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The Interplay of Reason and Emotion in Legal Reasoning

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Bachelor of Law

in

Law School

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Abstract

Until now, the law has been thought to be rational, but there have been many problems that cannot be explained by reason. To solve this problem, this thesis uses a utilitarian approach. Hume says that reason judges whether or not the relations between the two objects are in agreement, and that emotion is a fact itself and cannot be subject to truth or falsehood. Reason has long been thought to include the ability to reflect, but reflection itself cannot judge right or wrong. We can also reflect on our feelings or preferences, which are not subject to truth or falsehood. However, reason can judge whether the expressed emotions are consistent and whether the internal actual mind and the external expressed mind are different. Due to the bounded rationality of humans, utilitarian calculations to maximise happiness cannot be made for all problems; thus, in everyday life, we make rules, abide by them, and judge with them in general. Bounded rationality is the reason why law and deontological thinking are necessary in practical reasoning. The content of the law is the value system shared in society, which changes over time. In the economic method based on emotivism that supposes differences in preference, fairness can be maintained by adhering to the consistency of value judgement and principle of protecting minorities. In an economic form of utilitarianism, it is possible to explain the weighing of values, the exception of the law, and the development of legal systems. On top of that, we can improve the welfare of society and protect the rights of minorities by using the abovementioned approach.

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DECLARATION

I declare that, except when explicit reference is made to the contributions of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature:

Name:

Date:

Introduction

Backdrop of Study

I have worked at the Constitutional Court for 10 years and have observed that several decisions change the conclusion as the legal sentiment of people is altered. Therefore, I assumed that there would be emotion at the core of the law. Moreover, seeing many cases where opinions were divided according to the judge's value system in important decisions and numerous situations in which judges had to make decisions that are beyond wording, I thought it would be impossible for reason to solve these problems and that emotions were involved quite deeply.

In an attempt to explain this phenomenon, therefore, I have surveyed many studies of renowned scholars. H. Kelsen tried to raise law to a scientific level and achieved some great success, but later in his life he acknowledged that the basic norm—the core of his theory—is a fictitious norm¹ and that rulings that were out of wording were also effective.² H. Hart said that although judicial decisions involve choices between moral values, it is not easy to choose correct answers, and we have to strike a balance among competing interests.³ R. Posner claimed that there are many cases in which judges have to strike a balance between interests and there is no objective method to weigh among conflicting interests.⁴ Furthermore, he states that questionable decisions that violate originalism or textualism are sanctified by overwhelming public acceptance.⁵ These influential legal philosophers acknowledged that there is no only one correct answer in the interpretation of law and that, on occasion, an interpretation beyond wording is

¹ H. Kelsen, *A General Theory of Norms*, trans. Michael Hartney (New York.: Oxford University Press, 1991): p. 256.

² H. Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley and Los Angeles: University of California Press, 1970): p. 352.

³ H. L. A. Hart, *The Concept of Law, 2nd ed.* (New York: Oxford University Press, 1997. paperback): p. 204–205.

⁴ R. A. Posner, *How Judges Think* (Cambridge, Massachusetts: Harvard University Press, 2008): p. 242.

⁵ *Ibid.*, p. 343.

possible. This conclusion is not congruous with the common-sense view that law is rational. In modern science, questions have exact answers. But so far, the law has been perceived as rational, and there have not been many legal theories which deal with emotion. Studies of law and emotion have recently begun but are not systematic and show how emotions affect specific cases.⁶ Against this backdrop, I decided to further investigate the interplay between emotion and reason in legal reasoning.

Direction of Study

Until now, legal philosophy has been closely related to moral philosophy, and there has been a lot of controversy over whether morality and values can be determined by reason. Recently, many disciplines such as economics, psychology, and neuroscience have developed, and these can be applied to moral and legal philosophy. Such research has already begun, but it is still not sufficiently developed in legal philosophy. In this study, a new direction of legal philosophy will be presented by synthesising the studies of various disciplines, and in particular, by introducing a method of distinguishing reason and emotion in economics. The results of psychology and neuroscience also indirectly support this study.

D. Hume and A. Smith say that morality cannot be perceived by reason but can be approved by emotion, but this remains highly controversial. In this study, this thesis will analyse various human faculties such as reason, emotion, will, and reflection in Hume's study, and classify the areas where reason and emotion are used, and the areas where right and wrong can be perceived. In morality and law, the part that can be solved by reason and the part that cannot be identified by

⁶ Eric A. Posner, *Law and the Emotions* (Chicago Unbound, 2000); Renata Grossi, "Understanding Law and Emotion", *Emotion Review*, vol. 7, no 1., 2015.

reason will be distinguished.

Practical legal reasoning consists of two main branches: deontological reasoning and utilitarian reasoning. Since deontological reasoning cannot resolve the conflict of values and exceptions to the law, this thesis conducts a discussion based on utilitarian reasoning. Early utilitarian reasoning has the disadvantage of overconfidence in humans' rational abilities, but later theories recognising human bounded rationality emerged, leaving room for the provisional use of deontological reasoning for quick and efficient decisions. Introducing deontological reasoning through bounded rationality theory to utilitarian reasoning can explain controversial legal issues without contradiction. It shows that if you aim to make a better judgement rather than a right judgement, many contradictions in law can be eliminated and the legal phenomenon can be better explained. In addition, this thesis shows that utilitarian reasoning can protect the rights of minorities and maintain the fairness of the legal system emphasised in deontological reasoning. Finally, this thesis finds ways to protect individual rights and maximise the welfare of society using reason and emotion.

Plan of Study

Chapter 1 considers two issues among the decisions of the Korean Constitutional Court. One is that the conclusion of punishment for adultery, which was constitutional in the past, was later deemed unconstitutional, as the people's legal sentiments and value system changed over time. The other is that the value system is the main content of the law in some cases and something for which people's opinions are divided in other cases. This shows that emotion is deeply involved in legal reasoning and that the value system is the core content of the law, whereas emotions vary from person to person.

It is difficult to explain that the content of the law, which is considered rational,

changes according to a shift in emotion, and it is contradictory that values become the content of the law and differ from person to person. At the same time, the fact that the content of the law transforms according to changes in emotion and that the value system becomes the content of the law (and the value system of each person differs) suggests that the content of the law has an emotional basis.

To explain this problem, Chapter 2 reviews the overall practical reasoning. Deontological reasoning cannot find a basis for norms and resolve conflicts of value, and so discussions are conducted based on utilitarian reasoning.

Chapter 2 analyses Hume's remarks on reason and emotion to distinguish their respective roles. Hume says that to judge right and wrong is to determine whether the relation of two objects agree or not, and that because emotion is a fact itself, it is therefore impossible to judge right and wrong for emotion. From this, we can suppose that Hume's remark on the nature of 'is' and 'ought' has been misunderstood by scholars so far. Rationalists think that they can always reveal right and wrong through reflection. This is why they have misunderstood Hume and have rejected his theory.

Since the utilitarian method is chosen, it is necessary to introduce the concepts of economics that have developed from utilitarian studies into law. Chapter 2 shows that economics has already solved controversial problems in law and develops theories by dividing areas that can be solved by reason and areas that are left to individual choices as emotions. The indifference curve and Pareto improvement show that utilitarianism can satisfy the consistency of value judgement, the promotion of social welfare and the protection of minorities. In this way, utilitarianism also uses Kant's concept of universalism and protection of human rights, as well as a concept for fairness.

Chapter 2 introduces the concept of bounded rationality that enables the incorporation of deontological reasoning into utilitarian reasoning. Early utilitarianism assumed perfect rationality, but in recent years, it has been found that humans cannot be perfectly rational, and they make decisions quickly and efficiently using habits and rules. Decisions made using habits and rules are basically made by the method of deontological reasoning. However, weighing values, exceptions to rules and improvements of rules are made using utilitarian reasoning.

Chapter 2 shows that Hume's theory of reason and emotion and bounded rationality can also answer long-standing debates on the ground of norms. Naturalism, intuitionism, emotivism, prescriptivism, and moral realism are discussed. Norms are themselves emotions that are agreed upon by a community. It is said that there is no rational basis for a set of rules itself, and only the principle of equality can be recognised.

The distinction between reason and emotion was difficult to prove empirically in the past, but with the development of neuroscience, it became possible to prove this empirically. Chapter 3 explains the role of reason and emotion in modern neuroscience. In the past, when the role of the brain was not known, it was discussed with vague guesses, but now it is possible to take pictures of human activities and areas where the brain reacts through MRI filming. In deontological reasoning, the part of the brain responsible for human emotions was activated, and in utilitarian judgement, the part of the brain responsible for reason was activated. Greene's dual-process theory states that deontological judgements are fast and emotion-based, utilitarian judgements are slow using many rational parts and a proper combination of the two methods is required to make efficient judgements. The conclusion is contrary to Kant's deontological theory and is related to the theory of bounded rationality.

Chapter 4 explains the hierarchy and relativity of values with Maslow's needs theory. According to Maslow, needs have stages, and values correspond to each need. Needs generally have stages, but it should not be forced by others and should only be recommended. Sensuous pleasures and various virtues that do not belong to the hierarchy of needs are recognised as values. This allows us to explain both the objectivity and plurality of values. It is also possible to explain the change of value as the value system of community members grows.

In Chapter 1, this thesis states that the content of the law is likely to be a value system or legal sentiment because the law has changed according to changes in value system and legal sentiment. It is necessary to study analytically to confirm that the content of the law is an emotion-based value system. Since there are many scholars who say that the law consists of 'ought' sentences and that 'ought' includes value, the analysis of 'ought' sentences is necessary. Chapter 5 explains the contents of the law and validity of the law by analysing 'ought' sentences. Values have a hierarchy among them, so the content of the law is a value system. Value systems vary from person to person, but an appropriate level of agreement can be reached through discourse among community members. This agreement becomes objective in society by practice. And this practice is formed through the emotional acceptance of its members.

It is necessary to verify the existing legal argument theory with the practical reasoning method summarised in Chapter 2. Chapter 6 describes and analyses the theory of legal argument. Alexy's theory is the most systematic. Alexy says that the theory of legal argument has constraints such as statutes, precedents and principles, and understands the ambiguity of legal language, conflict between norms, absence of norms, and the needs of decisions against wording. He especially emphasises the role of dogmatics, which are provisional and open to refinement. Alexy's dogmatic was groundless, tentative and open to change. McCormack acknowledges the need for utilitarian reasoning, but suggests a three-

step theory of Stair, which is a deontological theory to compensate for limitations of utilitarian reasoning. The disadvantages of Alexy and MacCormick's respective theories can be supplemented by the concept of bounded rationality and Pareto improvement.

There are many cases that are difficult to deal with in syllogism, such as exceptions to the law, conflicts between values in hard cases, and changes in the law. Chapter 7 deals with the limitations of syllogism. A syllogism is logical, but sometimes it is necessary to acknowledge exceptions to rules, and sometimes not only a legislator but also the judge acknowledges that the law has changed beyond the level of exceptions to a specific case. These are cases where unforeseen values appear and should be considered superior to existing values. Too much detail in the legislation often leads to the need to acknowledge exceptions. Therefore, Kelsen says that legislators should make room for discretion in making rules, and A. Smith says that we should set only general rules and then judge it by emotion according to context.

Chapter 7 deals with exceptions to the law, conflicts between values in hard cases, and changes in the law. In this process, the weighing of values is always fulfilled. It is necessary to look at how to weigh values. Chapter 8 describes proportionality and balancing. Some philosophers argue that some values are not allowed to be weighed, but in order to make a choice, all values must be weighed. Future values can also be transformed into present value and weighed. All values cannot be weighed by numerically representing them, but preferences among values can be grasped.

1. Challenges from Korean Case law

1.1. The Change of Decision According to the Change of Legal Sentiments

The Constitutional Court of Korea, in Constitutional Court (CC) Decision 89Hun-Ma82 on 28 April 1992, in four cases of adultery including the 2007Hun-Ka17 on 30 October 2008, decided that the provision to adultery did not contradict the Constitution; however, this changed with the CC Decision 2009Hun-Ba17 on 26 February 2015, in which the Constitutional Petition in Article 241 (adultery) ruled the following: ⁷

There is no longer any public consensus regarding the criminalisation of adultery, along with the change of public perception on social structure, marriage, and sex and the spread of an idea to value sexual self-determination.

Likewise, the CC Decision 2015Hun-Ba216 Constitutional Court Act (amended by No. 12897, 30 December 2014) Article 47 Paragraph 3 Unconstitutional Case⁸ on 28 April 2016, Article 47, Paragraph 3, ruled the same, stating that constitutional interpretations shall change according to ‘legal sentiments’ and the circumstances era.

If the Constitutional Court, which holds the final judgement on the constitutionality of the law, makes a formal confirmation that an act is constitutional in consideration of the legal sentiments and the circumstances of

⁷ Constitutional Court of Korea No. 2009Hun-Ba17, 26 February 2015, Decision Point.

⁸ This provision was amended to limit the retroactive effect of the unconstitutional decision when the unconstitutional decision was made over time after the decision of the constitutionality.

the era, that fact itself must be given legal meaning and shall be respected. The fact that the Constitutional Court decided that certain penal regulations did not violate constitutional law in the past confirms that, at least during that time, the consent of the members of the society on the need to punish the conduct was valid, with no reason to acknowledge the retroactive effect of the decision beyond the time when the court decided that the provision in question is constitutional.

Even if a law was constitutional and appropriate at the time when the penalty clause was enacted, it may be difficult to maintain its validity or may be unavoidable to change to a new one, depending on changes in situations. However, if the law, which was once evaluated as constitutional, denies all effects beyond its decision of unconstitutionality on the grounds that it does not meet the justice demands, the continuity and stability of law enforcement and the trust in the state penalty system shall be broken in a situation where individual laws are repeatedly scrapped and enacted and its effect re-evaluated. Therefore, the retroactive effects for punishment clauses ruled unconstitutional in the current situation, but which have, at one point, been ruled constitutional, are limited in accordance with the legislator's determination that it is important to secure social trust and legal stability of the norms that have been built over time, which is why it is difficult to see limiting the retroactive effects of the unconstitutional decision in provision at issue unreasonable.⁹

While the law is perceived as rational, the fact that the interpretation of the constitution can be affected in accordance with changes in the 'legal sentiments' requires focused research. The interpretation of the constitution is to confirm the objective reality of the constitution before it is expressed in language, and any change in the interpretation of the Constitution means that the substance of the

⁹ Constitutional Court of Korea No. 2015Hun-Ba216, 28 April 2016, Decision Point.

constitution has changed. The Constitutional Court's decision shows that the substance of the constitution changes along with changes in legal sentiments, implying that the law is not rational but emotional. In particular, even if the law is unconstitutional due to changes in legal sentiment, it is difficult to explain from a rational perspective that the law by past legal sentiment is still valid for past events. The constitutional Court says that laws of the past were valid based on the consent of members of the past society. This agreement is more likely to be emotional, not based on reason. In particular, it is difficult to say that it is rational to simultaneously accept what was considered right in the past and is now considered wrong.

1.2. The Interpretation of Constitution and the Value System

1.2.1. The Dual Nature of the Value System

In general, lawyers think that problems without definitive answers appear due to different value systems of persons. Constitutional Court decisions also include such statements.

The decision of whether an expression impairs the public interest depends on the values or ethical belief of a person, implying that the interpretation of law enforcement cannot determine the meaning of the expression from the objective perspective.¹⁰

However, the value system also constitutes the objective substance of law in

¹⁰ Constitutional Court of Korea No. 2011Hun-Ba32, 28 August 2014, Dissenting opinion (Justice Lee Jung-Mi, Kim Yi-Su).

legislation for criminal matters.

The types and scope of statutory punishment should be decided by the Legislature within the legislative discretion, with the comprehensive considerations of the nature and public interest of crime, history and culture of our society, circumstances at the time of enactment, general value or legal sense of the people, and criminal policy for crime prevention.¹¹

The value system, in some cases, is the element which make individual opinion different, on the other hand, the element that constitutes the objective substance of law. These two self-contradictory notions play a key role in the interpretation of legislation and the constitution, so it is necessary to examine them closely.

1.2.2. Values, Legal Sentiment and Legal Awareness

In the Korean Constitutional Court's decision, legal sentiment, values, and legal awareness¹² mean the substance of the law, but they change with the times. Among them, legal sentiment is emotional and legal awareness is rational when we focus on the words 'sentiment' and 'awareness'. It is interesting that emotional and rational matters play the same roles. Nominatively, legal sentiment is an emotional element and legal awareness is a rational one, but a value system is neither definitely emotional nor rational. Therefore, the value system that has dual aspect is most appropriate to analyse the true substance of the law. I will consider the values deeply.

¹¹ Constitutional Court of Korea No. 2009Hun-Ba17, 26 February 2015, Opinion of Justice Kang Il-Won.

¹² Constitutional Court of Korea No. 2009Hun-Ba17, 26 February 2015.

1.2.3. Necessity of the Consideration of Value and 'Ought'

The value system generally refers to preferences to each value that can vary among individuals. In order to properly understand values, it is necessary to examine the various values that constitute a value system. In legal philosophy, it is generally accepted that the proposition of law is one of 'ought' and that 'ought' is closely related to value. Examining 'ought' in itself shall help understand the relationship among value, value system and law more clearly. An analysis of 'ought' intends to provide information on the contents and validity of 'ought', which also provides information on the contents and validity of the law.

1.3 Conclusion

Looking at the decisions of the Korean Constitutional Court, the decisions change as the legal sentiment changes, and the value system shared by people becomes the content of the law or varies from person to person. Besides, value systems, legal awareness, and legal sentiment are all things that change over time while being the content of the law. This implies that the content of the law is emotion, the value system is emotional, and the value system is recognised and becomes the standard for judgement. This is difficult to explain with existing theories, and it is necessary to look at the basics again. In the next chapter, we will look at practical reasoning in general. In particular, in order to clearly distinguish between reason and emotion, this thesis will look at Hume's theory which elaborates on emotion and reason. Plus, this thesis introduces concepts of utilitarianism-based economics and applies them to law to solve problems that cannot be solved by reason alone.

2. Practical Reasoning

Since the theory of legal reasoning is included in the theory of practical reasoning, it is necessary to first discuss the theory of practical reasoning. Practical reasoning can be divided into three types: Kantian, utilitarian and Humean practical reasoning.

2.1. Different Kinds of Practical Reasoning

2.1.1. R. Alexy's Practical Reasoning

Kant says that there are *a priori* principles and moral principles, but his argument is difficult for everyone to accept. David Hume and subsequent emotionalists have criticised some of Kant's normative statements for not being true, and Hume's arguments are quite convincing. Many scholars have admitted that they cannot draw a normative statement from empirical statements about the real world. However, many scholars have worked hard to find the correctness of normative statements, believing that the norm must have truth in order to have correctness.

R. Alexy refuses to understand the normative statement as an expression of emotion or attitude spoken by sentimentality or subjectivism, as he thinks that emotions or attitudes can be explained psychologically or socially but cannot be proved as conclusively legitimate or true. Alexy knows that providing a basis for a normative argument would require new arguments to be presented again, and that such work would have to continue indefinitely, and that an arbitrary decision would be needed in this infinite regress of decision.¹³ The arbitrary nature of

¹³ Robert Alexy, *A theory of Legal Argumentation*, trans. Ruth Adler and Neil MacCormick (Oxford University Press, 1989)

decision neutralises the entire process of justification, and attempts to justify normative statements will be subject to endless regressions or psychological or sociological explanations.¹⁴ Because Alexy cannot accept these results, he creates a rule of argumentation that would bring Habermas's discourse theory and the theory of various scholars to a more reasonable conclusion.¹⁵ The rules include that the speaker should not commit self-contradiction,¹⁶ that everyone can express their desires and needs,¹⁷ that they should not be hindered from exercising their rights by coercion,¹⁸ and that all rules should be acceptable to everyone.¹⁹

However, Alexy also acknowledges that these rules do not allow consensus to be achieved on all issues and that the agreements already achieved can be changed²⁰. Alexy admits that two incompatible rules may be based on the argument rules.²¹ As Alexy says, however, since agreement itself is not a truth standard, it is appropriate to say that the rules of discourse are not a process and method for finding truth but a way for all members of the community to accept it emotionally rather than reasonably. In Alexy's rule, saying that everyone can express desires and needs is more an expression of emotional needs than of reason, and accepting them in agreement requires emotion—it cannot be done only by reason. I will explain this later in detail.

p. 178.

¹⁴ Ibid., p. 179.

¹⁵ Ibid., p. 101–174

¹⁶ Ibid., p. 188.

¹⁷ Ibid., p. 193.

¹⁸ Ibid.

¹⁹ Ibid., p. 203.

²⁰ Ibid., p. 206.

²¹ Ibid., p. 207.

2.1.2. Utilitarian Practical Reasoning

Bentham has no doubt about a person's rational ability, nor does he doubt reasonable practical reasoning. Thus, he thinks that common law is not enough rational and believes that he could develop common law by human reason. For him, law is made by human society and is a necessary tool for social relationships to form and maintain human society.²² He thinks that no legal system needs to be protected as sacred.²³ Utilitarian practical reasoning aims to maximise utility, for which a set of rules is the mean.²⁴ Utilitarianism does not accept the concept of natural right.²⁵ However, utilitarianism thinks that precedents and practices are important because of the utility of expectation.²⁶ Moreover, he thinks that thoughtless submission to authority and tradition prevent us from considering the advantages of institutions and official practices.²⁷

Since principles or practices are not absolute, and it is appropriate to introduce utilitarian practical reasoning as a way to improve them. While justice can be judged differently by each society, it is also appropriate to put a lot of weight on justice for the stability of society because it is a very important value. Utilitarian practical reasoning recklessly assumes the perfection of human practical reasoning. Human rationality is not perfect, and humans unconsciously act on habits and arbitrary judgements in many parts of their lives. It is necessary to introduce the concept of bounded-rationality to supplement inappropriate

²² Ibid., p. 307.

²³ Gerald J. Postema, *Bentham and the Common Law Tradition*. 2nd ed. (Oxford 2019) p. 308.

²⁴ Ibid., p. 318.

²⁵ Ibid., p. 150.

²⁶ Ibid., p. 196.

²⁷ Ibid., p. 311.

explanations of utilitarian practical reasoning. In addition, it is impossible to determine and calculate the utility accurately. Thus, the ‘theory of revealed preference’²⁸ has emerged in economics, maintaining that a person's preference for something cannot be expressed numerically, but only the preference for two objects can be chosen. Furthermore, Bentham's theory did not point out that preferences for objects may vary from person to person. This is already accepted and theorised in economics. The theory is that ‘indifference curves’ differ from person to person, which explains the relativity of values. I will explain this later in detail.

2.1.3. Humean Practical Reasoning

Hume's theory is complex, profound and difficult to understand. However, it has had a major impact on modern scientists such as Einstein, and the results of recent experiments in neuroscience are much in line with what Hume says; as such, his theory needs to be discussed in depth. Hume begins with explanations of impressions and ideas. Impressions refer to the first appearance of sensations, passions, and emotions in our souls, and the ideas represent the images of these sensations, passions, and emotions used in thinking and reasoning.²⁹ Ideas and impressions are perceptions of the mind: they are different from each other only in their degrees and vivacity.³⁰ While many other theories think of ideas as rational, in Hume's theory, ideas contain emotions.

The most controversial part of Hume's theory is that reason is the slave to

²⁸ Paul A. Samuelson, “Consumption Theory in Terms of Revealed Preference.” *Economica*, vol. 15, no. 60, 1948, pp. 243–253. *JSTOR*, www.jstor.org/stable/2549561.

²⁹ D. Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge (Oxford: Clarendon Press), p. 1.

³⁰ *Ibid.*, p. 96.

passions,³¹ and reason cannot affect human action. Hume even implies that wills are empowered by emotions and action can be changed not by reason but by other emotions.³² Hume argues that ideas and beliefs are said to be lively ideas related to impression, and that the movement from impression to idea or belief is determined by habit.³³ Consequently, belief is more of a sensitive act rather than a cogitative one, and reasoning about causes and effects comes from custom.³⁴ He is sceptical toward reason. The more we reflect on ourselves, the more doubts we have, and carelessness and indifference cure us. Thus, Hume relies on carelessness and indifference.³⁵ Custom works even before we have time to reflect.³⁶

Reflection or contemplation³⁷ is a very important concept for Hume, who is always careful not to fall into dogma by questioning his reason. In general, custom prevents us from reflecting on ourselves.³⁸ However, Hume asserts that reflection can create new beliefs and habits sometimes in an artificial way.³⁹ His reason is also used as the meaning of reflection. Hume says that we can evaluate the accuracy and fidelity of our faculties by reason and add new doubts stemming from the possibility of error.⁴⁰ Reason as this reflection is a concept that Kant and Bentham consider important and consider to be at the core of reason. The biggest

³¹ Ibid., p. 415.

³² Ibid., p. 413.

³³ Ibid., p. 96–97

³⁴ Ibid., p. 183.

³⁵ Ibid., p. 218.

³⁶ Ibid., p. 104.

³⁷ Hume uses the expression 'reflection' the most, and Smith and Kant often use it. Bentham prefers contemplations. However, all of them reflect on their existing habits, find the wrong ones, and improve them to the better ones.

³⁸ D. Hume, *A Treatise of Human Nature*, p. 25.

³⁹ Ibid., p. 104.

⁴⁰ Ibid., p. 182.

difference among Hume, Kant, and Bentham is the question of whether right and wrong can be determined from reflection. I will explain this later in more detail.

Imagination is also a very important concept for Hume. In Hume's philosophy, imagination is some faculty of mind which reconstructs memories freely and thinks unrealistically rather than reasons strictly.⁴¹ Imagination is closely linked to emotion,⁴² and vivid notions involve imagination. Hume says that imagination evokes a sense of passion and enlivens the idea, and that idea acts as a new influence on passion and increases its power.⁴³ In this respect, for Hume, imagination is different from reason.

In general, emotions are considered capricious, spontaneous and selfish, so we should be rational, excluding them; however, Hume's emotions do not include only capricious, spontaneous and selfish things. There are also high levels of emotions such as love and honour. Adam Smith, who communicated with Hume and has a similar theory to that of Hume on moral sentiments, explains the feelings of benevolence, friendship, unadorned affection, favour, and respect.⁴⁴ To meet these high levels of emotion, low levels of emotion need to be controlled by what Smith calls 'self-command'. Self-command is similar to will, but it is more realistic to consider that the power of will emerges from a high level of emotion rather than from reason. Animals without reason still have a will. People who have learned a lot also use will not only to be smart but also for love, honour, community, or for their own growth. Hume says that philosophers study for the pleasure of

⁴¹ Jonathan Cottrell, *David Hume: Imagination*, Internet Encyclopedia of Philosophy, <https://iep.utm.edu/hume-ima/#H7>

⁴² D. Hume, *A Treatise of Human Nature*, p. 424.

⁴³ *Ibid.*, p. 148.

⁴⁴ A. Smith, *The Theory of Moral Sentiments*, ed. D.D. Raphael and A.L. Macfie, vol. I of the *Glasgow Edition of the Works and Correspondence of Adam Smith* (Indianapolis: Liberty Fund, 1982): p. 85, 218

satisfying curiosity and solving important or difficult problems.⁴⁵

There are many problems that cannot be solved if the problem of conduct and morality can be considered as a matter of reason and the right or wrong can be determined. If we leave this as a matter of emotion and make a proper judgement depending on the situation, the difficult problem will be eliminated. Some worry that we will arrive at extreme relativism if left as a matter of emotion, but Smith and Hume also value traditional virtues while creating a philosophical system in which society grows stably. However, it is difficult for most people to understand that the process of thinking is for emotions. In particular, self-reflection plays an important role, but it is difficult to maintain that this belongs to emotion. People generally consider this to be a trait of reason, which is the ability to look at themselves objectively away from instant emotions and habits. It is obviously difficult to distinguish right from wrong, but it is also difficult to see it as emotional. Reflection is close to the ability to see through both emotion and reason. In fact, Hume himself often calls reflection as reason. There has been a lot of confusion in philosophy on this matter. It is necessary to discuss the meaning of the word 'reason' in detail. I will discuss this later in detail.

2.1.4. Johnson's Practical Reasoning

M. Johnson's theory is close to Hume's,⁴⁶ but he accepts the concept of Rawls' reflective equilibrium.⁴⁷ This leaves room for acceptance of Habermas and Alexy's theories, which are close to rational-centred ones. Johnson says that humans

⁴⁵ D. Hume, *A Treatise of Human Nature*, p. 448–454.

⁴⁶ M. Johnson, *Morality for Humans: Ethical Understanding from the Perspective of Cognitive Science* (University of Chicago Press, 2014), p. 75.

⁴⁷ *Ibid.*, p. 128–129.

often act unconsciously by habits⁴⁸ and should reflect on these habits to improve themselves.⁴⁹ So far, the values and principles are only provisional guidelines.⁵⁰ It is also said that we should be able to keep as much value as possible in a creative way considering various values.⁵¹ Habermas talks about discourse as a method to identify a reasonable proposition, which is similar to Johnson's process of finding a reasonable alternative. The difference is that Johnson says the proposition cannot be a matter of truth,⁵² while Habermas says he can reveal the right proposition through discourse.⁵³ However, as society's public opinion changes, so does the outcome of the discourse, and it seems difficult to say that the outcome of the discourse is right. It is better to see it as a proposition shared and assumed by the community, as Johnson says.⁵⁴ Alexy sees dogmatics as tentative and modifiable just like Johnson. However, the difference is that Alexy considers dogmatics as the right one. If we accept that principles and propositions are not right, Habermas and Alexy's respective methodologies do not differ much from that of Johnson. The part that reveals that humans unconsciously live by habit points out the downside of utilitarianism, which is that it always assumes a rational human being. Johnson says that values or principles are not objective and absolute truths but are instead subjects of improvement that can be achieved through deliberation. These arguments provide an appropriate solution between positive law that recognises defects of laws and natural law that rejects the effect of flawed laws. While acknowledging the actual law, it provides a methodology for identifying its flaws and objectively making better laws.

⁴⁸ Ibid., p. 103.

⁴⁹ Ibid., p. 197.

⁵⁰ Ibid., p. 100.

⁵¹ Ibid., p. 127.

⁵² Ibid., p. 200.

⁵³ R. Alexy, *A theory of Legal Argumentation*, p. 101–137

⁵⁴ M. Johnson, *Morality for Humans*, p. 183–184.

2.2. The Role of Emotion and Reason of Hume

2.2.1. The Cause of Controversy in Practical Reasoning

In Kantian practical reasoning, it is believed that emotions are capricious and selfish and should be excluded from the reasoning. Kantians assert that they can judge right and wrong or correct and incorrect about 'ought' and principle by reason. However, there are many occasions where they have to weight value among principles, and the result can differ according to the context. By contrast, utilitarians aim to maximise the utility and judge right and wrong by this standard of utility. However, the result of maximisation of each person can differ. Moreover, it is not easy to measure utility, and maximising utility by accounting for all factors is either too time-consuming or costly.

Hume understands and frequently mentions the importance of reason, but he says that reason should serve emotion. Many scholars criticise Hume's theory of morality by claiming that it is based on arbitrary emotions and that this could lead to moral relativism by eliminating standards of moral judgement, thereby nullifying the possibility of being objectively right or wrong. Kant and Bentham emphasised the power of reason to discern the right truth proposition and create a principle system or maximise utility to produce the best results. Hume, on the other hand, acknowledged the limitations of human reason and said that humans live to satisfy their needs. In order to identify the differences in these theories and get closer to the truth, it is necessary to accurately identify the respective roles of reason and emotion. First of all, I will look at the role of reason and emotion according to Hume. In chapter 3, I will also discuss the role of reason and emotion as revealed in recent experiments in neuroscience.

2.2.2. The Essential Role of Reason in Hume

Hume argues that reason is the discovery of truth from falsehood, that truth and falsehood depend on the relations among ideas or in the agreement and disagreement between real existence and matter of fact, and that ideas without agreement or disagreement cannot be the object of reason. On the other hand, passion, motivation, and action are not objects that can distinguish the truth or falsehood because passions, volitions, and actions are ‘original facts or realities’ not susceptible of any such agreement or disagreement.⁵⁵ To Hume, the science that can clearly judge correct and incorrect is algebra and mathematics.⁵⁶ Emotion, passion, and action are not themselves the matter of reason as they are just original facts or realities⁵⁷ which have no things to compare with. I think that this part is very important in that he explain why reason can say true and false. Many scholars argue that right and wrong can be determined on laws and moral issues, but the more we study various cultures and legal systems, the harder it becomes to set the standard of right and wrong that everyone agrees with. Even if the criteria are set, exceptions often need to be recognised depending on the situation.

However, he says that reason is a wonderful and unintelligible instinct.⁵⁸ This reason is quite different from the former exact reason which judge right and wrong. Hume use the concept of reason in many ways. He says that ‘a skeptic cannot

⁵⁵ D. Hume, *A Treatise of Human Nature*, p. 458, 470, 581

⁵⁶ *Ibid.*, p. 71.

⁵⁷ *Ibid.*, p. 458.

⁵⁸ *Ibid.*, p. 179.

defend his reason by reason'⁵⁹. This shows that reflection⁶⁰ and reasoning about causes and consequences⁶¹ are also called reason by Hume. He includes imagination in reason.⁶² 'Reason excites a passion by informing us of the existence of something which is a proper object of it'⁶³ is a good example of reason used as imagination. Reflection, causality, and imagination are certainly areas where truth and falsity cannot be judged. Hume says that causality is not a definite connection, but probability.⁶⁴

2.2.3. Misunderstanding of Hume's 'Is' and 'Ought'

It is believed that 'ought' cannot derive from existence, which Hume says first, but this is likely to have been mistaken by following scholars. Hume made the next well-known argument.

I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last

⁵⁹ Ibid., p. 187.

⁶⁰ If we would closely pursue our reason, we would be unable to avoid making a decision. D. Hume, *A Treatise of Human Nature*, p. 182.

⁶¹ Ibid., p. 180, 459

⁶² Jonathan Cottrell, *David Hume: Imagination* IEP, <https://iep.utm.edu/hume-ima/>

⁶³ D. Hume, *A Treatise of Human Nature*, p. 459.

⁶⁴ Ibid., p. 95.

consequence. For as this ought, or ought not, expresses some *new relation* or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention wou'd subvert all the vulgar systems of morality, and let us see, that the *distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason.*⁶⁵

In the above paragraph, Hume argues that 'is' and 'ought' are different levels of matters. This has long been used as the basis for supporting that normative statements cannot be derived from positive statements. Hume does not explain this clearly. I think that 'is' denotes a statement which shows the relation of two objects, so it is possible to reveal right or wrong, whereas 'ought' denotes a psychological fact itself related to behaviour, will, and emotion, which is an original fact and has no object of comparison. Hume confirms again in the last italicised sentence that morality is not based on the relationship of objects and is not perceived by reason.

Many philosophers have heavily debated the meaning of this paragraph.⁶⁶ Nevertheless, I suppose that they have misunderstood the meaning of this paragraph. I will not go further because it is impossible to deal with them in this thesis in detail. However, I believe that I propose a plausible way to interpret this paragraph. This is consistent with Hume's theory and can explain many dilemmas.

⁶⁵ D. Hume, *A Treatise of Human Nature*, p. 469–470.

⁶⁶ Charles R. Pigden, (ed.) *Hume on Is and Ought*. (Palgrave-Macmillan, 2010)

2.2.4. The Role of Emotion in Hume

Hume says that moral distinction is entirely dependent on sentiments of pain and pleasure. It is said that it is virtuous to satisfy ourselves through survey or reflection of our or others' characteristics. Virtue is said to be the cause of pride and affection, and displeasure is the cause of humility or hatred.⁶⁷ An emotion shifts from one person to the other, just as the echo of one string is transmitted to another one.⁶⁸ This is the principle of empathy. It is similar with mirror neuron theory in modern neuroscience. Even the pleasures of strangers can be felt through empathy, and such empathy makes people feel pleasant about the good and welfare of society that is not related to their or their friends' interests.⁶⁹ However, pleasure and interest are different according to each person, so people's feelings and judgements cannot be consistent unless they make the subject appear the same through a common perspective. Other people's interests and pleasures are more vague than our own, but they are more constant and universal, and so they are recognised as the only criterion of virtue and morality.⁷⁰ Hume explains morality with emotions but shows the possibility of creating social welfare and justice through empathy and creating an objective moral standard at a certain level, although one that is not perfectly universal. Despite its not being perfect, I will argue later that Maslow's theory of needs and neuroscience can create some objective moral standards.

2.2.5. The Truth and Falsity of Emotion

⁶⁷ D. Hume, *A Treatise of Human Nature*, p. 574–575.

⁶⁸ *Ibid.*, p. 576.

⁶⁹ *Ibid.*, p. 577.

⁷⁰ *Ibid.*, p. 591.

Sentences containing emotions can also be subject to syllogism if there is a comprehensive relationship between sentences. For example, consider the propositions 'He hates fruits' and 'If he hates fruits, then he hates apples'. If both propositions are true, the proposition 'he hates apples' must be true. In logic, there are many philosophically difficult topics related to syllogism, but the syllogism used in law is neither difficult nor controversial. The debate over the conflict of values is a difficult issue, and even if morality is based on emotion, once moral rules are created by social practice or consensus, they determine rationally which behaviour is right or wrong. However, customs or agreements on morality are not clear in difficult cases and change over time. It is difficult to explain this only with reason, hence why we should appeal to emotion.

Hume says that an emotion cannot be the object of right or wrong as a fact itself. However, if there is an object to compare with the emotion, it can be a subject of right or wrong. For example, if you say, 'I hate A' when you actually like A, this would be a false statement. Even in legal matters, when making false statements about emotions, it can be revealed that the statements are false by looking at other circumstances and contexts. To judge the intentions in a criminal trial is to judge the criminal's mind and feelings. The judge determines whether the criminal intentionally or mistakenly committed the crime based on various circumstances, contexts and evidence. This is an inner mind state and cannot always be judged clearly, but in some cases, intention can be judged close to the obvious. This is the task of determining whether there is a difference between the emotions revealed by a person and the actual emotions, right or wrong.

In addition, a person may not be consistent when expressing preferences for objects. For example, the Korean Constitutional Court decided that sexual morality takes precedence over individual freedom in punishment of commercial

sex acts cases,⁷¹ but in adultery cases,⁷² Court ruled that individual freedom takes precedence over sexual morality. This is a change of preference according to a change of situation, and one of two the decisions must be wrong because the two decisions contradict one another. This might have other hidden reasons. For example, a judge might feel like that sex trafficking exploits women and that such women should be helped. However, this is different from the concept of individual freedom in sex. The purpose of law is to make fair judgements that are not arbitrary depending on the situation. The value system of every person is a matter of emotion that cannot be judged right or wrong. However, once someone has presented their value system, they should judge consistently according to it and keep it consistent within itself. That is the spirit of morality and law, and we can determine right and wrong here by comparing two cases which show the preference between values. Autocrats often rule their people by changing their principles according to their own whims. To resist this arbitrary dictatorship, the British created a system of rule by the people through a revolution. Currently, even in democratic society, many people often change standards depending on the situation and make arguments in their favour, and such actions are wrong. For example, politicians in Korea insist that the security of nation is more important than right to expression when they have power. However, when they lose power, they insist that the right to expression is more important than the security of the nation. One of their arguments must be wrong.

2.3. Faculties of Mind in Practical Reasoning

2.3.1. Faculties of Mind

⁷¹ Constitutional Court of Korea No. 2013Hun-Ka2, 31 March 2016

⁷² Constitutional Court of Korea No. 2009Hun-Ba17, 26 February 2015.

MacCormick tries to synthesise the theories of Kant and Smith.⁷³ Smith communicated with Hume academically, and his moral sentiments have many similarities to Hume's. Hume's theory is similar with Smith's, but he studies human faculties more analytically. It is worth introducing MacCormick in this paper to discuss the tension between the theories of Kant and Hume. It seems that MacCormick thinks that reason manages the thinking of human when humans try to improve their lives, for which they use the term 'practical reasoning'. Reason certainly plays a great role in human life: it gets rid of superstition and gives humans the means to develop the world with science. In the history of medicine, there were a great many superstitious treatments that caused an enormous number of people to die of infectious diseases. Due to the development of science, we can enjoy plentiful and various foods, we can survive far longer than our ancestors, we can learn of events on other continents as they occur, and we can travel to other continent in a day, which previously would have taken several months by ship or on foot. All of these blessing are attributable to reason.

Reason is generally considered opposite to emotion and capable of judging right from wrong. However, we cannot find a clear answer even if we make inferences from legal issues in everyday life's moral problems, and we see a lot of differences in conclusions between people's values and cultures. In the case of mathematics or logic, it is possible to clearly judge right or wrong, but in many other matters, it is often impossible to determine what is right or wrong. In this vein, challenges and dilemmas arise in morality and law. Therefore, it is necessary to analyse practical reasoning in more detail. The thinking for better life consists of distinguished abilities such as *imagination*, *reason*, *emotion*, *reflection* (*prudence*⁷⁴) and *will*. MacCormick mentions these faculties to explain practical reasoning. Only reflection and reason are included in traditional area of *reason*.

⁷³ N. MacCormick, *Practical Reason in Law and Morality* (Oxford University Press, 2008) p. 63.

⁷⁴ MacCormick considers prudence important. Prudence is needed for reflection.

Furthermore, *imagination*, *emotion* and *will* are different from reason, and they play an enormous role in human life. Hume expounds these human faculties in *A Treatise of Human Nature*.

2.3.2. The Analysis of Reason by Hume

As mentioned earlier, Hume's use of 'reason' has many meanings. The most important role of reason is to be able to judge right and wrong or correct and incorrect. This is the role of reason used in mathematics and logic. Hume calls the agreement or disagreement between the two things the 'object of reason'. In mathematics and logic, not only agreement/disagreement but also comparisons regarding the respective sizes of two things and inclusion-exclusion relationships can be determined by mathematics.

Reasoning the cause and effect is also said to be one role of reason.⁷⁵ However, this is only a guess at the probability by repeated habits, and it cannot be said clearly whether it is right or wrong. According to Hume, the sun rises every morning, but on some days it may not. However, reasoning about these causes and effects is very useful in everyday life and forms a key part of rational thinking. Imagination, if it is not a daydreaming, is more like reasoning through causes and effects.⁷⁶

Hume also uses reason as reflective and prudent thinking. Sceptical reasoning is not the reasoning of right and wrong but the reasoning which doubt everything

⁷⁵ D. Hume, *A Treatise of Human Nature*, p. 94.

⁷⁶ *Ibid.*, p. 95, 153–155.

deeply.⁷⁷ Reason has been used as to judge calmly and prudently rather than unconsciously based on habits or impatiently by momentary emotion. Reason as reflective thinking is regarded as important by most influential philosophers. However, it is often impossible to determine right or wrong in such reflective thinking. This is because judging on matters about various emotions and values can vary from person to person and from culture to culture. Many scholars still believe that they can determine right from wrong through reflective thinking on matters of emotion and values. However, there is no clear answer to reflective thinking on emotions and values. In difficult cases, opinions over legal sentiments and values vary from person to person even if each person makes decisions through long reflective deliberation.

Hume even refers to the amazing and incomprehensible instinct of the soul as 'reason'. This instinct is said to come from past observations and experiences. Hume says that it originates from habit and in nature.⁷⁸ It is an instinct that seems like intuition by repetition. However, this is a mystical conclusion that does not fit with Hume's other theories. Modern neuroscience shows that excellent intuitive judgements made through long repetitions work in the emotional parts of brain. I will return to this idea in Chapter 3.

The forms of reason that Hume distinguishes are generally accepted as reason by other scholars. In particular, reflection seems to be considered the most important role of reason. Among these various concepts of reason, the only one that can clearly reveal truth and falsity is the comparison of the relationship between the two concepts in mathematics and logic. The relationship between cause and effect is only a probability; there is no clear answer to reflecting calmly and prudently

⁷⁷ Ibid., p. 182.

⁷⁸ Ibid., p. 179.

on all matters. Finding a better alternative with mystical intuition is difficult to determine absolute right from wrong. The debates in morality and law begin with believing that we can distinguish right from wrong in matters where such distinctions are difficult to make.

2.3.3. Emotion

MacCormick quotes Kant's claim that emotion is contingent and variable and belongs to the animal nature of human beings.⁷⁹ MacCormick admits that Kant's theory posits an extreme dichotomy between rational will and animal feelings.⁸⁰ He claims that feeling and reason work together for our judgement and a person who cannot sympathise with others cannot make moral judgements. For example, psychopaths seem unable to empathise.⁸¹ MacCormick tries to 'establish a rapprochement between Smith's and Kant's moral theories', but he is closer to Kant in that he says that his theory is an 'adaptation of Smith's ideas to the kernel of what is best in Kant's'.⁸²

Emotion is sometimes blind and capricious, but there is a wide range of emotions. Benevolence is one of emotion, and its observance would make the world more peaceful. Love and friendship are crucial emotions for our life, and we try to be trustful to our partner and friends. Some people have the desire to be respected and honoured, so they act prudently and impartially. We should enhance high-level emotions such as benevolence, love, friendship, respect and honour, rather than attempting to be rational without embracing said emotions. MacCormick says

⁷⁹ N. MacCormick, *Practical Reason in Law and Morality*, p. 63.

⁸⁰ *Ibid.*, p. 117.

⁸¹ *Ibid.*, p. 62.

⁸² *Ibid.*, p. 117.

that we should be reasonable or prudent,⁸³ but the purpose for this is to eventually maximise the long-term goodness of all of life. To maximise goodness is for emotion, not reason. MacCormick himself admits that if our animal values are in danger, it is reasonable to pay attention to these values in the long-term prudential view.⁸⁴ Rationality and prudence are for values and emotions in long-term view.

Hume writes that there are calm and violent passions.⁸⁵ He says that ‘What we call strength of mind, implies the prevalence of the calm passions above the violent’,⁸⁶ and ‘Hence it proceeds, that every action of the mind, which operates with the same calmness and tranquillity, is confounded with reason by all those, who judge of things from the first view and appearance’.⁸⁷ It seems that Kant confounds calm emotion with reason, and thus he insists that reason should control emotion. The empathy to feel others’ emotions is crucial in maintaining a happy life. Someone who cannot empathise with others suffers many problems in family and has difficulties in making friends and even doing his or her work with colleagues. Therefore, emotional intelligence (EQ) is considered significantly for raising children, and every parent endeavours to develop their children’s ability to empathise. Humans should be able to empathise with various emotions of others, from animal to noble ones.

Smith discusses in detail the nature of virtue in the *Theory of Moral Sentiments*. Plato, Aristotle, and Zeno all considered virtue as a form of the propriety of

⁸³ Ibid., p. 158–159

⁸⁴ Ibid., p. 42–43.

⁸⁵ D. Hume, *A Treatise of Human Nature*, p. 417–418

⁸⁶ Ibid., p. 418.

⁸⁷ Ibid., p. 417.

conduct or the suitability of affection.⁸⁸ For Plato, reason has the ability to judge this, as well as to judge not only truth from false but also the appropriateness of conduct and affection.⁸⁹ Aristotle's virtue consists in the habit of mediocrity according to right reason, and between cowardice and presumptuous rashness lies courage, just as frugality lies between avarice and profusion.⁹⁰ Smith, however, argues that reason cannot provide a precise or distinct measure to judge the fitness or propriety of affection and virtue, and that it is the only sympathetic feeling of an impartial and well-informed spectator.⁹¹ Smith's example involving a gentleman who pays money to a highwayman is appropriate to explain the above. The gentleman is due some criticism if he breaks his promise to give the highwayman five pounds, but to break his promise to give his entire fortune is not considered inappropriate. How much the gentleman should give is impossible to decide based on a precise rule; rather, this should vary according to the character of the gentleman, his circumstances, and the solemnity of the promise.⁹²

The subordination of emotion to reason is a practice that began in the era of Plato. It is not easy to change this stereotype. Hume points this out, saying that people have long mistaken calm emotions for reason.

Reason, for instance, exerts itself without producing any sensible emotion; and except in the more sublime disquisitions of philosophy, or in the frivolous subtleties of the schools, scarce ever conveys any pleasure or uneasiness. Hence it proceeds, that every action of the mind, which operates with the

⁸⁸ A. Smith, *The Theory of Moral Sentiments*, p. 267.

⁸⁹ *Ibid.*, p. 267.

⁹⁰ *Ibid.*, p. 270–271.

⁹¹ *Ibid.*, p. 294.

⁹² This is a conflict between credibility and self-reliance. *Ibid.*, p. 330–332

same calmness and tranquillity, is confounded with reason by all those, who judge of things from the first view and appearance. Now 'tis certain, there are certain calm desires and tendencies, which, tho' they be real passions, produce little emotion in the mind, and are more known by their effects than by the immediate feeling or sensation. These desires are of two kinds; either certain instincts originally implanted in our natures, such as benevolence and resentment, the love of life, and kindness to children; or the general appetite to good, and aversion to evil, consider'd merely as such. When any of these passions are calm, and cause no disorder in the soul, they are very readily taken for the determinations of reason, and are suppos'd to proceed from the same faculty, with that, which judges of truth and falsehood. Their nature and principles have been suppos'd the same, because their sensations are not evidently different.⁹³

2.3.4. Imagination

Imagination is free, whimsical and sometimes superstitious. However, creativeness can appear from imagination. The range of imagination by Hume is very wide. His imagination includes the role of reason.⁹⁴ Even the conjecture of cause and result is a sort of imagination for Hume. This is because cause and result are derived from experience, and other result can happen someday.⁹⁵ Moreover, we can sympathise with the emotions of others who are far away from us when we use imagination. Without imagination, it is difficult to understand and sympathise with those who are not close to us or those who are far away. As such, empathy is closely linked to imagination.

⁹³ D. Hume, *A Treatise of Human Nature*, p. 417.

⁹⁴ Jonathan Cottrell, *David Hume: Imagination*, Internet Encyclopedia of Philosophy.

⁹⁵ D. Hume, *A Treatise of Human Nature*, p. 124–125.

When we try to discover new means and presuppose the side-effects of actions, we usually use imagination with the help of our experiences and knowledge. Finding new alternatives and thinking about the consequences is not about finding right or wrong; rather, it is the process of imagining creative alternatives among countless possibilities, imagining the process, and choosing the most satisfactory alternative among the results. If you dedicate more time to exercising your imagination, you can get a better mean. However, because we have time constraints, we are satisfied and choose better one if it exceeds the target criteria to some extent.

Imagination is sometimes deeply related to reason and sometimes related to emotion. Consequently, imagination is intermediate among memory, reason and emotion. Hume says that ‘men are mightily govern’d by the imagination.’⁹⁶ so he put much emphasis on imagination. MacCormick refers to imagination several times,⁹⁷ but it is likely that he does not make much of imagination. Johnson claims that moral deliberation consists of cognition, imagination, and feeling.⁹⁸ It is believed that moral judgement is made by reason, imagination, and feeling. This is credible as a result of a comprehensive study of modern neuroscience.

2.3.5. Will

MacCormick accepts that judgement is an act of *will*, not solely of *reason*.⁹⁹

⁹⁶ D. Hume, *A Treatise of Human Nature*, p. 534.

⁹⁷ N. MacCormick, *Practical Reason in Law and Morality*, p. 9, 31, 205.

⁹⁸ M Johnson, *Morality for Humans*, p. 89–111.

⁹⁹ N. MacCormick, *Practical Reason in Law and Morality*, p. 20.

Furthermore, he says that decisions are made by will¹⁰⁰ that ‘the law of our rational nature depends on our common universal legislative will’¹⁰¹ and that other-regarding reasons (i.e., those not directly beneficial to the self) are generated by the rational will.¹⁰² MacCormick knows that will is one of the important faculties of the human mind; however, he says that ‘practical reasoners use reason to guide their will’.¹⁰³ Our will makes us decide whether or not we initiate an action and allows us to persevere and endure adversities. Furthermore, will makes us abstain from hasty and selfish acts prompted by our animal emotions. Smith refers to self-command, which restrains us from acting impulsively and selfishly.¹⁰⁴ Self-command is more related to *will* than reason. Hume writes that the conflict between reason and emotion is common in philosophy, but the idea that man should follow reason is false,¹⁰⁵ because reason shows us only cause and effect—it cannot impel action, and only a contrary impulse can delay the impulse of passion.¹⁰⁶ He implies that will is derived from emotion, stating that strength of mind is derived from calm passions prevailing over violent ones, and that it is not easy to be in consistent possession of this virtue.¹⁰⁷ Later, he says that desire comes from good and aversion from evil, and that will works when good or the absence of evil is attained by any action.¹⁰⁸ Hume shows that will is derived from emotion and that we should strive to control violent passion with calm emotion.

¹⁰⁰ Ibid., p. 14.

¹⁰¹ Ibid., p. 19.

¹⁰² Ibid., p. 22.

¹⁰³ Ibid., p. 75.

¹⁰⁴ Ibid., p. 60.

¹⁰⁵ D. Hume, *A Treatise of Human Nature*, p. 413.

¹⁰⁶ Ibid., p. 414–415.

¹⁰⁷ Ibid., p. 418.

¹⁰⁸ Ibid., p. 439.

Kant includes a will in his notion of practical reason. Kelsen points out that Kant's practical reason is a contradictory concept which involves knowing and willing at the same time. In fact, will comes from emotions, and so it is far from reason.

The self-contradictory concept of practical reason, which is both knowing and willing, and in which the duality of Is and Ought is therefore resolved, is the basis of Kant's ethics.¹⁰⁹

Thus, the Kantian concept of practical reason is the result of an unacceptable confusion of two essentially different human faculties, two faculties Kant himself distinguishes.¹¹⁰

Kelsen knows that 'will' is related to 'ought', and he recognises that it is contradictory for the 'ought' to be included in the concept of practical 'reason'. This is because 'is' and 'ought' have been accepted as issues of different dimensions since Hume. Kelsen only raises the issue but fails to resolve it. However, if 'ought' is an emotional fact itself, the problem is solved easily. Hume says that will comes from emotion. Will that arises from emotions is the power to satisfy emotions. As explained earlier, in order to judge something as correct or incorrect, it must be determined whether or not the two objects are in agreement, but emotion is only fact inside the mind, which cannot determine right or wrong. However, emotions can also be subject to correctness or incorrectness when they have something to be compared with. The simple 'ought' sentence itself cannot reveal right or wrong as it is the fact itself and it represents the will which arises from the emotions. It can only be emotionally approved or not, as Hume and Smith say. Many scholars have mistaken this.

¹⁰⁹ H. Kelsen, *A General Theory of Norms*, p. 80.

¹¹⁰ *Ibid.*, p. 81.

The will is not only for rational people, but even barbarians who have not learned properly have the ability to will, as do animals. The difference between these wills depends on what desire the will was created by. The will of a rational person has a high level of desire, such as the welfare and peace of not only his family but also the community and the world, whereas the common person desires the happiness of those close to them and their family, and beasts only wish for their own survival. Rather than belonging to reason, it is more realistic to think that will arises from a variety of emotions, from noble to vulgar. In this regard, Kant's theory of including will in practical reason, which can determine right from wrong, has weaknesses that Kant's idea of the will cannot explain animal will, and Kelsen has grasped this well. The reason why many scholars think that will is included in reason seems to be because they keep in mind only the will of noble feelings. However, as Hume pointed out earlier, there is much possibility to mistake subtle emotions for reason.

In his attempt to find a balance between Kant and Smith, MacCormick also identifies will as rational. However, his rational will cannot include the will of animal needs. This is because of the influence of rationalism, which came down from Plato and ruled the philosophy until Kant. The will is not rational and is based on emotion, but it is better to use the will derived from high-level emotions.

2.3.6. Reflection

Reflection is used to look at oneself objectively from afar without being disturbed by momentary passions, or to contemplate both context and considerations at the same time, seeking to benefit oneself and community in the long run. In particular, the second meaning of reflection is similar to reason when someone is asked to think and act rationally. This meaning of reflection is used by many scholars. Hume

is sometimes called a hedonist because he emphasises pleasure rather than reason, but, in fact, Hume wants to think calmly, reflect on himself, and act for a high level of emotion, such as trust and honour, etc. The word ‘reflection’ appears several times in Hume’s *A Treatise of Human Nature*. In Hume’s words, ‘a very little reflection and philosophy is sufficient to make us perceive the fallacy of that opinion’,¹¹¹ ‘There is a great difference betwixt such opinions as we form after a calm and profound reflection and such as we embrace by a kind of instinct or natural impulse’.¹¹² These are good examples of calm and deliberate reflection for Hume.

MacCormick refers to prudence several times and says that prudence is a practical wisdom to deliberate in a sound and balanced way by taking account of all that ‘ought’ to be considered and setting aside irrelevant considerations.¹¹³ The prudence of MacCormick to calmly consider all considerations and find balancing also requires a process of reflection. This is not that different from what Rawls calls ‘reflective equilibrium’, which is also a task of trying to balance possible values by considering various values. Habermas and Alexy’s discourses are also a process of reflection by many people together. If one lacks a wide perspective due to one’s narrow experience and situation, one would also lack consideration for others. Discourse is the process of respecting each other, sharing opinions, and trying to share each other’s values as much as possible.

Reflection uses the various human intellectual faculties mentioned earlier. All faculties are used, such as memory of various things and their history in the world, imagination to recall new alternatives or causal relationships, feelings about an

¹¹¹D. Hume, *A Treatise of Human Nature*, p. 210.

¹¹² *Ibid.*, p. 214.

¹¹³ N. MacCormick, *Practical Reason in Law and Morality*, p. 16–17.

object or sense, and reason to compare two objects to determine right and wrong. Some consequences of reflection can be judged right or wrong and others cannot. The result of imagination in finding a better alternative is not a matter of right and wrong but of whether something is satisfactory or not. If we have all the information, we can judge whether or not we have the best results; however, we cannot think of all the alternatives and calculate the results, so the results we can find are not the best results but just satisfactory ones. Moreover, there is no right or wrong about emotions. As Hume says, emotion is not the object of right or wrong but the object of approbation and disapprobation. If you can compare two things or determine which is larger, you can determine true or false.

We cannot find absolute values or principles with which everyone agrees through reflection. This is because values and principles are objects of human emotion and not objects of right or wrong themselves. However, through reflection, improvements that everyone agrees with can be made. This is called 'Pareto improvement' in economics. Alexy also mentions 'Pareto optimality'.¹¹⁴ Habermas' discourse is also a process for Pareto-improvement. A change that everyone agrees with satisfies Pareto improvement conditions. Although it is not possible to find perfect and absolute values and principles, society can fully develop just by agreeing to implement a better value system and principles with which everyone agrees. And this is what we are doing to develop morality and law.

2.3.7. The Range of Reason

The practical reason of Kant's philosophy includes such concepts as the rationality to judge right and wrong, imagination, reflection, and will. Kant maintains that it

¹¹⁴ Pareto optimality is something that can no longer be improved, and Pareto improvement refers to something better than the current state. As Pareto optimality is difficult to find, it is appropriate to consider Pareto improvement here. R. Alexy, "Constitutional Rights, Balancing, and Rationality", *Ratio Juris*, vol. 16, no. 2, June 2003, p. 135.

is possible to distinguish between right and wrong. Bentham's utilitarianism assumes the perfection of the human mind and believes that it can produce the best results by calculating the overall utility of an act. However, there is a limitation to the human rational ability, and people unconsciously live according to their habits. Making perfect calculations is impossible because it requires a lot of time and cost. Even the utility of an object varies from person to person. Therefore, it is very difficult to find an answer when we try to calculate utility, supposing that individual's utility is rational.

Reflection is generally considered rational. Even Hume tends to agree with this. It can be seen as a practice for most people to consider reflection as rational. However, there is a major confusion here. It is supposed that being rational is the belief that you can tell right from wrong, but we cannot always distinguish right from wrong through reflection. The emotion itself cannot be the matter of right or wrong, nor can a consistent value system or a set of principles. This is because no perfect standard exists. However, it can be found by reflection that a value system or a set of principle is inconsistent. Reflection may include reason in its process, but this must be clearly noted. The only element of reason that can determine right from wrong is when two or more things are compared.

2.4. The Step of Practical Reasoning

Practical reasoning consists of finding goals and means and implementing the latter. We use reason, emotion, imagination, reflection and will during practical reasoning. Reason is important, but emotion, imagination, reflection and will are also essential and cannot be judged right or wrong. In administration, the purpose of a project shall be determined and the means of performing it shall be found, and the means shall be implemented and revised. The process is similar to the method of utilitarianism. I will explain the process of identifying the purpose,

finding the means, and implementing the means, as well as the human faculties used in this process.

2.4.1. Finding Goals

We sometimes live with a clear purpose in our daily lives, but we often live unconsciously and habitually. We need to stop habitual thinking in order to find a purpose and find a better way. Finding a purpose in Hume's philosophy is done through reflection on what pleasure we pursue. Feeling pleasure is the realm of emotion, and reflection can be seen as belonging to the realm of reason, but we cannot know right or wrong in some cases during reflection. Moreover, the object that feels pleasure can vary from person to person. In economics, the goal is to maximise utility. The ability to exercise reason is used a lot in this process. This is close to utilitarian methodology. It is possible to use this methodology in management and national policy, but it is difficult to maximise happiness in everyday life. When finding a purpose, various alternatives are possible, and it is through imagination that we can think of various alternatives.

Kant's theory of practical reason does not value the goal because it is said that one should live for prior values and principles rather than secular ones. It is concerned only about finding and implementing means except finding goals.¹¹⁵ However, such thinking prevents balancing between values by presenting absolute principles, causing people to experience meaningless pain and preventing flexible responses according to the context. Many people suffer meaningless pain due to euthanasia bans enacted because of the principle of absolute life. Kantian

¹¹⁵ There are many opinions about whether Kantian philosophy is consequential or deontological. D. Cummiskey says that Kantians ought to be normative consequentialists by treating persons as ends. This problem is better to have Pareto improvements as constraints based on utilitarian methods. Pareto improvement is a constraint of economics that respects individuals. D. Cummiskey, "Kantian Consequentialism", *Ethics*, Apr., 1990, vol. 100, no. 3, pp. 586–615.

philosophers have believed that they can identify *a priori* principles with intuitive reason, but this belief originates from a mistaken prejudice of rationalism and it is better to see this as an area of emotion. Hume says that belief is close to emotion. In neuroscience, it has also been revealed that intuition and belief by repetition belong to the realm of emotion.

Overall, it is done through emotion or imagination when finding a purpose. When humans live unconsciously and habitually, reflection is necessary to identify their true purpose. And means can be another purpose. For example, if happiness is the best purpose, the means for it are health and friendship, which can be a new purpose. If one's purpose is to make a lot of money, running a company well can be a means, which can be a new purpose. This is an example of maximising good and a form of utilitarianism. Imagination plays an important role when we find new means. Finding a new and effective mean is not only logical but also creative ability. Feeling value is emotional and not identical among people. Therefore, we have to empathise and compromise with others.

2.4.2. Finding Means

If the purpose is set, we find a means to realise it as well as possible. Finding means to realise a goal may have many alternatives, and sometimes various means must be mobilised simultaneously. For example, in order to stay healthy, one must eat well, exercise regularly, sleep well, and maintain good relationships. The food in order to eat well can be a very diverse combination, and exercise can be selected from various exercises. In this process, memory, imagination to think of various alternatives, and ability to infer causality between ends and means are needed. The causal relationship between ends and means may be a loose possibility or a scientifically proven fact.

The choice of means to achieve goals in economics often involves mathematical and scientific calculations. It relies heavily on the ability of reason to identify right and wrong. Even when there is no other scientific evidence, causal relationships by repeated experiences are used to find means. This is closer to probability than rationality to determine right from wrong. The value or utility as a result of means can vary from person to person. For example, food eaten to gain health may have different preferences from person to person, as may exercise for health. Reason, imagination, emotion and will are involved during the search for means.

2.4.3. Implementation of Means

To implement a means is to execute the means with the body or to make others execute it by expressing the intentions. Determining and implementing this requires a will. In the process of implementation, recognition and feeling are needed. Since everything cannot be anticipated in advance, it may be necessary to discover and solve new problems. In this process, imagination, reason, and will are used. As such, human ability, called practical reason, includes all kinds of phenomena, starting with emotions, imagination, memory, willpower, reflection, and reason to judge right from wrong. Even if reflection and imagination are included in reason, reason cannot be always judged right or wrong. The word 'reason' does not include emotion, nor does it include the will, which gains strength from emotion, so it is not appropriate to cover this whole process. Therefore, it is better to call this 'practical thinking'. The word 'reasoning' gives us a stereotype by which we can judge right from wrong. However, the word 'thinking' encompasses feeling, imagining, and coming up with new things, in addition to judging right from wrong. Prejudice can be eliminated by using the word 'thinking'.

2.5. Bounded Rationality and Moral Realism

If we are fully rational and want to maximise good or utility in finding and implementing means, we should not have rules or principles. That is because we have to consider every alternative mean and calculate the result and compare the result with one another. This is the process of utilitarian practical reasoning, which is done not by disconnected and dichotomous principled thinking but by smooth and continuous thinking.¹¹⁶ However, it is not possible in all cases because we cannot consider every goal and means and cannot calculate and measure the results perfectly. Furthermore, it costs too much, and the cost of calculation can sometimes exceed the maximised benefit. Thus, we are satisfied with an appropriate result. In fact, we occasionally act according to subconscious habits and principles in daily life as such habits and principles are useful. However, we make an exception to the rules and principles when we feel that the results of conforming to habits and principles are inappropriate. This is a sort of heuristics. When we feel that the result by principle or habit is inappropriate, it is based on emotion, not reason. Hume says that people usually live unconsciously by habits, and many experiments of modern neuroscience have shown that Hume's claim is right. I will later elaborate on the neuroscience which shows that emotion is more deeply involved than previously thought.

Humans have evolved from animals, and babies live on instinct and habits at the animal level at birth, and then gradually develop their reason, imagination and reflection. When babies are born, they are not capable of thinking about how to maximise their happiness, Instead, they follow basic instincts. When they are hungry or wet, they cry, and in response their parents feed them or change them. As babies acquire language, their parents teach them what they should and should not do, but they do not teach them how to maximise happiness. At school, children

¹¹⁶ Gerald J. Postema, *Bentham and the Common Law Tradition*, p. 315.

learn more complex behavioural rules, but they are not taught how to maximise goodness. As adults, they learn that they should not stick to the rules too strictly, and to adapt their behaviour according to the context. Some contemplate how they should live, or what they should live for, or how to maximise their happiness, but sadly, others simply live according to the customs and fixed habits they have been taught, or according to transitory instincts. Certainly, people do not always live to maximise their happiness. Normally, they live according to the rules and habits with which they are familiar, although if they become aware of the deficiencies of certain rules and habits they will sometimes try to modify the rules or change their habits to achieve a happier life. If they find that rigidly sticking to some rules makes their life unhappy or causes them harm, they recognise the need to refine and modify them. Most people therefore learn how to live in a deontological way, but they improve their rules and habits in a utilitarian way.

Why does this happen? It happens because human capacity for rationality is limited, and so we begin by teaching something more simply. In other words, we do not teach a baby to maximise his or her happiness, but we teach him or her not to do dangerous things, such as not to lie, and to have a balanced diet. As children grow older, they may learn that they can take part in risky sports, tell a white lie, and drink alcohol for enjoyment. Humans want as happy a life as possible, but due to *bounded rationality*, they cannot take account of everything, so they begin by learning simple rules which work well at that point in their life but will be refined and made more complex in the future. Individuals live their lives in this way, as do states. Herbert A. Simon, an American economist, political scientist and cognitive psychologist, who received the Nobel Prize in Economic Sciences in 1978, proposed the concept of ‘bounded rationality’.¹¹⁷ This concept explains how we make decisions based on the assumption that we cannot take account of everything and that decisions need to be made within a given timeframe. The

¹¹⁷ H.A. Simon (1990) *Bounded Rationality*. In *Utility and Probability*, Eatwell J., Milgate M., Newman P. (eds), The New Palgrave. Palgrave Macmillan, London. https://doi.org/10.1007/978-1-349-20568-4_5

theory postulates we use heuristics to arrive at a satisfactory result. The process of refining the set of rules for a happier life is one of decision-making within bounded rationality.

Living like this, we use all the practical reasoning of Kant, Bentham and Hume. Living according to the principles given by parents or authorities is a Kantian lifestyle. To follow habits and pursue pleasure—as most organisms do—is a Humean lifestyle. And it is a utilitarian way to analyse our way of life to make our life better. An analytical and efficient way to achieve goals in management or administration is closest to utilitarian methods. The best approach is to abandon as many habits and principles as possible, to live as efficiently as possible, and to help others, considering as much as possible. As humans evolve, they grow closer to what both utilitarians and Kantians want. They will be able to nearly maximise happiness and respect and help others.

MacCormick says that prudence and wisdom are supreme virtues.¹¹⁸ And MacCormick acknowledges the need for an exception to rules.¹¹⁹ A prudent or wise person is an experienced person who does not stick to the rules and can make decisions which are efficient and satisfy many people within a given timeframe, considering as many factors as possible. This conclusion of MacCormick is the same as the way to live by following the good habits and principles I mentioned earlier, and by accepting exceptions in consideration of as many things as possible. Due to bounded rationality, humans have no choice but to live according to habits and principles, but habits and principles have one more positive role. By teaching good habits and principles, one can set a good example for others of how to live. The instructions of ‘Live wisely’ and ‘Maximise happiness’, which are high-level ways

¹¹⁸ N. MacCormick, *Practical Reason in Law and Morality*, p. 45.

¹¹⁹ *Ibid.*, p. 48.

of life, do not help people and children with low consciousness levels. You need to teach specific principles and good habits for them to follow and learn basic ways of life. After that, they can learn to make appropriate judgements and accept exceptions according to circumstances and context. If a state orders people to maximise the happiness of the state, people will be at a loss of what to do. Therefore, the state must lay down specific rules which are understandable, consistent and beneficial to the state. This set of rules is a legal system, which is always imperfect but can be refined and improved over the longer term.

The idea of moral realism that morality has substance and can reveal truth and falsehood has been around for a long time, and many philosophers still argue it in various ways.¹²⁰ However, moral propositions, which are moral principles considered moral entities, are only tentatively used to make good judgements without much effort under bounded rationality and cannot be absolute standards for right or wrong. The more you study the ground of the moral proposition, the more difficult you find it to grasp. Moral propositions are not absolute, and if it seems inappropriate to follow them, depending on the situation, different choices can be made through weighing values. It should be recognised that moral propositions are only tools for quick and efficient moral judgement in general situations. Studies on neuroscience and evolution can also explain this argument well.

2.6. Economics and Law for Practical Thinking

2.6.1. The Necessity of Economics for Law

¹²⁰ Bosko Tripkovic, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017), David Plunkett (2020) "Conceptual truths, evolution, and reliability about authoritative normativity", *Jurisprudence*, 11:2, 169–212, DOI: 10.1080/20403313.2020.1715104

For a state, even in practical thinking, efforts cannot be made to maximise welfare for all matters due to bounded rationality. Efforts are made to get a satisfactory result in specific policies while creating basic social systems and rules and informing the public of them. Law is mainly in charge of studying the state's social systems and rules, and economics is related to studying specific policies. Economic methods are widely used to improve existing systems and laws. Since the purpose of the law is to protect the rights of the people and provide an efficient system for state management, economic methods are inevitably used when enacting and revising laws.

In general, economics and law are practical studies for national purposes. Economics focuses on economic actors producing better products and services that people can happily enjoy. Law increases the productivity of society by providing various systems that allow people to live peacefully and safely, and increases the efficiency of society by protecting people's property and bodily rights.

Economics and law are different disciplines. Economics is basically a study that deals with human choices to gain more utility, but it also deals with the economic effects of law regulations. Law is basically a study to protect the rights of the people, but economic analysis is also needed when revising or enacting the law because it should be made as efficient as possible so that people and companies are not interfered with when they express creativity. Economic judgements are also included when law is enforced or when the judiciary makes judgements. In law, striking a balance between legal interests is often used in legislation or specific judgements, and striking a balance between interests is well studied in economics. So, there is also a study called 'law and economics'.

Law and economics are different disciplines, but both are used and influence each

other for practical purposes of the state, so it is necessary to understand the basic concepts of economics in legal philosophy. Economics has long discussed how to find a better alternative to gain more utility, having already solved some problems which are still controversial in legal philosophy, and leaving other matters that cannot be solved. Among the concepts of economics, there are many things to bring to legal philosophy.

2.6.2. Concepts of Economics to Introduce to Law

2.6.2.1. Incentive and Happiness

In economics, it is assumed that a person is incentivised by punishment and reward.¹²¹ This is similar to what Hume says, that morality is based on pain and pleasure. Punishment and reward are felt by emotion at first rather than perceived by reason. In Kantian deontological philosophy focusing on a priori value, it would be difficult to theoretically accept being moved by punishments and rewards, but when making laws to regulate and punish actual human acts, we try to strike a balance between crimes and punishments appropriately. If the punishment for a crime is excessive, it is determined to be unconstitutional because it does not conform to the principle of proportionality.

In economics, we study how to maximise human happiness using reason. Economics is the study of how to maximise emotional happiness in a rational way. This is consistent with Hume's argument that reason is a slave to emotion. In moral philosophy, controversies remain about whether morality is based on reason or emotion and whether emotion is meaningless or not. Moreover, the realm of

¹²¹ N. Gregory Mankiw, *Principles of Economics 9th ed.* (Singapore: Cengage Learning, 2021), p. 5.

emotion and reason is not yet set concretely. However, in economics, emotion is meaningful and the respective realm of emotion and reason is set.

Until now, law has focused on making right judgements under the influence of the philosophy of moral realism. However, this attitude makes it difficult to make appropriate judgements and only causes a lot of controversy in a society where people of various cultures are mixed and technology is rapidly developing. Judgement in law should also be considered as a process of making better judgements, like economics. Various principles are only tools for faster and more efficient judgement, not absolute value. A nation's biggest goal is to maximise the welfare of the people and protect the rights of the minority. This can be achieved in an economical way.

2.6.2.2. Indifference curve and Transitivity of Preferences

Early economics thought that human happiness could be measured by utility, but utility was impossible to measure and express in numbers. What we can feel in real life is that enjoying a product is useful, and the more we enjoy it, the less useful it is. This is called the law of diminishing marginal utility. In economics, since people have different preferences for each product, it has been confirmed that each person has different personal utility for each product, and a theory has been made reflecting this.

The indifference curve is a graph created by reflecting that each utility cannot be accurately measured and that each person's preferences are different. The indifference curve is a curve that connects the same utility felt when consuming

any two products.¹²² It shows that it is more useful when the two are properly combined than when one product is used to the extreme, and the optimal combination of the two products varies from person to person. The indifference curve shows that utility cannot be measured in number and preferences vary from person to person, but this is expressed in a mathematical way, maximising the utility of each individual and the utility of society.

There are also many conflicts of value in law. We will discuss values in detail later, but values ultimately give people emotional happiness. A lot of people often argue that the values they prefer are important and rationally correct about the conflict of values in law. For example, in the case of abortion, a person who considers the right to life of the foetus important and a person who considers the right to self-determination of women important argue that their own opinions are reasonably correct. As for media articles on national security issues, some argue that national security is more important and others argue that freedom of speech is more important. However, this is only a choice based on each person's value system and cannot be solved rationally. Economics admits that individual preferences for apples and bananas may differ and proceeds with the theory, but in legal cases, they do not admit differences in preferences and argue that their values are rationally right.

However, in economics, while acknowledging the difference in values, theories are developed for each individual's happiness and national growth. While acknowledging the difference in values, one of the assumptions necessary to make a theory mathematically is the transitivity of preference.¹²³ If $A > B$, $B > C$, then $A > C$ must be met. $A > B$, $B > C$, but $C > A$ is mathematically wrong. Preference is a matter

¹²² N. Gregory Mankiw, *Principles of Economics*, p. 423–425.

¹²³ Hansson, Sven Ove and Till Grüne-Yanoff, "Preferences", *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/fall2021/entries/preferences/>>.

of emotion, but preferences must be consistent, so there are cases where right and wrong can be determined even in emotional problems.

In law, consistency is also important to prevent the arbitrary will of the powerful, so principles are created and followed. Those in power are often generous to their friends and harsh to their enemies, even if they commit the same crime. This is called a double standard. This happens a lot in legal decisions, but it also happens a lot in the legislative process. Preference may vary, but it is clearly wrong if the criteria vary depending on the target. When politicians have power, they often legislate the act that puts national security before freedom of speech, but if they lose power, freedom of speech is said to be more important than national security. Their true intention is not to think that freedom of speech is more important than national security, but to say so because it is more advantageous for their side to have freedom of speech. Their true thoughts and the arguments they make are inconsistent and it is wrong. If they had thought freedom of speech was more important than national security faithfully, they would have said so under any circumstances. This often happens unconsciously, not consciously. Humans often deceive themselves for advantage.

Emotions basically cannot be determined right or wrong, but whether emotions are consistent can be determined by reason. Values in morality and law themselves are an area of emotion, we can determine whether they are consistent in legislation or the application of the law by reason. People feel that it is unfair when the values which authority uses are inconsistent and arbitrary. The indifference curve well represents the difference in preference, one of the emotions, and the transitivity of preference shows that preference should not be expressed falsely, and we can discern it with reason.

There is controversy over whether preferences are consistent. In fact, there are

cases in which preferences appear inconsistent in survey results.¹²⁴ Preference may not be clear, or preference may have changed depending on the situation. In general, you may like apples more than bananas, but if you eat a lot of apples, you may prefer bananas to apples at the moment. And if a person who values freedom of expression more than national security suffers from war and sees that many people are sacrificed, he can change his mind and value national security as more important than freedom of expression. However, if there is no opportunity for a great change in the general situation, the preference is consistent. If the preference is not consistent, it is likely that he or she lies. Therefore, economics develops the theory assuming that preferences are consistent. If the preference is not consistent, economic theory cannot be developed.

However, in law, most scholars think that moral judgements based on emotions are not consistent, rational, or logical.¹²⁵ The view of emotional moral judgement between economics and law is very different. Each individual's moral judgement may be different from others, and this is only a matter of individual choice and cannot be judged right or wrong. However, each individual's moral judgement must be consistent within his or her value system. It is inconsistent if a person who insisted that the death penalty should be abolished claims that the person he or she hates should be executed when the person becomes a defendant. Consistency is also important in moral judgement, and when it is inconsistent, it can be judged by reason.

Consistency of preference is related to the golden rule of the Bible 'Do unto others as you would have them do unto you', Kant's first categorical imperative, principle of universalizability. Consistency of preference involves consistently making the same decisions to oneself and others when making value judgements.

¹²⁴ Hansson, Sven Ove and Till Grüne-Yanoff, "Preferences", *The Stanford Encyclopedia of Philosophy*

¹²⁵ Bosko Tripkovic, *The Metaethics of Constitutional Adjudication*, p. 81

Utilitarianism has been considered to lack the notion of justice, but it does not.

2.6.2.3. Marginal Change

When making a choice in economics, we compare the values of the marginal change.¹²⁶ For example, when the price of an apple is \$1.00, we buy it until the utility of the apple is \$1.00 and do not consume it if it is less. This concept can be used in the striking balances of interests arising from legal matters. The size of each value may vary for each specific event. In general, freedom is more important than bread, but for those who are very hungry, the value of bread is greater than freedom. It is used to determine exceptions to the rule. And in legislation, when conflicting values arise, the way to properly compare and strike a balance between the two is to compare the marginal change. However, since each person has a different marginal change, compromise and agreement among members are important in legislation.

2.6.2.4. Pareto Improvement

In economics, in transactions by agreement between economic actors, there are always benefits to the parties. However, economics does not only deal with transactions by agreement of the parties, but also deals with the state's tax policy and redistribution policy. In tax and redistribution policies, there is a possibility that the powerful or majority will exploit the minority.

Pareto improvement¹²⁷ is the first concept proposed by Italian economist Vilfredo

¹²⁶ N. Gregory Mankiw, *Principles of Economics*, p. 4–5.

¹²⁷ R. A. Posner, *Economic Analysis of Law* (New York: Wolters Kluwer Law & Business, 2014): p. 35

Pareto and has long been widely used in economics. It is a concept that can be used in the fields of distribution, production, and exchange. When used in distribution, Pareto improvement is a change that benefits at least one without harming either side. Keeping the conditions for Pareto improvement can prevent the exploitation of the minority by the powerful or the majority in the national policy.

However, the result of Pareto improvement is not a perfect choice and there are many options. For example, in a situation where five apples are given to A and one to B, three more apples are given to A alone, giving eight apples to A and one apple to B is also a Pareto improvement. B may not be satisfied with giving more to A, who has nothing to lose but no more apples. Rather, giving two more apples to B and one more to A may increase the utility of society. The condition of Pareto improvement plays a role in preventing the case of stealing apples from A or B and giving them to others without any compensation.

Protecting the rights of the minority in law is to ensure that the rights of individuals are not infringed upon by the powerful or the majority. This is similar to the concept of Pareto improvement in economics. As laws are enacted and amended, they often affect the rights of individuals. In this case, Kantian deontological philosophy and utilitarian philosophy are difficult to give a guide to achieving both purposes of guaranteeing rights of individuals and improving the welfare of society. The deontological way protects rights well, but it is difficult to increase the welfare of society, and the utilitarian way is good at increasing the welfare of society, but it is likely to sacrifice the rights of the minority. The concept of Pareto improvement can be one that protects the rights of minorities in a deontological way and increases the welfare of society in a utilitarian way.

In the second categorical imperative Kant says, treat humans as an end, not as a

means. Since the Pareto improvement contains the condition that it does not infringe on the rights of others, it satisfies Kant's second categorical imperative. There is a general view that utilitarianism does not protect the rights of minorities, but it has the concept of protecting the rights of minorities.

However, complying with the condition of Pareto improvement does not achieve the best results, and scientific research and social consensus should come up with ways to satisfy more people and increase social welfare among alternatives that can satisfy Pareto improvement.

Utilitarianism, which uses the concept of Pareto improvement, is likely to allow institutions which infringe upon basic human rights such as slavery.¹²⁸ In fact, the power to abolish slavery began with the belief that humans are dignified rather than utilitarian judgments. The power to eliminate social systems that violate human dignity is stronger in deontology than utilitarianism. However, in a mature society where individual basic human rights are protected and various values conflict, utilitarian thinking is better for integrating various values and allowing society to grow stably.

2.6.3. The Role of Law in Practical Thinking

Rules and laws exist in society because it is impossible to calculate efficiency maximisation for all problems due to bounded rationality. In terms of bounded rationality, rules and laws in society maintain social order and increase social efficiency by providing guides for members to follow in their daily lives. Determining whether a car will travel right or left on the road has nothing to do

¹²⁸ John Rawls, *A Theory of Justice*, (Harvard University Press, 2005): p. 62–63, 156, 167–168

with protecting the rights of individuals, but maintains social order and increases efficiency.

From a traditional point of view, law plays a role in protecting individual rights. It is the role of the law to prevent infringement of the property or physical freedom of minorities by the arbitrary power of the powerful or the majority. This is consistent with the concept of Pareto improvement conditions in economics that prevent individuals from being sacrificed to benefit others.

2.6.3.1. Point for Law to Use Concept of Economics

Kantian deontological philosophy deals well with rules and laws, but Kantian philosophy is difficult to harmonise the opinions of various people when it comes to exceptions to the law, striking a balance between interests in specific cases, conflicts of values in difficult cases, and revision of the law. Assuming *a priori* value, it does not fit Kantian deontological philosophy to strike a balance between values. Kantian philosophy cannot give an answer to the conflict among important values, for example, whether terrorists are allowed to be tortured to save people. At the point where these conflicts of values arise, the method of economics, a kind of utilitarian method, should be used.

In addition, when times and the values of the people change, technology develops and new laws are needed, balances are struck among values to make laws. Even when discovering and improving the inefficiency of existing systems, economic methods are used to improve them.

2.6.3.2. Role of Emotion and Reason in Legal Practical Reasoning

In economics, utility itself is based on feelings of pleasure and displeasure, and although it cannot be accurately measured and may vary from person to person, economics has academically established a way to maximise utility using reason. This methodology has a lot to introduce in law.

In law, discussions have not yet been concluded on whether values are based on emotions or reason or can vary from person to person. Value is an area of emotion and cannot be determined right or wrong, but in cases where values conflict, the value one considers important is more important and is often said to be reasonably right.

Economics acknowledges that individuals who prefer each value have different preferences, but it creates a theory that maximises the interests of the entire community assuming that preferences should be consistent. It is believed that it is wrong to arbitrarily change the preference according to one's position and present it in an advantageous way, saying that the preference is inconsistent. In law, it is also used to criticise the self-contradiction of the other person by finding the use of double standards. However, in legal matters, there are many people whose values change depending on their situation. It is a matter of emotion when the values asserted by a person change depending on the situation, but we can confirm that it is wrong with reason.

When striking balances between interests in various cases, emotions are responsible for feeling each value, and reason is responsible for comparing the sizes of different values. Hume says that reason determines right or wrong by comparing the relationship between the two objects, which corresponds to this. When striking balances between values, the values people hold often change depending on the situation. Some argue that national security is more important

when they have power, and that freedom of expression is more important than national security to attack the power when they lose power.

When striking balances between values, if each person's preference is consistent with its values and each person's choice is different, then neither side can be considered reasonably wrong. In this case, compromise and agreement with each other are needed to select a final conclusion. Reason also intervenes in the process of this compromise and agreement, but the final choice is made by emotion.

Textual interpretation and syllogism are done by reason. The syllogism is a method that is widely used not only in law but also in mathematics. In this part, right and wrong can be clarified, and there is not much controversy in law. It is also by reason to confirm the consistency of the system of laws and regulations. When the law is revised to cope with problems that occur according to the times, there are cases where it is inconsistent with parts of past laws. It is also the role of reason to confirm consistency by comparing the revised regulations with other regulations.

However, when the results of the application of the law according to the interpretation of the text are not appropriate, the law may not be applied exceptionally. Emotions mainly intervene when we feel that the results of the application of the law according to the interpretation of the text are not appropriate. When confirming the necessity of not applying the law exceptionally, reason may be used with emotion, but the moment when the results of the application of the law according to the interpretation of the text are not appropriate is due to emotion.

Economics has been developed by distinguishing between what can and cannot be judged as reason while dealing with emotion-based utility. What cannot be judged

as reason is a matter of values and is excluded from the subject of discussion. In legal problems, belonging to the same practical reason problem, the introduction of concepts and methodologies used in economics can separate problems to be solved with reason and problems to be solved with emotions.

2.6.3.3. Standard of Fairness in the Method of Economics

In general, it is considered difficult for emotivism to judge fairness because emotivism cannot tell between truth and falsity. However, as discussed earlier, there is a way to judge fairness in economic methods based on emotivism.

The first is that value judgement should be consistent. In everyday life and political issues, people often judge for their advantage and use double standards. In many cases, standards are changed to make judgements in favour of one's side. There are many cases in which powerful people or majorities are generous to their side and harsh to their enemies. Even if there is a law, there are still many people who use double standards in the discretionary domain. In this case, we think that this is unfair. The attempt to make and abide by laws is basically to consistently judge values and prevent arbitrary use of power. In this judgement, we must reflect and use reason.

The second is that the minority should not be unfairly sacrificed for the benefit of the majority. There are cases where the rights of minorities are unfairly violated by those in power or the majority, and in this case, we feel that it is not fair. Economics evaluates that it is bad for the majority to infringe on the rights of the minority with a condition of Pareto improvement. Reason will play a role in this, but reflection and empathy for others mainly play important roles in this process.

There can be more cases that we feel are unfair, but these are two of the cases that we feel are most seriously unfair. In this way, the concept of fairness can be satisfied to a large extent through an economic method with a basis of emotivism. In addition, it is necessary to find a way to satisfy each other through discussions and compromises.

2.7. Justification of Normative Sentences

There have been many theories about whether normative statements can be reasonably justified. Hume and Smith argue that moral statements are emotionally approved and cannot be reasonably justified, but many other theorists have tried to justify normative statements by reason. Hume's assertion that truth and falsehood depend on the relations among objects, the economic theory that habits and rules are needed in decision making because of bounded rationality, the consistency of value judgement and the fact that the role of reason and emotion is well distinguished by economics can solve this issue.

Hume and Smith thoroughly explain that morality is based on emotions. However, since Plato, the practice of scholars who considered morality to be judged by reason has been maintained. In particular, Hume says that 'Is' can be judged right or wrong by reason as a matter of the relationship between the two objects, and 'Ought' cannot be determined by reason as a fact itself of emotion, but many scholars have misunderstood it. The ground of normative sentence can be well explained by the fact that emotions can also be consistent and that we can judge whether inner emotions and expressed emotions match by reason. Until now, there has been a lot of controversy in moral and legal philosophy because it has been thought that consistency of emotion and truth or falsehood of emotion cannot be judged in any case. As Hume says, emotion is a fact itself that cannot be true or false, but whether emotions are consistent or different from actual emotions can

be judged by reason.

The discussion on the ground of normative sentences is enormous, so it is difficult to deal with in detail in this thesis. However, the pros and cons of each theory can be identified by explaining it based on the contents covered above.

2.7.1. Naturalism

Naturalism refers to theories that argue that normative expressions such as 'good' or 'ought' can be defined through descriptive expressions.¹²⁹ It is an old debate over whether 'ought' can be derived from 'is', and there have been many controversies and negative opinions about this.

Earlier, this paper supposes that Hume regards 'ought' proposition as a kind of emotional state, and thinks that 'ought' is not a matter of 'is' which confirm truth and falsity between two things because 'ought' describes the state of emotion, and so far, many scholars have misunderstood Hume's intention. If an 'ought' proposition represents a simple state of emotion, and if two things are necessary to confirm truth and falsity, an 'ought' proposition itself cannot reveal truth and falsity.

If an 'ought' proposition is an expression of emotion and has no object with which to be compared, then the 'ought' itself is not an object of right or wrong; however, if there is an object of comparison, it can be judged right or wrong. For example, if you say you do not actually like apples even though you like them, this is a

¹²⁹ G. E. Moore, *Principia Ethica* (Cambridge, 1903) p.40. quoted in R. Alexy, *A theory of Legal Argumentation*, p. 34–35

wrong proposition. If you think that freedom of expression usually takes precedence over national security, but you say that national security takes precedence over freedom of expression for partisan reasons, this is different from the internal actual mind. If you say it truthfully, you may say that freedom of expression is more important than national security, but in this case, you will choose national security rather than freedom of expression because it is advantageous to your party.

Naturalism is not completely wrong in that an 'ought' proposition or normative proposition can be judged right or wrong by reason as a psychological fact if it has something to compare with. Subjectivism, a part of naturalism, says that normative proposition describes the speaker's feelings or attitudes.¹³⁰ However, there is no absolute criterion for determining the right or wrong of psychological facts themselves.

Moral naturalism is related to moral realism. It is argued that a normative proposition is substantive and can be determined as truth or falsehood. However, it is difficult for any moral realism to explain the value conflict in difficult cases or exceptions to the law. Conflicting values is a situation in which two true moral propositions contradict each other, and one of the two true proposition is wrong. It is difficult to reasonably accept that the two true propositions are contradictory, just as it is to accept that the two true propositions meet each other, and one becomes wrong. In the controversy over abortion, the two propositions that a life is dignified and that women have the right to self-determination conflict each other. There may be situations such as pregnancy due to rape, foetal disability, and maternal health risk. Moral realism does not solve this. In real life, we make choices by the weighing values, which is an economic method, and the choices depend on each person's value system. However, the choice must be consistent

¹³⁰ R. Alexy, *A theory of Legal Argumentation*, p. 39

according to each person's value system.

Rules are provisional things to make it easy and quick to judge general problems because it takes too much time and effort to calculate economically for all problems under bounded rationality. Since it is a provisional rule, it is not absolute, and in some cases, exceptional judgements are made, and the rule itself needs to be improved to suit changes in society. These exceptional judgements and changes and improvements in rules cannot be explained by realism. In particular, it is hard to accept that the once right proposition becomes a wrong proposition over time. It is easier to accept the explanation that the choice is different because the value based on emotions changes over time.

2.7.2. Intuitionism

Intuitionism argues that we can judge whether a normative proposition is right or wrong by intuition.¹³¹ However, there are criticisms that intuition can vary from person to person, and there is no standard for whether intuition is pure, or whether intuition is right or wrong.¹³² Some intuition is done instinctively, but a lot of intuition is achieved through long repetitions. Since the intuition achieved through repetition is different for each culture, it is difficult to use as the standard for right or wrong.

M. Johnson says that habits and rules are tentative and objects to be developed. Even in the theory of bounded rationality, rationality cannot be evaluated for all problems, so rules by habit are necessary and subject to development. Reason can also judge whether repeated habits and new things match or not. This is because

¹³¹ Ibid., p. 37

¹³² P. F. Strawson, "Ethical Intuitionism", *Philosophy*, 24 (1949) p. 27 quoted in R. Alexy, *A theory of Legal Argumentation*, p. 39

it is possible to check whether existing habits are consistent with a new act by reason. However, when comparing existing habits with a new act, existing habits are a criterion for judging by reason, but this is tentative, it is difficult for habits to become an absolute criterion.

2.7.3. Emotivism

Emotivism says that normative sentences are the expressions which represent the attitudes we feel and use to try to influence someone, rather than the argument which tells truth or falsehood and can be analysed and discussed by reason.¹³³

As Hume or subjectivist argues, the expression that represents our feelings is the fact of human psychology itself, so we cannot reveal right or wrong because there is no object to compare with, but if there is an object to compare with, we can tell right or wrong. If I say I like apples but I actually hate apples, it is a lie and the expression that I like apples is rationally wrong. If I say that I like oranges over apples, bananas over oranges, and I like apples over bananas, at least one of the three expressions is a lie. This is because there is no consistency of preferences.

There are also cases of deceiving emotions in the legal arguments. As mentioned earlier, there are cases where a criminal suspect deceives the intentionality of the crime. Politicians lie when making laws depending on the subject. In Korea, it is often argued that corruption of one's own party is forgivable because it is an old practice, and that corrupt practices of other parties should be impeached and punished. Their real mind is to choose one because it is advantageous to their side. Laws have been created to eliminate this arbitrariness, but arbitrary legislation

¹³³ R. Alexy, *A theory of Legal Argumentation*, p. 39

and legal applications still continue.

In economics, the feeling of preference itself may vary from person to person, but the discussion continues rationally assuming that preference should be consistent. However, in law, many argued that preferences are emotions, but values that do not differ significantly from preferences are in the realm of reason. Therefore, they have failed to admit that value is based on emotion and proceed with the discussion by separating the areas of reason and emotion. Law can also admit that normative statements are emotional attitudes and proceed with discussions. Most of the causes of difficult problems in law are conflict of values. The conflict of values is to determine the superiority between values, and setting the superiority between values must be consistent and is a problem to be solved using reason. The order of values is a value system, and it is the role of the law to determine and apply a consistent value system agreed upon and shared by society.

2.7.4. Prescriptivism

R. M. Hare is one of the leading philosophers of prescriptivism. Hare admits that normative sentences and value judgements cannot be derived from descriptive statements, such as emotivism.¹³⁴ However, Prescriptivism says that the evaluation of 'good' includes a descriptive meaning that meets certain universal standards or criterion.¹³⁵ Hare, however, ultimately admits that it is up to individual decisions to choose a certain set of moral principles.¹³⁶ Hare fails to find any more rational basis for moral norms other than the principle of universality.

¹³⁴ Ibid., p. 71

¹³⁵ Ibid., p. 71

¹³⁶ R. M. Hare, *The Language of Morals*, (New York: Oxford University Press, 1952), p. 196

As discussed earlier, because of the bounded rationality, we cannot make calculations that maximise utility for all problems, and in most daily lives, we live according to habits or rules. Even in moral issues, you try not to violate them by living unconsciously according to certain moral rules accepted in society and you feel guilty if you violate them. It is also possible to judge rationally whether an act conforms to moral rules. Laws also make society safe and efficient by maintaining the order of society and giving it predictability. We can judge by reason whether an act is against the law or not.

There is no moral or legal system in which all citizens agree on all matters. If a certain number of citizens accept it, it is accepted as a universal moral system, but there are also minorities who resist it. The legal system is also recognised as a law and has effect if a majority of the representatives of the people agree, even if not all citizens agree. Most people agree that giving effect to the law in favour of the majority would be better to maintain and secure social order than to have no law at all. What some people approve of is not only determined by reason, but ultimately by emotional decision, and it is impossible to determine right or wrong.

Johnson says that moral rules are tentative and developing. In fact, morality and law change and develop according to technological development, cultural exchange, and changes of value systems of people. However, there is no absolutely right moral and legal system. All are in the process of improvement. The direction of improvement is to protect the rights of minorities and expand the welfare of society. The intention is to increase the utility of society as a whole by reducing the number of people whose rights have been unfairly violated and increasing the efficiency of society. Practical reason is to achieve the goal, and the goal of the law is to protect the rights of minorities and maximise the welfare of society. For this purpose, morality and law are also improving. The concrete condition to

improve rules is Pareto improvement, which protects the rights of the minority and increases the welfare of society.

Even if the law itself is excellent, there are times when exceptions to rules must be granted depending on the situation. The law is not perfect, but provisional for the general situation. Therefore, acknowledging exceptions to rules depending on the situation is good for protecting minorities and expanding the welfare of the state. It is necessary to give some discretion to public officials or judges under strict responsibility. In addition to reason, an emotion that can judge various values of exceptional situations must intervene to judge exceptions to the law. A. Smith also says that moral judgement must take into account various situations and this is done by emotions.

Prescriptivism has a good grasp of reality overall. It points out that the principle of equality is important, which is a very important part of pointing out the consistency of value judgement. In economics, in order to create a theory that maximises the utility which is an emotional one, consistency of preferences is assumed. Reason must intervene in determining whether it meets the principle of equality or whether preferences are consistent.

2.8. Moral Relativism and Utilitarian Method

In general, emotivism's belief that moral judgement cannot be judged right or wrong is related to moral relativism that all moral systems are relative and cannot discuss superiority. They are different in that emotivism cannot have any true or false moral judgement, but moral relativism can judge right or wrong and each

society has different standards.¹³⁷ Relativism itself has a considerable contradiction. It is difficult to accept that the standards for right and wrong vary from society to society. With Relativism, it is also difficult to explain that right and wrong change over time even when morality and law change. And it is hard to accept that it can rationalise an extremely cruel legal system such as the one enforced by the Nazis, and that it can judge that the lives of primitive people with a lot of superstition and no human rights are good in their own way. For this reason, moral relativism has a lot of room for criticism.

However, the utilitarian method introduced in this thesis recognises the pluralism of each moral and legal system, but requires consistency within the moral and legal system. Moreover, because of its limited rationality, we can tentatively judge right or wrong with a tentative moral and legal system. In addition, the utilitarian method has no defects of existing theories because it has the consistency and universality of the moral and legal system within itself, and suggests the direction of development of morality and law. Many contradictions can be avoided because it has the purpose of making judgements for better choices rather than making judgements for the right choices.

2.9. Conclusion

Given that legal argument theory is a special form of practical reasoning theory, it was necessary to consider practical reasoning theory before looking at legal argument theory. Kantian practical reason puts forward *a priori* principle which is both difficult to prove and to use because it makes it difficult to weigh values. Alexy's theory takes Habermas' discourse theory to find the right objective principle; however, the consensus by discourse is not an objectively rational

¹³⁷ Bosko Tripkovic, *The Metaethics of Constitutional Adjudication*, p.89

principle but a principle that many people have accepted emotionally. It can be objective, but it is not rational. Objective rational principles will not change as society changes. Scientific and mathematical truths do not change over time. Bentham's utilitarianism assumes human rationality, but humans are not perfectly rational, and it is impossible to discover the best alternative through deliberation on all alternatives, and this also takes too much time and cost. Utilitarianism is useful when improving existing principles or rules, but it is always impossible to find a perfect answer. Hume's theory states that humans mostly live for pleasure by unconscious habits. It is misunderstood that Hume is a hedonist; rather, he talks about both high and low levels of pleasure. Smith, who communicated with Hume and suggests similar moral sentiments as Hume, emphasises noble values such as honour, friendship, and trust. Both Hume and Smith say that empathy plays a major role in morality and serves as the basis for a peaceful and stable society. Johnson's concept of moral deliberation and growth is based on Hume's theory and well overcomes Kant and Bentham's theory. It prevents Hume's theory from falling into hedonism by a moral deliberation and prevents emotions from becoming relativism by a concept of growth. Research in modern neuroscience also supports this.

Human faculties such as will, reason, and reflection play a role in practical reasoning. Practical reasoning has a process of finding ends and means and implementing means. There are theories that include the will in reason and see it as being able to distinguish right from wrong, but according to Hume, the only way to clearly distinguish right from wrong is by comparing two things. Many have mistaken practical reasoning for the role of reason, but practical reasoning includes the approval and disapproval of emotions. However, even in the case of emotions, if we can compare two objects, then the right or wrong can be determined by reason. Reflection has been recognised by most scholars as the most important ability of reason, when in fact it is an ability that encompasses both reason and emotion, and the consequences of reflection may not always determine right or wrong.

In the practical thinking process of finding goals, finding means, and implementing means, various human faculties such as reason, emotion, imagination, memory, and will are used. However, since human cognitive ability is limited, all possible means cannot be found and all calculations cannot be made. When we get a satisfactory result to some extent, we are satisfied and choose. And rather than aiming for the most efficient solution for all problems, we act according to rules and habits in everyday life. Long-time revised rules are a good guide to yield more than a certain level of results.

Both economics and law are studies for practical thinking. These two disciplines have developed differently, but recently they have been studied integrally. In economics, theories are developed by assuming a consistency of preferences while acknowledging differences in preferences for each individual. Recognising that individual preferences are different means acknowledging that preferences are emotionally based, and assuming consistency of preferences means that consistency of emotional preferences can be judged rationally. Economics develops theories by clearly dividing the realm of emotion and the realm of reason, but in law, there is still controversy over whether values are based on emotion or reason. In law, discussions can also be conducted by assuming that value is based on emotions but must be consistent. Through this, the role of reason and emotion in law can be clearly revealed. And the concept of Pareto improvement can meet the goal of increasing the welfare of society while guaranteeing minority rights. In addition, the concepts used in economics can explain the striking balance of interests in the law, the direction of improvement of the law, and exceptions to the law. And this can explain the process of making a better law, not finding a perfect law.

So far, there have been many studies on whether the rational ground of moral

norms and legal norms can be found. Emotion is psychological fact itself, and so we cannot determine its truth and falsity, but the consistency among emotions can be determined rationally. Naturalism, emotivism, and intuitionism all have some facts and errors, and prescriptivism understands reality well. Prescriptivism emphasises the universality of regulations and principles, which refers to the consistency of values and emotions. The consistency of values and emotions is determined by reason. In addition, the utilitarian method for making better choices summarised in this thesis solves the contradiction of existing theories in that it can present the direction of development of the moral and legal systems while acknowledging the relativity of each moral and legal system.

I have discussed general practical reasoning. There has long been a philosophical debate over whether the process of practical reasoning is based on emotion or reason. Not long ago, it has been difficult to prove it scientifically. However, after neuroscience developed and enabled imaging of the brain, experiments show whether certain thoughts are based on emotion or reason. I will briefly introduce these experiments.

3. Neuroscience about Emotion, Reason and Reflection

Kant says that human moral acts under the name of practical reason are enacted by reason, and Bentham's utilitarianism thinks that utility is maximised by reason. On the other hand, Hume says that reason serves emotion and morality is based on emotion. There has long been controversy over whether morality was based on reason or emotion, but it has been difficult to prove. Now that science has developed, it is possible to identify which thinking belongs to emotion or reason with an MRI (Magnetic Resonance Imaging).

3.1 Intuition Related with Emotional Part of Brain

Kant considers judgement by prior intuition to be a role of reason, and even Hume, who claims that morality is based on emotion, says that instinct, like intuition, is a function of reason. Surprisingly, however, modern neuroscience shows that moral intuition occurs in the realm of emotion.

3.1.1. Trolley Thought Experiment

There is a famous trolley dilemma among the thought experiments put forward by ethical philosophers. This experiment asks the subject whether he or she would pull the switch to divert an incoming trolley away from five innocent people to kill one innocent person. People who are asked this question are said to answer positively, although they hesitate for a while regardless of their cultural background. This is an example of the moral calculus of the utilitarian Bentham.¹³⁸

¹³⁸ M. Pigliucci, *Answers to Aristotle: How Science and Philosophy Can Lead Us to A More Meaningful Life*, (Basic books 2012) p. 9.

However, if we change the method of this experiment a little bit, the conclusion will be different. Most respondents are surprised if stopping the trolley would instead require pushing a large, innocent person in front of the trolley to stop it from killing the other five. This is far from utilitarianism and is the result of the Kantian principle not to kill innocent people and deontological thinking in general.¹³⁹

A team led by Michael Koenigs of the University of Iowa and Antonio Damasio of the University of Southern California conducted a new experiment with trolley problems. Patients who suffered brain injuries to areas known to affect emotional responses were compared with unaffected subjects. As a result, there was no difference in the experiment of pulling the switch. However, there was a significant difference in the experiment in which five people had to be saved by pushing and sacrificing a large person on a footbridge. In contrast to the unaffected subjects, many patients who suffered brain damage were willing to push a large man without hesitation. Damage to the ventromedial prefrontal cortex (VMPC) causes patients to make less emotional or impersonal judgement.¹⁴⁰ These experiments do not conclude that a person with missing parts of the brain's emotional faculty makes good moral judgements, but the experiments show that parts of the brain that match emotion is related to Kant's intuitive thinking rather than Bentham's utilitarian thinking.

3.1.2. Distributive Justice and Neural Encoding of Equity and Efficiency¹⁴¹

¹³⁹ Ibid., p. 9.

¹⁴⁰ Michael Koenigs et al. "Damage to the prefrontal cortex increases utilitarian moral judgements", *Nature* 446(2007) p. 908–910.

¹⁴¹ Ming Hsu, Cédric Anen and Steven R. Quartz, "The Right and the Good: Distributive Justice and Neural Encoding of Equity and Efficiency", *Science* 320(2008), p. 1092–1095.

Ming Hsu's team studied distributive justice between equality and efficiency in neuroscience. They asked subjects questions and observed where the brain was activated by magnetic resonance imaging. In this experiment, MRI images of the brain are taken according to the choice of handing out money to children in orphanages in North Uganda. The MRIs show the response of brain in the choice between efficiency and inequity. The purpose of this experiment was twofold. The first was to confirm the debate between utilitarian theory and deontological theory about distributive justice. The second was to determine whether the justice of distribution was based on reason, as Kant and Rawls argue, or on emotion and empathy, as Hume and Smith argue.

This experiment verified the relationship between each brain region and its role. Striatum is known to be responsible for calculating indirect rewards in public goods games, such as charitable donations and punishment of free riders. The septal-subgenial area is related to altruism and social attachment. The insular cortex is an area of emotion that is related to unfairness, has recently been known to be related to empathy and fairness, and has also been found to be related to decision-making under uncertainty. Briefly summarising the experimental results, putamen, part of the striatum, responds to the problem of efficiency, insular is related to unfair judgement, and septal-subgenial area is used to comprehensively judge efficiency and inequity. As a result of this experiment, people consider equity more important than efficiency in distributive justice. Interestingly, equity is emphasised in Kantian and Rawlsian deontological theories, and deontological theories think that these results are derived by rational reasoning, but in experiments, inequity-aware areas are insular and emotion-related areas.

The results of this experiment strongly support Hume and Smith's claim that judging morality is based on not reason but emotion. While discussing general practical reason in an earlier chapter, it was said that moral judgement is mainly determined by emotion, not reason. The area of comprehensive determination of

efficiency and fairness is related to reflection, and reason and emotion are considered together in this process. Reflection is most important in the moral thinking, and most scholars consider reflection quite important while discussing it differently.

3.1.3. Intuition, Practice and Emotion

Neuroscientists say that there is no born intuitive person and a lot of practice makes intuitions better. Intuition is an ability to find the regularities in repetition and domain-specific ability. Therefore, someone can be intuitive about one thing with which he is familiar while lacking intuition in other domains. In games such as chess, if you practice for a long time, you will develop intuition through repetition. However, having an intuition about chess does not mean that you have intuition in other fields. People who have much experience within certain domains find heuristic solutions more quickly.¹⁴² Nevertheless, intuition is not always right and needs to be corrected through analytical thinking. However, analytical thinking takes a lot of time and effort, and so an appropriate balance must be found between intuition and analytical thinking.¹⁴³

Now, due to the development of neuroscience, we can experiment to discover which areas of the brain are the most related to intuition. One of the areas of brain which related to intuition is the amygdala, which is associated with emotion. Because of this, intuition is accompanied by a strong 'gut feeling' when an individual has made a right decision. Neurologically speaking, intuitive and emotional responses are not the same, but they are difficult to distinguish because

¹⁴² M. Pigliucci, *Answers to Aristotle*, p. 40.

¹⁴³ *Ibid.*, p. 41–43.

they originate in the same part of the brain.¹⁴⁴

3.1.4. Two types of Intuition: Moral Intuition and Intuition by Practice

As you can see earlier, there are two types of intuition. The first is an intuition that feels right and fair as a moral judgement. The second is intuition, the ability to find fast and efficient ways to be obtained from long iterations in a particular field. These two intuitions are somewhat different in nature, but they occur in areas of emotion in the brain.

3.2. Evolution of Morality: Empathy and Mirror Neurons

Thomas Hobbes and Richard Dawkins say that humans are selfish, so they should make social contracts or artificially teach morality and altruism. However, not only humans but also animals seem to share what they have or sacrifice for their family and friends. For example, a chimpanzee jumps into the water to save their drowning friends,¹⁴⁵ while vampire bats share their food with their colleagues.¹⁴⁶ Animals also have a certain amount of altruism. This altruism belongs to family altruism, which seeks to preserve one's DNA, and reciprocal altruism which is motivated by the hope of receiving acts of kindness in return. Many scientific studies of moral decision-making show that morality is based on intense moral emotions that begin with unconscious behaviours such as family altruism and reciprocal altruism.¹⁴⁷

¹⁴⁴ Ibid., p. 40–41.

¹⁴⁵ Ibid., p. 20.

¹⁴⁶ Ibid., p. 21.

¹⁴⁷ Ibid., p. 22–23.

Most people think that morality is based on the ability to empathise and understand the emotions of other people in different situations. This has been scientifically proven by experiments that show that psychopaths who cannot empathise cannot distinguish between conventional wrongs and important moral wrongs.¹⁴⁸ Dr. Giacomo Rizzolatti observed the motor acts of monkeys and discovered that mirror neurons were used to mimic acts. Later, other scholars found that in addition to the imitation of motor acts, mirror neurons worked in language acquisition, intention understanding, and empathy of emotions.¹⁴⁹ Over 280 years ago, Hume claimed that affection is transferred from one person to another, which has now been proven by mirror neurons.

As in strings equally wound up, the motion of one communicates itself to the rest; so all the affections readily pass from one person to another, and beget correspondent movements in every human creature.¹⁵⁰

3.3. Emotion, Reason and Reflection

I discussed general practical reasoning specifically earlier. Judgement of values and morality, as Hume and Smith argue, is based on emotion, and reason works when we compare two things. Overall, it is a reflection to judge by considering the whole. This is generally consistent with the findings of neuroscience.

3.3.1. Emotion, Reason and Reflection in Moral Judgement

¹⁴⁸ J. Prinz, *The Emotional Construction of Morals*, (Oxford University Press, 2007) p. 43–44.

¹⁴⁹ Giacomo Rizzolatti and Maddalena Fabbri Destro (2008) "Mirror neurons". *Scholarpedia*, 3(1):2055.

¹⁵⁰ D. Hume, *A Treatise of Human Nature*, p. 576.

In the trolley experiment, pulling a switch to sacrifice fewer people stems from reason, and feeling reluctant to push a person stems from emotion. A psychopath, as someone who has problems with emotion, does not feel reluctant to push people. Based on the results of this experiment alone, we can think that psychopaths make reasonable judgements. However, psychopaths without empathy have difficulties in social life, such as not being able to distinguish moral wrongs and conventional wrongs. It is necessary to use both reason and emotion normally, and to comprehensively consider them. This is the ability to reflect. An experiment by the Hsu team nicely demonstrates the ability to reflect. It shows that when distributing food to orphans, efficiency, fairness, and the ability to make a comprehensive judgement are needed, and that there is a division of the brain for each ability.

3.3.2. Kant and Hume from the Perspective of Neuroscience

Kant's deontological theory is based on reason. However, the neuroscience experiments show that Kant's intuition, which he thinks is rational, is related to part of the brain that controls emotion. However, even though it seems that moral intuition is related to emotion, part of Kant's theory is related to reason. Kant tries to make universal legislation. This seeks to create a principle acceptable to all people through rational analysis and reflection in legislation. Kant's intuition is related to emotion, but efforts to legislate universal imperatives requires the ability of reason and reflection.

Neuroscience shows that Hume and Smith's respective theories of moral sentiments are generally closer to reality. Hume says that people live according to their habits. Neuroscience tells us that habits are also related to an area of emotion in brain. It is also surprising to mention the transfer of emotions between

two persons suggesting mirror neurons. People say that Hume considers only emotion important, but in fact, Hume cannot be seen as a mere hedonist because he values quiet needs and reflection. His theory is closest to the results of neuroscience research. However, Hume is wrong to believe that intuition is a mysterious reason.

3.4. Conclusion

The results of modern neuroscience experiments show that, as Hume says, intuitive moral judgements are mostly in the emotional domain, and utilitarian optimisation, which involves comparing two subjects, is in the domain of reason. This is similar to the results of the previous philosophical study of general practical reason. I said earlier in Chapter 1 that the decisions Constitutional Court of Korea have changed due to the change of the legal sentiments and people's value systems. It seems that legal sentiments and people's value systems are deeply related. A value system consists of various values, and many philosophers acknowledge that 'ought' has value in itself and law or morality is one of 'ought'. Now, therefore, I will review the value to prepare to focus on the theory of legal reasoning.

4. Maslow's Value Theory

4.1. Definition of Value

Value is a concept used in most disciplines including moral philosophy and legal philosophy. Much controversy exists about whether value can be objectively recognised or determined, but value is generally understood as something that fulfils human desires and feelings.

4.2. Limitations of Conventional Value Theories

Intuitive value theorists such as N. Hartmann argue that an absolute value beyond the relativity of perceived value certainly exists¹⁵¹ albeit cannot be proven. They fear that society will lose its moral standards by relativising values. M. Johnson thinks that this belief stems from the anxiety about relativity of morality¹⁵² and hinders serious moral inquiry.¹⁵³ However, it is difficult to obtain an absolute and objective value system that forms the basis for judging value.¹⁵⁴ If the objective ranking of values were possible and successful, there would have been no disagreement in law in comparing between values, and we could create an objective hierarchy of values and make judgements accordingly. However, it is impossible to establish an objective order for all values, and conclusions may be different depending on the situation, even when comparing between values

¹⁵¹ N. Hartmann, *Moral Phenomena, Volume One of Ethics*, trans. Stanton Coit (New Brunswick, New Jersey: Transaction Publishers, 2002), p. 180.

¹⁵² M. Johnson. *Morality for Human*, p. 124.

¹⁵³ *Ibid.*, p. 190.

¹⁵⁴ This is related to the value neutrality and pluralism discussed recently, and the majority recognises value neutrality and pluralism.

generally thought of higher and lower importance. For a starving person, a single piece of bread may be more precious than freedom,¹⁵⁵ just as some regions maintain the death penalty as a form of public vengeance, which is valued higher than individual life.¹⁵⁶ The appraisal of value, like in A. Smith's gentleman and highwayman example, occurs in various situations as the result of emotion, not reason.¹⁵⁷ Although, in general, a social value hierarchy exists and is accepted by the majority, it cannot be legally enforced on all individuals, and, in case the state exercises it forcibly, it must do so with minimum necessity as in many cases will be followed by controversies.

4.3. Overcoming the Limitations of Existing Value Theories

Leaving the problem of value to the question of right and wrong or of reason will not solve the problem. If the problem of value is considered as a question of good and bad and of making a better choice, the problem can be divided into the question of how members of the society will agree on the good and bad and how they will use reason to find methods to reach the chosen goals. This enables us to focus on the issues that shall be pondered with reason and terminate useless conversation for controversial problems. Although the value of each person may vary, as may the final result from case to case, it is possible to search for solutions accordingly.

4.4. Theory of Values in Hume's Philosophy

¹⁵⁵ "Why some Japanese pensioners want to go to jail." BBC News, 31 January 2019, <https://www.bbc.co.uk/news/stories-47033704>.

¹⁵⁶ Assuming that life is absolute and if concerned about the possibility of other lives being harmed, a life sentence is sufficient.

¹⁵⁷ Smith was talking about morality and virtue, but the term *value* can be used without problem as it is more inclusive.

4.4.1. Value, the Cause of Pleasure and Pain

Hume explains value in terms of sympathy on the feelings of pain and pleasure. Every quality that gives pleasure causes love and pride and produces uneasiness that excites humility and hatred, where these two particulars are considered as equivalent.¹⁵⁸ Natural talents and moral virtues are values insofar as they give pleasure to humans. Meekness, beneficence, charity, generosity, moderation and fairness clearly manifest among moral qualities, and, as they contribute to the good of society, they are called social virtues.¹⁵⁹ There are two qualities for which great people are lauded: the first includes characteristics such as generosity and humanity, which play a social role, and the other includes characteristics such as prudence, temperance, frugality, assiduity, enterprise and dexterity, which enhance personal gains; both are appraised.¹⁶⁰ Hume's virtues are far from hedonistic values. Rather, Hume argues that values are elements that cause pain and pleasure, and that they are useful to society, even though some values are useful only to personal interests. Generally, most people will agree with Hume's explanation as they too can feel so in their daily lives.

4.4.2. Relativity of Value

Hume argues individuals have different perspectives and that, unless the object appears the same to everyone who shares a common point of view, sentiments and

¹⁵⁸ Hume, *A Treatise of Human Nature*, p. 575

¹⁵⁹ *Ibid.*, p. 578.

¹⁶⁰ *Ibid.*, p. 587.

judgements cannot be matched with one another.¹⁶¹

4.4.3. Empathy and Imagination that Expand Value

Human feelings are universal; just as when two strings vibrate and one string's motion is transferred into the other, affection, likewise, is readily transferred from one person to another.¹⁶² A convenient house, strong horse and a swift-sailing vessel of an unrelated person make us feel good because they provide pleasure through the delicate sympathy with the unrelated owner.¹⁶³ On the contrary, it is because of sympathy that our feelings become uneasy when we see a personality or a habit that is incommodious to oneself.¹⁶⁴ We value justice as the highest good and injustice the lowest; the good of society unrelated to the interest of oneself or a friend gives pleasure only through sympathy.¹⁶⁵ The above explanations are mostly felt in everyday life. However, in those explained by sympathy, imagination can also be a mechanism that makes one feel value.

4.4.4. Limitation of Empathy and Reflection

Sympathy is variable, so it is easier for one to sympathise with persons contiguous to us than to persons remote from us.¹⁶⁶ It is seldom that men heartily love something far from them or something of little interest, and it is difficult to

¹⁶¹ *Ibid.*, p. 591.

¹⁶² *Ibid.*, p. 575–576.

¹⁶³ *Ibid.*, p. 576–577.

¹⁶⁴ *Ibid.*, p. 589.

¹⁶⁵ *Ibid.*, p. 577.

¹⁶⁶ *Ibid.*, p. 580–581.

pardon any person who directly conflicts with his or her own interests, even if doing so conforms to the general rules of morality.¹⁶⁷ We know that many contradictions arise in social life when we only consider personal interests or interests of close friends, which is why we fix our behaviour in such a way as to sympathise with a person under consideration or one with whom we interact; this type of sympathising, although not vivid, is equally well suited to general principles as to dominate our judgement and opinion.¹⁶⁸ In fact, even if we deliberate to sympathise with other people's conditions, it is difficult to empathise with the feelings of others as our value systems are still different. Therefore, the opinions of judges divide in hard cases.

4.5. New Value Theory

4.5.1. Superstition Regarding Emotions

Generally speaking, emotions are thought to be foolish, unforeseeable moments of enthusiasm, while economics claims itself to be a rational discipline in pursuing the utmost utility. But the ultimate goal of economics is maximisation of utility, which belongs to the domain of emotion. Like A. Maslow's understanding of desire, Hume and Smith see that emotions are not enthusiastically foolish but are felt after a deep deliberation of what one wants.

4.5.2. Values that Satisfy Human Emotions

¹⁶⁷ Ibid., p. 583.

¹⁶⁸ Ibid., p. 583–584.

‘Value’ refers to something that meets human emotions such as human interest, emotion, desire, etc. Maslow says that “needs or values related to each other in a hierarchical and developmental way.”¹⁶⁹ Values in everyday life are not only noble and sacred but also relate to diverse desires including sensual desires such as sight, smell, touch, taste and hearing, aesthetic desires such as creativity and humour, and also physiological, belongingness and love, esteem and self-actualisation needs,¹⁷⁰ as distinguished by Maslow. M. Johnson introduces many values.¹⁷¹ His classification method differs from Maslow and MacCormick, and classifying values can vary from person to person. But the most important values are similar. Claiming that a value is noble and holds the absolute truth only indicates a strong desire to pursue the ultimate value. Maslow says that by needs, ‘we can solve many value problems that philosophers have struggled with ineffectually for centuries.’¹⁷²

4.5.3. Hierarchy of Value

4.5.3.1. Value in General Value Hierarchy

Need theorists such as Maslow argue for a hierarchy of needs in which a lower need must be met before pursuing a higher one. If needs have a hierarchy, it must mean that there is a hierarchy in values. Maslow implies value objective theory through his chick experiment, arguing that needs are hierarchical and developmental¹⁷³: Chicks are given different food, and the food chosen by the

¹⁶⁹ A. H. Maslow, *Toward a Psychology of Being 3rd ed.* (New York: John Wiley & Sons. 1999) p. 168.

¹⁷⁰ A. H. Maslow, *Motivation and Personality* (New York: Harper & Row, Publishers, 1954) p. 35–46.

¹⁷¹ Mark Johnson, *Morality for Humans*, p. 48–72.

¹⁷² Maslow, *Toward a Psychology of Being*, p. 169.

¹⁷³ *Ibid.*, p. 168–170.

strongest grown-up chicken is given to other, weaker chickens, after which the weaker chickens become stronger,¹⁷⁴ although not to the extent of the strongest chicken. Even if it is not possible to place all values in a hierarchy, anyone can admit that some values may be done so from a general perspective, as argued by value objective theorists or Maslow.

However, as value hierarchy in legal problems means to force a special value hierarchy on the individual, it is dangerous to think that authority can forcibly apply the value hierarchy observed in general situations to the public in special circumstances. This suppresses individual freedom and goes beyond paternalism to dictatorship. Concerning the question of value in democracy, the state must not determine the hierarchy but rather inform the existence of a general hierarchy for the people to willingly choose. Maslow also argues that development cannot be forced but can be coaxed in the trust that new experience leads to preference¹⁷⁵ and be helped through understanding and respecting deficiency and growth needs.¹⁷⁶ M. Johnson says that there is no right answer for morality, but we can still search for better morals. The concept of moral growth is closely related to value hierarchy.

4.5.3.2. Value out of General Value hierarchy

Human sensual desires differ from one another, and this is called preference or taste, which can hardly be put into a hierarchy. Many other desires cannot be placed in hierarchy. This is called the value system, and each individual's preference depends on their genetic characteristics, environment, and socio-

¹⁷⁴ *Ibid.*, p. 166–167.

¹⁷⁵ *Ibid.*, p. 62.

¹⁷⁶ *Ibid.*, p. 160.

cultural experience, among others. Those who prioritise the need for safety will place a greater emphasis on state control for equality and security than on individual freedom, and those who prioritise the need for self-realisation will value individual freedom higher than equality or state control. Values are relative because they depend on the genetic propensity and the psychology of the individual changing with the situation. This causes a conflict of values in legal matters.

4.5.4. Changes in Values

Value fulfils human needs, which is why it changes according to social situations and technological changes.¹⁷⁷ On the individual level, the value received from interacting repeatedly with the same thing decreases, as explained by the diminishing of marginal utility in economics;¹⁷⁸ likewise, the familiar value is depreciated than its real and intrinsic merit, and we set a higher value due to singularity.¹⁷⁹ As in Maslow's motivation theory, if human desire reaches a higher level, the individual's value system changes.

4.5.5. Evaluation and Choice among Values

4.5.5.1. Denial of Absolute Value

Still, there are some who argue that certain values are absolute, and there are

¹⁷⁷ Examples include the appreciation of previously useless minerals due to technical development and the creation of personal information rights due to the development of the Internet.

¹⁷⁸ N. Gregory Mankiw, *Principles of Economics*, p. 430.

¹⁷⁹ Hume, *A Treatise of Human Nature*, p.291–292.

some traces in the legislation.¹⁸⁰ However, if values were not a problem of right and wrong but of good and bad, no value would be absolute; only very important values would be. Even very important values cannot be selected depending on the situation. Some problems arising from this fact are euthanasia, abortion, and many others. Many suffer needlessly due to the religious or metaphysical conception of absolute value of life. Euthanasia and abortion are very important and irreversible life matter, which must not be allowed easily but only be allowed under strict requirements.

4.5.5.2 Choice through the Comparison of Marginal Value

Economics states that the best results are made after comparing marginal values of different choices.¹⁸¹ This means that, making a choice after constant cost and effort, it is better to choose the one that yields the highest value for that last unit. This explains why a hungry person prefers bread over freedom. The same principle is used to strike a balance between legal interests in law works. This method is from utilitarianism's maximisation of utility.

4.5.6. Objectification of Value

4.5.6.1. Similarity in Human Desires

As mentioned earlier, humans maintain a certain degree of objectivity due to basic

¹⁸⁰ Article 10 of the Constitution of the Republic of Korea also stipulates that 'it shall be the duty of state to confirm and guarantee the fundamental and 'inviolable' human rights of individuals', which raises problems by allowing the value to be absolute without leaving room to strike the balance between legal values.

¹⁸¹ G. Mankiw, *Principles of Economics*, p. 4.

needs such as the desire for survival, affection, recognition, and self-realisation, although preferences differ per individual depending on genetic and growth environment. However, as mentioned above, this cannot be considered objective in specific circumstances, and the law should not be applied under the assumption that all desires are objective.

4.5.6.2. Escaping from the Perspective of Right or Wrong

In society, the problem of value is still a matter of right or wrong, and people who think differently are often considered wrong and evil. It is necessary to acknowledge that the problem of value is not a matter of right or wrong but a matter of good and bad, and to admit that others may think differently. One has to be free from the illusion that he or she is objective in order to, paradoxically, become a more objective person and to solve problems.

4.5.6.3. Empathy

After fully accepting that the problem of value is not that of right and wrong but of good and bad, it is necessary to modify our behaviour in such a way that we can empathise with others, just as Hume argues. As Smith claims, this is also a good way to empathise in the view of an impartial and informed spectator. Doing so requires interacting with various people through seeing and feeling others' lives.

4.6. Evolution and Mind-independent Normative Truth

Moral values help humans survive and pass on their genes. Diligence prevents external attacks and increases the likelihood of obtaining resources for survival.

People who are honest, tolerant, and have faith are likely to survive and leave offspring as they can build trusting relationships with others and help each other. From a utilitarian point of view, moral value is not absolutely right, but it is a good thing that makes individuals happy and helps them survive.

However, moral realists who argue that there is a mind-independent truth think that it is difficult to accept the relation of moral value and fact. They think morality belongs to 'ought', and it is in the realm of 'being' that humans survive and pass on genes. Moral realists think that, according to Hume's law, normative sentences cannot be derived from facts; this relation is not inevitable and is the result of a coincidence. There have been a lot of controversies over Hume's law, as well as between evolutionary fact and mind-independent moral truth.¹⁸²

The moral value accepted by society is itself a social and psychological fact about emotions. Because value is social and psychological fact, it can be called realism, but it cannot reveal truth or falsity. However, if a value or normative statement is agreed upon by members of society and becomes a criterion for judgment, it can be a criterion for rationally determining whether a person's act meets the moral criterion. This standard is not absolute because it is based on the feeling of consensus by a community. And this standard may vary from society to society depending on path dependence after accidental events in a certain society. This standard changes as society changes, technology develops, and people's value system grows. Therefore, this standard is not an absolute mind-independent truth.

There is concern that if there is no truth in morality, moral scepticism will arise,

¹⁸² Sharon Street, "Objectivity and Truth: You'd Better Rethink It", *Oxford Studies in Metaethics*: 11, 2016. DOI:10.1093/acprof:oso/9780198784647.003.0012, David Plunkett, "Conceptual truths, evolution, and reliability about authoritative normativity"

and there will be no basis for criticising and punishing evil behaviour.¹⁸³ However, even if there is no absolute standard for morality, people's desires are very similar, and people have the ability to empathise with others, so they can create some moral standard that most people agree with and criticise and punish those who harm others.¹⁸⁴ In particular, the condition that requires consistency in value judgment can reduce scepticism.

Rather, if there is absolute truth in a set of norms, it is impossible to explain the conflict of values, exceptions to the law, and changes in morality and law according to changes in values and technology. Social problems can be solved by considering values as gradational things as a matter of good and bad, not a matter of dichotomy between truth and falsity. In this utilitarian way, efforts can be made to make better laws, irrespective of their truth, and there will be far fewer meaningless debates.

B. Tripkovic says there is no absolute truth in the law and it is evolving over time.¹⁸⁵ In his thesis, he reveals through case studies of several countries that the content of the law consists of the constitutional identity which shows each society's path dependence,¹⁸⁶ the people's common sentiment without judge's reflection,¹⁸⁷ and the universal reason which reflects on its own law and other laws.¹⁸⁸ He also says we should stop looking for absolute moral truth.¹⁸⁹

¹⁸³ Sharon Street, "Objectivity and Truth: You'd Better Rethink It", p. 302–304.

¹⁸⁴ *Ibid.*, p. 329.

¹⁸⁵ Bosko Tripkovic, *The Metaethics of Constitutional Adjudication*, p.23

¹⁸⁶ *Ibid.*, p.13–58

¹⁸⁷ *Ibid.*, p.59–95

¹⁸⁸ *Ibid.*, p.96–142

¹⁸⁹ *Ibid.*, p.173–174

Hume's distinction between reason and emotion, Maslow's value theory, and studies on reason and emotion in modern neuroscience are largely consistent. Values are based on human emotions tied to survival and happiness, and by pursuing values, humans have survived and prospered. Values are psychological facts themselves and are not subject to right or wrong. However, since people's needs are similar and humans have the ability to empathise, they have created a certain value system to agree with each other and try to keep it. The value system shared by a community is universal in the aspect of humans' similar nature and depends on the path dependence of history of a certain culture in the aspect of different preferences. The value system agreed upon by a community has no universal and absolute truth, but the direction of development can be grasped under conditions of Pareto improvement, such as whether to protect the minority and increase the welfare of society.

4.7. Conclusion

In moral and legal philosophy, values have long been considered to be determined by reason, but there have been many problems that cannot be solved. Through Hume's philosophy and Maslow's psychology, it can be seen that value is based on emotions. Each person has similar needs, so there are some values that are considered similar among people, and there are other values that differ from person to person because they are close to preferences. And values change according to the growth of individual value systems or according to improvements of science and technology. And although it is not perfect, economics has studied how to objectify values as much as possible and chooses to maximise social welfare.

In the next chapter, by analysing the 'ought' that contains value, I will show that the contents of the law made up of 'ought' propositions is a value system shared

by the community, and the validity of the law is also based on the emotion that is accepted by members of the community.

5. Content of law and Validity of Law

5.1. Analysis of 'Ought' and Law

5.1.1. 'Ought' which has Value

5.1.1.1. Concept of 'Ought'

Kelsen argues that 'ought' can be represented by command, permission, and authorisation in general linguistic habits. And he says that 'ought' cannot be explained further,¹⁹⁰ Klug revealed that, viewing 'ought' as command, the concept could correspond with permission and prohibition.¹⁹¹

5.1.1.2. Cases of 'Ought' in Everyday Life

'Ought' expressions are diverse when used in everyday life, and their usage and meaning differ slightly. A comparison of them enables the core of the concept of 'ought' to be extracted. M. Chrisman suggested five examples of 'ought' in everyday life.¹⁹²

Moral: We ought to do more to relieve great suffering.

¹⁹⁰ Kelsen, *Pure Theory of Law*, p.5

¹⁹¹ U. Klug, *Logische Analyse rechtstheoretischer Begriffe und Behauptungen*, in: *Logik und Logikkalkul Festschrift für W. Britzelmayr*, hrsg. v. M. Käsbauer und F.v. Kutschera, Freiburg/München (Alber), 1962: p. 117; quoted in Sim, *Legal Philosophy of Analysis and Critique*: p. 442.

¹⁹² M. Chrisman, *The Meaning of 'Ought'* (New York, NY: Oxford University Press, 2016) p. 27, 32–33.

Prudential: Jay ought to give up smoking.

Teleological: To support a loft bed in plaster walls, anchor bolts rather than nails ought to be used.

Evaluative: Milton, you ought to be living at this hour.

Epistemic: The storm ought to hit shore before midnight.

The 'ought' in everyday life is largely unrelated to the rules of the community except those that are 'moral' in nature. The sample of the 'moral' category is merely encouraging rather than moral rules agreed upon by members of the community. And except for 'epistemic', there are all human needs and values such as hope and aspiration.

5.1.1.3. Components of 'Ought'

'Ought' elicits good results to human beings. Command has in it the desire of the commander, and morality contains values which satisfy human needs or do not offend them. The rules also have the purpose of communicating with each other and proceeding the procedure. Finally, there is an expected result in desire, need and the choice of method. These 'desired result' and 'purpose' are types of *value* that satisfy human interest and desire. The value here can be the value of the subject's strong desire, but there is also a degree of speculation that when viewed from the objective viewpoint of a calm observer, someone else will feel the value in it. 'Ought' always contains *action*. This is natural since it relates to an action for the purpose of obtaining a value. Action is included more so because 'ought' as auxiliary verb needs verb. Except evaluative and epistemic, 'ought' propositions contain the disadvantages or *harm* when no action is taken. In particular, for morality and law, there is harm if we do not comply with them.

5.1.1.4. 'Ought' and Value

As many scholars have pointed out, value forms the core of 'ought'. Kelsen includes value in 'ought' by saying 'an objectively valid norm according to which a certain behaviour "ought to be", constitutes a positive or negative value.'¹⁹³ Heck claims that 'Interest is the cause of legal norms which result in producing ought representation'.¹⁹⁴ Value is key in an 'ought' sentence; thus, changing the sentence to 'doing ~ is good' does not make a big difference. In English, 'had better' is interchangeable with 'should' or 'ought'.

5.1.2. The Content of Law: Value System Shared by Members of Community

The content of the law is a set of values agreed upon by members of the community, because the law consists of many 'ought' propositions, each of which contains values. Values and value systems are based on emotions and change over time. This can explain why courts' decisions change and laws change over time. Setting a hierarchy of values is important because the values that each member desires may conflict with one another and highly influence the general consideration of how every single value weighs in the hierarchy. Thus, in brief, the law is the value system of members of the community.

5.2. The Objectivity of Value Systems

¹⁹³ Kelsen, *Pure Theory of Law*, p. 17.

¹⁹⁴ Heck, *Das Problem der Recht Rechtsgewinnung*, p. 167; quoted in Sim, *Legal Philosophy of Analysis and Critique*, p. 405.

5.2.1. Value Systems as Based on Emotion

Earlier, I philosophically examined that value is based on emotion and showed strong support from neuroscience experiments. Each community has a moral system and values that most people have accepted. These values and moral systems are considered objective truths by the people within the community. However, if you learn about the values and moral systems of neighbouring countries and countries far away, you will find that your values and moral systems are not absolute truths. Different cultures have different values and moral systems, and in many cases it is difficult to say that the other side is rationally wrong or inferior. It is easy to solve the problem by considering that each community's values and moral system are not rationally right or wrong but can be emotionally dependent on its preference. The objective and relative parts of the values can be generally classified by Maslow's needs theory. Most people accept both the basic hierarchy of desires and the values associated with tastes which are not related to the hierarchy of desires.

5.2.2. The Effort to Objectify Value System

We respect people with value systems that differ from our own in freedom of conscience, freedom of expression, freedom of art and so on. However, as values conflict with each other in the core area of life or damage the rights of others, we make a communal value system by creating a hierarchy among values.

The law stipulates a value system by which the entire people in nation must abide. Therefore, the state should derive a value system that members of the community will agree on through discussion and agreement. Habermas' concept of discourse does well to allow for a compromise in value systems among different people. The

German Federal Constitutional Court refers an ‘objective order of values’¹⁹⁵, but there is no one answer for an objective order of values. It is the entity being improved by discourse and compromise. Habermas is close to Kant in that he tries to be rational. Accordingly, Habermas criticises that balancing changes the matter of right and wrong into a matter of discretion whether it is appropriate or not¹⁹⁶. But, his concept of discourse has the advantage of making a value system objective. It is difficult to establish one answer through discourse in practical reasoning. We just choose adequate and better options by compromise.

5.3. Practice and Acceptance as Validity of Morality and Law

5.3.1. Irrelevance of ‘Ought’ and Validity

Of the examples of ‘ought’, only ‘moral’ has an objective validity when accepted by a considerable number of members of a certain community, although ‘prudential’, ‘teleological’ and ‘evaluative’ are personal matters, leaving no debate for validity. In other words, ‘ought’ and validity are not always affiliated.

5.3.2. Acceptance of the ‘Ought’ by Members

‘Ought’ is what forms the contents of norm, and validity is about whether norm has socially binding power. The two concepts combine to form social norms such as law, morality, and rule. Controversy exists as to what forms the basis of the validity of ‘ought’, but this is a matter of acceptance by members of society. Some

¹⁹⁵ R. Alexy, “Constitutional Right, Balancing, and Rationality”, *Ratio Juris*. vol. 16, no. 2, June 2003, p. 133.

¹⁹⁶ *Ibid.*, p. 134.

try to locate validity of 'ought' in reason or justification; however, as explained earlier, reason cannot provide the validity or justification of 'ought', for value is the core of 'ought' and value is a matter of emotions. 'Ought' is only objectified through its acceptance—an act of emotion—by members of a community. This is definite in a hand signal. We do not accept a hand signal because we consider it rational; rather, we follow the use of hand signal because other people use it. The members of a community can make a new hand signal if they all agree. Objectivity does not require the unanimous acceptance but is sufficient with an approximate level. Acceptance may either be voluntary or enforced through force. Generally, voluntary acceptance is considered preferable to enforcement. Nonetheless, it is the physical force that produces the ultimate validity. This topic will be considered again when discussing the validity of the law.

5.3.3. Validity of Law

The validity of law, whether voluntary or enforced, is objectified by the public acceptance. Bierling's acceptance theory¹⁹⁷ precisely gets to the point. Law has existed in nations hundreds of years ago, and legal systems unacceptable in this era were all effective. Many philosophers have tried to find the origin of justification or validity of morality and law. Some philosophers have said that justification and validity of morality and law are based on divine good or priori reason. This is difficult to prove. Recently, some philosophers have said that the validity of morality and law is based on practice, which is related to the acceptance of members of community. Hart asserts that acceptance maintains an internal point of view. Kevin Toh says that it is a sort of expressivism,¹⁹⁸ which is related to emotivism. From the perspective of Hume's philosophy, as acceptance

¹⁹⁷ E.R. Bieling, *Juristische Prinzipienlehre*, Bd, I. Freiburg, I. Br/Leipzig, 1894: 45–47p; quoted in Sim Hooknose, *Legal Philosophy I*, (Seoul: Baboons, 1989): p. 89–90.

¹⁹⁸ Kevin Toh, *Hart's Expressivism and His Benthamite Project* (2005) <http://dx.doi.org/10.2139/ssrn.1650746>.

is not a matter of agreement between two things, acceptance is emotional.

H. Kelsen attempted to raise objectivity and rigidity of the law to the level of science,¹⁹⁹ and he also attempted, unsuccessfully, to rationalise the basic norm underlying his theory. Rather, his *General Theory of Norms* stated that the basic norm is not a positive norm but a fictitious one, and he eventually admitted that the basic norm is a self-contradictory concept.²⁰⁰ Alexy agrees with Rottleuthner's claim that 'the dogmatic propositions are those which the majority of lawyers hold to be correct',²⁰¹ and that no dogmatic proposition can be justified. Furthermore, dogmatic propositions are provisional, relying on practical arguments.²⁰² These examples show that even the best scholars have failed to reasonably justify the law and 'ought' propositions. Kelsen cannot reasonably justify the basic norm, which is an 'ought' proposition, nor does Alexy clearly justify dogmatics. As we saw earlier, it is the acceptance of the members and the role of emotion that objectifies the 'ought' socially. According to Alexy, what is correct by many lawyers is, after all, just an individual's emotional acceptance and not a rational one.

5.4. Conclusion

Many philosophers say that 'ought' has value in itself. Examples of 'ought' in everyday life reveal that 'ought' is not related with validity in personal matters, and that it is valid when a large number of people have accepted it. Both value and acceptance are based on emotion. However, values are prone to change

¹⁹⁹ H. Kelsen, *Pure Theory of Law*, p. 1.

²⁰⁰ H. Kelsen, *A General Theory of Norms*, p. 256.

²⁰¹ R. Alexy, *A theory of Legal Argumentation*, p. 259.

²⁰² *Ibid.*, p. 265

depending on the situation, so the ability to reason and reflect is necessary to make the law consistent and objective. The process of creating, empowering, and executing organisations requires a significant ability of reason.

In the next chapter, I will review the theories of legal argument based on what I have mentioned so far. The theory of legal argument can be largely divided into Kantian deontological theory, Benthamite utilitarian theory, and a hybrid theory that mixes the two. I will not be able to examine all of the theories in detail, but I will briefly examine Kantian deontological theory and the hybrid theory of MacCormick and introduce a theory of legal argument that is close to Hume's theory.

6. Theories of Legal Reasoning

6.1. Alexy's Special Case Thesis

6.1.1. Special Case Thesis

Alexy thinks that legal discourse is one of general practical discourse. He tries to argue for the theory of general practical discourse. However, it is difficult to justify the norm, and he tries to justify norms with the overall acceptance of the members. There can be conflicting norms, and the people's acceptance can change. This is because the people's acceptance does not determine right or wrong rationally but the emotional acceptance of majority validates objective norms. The theory of general rational practical discourse has defects in that it considers members' emotional acceptance as rational, but it is most systematic and practical in creating a legal theory under bounded rationality. Alexy created a special-case thesis that considers the unique constraints of law. He says that legal discourse has several limiting conditions such as statute-bound character, regard to precedent, and involvement with doctrinal studies.²⁰³

6.1.2. The Difficulty of Legal Judgement

Alexy knows that there are many difficult cases where logical judgement cannot easily be deducted from existing valid norms. This is due to the vagueness of legal language, conflicts between norms, the lack of an existing valid norm, and the need to be contrary to the wording of a statute.²⁰⁴ These problems are similar to

²⁰³ Ibid., p. 16.

²⁰⁴ Ibid., p. 1.

my concerns, which I referred to in the Introduction. I proceed with the discussion assuming that there is considerable emotion involved in the content of the law, but Alexy proceeds with the discussion believing that he can solve it by reason.

6.1.3. Internal Justification and External Justification

There are two justifications in legal discourse. One is the logical justification within a given premise, and the other is the process of justifying the premise. The first is called ‘internal justification’, and the latter is called ‘external justification’.²⁰⁵ Internal justification is achieved using the methods of modern logic in legal syllogism. It is not simple, but it is also not a source of major controversy. This makes it clear which premises should be externally justified. The presentation of these universal rules helps to maintain consistency in decisions, which contributes to maintaining justice and legal stability.²⁰⁶ The formal process of syllogism is mostly within the domain of reason, as it is the process of identifying whether the two are in agreement or capture. Therefore, there is little controversy. The purpose of external justification is to justify the premises which are used in internal justification. There are six groups of rules and forms of external justification; interpretation, dogmatic argumentation, precedent, general practical reasoning, empirical reasoning and special legal argument forms.²⁰⁷ General practical reasoning is finally used when legal interpretation or dogmatic thinking cannot solve legal problems. As I mentioned earlier, reason, emotion, and reflection are used comprehensively to make judgements in general practical reasoning.

²⁰⁵ Ibid., p. 221.

²⁰⁶ Ibid., p. 230.

²⁰⁷ Ibid., p. 231–232.

6.1.4. Dogmatic Reasoning

6.1.4.1. The Concept of Legal Dogmatics

The meaning of legal dogmatics is unclear, and there is no generally accepted legal dogmatics theory yet.²⁰⁸ Legal dogmatics is a collection of propositions associated with norms and precedents. Legal dogmatic propositions are interconnected and should not be mutually contradictory. They are raised and discussed within institutional law, and it has normative content.²⁰⁹ Legal dogmatics can be seen as a consistent system of legal propositions. The pursuit of consistency requires the role of reason.

6.1.4.2. The Propositions of Legal Dogmatics

Definitions of genuine legal concepts are the core of dogmatics.²¹⁰ Legal dogmatics also have propositions that cannot be derived from laws. It is difficult to determine whether a proposition is dogmatic or not.²¹¹ Dogmatic propositions shape principles.²¹² A dogmatic proposition is used without justification, and no dogmatist can justify all dogmatic propositions.²¹³

²⁰⁸ *Ibid.*, p. 250.

²⁰⁹ *Ibid.*, p. 255–256.

²¹⁰ *Ibid.*, p. 257.

²¹¹ *Ibid.*, p. 258–259.

²¹² *Ibid.*, p. 260.

²¹³ *Ibid.*, p. 261.

Dogmatics controls consistency in two ways. The systematic test in the narrower sense determines whether dogmatic propositions and legal norms are consistent, and the systematic test in the wider sense determines whether the judgements justified with the help of dogmatics and legal norms are consistent with each other from a general practical perspective.²¹⁴ Thus, dogmatic reasoning cannot be reduced to general practical reasoning, but general practical reasoning is the basis of dogmatic reasoning.²¹⁵ The claim that dogmatics is reduced to the preceding judgements cannot be maintained any longer.²¹⁶ Dogmatic arguments are based on persuasiveness of reflection and performance.²¹⁷ A dogmatic proposition cannot be irrefutable any more,²¹⁸ and is only a tentative formulae.²¹⁹

The justification of dogmatic propositions is based on approvals, which shows that justification is based on emotion, as we saw earlier. Changes in value system are the same as changes in the value system of community members, which are not changes in reason but in emotion. The pursuit of consistency between a proposition and legal norms in dogmatics is done by reason. Finally, however, the fact by general practical reasoning demonstrates that reason, emotion, and reflection work together, as we saw earlier. Provisional dogmatics is also linked to the provisional rule which M. Johnson states.

6.1.4.3. The Functions of Dogmatics

²¹⁴ Ibid., p. 264.

²¹⁵ Ibid., p. 264–265.

²¹⁶ J. Esser, Möglichkeiten und Grenzen des dogmatischen Denkens im modernen Zivilrecht, in: *AcP* 172(1972), p.108.; quoted in R. Alexy, *A theory of Legal Argumentation*, p. 265.

²¹⁷ Fr. Wieacker, Zur praktischen Leistung der Rechtsdogmatik, in: *Hermeneutik und Dialektik, Festscher. F. H.-G. Gadamer*, Bd. 2, hrsg. V. R. Bubner/K. Wiehl, Tübingen 1970, p. 321.; quoted in R. Alexy, *A theory of Legal Argumentation*, p. 265.

²¹⁸ R Alexy, *A theory of Legal Argumentation*, p. 265.

²¹⁹ J. Esser., Möglichkeiten und Grenzen des dogmatischen Denkens im modernen Zivilrecht, p. 101.; quoted in Robert R. Alexy, *A theory of Legal Argumentation*, p. 262, 265–266.

Dogmatic propositions cannot be logically derived from valid norms and are ultimately justified through general practical arguments. Then a question arises as to whether dogmatic reasoning is necessary over general practical reasoning. There are six positive functions of a dogmatic argument: (1) stabilisation, (2) development, (3) burden-reducing, (4) technical, (5) control, (6) heuristic functions.²²⁰ These functions of dogmatics are similar to the methods and advantages of judgement under the bounded rationality discussed in Chapter 2. Human beings have bounded rationality and make choices to make the best efficient judgements within a given time. Therefore, human beings maintain what has worked among existing habits and principles, acknowledge exceptions, and improve principles and habits depending on the situation. This is also in line with the proper fusion of efficient repetitive habits and analytical thinking seen in neuroscience. Following principles and habits gives stability and reduces burden. Establishing principles creates a unified and consistent system. Only then can these principles be controlled well. If a system of this principle is established, a certain level of decent judgement can be maintained and, furthermore, easily improved. A heuristic is used within habits and analytic thinking. In particular, Alexy says that dogmatics is provisional. Dogmatics has a system, and this system can be improved through general practical arguments, which is virtually the same as the thinking under bounded rationality or thinking in the manner proven by neuroscience. The only difference is that neuroscience shows that determination under bounded rationality happens in the part of the brain that controls emotion, but Alexy does not accept this and considers it as a role of reason.

6.1.5. Evaluation of Alexy's Legal Reasoning

²²⁰ R Alexy, *A theory of Legal Argumentation*, p. 266.

Law is not the sum of cases or practices; there are hidden principles or systems under the cases. Without a principle or system in law, we would be unable to make decisions or refine legal systems. We should extract the principle from practice and refine the legal system to make it internally consistent. Therefore, Alexy's theory is very useful in that we should extract the principles from practice, form a set of rules, and improve it as time goes on. Since we, as humans, have bounded rationality and live according to habits and principles, we need a set of rules even if provisional.

Alexy, however, tries to explain all of this as belonging to the realm of reason. It is not possible to find the final basis for the dogmatic proposition in such a way. He explains the final basis with the agreement of the members or the approval of the lawyers. Members' agreement or approval cannot rely on reason to distinguish right from wrong but is the result of emotionally choosing, and the 'ought' proposition includes value, which is judged by emotion. If law is purely in a domain of reason, such as mathematics, the conclusion would hardly change over time. However, the process of creating a systematic legal system and maintaining its consistency is mainly done by reason and reflection. This is also essential to make an efficient and fair legal system. We do not need to regret that the choice that all members with different value systems agree on is based on emotion because it satisfies the need of everyone and protects their human rights. It is Pareto improvement which is the way to pursue mutual interests by voluntary agreement of people in economics. In *Pareto improvement*, change harms no one, and change benefits at least one. This means that a change does not infringe upon the right of minority, and everyone is not treated as a mean but an end. This satisfies Kant's categorical imperative to treat persons as ends, not means. This is one of purposes of law even though it is not the perfect truth.

6.2. MacCormick's Hybrid Theory

6.2.1 Value as a Matter of Reason: Right and Wrong

MacCormick accepts that value is a matter of what is good or bad, but he also refers to the potential of judging values using reason. He says that there are ideal goods.²²¹ Very bad things are deemed to be wrong, but ‘bad’ and ‘good’ are graded on a spectrum ranging from best to worst and covering the entire range in between.²²² It seems that MacCormick means that values are basically a matter of what is good or bad, but by some standards, at the extreme range of bad, something can also be defined as wrong. MacCormick means that value is basically based on emotion but is a matter of reason in extreme cases.

In fact, if there is a fixed standard, we can assess whether an action is right or wrong by reason. Hume argues that reason is the discovery of truth from falsehood and that truth and falsehood depend on relations among ideas or in the agreement and disagreement between real existence and matter of fact.²²³ Reason requires objects to be compared. The law is an overt standard with which we can rationally judge whether an act is legal or illegal (and right or wrong). However, there is no written moral book, and so there is no fixed standard for morality. Morality is deeply related to context.²²⁴ It is just a practice among people in a community—not a definite set of rules but a general one. We can judge right and wrong by general rules—this is the role of reason—but we should consider the situation and context. This process simultaneously involves emotion. For example, if someone lies, we can say that it is wrong by a general rule. We can judge this with reason

²²¹ N. MacCormick, *Practical Reason in Law and Morality*, p. 35, 37, 156.

²²² *Ibid.*, p. 49.

²²³ Hume, *A Treatise of Human Nature*, p. 458.

²²⁴ N. MacCormick, *Practical Reason in Law and Morality*, p. 50.

because he or she violates the general rule not to tell lies. But if we get to know that it is a white lie in the context, we might think that it is not wrong or even that it is good. In this process, emotion and reflection also are involved.

Smith says that the general rule can be formed by only observing, and afterwards, by forming concurring moral sentiments of mankind, and it is the ultimate foundation of what is just and unjust.²²⁵ We can then appeal to these as standards of judgement. We can formulate a general set of rules by referring to the common feelings of humans. Humans value life, health, love, honour and so on and feel resentment when they are treated unfairly. Every society therefore has rules based on these principles, such as the imperative to not kill, steal from, defame others. However, other specific rules differ according to different cultures. Smith does not say that we can make fixed rules about specific cases. In fact, he criticises the casuists for trying to make precise rules about all cases. Smith says that attempting to formulate precise rules for specific cases is useless, and the smallest change in a situation will change what is an appropriate conclusion.²²⁶ He asserts that moralists, judging by sentiment in a general way that uses principles of justice, modesty and veracity, do better than casuists, who stick to precise rules.²²⁷ According to Smith, we can formulate general rules of morality, by observing common sentiments, and we can judge whether an action is right or wrong in the light of these general rules. However, we cannot make specific rules applicable to all specific cases.

MacCormick uses Smith's well-informed impartial spectator to make the Smithian categorical imperative a standard for morality.²²⁸ He says that 'being fully aware

²²⁵ A. Smith, *The Theory of Moral Sentiments*, p. 160.

²²⁶ *Ibid.*, p. 339–340.

²²⁷ *Ibid.*, p. 340.

²²⁸ N. MacCormick, *Practical Reason in Law and Morality*, p. 63–64.

of the complex feelings that make a case morally significant, we come to a judgement about an appropriate equilibrium among them, and that is our judgement of what is right and wrong in the case'.²²⁹ However, at this point, a major problem emerges: how can we be both fully aware and an impartial spectator? We are raised in different environments from each other and differ in our education, race, religion and the like. We are born with different characters and predilections. It is therefore impossible to be a well-informed and an impartial spectator perfectly. Hume says that 'every particular person's pleasure and interest being different, it is impossible men cou'd ever agree in their sentiment and judgements, unless they chose some common point of view, from which they might survey their object, and which might cause it to appear the same to all of them'.²³⁰

6.2.2. Inductive Natural Law

MacCormick refers to natural law; however, his concept of natural law is different from other natural law theories. It is not a set of rules established *a priori* but a set of inductive generalisations from the Smithian categorical imperative.²³¹ The Smithian categorical imperative combines Smith's impartial spectatorship with Kant's categorical imperative, revising Kant's theory and creating links between feeling, judgement, decision and action.²³² MacCormick says that we should take account of our sentiments, and that what is right and good for us to do are matters dependent on our common human nature. To this extent, his concept is one of

²²⁹ Ibid., p. 59–60.

²³⁰ Hume, *A Treatise of Human Nature*, p. 591.

²³¹ N. MacCormick, *Practical Reason in Law and Morality*, p. 200–201.

²³² Ibid., p. 64.

natural law.²³³ He explains his natural law as follows. There is no rulebook written in our hearts: moral rules are established inductively by reflection on impartial spectator reasoning. These inductive rules differ according to culture and are open to critique and revision. If we believe in a natural law which has a perfect pre-ordained code, it is a false belief.²³⁴

His explanation of his natural law is appropriate in the light of a real set of rules, and his natural law is close to the general rules set out by Smith. However, it is difficult to call it a natural law in that it has no objective fixed rule; it is established by reflection on actual judgement; and it is open to critique and revision. It cannot, therefore, help to resolve legal controversies around many topics. In many debates, both sides insist that they are impartial or right and that the opposite side is biased or wrong, but there is no absolute standard by which to judge them. What we can tell, however, is whether someone uses a double standard—in other words, whether one changes the standard in different situations to suit his or her present interests. Trying to reduce double standards is a good way to make the law more impartial and reasonable. We use reason to check double standards. In addition, as mentioned above, Smith says that we do not need to make precise rules for specific cases and should judge using sentiment according to different situations. This means that rules are less important to specific cases, and a prudent person should judge specific cases using reason, emotion and reflection altogether.

6.2.3. Evaluation of MacCormick

We must improve our present legal system, and there are generally two ways to

²³³ Ibid., p. 200.

²³⁴ Ibid.

approach this. One is to imagine an ideal and perfect model and try to achieve that ideal. The other is to improve the existing model so that the revised model is better in the future. MacCormick chooses the former approach. He presupposes that there are ideal values and natural laws for us to pursue. However, the substance of ideal values and of MacCormick's natural law are quite hard to pin down. There is no written book setting out ideal values and natural law. Both are formulated by reflection with the help of impartial spectator thinking. Even MacCormick's natural law is open to critique and revision. He should have chosen the second approach.

Natural law theory was first presented as an ideal and perfect set of laws to demonstrate the infallibility of God. Later, revolutionaries used the theory of natural law to justify violent overthrow of the authorities.²³⁵ Natural law theorists insist that their theories are perfect and infallible. They prevent peaceful debate and compromise because they think that they are right and others are wrong. MacCormick himself confesses that he felt guilty when he compromised in parliament about what he believed was just.²³⁶ To believe oneself right does not help one to compromise with others; it will create conflict. Instead, we should try to recognise that when something is good from our own perspective, it would be better if it is also good for others or at least it does not harm others. If we choose to improve our legal system and keep in mind the principle to not harm others, there would be no problem. We do not need to imagine an ideal and perfect set of laws but need to improve the present legal system. The most important consideration when we alter or create a new law is to be careful not to infringe unfairly on citizens' rights. If changes to the law result in unfair infringement on people's rights, measures should be taken by the legislator to compensate for the harm. The constitutions of most democratic countries have the clause of

²³⁵ *Ibid.*, p. 109.

²³⁶ *Ibid.*, p. 41–42.

compensation for people whose rights are infringed upon unfairly. This improvement for all is called *Pareto improvement* in economics.

Legal precedents can be changed by judges in certain cases, and this amounts to a sort of legislation. Judges therefore need to take account of all people concerned in order to keep everyone protected as much as possible. In many cases, legislators and judges need to understand current scientific technology in order to make sophisticated laws or decisions in a scientifically developed society. By applying developed or sophisticated techniques to cases, many can be resolved in a way which will satisfy every participant. In this process, the role of the well-known impartial spectator is crucial. The legislator and judge must try to be impartial and to keep abreast of current economics, science and so on. To make better laws and legal decisions takes enormous effort; it also requires that we try to empathise with others and learn about modern economics and technology. In this process, reason, emotion and reflection all work together.

6.3. Conclusion

I reviewed legal reasonings of Alexy and MacCormick. Alexy's theory systematically clears up many points with dogmatics, but his theory is weak in finding rational justification for the law, as Kelsen fails to justify basic norm. Alexy tries to justify dogmatics with the agreement of the majorities of lawyers, but this is an acceptance by emotion and not a rational justification. However, community members' agreement has objective validity. MacCormick combines Kant and Smith's theories to create a hybrid theory, namely the 'Smithian categorical imperative'. His theory explains much of the reality well and also consider feelings, but there is limit in that he thinks that the result of Smithian categorical imperative can be perfectly impartial. The concept of *Pareto improvement* satisfies the purpose of both Alexy and MacCormick. It protects the rights of

everyone and improves the legal system.

Many cases are difficult to deal with in syllogism, such as exceptions to the law, conflicts between values in hard cases, and changes in the law. In the next chapter, we will look into the value conflict that is difficult to resolve with only reason.

7. Limitation of Syllogism: Value Conflict in Legal Reasoning

7.1. Written Law

7.1.1. Contents of Law before Codification

In the legal system, the content of the 'ought' is to command people to act in accordance with the values of community, which are unclear. The value system of community is emotional, which makes it difficult to grasp clearly and causes it to change according to the situation. In a democratic country, the consensus among all is opaque and flexible due to differing values.

7.1.2. Limitations of Written Laws

The concept of a 'value' itself is still unclear, and like Wittgenstein's idea that language is unclear, we are unable to predict and reflect future changes. As Smith says, no judgement is a clear answer because every situation cannot be prescribed by regulations and must be judged with emotions, depending on the situation. Interpretation and judgement can differ from individual to individual. Even unpredictable values may arise and clash with values written in words, and changes in society or values may force an interpretation beyond the text and a revision of law.

7.1.3. Usefulness of Written Laws and General Rule

We cannot but make written laws even though they are incomplete. A written law is a set of rules in order to inform many citizens and public workers of the will of

people, to establish the order of the state, and to permanently operate the nation. However, while admitting that the written law is not absolute but incomplete and the people's value system is behind it, an authority can make interpretations beyond the text, if the authority thinks that the interpretation within the text is inconsistent with common sense or the interpretation does not correspond with the values of community. In a democratic country, if the majorities of the people accept values clearly, they can recognise interpretations beyond text. There are limitations to the law, but law is nonetheless necessary in order to maintain social stability. But if the law is too detailed, as Smith says, it can sometimes produce foolish conclusions that do not fit the situation. Therefore, legislators should make an appropriate level of general law. In criminal cases, the sentencing standards may be specific, they are advisory guides.

7.2. Uncertainty of the Legal Interpretation

Kelsen says that (written) law forms only the boundaries of interpretation, and one result of interpretation is not the only legitimate decision but only a possible decision among others. There is no interpretation method that allows us to definitively conclude that one is objectively more 'just' than others, and even the results of the interpretation beyond text are equivalent to those that strictly comply with text.²³⁷ This shows that the syllogism cannot play a role in the final stage of the interpretation of the law, and eventually the various values shown in the situation must be balanced with emotional judgement. Of course, reason and reflection also intervene together.

7.3. Exceptions and Changes to the Law

²³⁷ H. Kelsen, *Pure Theory of Law*, p. 351–352.

If there are no exceptions to a law and no changes to a law over time, it is easy to explain what a law is. However, in practice, when judges apply the theory of law to real cases, they are sometimes required to interpret the law beyond wording. This has long been debated as the absurd result principle.²³⁸ This is because new value can emerge in unexpected new situations. Moreover, as time goes on, some laws (or clauses within laws) may become less appropriate to deal with present day cases²³⁹, and so they will need to be revised. In addition, laws may come into conflict with some people's belief systems and moral codes.²⁴⁰ Universal law or natural law cannot give clear answers to these cases. MacCormick acknowledges this and says that the answer is different according to the context.²⁴¹ However, context is often vague, and it is difficult to categorise cases systematically from the perspective of natural law. It is more helpful to explain exceptions and changes to laws in a utilitarian way.

7.4. Changes to the Realm of Negligence and Freedom

MacCormick repeatedly mentions negligence, which he defines as them injury to others' bodies or infringement on others' property without malicious intent.²⁴² *Donoghue v. Stevenson* is an example of this type of negligence.²⁴³ This case set an important legal precedent, following which the realm of negligence became

²³⁸ Veronica Dougherty, "Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation", *44 American University Law Review* 127 (1994).

²³⁹ N. MacCormick, *Practical Reason in Law and Morality*, p. 64.

²⁴⁰ *Ibid.*, p. 84.

²⁴¹ *Ibid.*, p. 86.

²⁴² *Ibid.*, p. 59.

²⁴³ *Ibid.*, p. 181–192.

broader, and it informed the legal approach to many cases which followed. As scientific technology develops, there is increased potential for negligence. Growing technological complexity means that manufacturers need to check at each point in the production process that procedures have been implemented properly, with appropriate care, and that all ingredients used in the process are safe. There are now more things that need to be taken into account. As populations grow and become denser in urban areas, people need to be more aware of others around them and their neighbours. If someone lives in an isolated house, for example, she can sing loudly and run at night, and her dog can defecate anywhere. However, if she lives in a densely populated city with many close neighbours, she cannot sing loudly at night, and she must clean up after her dog. If she breaks these rules, she may be fined. These rules are introduced because some actions, although they are done without any intention to harm, can have a detrimental effect on others.

Both the expansion of the legal definition of negligence and the reduction of individual freedom are the result of the increasing probability of harming others. Standards of duty vary according to public sentiments within different societies. In South Korea, for example, people cannot smoke on a main street, but in Scotland, people are allowed to smoke on any street. It is difficult to explain why the realm of obedience and freedom has been adjusted using a natural law, but again, utilitarianism offers an explanation. As the probability of harming people increases (even if the harm is unintentional), we try to find ways to reduce these harms for the good of everyone in society. The criteria differ according to public feeling. Public opinion is difficult to analyse with reason: it is contingent. As long as the majority in a society agree, that is enough. It is not everyone's approval that changes in the law are accepted; rather, they simply require the majority's approval. When a new legislation is established in the National Assembly, it is approved with the approval of a majority of members of the National Assembly, not unanimously in most cases. If the law is legislated by the approval of a majority of the members of the National Assembly, it becomes valid.

7.5. Explaining Changes to the Law from a Utilitarian Perspective

MacCormick gives an example of something that Smith took for granted—capital punishment—to show how the law can change over time.²⁴⁴ There are many cases which show the necessity for changes to laws over time. Some are due to the development of new or evolving scientific techniques and others to changes of public opinion. For example, in many states, the death penalty was abolished owing to the belief that the right to life is absolute. Similarly, abortion and voluntary euthanasia or assisted suicide for the terminally ill were prohibited in many countries until recently; however, many countries have now revised or repealed their anti-abortion laws, and Germany's constitutional court now permits assisted suicide for terminally ill patients. Opposition to abortion and euthanasia is based on a belief that life is precious and absolute in nature or by the will of God. The opposing view is that prohibiting abortion or euthanasia creates meaningless pain. In the case of euthanasia, terminally ill patients suffer enormous physical pain, emotional distress and diminished quality of life. Life is precious, and the government must make efforts to protect the lives of its people; however, this principle is not absolute. In the case of the terminally ill, if it is no longer possible to achieve quality of life, the patient should be able to choose to end her or his life, after sufficient consideration and discussion with those close to them. This movement will likely spread as the belief in absolute right to life becomes less common. As explained so far, no value is absolute: all values can be compared and weighed against other values according to their context.

7.6. Value Conflict and General Rule

²⁴⁴ Ibid., p. 84.

Syllogism under the provisions of the law does not answer the difficult questions of the law. The syllogism only settles a discretionary area that can be chosen logically. Choosing one among discretionary area is the process of selecting one decision by weighing various values. Choosing within a discretionary area is a common decision, and choosing outside of a selectable discretionary area is an interpretation beyond text. Interpretations beyond the text should be restrained for legal stability if possible. If the situation changes and the decision must be made outside the discretionary area not once but continuously in the future, the law must be changed. There is always a conflict of values in this process. Even in simple cases of theft, various values conflict. The punishment varies depending on whether the criminal is a poor person, whether he or she has a family to support, whether he or she has a criminal record, and how much money he or she stole. There are many cases in which the criminal is poor, has a family to support, has no criminal record, and is not punished if they are not large amounts. Textualists can think that the criminal should be punished, but the general public may want to release him or her.

There is always a conflict of values in legal reasoning, and so if the regulations are defined in too much detail, as Smith says, foolish results can often be produced. Therefore, an appropriate level of general principles conforming to the practices and values of the society should be established. The balancing of value is made of emotion, reason and reflection, so it can vary from person to person. If most people accept the decision, it is a decent result. In this process, it is recommended to use Smith's idea of the feelings of an impartial spectator. Reason is used in syllogism, and reason, emotion, and reflection are used in the weighing of values. Emotion feels value and reason and reflection compare it. However, the conclusion may vary because the values felt may differ from person to person.

In the next chapter, I will look at weighing values. If we think that value cannot be compromised, we cannot choose one of many values. Values can be compared

and should be chosen in everyday life. This method is well organised in economics.

8. Proportionality and Balancing

Among the many scholars who discuss balancing values, MacCormick, who is trying to merge Kant and Smith, discusses it in detail, and so I will discuss the balancing based on what MacCormick has considered.

8.1. Value of MacCormick

8.1.1. Human Values

There are many value theories, but MacCormick explains values briefly in his own way. He says that the following are human values: life, health, shelter, friendship, love,²⁴⁵ sexuality, care for the young and community,²⁴⁶ knowledge and truth, communication, beauty, sports and games, aesthetic experience, religious experience and community.²⁴⁷ In addition, he refers to some higher values, for example, when someone risks his or her life for comrades or a stranger.²⁴⁸ MacCormick says that the values concerned with life and health can be classed as ‘self-regarding reasons’ or ‘other-regarding reasons’. There are two types of other-regarding reasons—those related to love and friendships to people close to us, such as family, relatives and friends,²⁴⁹ and those related to acting within societal norms.²⁵⁰ However, specific values differ from person to person. General

²⁴⁵ Ibid., p. 30.

²⁴⁶ Ibid., p. 31.

²⁴⁷ Ibid., p.161–166.

²⁴⁸ Ibid., p. 30–31.

²⁴⁹ Ibid., p. 32–33.

²⁵⁰ Ibid., p. 33.

values are similar among individuals, such as those related to life, safety, beauty and so on, but specific preferences differ. MacCormick also says that people pursue different virtues depending on the perspective of one's own character and predilections.²⁵¹

MacCormick's explanation of values is appropriate and may be broadly accepted. The psychologist Maslow elaborates on needs and values related to needs. His theory is similar to MacCormick's, but Maslow's theory explains values more systematically and specifically, referring to physiological, belongingness and love, esteem and self-actualisation needs.²⁵² MacCormick's higher and ideal values are related to self-actualisation in Maslow's theory.

8.1.2. Ideal Values

MacCormick acknowledges that humans try to achieve good outcomes and to avoid bad ones, but denies Hume's hedonistic theory that humans aim simply to maximise pleasure and avoid pain.²⁵³ Furthermore, he says that there are some ideal values classed as good but not just for animal wellbeing or the satisfaction of passions.²⁵⁴ Values are relative and based on human needs, but there are other, more objective values which are regarded as desirable by the majority.²⁵⁵ MacCormick's assertion is plausible; however, his theory cannot solve many moral and legal problems. There are a lot of dilemmas in which several ideal or objective values conflict with one other. For example, in the case of euthanasia,

²⁵¹ *Ibid.*, p. 42.

²⁵² A. H. Maslow, *Motivation and Personality*, p. 35–46.

²⁵³ N. MacCormick, *Practical Reason in Law and Morality*, p. 34.

²⁵⁴ *Ibid.*, p. 35.

²⁵⁵ *Ibid.*, p. 36.

the right to life is an ideal and objective value, and the right to make one's own decisions is also an ideal value. We may need to choose one between two ideal or objective values. If a person is starving, he or she may choose food over freedom, even though food is an animal value and freedom is regarded as an ideal value.

MacCormick says that we should secure the most basic needs for ourselves and people close to us.²⁵⁶ As people have different characters and predilections, ideal values cannot resolve conflicts between different predilections. A good example of this is the relative importance of the right to expression versus state security. To solve these conflicts, we need to weigh competing values. This is related to utilitarianism and well-developed in economic theories. We may also need to consider psychological theories in order to take various values into account at the same time.

8.2. Weighing Values

8.2.1. The Limitations of Weighing Values

MacCormick discusses the weighing and balancing of values but says that this has limitations—firstly, because it is difficult to find independent and objective standards for evaluation, and secondly, because self-regarding, other-regarding and community-regarding reasons are on different dimensions and thus not comparable with one another. Animal and ideal values are not comparable. Therefore, he says that utilitarianism is unable to calculate happiness or preference satisfaction quantitatively.²⁵⁷

²⁵⁶ Ibid., p. 156.

²⁵⁷ Ibid., p. 37.

8.2.2. The Inevitability of Weighing Values

It is correct to say that there is no objective standard of value and that we thus cannot add up all happiness, arriving a specific number, in a utilitarian way. However, we face many occasions when we must choose one value among several which are on different dimensions. For example, in Victor Hugo's 1862 novel 'Les Misérables', Jean Valjean steals bread owing to his severe destitution, preferring food to honour when his survival is at stake. It is not easy to simply say that the act of stealing is unforgivable if the thief is starving. To use another example, in Japan, many elderly people commit robbery in the hope of being sent to prison,²⁵⁸ because they are poor and prison offers shelter and food. In other words, they are willing to give up their freedom in return for food and shelter, so even though freedom is an ideal value and food is an animal value, we can consciously choose animal values depending on our situation. MacCormick himself says that we must satisfy basic needs first in order to be benevolent. This decision is made by weighing values, but the measurement is intuitive rather than quantitative.

8.2.3. The Conversion to Self-regarding Reasons

MacCormick says other-regarding and community-regarding reasons are on a different level than self-regarding reasons²⁵⁹ but that we should not always prefer other-regarding and community-regarding reasons over those that are self-regarding: we need to compare these reasons before we choose one. Sometimes we will choose a self-regarding reason, and sometimes an other-regarding reason

²⁵⁸ "Why some Japanese pensioners want to go to jail", *BBC News*, 31 Jan 2019, <https://www.bbc.co.uk/news/stories-47033704>

²⁵⁹ N. MacCormick, *Practical Reason in Law and Morality*, p. 37–38

or a community-regarding reason. The example MacCormick gives is that when we raise children, if we are too inclined towards other-regarding reasons, children can end up being spoiled.²⁶⁰ We must therefore strike a proper balance between self-regarding reasons and other-regarding and community-regarding reasons.

If we want to strike a balance between self-regarding, other-regarding and community-regarding reasons, we need to weigh values, and to do this, other-regarding and community-regarding reasons can be viewed from a self-regarding perspective. For example, we do not help and take care of strangers who are far away, as our money, time and energy are limited. We take care of people close to us, such as family, friends and colleagues—partly because we empathise with them and we do not want them to feel pain, but also, even if unconsciously, we know that people close to us will take care of us in the future. We tend to end relationships with unempathetic and ungrateful people, because such people are not helpful to us. This is the reciprocal altruism mentioned in Chapter 3.

Sometimes we make charitable donations to destitute people that we do not know. We feel sympathy for them, but we know that we cannot help every destitute person, and so we tend to donate to a few people we hear about on the news or who are in a category close to our hearts. When their situation improves, we feel good not only because we sympathise with them, but also because it makes us feel proud or better about ourselves that we are making the community better. Pride and self-esteem are important values to us. However, we do not donate as much money to charitable causes for strangers as we spend on family or close friends. Ultimately, community-regarding reasons give us a higher level of happiness. Smith says that it is not the love of our neighbour or the love of mankind which make us practice divine virtues; rather, it is the love of honour, dignity, and superiority of our own characters.²⁶¹ This relates to the need for self-actualisation

²⁶⁰ Ibid., p. 16.

²⁶¹ A. Smith, *The Theory of Moral Sentiments*, p. 137.

put forward by Maslow.

8.3. The Maximisation of the Sum of Present Value and Future Value

Moderation is good for a person. It makes us abstain from actions which give us temporary pleasure but might ruin our lives if we indulge in them excessively. We study and work hard to improve our own lives and those of our family, not for others. A moderate person takes account of the value of his or her future and so enjoys his or her present life and prepares for future life at the same time. We study and work hard, and we try to be kind, benevolent and faithful to family and friends and so on. We know that if we work hard then we will lead a better life, and if we are kind, benevolent and faithful to those close to us, we will be loved and will be helped more by them. All these actions might be preparing for a better future life, but we can enjoy them in the present too. However, some people sacrifice present pleasures for future pleasures to an excessive degree: hardworking and miserly people only work for their future and do not spend time with family enjoying their present life. This is as absurd as living a lazy life with no thought to the future.

8.4. Revealed Preference Theory: The Tool to Maximise the Happiness of a Whole Life

As previously discussed, every value can be viewed in the context of the happiness of one's whole life. Sometimes, food (an animal value) is far more important than freedom (an ideal value). We may act for others and for the wider community in order to be loved or approved of, or to feel better about ourselves, but we must not give away everything to others, as we first need to secure our personal and familial wellbeing. We need to weigh values—between the animal and ideal, and between self-regarding reasons and other-regarding or community-regarding

reasons—in order to maximise benefit. Likewise, we need to weigh values between present and future pleasures to maximise the whole happiness of our life. As a result, we can use the method of utilitarianism. We cannot measure every value quantitatively, but we can still choose which value is better when we compare them. The theory of revealed preference²⁶² explains this choice well. This theory explains economic phenomena without needing to measure the specific figure of utility, instead using revealed preference. In fact, the weighing of value varies from person to person, so there is no exact answer. Emotion as well as reason and reflection work a lot in this process, which leads Kelsen to claim that the weighing of interest is not a solution and is performed by judges.²⁶³

8.5. Balancing of Alexy

R. Alexy deals with balancing in constitutional rights.²⁶⁴ Habermas criticises that balancing eliminates the normative power of constitutional rights and degrades rights to the level of policy or value. As a result, constitutional rights are not subject to judgement between right and wrong but rather to discretion in terms of whether or not they are appropriate.²⁶⁵ In response, Alexy says that balancing does not remove constitutional rights from the realm of justification or right and wrong. It is very serious harm to paraplegic's personality right to call a paraplegic reserve officer as 'cripple'. Therefore, in this case, he says that freedom of personality takes precedence over freedom of expression, and this judgement is not arbitrary.²⁶⁶ Therefore, constitutional rights become over-proportionally

²⁶² Paul A. Samuelson, "Consumption theory in terms of revealed preference". *Economica*. New Series. 15 (60) (November 1948), p. 243–253.

²⁶³ H. Kelsen, *Pure Theory of Law*, p. 352.

²⁶⁴ R. Alexy, "Constitutional Rights, Balancing, and Rationality", *Ratio Juris*, p. 131–140.

²⁶⁵ *Ibid.*, p. 134–135.

²⁶⁶ *Ibid.*, p. 138–139.

stronger as the intensity of the infringement is added.²⁶⁷

However, The Federal Constitutional Court of Germany held that ‘cripple’ was humiliating and disrespectful.²⁶⁸ The words ‘humiliating and disrespectful’ stimulate the emotion of hearer. This decision was made not by reason but by emotion. Moreover, there may be a conflict between very intense interference of constitutional rights. In the case of abortion, the foetus' right to life conflicts with the woman's right to self-determination. If one of the two constitutional rights is violated, it is very intensive interference. There is no clear conclusion about this conflict, and opinions differ among people. This eventually results in a conclusion that depends on each individual's values, and values are based on the area of emotion.

²⁶⁷ Ibid., p. 140.

²⁶⁸ Ibid., p. 139.

9. Conclusion

I started this study after seeing that the decisions of the Constitutional Court of Korea changed according to changes in legal sentiment, value system and legal awareness of people. It was interesting to see the legal sentiment belonging to emotion change with legal awareness, which has traditionally been understood as a product of reason. Furthermore, it is interesting that value system has a dual aspect that is different among people while becoming the content of the law. I looked at general practical reasoning and legal reasoning by assuming that legal reasoning is not made up of rational things alone but that emotions are also involved therein.

Most controversies in legal theory come from how to fix the realm of reason. Hume argues that reason is the discovery of truth from falsehood, that truth and falsehood depend on relations among ideas or in the agreement and disagreement between real existence and matter of fact, and that objects without agreement or disagreement cannot be objects of reason. On the other hand, emotions cannot distinguish truth from falsehood among objects because emotions are 'original facts or realities' that are not susceptible of agreement or disagreement. Therefore, Hume and Smith say that morality is based on emotion and is either approved or not. In math and logic, we can judge true or false because there are relations to compare. Many philosophers think that reason includes imagination and reflection and will. We can make judgements about truth and falsity when we compare to objects by Hume's concept of reason, but it is difficult to say whether to choose a value is true or false based on imagination and reflection. There have been a lot of controversies on hard cases. If we want to judge truth and falsity using reason, then we should confine the realm of reason to within Hume's reason to compare two objects. Reflection always plays a big role in deliberation and is an important faculty to encompass emotion, imagination and reason. Reflection is a faculty that is very important to all philosophers, and it is often mistaken for

reason; likewise, the result of reflection is also mistaken for being able to determine truth and falsity. The recent development of neuroscience has revealed that various faculties such as reason, emotion, and reflection are involved in human moral judgement.

Both law and economics are studies for practical thinking mainly at the national level. Recently, two studies have begun to be studied together. In economics, while acknowledging that emotion-based values differ from person to person, theories are developed assuming that values should be reasonably consistent. In law, there is still controversy over whether value is based on reason or emotion and whether there is an objective hierarchy of values. By introducing the perspective on the value of economics into law we can solve the problems of law. Confirming the consistency of values is the role of reason, so economics considers the role of reason important. Several concepts in economics help improve the legal system or help weigh interests in legal reasoning. In particular, Pareto improvement is a concept that can increase the welfare of society while protecting individual rights. The utilitarian method places importance on consistency and universality of judgement, and has a concept of protecting the rights of minorities, so it has means for fairness.

We may answer to the debate over the grounds of the normative sentences by the facts that reason can distinguish right from wrong by comparing two objects and that a person has no choice but to live by rules or habits due to bounded rationality. Normative sentences are psychological facts about emotion, and when we compare emotional statements with real minds, or when we confirm the consistency of various normative propositions, we can determine them by reason, but there is no absolute standard or a perfect set of moral rules. Prescriptivism is appropriate in that morality can be judged based on a set of moral propositions by reason, but an absolute set of moral rules cannot be found. The principle of universalisation, which is important in prescriptivism, is based on reason by

confirming the consistency of values.

In moral and legal philosophy, there has been controversy over whether value is based on reason or emotion, but Hume's philosophy and Maslow's psychology show that value is based on emotion. Since people's desires are similar, some values can create a general hierarchy, but there are many values that cannot make a hierarchy because they are close to preference. There can be exceptions to a general hierarchy of values depending on the situation. If you consider value as emotion-based, you can answer to many controversies. The method of comparing and selecting values has been well developed in economics.

According to the decisions of the Constitutional Court of Korea, the contents of the law appear as legal sentiment, value system, and legal awareness, and among them, value system is good for analytical research. Since the law consists of 'ought' propositions and many scholars recognise that 'ought' has value in itself, a value system shared by a community can be seen as the content of the law. Values are based on emotions that vary from person to person. Therefore, it can be said that value systems are based on emotions, and the content of the law is based on emotions. If we look at the everyday use of the 'ought' propositions, it is a personal matter and has nothing to do with the validity of the 'ought'. This suggests that 'ought' and validity are not always related. It is valid only when members take it emotionally without any particular reason. The validity of 'ought' is also based on emotion.

The theory of Alexy is quite useful in legal reasoning in that humans are under bounded rationality and live according to habits and principles until we find the defects in them. MacCormick recognises the role of emotion in law and incorporates Kant and Smith's theories. He tries to explain legal reasoning as a Smithian categorical imperative. He suggests that natural law open to criticism,

but he would have had no weakness if he had argued for a better law. Both Alexy and MacCormick's respective theories are good in that they can introduce the concept of Pareto improvement of economics. Pareto improvement is a concept in which one party benefits without harming another in the change of policy. This concept can be used to protect individual rights and to seek improvement in the legal system. This satisfies Kant's categorical imperative to treat humans as ends. Admitting that the content and validity of the law are based on emotions makes it easier to explain changes in the law over time, exceptions to the rules, and balancing of conflicting rights or values. However, reason and reflection must be involved in this process to make a more consistent, fair, efficient, and systematic legal system.

As this thesis combines many theories from various disciplines to discuss a big topic which has been discussed for a long time, there are many points that have not been thoroughly argued. However, this paper is worthwhile in that it has sought to solve problems that have had controversies in legal or moral philosophy by combining theories from various disciplines with a broad perspective.

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