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Metadeductivism: Widening the Frontiers of Judicial Activism in Lower Courts

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Abstract: This paper, attracted by the increasing rate of lack of confidence in the law expressed by citizens, especially in developing countries, articulates how 'metadeductivism', a product of hermeneutic understanding of Herbert Lionel Adolphus Hart's disparate remarks on legal reasoning, could open new windows for judicial activism. Judicial activism is acknowledged in this work, as an essential instrument that could enable courts of law manifest a comprehensive understanding of the concept of justice as an embodiment of both legal and substantial factors. The findings of this paper highlight that 'metadeductivism' clears the clear-case/hard-case distinction retained by Hart, thereby making judicial discretion a necessary feature of every judicial process. They also highlight that 'metadeductivism' eliminates the presumption of arbitrariness in judicial discretion, which is behind the rejection of judicial activism. This follows from 'metadeductivism' arguing that both legal and metalegal factors should be concurrently considered during the judicial process by a team of legal and non-legal actors. Thus, this paper calls for a rearticulating of the judicial process to give effect to the idea of judicial pronouncements being products of teamwork of legal and non-legal actors.

Keywords: Frontiers, Judicial Activism, Metadeductivism.

1. Introduction

'Metadeductivism' is the theoretical framework for legal reasoning which I derived from H. L. A. Hart's disparate remarks on legal reasoning (Chukwu 2014:96). It advocates for legal reasoning involving a deductive strategy that goes beyond the established legal rules to make reference to metalegal factors such as principles of morality and public policy. This paper articulates how 'metadeductivism' can help to broaden the frontiers of judicial activism in lower courts.

Judicial activism has come to be conceived in a pejorative sense, against its positive use when it was introduced by Arthur Schlesinger Jr. (Schlesinger 1947). The rejection of judicial activism portraying it as a negative development in law is not unconnected with perception of arbitrariness. Arbitrariness no doubt jeopardizes the predictive nature of law and whittles down citizens' confidence in the law, making legal obligation questionable. This paper adopts a conceptual approach in explaining how 'metadeductivism' overcomes the challenge of arbitrariness to open more windows for judicial activism.

2. 'METADEDUCTIVISM'

'Metadeductivism', builds on major assumptions and postulates inherent in Hart's remarks on legal reasoning such as: legal reasoning is essentially deductive; judicial discretion is a necessary feature of legal reasoning and does not imply deciding cases arbitrarily; and, metalegal elements can determine the outcome of legal reasoning (Hart 1961:121-139; 1983:100-105). It improves on Hart's understanding of judicial discretion by dissolving the clear case/ hard case distinction. According to 'metadeductivism', judicial discretion should not just occur at the fringe of the law but in every application of a legal rule. It depicts legal reasoning as a syllogism of a peculiar form.

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SYLLOGISM OF LEGAL REASONING ACCORDING TO 'METADEDUCTIVISM'

Premise 1= C then Y if and only if X applies

Premise 2= C

Premise 3= Does X apply?

Premise 4= Yes, X applies or no X does not apply

Premise 5= X applies

CONCLUSION: Therefore, Y

Premise 6= If X does not apply, then S applies

CONCLUSION: Therefore, Z.

CLARIFICATION OF KEY TERMS IN THE SYLLOGISM

C = An act, say, stealing.

X = A general rule, say "one who steals is liable to two years imprisonment

Y = The conclusion that is to follow necessarily if X applies to **C**

S = metalegal element that can apply to **C** if

X does not apply

Z = The conclusion that follows if **S** rather than **X** applies.

THE SYLLOGISM COULD SYMBOLICALLY BE REPRESENTED AS:

$C \supset Y \equiv X$

$(C \supset X) > (C \sim X) \supset S$

$C \supset X$

.: Y

$C \sim X \supset S$

CONCLUSION .: Z

C represents an act which could be brought under a general rule **X**. When **C** occurs, the court seeks to determine whether **X** could actually be applied in determining the predictable outcome **Y**. The court calls for evidence and witnesses. In considering whether **X** could apply, the court simultaneously considers whether it should not apply. In the course of considering whether **X** could apply to **C**, two sets of contradicting facts emerge. Facts that can make **X** applicable emerge simultaneously with those that can render it inapplicable to **C**.

As facts that can make **X** applicable point to **X**, those that can make it inapplicable point to the metalegal element that can apply should X be found inapplicable.

If the facts that make **X** applicable prevail, then **X** will be applied by the court to arrive at **Y**. However, if the facts that make **X** inapplicable override, a metalegal factor S will be applied and Z instead Y may be the outcome of the case. The above pattern of reasoning is an improvement on Hart's account of reasoning in situations of clear case and hard case, which could be represented as follows:

CLEAR CASE:

Premise 1= If C then Y if and only if X applies

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Premise 2= C

Premise 3= Only X applies

CONCLUSION: Therefore, Y

SYMBOLICALLY:

C ⊃ Y ≡ X

C · X

.: Y

HARD CASE:

Premise 1= If C then Y if and only if X applies

Premise 2= X does not apply then a metalegal factor S applies

CONCLUSION: Therefore, Z.

SYMBOLICALLY:

C ⊃ Y ≡ X

(C · X ~ Y) ⊃ (C · ~ X) ⊃ (C · S)

CONCLUSION .: Z

These syllogisms show that for Hart, the pattern of reasoning in a clear case differs from that in a hard case. He seems to be arguing that before a hard case emerges, the pattern of reasoning in situation of clear case must have been carried out to find out that the particular general rule in question does not apply. This means that the court has to first of all consider factors that make **X** applicable and will turn to consider those that make it inapplicable, after those factors that can make **X** applicable fail to result to **Y**. Hart thinks that in engaging in the pattern of reasoning in a situation of clear case, the judge is doing what he is mandated to do by the law, he is not making a choice. The judge encounters a hard case when this duty imposed on him by the law fails to yield the desired fruit, he then embarks on another pattern of reasoning which involves his using his right of choice or discretion to go beyond what the law provides, to import a metalegal element S which will then apply to **C** resulting to **Z**, the desired outcome. However 'metadeductivism argues that at no point in the judge's reasoning should metalegal factors not be considered. Thus, the moment the judge starts considering whether **X** could apply, he is equally expected to be considering whether it should not apply and this presupposes his considering the metalegal factor that can apply if **X** does not apply. If the judge finds out that **X** applies and then determines the case by applying **X**, he has made a choice between the **X** and metalegal factor that could have applied if **X** does not apply. If, on the other hand the judge finds out that **X** could not apply and then applied the metalegal factor, he has equally made a choice between **X** and this factor. In fact, 'metadeductivism' entertains the idea that the judge could even determine the outcome of a case if he considers that a metalegal factor overrides a legal rule. This should not be strange to Hart, as he argues, the rule of recognition, the foundation of the legal system, validates even metalegal elements (Hart 1961:97). However, it should not be forgotten that the court can make a choice between **X** and metalegal elements, or consider metalegal factors alongside general rules, simply because **X**, an established legal rule, presupposing power of court exists. This may be what Hart means when he argues that legal reasoning is essentially, deduction from laid-down legal rules because the rule of recognition, a secondary power-conferring rule, as against Hens Kelsen's presupposition, automatically recognizes any metalegal element found applicable by the court. Metadeductivism

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affords a better explanation than Hart's, by arguing that once a metalegal factor is being considered *paripersue* with applicable legal rules, the rule of recognition automatically makes it part of the law.

3. Widening the Frontiers of Judicial Activism

Judicial activism portrays judicial law-making usually viewed pejoratively as violation of constitution and willin

gness to ignore precedent (Garner 2009:922). 'Metadectivism' helps in broadening the frontiers of judicial activism in two major ways. Firstly, it eliminates the conflict of logic of legal reasoning epitomized in the arguments for such approaches as 'Intentionalism', 'Purposivism' and 'Textualism. Secondly, it makes judicial activism not a function of only apex courts like supreme courts, but a function of every court. 'Metadeductivism' could be compared to purposivism and intentionalism which accommodate rules of interpretation such as the 'mischief rule' and the *eiuidem generis* (Presumption) rule; and, which propose combination of deduction and induction in legal reasoning (Williams 1982:110-111). The contribution of purposivism and intentionalism is evident in the seemingly universally accepted procedure of courts determining cases by considering both statutes and precedents. Thus, statutory interpretation and the principle of precedent are uniformly adhered to by courts thereby bridging the gap between common law and civil law procedures (Hodge 2020). Even in China, Turkey, and Iraq, where judges are viewed as strategically constrained actors, textualism with the 'literal rule' and the 'golden rule' no longer strictly applies (Tezcir 2009:309-311). Despite this, judicial activism is still downplayed common law countries (Australia, Canada, India), and civil law countries (Italy, Scotland, Nigeria). In majority of legal systems it is reduced to judicial review effectively carried out by only the apex courts (see *Roe v. Wade* 1973, 410 U.S. 113).

'Metadeductivism' goes beyond the other approaches by acknowledging concurrent and joint consideration of legal and metalegal factors by legal and non-legal actors in the judicial process. Non-legal actors could be philosophers, religious moralists, psychologists, political scientists, sociologists, and etcetera, with expert knowledge of metalegal elements. Thus, 'metadeductivism' envisages an adjudication process in which not only the judge, but also other personnel will contribute in passing judgment on a case. Judicial discretion is therefore not limited to the act of courts adopting or adjusting the *ratio decidendi* of precedents after distinguishing, according to common law principles. Rather, judgment could be passed even without recourse to precedents, coinciding with the idea of every judgment of the court becoming a precedent in itself. Legal realists (Oliver Wandel Holmes, Carl Olivecrona, John Chirpman Gray, among others), argue for courts laying precedents with every judicial pronouncement. However, they could not dismiss the notion of arbitrariness usually leveled against judicial discretion thereby fostering rule-skepticism, and unattained their mission of eliminating legal formalism (Hart 1983:104).

The fear of rule-scepticism is behind rejection of judicial activism. 'Metadeductivism' eliminates arbitrariness in judicial discretion by presenting whichever factor (legal or metalegal) found applicable to particular case as necessarily applicable, and not as a preference of the judge (Palazo 2021). Judicial discretion is therefore exercised when either of the factors is adopted, the law, making *ab initio*, a provision for the choice between the factors, as justice demands. Thus, a unified conception of justice (legal and substantial), ultimately determines the choice.

Conclusion

Metadeductivism will be highly appreciated when we realize that not all matters brought before courts of first instance reaches the apex court. In most developing countries, (e.g., Sub-Saharan African countries), even when litigants spot lacuna in the decision of lower courts in terms of procedurial and formal injustices, they hardly appeal to higher courts due to economic (poverty), political (non-

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independence of judiciary), to social (tribalism), factors. With 'metadeductivism', lower courts can save litigants the stress emanating from these factors, thereby retaining their confidence in the law.

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