



How to Measure the Quality of Judicial Reasoning?

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BOOK REVIEW



ABSTRACT

How can we measure judicial reasoning? This question has been around for a long time and several researchers, judges and sociologists have tried to answer it in an attempt to define the process of measurement. Despite a large body of studies available, there are many diverse opinions about this subject and it is not clear what impact these works have on the ways judicial decisions are justified. The reason for differences in measuring the quality of judicial reasoning and setting clear indicators could be attributed to the complexities involved in identifying the process that lead to measurement of quality of judicial reasoning. Following a conference at the University of Debrecen in Hungary, during which authors have reflected on this issue, a book entitled "how to measure the quality of judicial reasoning" has come.

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How can we measure judicial reasoning? This question has been around for a long time and several researchers, judges, and sociologists have tried to answer it to define the process of measurement. Despite a large body of studies available, there are many diverse opinions about this subject, and it is not clear what impact these works have on the ways judicial decisions are justified. Due to the complexities involved in identifying the process that leads to measurement of quality of judicial reasoning, there are differences in measuring its quality and setting clear indicators. Following a conference at the University of Debrecen in Hungary, during which authors have reflected on this issue, a book entitled “How To Measure The Quality Of Judicial Reasoning” has come.

The organization of how to measure the quality of judicial reasoning allows the reader to easily capture the complexities of this subject. The book is divided into fifteen chapters. Opening with measuring the unmeasurable, the book progresses through judging and the ethical life, an essay on the social context of measuring quality, judicial reasoning from the perspective of behavioural law and economics, quality of justice and lay participation in the light of scientific studies, obstacles and opportunities measuring the quality of judicial reasoning, quality of judicial reasoning in England and Wales, quality of justice and of judicial reasoning in Italy, the quality of adjudication in France, the criteria established regarding the the quality of justice and of judicial reasoning in Czech Republic, methods of quality assessment of judicial reasoning in Hungary, quality of judicial reasoning in International Criminal Tribunals, the quality of decision-making at the Court of Justice of the European Union (CJEU), reflections on legal reasoning in the case-law of the European Court of Human Rights (ECtHR).

What is expected from judicial reasoning is a complex issue. Firstly, there is no general concept of good quality judicial reasoning. Secondly, no legal document deals with this issue. Do we expect too much from judicial reasoning? Starting with “measuring the unmeasurable”, Matyas Bencze and G. Y. Ng, in this introductory chapter, delve us into the general complexities of the quality of judicial reasoning. After reading this chapter, the reader may assume that a judicial system which can be measurable will probably lose the spirit and symbol of justice. Delving into the issue of the quality of judicial reasoning also means to understand what is going in the judge’s head. While it is well-known that there is no methodology able to reflect convincingly the real quality of a judge’s work, Zenon Bankowski seeks to identify what is that we expect a judge to do and to be. The author answers this question in the context of the ethical life of the law and of the judge. In so doing, the author depicts the essence of any judicial decision-making within the framework of a virtue theory of adjudication. Furthermore, the author states, the written judgment does not suffice “to capture the actual way the judge decides” (p.6). However, despite a good analysis, the reader is still not able to understand whether judges pay attention to the parties’ arguments or societal expectations. Knowing rules cannot be automatically applied, do judges really let the case speak for itself?

Studies show that performance indicators whether they are of a quantitative or qualitative nature are unreliable. Zoltan Fleck tackles the issue of judicial evaluation from the social and institutional background of adjudication. Of special importance in this chapter is that “the contradictory nature of social expectations makes the results from consumer surveys on the level of trust in the justice system quite unreliable as quality indicators” (p.43). For that reason, finding measurable indicators other than the results of customer surveys, is essential when assessing judicial quality.

To sum up, the author's main contribution is to warn us about "the threat of abuse of quality control based on numbers". The author suggests that one should expel measurable indicators from the quality assessment of adjudication. The author closes the debate by suggesting that there is a need for an evaluation mechanism that captures this complexity. Unfortunately, the author does not delve more deeply into the issue of a potential evaluation mechanism.

Marius J. Golecki, states that the "judicial decision-making process is heavily influenced by heuristics and biases and special intuitive rules" (p.58). The author has made a fresh attempt to address these problems of measurement through a "behavioral approach based on evolutionary and cognitive psychology". What is interesting here is that, according to him, "emotions have a more influential effect on decisions than heuristics and biases". As M. J. Golecki asserts it "the risk is that under such circumstances the written or oral justification of a judgement can easily become nothing more than a veil that conceals the true motives behind the decision" (p.6). This analysis of judicial reasoning could be made more elaborate paying more attention to the impact of emotions on the decision-making process.

The notion of quality in the field of lay justice has rarely been examined by the doctrine. Attila Bado asserts that balance is required in a court in which lay justice is being exercised. The author reveals the relationship between lay participation and the quality of justice by collecting classic arguments establishing lay participation in dispensing justice and subjecting them to critical analysis. According to the author, "the societal need can clearly be observed to be under the influence of rewarding or harrowing historical experiences regarding lay judges or the purported effect exerted on historical processes by lay judges" (p.85). To explicate that, the author takes the examples of the English jury and the United States jury system. The author examines the uncertainties of judicial reasoning in the light of the importance of time and place and changing function.

Delving into the issue of the measurement of the quality of judicial reasoning is a daunting task. According to Matyas Bencze, it is possible to evaluate the quality of judicial reasoning¹ by using methods that can produce exact indicators. In other words, the quality of justification is measurable. In this chapter, the opportunities for the quality control of judicial reasoning are summarized. His hypothesis is that it does make sense to check the quality of the written justification separately from other components of the judgment. However, as the author concludes "one cannot find universal standards of correctness of justification". The challenge, then, is to find reliable quality indicators that respect judicial independence. Here, one minor criticism may be permitted. In an analysis of this kind, it would have been interesting to provide more details on quality indicators.

Each legal system has its own particularities. Furthermore, there is no uniformization in the benchmarks worked out for the assessment of the quality of judicial reasoning. That is why it is interesting to learn more about what is going on in other countries. Gar Y. Ng looks at the theoretical and practical foundations for the quality of judicial reasoning by taking England and Wales as examples. The author focuses on the question of whether there are criticisms on the quality of judicial reasoning and their source, and whether quality management can help to alleviate these critiques

¹ The quality of judicial reasoning is understood here as a written justification of a court judgment.

without being in breach of judicial independence (p. 103). Francesco Contini moves the discussion with the question of judicial quality in Italy considering the principles and values that should underpin the functioning of judicial institutions. The three fundamental principles considered by the author are the rule of law, the rule of economics, and the legitimacy of justice institutions. In addition to that, the author identifies some innovative practices to evaluate and improve the quality of justice as joint programmes in which practitioners work together to redesign common judicial practices at court level. However, it is a matter of regret that this chapter does not include more information on these joint programmes. In the chapter on the Quality of Adjudication, Emmanuel Jeuland, tell us that the quality of justice is not really assessed in France. Only quantity seems to matter. In a context where the policy of numbers has become a vital obsession everywhere, according to the author, “lay judges must be better educated, statistics must be improved, and satisfaction surveys must be made on a regular basis” (p.141). Additionally, he recommends that the judgment must be clear and must be explained to the parties and that “the reasoning must be understood and not be stereotyped”.

In Finland, the quality of judicial reasoning, as with the role of the judge, is controlled by the constitution. In fact, as Markku Kiikeri asserts it, “there is a role for the Parliamentary Ombudsman and the Advocate General in Finland to provide certain checks, but never on the quality of judgments”. Markku Kiikeri analyzes and describes the way the quality of legal decisions has been conceived and regulated by the Finnish judiciary and legal scholars within the Finnish legal order and legal system in general. The author does that by categorizing and examining the nature of various quality criteria within a methodological framework. Finally, he critically evaluates the prevailing Finnish doctrine of legal sources and proposes more principled approach to legal decision-making and judicial motivation (p.155). According to Zdenek Kuhn, the idea of “quality control of judicial reasoning’ is in the Czech legal culture in conflict with the separation of powers and judicial independence if utilized by the Ministry of Justice in disciplinary proceedings (p.173). The author focuses on the beginning of the 21st century when the Czech Republic did not even have a single ideal of judicial reasoning which would unite the constitutional, administrative, and general judiciary.

A. Kovacs, M. Bencze and Z. Zodi provide deeper insight into what, in some studies, is just a listing of indicators. The authors consider the possible impact of additional indicators which may give insight into the quality of judicial reasoning. The authors draw the unsurprising conclusion that the question remains whether these newly introduced instruments can be readily incorporated into the process of quality assessment (p. 187).

The issue of judicial reasoning within supranational courts has rarely been addressed. It is therefore exceedingly difficult to capture the definition of the quality of justice within international courts. In this book, three authors provide an interesting analysis. Marjan Ajevski analyzes in what way the judgements of the international criminal courts (ICCs) have become a judge made law in terms of the quality of their reasoning. In so doing, he analyses the criticisms that have been raised in terms of their interpretation and reasoning. The author concludes that it is hard to give an assessment of the quality of judicial reasoning in international criminal courts because of their “ad hoc-ishness” (p. 207). According to him, “it might be a bit too early to issue a concrete judgment on the quality of reasoning at the ICC”.

Gerard Conway analyzes the quality of the legal reasoning of the CJEU from an internal legal perspective. The author looks at the impact of the Lisbon Treaty and Fiscal Compact; recent scholarship; and the broader political context in which the Court operates. The author concludes that “characterizing the quality of the Court depends upon the conception of quality employed and that process-oriented and consequentialist justification can be contrasted in the institutional context of courts” (p. 225). At a time when the legitimacy of the ECtHR is now in question, David T. Bjorgvinsson shares a few thoughts on legal reasoning in the case law of the ECtHR. The author disputes “the desirability of consistency in court practice, which, if not respected, may negatively affect public confidence in the judicial system” (p. 251).

It is undeniable that the traditional function for judging is to redress a wrong cause by a violation of a legally authorized standard. However, it must be said, the issue of the quality of judicial reasoning is very complex mainly because the functions of judicial reasoning are not always the same. In fact, they depend upon the needs of a society at a given time. The sole style of legal reasoning is from case to case. This book makes the topic more accessible to the average reader.

With a subject matter such as the quality of judicial reasoning, it is quite easy for a book to be sidetracked into a discussion of theoretical issues which often tends to obfuscate rather than explain. This book does not fall into that trap. It succeeds in explaining much of the theoretical context, without unduly prolonging the discussion in that area. As it stands, the book provides a most valuable contribution to the understanding of this central but complicated and sometimes enigmatic subject matter.

The construction of the book meshes well with its organization and lends itself successfully to the study of the quality of the judicial reasoning. Each chapter is completed by a thorough bibliography. The book is well-referenced, making skillful use of complex notions like “benchmarking”, “performance indicators”, “inputs” and “outputs”. In addition to that, this book achieves an admirable level of analysis of the various complexities attending the quality of judicial reasoning. It is comprehensive in its treatment and easy to read.

COMPETING INTERESTS

The author has no competing interests to declare.

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