

Doing justice, justifying, resolving

Tommi Ralli*

Every discussion on judicial virtues supposes some general conception of judging. In reconstructing a ‘broad context’ of the judge,¹ this paper examines three activities: doing justice to facts, resolving the case, and justifying the decision. These activities form a threefold framework.

With any new legal problem we face, we bear in mind justification and the need for resolution. But we also turn to the particulars of the case, with the belief that we shall then find some way of proceeding in the problem. The last coordinate – focusing attention on an object – is traditionally theorised starting from justification. For example: it is said that legal sources need concretisation or offer possibilities in application, or the species ‘legal justice’ extends to equity or reasonableness as we look into particulars.² In contrast to this tradition, I individualise *judicial attention* as an element of just judging. The impact of just attention on choice will be theorised based on the writings of Iris Murdoch and, as her influence, Simone Weil, both of whom treated attention as separable from past knowledge. In the end, emphasis on attention leads me to pose a question which would not otherwise emerge in the judicial context – namely, whether attention gives rise to ‘gut feeling’ relating to decisions.

The paper is organised into three parts. First, I explain the threefold framework, and show by way of example that legally relevant facts may comprise personal characteristics within that framework. Next, I argue that the judge becomes inclined towards a resolution not only by justifying, with the help of non-conclusive principles or rules, but also by paying just attention to particulars.

* The author is a Research Assistant at Centre of European Law and Politics (ZERP), University of Bremen.

¹ The reconstruction is informed by European, national, and international cases and by conversations with people with experience from legal consulting, arbitration, or truth commissions in various parts of the world.

² The latter is Aristotle’s classical point of view. Aristotle 2002, 1137a32–1138a3 and 1143a19–1143a35.

Finally, I address the aspect of time by investigating Antonio Damasio's hypothesis, according to which gut feeling is necessary for practical judgment.

The threefold framework

As a preliminary outline, one feature of legal dispute resolution consists of ending uncertainty by a decision, so that lawyers are characteristically solution-driven. As a second feature, reasons for the decision must meet conventional standards, although in this respect a theoretical account should be flexible so as not to confuse any one practice in this or that court, field, or State for a model of legal reasoning more generally. Lastly, while attention to detail is vital in any craft, attention to particulars – to 'facts' – combined with the aforementioned two features makes for just legal judgment.

In the following scheme, I combine these three characteristics by ascribing three activities to the judge, whom I assume to be the model legal agent, observed closely by other legal professionals. In this way, the parties' representatives' position is handled indirectly, with the judge's style (of legal reasoning in particular) being assumed to reflect that of other lawyers in the system.

By the activity of 'doing justice,' I mean that the judge considers all aspects of a matter. The opposite to doing justice is omitting and simplifying,³ so that, ideally, the result of doing justice is a full picture or story.⁴

I should have said that the judge considers all *relevant* aspects of a matter, because the aspects to which justice is done are continuously regulated by justification. By 'justifying,' I mean that the judge reasons, figuratively speaking answering such questions about the choices she or he makes as 'What makes it just?' or 'Why is it just?' (Corresponding to this activity, the word 'justification' comes from the Latin *justificare*, meaning literally 'to make just.')

'Resolving' is the third activity of the judge. This means construction of the form which the final outcome will take when the time for decision comes. An

³ 'However elegant and memorable, brevity can never, in the nature of things, do justice to all the facts of a complex situation. On such a theme one can be brief only by omission and simplification. Omission and simplification help us to understand – but help us, in many cases, to understand the wrong thing; for our comprehension may be only of the abbreviator's neatly formulated notions, not of the vast, ramifying reality from which these notions have been so arbitrarily abstracted.' Huxley [1958] 2000, vii.

⁴ For a notion of impartiality that consists in considering ideally all the particular circumstances, see Günther 1993.

either-or, affirmative or negative, ‘yes’ or ‘no’ decision is not the only form: the judge could seek a compromise or ‘split the difference,’ for example. Although seeing the best on both sides may be ‘the easiest way not to get mixed up with the quarrels of others,’ as Niklas Luhmann writes in ‘The Third Question’ (Luhmann 1988, 153), the judge still has to decide. But, as Luhmann notes, deciding right and wrong between contradictory opinions does not dispose of the question whether ‘there might be deeper reasons to accept controversies with their right on both sides’ (Luhmann 1988, 153). I would also ask whether an even deeper understanding is required after we understand that right and truth exist on both sides, when we should still decide one way or the other. If the last desideratum were justified on the basis that rules must be clear for others in the future, we would admit that it is the judge who forms rules for others. Alternatively, factual premises could be fundamental, and legal thought might seek to disallow inconsistent beliefs. However the desideratum is justified, the form of the judicial decision is often affirmative or negative, even though counter-examples exist, perhaps more likely to be found in advisory opinions than in cases. While the same either-or form can be borrowed and used in any debate, a basic point of the present scheme is to visualise that in the (possibly original) judicial setting this form must be seen together with the activity of doing justice to myriad factual points, because the questions to be settled in legal disputes are seldom so general as, for example, whether affirmative action should be allowed, but they concern more specific circumstances.

In brief, the judge does justice to a matter by hearing all the arguments of the relevant parties. Often judges resolve disputed questions either this way or that way. And they justify their decision.

These three activities need not occur in any single order. They can occur in cycles, once the decision-making process has begun, so that the three elements can be conceived as a circle within which the judge moves. The judge gets out of the circle through time.

Before the circle can begin, some facts must be provided or assumed to exist. For example, a party relying on a rule cannot on that sole basis demand that the other party substantiate their reliance on an exception: some facts must be supplied to start a case. As a result, in everyday discussions one should not locate within the judicial context such highly abstract questions as those about the desirable distribution or treatment of abstract units. Prefacing such questions by asking, for the sake of vividness, ‘what would you do if you were a judge’ may mislead the listener into thinking that the question relates somehow to the judicial context, although the question cannot come up in this context without

any facts being given about particular circumstances. '[W]e are first confronted with [. . .] various interpretations of the situation,' as Klaus Günther writes in *The Sense of Appropriateness*, and only then can one separate aspects or 'steps' of justification, such as isolating generalisable features of the situation, in legal as in moral deciding (Günther 1993, 70). Legal reasoning does, of course, abstract or generalise from concrete particulars to some degree. But presently the claim is that facts do give some points of departure for justification, and soon I shall contend that attention to facts can also offer direction towards resolution.

The circularity among the three elements of the framework brings out the fact that legal rules do not simply determine the relevancy of certain facts. Facts and more or less determinate or even conflicting rules are considered together, and together they are made to result in a conclusion to the case. Even if factual and legal premises can be separated into different sections in the text of the final decision, it is easy to see that a back and forth movement occurs between the two premises when, for example, the text of the decision itself says that the content of some contested legal rule need not, in the present case, be clarified any further than has been done in the decision so far, because the facts of the case can already be subsumed under the so far clarified legal rule.

The circularity between doing justice and justifying illustrates that separating relevant – essential, material, significant – facts from irrelevant ones requires, among other things, knowledge of law, which in the framework belongs in the area of justification. The same circularity also explains that applying the term 'facts' to that to which justice is done can already be a matter of law, and thus of justification. For example, the way personal characteristics are taken into consideration varies. In recent times, the American anthropologist Lawrence Rosen has argued that one difference between 'Islamic common law' and 'American common law' lies in their respective emphasis on, and tendency to assess and to classify, 'persons' versus 'facts' (Rosen 1999, 39–54). In describing Moroccan adjudication, Rosen writes that the judge is typically constrained by attestation from notaries, witnesses, and other community sources and by 'local person perception' (Rosen 1999, 54). When determining the bounds of relevance in a case, the judge is likely to focus on the individual being considered, in the sense of taking into account his or her social relations and origin, rather than trying to fix the legal discussion on the person's intention as an independent factor in the case. In explaining this tendency, Rosen points to orienting ideas common to law and culture generally, such as 'No separate intent inquiry is needed if the person and the context are known' (law) and 'Actions do not exist separate from their intentions' (culture) (Rosen 1999, 22, 42, and 76–77). Here are two of his

examples describing how the judge's determination of the bounds of relevance in the case may depend on classifying persons:

Thus he may simply chide an unlettered country woman for running away but seek out the full nature of an educated urbanite's dispute while reminding him of the example he should set. (Rosen 1999, 13.)

Or if a woman holds a good position in the civil service and earns more than her husband, courts, which otherwise would favor the husband, have often revised their categories in order to grant to the mother custody of a minor child. (Rosen 1999, 51.)

The reason that courts may consider a wider range of relationships and issues when important or wealthy individuals are involved in the case is, Rosen says, the assumption that these people's acts have greater consequences for social harmony (Rosen 1999, 30 and 40–41), and, likewise, in culture generally the assessment of who a person is turns on the consequences brought about by the relations the person constructs (Rosen 1999, 28 and 40). But regardless of whether the legal system assesses and classifies 'persons' or 'facts,' the systematic separation of relevant and irrelevant features from case to case requires knowledge of law, embedded as it is in culture, and this expertise belongs in the area of justification in the model sketched.

Attention to facts inclines towards a conclusion

Now, we can try to separate justification and focus on doing justice to particulars. To illuminate this, I adopt the notion of just attention, which challenges the misguided presupposition (exemplified, for instance, by mid-twentieth-century legal positivism) that the judge is finally free to choose if public legal rules do not determine a resolution. To clarify what is in general flawed in this presupposition, I draw on Iris Murdoch's discussion in 'The Idea of Perfection' (1964).

In this essay, Murdoch criticises the view accepted at the time that morality could, to borrow her words, be likened to 'a visit to a shop,' the agent surveying facts and then reasoning and choosing (Murdoch [1964] 1999, 305). Instead, she argues, an account of any other than an easy, simple, and unimportant choice ('I receive my bill and I pay it' [Murdoch (1964) 1999, 328]) requires that we are aware that moral activity consists of an ongoing effort to give attention to an object and is, in any case, not necessarily directed at any conclusion. In emphasising attention, Murdoch pays tribute to Simone Weil:

I have used the word “attention”, which I borrow from Simone Weil, to express the idea of a just and loving gaze directed upon an individual reality. I believe this to be the characteristic and proper mark of the active moral agent. (Murdoch [1964] 1999, 327.)

Weil explains what she means by attention in the context of school studies:

Attention consists of suspending our thought, leaving it detached, empty, and ready to be penetrated by the object; it means holding in our minds, within reach of this thought, but on a lower level and not in contact with it, the diverse knowledge we have acquired which we are forced to make use of. (Weil [1951] 1977, 49.)

Though Weil speaks of attention as waiting and claims that sloppiness results from being too active in seeking something, she need not be taken to mean that we are passive: when we write, for instance, she says we constantly reject all inadequate words (Weil [1951] 1977, 50).

Weil uses the metaphor of looking, as she compares knowledge in the back of the attending person’s mind to peripheral vision: ‘Our thought should be in relation to all particular and already formulated thoughts, as a man on a mountain who, as he looks forward, sees also below him, without actually looking at them, a great many forests and plains’ (Weil [1951] 1977, 49). But it is Murdoch who uses the metaphor extensively, talking of a ‘gaze’ and ‘seeing’ – rather than, say, listening and hearing. With listening as an additional metaphor for just attention, we can again take up Murdoch’s argument.

She argues as follows: ‘I can only choose within the world I can *see*, in the moral sense of “see” which implies that clear vision is a result of moral imagination and moral effort’ (Murdoch [1964] 1999, 329). In the passage below, she describes her resulting view on choice:

If we ignore the prior work of attention and notice only the emptiness of the moment of choice we are likely to identify freedom with the outward movement since there is nothing else to identify it with. But if we consider what the work of attention is like, how continuously it goes on, and how imperceptibly it builds up structures of value round about us, we shall not be surprised that *at crucial moments of choice most of the business of choosing is already over*. This does not imply that we are not free, certainly not. But it implies that the exercise of our freedom is a small piecemeal business which goes on all the time and not a grandiose leaping about unimpeded at important moments. The moral life, on this view, is something that goes on continually, not something that is switched off in between the occurrence of explicit moral choices. What

happens in between such choices is indeed what is crucial. (Murdoch [1964] 1999, 329, emphasis added.)

Similarly, of course, in legal contexts, continuous attention to particulars can point to a conclusion. This influence of attention operates in addition to the influence of non-conclusive principles or rules, which have been much emphasised in criticisms of mid-twentieth-century legal positivism⁵. In enlarging the analysis of legal decision from justification to attention to particulars, I want to make it easier to keep in mind both of these two ways of becoming inclined towards a conclusion. Compared with existing analyses, this last position and the prior scheme redirect emphasis towards the process of doing justice to particulars in judicial decision-making.

Whereas moral activity need not be directed at any conclusion, legal thinking is different, as indicated by the element of resolving in the scheme above. The mark of legal thinking is to find solutions to practical problems, as opposed to merely describing things from various angles and leaving a matter at that. But Murdoch's idea of continuous – even endless – moral activity does capture one aspect of the otherwise solution-driven legal activity rather well. Namely, the judge should hear all arguments put forward by the parties. A party may offer numerous defences, for example, all of which, in principle, should be considered. In this sense, doing justice can also be called reasonableness towards the parties. As John Rawls points out, the word 'reasonable' 'can also mean "judicious," "ready to listen to reason," where this has the sense of being willing to listen to and consider the reasons offered by others' (Rawls 2000, 164). At the same time that the judge does justice, she or he is naturally following a legal rule, wherever the party can file a complaint if an argument is not answered in the opinion.

Damasio's 'somatic-marker' hypothesis

In stressing attention to facts as a way in which the judge becomes inclined towards a conclusion, we are drawn to explore other factors beside justification that direct the judge's choice of relevant facts and, in simplest terms, lead the judge to cease hearing facts. The judge's decisive 'hunch'⁶ was already taken to be 'a function of' facts attended to and determined by her or him in Jerome Frank's *Law and the Modern Mind* (Frank [1930] 1963, 119). According to Frank, steps of

⁵ For example, Dworkin [1967] 1978.

⁶ The term is from Hutcheson 1929.

justification and the judge's memories and formed personality are what produce hunches during and after the hearing process (Frank [1930] 1963, 113, 115, and 141). But we can add, based on the above, that just attention to the situation at hand may also produce these feelings or intuitions. The question of the sources of feelings hangs over a more recent hypothesis, which I shall look at now. The hypothesis states that gut feeling is necessary in coming to a practical decision, at least to speed up the process.

Despite the time-consuming task just mentioned of doing justice to particulars, rational decision-making can occur within a reasonable time, no doubt for a number of reasons, among which gut feeling is likely to be one. At least in decisions touching on 'one's personal life and its immediate social context,' according to the neurologist Antonio Damasio (Damasio 1994, 169), gut feeling is necessary for our practical reason. In *Descartes' Error*, Damasio describes patients who have lost their ability to experience feelings while their rationality – by modern rationalist lights – is intact. For example, he relates the story of a patient who arrived at his laboratory driving on an icy road, making the usual rational calculations, and avoided skidding off the roadway more successfully than some other drivers. Later, the same patient was offered two alternative dates for his next meeting:

The patient pulled out his appointment book and began consulting the calendar. [. . .] For the better part of a half-hour, the patient enumerated reasons for and against each of the two dates: previous engagements, proximity to other engagements, possible meteorological conditions, virtually anything that one could reasonably think about concerning a simple date. (Damasio 1994, 193.)

According to Damasio's hypothesis, rational decision-makers need, at least to save time, what is commonly called gut feeling, for which he invents the term 'somatic marker': 'Because the feeling is about the body, I gave the phenomenon the technical term *somatic state* ("soma" is Greek for body); and because it "marks" an image, I called it a *marker*' (Damasio 1994, 173). These feelings are acquired by experience; they can be negative or positive, like signals saying 'Danger!' or 'Go for it!' before an option for action; and they operate *before* rational calculation, negative gut feelings limiting the range of relevant information through which the agent sifts to arrive at a solution, and positive ones disposing towards a solution.⁷ Damasio focuses on conscious deliberation: the agent perceives the body-

⁷ Damasio 1994, 173–180. Because the feelings control which information gets priority for processing in short-term memory, affective processes and short-term-memory processes are here interdependent.

state change and is thus led to avoid or to pursue an option. But Damasio also proposes that gut feelings could operate outside consciousness in the following sense: ‘The explicit imagery related to a negative outcome would be generated, but instead of producing a perceptible body-state change, it would inhibit the regulatory neural circuits located in the brain core, which mediate appetitive, or approach, behaviors’ (Damasio 1994, 187). If this covert mechanism entirely cancelled some undesirable option or made some highly desirable option of action more likely, then we would, Damasio suggests, have here a source of intuition, intuition negatively defined by him as a ‘mechanism by which we arrive at the solution of a problem *without* reasoning toward it’ (Damasio 1994, 188).

Damasio proposes the above hypothesis as a correction to the unrealistic rationalistic outlook of the mainstream contemporary style of modelling rational decision-making, which he summarises as follows:

The terms reasoning and deciding usually imply that the decider has knowledge (a) about the situation which calls for a decision, (b) about different options of action (responses), and (c) about consequences of each of those options (outcomes) immediately and at future epochs. Knowledge [. . .] exists in memory under dispositional representation form [. . .].

The terms reasoning and deciding also usually imply that the decider possesses some logical strategy for producing valid inferences on the basis of which an appropriate response option is selected, and that the support processes required for reasoning are in place. Among the latter, attention and working memory are usually mentioned, but not a whisper is ever heard about emotion or feeling [. . .]. (Damasio 1994, 166.)

Unsurprisingly, parallels exist between these distinctions concerning (a) situation, (b) options of action, and (c) consequences of each of the options and the earlier circle of doing justice, resolving, and justifying. First, knowledge of the situation is acquired in the process of doing justice, or attending, to a matter, most often by listening to what other people have to say. Second, at least two options are open in the deliberation leading to a resolution – otherwise there would be no dispute. And third, the emphasis on consequences in the above-quoted mainstream picture picks out one aspect which is surely taken into account in any legal justification too, whether explicitly or not.⁸ Interestingly, before the last indented two passages, Damasio also cites the following circular structure of rational de-

⁸ As Rawls once remarked, every deontology takes consequences into account to some degree: ‘All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.’ Rawls [1971] 1999, 26.

cision-making: ‘Reasoning and deciding are so interwoven that they are often used interchangeably. Philip Johnson-Laird captured the tight interconnection in the form of a saying: “In order to decide, judge; in order to judge, reason; in order to reason, decide (what to reason about)”’ (Damasio 1994, 165–166). Unfortunately, based on this quotation alone it is difficult to say whether the circularity of deciding, judging, and reasoning is parallel to that of doing justice, resolving, and justifying.

In a straightforward manner, Damasio’s body-based supplement to the mainstream modelling style creates a perspective on the traditional requirement that the judge should hear both sides and the assumption that legal reasons should indeed be more rational than mere ‘hunches.’ This requirement and this assumption guard against the irrationality which the somatic ‘biasing devices’ discussed by Damasio (1994, 174) may produce on some occasions. According to the picture given, these biasing devices are in any case necessary for decision-making in concrete circumstances, if for no other reason than to save time.

Conclusion

I started with the idea of a circular process of doing justice, justifying, and resolving. I concentrated on the activity of doing justice to particulars, which inclines the judge towards a conclusion – or so I argue. The argument opens up a general question concerning the sources of inclinations to judge: do these inclinations or intuitions arise from attention to the particulars of a concrete situation facing us, in addition to historical and neural sources?⁹ Lastly, I considered gut feeling, whether conscious or unconscious, which may be needed to complete the decision process expeditiously. The challenge remains to elucidate further the link between judicial attention, which alternates with justification, and gut feeling, which Damasio relates to reasoning.

⁹ For an interdisciplinary perspective on the relation between descriptive and normative studies in this area, see Greene 2003.

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