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THE TAIL THAT WAGS THE DOG, OR HOW JUDGES RULE IN HARD CASES

Abstract

This article aims at answering a question about the influence of intuition and emotions on the decision-making process of judges who rule in hard cases. This influence seems much more considerable than traditional decision-making models adopted in legal science, according to which a judge reaches a final decision by way of rational legal reasoning guided by principles of logic, life experience, and common sense whereas any emotions that might appear in the process should be controlled.

This article presents an alternative concept arguing that in hard cases judges make fast, intuitive decision based on non-rational criteria and legal reasoning is merely an element of secondary rationalization which serves the purpose of post-factum justification of a decision made previously. The author argues this thesis drawing on the work of one of the most distinguished modern moral psychologists, Jonathan Haidt.

KEYWORDS

judge's thinking process, role of emotions in judge's work, legal intuition, hard cases

SŁOWA KLUCZOWE

proces myślowy sędziego, rola emocji w pracy sędziego, intuicja prawnicza, trudne przypadki

INTRODUCTION

Some time ago I spoke to an acquaintance of mine, a judge with many years of professional experience and an extensive body of jurisprudence behind him, and I asked him about his decision-making process in hard cases, quoting a few examples taken from the works of Ronald Dworkin and Lon Fuller. After a moment's reflection, he replied that, usually, after reviewing the facts, he intuitively knew (felt) what ruling he would eventually make, and only then did he check it against the relevant regulations, case law and the applicable doctrine to give the line of argumentation a reasonably defensible form. So, is it really the case that in hard cases judges are primarily guided by intuition or emotions while the legal reasoning (validation, interpretation), so thoroughly discussed by legal theorists, merely plays the role of secondary rationalization, serving the purpose of a post factum justification for a decision reached by non-rational criteria?

In this article, I intend to give a positive answer to this question, being fully aware that legal discourse has been for a long time filled with disputes about hard cases, means of solving them, the scope of judicial discretion,[1] legal intuition[2] and the role of emotions in the process of applying the law.[3] Therefore, without duplicating the arguments cited in the above sources, I wish to present my own based on the work of Jonathan Haidt, a moral psychologist from New York University, whose thinking, although focused on a different area of study, can – I firmly believe – make an important contribution to general deliberations on law.

[1] Herbert Hart, *The Concept of Law*, Oxford 1986, Lon Fuller, *The Morality of Law*, New Heaven 1969, Ronald Dworkin, *Taking Rights Seriously*, London 1977.

[2] See Tomasz Pietrzykowski, *Intuicja prawnicza. W stronę zewnętrznej integracji teorii prawa,* Warsaw 2012, Bartosz Brożek, *Umysł prawniczy*, Kraków 2018.

[3] See Maciej Wojciechowski, Bogna Dowgiałło, Dorota Rancew-Sikora, *Emotional Labour of Judges*, Archiwum Filozofii Prawa i Filozofii Społecznej, No 1(10)/2015, 97–109 and Maciej Wojciechowski, *Sprawiedliwość i emocje w sądowym stosowaniu prawa* Gdańskie Studia Prawnicze, Vol XXXV 2016, 519–532.

THE DECISION-MAKING MODEL OF THE APPLICATION OF LAW

Let us begin by emphasizing that the thesis stating that it is not rational reasoning but intuition and/or emotions that constitute the basis for a ruling in hard cases is undoubtedly controversial. According to the classic and rarely questioned so-called decision-making model of the application of law, discussed in the Polish literature by Jerzy Wróblewski,[4] the process consists of four elements: '(1) the determination of the norm that applies in a sufficiently defined sense for the purposes of adjudication, (2) the recognition of a fact as proven based on specific materials and the accepted theory of evidence, as well as the formulation of this fact in the language of the applied norm, (3) the subsumption of the fact, considered proven, under the applied legal norm, (4) the binding determination of the legal consequences of the fact considered proven on the basis of the applied legal norm'.[5] In accordance with this model, various kinds of reasoning[6] take place at the four stages, which enable partial decisions to be made (a validating decision, an interpretive decision, an evidentiary decision, a decision to choose consequences). In turn, these sub-decisions form the basis for the final decision, as they provide the justification for it.[7] Naturally, as Leszek Leszczyński rightly points out, these stages do not always 'lend themselves to the classical phase system of the process'[8] as, for example, in the case of findings of law and findings of fact, which 'overlap (...) [and] are carried out in parallel';[9] yet in the light of the above model, the sub-decisions (and thus the reasoning that leads to them) must precede the final decision in the application of law. As already mentioned, at each of the four stages a judge carries out a series of reasonings, which he is obliged to express in the form of a written or oral justification. As an aside, it is worth noting that there is a debate in legal studies on the essence of judicial reasoning, which is sometimes summarized as 'justification – is it description or rationali-

[4] The so-called decision-making model of the application of law. See Wiesław Lang, Jerzy Wróblewski, Sylwester Zawadzki, *Teoria państwa i prawa*, Warsaw 1986, 463ff, Andrzej Korybski, Leszek Leszczyński, *Stanowienie i stosowanie prawa. Elementy teorii*, Warsaw 2021, 211ff.

[5] Wiesław Lang, Jerzy Wróblewski, Sylwester Zawadzki, *Teoria państwa i prawa*, 463.

[6] Sometimes, e.g., at the stage of legal determination, these will be strictly legal reasonings, primarily interpretative while at the stage of fact-finding, they will be intellectual reasonings, based on scientific knowledge criteria. For more, see Leszek Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2004, 62–71.

[7] Wiesław Lang, Jerzy Wróblewski, Sylwester Zawadzki, *Teoria państwa i prawa*, 463.

[8] Andrzej Korybski, Leszek Leszczyński, *Stanowienie i stosowanie prawa. Elementy teorii*, 214.

[9] ibid.

zation?'.[10] It seems that those who argue that justification combines 'elements of the description of the reasoning and actions undertaken as well as their rationalization'[11] appear to be right in this dispute, with rationalization merely meaning 'a rational explanation of the reasons behind a particular decision',[12] and not implying a non-rational basis for decision making.

HARD CASES

Given that the decision-making model of the application of law is firmly embedded in legal thinking (including my own), I initially dismissed the reasoning presented by my judge friend as either erroneous or based on oversimplifications. I only reconsidered my view when I came across Jonathan Haidt's work on moral decision-making, which led to me changing my position recognizing that, in hard cases, emotions and/or intuition play a much more crucial role in a judge's decision-making that I had previously thought. Before I proceed, however, I must first clarify my understanding of the concept of hard cases.

As Jerzy Zajadło rightly remarks 'in the contemporary theory and philosophy of law, the notion of the so-called hard cases (…) is most often associated with Anglo-Saxon legal culture and, in particular, with Ronald Dworkin's integral philosophy of law'.[13] The understanding of hard cases adopted for the purposes of this article roughly coincides with Dworkin's view. As is well known, at the core of this American thinker's non-positivist philosophy of law is the belief that 'there is more to law than rules'.[14] The law is not just a simple set of rules, as it also contains 'standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards'.[15] Dworkin explains the meaning of these terms, with particular attention given to characterizing principles.[16] A principle, in this view, is a certain moral standard which is an element of the legal system. It is 'a standard that is to be observed (…) because it is a requirement of justice

[10] Iwona Rzucidło, *Uzasadnienie orzeczenia sądowego. Ujęcie teoretyczne a poglądy orzecznictwa*, Warsaw 2020, 107ff.

[11] Andrzej Korybski, Leszek Leszczyński, *Stanowienie i stosowanie prawa. Elementy teorii*, 222.

[12] Andrzej Korybski, Leszek Leszczyński, *Stanowienie i stosowanie prawa. Elementy teorii*, 222.

[13] Jerzy Zajadło, *Co to są hard cases?*, in Jerzy Zajadło (ed), *Fascynujące ścieżki filozofii prawa*, Warsaw 2008, 7. See also R. Dworkin, *Hard Cases*, Harvard Law Review, Vol 88, No 6 (April 1975), 1057–1109, Idem, *Taking Rights Seriously*, Idem, *Law's Empire*, Cambridge 1995.

[14] Raymond Wacks, *Philosophy of Law. A Very Short Introduction*, Oxford 2014, 51.

[15] Ronald Dworkin, *Taking Rights Seriously*, 22.

[16] In a number of places, Dworkin uses the term principles *sensu largo* to refer to all norms that do not function as rules.

or fairness or some other dimension of morality'.[17] Dworkin takes great care to explain the ways in which the principles defined this way differ from rules. In his own words 'rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision'.[18] Principles work differently, as they 'do not set out legal consequences that follow automatically when the conditions provided are met'.[19] A principle 'states a reason that argues in one direction but does not necessitate a particular decision'.[20] In other words, a principle provides arguments in favor of a certain decision, but these arguments are never decisive. A characteristic of each principle is its weight (importance). Consequently 'when valid principles conflict, the proper method for resolving the conflict is to select the position that is supported by the principles that have the greatest aggregate weight'.[21]

The above distinction helps to explain Dworkin's views on hard cases. In light of this concept, a hard case is a case in which there is no unambiguous and precise rule in the system, and the judge has to decide based on a different kind of norm – a principle, weighing the reasons and arguments it provides.

As already pointed out, the principles that are part of the legal system and which guide judges through the process of ruling in hard cases are moral standards. This is understandable insofar as Dworkin 'rejects [the positivist thesis about – K.S.] a strict ('conceptual', 'necessary') separation between law and morality'[22] and accepts an assumption according to which 'moral evaluations are a necessary part of determining the content of a legal system'.[23] Scott Shapiro explains this as follows: 'legality is ultimately determined not by social facts alone, but by moral facts as well. In other words, the existence and content of positive law is, in the final analysis, governed by the existence and content of the moral law'.[24] So, clearly Dworkin 'believe[s] that law cannot be properly understood without morality, especially the moral values towards which all law necessarily aspires'.[25] Consequently, each judge must have an answer to the question 'Could my decision (…) form part of the best moral theory justifying the whole legal and political system?,'[26] as 'the choice between tenable interpretations (…) may easily come down

[17] Ronald Dworkin, *Taking Rights Seriously*, 22.

[18] ibid, 24.

[19] ibid, 25.

[20] ibid, 26.

[21] Scott Shapiro, *The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed*, in Arthur Ripstein (ed), *Ronald Dworkin*, Cambridge 2007, 26.

[22] Brian Bix, *Natural Law: The Modern Tradition*, in Jules Coleman, Kenneth Himma, Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford 2004, 84.

[23] ibid.

[24] Scott Shapiro, *The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed*, 23.

[25] Brian Bix, *Natural Law: The Modern Tradition*, 84.

[26] Raymond Wacks, *Philosophy of Law. A Very Short Introduction*, 53.

to a determination of which interpretation presents the legal system as better in moral terms. Thus (…) one cannot determine 'what law is' without considering moral or evaluative matters'.[27]

As already mentioned, the interpretation of the term 'hard case' as adopted for the purposes of this article generally coincides with the concept of the author of 'Taking Rights Seriously'. A 'hard case' is presented when there is no rule in the system in the sense of a norm that determines unequivocally the content of a particular decision, and the judge has to decide on the basis of a principle (a norm providing arguments in favor of a decision in a particular way but not determining its content). These principles, although positivized,[28] are in fact moral standards, so that the judge who assesses their significance becomes – to some extent – a moral philosopher.

A RIDER AND AN ELEPHANT

Now that we have adopted a certain understanding of hard cases, we can attempt to answer the question about the judge's decision-making process in this type of cases. The thesis I intend to defend is as follows: in hard cases, judges rule on the basis of non-rational considerations. They make quick, intuitive decisions, and the rational reasoning, presented in the justification of the court decision, is merely an instrument of secondary rationalization, the purpose of which is to persuade and convince others (including the court of higher instance) of the correctness of the position taken in the particular case.

In substantiating the above thesis, I wish to refer to the views of Jonathan Haidt, American scholar, moral psychologist and lecturer at New York University's Stern School of Business, who was named one of the world's 100 most prominent thinkers by Foreign Policy magazine in 2012. In 2001, he published an article in Psychological Review entitled 'The emotional dog and its rational tail. A social intuitionist approach to moral judgment',[29] in which he rejected the so-called rationalist model of moral judgments formerly prevalent in moral psychology and argued in favor of a social-intuitionist model. As Bogdan Wojciszke explains:

> The rationalist approach (...) assumes that moral judgments are thoughtful and rational in nature, and that their formulation is verbal and deliberate, thus requiring time, effort, intention and mental capacity. The intuitionistic approach, on the other

[27] Brian Bix, *Natural Law: The Modern Tradition*, 84.

[28] Contrary to Dworkin, I assume here that only those principles which have been positivised are an element of the system of law. See also Marcin Matczak, *Summa iniuria*, Warsaw 2007, 93.

[29] Jonathan Haidt, *The emotional dog and its rational tail: A social intuitionist approach to moral judgment*, Psychological Review, 2001, No 108, 814–834.

> hand, (...) assumes that moral judgments are involuntary, automatic intuitions based on emotions and associations, appearing ad hoc, without any deliberate thinking.[30]

Haidt developed this argument in the books he published in the years to follow: *The Happiness Hypothesis: Finding Modern Truth in Ancient Wisdom,*[31] *The Righteous Mind: Why Good People Are Divided by Politics and Religion*[32] and also *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure,*[33] co-written with Greg Lukianoff. Let us have a closer look at the concept he put forward in these books.

In order to explain the moral decision-making process, Haidt conducted a series of large-scale experiments. These consisted of presenting various groups of people with fictional stories, whose protagonists took actions that, although not harmful to anyone, evoked feelings of dislike, repulsion or even disgust. The subjects were then asked to formulate a moral evaluation of these actions and justify it. In this way, Haidt wanted to answer the question of whether people are guided by rational considerations in formulating moral judgments, or perhaps they act predominantly on the basis of other criteria (emotions or intuitions). As he says, the research involved giving '(…) stories that pitted gut feelings about important cultural norms against reasoning about harmlessness, and then see which force was stronger'.[34] Here are a few of Haidt's examples: 'A family's dog was killed by a car in front of their house. They had heard that dog meat was delicious, so they cut up the dog's body and cooked it and ate it for dinner. Nobody saw them do this,'[35] or 'A man goes to the supermarket once a week and buys a chicken. But before cooking the chicken, he has sexual intercourse with it. Then he cooks it and eats it,'[36] or 'A woman is cleaning out her closet, and she finds her old American flag. She doesn't want the flag anymore, so she cuts it up into pieces and uses the rags to clean her bathroom'.[37]

As could have been expected, the vast majority of respondents evaluated the offenders' conduct negatively. Moral judgments were made quickly and without

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[30] Bogdan Wojciszke, a forward to the Polish issue of *The Righteous Mind: Why Good People Are Divided by Politics and Religion*. See Jonathan Haidt, *Prawy umysł. Dlaczego dobrych ludzi dzieli religia i polityka?*, Sopot 2014, 10.

[31] Jonathan Haidt, *The Happiness Hypothesis: Finding Modern Truth in Ancient Wisdom*, London 2021.

[32] Idem, *The Righteous Mind: Why Good People Are Divided by Politics and Religion*, London 2013.

[33] Jonathan Haidt, Greg Lukianoff, *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure*, New York City 2019.

[34] Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion*, 22.

[35] ibid, 3.

[36] ibid, 4.

[37] ibid, 22. Haidt formulated dozens of such stories for his experiment but he quickly realized 'that the ones that worked best fell into two categories: disgust and disrespect'.

much deliberation. However, when it came to justifying them, the respondents had a serious problem. After all, Haidt's examples were designed in such a way that they lacked a victim, and no one was harmed. So how did the respondents justify their assessments? Many of them (38%)[38] tried to modify the stories to prove that harm was in fact done (to a victim, perpetrator or a third party) and in this way they tried to justify the negative moral judgment they gave. Sometimes this proved to require some imagination; for example, the injustice done by a woman who had cut up the flag lay in the fact that 'the rags might clog up the toilet and cause it to overflow,'[39] or the family which ate their dog 'would get sick from eating dog meat'.[40] When Haidt pressed the respondents, reassuring them directly that no harm they suggested, was in fact done (e.g., no one got sick after eating the dog meat), the respondents sought more potential victims, giving increasingly absurd rationalizations, only to finally say something along the lines of 'I know it's wrong, but I just can't think of a reason why'.[41] So, as Haidt says, 'They seemed to be *morally dumbfounded* – rendered speechless by their inability to explain verbally [rationally – K.S.] what they knew intuitively'.[42] Haidt concludes that 'It is the intuition based on emotions and not reasoning that tells us that [the protagonist in our stories – K.S.] did something wrong. Reasoning takes place only when we wish to justify our judgment, and something it can let us down'.[43] In the examples quoted here, the respondents' reasoning failed as the examples were formulated to counter rational arguments against eating dogs or insulting national symbols (no one saw it, the dog was already dead anyway, the dog was theirs, no one got hurt, etc.). Given the results of the above experiments, Haidt came to the fundamental conclusion that 'moral reasoning (…) [is – K.S.] often a servant of moral emotions'.[44] Expanding on this thought, he distinguishes between two types of human cognition, i.e. reasoning and intuition, which function simultaneously in our minds. The metaphors he uses for them are that of a rider and an elephant.[45] The rider represents 'controlled processes, including 'reasoning-why'[46] whereas the elephant stands for 'automatic processes, including emotion, intuition, and all

[38] ibid, 28.

[39] ibid.

[40] ibid.

[41] ibid, 29.

[42] ibid. Author's emphasis.

[43] Bartłomiej Kucharzyk, Łukasz Kwiatek in conversation with Jonathan Haidt [an interview], *Smak dobra i zła*, Tygodnik Powszechny, No 51–52/2014, 85.

[44] Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion*, 29.

[45] See ibid, 52ff. Haidt writes elsewhere, 'the rider is (…) conscious, controlled thought. The elephant, in contrast, is everything else. The elephant includes the gut feelings, visceral reactions, emotions, and intuitions that comprise much of the automatic system'. Idem, *The Happiness Hypothesis: Finding Modern Truth in Ancient Wisdom*, 17.

[46] Idem, *The Righteous Mind: Why Good People Are Divided by Politics and Religion*, 53.

forms of 'seeing-that'.[47] While it might seem, as rationalist models teach us, that the rider should be in charge of the elephant and reason should rule over emotions when making moral decisions, the research findings mentioned above led Haidt to a different conclusion – the rider has a subservient role in this relationship. He appeared much later in the course of evolution, 'to serve to the elephant.'[48] Haidt characterizes the relationship between the two as follows: 'if you listen closely to moral arguments, you can sometimes hear something surprising: that it is really the elephant holding the reins, guiding the rider'.[49] He also adds that 'moral judgment is like aesthetic judgment. When you see a painting, you usually know instantly and automatically whether you like it'.[50]

However, the dominant position of the elephant does not diminish the key role of the rider who, among others, 'can see further into the future (…) and, therefore, it can help the elephant make better decisions in the present. (…) [What is more – K.S.] the rider acts as the spokesman for the elephant (…). [It – K.S.] is skilled at fabricating *post hoc* explanations for whatever the elephant has just done, and it is good at finding reasons to justify whatever the elephant wants to do next'.[51] Haidt also emphasizes the prominence of the rider's role elsewhere by saying 'only the rider can string sentences together and create arguments to give to other people. In moral arguments, the rider goes beyond being just an advisor to the elephant; he becomes a lawyer, fighting in the court of public opinion to persuade others to the elephant's point of view'.[52]

CONCLUSIONS

The thought process of a judge confronted with a hard case significantly resembles the process of formulating a moral judgment as outlined by Jonathan Haidt. After all, the principles by which a judge rules in a hard case are moral standards, with all the consequences this entails. The stronger the emotions, such as repulsion, disgust or disrespect that are triggered by a case, the more difficult it is for a judge to disregard his or her intuitive judgments because, figuratively speaking, in such circumstances even the best riders find it difficult to hold the reins and control the elephant.

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[47] ibid.

[48] Jonathan Haidt, *The Happiness Hypothesis: Finding Modern Truth in Ancient Wisdom*, 16. Author's emphasis.

[49] ibid, p. 21.

[50] ibid.

[51] idem, *The Righteous Mind: Why Good People Are Divided by Politics and Religion*, 54.

[52] idem, *The Happiness Hypothesis: Finding Modern Truth in Ancient Wisdom*, 22.

A good example is the reasoning of the fictional Judge Tatting in the famous case of the 'Speluncean Explorers', [53] which is a textbook example of a hard case. It is a fictional case, invented by Lon Fuller more than 70 years ago, but inspired by a case that had taken place decades earlier.[54] The considerations it contains about the judge's decision-making process are so universal that they are undoubtedly worth recalling. Let us briefly look at the facts. In May 4300, a group of amateur speleologists got stuck in a deep cave. It soon became apparent that by the time the entrance was decompressed by the emergency services, the stranded were likely to die of starvation. The speleologists then took the dramatic decision 'that they might find the nutriment without which survival was impossible in the flesh of one of their own numbers'.[55] They drew lots and, in this way, decided which man 'was then put to death and eaten by his companions'.[56] Soon after, the cannibal speleologists were rescued and subsequently brought to trial. Following an appeal, the case went to the Supreme Court, which was to decide it. Fuller reports on the deliberations of the members of the Supreme Court bench who provide metaphors for competing philosophical and legal views. One of them, Judge Tatting, begins his argument with the following words:

> In the discharge of my duties as a justice of this Court, I am usually able to dissociate the emotional and intellectual sides of my reactions, and to decide the case before me entirely on the basis of the latter. In passing on this tragic case I find that my usual resources fail me. (…) I had hoped that I would be able to put (…) emotions to one side as irrelevant, and to decide the case on the basis of a convincing and logical demonstration of the result demanded by our law. Unfortunately, this deliverance has not been vouchsafed me.[57]

Tatting is not an example worth following. Indeed, his realization that he will not be able to free himself from emotions leads him to 'decision paralysis', as he ultimately refuses to rule in the case. It would seem that a different strategy would be more appropriate in this case, that of accepting that – as Haidt teaches us – 'The mind is divided into parts, like a rider (controlled processes) on an elephant (automatic processes)'.[58] No matter how seasoned we are as riders, sometimes we will not be able to control the elephant. In hard cases, judges are torn by emotions, and the belief that they can be free of them at all times is a fiction. I believe that

[53] Lon Fuller, *The Case of the Speluncean Explorers*, Harvard Law Review, Vol 62, No 4 (February 1949), 616–645.

[54] The Queen v Dudley and Stephens case, 14 Queens Bench Division 273, 9 December 1884, after Michael Sandel, *Sprawiedliwość. Jak postępować słusznie?*, Warsaw 2020, 45.

[55] Lon Fuller, *The Case of the Speluncean Explorers*, 618.

[56] ibid.

[57] ibid, 626.

[58] Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion*, 58.

accepting this as true would prompt more interest in the problems related to the decision-making process of judges, which seems exceedingly warranted.

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