for the case, and only then is he in position to seek a legal reason which supports his finding. If no legal reason is found he has to reconsider the correctness of his finding.

It is clear that in *Stallard* case the judges could not pass a retrospective sympathy judgement, but they had opportunities for a prospective sympathy judgement. In fact, this is what they did. The judges looked at the moral perspective of a husband and a wife in the modern family. They did not look at the perspective of the particular husband and wife, but in the perspective which is shared by the majority of husbands and wives, in other words shared generally by public conscience: "Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances".[56]

Thus, the issue which the court had to decide on did not allow the judges to pass a retrospective sympathy judgement. However, the judges took the general moral perspective of an ordinary citizen. Therefore one can say that a prospective sympathy judgement can be traced in the decision. Taking into an account the state of public

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[56] ibid., at 473.

conscience is not enough for passing a prospective sympathy judgement. The judges have to take the perspective of a 'normal' offender and of a 'normal' victim. The perspective of a victim was taken into consideration, and, as it so happened, public conscience was in favour of the victim. But an impartial sympathy judgement could take place only if the judges put before them the following questions: can be there a situation where a husband may be excused for raping his wife? If we look, firstly, at the nature of rape as a violent act of causing the other to submit to sexual intercourse, and, secondly, at the nature of marriage where although sexual intercourse is an important element, and one if one accept that the fundamental relationship between wife and husband should be built on love and mutual care, then it is impossible to find any justification for wife-raping.

The important thing in the process of passing a sympathy judgements is not so much a deontological moral conclusion that any kind of rape is evil intrinsically, as a real concern and care for the affected people including both victim and rapist. Even though it may be extremely difficult to get the evidence that rape took place between husband and wife, the decision reached in *Stallard v. H.M. Advocate* may be seen as an example of a prospective sympathy judgement where the interests of the husbands and wives were taken into consideration. It is interesting to compare this case with *Grant v. Allan*. In the latter case the judges excused themselves for not declaring specific act of dishonesty on the ground that it is extremely difficult to get the evidence in similar cases, although it was not a problem to obtain the evidence in that case. In *Stallard* case, one can see a different approach: what is important is not to make criminal prosecution as effective as possible but to protect the interests of victims.

A prospective sympathy judgement may be different from a retrospective one. There can be special circumstances which may affect the force of condemnation of the act of rape of a wife by husband either by mitigation or aggravation. There is at least one mitigating circumstance which will be always present in exercise of the declaratory power. The judges punishing someone for the first time without the clear sanction of legislation are naturally disposed not to impose a heavy punishment on the offender. This particularity of the exercise of the declaratory power was noted already by David Hume: "the crime being censured on its first appearance, and before it has become flagrant or alarming to the community, is restrained at that season by far milder

correctives, than are afterwards necessarily to be applied to it, when the growing evil has to come to require the passing of an express law in that behalf".[57]

One may conclude that sympathy judgements under the exercise of the declaratory power are restricted by the principle of legality and by the consideration of the impact of the use of the power on the future case law. It has been argued also that these deontological and consequentialist constraints cannot bar the judges from acting in accordance with the principle of ethical love. The principle of legality itself can be seen as one derived from the principle of love, and as a security that the rights and interests of the accused are protected. As inferior to love, the principle of legality functions as an assistance in guiding sympathy judgements, but at the same time, it puts a restraint on judicial activism. On the other hand the declaratory power can be seen as an application of another, a higher, law than the one established by the state.

The case *Stallard v. H.M. Advocate* can serve as an example where the principle of legality appears in two forms. On the one hand, whatever sympathy the judges feel to the wives who are raped, their moral judgements are restricted by the principle of legality. On the other hand, it is clear that in the present case, the judges changed the established law retroactively, but by doing this the principle *nullum crimen sine lege* was not violated. It was maintained that the court did not create a new crime but merely applied an existing crime to the circumstances. The established law, however, exempted wife rape from the composition of the crime of rape. Thus, it was not the established composition of the crime of rape which was applied by the judges. The only possible explanation of such an application of an existing crime to the circumstances is that the judges applied unwritten law which resides in conscience. Wife rape was a crime independently of whether or not the formalised law acknowledged it. The *Stallard* case casts light on the genuine relationship between sympathy judgement and the principle of legality. In its relationship to sympathy the principle of legality appears not only as a safeguard and a constraint, but it can change its place with sympathy, and sympathy can become a constraint and a safeguard for a fair application of the principle of legality.

The declaratory power and human rights law.

The present chapter deals not only with the way sympathy judgements can operate in a context similar to that of High Court of Justiciary, but also gives practical

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[57] Hume D. *Commentaries on the Law of Scotland Respecting Crimes.* - Edinburgh: Law Society of

recommendations to the decision makers who are willing to act in accordance with the principle of neighbour-love in the administration of criminal justice. The principle of love may require from the judges the suppressing of social evil in the beginning before it is prohibited by legislation, in order to protect the lives and the rights of other people.

There is always opposition to judicial activism, particularly in the area of criminal law. It is important to stress here, that this thesis does not warrant judicial activism unconditionally. The main idea of the thesis is that if the judges do exercise their discretion they should exercise it in accordance with the principle of love for one's neighbour with impartial sympathy and constant awareness of their own imperfection. On the other hand, the thesis is opposed to the restriction of the judicial role only to the application of the existing law without paying enough attention to the existing circumstances. In this thesis I argue that there can be some circumstances which may call the judges to impose punishment for acts which were never punished before and for which there is no legislative sanction. Some of cases considered above are the examples of such circumstances.

In the modern legal context, every judge who dares to use the declaratory power faces the problem of complying with human rights law which prohibits punishment of the acts which were not punishable previously. This is, perhaps, the main argument against the use of the declaratory power found in the modern literature.[58] The case *Gay News Ltd. and Lemon v. UK*[59] is often invoked[60] in which it was held by the Commission that "Acts not previously punishable should not be held to entail criminal liability nor should existing offences be extended to cover facts which clearly did not constitute a criminal offence when committed."[61]

The applicant who was punished for blasphemous libel argued that a mere publishing of the poem which offended religious feelings of the people was not a crime when committed. In this case, however, the Commission did not find a violation of Article 7 of the European Convention on Human Rights which states that "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed." The Commission agreed in principle that the judges may exercise functions

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Scotland, 1986. - I. 12.

[58] Willock I. 'The Declaratory Power - Still Indefensible'. in: *The Juridical Review.* 1996. 2. - pp. 97-109.

[59] *Gay News Ltd. and Lemon v. UK.* [1983]. 5 E.H.R.R. 123.

[60] Gane Ch., Stoddart Ch. *A Casebook on Scottish Criminal Law.* - Edinburgh: Green, 1991. - P. 15.

[61] *Gay News Ltd. and Lemon v. UK.* [1983]. 5 E.H.R.R. 123.

of law making in the area of criminal law: "The Commission first observes that not only written statutes, but also rules of common or other customary law may provide a sufficient legal basis both for restrictions of fundamental rights... , and for the criminal convictions envisaged in Art. 7 of the Convention".[62] But the judicial exercise of law making functions is inevitably retrospective. In other words, in the same decision the Commission maintained the prohibition of the retrospective application of criminal law and at the same time allowed it within 'reasonable limits'. Therefore, this case can be used both for and against the use of the declaratory power.

The evidence is that courts do punish for acts which were not previously punishable, and that the courts do extend existing offences to cover facts which might not be clear enough to constitute a criminal offence, shows that the law itself is not a system without any contradictions and conflicts. The advantage of the casuistic method is that it allows these contradictions to co-exist through offering a principle for reconciling of the incongruity of law on the level of deciding a particular case. Agapic casuistry promotes the principle of love in decision making on the basis of which the conflict between the declaratory power and human rights can be solved, not in an abstract way, but in real situations of life through exercising a sympathy judgement.

The Scottish case *Stallard v. H.M. Advocate* is a good example of how the declaratory power can fit in the whole system of protection of human rights. It is a good example not only because we can observe sympathy judgement underlying the decision, but also because the issue of wife rape arose before English courts[63] and before the European Court of Human Rights,[64] and was decided in a similar way. The later case is particularly of interest because the European Court of Human Rights approved the decision of English judges to punish for the act which was not previously punishable, as consistent with observance of human rights protected by the Convention. The decision in *SW v. UK; CR v. UK* is remarkable not only as an example of how the declaratory power can be harmonised with the protection of human rights but also gives a better understanding of the problems arising before any court in exercising judicial discretion, particularly in the criminal cases.

The facts of *SW v. UK; CR v. UK* are very similar to *Stallard v. H.M. Advocate.* SW was found guilty of raping his wife, and CR pleaded guilty to the attempted rape of

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[62] ibid. at para 6.
[63] *R. v. R.* [1992] A.C. 599. (HL).
[64] *SW v. UK; CR v. UK.* - [1995} 21 E.H.R.R. 363.

his wife. At the time of the acts for which they were prosecuted they were immune from prosecution for the rape of their wives on account of the consent to sexual intercourse that was thought to be inherent in the contract of marriage. The European Court decided unanimously that there was no violation of the Article 7 of the European Convention of Human Rights.

The present case is interesting from two points. The first is a continuation of the line seen already in the *Gay News Ltd. and Lemon v. UK*. The Court acknowledged the fact that the courts do exercise law-making functions in the form of judicial interpretation and the gradual clarification of the rules of criminal liability.[65] The process of interpretation is, however, restricted by the nature of the offence which is thought to occur in the particular circumstances, and secondly, by the requirement of reasonable foreseeability. The first requirement directs the judges to look at the nature of the crime, and in a way is opposed to a purely formal approach to definition of a criminal act. It requires that the judges should exercise their moral reasoning. The second requirement directs the judges to take the perspective of the litigants and to see whether they foresaw or should foresee the possible consequences of their acts or omissions. This leads us directly to the necessity to exercise sympathy judgements and the importance of the principle of agape.

The second interesting point is that the judges gave a normative argument which can be a manifestation of deontological moral reasoning: "The essentially debasing character of rape is so manifest that to convict the applicants in these circumstances cannot be said to be at variance with the object and purpose of Art. 7. The abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and freedom".[66] One can see the similarity of reasoning in this case and in *Greenhuff*. The use of the declaratory power is justified through giving a normative argument which can support a sympathy judgement as well as a deontological one. In the chapter on sympathy judgement it was shown in detail how sympathy judgements are supported by different types of moral arguments, though it is necessary to stress that not every moral argument is based on sympathy judgement, moreover, sympathy may enter into conflict with rigid deontological and consequentialist moral reasoning.

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[65] ibid., at 364.

Thus, the exercise of the declaratory power and the protection of human rights do not exclude each other. There can be conflict between the need to bring justice into social relationships and the principle of non-retroactivity of criminal law. Nevertheless, agapic casuistry offers a method which allow judges to solve this conflict in deciding a particular case.

Conclusion.

In this chapter we have considered the way sympathy judgements can be, and are, exercised in the situation where the judges are moved by their conscience to change the formal law despite strong moral reasons not to do so. The use of the declaratory power is taken only as an example. It is true, however, that the common law tradition gives to the judges more freedom to carry out the function of law-making, than in the countries of a Roman law tradition. It is a great advantage of Common law judges to be able to decide cases standing face to face with those who are involved in the process. The whole judicial culture is to go from a particular to a general, while a continental judge goes from a general to decide a particular.

Sympathy judgements are based on looking at the particular. The experience of the Scottish judges in their exercise of the declaratory power, which is deeply rooted in the Common law, can be a valuable contribution to the judicial culture of not only the Common law countries, but also of all other legal traditions. The phenomenon of the declaratory power allows judges from a different background to learn better to see legal rules as an instrument rather than a goal in themselves. It moves the judges to seek what is just and fair in every particular case.

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[66] ibid.

11. SYMPATHY JUDGEMENTS OF CONSCIENCE IN THE RUSSIAN CONSTITUTIONAL COURT.

Introduction.

In this chapter we shall consider sympathy judgements in a particular context where the judges are not authorised to decide on the merits of a particular case but only on the question of law involved. However, in passing their judgements on the question of law the judges are aware of the impact their interpretation of law would have on the people affected by that law. In the previous chapter about the declaratory power of the Scottish High Court, we have already considered a prospective sympathy judgement where the judges have to decide whether a particular act is criminal or not. Nevertheless, the High Court in its decision moves from the merits of a particular case to formulating a rule which will influence future decisions in similar cases. It was shown that because of this impact on future decisions it is not enough to pass a sympathy judgement towards the parties of the case. The judges have to go further and take the perspective of future offenders and victims. This is what we called a prospective sympathy judgement which, though identical in its essential parts to a retrospective sympathy judgement, still has some distinctive characteristics.

The case law of the Russian Constitutional Court gives a further opportunity to look at the characteristics of prospective sympathy judgements and the potential of the judges to act in accordance with the principle of love to one's neighbour in a different normative setting. It will be shown, however, that even in the restricted legal framework which prevents the judges from exercising retrospective sympathy judgements the judges still consider the facts of the case associated with a particular issue of law. They also show a sympathy for the parties of the case, and thereafter interpret the law in accordance with their conscience. In order to understand the way the judges of the Russian Constitutional Court make their sympathy judgements one has to look at legal constraints on their decisions.

Legal constraints on the Court's decisions.

Judgements of conscience in the Russian Constitutional Court are determined to a considerable degree by the legal constraints imposed by the positive law. The present status of the Court is regulated in general by *the Constitution of the Russian Federation*

adopted in 1993, and in detail by *the Constitutional Statute on the Constitutional Court of the Russian Federation of 24th of May, 1994*[1]. Both acts give quite restricted powers to the Constitutional Court, so restricted that it might be said that the authors of those acts made every effort to ensure that the judges of the Court would have no other choice but to conform to what is decided in high places of Russian politics. The Chairman of the Court, Marat Baglai, acknowledges the powerlessness of the court to protect the victims of political and administrative injustice. In one of his interviews he said: "We have a huge number of petitions that, to put it in the formal language of the law, are 'beyond our jurisdiction'. We simply have to turn down such lawsuits, knowing that behind each petition lie burning human problems. To deny someone justice is always embarrassing and painful."[2]

The strongest legal constraint is that the Court cannot decide on the merits of a particular case. It can only decide under certain restraints that a rule to be applied in a particular case contradicts or does not contradict the Constitution of the Russian Federation. If it decides that the rule does contradict it, then the court declares it void, and consequently the rule cannot be applied any more. But the Court cannot do anything if the rule was applied in unjust and unfair manner. "When conducting the Constitutional Court's proceedings the Court refrains from establishment and examination of the factual circumstances at all times when the matter lies within the competence of the other courts or other authorities."[3] The meaning of this constraint becomes much clearer when the statutory powers of the Court are examined in full.

According to the statutory provisions the Court decides on the compliance of all the normative acts of the State authorities with the Constitution. Any act of the State authorities which contains a general regulation or rule can be reviewed by the Court for compliance with constitutional provisions providing that the conditions of standing are met. As we shall see these conditions are very strict. Another area where the Court has to give its ruling is that of disputes between state organs concerning their competence. Up to now all cases held before the Court fall either into the category of control over rules, or in the category of settling disputes between different state authorities. The Court is also authorised to give an official interpretation of the Constitutional provisions only when asked to do so by the highest political authorities of the Russian Federation. The Court uses this power quite rarely. It is also empowered to decide on the guilt or

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[1] SZRF - No. 13. [1994].
[2] Baglai M. 'We're Concerned with Law, not Politics'. - Interview in *Russia.* No. 10. (1997). pp. 12-14.
[3] SZRF - No. 13. [1994]. Art. 3.

otherwise of the President of the Russian Federation under the procedure of impeachment. The majority of the cases decided by the Court falls into the category of control over normative acts. We shall examine this category of cases because firstly sympathy judgements are easier to observe here than in highly technical disputes on competence, which, nevertheless, do not exclude sympathy judgements either, and secondly, the impact of the decisions on ordinary citizens of this sort of case can be hardly overestimated.

If the constraint on the consideration of the factual circumstances is examined in the light of the powers of the Court, then it becomes clear that the Court is very restricted in its power to interpret the facts which have caused the appearance of the constitutional dispute. According to the letter of law the Court is bound to decide exclusively on the question of the rule, that is holding in one hand the Constitutional provisions and in the other hand the provisions of the disputed normative act disregarding the actual facts of how these provisions were applied. It is important to stress that the Court is formally prevented from examining whether or not the authorities, by interpreting and applying a particular rule, did in fact violate the Constitution of the Russian Federation and especially the constitutional rights of the citizens. It can decide only whether the disputed rule itself complies with the requirements of the Constitution. We shall see how the Court tries its best to avoid this constraint in order to give protection to the victims of administrative injustice.

Another strong formal hindrance to the activities of the Court is the restriction on the persons who may launch a complaint to the Court. Apart from the conditions of standing and time for admissibility of the complaints there is a statutory provision that the Court may consider citizens' complaints about a violation of the constitutional rights and freedoms by legislative rules only, but not by any other normative act. If one takes into account that the majority of formal rules are made by the President, his government and ministries whose acts do not fall into legislative rules, it is not difficult to understand how significantly the Court is restricted in protection of ordinary citizens from abuses of political and administrative powers. The overwhelming majority of rules affecting the rights of the individual is issued by the President or by the Executive (the Government), or by administrative agencies rather than by the legislative bodies. The citizens affected by those rules cannot find a direct remedy in the Federal Courts against the decrees of the President and the Executive (the Government). It is a significant shortcoming of the system of protection of constitutional rights that a citizen who is

affected by a non-legislative normative act cannot directly challenge that act. The right to challenge those acts was taken from the citizens and has been given to the President of Russia, Parliament as a whole or a one-fifth of the MP of either of two Chambers, the Executive (The Government), the Supreme Court of Russia, the Supreme Arbitration Court, and the highest bodies of legislative and executive power of the members of the Russian Federation.[4] The only way to challenge those rules which violate the rights of the individuals is if one of the state authorities listed above submits a petition to the Constitutional Court. As for the Constitutional Court itself, it cannot decide anything on its own initiative.

Thus, citizens who are aggrieved because a presidential decree or regulations set by the Executive violate the rights and freedom protected by the Constitution, cannot directly challenge them in the Constitutional Court. These acts can be challenged in an indirect way, for example through challenging legislation which did not provide sufficient protection for citizen's rights, or through appeal to the listed authorities. The latter, however, have a broad discretionary power whether to back an appeal or not. That has a huge impact on the way the cases on constitutional control over non-legislative acts are heard. For the party who argues there is a violation of constitutional rights is not necessarily an affected person. This undoubtedly influences the process of passing moral judgements. The Court is constrained to decide a case on the matter of law only, and the factual setting should not be a concern for the Court. Taking the factual setting seriously is, however, one of the conditions of sympathy judgements.

Consequently, it might be very problematic to pass a retrospective sympathy judgement in the conditions when the party affected by the rule disputed is not even heard by the Court: it is only one of the highest Russian political authorities who can submit a petition, being guided by some political or moral considerations. If we take into account that one of the important conditions for passing a sympathy judgement is that judges should attempt to understand the motives and moral perspective of the parties, it becomes clear that passing a sympathy judgement is not an easy task under the legal constraints imposed on the Russian Constitutional Court. Thus, a short survey of legal constraints imposed on the activities of the Court gives a general idea of limited authority of the judges to correct abuses of political and administrative powers. But, interestingly, even in such a situation the judges have been able to use their skills to exercise their sympathy judgements.

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[4] *The Constitution of the Russian Federation.* [1993]. Art. 125 (2).

Precedent and sympathy judgements of the judges.

The amount of case-law of the Russian Constitutional Court is comparatively small. Nevertheless, it has already been decided by the judges in a number of cases that the previous decisions made by the Court must be taken into account in deciding fresh cases. The need for that is explained by the breadth and ambiguity of constitutional provisions. Consequently, the judges have to find more specific legal reasons for justification of their decisions. There is no rigid doctrine which obliges the judges to follow their previous decisions. However, the rule of precedent is more than only a source for a legal reason. It is held by the conscience of judges to be the principle which should be applied, because the judges believe that the law must be coherent and consistent.

The inquiry as to how far the judges follow their previous decisions is important for our subject for two reasons. Firstly, consistency or lack of it becomes one of the tools for discovering a conflict of conscience, for it may be that the judges do not apply a previous decision because of a sympathy judgement, even though there may be other reasons for that. Care needs to be taken for inconsistency of a fresh decision with precedent is not necessarily explained by a sympathy judgement. The judges may be acting in accordance with other states of conscience. For example, the judges may think that it is not pragmatic to follow precedent mainly on effect considerations, or they may find a stronger normative ground than the one for following precedent. However, looking at inconsistencies in the decisions of the Court is important because the law reports are very scant, and often the official justification, written by the Court's clerks, is not enough to determine whether or not a sympathy judgement took place. Secondly, inconsistency of precedent often makes the judges expand their justification, and often gives us insight into at what is going on in conscience of the judges.

Overturning previous case-law is already a moral problem even though there is no rigid doctrine which obliges the judges to follow precedent. Deontological conscience assumes that following previous decisions is a natural duty of the judges unless there are special circumstances which can excuse them from following the old case-law. This position is expressed clearly in the works of MacCormick and Dworkin whose theories were considered above. Agapic casuistry looks at the principle of consistency and coherence from a different point of view. It does not reject the idea that the judges should use that principle, but the latter is not the goal in itself, rather it is

instrumental, and as such, it should be used where appropriate. If there is another legal reason which, although not consistent and coherent with the previous case-law, but whose application is warranted by the merits of case in the interest of justice, then the judges must not strive for coherence and consistency in their decisions.

Two recent cases in the practice of the Russian Constitutional Court are good examples of such a situation. Both of them have long names: *Case on Constitutional Control of the Art. 242 and 280 of the Customs Code*[5] and *Case on Constitutional Control of the Article 266 of the Customs Code, and of the Article 85 (2) and the Article 222 of the Administrative Offences Code*[6]. The petition in the first case was submitted by Nijegorodskiy Regional Court, therefore, for the sake of convenience it will be referred later as the *Nijegorodskiy* case. The second cases was a consideration of two separate petitions by Russian citizens: Galgoeva and Pestriakov. This case will be referred as the *Galgoevoi* case.

The petition in the *Nijegorodskiy* case followed the confiscation by the customs authorities of a car which was not declared according to the customs rules. The Customs Code conferred on the customs officials the power to confiscate property which was not declared. The person who used the car and who failed to declare it was even not its owner. The majority of the Court, however, disregarded the personal circumstances of the case. The majority, found that the provisions of the Customs Code do comply with the Constitution, and used a quite sophisticated justification trying to avoid collision with the Art. 35 (3) of the Constitution which directly forbids any non-judicial forms of deprivation of private property.

The Court maintained in its decision that the confiscation of property by the customs officials was not a deprivation forbidden by the Constitution. The person had the right to complain to court, and it is a judicial decision which would finally lead to deprivation of property[7]. The decision of the executive to confiscate was itself not a deprivation, which takes place only after the decision is implemented. The latter cannot take place if the affected person appealed to the court. The absence of a formal complaint was considered as consent of the person to the punitive measure, and consequently there was no need for a judicial hearing. This simplified procedure for deprivation of property was justified by the presence of a public interest in the effective functioning of administrative bodies.

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[5] SZRF - No. 21. [1997] St. 2542. - Decision of 20 May, 1997.
[6] SZRF - No. 12. [1998] St. 1458. - Decision of 11 March, 1998.
[7] SZRF - No. 21. [1997] St. 2542. - Decision of 20 May, 1997. Para 3 of the Findings.

The Court made a consequentialist judgement saying that the measure authorised by legislation was in the interests of the economic safety of the State, therefore, the confiscation was justified[8]. This consequentialist judgement collides with sympathy judgement as expressed in the dissenting opinion of Judge Kononov. He interpreted the provision of Art. 35 (3) of the Constitution: "nobody may be deprived of his property except by a judicial decision" as absolute. The meaning of it does not allow any executive body to deprive a person of property even by the confiscation as a sanction for committing legal offences, unless by a judicial decision. The judicial process of confiscation is considered as necessary in order to protect a person's right of property. Although his argument was normative and there were not many personal considerations, it is possible to trace some characteristics of sympathy judgement.

Thus, the dissenting opinion of Judge Kononov is interesting from the point of view that it contains considerations of the facts and circumstances which caused the petition to be launched. This is despite the legal constraints that the judges should investigate only the abstract content of the rules supervised in their compliance with the even more abstract content of the Constitutional provisions. In fact, his dissenting opinion gives a much better exposition of the facts of the original case heard before the Nijegorodskiy court than it is given in the official report on the Court's decision. The personal considerations taken by Judge Kononov point to a sympathy judgement: "The owner was deprived of his property, even without being an offender, without establishment of his participation, his responsibility, even without his awareness - this grossly violates any constitutional and general principles of legal responsibility."[9] In this case Judge Kononov was dissenting, and he had more freedom to express his opinion than the justification of the majority opinion can do. The text of the decision and its justification is usually composed by the clerks and signed by the judges. Unlike the opinion of the majority, a dissenting opinion written by a judge himself gives more opportunity to explore the moral reasoning of the judges.

The dissenting opinion of Judge Kononov supports the idea that the factual settings and circumstances do influence opinions of the judges despite all legal constraints. This put his judgement in sharp contrast with the consequentialist reasoning of the majority of the Court. Sympathy judgement can be seen in the fact that the judge took the perspective of those who suffered from application of the statutory provision

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[8] Ibid., para. 2 of the Findings.

[9] SZRF - No. 21. [1997] St. 2542. - Dissenting opinion of Judge Kononov, 1997.

which allowed confiscation of undeclared property. Another clue is found in the words of the judge condemning the confiscation. These words express compassion and pain towards the victim of administrative arbitrariness. The judge talked about "a crying injustice" which occurred in the present case.[10]

It seems that this cry was not left unheard in the subsequent case which was very similar to the *Nijegorodskiy* decision. In the following case Judge Kononov was among the majority, and his previous dissenting opinion can be a good tool for understanding the brief report of the latter decision. In the *Galgoevoi* case[11] the Court decided contrary to the *Nijegorodskiy* decision. In the later case, the Constitutional Court examined the provisions of *the Customs Code* and *the Code of Administrative Offences,* which empowered the administrative bodies (agencies) to confiscate personal property without a judicial hearing as a sanction for committing customs or administrative offences. As in the *Nijegorodskiy* case, an appeal was available under the provisions. But unlike the previous case, the Court held that these provisions violated the requirements of Constitution of the Russian Federation concerning the protection of private property. It held that any confiscation requires a judicial process before the decision to confiscate is taken[12].

There are several interesting characteristics of this case.

1. The case was started by two petitions which had very different factual settings. One petition was caused by confiscation of pictures, the owner of which failed to go through the customs formalities in the due period of time. Another was caused by confiscation of a hunting gun because of an alleged 'gross violation of the rules for hunting'. The Court deliberately abstained from any investigation of the facts in the both cases as it is required to do by the positive law.

2. Both petitions were heard together because they involved one issue: the authorisation by legislation of non-judicial confiscation of personal property, and the relation of such confiscation to the constitutional provisions which protect the rights to private ownership.[13] The Court's decision was based on direct application of the provision of Art 35 (3) of the Constitution which says that: "nobody may be deprived of his property except by a judicial decision." As we have seen in the *Nijegorodskiy* case,

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[10] ibid.
[11] SZRF - No. 12. [1998] St. 1458. - Decision of 11 March, 1998.
[12] Ibid., para 1 of the Decision.
[13] *Constitution of the Russian Federation.* Art. 35 (3), 55 (3).

the appeal to this constitutional provision had been a key argument in the dissenting opinion of Judge Kononov who was now among the majority.

3. The decision of the Court was contrary to the previous decision on the same issue, namely, that a citizen can be deprived of his property without a judicial hearing. In the *Nijegorodskiy* case the Court by a majority held that a citizen can be deprived of his property as long as there is an opportunity to appeal to the court. In the *Galgoevoi* case the Court decided that in any instance of confiscation there must be judicial proceedings[14].

In the first case the non-judicial form of confiscation was justified, in another, it was condemned. It is true, however, that in both cases the judges had to decide on different provisions of the same Customs code. The provisions themselves foresaw different conditions for confiscation: in the first case it was authorised to confiscate property which, contrary to the customs rules, was not declared at all. In the second, it was authorised to confiscate property which though declared, had not gone through all formalities in the period of time prescribed by the customs rules. But the issue was the same: non-judicial confiscation of private property.

It is interesting to compare the different reasoning of the same Court in the period of less than ten months. Like in the *Nijegorodskiy* case in the *Galgoevoi* case the Court was concerned more with the general issue about whether or not an administrative body can confiscate the property of ordinary citizens. But unlike in the *Galgoevoi* case, there was also the issue of proportionality and administrative arbitrariness.[15] The Court took into account that, apart from permanent confiscation, the administrative agencies were authorised to employ temporary seizure of property. The latter is more appropriate for an administrative form of legal sanction than confiscation. Confiscation of personal property because of the failure to go through the customs formalities was considered by the Court as disproportionate and arbitrary. Because in both cases the issue was not about the correctness of the actions of administrative bodies but about the legality of the statutory provisions in accordance with which the administrative bodies exercised their discretion, the Court had to decide whether there was a failure by the legislator who had granted such a discretion without limiting it.

It is clear that the difference between two decisions cannot be explained by the facts of the cases. All cases contained the same issue, and the facts were assumed as not

[14] SZRF - No. 12. [1998] St. 1458. - Decision of 11 March, 1998. Para. 6 of the Findings.
[15] Ibid., Para. 5-6 of the Findings.

of great importance, for the Court was required to rule on the matter of law. The root of the difference must lie in the underlying reasoning of the judges themselves. It is extremely difficult to determine whether the judges of the Court were guided by a sympathy judgement or not. The official report of the decision is very brief. One can hardly see much more then a normative argumentation of the decision apart from few clues. Firstly, the majority of the judges took into their consideration the issues of proportionality and administrative arbitrariness, which were left ignored in the *Nijegorodskiy* case. The second clue is that in justifying its decision, the majority appealed to a sense of justice,[16] which in Russian legal and linguistic context means attentiveness to the special circumstances of the case. It is clear that when invoking a sense of justice the judges went further than a mere control over rules in the form of abstract and formal legal reasoning.

It is true that not all the judges accepted the sharp change which occurred in the judicial reasoning in the short period between the *Nijegorodskiy* and *Galgoevoi* cases. Judge Vitruk, who dissented in the *Galgoevoi* case, tried to defend the reasoning of the Court in the *Nijegorodskiy* case. His dissenting opinion was an interesting mixture of deontological and consequentialist reasoning, pointing indirectly to the fact that the majority in *Galgoevoi* was able to pass a sympathy judgement. On the one hand he employed almost the same arguments as the majority in *Nijegorodskiy* did, which were mainly consequentialist. On the other hand he strongly believed that the Court must adhere to its previous decision, which is a sign of deontological reasoning. His main argument was that the present decision of the Court did not bring clarity to the existing law because it was not consistent with the previous case law, indeed, it undermined it. It also cast doubt on many other rules which granted the executive almost unrestricted powers to penalise the citizens for different administrative offences. Because of this decision "neither the judges nor officials", - Judge Vitruk said - "know what to do".[17] Unlike Judge Vitruk, a judge, who is guided by ethical love, knows what to do. Judges and officials need to learn to take more seriously the interests of the participants in the legal process and exercise their impartial sympathy judgements depending on the circumstances of each case.

The *Nijegorodskiy* case and *Galgoevoi* case represent a striking contrast not only in their different effect on the existing law but also in manifesting different kinds of

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[16] Ibid.
[17] SZRF - No. 12. [1998] St. 1458. - Dissenting opinion of Judge Vitruk.

legal reasoning. One type of reasoning (*Galgoevoi*)is an endeavour to do what is just despite entering into conflict with the existing law, another (*Nijegorodskiy*) is an endeavour to engage in all possible mental manipulations to preserve coherence and consistency of the law at the expense of equity.

We cannot realise the significance of overturning the previous case law without understanding the social and legal context in which the Court acted. Up to that moment it was an accepted principle in Russian legal practice that the executive could penalise Russian citizens without a judicial process. According to Russian legal doctrine and practice only the most gross offences like theft, murder, treason and similar offences were considered as properly criminal requiring a punishment imposed by the court. Other minor offences, falling under the category of either administrative or disciplinary ones, could be penalised by the administrative organs without any judicial process. This practice has been softened significantly since the 'Perestroyka' era and the collapse of the Soviet Union. The Russian citizens have obtained the right to complain to the court against any decisions of the executive which are thought to infringe their rights and the interests protected by law.

However, the executive has retained huge discretion to penalise ordinary citizens, and because of the Russian legal culture citizens were reluctant to go to the court to complain against administrative penalties. On the other hand the courts are reluctant to be involved in conflict with the executive which has much more power and influence in Russian society than the judiciary. Moreover, executive absolutism is to a significant degree supported by legislation. In this context the effect of decision of the Court in the *Galgoevoi* case is difficult to overestimate. For it means a beginning of a break with the old law inherited from the past, the law which is still alive and to which the judges have and should have a certain kind of fidelity.

If we look at the conflict of types of reasoning in the context of the conflict of different states of conscience it becomes clear how much a particular state of conscience can affect not only a judicial decision, but also the whole of the legal and social practices. In Part II of the thesis we have seen that sympathy judgements take their strength in agapic love. Behind compassion towards the victims of administrative despotism one can see the power of agapic love which overcomes the consistency of the law, if that law does not meet its requirements. Thus, the conflict of legal reasoning of the majorities in the *Nijegorodskiy* and *Galgoevoi* cases is more than a mere conflict between a moral principle of the judges to be consistent in their decisions on the one

hand, and for them to have compassion to those who have suffered from administrative injustice on the other. This conflict represents a shift in legal culture; whereas the principle of love, which underlies sympathy judgements, becomes a moving power transforming legal institutions and practices.

The legal restriction confining the judges only to examining the content of the rules cannot resist the power of love which makes the judicial control over rules much less abstract and technical than one might assume. It involves a complex moral judgement, among which sympathy for particular participants can take its role in affecting the whole system of law. Nevertheless, the way the sympathy judgements operate in such cases is significantly different from the cases where the judges are obliged to evaluate facts and circumstances. In this situation sympathy for the participants in the constitutional control over rules would become illegitimate unless this sympathy passes its factual confinement. For the decision of the Court affects more than the participants of one legal dispute. If sympathy judgement should play any role in making judicial decisions on the constitutional level, it must be a prospective sympathy judgement.

Prospective sympathy judgement.

Although the report on *Galgoevoi* case does not give us enough material to examine underlying moral reasoning of the judges in their decision in overturning their previous decision in the *Nijegorodskiy* case, it does give an idea of how sympathy judgement can operate under strict legal constraints in the examination of the circumstances of the case. It is true that the judges are very restricted, though not absolutely prevented from passing a retrospective sympathy judgement. We have seen in the *Nijegorodskiy* case that dissenting Judge Kononov passed such a judgement. We may also conclude, although with less assurance, that in the *Galgoevoi* case the majority of the judges passed a sympathy judgement as well. Anyway, both cases give enough material to illustrate the great opportunities for the judges to pass a prospective sympathy judgement. A particular feature of a prospective sympathy judgement is that of taking the perspective of an ordinary citizen who may find himself in the situation foreseen by a legislative rule.

The prospective sympathy judgements may be traced particularly in the cases in which legal rules were claimed to be violating the rights of the citizens protected by the Constitution. Let us consider one recent case of this kind: *On Constitutional Control of*

Provisions of Art. 8 (1,3) of the Federal Statute 'On Procedure for Leaving and Entering of the Russian Federation'.[18] The complaint was launched by Mr Avanov, a citizen of the Russian Federation.

The *Avanov* case cannot be understood without some knowledge of the present day legal practices in Russia. Every citizen in Russia must have a permanent residence permit issued by the police of the region where the citizen lives or intends to live permanently. In some areas of Russia it may be extremely difficult for an ordinary citizen to get such a permit. The regions of Russia have got such a degree of autonomy sufficient to introduce a number of restrictions to prevent citizens from other less prosperous territories settling within more prosperous regions. The Court more than once declared these restrictions unconstitutional[19]. Yet, the regions, after abrogation of the previous rules, have passed new rules with almost the same content. New petitions have been launched to the Court once more, and the Court has had to repeat its rulings. One can see here another weakness of the constitutional safeguards of the rights and freedoms of ordinary citizens in Russia. The Court by its decision can annul any normative act as violating constitutional provisions, but it cannot easily prevent the authorities from passing an act with a similar content.

The Court, however, found a different way to resist political and administrative despotism by setting out specific requirements for particular normative acts. The *Avanov* case is one example of such judicial policy. The purpose of this policy is the protection of ordinary citizens from political and administrative injustice under the circumstances in which the Court has not enough power to prohibit certain abuses of power. The *Avanov* case shows the place of prospective sympathy judgements in such a policy.

The facts which led to the petition to the Court were as follows: Mr Avanov, a citizen of Russia, lived in Moscow without a permanent residence permit. His permanent residence permit was issued in Tbilisi, Georgia, which later became an independent state. According to the Federal statute *On the Procedure for Leaving and Entering the Russian Federation,* in order to leave Russia, each citizen must get a special passport which has to be issued at the place of his or her permanent residence. The situation was quite paradoxical: a citizen wants to leave Russia, but in order to get permission for that, he has to be outside Russia. The officials refused to give the

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[18] VKS - No. 2. [1998], 19. - Decision of 15 January, 1998.

[19] See: Baglai M. 'We're Concerned with Law, not Politics'. - Interview in *Russia.* No. 10. (1997). pp. 12-14. See also a later case in which the restrictions were unanimously declared unconstitutional: SZRF - No. 6 [1998] - St 783. - Decision of 2 February 1998.

passport on the basis of the absence of a residence permit, and the latter was refused, on the basis that Mr. Avanov had no accommodation required for granting the permit.

The Court in its decision found that the statute, which requires the issue of a passport for leaving Russia only in the place where a citizen has a permanent residence permit, does not comply with the constitutional provisions protecting the rights of citizens freely to leave and enter Russia[20]. The Court appealed to the following constitutional provisions:

1. "The State shall guarantee equal human and civil rights and freedoms without regard to sex, race, nationality, language, origin, property or official status, place of residence, attitude to religion, persuasions, affiliation with social associations or other circumstances".[21]

2. "Each person may freely go beyond the boundaries of the Russian Federation".[22]

The reasoning of the Court in the *Avanov* case was the following: the Court agreed in principle that the passport must be issued at the place of permanent residence as complying with the Constitutional provision that "Human and civil rights and freedoms may be restricted by federal law only to the extend necessary for upholding the foundations of the constitutional system, morality, or the health, rights and lawful interests of other persons or for ensuring the defence of the country and state security".[23] However, it was noted that "the issue of the passport only in the place of residence, which is proved by registration, restricts too severely realisation of the constitutional right of a citizen to leave the country, because of an obligation to apply only to a certain territorial administrative body"[24]. This practice was considered as violating the constitutional right, "because it essentially prevents the issue of the passport to a citizen of the Russian Federation if he does not have the registration of his residence".[25]

Therefore, the statutory provision which established such a practice was declared as not complying with the Constitution because the lawgiver failed to specify a remedy in circumstances when a citizen cannot get a permanent residence permit. In other words the Court held that the lawgiver when imposing any duties affecting the rights and freedoms of the individual in accordance with the Constitution must specify the

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[20] VKS - No. 2. [1998], 19. - Decision of 15 January, 1998. - Para. 1 of the Decision.
[21] Constitution of the Russian Federation. Art. 19 (2).
[22] ibid., Art. 27 (2).
[23] ibid., Art. 55 (3).
[24] VKS - No. 2. [1998], 19. - Decision of 15 January, 1998. - Para. 4 of the Findings.
[25] Ibid., para 1 of the Decision.

circumstances when these duties can prevent a citizen from enjoying his rights and freedoms, and the ways of mitigating these duties.

The particular feature of the *Avanov* case is that the judges went much further in the abstract control over disputed rules. They tried to take the perspective of those who for some reason do not have a residence permit. Because of that the judges were able to take a step which transformed the whole system of constitutional control over the exercise of political and administrative powers. The decision of the Court itself may be seen as a breakthrough in the scope of review over legislative and other state rules. The decision implies that a normative act of the state may violate the Constitution not only by prescribing something, but also by failure to prescribe something.

There was a strong argument against such an approach by the Court. Judge Aebzeiev, who dissented, noted that although Mr Avanov suffered injustice, it was not a fault of the legislation but of those who applied the law[26]. In fact, no statute can specify all the circumstances in which a strict application of statutory provisions may cause infringement of citizen's rights. Therefore, it is not expedient to strike out the legislative act because of the failure to specify the circumstances when it cannot be applied. Judge Aebzeiev also employed a normative argument that the decision of the Court violated the principle of separation of the powers, and intervenes into the prerogative of the legislator.

It is important to note that the Russian courts are very reluctant to take an activist position. The *Avanov* case is extraordinary. It is difficult to find any other explanation of the decision unless we consider the sympathy of the judges. The official report of the decision is too brief to give us hard evidence that a sympathy judgement took place. Nevertheless, from the fragmentary evidence one may reconstruct the original reasoning of the majority of the judges based on sympathy. Firstly, they looked at the facts which caused the petition, and they discovered that his petition to the Court was the only avenue left for Mr Avanov to find protection against administrative injustice. However, the Court can act only within the limits prescribed by law, and the only way to grant a remedy was to strike out the legislative act which was incorrectly applied. The injustice suffered by Mr Avanov is not sufficient to declare the statutory provisions violating the Constitution. This is where the judges have to go further from a retrospective sympathy judgement to a prospective one. They have to take the perspective of an ordinary citizen who found himself in the situation without a residence permit. It is worth remembering

[26] VKS - No. 2. [1998], 19. - Decision of 15 January, 1998. - Dissenting opinion of Judge Aebzeiev.

that a significant number of Russian citizens do not have such a permit. Therefore, it was not a sympathy judgement towards Mr Avanov only, it was sympathy judgement towards every citizen who was deprived of a permit because of political and administrative injustice.

Even though the official report is not sufficient to show the sympathy of the judges, putting the decision into the wider political context makes that sympathy clear. The decision of the Court to declare the provisions of the statute *On the Procedure for Leaving and Entering the Russian Federation* unconstitutional, and the enormous step in judicial activism, an activism which the Russian judges are not used to, cannot be explained, other than that the judges felt compassion for people like Mr Avanov, who after the collapse of the USSR fled to their homeland to find political despotism and bureaucratic inhumanity. The Court tried to correct the injustice caused to such people, who were not able to get a permanent residence permit, by ruling that the legislator should not limit any realisation of citizen's rights and freedoms through the availability of such a permit. To assume that the judges had other motives than sympathy for the act, previously unthinkable in Russian legal context, of judicial activism is to assume that the judges were deaf to administrative injustice and moved by a desire to impose their political will on the legislator and the executive. Such a view violates all the legal and moral foundations of judicial office.

It is a paradox, that the legal constraints on the activities of the Court excluding any decision on the merits of case with the purpose of suppressing any judicial activism, made the Court act in such an active form as to prescribe what exactly the legislator should put down in his acts. In this paradox one can see again the power of agapic love which is able to make such wonderful transformations. Although the Court is very restricted in its ability to examine the facts and circumstances of the complaints and petitions in the cases when it has managed to pass a sympathy judgement, it makes an immense impact on the whole law.

Sympathy judgements and technicality of law.

Sympathy judgement requires compassion towards the parties involved, understanding of their motives, and the importance of the issue in the dispute. One may argue that the cases considered above are extra-ordinary: there is a number of disputes in which a reasonable judge would find it difficult to take into account the circumstances of the litigants. An example of this would be those concerned with the competence of

different state organs. These sorts of disputes may be seen as technical as they do not allow the conscience of the judges to play any important role. However, even in such technical cases there can be place for sympathy. Let us consider one of the ordinary cases: *Case on Constitutional Control of the Governmental Decrees of 26 September 1995, No 962 'On Tariffs with the Possessors and Users of Heavy Loads Transport', and of 14 October 1996, No 1211 'On Introducing Temporal Tariffs for Transportation of Heavy Loads'*.[27]

The petition to the Court was submitted by the Governor of the Karel Republic, a subject of the Russian Federation. The *Karel* case was about the competence of the Executive to introduce tariffs for transportation of heavy loads on the federal roads. The Governor of the Karel Republic argued that this tariff is a kind of tax, and therefore it can be introduced only by the legislator according to the provision of Art. 57 of the Constitution which says that 'Each person shall be obliged to pay taxes and levies set by statutes. Laws imposing new taxes or worsening the position of the taxpayers shall not have retrospective force'. It is generally held that this constitutional provision has established a very important principle according to which a tax or levy can be introduced only by legislative act.[28] The Executive, however, introduced a tariff on every vehicle carrying heavy loads without an explicit act of legislation which allows them to do so.

The majority of the Court, Judge Kononov dissenting, found that the provisions of the Governmental decrees do comply with the Constitution. The decision in favour of the Executive was taken contrary to a strong judicial opinion in previous decisions of the Court that the Executive tariffs violate the constitutional principle: 'No taxes without legislation', and the previous case law in which a number of tariffs introduced by the Executive, were considered as taxes, and therefore the fact of their introduction was held by the Court in its previous decisions as a violation of the Constitution.[29]

The Court justified the introduction of the tariff through finding that the Executive pursued the public interest. It employed an effects argument: "Introducing the tariff for transportation of heavy loads on the Federal roads the Executive stimulates thereby those who transport the loads to use ways of transportation less damaging to the

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[27] SZRF - No. 30. [1998] St. 3800. - Decision of 17 July, 1998.
[28] *Commentary on the Constitution of the Russian Federation.* - Ed. by Academic B. N. Topornin. - Moscow: Jurist, 1997. - P. 359.
[29] Decisions of the Court of 18.02.1997; 01.04.1997; 02.07.1997; 11.11. 1997.

roads."[30] This argument was also supported by a sophisticated justification of the legality of the Executive in introducing new tariffs. Because it is held that the Constitution forbids any taxes without legislation, the Court drew a distinction between taxes and tariffs, maintaining that not every tariff is a tax[31]. Three arguments were employed to warrant this distinction: Firstly, the tariff is individualised for different categories of those who transport the loads. Secondly, the operators have freedom to use the roads or not to use them. Thirdly, the Executive decrees established a different mechanism for compulsory collection of the tariff than for ordinary taxes.

Dissenting Judge Kononov pointed to some weaknesses of the majority's justification. First of all, taxes can and do establish different rates for different individuals as well. Secondly, many objects of taxation also can be chosen freely by those who are taxed. If one would follow the logic of the Court he may conclude that the tax on property is not tax at all, because the owners are free to get rid of their property and to pay nothing. Therefore, the first two points are not strong enough. The third point does not look strong either. It was argued that to compel the tariff payer to pay, the state authorities must use a different mechanism from that used in the case of collecting taxes. In the second case it is the tax police who takes measures of compulsory collection, in the case of the tariff on transportation of heavy loads it is a traffic police. Nevertheless, both measures have the same characteristic: a compulsory transfer of property (money) in order to meet a public interest and needs, even though the compulsion is carried out by different public organs and in accordance with different legal provisions.

However, the Court's majority thought they had a stronger reason not to follow the persuasive arguments of Judge Kononov. The root of the differences between the majority and the dissenting judge is lost in the depth of the conscience of judges. Once again, the brevity of the formal report of the decision does not give us a definite answer as to what sort of moral judgement the judges were guided by. The character of the arguments employed point at the suggestion that the majority passed a consequentialist judgement, while Judge Kononov followed a deontological conscience. But it does not exclude a possibility of a sympathy judgement in this or similar cases. The case-report contains evidence that the Court when making its decision clearly understood the guiding interest, motives and the intention of the Executive introducing the tariff. It is

[30] SZRF - No. 30. [1998] St. 3800. - Decision of 17 July, 1998. - Para. 2 of the Findings.
[31] Ibid.

not, however, clear if the interests of the people affected by this measure were taking into an account. The legal constraints might prevent the judges from consideration of whether or not the rates of the tariff were reasonable.

If the judges were really passing a sympathy judgement, they must take into account the interests of all those who are affected by the decision. It is true that the majority took the perspective of the Executive. But this is not enough. The perspective of those who become burdened by the imposition of the tariff is of no less importance. Sympathy judgement does not mean that the judges must strive to please everyone. In the context of the introduction of the tariff it means that the judges' task is to guarantee that the Executive used its power fairly and justly. The contribution of agapic casuistry is that finding what is fair and just cannot be achieved without taking the moral perspective of all the parties involved.

The substance of the decision points to the conclusion that the judges possess freedom to go much further of a mere technical control over rules in their interpretation of the constitutional provisions, and to do that in accordance with their conscience when treating previous case law as not absolutely binding, and accepting or rejecting even strong normative argument. Consequently, there is a significant room for passing a sympathy judgement. Another interesting conclusion is that even in deciding a technical question like an issue of competence of state authorities the judges can be guided by the principle of ethical love providing that they take the perspective and the interests of the parties seriously, consider their motives, and pass their judgement with the purpose of doing good to all those who are affected by the decision.

Although one cannot see clearly enough what is behind normative and effects arguments of the judges, the effect of the decision goes further than the interests only of the Executive and the Governor of Karel Republic who pleaded in the case. It affects even more than just those who transport heavy loads on the roads, it affects everyone who is within the power of the Executive to impose any tariff. Therefore, there is a place for sympathy, and if so, then it is a matter of judicial skill to justify a sympathy judgement in accordance with legal constraints imposed by positive law. It is not my intention to determine the outcome of the cases similar to *Karel* case. The judges are in a better position to do that. The sympathy approach, as presented in this thesis, does not provide ready answers to every legal case. But it presents the way and method of making decisions in accordance with the principle of love after taking into account the circumstances, moral perspective of the parties to the process and their interests.

Conclusions.

Despite strong legal constraints which prevent the judges from considering the facts and circumstances of the cases, the Russian Constitutional Court has important opportunities for passing a sympathy judgement. In one set of cases we have seen that the judges did pass sympathy judgements, in an other set, one could see that there was room for sympathy. Even in the case where the person affected by a legal rule was not a party directly, the Court has an opportunity to pass a sympathy judgement providing that the possible effect of the rule on the rights and interests of such a person is seriously taken into consideration.

The activities of the Russian Constitutional Court are a good example of the situation in which the judges are restricted significantly by the positive law in passing a retrospective sympathy judgement towards the parties to the process. Though the function of the Court is primarily control over rules, it has, however, tremendous opportunities for passing a prospective sympathy judgement, that is a judgement which takes the perspective of an ordinary citizen in ordinary circumstances under the legal rules reviewed by the Court. Here, one can see another proof of the conclusion made in the second part of the thesis that sympathy judgement does not exclude rules and principles. In giving due regard to the particular, a judge with sympathy can employ the generality of legal rules without losing the speciality of the sympathy approach. What is indispensable for sympathy is imagination, compassion, and the will to do good.

The activities of the Russian Constitutional Court show a different pattern of sympathy judgements from those observed in the cases where the judges are empowered to give their evaluation of the facts and circumstances. In the second part of the thesis the process of passing a sympathy judgement was, in effect, presented as involving three major steps:

1. Once a judge grasps the issue of a dispute presented before him he tries to understand the motives of the parties involved, the legal and social context of their behaviour.

2. Being aware of his own prejudices and influences of different contexts on his own sense of justice, the judge determines what would be right behaviour if he had to act in the place of the parties involved.

3. After determining what is just in this particular case the judge finds the appropriate legal rule to formulate his decision taking into account the interests of both parties.

In the activities of the Russian Constitutional Court the process of passing sympathy judgement seems different. After analysing the majority decisions in *Galgoevoi* and *Avanov* cases, and also the dissenting opinion of Judge Kononov in the *Nijegorodskiy* case the way sympathy judgements are passed can be summarised in the following steps:

1. Since the judges have to pass their judgements exclusively in regard to a disputed rule, the first step, after grasping the issue of the dispute, is to establish the abstract content of the rule in dispute, and the abstract content of the constitutional provisions involved.

2. The judges put themselves in the place of the person who can be *possibly* affected by the rules and in the place of the state body which authorises the rule. They need to know the range of possible contexts in which the rule may be applied, and they have to understand the intent of the state body introducing the rule.

3. After grasping the possible and sometimes real effect of the rule and the motives of the state body issuing it the judge passes his judgement on the content of the constitutional provisions in respect of the disputed rule. In their interpretation of the constitutional provisions, however, the judges are restricted by the wording of the Constitution and previous case-law. However, the Court, as we have seen, can exercise remarkable skills in creative interpretation of the wording of the Constitution and ignoring the previous case-law, when it is thought appropriate.

The particular feature of moral reasoning in the Russian Constitutional Court is that the judges must take the *possible* factual settings rather than actual ones in relation to the rule under dispute, although actual factual settings may play a crucial rule as it happened in the *Avanov* case. The second peculiarity is that, in determining what is just in a particular conflict of interests under the disputed rule, the judge determines at the same time the content of the constitutional provisions rather than tries to find which rule should be applied. In other words, moral reasoning in the Russian Constitutional Court may serve as an example of when the judges are restricted in the choice of the rules to be applied, and in order to justify a sympathy judgement they have to use all their casuistic skills when interpreting constitutional provisions. We shall observe the same pattern of reasoning in the following chapter on the European Court of Human Rights.

The approach of sympathy judgement adopted by the Russian judges appears to have distinctive features. Unlike the judges of the European Court of Human Rights, the ability to pass a sympathy judgement in the Russian Court depends mainly on how far the judges are prepared to examine the *possible* effect of the disputed rule, and how much the wording of the constitutional provisions gives them room for manoeuvre. It is time now to look at the particularities of sympathy judgement in the legal context of the European Court of Human Rights.

12. SYMPATHY JUDGEMENTS OF CONSCIENCE IN THE EUROPEAN COURT OF HUMAN RIGHTS.

Introduction.

The activity of the European Court of Human Rights is one of the areas of law where sympathy judgements of conscience can be traced comparatively easily. There are several reasons for this. Firstly, human rights law itself already presupposes a greater role for moral ideas and values compared with such fields of law as tax law, local government law and so on. Unlike 'technical' branches of law, human rights law defies detailed regulation. Secondly, the broad language of the European Convention of Human Rights which the Court applies, is not precise, and leaves much to the interpretative skills of the judges. Whether the judges want it or not, they have to pass some moral judgements in order to determine the scope, limits and applicability of human rights. Thirdly, the judges of the Court represent all variety of legal and moral cultures from the Atlantic to the Pacific. Each country which has signed the Convention bears different moral cultures which can and do affect the vision of human rights. A judge who was brought up somewhere in the spaces of the former Soviet Union may differ significantly from a judge from the West. A judge educated in the Common law tradition may differ even more from a judge educated in the Civil law tradition.

The differences in the vision of human rights lead to a more elaborate justification of decisions. This allows an observer to identify more easily the underlying moral values. Apart from this, the judges often disagree with each other. Dissenting opinions of the judges are one of the important instruments to trace sympathy judgements of not only the dissenting judges but also of the majority which otherwise would be left unnoticed. On the whole, sympathy judgements are easier to trace in dissenting opinions because, firstly, they are written by the judges themselves, secondly, unlike the justification of the majority they express an individualised opinion of the dissenting judge, and thirdly, they are less bound by formal requirements applied to the documents with the stamp of the European Court of Human Rights.

The case law of the European Court of Human Rights is enormous. A full analysis of it from the point of view of agapic casuistry would require much more then one can afford in one chapter. Therefore, the main purpose of this chapter is to show the way sympathy judgements can operate in the context similar to the one of the European

Court of Human Rights. The thesis is not going to examine how sympathy judgements *do* operate on the whole, but how they *possibly can* operate in the given legal context. Unlike the chapters on natural justice in England, the declaratory power in Scotland, and the Russian Constitutional Court, in this chapter the cases were chosen not because of their great importance. The author has selected quite ordinary cases which did not leave a significant landmark in the history of the European Human Rights Law. The reason for this was to stress that sympathy judgements are not something extraordinary, but a reality of high judicial culture.

The ordinary character of sympathy judgement is the first aspect of this chapter. The second is the examination of the legal context in which the judges pass their sympathy judgements. We shall see that this context is quite different from those of the House of Lords, the Scottish High Court of Justiciary, and the Russian Constitutional Court. At least two features of the context are remarkable. The first was already noted. The only task of the European Court is to apply the law as it is set in the European Convention of Human Rights. The provisions of the Convention are very broad, but they are the only provisions to which the judges of the Court may appeal. The second feature is that the judges have to pass their judgements on the merits of case. They have to examine the facts, and at the same time they have to examine the domestic law of the respondent countries for its consistency with the Convention. In order to understand the mechanism of the operation of sympathy judgements in a similar context we need to look closer at legal constraints on the Court's decisions.

Sympathy judgements and legal constraints.

It was stressed in the second part of the thesis that the judges exercise sympathy judgements within legal constraints set in the rules governing their activities. Although judgements of conscience may play an important role in making judicial decisions it is necessary to note that they can have only a constrained application. When deciding a case a judge is almost always squeezed into a more or less narrow straight jacket of legal provisions. The European Court of Human Rights is not an exception.

The moral deliberation may take place only after certain legal requirements are observed. First of all there are constraints on admissibility of the case[1]. A judge can morally approve or disapprove of how the rights of a particular person have been

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[1] *The European Convention on Human Rights.* - Art. 34.

treated, but this judge can do nothing if the domestic remedies are not exhausted or the period of six month has been expired since the final decision was taken.

Even after the application is recognised as admissible the moral deliberation is determined to a significant degree by other legal constraints. The first constraint is that the judges have to show respect for the wording of the Convention. Their moral deliberation cannot overstep the ordinary meanings of the words. Though it is true that "the language and structure of the Convention leave the judges important opportunity for choice in interpretation"[2], they must exercise this choice within the limits of the ordinary meaning of the words of the Convention. The second, a less strong legal constraint, is the case-law. Although the case-law of the Court does not represent a body of wholly consistent judgements, the judges are very reluctant to take a decision which substantially differs from their previous judgement on the same issue. Almost in every case one can see that the previous decisions of the Court, if there are any, are taken into account. There is not, however, a strict rule which requires from the judges to follow their previous decisions.[3]

Another legal constraint is based on the interpretation of the Convention with regard to its object and purpose. The doctrine of the margin of appreciation is one of the most remarkable implications of such interpretation.[4] The meaning of this doctrine is that it is not a function of the Court to impose its law on the States in every dispute which involves the issue of human rights. It maintains a division of responsibility between the democratic institutions of the countries and the Court. Developing the doctrine of the margin of appreciation the Court recognised that Contracting States are in a better position than the judges to decide, particularly, on limits of the rights, their restrictions when this is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others[5]. The necessity to take into account the rights of others and the interests of the public when giving protection to particular rights of the individual has been expressed in a number of articles of the Convention.[6]

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[2] Mahoney P. 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights'. in 11 *Human Rights Law Journal* (1990) 57. - P. 85.
[3] Hunnings N.M. *The European Courts.* - London: Cartermill Publishing, 1996. - P. 342.
[4] See: Mahoney P. 'Marvellous Richness or Diversity of Invidious Cultural Relativism.' in 19 *Human Rights Law Journal* (1990) 1.
[5] *Brannigan and McBride v. UK.* - Judgement of 26 May 1993, Series A, No. 258-B; (1994) 17 EHRR 539.
[6] *The European Convention on Human Rights.* - Art. 8 (2); 9(2); 10 (2); 11(2).

However, even these legal constraints leave a significant place for the judges to exercise their moral reasoning. It has been already noted that the language of the Convention is quite broad. The Court has to exercise its judicial creativity in order to determine the scope of the Convention terms. Neither can the preceding law prevent the judges from making moral choices, for the circumstances of the cases involving human rights issues are so diverse that it is hardly possible to rely constantly on the previous decisions. Another reason for restricted application of the preceding law is adaptation of the 'dynamic' model of interpretation of the Convention. This model means that the Convention must be interpreted in the light of developments in social and moral values.[7] It means that the changes in this development can affect the application of the old case-law.

Finally, the doctrine of the margin of appreciation may not only limit the exercise of moral choices by the judges, but in a certain sense broadens it. For the margin of appreciation is subject to the supervision of the Court, since it is for the Court to determine whether the State measure goes beyond the extent strictly required by the exigencies of the situation. "As the concept has evolved in the case-law of the Court , it has become clear that the scope of the margin will vary according to the circumstances, subject matter, and background to the issue before the Court".[8] In a sense the doctrine of the margin of appreciation serves as another source for moral doubts, perplexities, dilemmas and disagreements among the judges.

It is clear that the wording of the Convention, case-law, and the margin of appreciation do not save the judges from the necessity of moral deliberation, rather they are the framework in which the judges have to make their moral choices. Paul Mahoney, the Registrar of the Court, concludes: "We no longer believe that in the process of legal adjudication judges merely uncover and expound pre-existing law, or that a single, correct solution can be reached in every case by the logical application of the relevant rules of law."[9]

There is another constraint which influences the decisions of the Court, but which has a different nature from the constraints listed above. The interviews in the Court conducted by the author of the thesis have proved that when arriving at their

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[7] Jacobs F., White R. *The European Convention on Human Rights.* - Oxford: Clarendon Press, 1996. - P. 31.
[8] ibid., p. 37.
[9] Mahoney P. 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights'. - P. 57.

decisions the judges take into consideration the moral values which are shared by the European society as a whole. It does not mean that the judges are always aware of this constraint. But as one of the senior officials in the Court told me, whether or not the judges like or dislike the practice, for example, of homosexuality, when they arrive at their decision in the cases concerning alleged infringement of the rights of homosexuals, they do take into account moral values shared by the European societies[10]. Although this constraint lacks legal characteristics in sense of its binding force, its power can be enormous. The only difference is that the content of this constraint is not formalised in the positive law. Rather it acts through the intuitive law of the judges. The constraint requires the judges not to impose their own personal moral beliefs. They have to respect the moral values which are predominant in the contemporary era.

The influence of generally held moral values is particularly seen when the judges determine the scope of rights protected by the Convention. For example, in case *Boughanemi v. France*[11] the Court found no violation of the respect for family life (Article 8 of the Convention) by the French authorities who expelled an alien claiming that he had family ties in France. One of the circumstances of the case was the fact that the applicant lived on the earnings of prostitution. This was considered as incompatible with family life. In other words, the judges interpreted the right to family life within the framework of moral values dominant in Europe, even though some judges differed in their own moral convictions on this matter. The fact that the applicant lived on the earnings of prostitution outweighed even such circumstances in his favour as the facts that he lived in France for 22 years, he had there ten brothers and sisters and parents, moreover he had adopted a child in France.

Others good examples of how dominant moral values serve as a restraint are the cases involving the issue of the rights of homosexuals and transsexuals. For example, in the matter whether or not to recognise the marriages between individuals acknowledged by the law as belonging to one sex, the judges have, to date, followed the traditional concept of marriage. In the case of *Rees v. UK* the Court stated that the right to marry guaranteed by Article 12 refers to traditional marriage between persons of opposite biological sex.[12] In a similar case *Cossey v. UK* the Court restated this again:

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[10] Interview with the Registrar of the Court, John Mahoney on 12th of October, 1998.

[11] *Boughanemi v. France.* - Judgement of 24 April 1996. - European Court of Human Rights. RJD 1996-II; 22 E.H.R.R. 228.

[12] *Rees v. UK.* - Judgement of 17 October 1986. -Series A. No 106; [1987] E.H.R.R. 56. Para 49.

"Attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purpose of marriage".[13]

It is clear then that decision making in the European Court of Human Rights involves an attempt to interpret the rights of the individual in accordance with the values shared by European countries. This is particularly seen in the doctrine of dynamic interpretation which is accepted by the Court[14]. This doctrine states that interpretation of the Convention is not bound by the original meaning given by the authors of the Convention. Its interpretation must reflect the changes in social and moral attitudes of the European societies. Judge Bernhardt expressed this idea in the following words: "Human-rights treaties must be interpreted in an objective and dynamic manner, by taking into account social conditions and developments; the ideas and conditions prevailing at the time when the treaties were drafted retain hardly any continuing validity".[15] This doctrine contains implicitly a requirement that the judges should interpret the Convention according to the dominant moral values. There is some parallel here with Dworkin's ideas on constitutional interpretation.[16]

The requirement of dynamic interpretation seems much more difficult to apply than simply following the exact wording of black letter law. There are two main difficulties. Firstly, there is the problem of establishing what are the dominant values. Secondly, there is the problem of the conscience of judges, particularly when a judge finds that his or her moral convictions are in a conflict with those shared by society as a whole. The first problem also involves a matter of conscience, because a judge has to examine his conscience in order not to substitute his own personal sense of justice for the moral consensus. Moreover, in some cases there can be no moral consensus at all, for example, in cases of abortion. The second issue should not be disregarded either. It is true that the judges are servants of the rule of law, and if it is a requirement of the law to follow the shared moral values, the judges must follow. But what about the case where the shared moral values become dangerous to the rule of law as it is grasped by the conscience of the judge? Or what about those situations where the moral convictions

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[13] *Cossey v. UK.* - Judgement of 27 Sept. 1990, Series A. No 184; [1997] 13 E.H.R.R. 622. - Para 46.
[14] Jacobs F., White R. *The European Convention on Human Rights.* - P. 31.
[15] Judge Bernhardt. 'Thoughts on the Interpretation of Human Rights Treaties'. In: Matscher F., Petzold H. *Protecting Human Rights: European Dimension.* - Koln: Heymanns Verlag, 1988. - pp. 65-71.
[16] Dworkin R. *Law's Empire.* - Harvard University Press, 1986. - Chapter 10.

of the judge are so fundamental that he is ready to sacrifice himself in order to defend the value of these convictions?

Dworkin tries to solve these issues through the concept of the ideal community which is committed to the principles of justice, fairness, due process, and above all to the principle of integrity.[17] A judge must follow the values of such a community, even though his or her personal moral beliefs are contrary to them. The real community of the countries who have signed the Convention may fit or not fit into the ideal community of Dworkin. But at least one thing is common for both of them. Sharing commitment to the principles of justice, fairness and due process does not avoid disputes on moral issues, and consequently, *per se* does not solve the problems of conscience, even if a judge is compelled to take a particular decision because the principle of integrity requires so. Moreover, there can be situations where the principle of integrity does not provide a clear answer as we have seen in English case of *Ridge v. Baldwin*[18].

The questions of conscience are important, and the judges have to live with them and attempt to solve their moral doubts and dilemmas in deciding the cases. In fact, the case law of the Court contains different approaches to resolving these issues. Dworkin's principle of integrity can be one of them. Agapic casuistry offers a different way to resolve them, although this way is not an easy one, because it does not provide an immediate answer. It requires a judge to decide a particular case with the question always open to him: what does it mean to love one's neighbour in the given case? Perhaps, it is easier to escape from answering the question into a kind of legal formalism or unconditional adherence to previous decisions as the principle of integrity may require, than to examine one's own conscience all the time, the burden of which can be heavy. This tension itself becomes a matter of conscience. A judge is faced with the existential choice: to live with the question always in mind, and that is with an awakened conscience, or to bury his conscience in the grave of legalism.

Judgements of conscience in the Court's decisions.

Before exploring sympathy judgements of conscience in the making of judicial decisions in the European Court of Human Rights, it is important to note the difference between a judgement of conscience on the one hand and the legal decisions found in a law report on the other. The main presupposition of this paper is that almost every legal

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[17] Ibid., pp. 208ff.

decision is based on a certain type of moral judgement. Even blind following of the letter of law can have a moral judgement as its foundation. Nevertheless, the judgements of conscience may be hidden, and not so easily discovered on the pages of law-reports.

All written decisions contain a summary of the procedure before the Court, a statement of facts found relevant by the Court, the provisions of national laws, the issues concerning the Court's jurisdiction, examination of the alleged violations of the Convention, the ground of the Court's decision, the operative provisions, and finally, the dissenting opinions if there are any[19]. The judgements of conscience are not evident on the surface. They should be distinguished from the conclusion whether there is a violation or not. This conclusion is purely declaratory. It simply says whether in a particular case the State respondent has violated a right of the individual, protected by the Convention, while a judgement of conscience of the judges points what was right and wrong in the behaviour of the parties involved, and how the judges should react and why.

The decision of the Court on an admissible case is either there is a violation or there is none. The judgements of conscience may be much more complicated than this. The degree of the rightness of the parties' behaviour established by the conscience of a judge may differ from the standards prescribed by the positive law. As well as that, the conscience of judges can fail to determine the rightness of behaviour of the parties involved. The judges can have moral doubts concerning the behaviour of each party. There can be hard cases in which the conscience of a judge may be unable to pass a definite judgement. However, the law requires that a judge must make a decision. A judge has a duty prescribed by the law to decide on whether there is a violation or not. If a judge has some doubts on the merits of the case he still is required by the law to arrive at a decision on violation of the Convention.

Therefore, the judges can arrive at a legal decision even with a conscience uncertain of the merits of the case. If all this is taken into consideration the decisions of the Court can be seen in a different perspective. The relationship between conscience and law is very complex. Yet, it would be a mistake to think that the judgements of conscience and legal decisions exist in two different realities. They cannot be separated, as a living body cannot be separated from blood. The case-law of the European Court of

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[18] See chapter 9 of the thesis.

[19] Callewaert J. 'The Judgements of the Court: Background and Content. In: *The European System for the Protection of Human Rights.* – Dordrecht: Martinus Nijhoff Publishers, 1993. – P. 713- 732.

Human Rights is the area of the law where the judgements of conscience can be much more easy traced than in any other area. They appear to various extents in the written decision dealing with the merits of the case.

In the second part of the thesis, three kinds of judgements of conscience were singled out: consequentialist judgements, deontological judgements and sympathy judgements. 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. Sympathetic conscience, without rejecting the importance of consequences or moral nature of actions, evaluates actions according to the principle of loving one's neighbour as oneself. Although these types of conscience are rarely met in their pure forms, it can be that some judges are more inclined to pass a particular type of moral judgements. Passing a different type of judgement leads to a collision of judicial opinions.

The conflict between deontological moral reasoning and consequentialist reasoning can been seen for example in case *Balmer - Schafroth v. Switzerland.*[20] The Court, unlike the Commission, found no violation of Art. 6 (1) of the Convention (by a majority of 12 against 8). In this case the applicants claimed the violation of their right to a fair trial because according to the Swiss law it was impossible for them to have access to a tribunal to appeal against the decision of the Swiss government to renew an operating licence for a nuclear power station. At the same time these objectors to the licence were recognised by the Swiss government (the Federal Council) as persons having an interest worthy of protection to file an objection. Their objection was considered and rejected by the Swiss government. The Court's justification of their decision is a good illustration of consequentialist moral reasoning. In the opinion of the majority of the Court, the applicants had not established a direct link between the operating conditions of the power station and their right to protection of their physical integrity, as they had failed to show that they were personally exposed to a serious, specific and immanent danger. Above all, one may feel the reluctance of the majority of the judges to restrict the freedom of the Swiss government to make political choices which pursue the economic interests of the country as a whole.

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[20]*Balmer - Schafroth v. Switzerland.* - Judgement of 26 Aug. 1997. - *HRLJ.* - 18. (1997) 196; 25 E.H.R.R. 598.

By contrast, the dissenting opinion of Judge Pettiti[21] joined by other six judges illustrate an example of deontological reasoning: whether or not there is danger as a consequence of operation of the nuclear station does not matter. Their reasoning is based on a deontological preposition that there is no exercise of executive power without judicial control. Because the Federal Council which granted the licence cannot be considered as an independent and impartial tribunal, Judge Pettiti and others made a conclusion that there was a violation of the right to a fair trial. Thus, the majority of the Court looked at the real consequences when examining the decision of the Swiss government, while the dissenting judges looked at the principle of judicial review of executive actions.

It was stated in the previous parts of the thesis that deontological and consequentialist states of conscience may conflict not only with each other but also with sympathy conscience guided by the principle of neighbourly love. The first two states of conscience represent what can be called a generalised approach. The applicant affected by a state measure is only *a* person. He is no better or worse than any other person who finds himself in the same position. Sympathy conscience is different. It represents an individualised approach to moral issues. It looks at the case as having particular characteristics. The personality of the applicant and his life-style have an effect on the result of the decision-making. The presence of dissenting opinions can be helpful in discovering the conflict between different types of moral reasoning, although not every dissent is a result of different state of conscience, and the absence of dissent does not necessarily means all judges are guided by the same state of conscience. The advantage of dissenting opinions is that as we have seen in the cases before the Russian Constitutional Court, the dissenting judges are more free to express their moral views, than the majority can do in the official report, in drafting which they may take but an insignificant part.

The case of *Gustafsson v. Sweden*[22] is interesting as an example of a case where sympathy judgements can been seen in the dissenting opinions. In this case the majority of the Court found no violation of freedom of association when a restaurant-keeper was granted no remedy against a trade-union compelling him either to join an association or to adhere to a system of collective bargaining. The compulsion was carried out through

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[21] Ibid., 25 E.H.R.R. 598; at 616.

[22] *Gustafsson v. Sweden.* - Judgement of 25 April 1996. - European Court of Human Rights. RJD 1996-II. 22 E.H.R.R. 409.

a blockade and boycott which led eventually to significant damage to his business and to his eventually selling the restaurant.

Some dissenting opinions of the judges show clearly a sympathy for the restaurant-keeper. Dissenting Judge Jambrek stated that "The collective action by the unions not only endangered his business and financial interests but threatened his whole philosophy of business, employment relations and life-style."[23] There was sympathy for applicant as a victim of despotism of the unions, and it was thought that the state might be conniving with the unions. It was noted, particularly, that the working conditions offered by the applicant were better than the conditions even if the applicant had complied with the demands of the Trade Union. Judge Jambrek supported his sympathy judgement with a following argument: "The employment policy applied by the applicant at a micro-level in his restaurant business was one based on co-determination and it sought to achieve the very same social goals as the collective-bargaining system at a micro-level, namely industrial peace and solidarity".[24] The dissenting opinion of Judges Martens and Matscher also contain clear indications of sympathy for the applicant.[25] An interesting characteristic of sympathy judgement is that it does not exclude the arguments which are employed by deontological and consequentialist consciences. For example, it was argued by the dissenting judges that "The individual must in principle be free to act according to his convictions and, accordingly, be protected against having to go against those convictions as a result of constraining collective action by one or more trade unions".[26] This argument fits deontological judgement as well.

Another tool for discovering sympathy judgement is a careful reading of the facts of the case as they were conceived by the judges. For example, the report of the case *Botten v. Norway*[27], which, at the first glance, does not contain any personal considerations, may have an indication of sympathy towards the applicant. The arguments were concerned with a quite technical issue of whether the Swedish Supreme Court has violated Article 6 of the Convention by overturning the acquittal of the applicant by the City Court, without having summoned him and without having heard

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[23] 22 E.H.R.R. 409; at 456.
[24] ibid.
[25] ibid., at 446.
[26] ibid., at 449.
[27] *Botten v. Norway.* - Judgement of 19 Febr. 1996. - European Court of Human Rights. RJD 1996-I.

him in person. The applicant, being a rescue officer during a rescue operation in the sea, used a rubber dinghy instead of a dory. Because of the weather conditions the dinghy was sunk and three passengers were drowned. The applicant was the only one who survived, and he was held responsible for using the rubber dinghy instead of the dory.

It seems from the law report and from the dissenting opinions that sympathy judgements hardly appear. The issue was quite abstract and the personality of the applicant was not of great importance for argumentation, although the Court finding a violation noted that "Considering what was at stake for applicant, the Court does not consider that the issues to be determined by Supreme Court when convicting and sentencing him could not, as a matter of fair trial, properly have been examined without direct assessment of evidence given to him in person - Supreme Court was under duty to take positive measures to this effect, notwithstanding fact that he neither attended hearing, nor ask for leave to address Supreme Court."[28] One can see only that justification of the decision as a whole is built on an normative argument which requires that anyone facing a criminal charge should be heard in person.

The description of the facts in the official report which may provide a clue to seeing that sympathy is part of the moral deliberation. There might be reason to doubt that the statement of the facts in the decision differs from the facts which were actually employed in deliberation. However, this doubt may be better justified in respect of the facts which were not mentioned in the statement rather than those which have been stated in the report. In other words, the facts employed in sympathy judgements may be omitted in the statement of facts in the official report on decision, but the facts which are present in it must have been employed in the moral deliberation. It is possible that one fact can be of particular importance. In this highly technical case the judges took as a relevant fact the number of hours (which was quite significant) spent by the applicant struggling for life in the cold sea water. Though the sympathy judgement is not apparent in the decision of the Court and in the dissenting opinions, some indications of sympathy can be traced even from the formal statement of facts in the report on decision.

Thus, sympathy judgements do not exclude the arguments employed by deontological and consequentialist judgements because these arguments are derived from legal principles and rules. In the second part of the thesis, the difference between

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[28] ibid,. Para 52.

moral judgements and the moral arguments employed for their justification have been shown and three different types of moral arguments have been singled out: normative, effects and personal. Sympathy judgements need these arguments not simply for rhetoric or persuasion of the parties to the process, but because of the legal significance of the decisions and for the sake of the judges themselves who can make errors if they are not guided by rules[29]. The case of *Gustafsson v. Sweden* shows the potential of sympathy judgement to use effects and normative arguments for their own purposes. On the other hand it shows that because of the use of such arguments when passing a sympathy judgement it is possible that the sympathy grounds of these arguments may not appear in the official text of the decisions or even dissenting opinions of the judges. Therefore, a researcher in European Human Rights case-law must be aware of the difficulty of identifying the real picture of the role of sympathy judgements in making judicial decisions. The complex character of the relationship between sympathy judgement and the arguments similar or even identical to deontological and consequentialist judgements makes it important to look at the process of moral deliberation of the judges of the Court when passing their judgements of conscience.

The process of moral deliberation.

A judgement of conscience represents the final stage of moral deliberation. In order to understand it better we need to look at the process of arriving at the decision. Independently from the state of conscience in which a judge is acting one can think of some common stages of moral deliberation. These stages are determined by the legal constraints considered above. The officials of the Court interviewed by the author of the thesis pointed to the wording of the Convention which gives rise to the practice that when judges come to decide a case, they, firstly, may try to find out whether there is an infringement of rights at all (the infringement level of deliberation), and only then, look at whether this infringement was according to law or necessary in a democratic society (the necessity level of deliberation)[30]. Thus, the Convention gives a channel for the stream of moral reflection. However, this is simply an observation of one who has worked in the Court for many years. In practice, a judge may look at case without a deliberate purpose of separating these issues. A judge may be governed by intuition, and

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[29] Devlin P. *Judge.* - Oxford University Press, 1979. - P. 89.

[30] Interview with Dr. Stanley Naismith on 8th of October, 1998.

his fact finding and fact evaluation may lack this form of rationalisation proposed by the framers of the Convention. He might use this distinction only in justification of his opinion.

In a sense the construction of the Convention propositions may stimulate the conflict between different moral judgements and states of conscience, for every state of conscience may appeal to the wording of the Convention. The deontological conscience may exploit the 'infringement level' of moral deliberation. The consequentialist conscience or sympathy conscience may employ the 'necessity level'. On the 'infringement level' a judge looks at the issue of whether a substantive right protected by the Convention is violated or not. By doing this he can be guided by a conviction that a certain liberty of the citizen must be protected whatever are the social circumstances. On the necessity level, a judge uses the clauses of the Convention which allow the authorities to limit certain liberties of the citizens providing that it is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of the others.[31] In justifying or condemning a certain public measure in respect to its necessity a judge can be guided by consequentialist moral reasons.

By contrast, a sympathy judgement looks at the issue without the separation of 'infringement level' and 'necessity level'. It is free from deontological presuppositions which determine whether a certain liberty is worth protecting or not, disregarding any personal circumstances, and it is free from pressure of consequentialist reasons which sacrifice the interests of the individual to social and political goals of the community. A sympathy judgement neither rejects nor approves the deontological presuppositions or consequentialist reasons *per se.* It looks at the issue in a different way. It takes the perspective of the parties to the process, trying to understand them and help them. It is guided by active agapic love to the persons involved, whatever are they. Sympathy judgements may employ arguments similar to those of deontological and consequentialist reasoning. But the personality of the parties and their acceptance is the starting point of sympathy.

The significance of the rights and freedoms of the individual involved, the consequences of infringement, the personality of the applicant - all these can receive absolutely different evaluations among the judges. The judges can waver between

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[31] Articles 8, 9, 10, 11, 15 of the Convention.

different states of conscience. Both in the justification of the decision and in the dissenting opinions, one can find moral arguments of all sorts among which it is not so easy to determine which had the decisive role. The distinction between different moral arguments drawn in the second part of the thesis can help to clarify the process of moral deliberation in the European Court of Human Rights.

Normative and effects arguments in moral deliberation of the Court.

The judges in the European Court of Human Rights use normative arguments in the following form: a state authority was right (or wrong) in the exercise of its powers because it does not (or does) infringe human rights. The normative arguments are not simply claims. They contain an evaluation of the freedom of the individual and the power of a state authority. The Convention and the Court as the institution which guarantees the observance of the Convention are conceived as the instruments which should serve the principal task of protection of the dignity of human beings from the abuses of public authority. Therefore, the evaluation of the freedom of the individual affected by the public authority is an essential element of normative arguments in the European Court of Human Rights. The argument includes firstly whether this particular freedom of the individual affected falls into the categories of rights secured by the Convention, secondly it is weighed together with other rights and interests which are recognised by European Human Rights law and which can be involved in this particular case.

So, for example, in relation to Article 9 (Freedom of thought, conscience and religion) it is a matter of normative argument whether or not abstention from work on Sunday as a manifestation of religious belief should be protected by the Court. The Court has to evaluate this claimed freedom in order to pass its judgement. It was stated by the Commission clearly that Article 9 does not protect "each act which is motivated or influenced by a religion or belief".[32] The selection of what is protected and what is not is embedded in certain ideas which are used as normative arguments. One can agree with Holly Cullen that the limits of freedom of conscience are mainly determined by the idea of a pluralistic society, rather than the individual's right to self-identification and

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[32] App. 7050/75. *Arrowsmith v. UK,* 12 Oct. 1978, (1980) 19 DR 5.

self-determination[33]. The implication of that is that importance given to the idea of a pluralistic society may cover different types of judgement of conscience.

It is important to note that the consideration of the freedom of the individual is done not in the abstract, it is always bound to a particular case held before the Court. It is not enough to evaluate the freedom of the individual affected by the decision in order to establish violation of the Convention. A judge has to look at the link between the freedom of the applicant and the measure or absence of the measure which the applicant is complaining about. If the Court makes any general observations on the meaning of the rights and the scope of their protection one should always take into an account the context in which the judges make their generalisations. Normative arguments are not only about the relevance of a freedom of the individual to the Convention's protection of human rights, but also about evaluation of the state activities which the applicant is complaining about. However, as soon as the matter becomes whether a state measure which infringes the rights is in accordance with domestic law or is necessary in democratic society, the effects arguments become paramount.

Normative arguments deal with the problem of whether a particular freedom of the individual is protected by the Convention, and whether a particular action or omission by the public authorities violates the Convention in itself. The effects argument is about the link between the recognised freedom or right of the individual and the measure of the public authorities which is complained about. Even if there is the appearance of an infringement of a particular freedom, the action of the public authorities still may be legitimate. The clause of necessity, which is repeated many times in the Convention[34] and which justifies a restriction of the rights providing that it is done in accordance with the law and is necessary in a democratic society, calls for effects arguments. One can speak about two aspects of the effects arguments at least. Firstly, it is evaluation of the objective link between the applicant's freedom and the activities of the state which are considered as necessary. Secondly, it is the effect of the state measure on the rights and interests of other individuals or the society as a whole, which are also protected by the Convention.

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[33] Cullen H. 'The Emerging Scope of Freedom of Conscience'. - 22 *ELR* (1997). Supp. HRS. 32.
[34] *European Convention on Human Rights.* - Art. 8 (2); 9(2); 10 (2); 11(2).

The first aspect of effects arguments played an important role in the case *Balmer - Schafroth v. Switzerland*[35]. In this case, the issue was whether the rights of the applicants to a fair trial had been infringed when the Swiss authorities dismissed their complaint against granting an operating licence to a nuclear power station and without giving them a judicial hearing. The judges in this case sharply disagree on whether or not there was a connection between the right of the applicants to protection of their physical integrity on the one hand and the decision of the Swiss authorities to grant an operating licence for a nuclear power station on the other hand.

The second aspect of effects arguments was of paramount importance, for example, in the case *Doorson v. the Netherlands*[36]. In this case after considering the effects of the Dutch court's reliance on the evidence of anonymous witnesses in respect of violation of Article 6 of the Convention the Court found no violation particularly because "Principles of fair trial require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify".[37] The effects argument in this case was about the danger of disclosure of the identity of the witnesses for their lives. The case *Doorson v. the Netherlands* helps also to understand why it is important to distinguish effects arguments and consequentialist judgement. In this case, the effects argument was based on sympathy towards the anonymous witnesses. Although the line between consequentialist and sympathy judgements are not always clear, the main difference is that sympathy judgement takes the perspective of those affected by the decision while consequentialist judgement looks at external results.

The argument of necessity is not the only kind of effects argument. There are also arguments about the real impact of the ruling of the Court on the particular sort of relations between state-contractors and the individuals, between domestic laws and the European Human Rights law. For example, in the case *Balmer - Schafroth v. Switzerland* the effects argument involved much more than establishing a complicated link between the rights of the applicants to a fair trial which was considered together with their right to protection of their physical integrity, and the judicially uncontrolled power of the Swiss authorities to grant a licence. It encompassed the limits of power of the State in determining the scope for judicial review of administrative and political

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[35] *Balmer - Schafroth v. Switzerland.* - Judgement of 26 Aug. 1997. - *HRLJ.* - 18. (1997) 196; 25 E.H.R.R. 598.
[36] *Doorson v. The Netherlands.* - Judgement of 26 March 1996. - European Court of Human Rights. RJD 1996-II; 22 E.H.R.R. 330.
[37] ibid., at 358.

acts, and above all, the limits of the power of the Court itself to impose such a scope on the Sovereign states.

Whatever the state of conscience of a judge, it is impossible for him to escape from consideration of the effects of his decision. It is important to note that the moral deliberation of the judges is carried out not only through the examination of the issue involved, but also through self-examination and understanding of their own position and significance, even though this second element of moral deliberation may not be clearly articulated in the case-reports. The interviews conducted by the author of this paper in the European Court of Human Rights have shown that the judges, or at least the majority of them, are very attentive to the matter of how far the Court should go in imposing their own vision of the Human Rights law on the law of the sovereign states[38]. The doctrine of the margin of appreciation is a product of this attentiveness.

The doctrine of the margin of appreciation is a good example of effects argument which is developed in the case law of the Court. The idea of this argument is that in a particular set of circumstances it is up to the state to determine the limits of the rights and freedoms of its citizens. For example, in the case of *Brannigan and McBride v. UK,*[39] in which the applicants complained about the system of detention under British terrorist legislation, the Court recognised that Contracting States are in better position than the judges to decide both on the presence of an emergency threatening the life of the nation and on the nature and scope of derogations necessary to avert it.[40] Such an argument was made after the judges examined the effect of the measure complained by an applicant.

A margin of appreciation argument is an effects argument because it is for the Court to determine whether the derogation goes beyond the extent strictly required by the exigencies of the situation[41]. In the case of *Rasmussen v. Denmark,*[42] it was held that the scope of the margin of appreciation will vary according to the presence or absence of common ground among the States Parties to the Convention[43]. That underlines the double nature of the effects argument. It considers the link between the alleged violation

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[38] Interview with the Registrar of the Court, John Mahoney on 12th of October, 1998.
[39] *Brannigan and McBride v. UK.* - Judgement of 26 May 1993, Series A, No. 258-B; (1994) 17 EHRR 539.
[40] Ibid., para. 43 of the decision.
[41] *Ireland v. UK.* - Judgement of 18 January 1978. - European Court of Human Rights. Series A, No. 25. [1979-1980] 2 E.H.R.R. 25. - Para. 207 of the decision.
[42] *Rasmussen v. Denmark.* - Judgement of 28 November 1984. - European Court of Human Rights. RJD 1984; [1985] 7 E.H.R.R. 372.

of the Convention and the legal practices of all the Contracting States, and at the same time it considers the possible effect of the ruling of the Court on these activities. It does not mean, however, that a margin of appreciation is a product of consequentialist reasoning. In fact, it may cover any judgement of conscience. It may fit well to deontological reasoning in supporting a legal rule or a principle which is common among the States Parties to the Convention. It may also fit an impartial sympathy judgement, when after examining both the motives and perspectives of the litigants, a judge finds that a measure of the public authority is correct.

It is not easy for an external observer to trace the link between normative and effects arguments on the one side and sympathy judgement on the other if there is not personal arguments, because it is the inherit characteristic of sympathy judgement that id deals with personalities. Not every report of a decision contains explicitly personal arguments, but every sympathy judgement is necessarily based on such arguments. Other moral judgements may include personal arguments as well, but they do not have the same importance. To clarify this point, I shall consider a case where the judges passed different types of moral judgements using personal arguments.

Personal arguments and sympathy judgement in the case Gül v. Switzerland.

The relationship between personal arguments and sympathy judgement can be well illustrated in a quite ordinary case of *Gül v. Switzerland.*[44] The judges disagreed in this case. One of the points of disagreement was the value of personal argument, that is how much the personal circumstances of the applicant can affect the decision of the Court. In this case a Turkish citizen of Kurdish nationality had permission to live in Switzerland given on humanitarian grounds, because of the illness of his wife and the birth of the daughter in Switzerland. He asked permission to bring his two sons to the country. The minor was seven years old at that time. His request was rejected. The application was launched under Article 8: Right to respect for family life. The majority of the judges acknowledged in their decision that "applicant's family's situation was very difficult from human point of view",[45] but they rejected the opinion that a violation of the right to family life took place.

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[43] Ibid., at 380.
[44] *Gül v. Switzerland.* - Judgement of 19 Feb. 1996. - European Court of Human Rights. RJD 1996-I; 22 E.H.R.R. 93.
[45] 22 E.H.R.R. 93; at 115.

There are two possible connections between this statement and a sympathy judgement. The acknowledgement of the difficult personal circumstances may not be necessarily an expression of sympathy. The personal argument does not automatically involve a sympathy judgement. Reference to the difficult situation can be only rhetoric called forth by disputes among the judges. On the other hand the acknowledgement of the difficult situation may be an expression of genuine sympathy. It was stated in chapter 7 that sympathy judgement in the judicial context means an impartial sympathy judgement, and therefore personal arguments in favour of one party may overweigh the personal arguments in favour of another. Therefore, it is important, in this case, to look at the way the activities of the Swiss authorities were conceived by the judges.

Sympathy judgement involves taking a moral perspective of those who are involved in the dispute. It does not necessarily involve approval. The Court found that in this case, the Swiss authorities' measure to prevent immigration of aliens was motivated by the intention to protect the public interest. It is one thing to understand and another thing is to agree with it. The wording of the decision suggests that the majority of the judges basically agreed with the stance of the Swiss authorities. Does this fact allows us to say that the majority passed an impartial sympathy judgement? At least two things resist such a conclusion. The first is that the judgement of the Swiss authorities represents a consequentialist state of conscience. The majority of the Court did not go further so as to agree with that judgement, which may serve as an indicator that the majority were acting in the same state of conscience as the Swiss authorities. Unlike sympathy conscience, a consequentialist state of conscience disregards the particular in favour of the general effect on law and order. Secondly, the judges tacitly agreed with the arguments of the Swiss authorities who portrayed the applicant as a seeker of an easy life in the West. This image of the applicant does not fit what sympathy judgement requires. The majority agreed with the Swiss authorities that it was the choice of the applicant to live in Switzerland, and if he really wanted to be with his children he could live with them in Turkey. The Court agreed that the refusal to grant permission in fact did not affect the bond of family life anyhow, for example, the applicant frequently visited his youngest son. Accepting these arguments, the judges have shown that they did not take the perspective of the applicant who was in a desperate situation. Although the justification of the majority's decision contains a personal argument, there is more indication in the decision of the Court that the majority were guided in this case by a consequentialist judgement of conscience. They supported the judgement of the Swiss

authorities who argued that if they meet the needs of all those aliens who are willing to immigrate into the country, the public interest would suffer.

The dissenting opinion of Judge Martens approved by Judge Russo shows different moral reasoning: "In cases where a father and mother have achieved settled status in a country and want to be reunited with their child which for the time being they have left behind in their country of origin, it is *per se* unreasonable, if not inhumane, to give them the choice between giving up the position which they have acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other's company which constitutes a fundamental element of family life"[46]. It is an interesting feature of both types of moral reasoning that both considered the same facts and circumstances but the effects arguments and personal arguments led finally to different moral judgements. In this particular case, one can find the explanation of the differences in the conclusion of Judge Martens that that "applicant and his wife deserve compassion"[47]. Thus, in order to pass a sympathy judgement a judge must be able to feel compassion. As it was argued in Part II of the thesis, the ability or inability of a compassionate attitude lies at the root of the conflict between different types of judicial conscience. The judges do not often appeal openly to compassion and mercy. *Gül v. Switzerland* can be an exception that shows clearly the root of the conflict between different states of conscience, but from the point of view of the conflict itself it can be seen as an ordinary case. But it does not mean that the judges are lacking the sense of sympathy wherein compassion and mercy are essential elements. A number of officials in the European Court of Human Rights interviewed by the author of this thesis said that compassion is not an unusual thing among the judges[48]. The way it displays itself is seen rather in the passion which they argue with for or against rather then in a formal style of their opinions. As was shown before, the sympathy judgement can be easily transformed and acquire different form that of normative or effects arguments which cover the sympathy judgements.

The written text of the decision and dissenting opinions are good for a researcher of conscience of the judges only to the degree the judges and those who compile the official justification are ready to expose their moral judgements covered by the pile of legal and moral arguments. *Gül v. Switzerland* gives once again a proof that it is easier

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[46] ibid., at 121.
[47] ibid., at 122.

to trace a sympathy judgement in dissenting opinions. However, it is possible to establish a sympathy judgement in the written opinion of the majority although it requires a very careful analysis of the text.

Goodwin v. the United Kingdom: reconstructing a sympathy judgement.

The case of *Goodwin v. the United Kingdom*[49] can serve as an example where the majority of the judges arrived at a sympathy judgement. In this section of the chapter I shall try to reconstruct the sympathy judgement which is hidden under a flood of different arguments. It is necessary to admit, however, that such a reconstruction cannot be perfect. The image drawn through the reconstruction cannot be a hundred percent copy of the actual process of passing a judgement of conscience. For only God knows completely the heart of man. The limitations of my reconstruction of the case does not, however, make it worthless. It is worth doing because that will help us to understand the possible (if not necessarily real) way the judges reached the decision in this case. It helps also have better understanding of the prescriptive aspects of sympathy judgements in the activities of the Court.

The background of the case was as follows: an English court granted a disclosure order to a private company requiring a journalist to disclose the identity of his source of confidential information which was obtained in a dishonest way by one of the employees of the company. The journalist refused to do this, and as a result of the refusal he was fined him for contempt of the court according to a statutory provision. The journalist claimed that by doing this the court had violated freedom of expression protected by Article 10 of the Convention.

The method of reconstruction can be presented briefly in following terms. A researcher must assume that every judge passed a sympathy judgement. Then he must examine all the arguments employed in the light of the sympathy judgement. If an argument cannot be traced to that judgement, then the presupposition of sympathy is incorrect. If it can be traced back to the sympathy judgement, then the assumption is probably correct. Although it is true that in the latter case there is still not a hundred percent guarantee that these judges actually passed a sympathy judgement, the

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[48] Interviews with John Mahoney, Stanley Naismith, Maija Junker-Schreckenberg on 8-12th of October, 1998.

[49] *Goodwin v. the United Kingdom.* - Judgement of 27 March 1996. - European Court of Human Rights. RJD 1996-II; 22 E.H.R.R. 123.

correspondence of the arguments to sympathy provides a better explanation of the particular decision, because it allows a researcher to look at a deeper level of judicial decision-making. The reason why such a reconstruction is important is purely educative and serves as an example. Its task is to show the way the sympathy conscience can operate, what difficulties it may meet, and how they can be solved. Thus, let us assume, that the judges had done everything possible to arrive at sympathy judgements: they had investigated the context, social and legal settings in which the parties involved acted. They had tried their best to eliminate their personal prejudices and antipathy through examining their own conscience. They had visualised themselves in the place of the applicant and the English court. After this they were able to understand the motives and reasons of the behaviour of the both sides, and... they did not reach an unanimous decision.

Here, we again face with one of the fundamental questions of jurisprudence. The question is whether a process of sympathy judgement provides one single answer to the question of what is right and fair in a particular case? Agapic casuistry developed in this thesis does not claim that there must be one answer to every issue laid before a judge. Nevertheless, it points to some errors which may occur in the process of judicial decision-making even if the judges were guided by sympathy judgement. Therefore, we can try to look at the present case in order to see whether an error of sympathy judgement occurred in this case, assuming that all the judges were guided by a sympathy judgement.

As it was emphasised in chapter 7 of the thesis, the particular feature of sympathy judgements is a clear understanding of the motives of behaviour of the parties. The second important feature is that the judges, guided by sympathy, are determined to pass a judgement which they would be ready to accept even if they were the parties themselves. By doing this they should try to exclude their own prejudices and biases and try to accept the personalities of the participants as they are. In order to pass a correct sympathy judgement it is not enough to understand the motives and the context of the behaviour of the participants, and even to exclude the judges' own prejudices. A judge has to find what would be a reasonable answer to the issue in accordance with relevant legal principles and rules. An error in a sympathy judgement may occur therefore on several levels:

1. the judges do not understand clearly the motives and context of the behaviour of the parties;

2. the judges fail to eliminate their own prejudices and antipathies when they put themselves in the position of the participants;
3. the judges make a mistake in determining what behaviour would be reasonable in accordance with legal principles and rules in this situation for all the parties.

If we apply this to the case *Goodwin v. the United Kingdom* we can see that it is not easy to find out where the error, if there is an error at all, may lie. However, there are certain signs which can help to identify a possible error. First of all it is necessary to note whether in the justification of the decision there is a clear understanding of the motives of the behaviour of the parties. Because in the *Goodwin* case there was no unanimous decision, we need also to examine the dissenting opinions.

A supposition that the judges passed sympathy judgements can be proved only if the arguments used by the judges can be reconverted into sympathy judgement. As said above the presentation of arguments is the final stage of sympathy judgement. In order to reconstruct the original judgement a researcher should make the opposite move. The arguments play an important role because they are the key to understanding the conscience of judges providing that the judges were sincere in giving their arguments. The official justification of the decision and the dissenting opinions contain all sorts of views. This case is an example where both parties have strong normative arguments, and their strength was acknowledged by all judges. The disagreement between judges was about the strength of effects and personal arguments. The effects arguments were concentrated, firstly, on the issue of whether or not there was so great a threat of severe damage to the business and to the livelihood of the employees of the company that it required ordering the applicant to disclose the source of the information, and secondly, on the issue of whether or not there was a social need to punish the applicant for refusing to disclose the source of the information which the company had been unable to keep secret.

All effects arguments in favour of both parties can be reconverted into a sympathy judgement, but not all of them into an impartial one. In the opinion of the majority one can find the following effects arguments. According to the majority of the judges, the act of English court was unreasonable because "It will not be sufficient, *per se*, for a party seeking disclosure of a source to show merely that he or she will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he or she bases his or her claim in order to establish the necessity of

disclosure"[50]. If one puts the question whether this effects argument can be converted in an impartial sympathy judgement, the answer will be positive because this justifying ground is open to the technique of visualising himself in the place of both an applicant and the English judicial authorities, the technique which is essential for passing an impartial sympathy judgement.

The effects argument in the joint dissenting opinion is much weaker from the point of view of possible re-conversion of it into a sympathy judgement. It states that in the cases like the *Goodwin v. UK* "the domestic courts were, in any event, better placed to evaluate, on the basis of the evidence before them, the strength of the competing interests".[51] If examined from the point of impartial sympathy this argument suffers at least one shortcoming: it says that whatever is the dispute between an applicant and domestic judicial authorities the latter are always right: "the domestic courts are better placed to evaluate." This makes the whole process of sympathetic understanding of the behaviour of the parties involved useless. If there is any sympathy at all under such a justification it can be only a partial sympathy.

Things appear similar in relation to personal arguments. Both the majority's opinion and the joint dissenting opinion contain different personal arguments. Not all of them can be reconverted into statements of sympathy, even if it is partial sympathy. The differences in personal arguments between the official justification and in the joint dissenting opinion suggest that the error of conscience took place on the level of examining the context of the behaviour of the parties involved and drawing from it personal arguments. There are several indications in favour of the majority of the Court whose personal arguments can fit into sympathy judgement, which cannot be done with the personal argument of the dissenting judges.

The analysis of the justification of the decision shows that the majority's opinion of the Court established that the act of the English court to fine the journalist had a basis in national law, that English law gives enough protection to the applicant against arbitrariness, that the English court pursued a legitimate aim - protection of rights of the private company which discovered that the journalist possessed an information from a stolen confidential document, disclosure thereof could seriously damage the interests of

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[50] *Goodwin v. the United Kingdom.* - Judgement of 27 March 1996. - European Court of Human Rights. RJD 1996-II; 22 E.H.R.R. 123; at 145.

[51] Joint Dissenting Opinion of Judges Ryssdal, Bernhardt, Thor Vilhjalmsson, Matscher, Walsh, Freeland and Baka. - *Goodwin v. United Kingdom.* - Judgement of 27 March 1996. - European Court of Human Rights. RJD 1996-II; 22 E.H.R.R. 123; at 151.

company and its employees. Therefore, the act of the English court could be considered as appropriate from the point of view of protection of the interests of company and its employees. Despite all this, the majority of the Court found a violation of the Article 10 of the Convention, because disclosure order followed to Injunction which already protected the interests of company, and further purposes of disclosure order were not sufficient to outweigh vital public interest in protection of applicant journalist's source. There is nothing in the justification of the decision which suggests that the majority failed to understand the motives of the conduct of the parties involved.

A different conclusion is reached if one looks at the dissenting opinions of those who supported the decision of the English court. There is no evidence that the perspective of the journalist was taken seriously enough. In the joint dissenting opinion of Judges Ryssdal, Bernhardt, Thor Vilhjalmsson, Matcher, Walsh, Freeland and Baka indicated that no examination of the journalist's behaviour was offered. It does not mean necessarily that all these judges suffered from partial sympathy. Their opinion simply does not contain any indication that they understood the motives of journalist who refused to name his source. The opinion, however, indicates a clear understanding of the situation of the company which was endangered by severe damage to its business and the livelihood of its employees. Unlike the dissenting judges, the opinion of the majority contains an indication that the judges took the perspective of both parties. The majority agreed that the injunction issued by the English court restraining publishing of the information was correct, that there was a real danger to the company business and the livelihood of its employees[52]. However, after the Court weighed the interests of the company and the interests of the journalist, it found that there was no pressing social need for punishing the applicant for refusing to disclosure the source of the information which the company had been unable to keep secret.[53]

The lack of indication in the dissenting opinions that the perspective of the journalist was taken seriously may suggest an error in sympathy judgement. A better evidence of error is contained in the separate dissenting opinion of Judge Walsh[54] which shows more antipathy to the journalist than sympathy. It says that the applicant did not suffer any denial of expressing himself, that because he did not believe the document was stolen he set up his personal beliefs as to truth of a fact which is exclusively within

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[52] Ibid., para 38 of the decision.
[53] Ibid., para 37 of the decision.
[54] Ibid., at 151.

the domain of the national courts to decide. Judge Walsh: "To permit him to do so simply because he is a journalist by profession is to submit the judicial process to the subjective assessment of one of the litigants and to surrender to that litigant the sole decision as to the moral justification for refusing to obey the court order in consequence of which the other litigant is to be denied justice and to suffer damage. Thus there is a breach of a primary rule of natural justice - no man is to be the judge of his own case".[55] The opinion of Judge Walsh can be interpreted as containing an error of sympathy judgement on the level of exclusion of one's own prejudices. It seems that Judge Walsh was prejudiced against the journalist's conviction not to disclose the source of his information despite the court's order.

There is no evidence whether or not the rest of the dissenting judges failed to pass impartial sympathy judgements. It is only clear that there is nothing in their written opinions which suggests that they understand the motives of the journalist for refusing to obey the court's order. The decision of the majority contains much more evidence that the perspective of both parties was taken into account. However, we should remember that the official justification is a formal document, and judges individually do not participate much in its final drafting. Therefore, we should expect much more evidence from dissenting opinions than from the official justification. Thus, there is more likelihood that the error in passing of the impartial sympathy judgement has happened on the side of the dissenting judges, if of course, there was impartial sympathy deliberation at all. Whoever made an error of conscience in passing sympathy judgement, it is clear that the judges disagreed on the level of evaluation of the context of the behaviour of the applicant and the measure of the English judicial authorities.

We may conclude that the assumption that the judges were guided by a sympathy judgement in the case of *Goodwin v. the United Kingdom* can be proved only for the majority of the Court, but not for the dissenting judges. However, as it was pointed out in the beginning, a researcher cannot claim that all the judges of the majority were guided by impartial sympathy as well. The analysis of the *Goodwin* case is given here as an attempt to show the possible relationship between an impartial sympathy judgement of conscience and the formal decision of the Court and its justification. It shows the importance of careful examination of the context of the case, self-

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[55] ibid., at 152.

examination of conscience of the judges, and analysis of general rules and principles in the light of impartial sympathy to all participants in the legal process.

Prescriptive aspects of sympathy judgement in the activities of the Court.

There are certain difficulties which stand before the judges in the European Court of Human Rights in relation to passing a sympathy judgement. First of all, as for almost all modern courts, the European Court of Human Rights is flooded with applications. Sympathy judgements require time and comparatively long considerations of personal circumstances, while deontological and consequentialist judgements do not necessarily require so much time. The second difficulty is that the judges in the Court represent a variety of cultures and this might prevent them from reaching a proper understanding of the behaviour of the parties. The third difficulty is that the ability to pass a sympathy judgement involves the capacity to examine one's own conscience, to discover one's own prejudices and biases. Indeed, the judges must possess a high moral character[56]. The fourth difficulty is the danger of partial sympathy. Sympathy can have a strong emotional power which can prevent judge from taking seriously the interests of the opposite party. There is danger also of antipathy. A judge can hate, for example, the practice of homosexuality, and yet have to make judgements relating to homosexuals being discriminating against. One of the officials in the European Court of Human Rights told me that there was one of judges who expressed a private opinion that it would not be wrong if the homosexuality were a criminal offence. Everyone is entitled to have their personal opinions. However, it is very important that the personal convictions of the judges do not block sympathy to the persons involved.

Thus, passing a sympathy judgement is a not easy task. The difficulty of reaching an impartial sympathy judgement and the danger of falling into partial sympathy lead to the necessity of self-control in reaching sympathy judgements in the legal context of the Court. There are certain requirements which are necessary for passing a sympathy judgement in accordance with the legal restraints imposed on the activities of the Court. Having a sympathy judgement calls for a special skill in tackling the facts of the case. A judge should be able intuitively to grasp the context, social and legal settings in which the applicant and the state authority are placed. Intuition is important because there is

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[56] *The European Convention on Human Rights.* - Art. 21 (1). as modified by protocol 11.

often not much time to scrutinise every aspect of personality of the parties which is important for passing a sympathy judgement. A pure intellectual analysis may hinder compassion towards the parties. The facts should be grasped spontaneously. It does not exclude a rational reflection which comes as a second stage of passing judgement.

The judge has to reflect on the facts and compare them with his own experience. However, this reflection goes hand in hand with imagination. The judge has to put himself in the context of the parties and reflect on how he would act if he were an applicant (the affected person) and as a representative of the public authority. It is very important before putting himself in the place of the parties involved, to make a comparison of their social context with the social context of the judge in order to achieve the maximum possible degree of understanding through highlighting the differences which can hinder from the passing a correct judgement of conscience.

After finding a right line of behaviour for both parties the judge must use legal rules and principles to formulate his decision. This is where intellectual skills and the knowledge of law is of great importance. A legal expression of what was arrived at by intuition and moral reflection is important because, firstly, legal rules serve as safeguards against possible judicial mistakes and even abuse, secondly, it is a way of compliance with the legal restraints, and finally, this is what the parties of the process are expecting from the judges.

Considering some of the ordinary cases in the European Court of Human Rights, we see that sympathy judgements need to be embedded in normative and effects arguments. This is important not only for persuading the parties and the public of the correctness of the decision, it is also important as a process of verification of the sympathy judgements. A judgement which is not supported by normative and effects arguments cannot be relied on because of the real danger of failure in passing impartial sympathy judgement. Prejudice judgements and anti-sympathy judgements can be blocked by the use of general legal principles and rules. The sympathy judgements can be only strengthened through the operation of the verification. The reason for this is that impartial sympathy requires a rational reflection, while prejudice and antipathy are caused by irrational emotions. Thus, no impartial sympathy can be passed without skilful handling of legal arguments. All these prescriptive aspects of sympathy judgement are relevant not only to the judges of the European Court of Human Rights.

Conclusion.

The matters of conscience in the European Court of Human Rights require at least a book to give a serious and thorough analysis. The task of this chapter has been much more modest: to show the specific characteristic of operation of conscience of the judges when interpreting an international convention on human rights. Apart from the individual characteristics of this Court alone there are some features which can be seen in activities of the other judicial authorities. The description of how conscience can operate is given as an example.

There are several characteristic which can be traced in the activities of the other courts. It is clear that conscience operates within specific legal constraints. In the European Court of Human Rights, the strongest legal constraints are the conditions of admissibility. As soon as a judge starts evaluating circumstances and facts, his conscience begins functioning. This chapter was about the approach of impartial sympathy. But this is not the only approach which can be discovered in the case law of the European Court of Human Rights. The essence of the sympathy approach is that the judge has to understand the motives of the behaviour of the parties involved before he can make a correct decision. This understanding may be more or less complete if judge can experience what the parties experience. To do this the judge must put himself in the place of the participants in order to decide how he would behave in this situation. It requires special intuitive abilities refined from biases and prejudices.

The analysis of the European Human Rights case law shows the necessity for judges to examine their own conscience in order to reach a just decision. It is not enough to put themselves in the position of the parties involved in order to understand their behaviour. A judge himself must examine his own picture of the situation in the light of general principles held by conscience in order to escape bias and prejudice. The judge who tries to pass an impartial sympathy judgement must not confine himself to an intuitive grasp of what is right in the particular situation. He must use legal arguments for proving the correctness of his moral intuition, for justifying his findings and persuading all parties involved in the process.

The approach of impartial sympathy confronts an inflexible approach when a judge deals with a case with an already fixed set of rules and principles, and tries to squeeze the given case into a narrow mould of his own normative framework disregarding the unique and specific characteristics of the case and individuality of the persons involved. Some officials in the European Court of Human Rights interviewed

by the author of this thesis said that they could predict with certainty who from the members of the Commission or the Court would vote for finding a violation or even against it before all the circumstances and facts of the case become clear, particularly in cases of deportation or rights of homosexuals and etc. It is important to stress that a sympathy approach does not justify such attitudes. Sympathy calls for an open mind, acceptance and compassion.

Thus, the activities of the European Court of Human Rights gives an illustrative example of the conflict between a sympathy approach and a rigid approach in legal reasoning of the judges. The Court activities display the difference in the way principles and rules are treated by the judges. A judge governed by impartial sympathy looks at a rule in order to check whether or not his or her moral intuitions of what justice requires in the given case are true. A formalist judge looks at a rule as a measure of justice. This conflict lies in the nature of application of legal rules. Interpretation of such broad provisions as the European Convention on Human Rights underlines the weakness of a formalist approach, and calls the judges to make their interpretations in the light of the circumstances of a particular case. In this chapter we considered the way sympathy judgement can affect the interpretation of broad legal provisions, and particularly the use of legal arguments when passing a sympathy judgement. The importance of having skills of interpreting broad legal provisions and ability to draw strong legal arguments to support a sympathy judgement becomes clearer when one takes into account the fact that the provisions of the Convention and other similar acts have become a part of the domestic legal systems including the countries of the Common law tradition.[57]

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[57] Coppel J. *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts.* - Chichester: Wiley, 1999.

CONCLUSIONS.

The main idea of this thesis is that the judges have a moral duty to comply with the principle: love your neighbour as yourself. In the judicial context love means caring, and neighbours are all those who are affected by court's decision.. The support for this thesis is derived from the psychological theory of Petrazycki and Thomas Aquinas's theological concept of conscience. Both theories, although in a different way, maintain the supremacy of conscience, but also acknowledge the danger of errors of conscience and the need for its education. Both theories point at love as the essential characteristic of a good conscience. However, the principle of neighbourly love was left by Petrazycki and Aquinas undeveloped.

Love, even being expressed in the terms of care, is a complex concept. We need something which not only clarifies it theoretically, but also shows its reality. The author of the thesis believes that both needs are met in the Gospel of Jesus Christ. His teaching and life is an example of integrity, selflessness and self-sacrifice in the name of love. It is not important for the purpose of the present research to inquire into how far the narrative of the Gospels is historically accurate. What matters is that the Gospels, as written, convey the image of love very well. It is difficult to find an example as good as the teaching and life of Christ, who put his words of love into practice, who, being the King and the Judge of the world sacrificed himself for the sake of the world.

It is already for two millennia since the image of love revealed in Jesus Christ does not cease to attract people from all around the world, from all countries and cultures. It is the historical fact that this image contributed much to making human law more humane, and it is the hope of millions of people that this image will continue changing the lives and practices of the people, making them more compassionate and more responsive to the need and suffering, which is our age is so abundant. Love, this is what we need. Judges need love, and those who are affected by their decisions need it too.

The advantage of the Christian concept of love is that it is specific. Agape is not any sort of love. It represents a genuine care for another, it is the will to do good to another and avoid causing evil. The commandment 'love your neighbour as yourself' becomes in judicial context the principle that the judges must take seriously the moral perspective of the parties to process, must imagine themselves in the place of the parties, and must try to do to the parties what they would expect to be done if they were in their place. It does not mean that the judges must disregard legal rules and rely exclusively on their conscience.

This thesis represents an inquiry about the potential of love in the course of interpretation of legal rules. The main conclusion is that the duty of love does not contradict the Rule of law, and that legal rules leave enough space for the judges to act in accordance with love. Moreover, love supports law through providing a better method of interpretation of rules, expressed in the concepts of impartial sympathy and watchfulness. For centuries, the question of love was not an issue of the philosophy of law. The times have begun to change, and one can hear already the call that "the philosophy of law must give way to the philosophy of love"[1].

[1] Detmold M. J. *The Unity of Law and Morality.* - London: Routledge, 1984. - P. 107.

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