

Some Thoughts on Judges' Decision-making

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1	Introduction	78
2	What Actually Happens in Court?	78
3	The Analogy from the Theory of Science	79
4	The Context of Discovery	79
5	The Context of Justification	81
6	The Reasons as Description of the Decision Process	82
7	The Reasons a Justification of the Judgment	82
8	Rational Reasons	84
9	Some Critical Voices	85
10	The Sociology of Knowledge Analogy	86

1 Introduction

It has occasionally been stated in the legal debate that the decision or verdict in a judgment is decided before the motivations and reasons therefore are articulated. The conclusion is manifested before its premises are formulated. The idea could be that the judges – one judge rarely decides a case in most civil law legal systems – find the decision intuitively or by a hunch without having thought of the reasons for it. One could possibly imagine that the judges of a case would argue: “X is the only reasonable outcome”. This without the judges having contemplated on the reason why that particular outcome would be the only reasonable one. Perhaps the judges might have thoughts on reasons which are irrelevant from a legal standpoint, but not on various legally relevant reasons which constitute the basis for the judgment

I would forthwith like to try to explain some typical characteristics of the legal decision-making process and then indicate some ways to analyze the reasons and finally observe what it can mean that the decision could come “before” the motivations or reasons for the decision.

2 What Actually Happens in Court?

The prosecutor’s submission in criminal cases is primarily a description of the alleged criminal act which he must prove and in civil cases the plaintiff must specify the relief sought and the grounds therefore from which the court may not deviate. This in itself constrains the judges. Thus the court has before it a detailed and precise realm of inquiry. Naturally, the judges then prepare themselves by studying the materials relevant to the particular problem at hand. In collegial courts – especially appellate and supreme courts – the case is prepared for a decision by one of the judges or some other court-appointed officer through the preparation of a brief setting out any relevant legal sources on which the case may be decided. Lower court(s’) judgment may also be appraised at this stage. Thus, already prior to the main or oral hearing, the judges will often have formulated a hypothesis regarding relevant reasons and a hypothetical outcome based on precedents, general principles, legal doctrine or preparatory legislative materials. If this were not the case it would be difficult to appraise the relevancy of the facts which, according to the hypothesis or its antithesis, are to be considered as facts of law or evidence. The court merely accedes to or rejects it. It is only a question of the court saying yes or no, in full or in part, to the prosecutor’s or plaintiffs submissions. Possible reasons/interpretations are normally known to and considered by both parties and the court. One could possibly concur with MacCormick in that the plaintiff in the case attempts to construct a syllogism, *i.e.*, the grounds for the claim comprise a constellation of facts which correlates with the requisite components of the legal rule in question.¹ After having heard the parties the court then

¹ MacCormick, Neil, *The Reasons of Judgment in the Common Law*, p. 177 et seq. La motivations des décisions de justice. Etudes publiées par Chaim Perelman et Paul Fortier. Bruxelles 1978.

appraises whether the plaintiff has succeeded or not, in the latter case either in the sense that the relevant legal rule is found to have a content different from what the plaintiff assumed or that the asserted constellation of facts has not been proven.

3 The Analogy from the Theory of Science

The theory of science utilizes a well known distinction between context of discovery and context of justification. The former concerns the question of how a scientist has come to formulate a theory and the latter addresses the problem of the scientific justification of that theory. The context of discovery hence concerns the psychological and sociological processes that lead to the solution/theory. It is a controversial question whether there also exists a “logic of discovery” – a logical means to achieve the discovery.² The context of justification concerns how the scientist within his scientific field defends the theory. In that context it is obvious that, *i. a.*, various logical arguments play important roles. The conceptualization of these contexts evolved in the theory of science foremost as an epistemological tool. It was not intended to reflect empirical matters/processes.³

4 The Context of Discovery

Hempel addresses the context of discovery with the following example:

“The chemist Kekule tells, for example, that he had for a long time unsuccessfully attempted to find a structural formula for the benzol molecule when, during an evening in the year 1865, he found the solution to his problem while dozing off in front of the fireplace. When he stared into the flames, he thought he saw atoms dance in snake-like formations. Suddenly the snakes form a ring by gripping their own tails and then twirling deceptively before him. Kekule wakes up with a twitch: he had come across the now famous and well-known idea of representing the molecular structure of benzol by a hexagonal ring. He spent the rest of the night working out the consequences of this hypothesis.”⁴

2 Cf. Hanson, Norwood, Russell, *Patterns of Discovery*, Cambridge 1979 and. Popper, Karl R. *The Logic of Scientific Discovery*. London 1968.

3 Wolenski, Jan, *Context of Discovery, Context of Justification, and Analysis of Judicial Decisions*, p. 115 et seq. in, Pezcenik, Aleksander and Uusitalo, Jyrki (eds.) *Reasoning on Legal reasoning*, Vamala 1979.

4 Hempel, Carl G. *Philosophy of Natural Science*. Prentice-Hall Inc. 1966, p.16. See also Golding, Martin P. *Discovery and Justification in Science and Law*, p. 295 et seq. in Pecenic A., Lindahl, L. and Roermund, B. van *Theory of Legal Science*, (eds.), D. Reidel Publ. Co. Dortmund/Boston/Lancaster 1984.

It may be that similar processes occur among judges, or all human beings for that matter.⁵ However, it is obvious that Kekule's dream could not have come to just anybody, at least not with the implications that it had. Kekule's knowledge and thinking comprised a necessary context. Hanson has claimed that there actually is a logical pattern in the context of discovery.⁶ Judicial decision-making is based on both theoretical propositions and norms such as *e.g.*, genuine and descriptive juridical propositions. The idea of a logical pattern is therefore not applicable in exactly the same way in the judicial decision-making process. However, there are grounds for making an interesting comparison.

According to Polanyi one could speak of tacit and focal knowledge.⁷ The tacit knowledge exists at the subject which is non-articulated and is a condition for utilization of focal knowledge. Tacit knowledge operates in a given situation as background knowledge.⁸ Every discovery process relies on tacit knowledge, states Bertil Rolf, and the mapping of reality is tacitly compelled from a background of knowledge and proficiency.⁹

As regards the judge, Esser has spoken of the judge's "Vorverständnis" by which is meant the judge's "predispositions, preconceptions, possibly even intuition or hunch",¹⁰ The judge has acquired this disposition or orientation in various ways, through legal studies and the identification of working modes of courts.¹¹ Most important of all is, however, the particular cases the judge works on.¹² Also, language itself conveys specific values, everyday language as well as technical legal terminology. Other things also become part of the role as citizen and jurist and is gradually internalized "so as to become part of the individual's very character."¹³ The legal system's traditional concepts comprise a crystallization of values that prior generations have acquired and developed as answers to problems – and they constitute guidelines for the judge.¹⁴ There is hardly anything strange about this. It may well be self-evident that the judge does not approach his profession as a judicial *tabula rasa*. The judge is directed

5 "My most influential pronouncement is found in a passage inserted after I had written the main judgment, which came to me in my bath". This passage is found in a speech by Lord Wilberforce, House of Lords.

6 Hanson, *op.cit.*

7 See Polanyi, Michael, *Personal Knowledge*. New York 1964 and the same author's *Knowledge and Being* (Part Three: Tacit knowledge). London 1969 as well as Rolf, Bertil *Personlig kunskap och kulturförmedlingens villkor*. Forskning och utbildning 1990:2, p. 17 et seq.

8 Swedish: "kringvetande." Rolf *op.cit.*

9 *Ibid.* Cf. Ryle, Gilbert, *The Concept of Mind* (II Knowing How and Knowing That, p. 26 et seq.) Penguin Books 1968.

10 Prott, Kyndel V. *Updating the Judicial "Hunch": Essers Cocept of Judicial Predispositions*. The American Journal of Comparative Law, Volume 26 1978, p. 461et seq.

11 *Ibid.*, p. 463.

12 *Ibid.*

13 *Ibid.*

14 *Ibid.*, p. 465.

by his “Vorverständnis” and can thereby orientate himself in the judicial landscape.¹⁵ In addition to this comes the concrete and specific preliminary work in each individual case. The judicial thinking in “hard cases” resembles in many ways the position-taking process in matters of ethics.¹⁶ It can therefore be enlightening to point to a significant similarity. Prawitz discusses moral and logical propositions’ truthfulness.¹⁷ In this context he means that we often argue in the same way when we take positions on values and on assertions of a logical character. Sometimes a principle can determine the particular result and sometimes a result in a particular case will make us modify a principle. We strive to achieve a “reflective equilibrium” – a balanced position.¹⁸ Prawitz’ thesis can be compared to what below is called a feed-back between reasons and decision. A reciprocal action occurs and neither reasons nor decision can be seen as primary or secondary. Because legal thinking includes, *i.a.*, norms relating to legal sources and methods, the scope for modifications of principles is much more limited than in the purely ethical sphere. I will let it suffice to refer to the court’s practical work and the judge’s “Vorverständnis” to make it probable that also a context of discovery to a significant degree can be a pursuit of legal knowledge.

5 The Context of Justification

The theoretical judicial equivalence to the context of justification will relate to the reasons for decision as presented in the written judgment or opinion. In this context, the issue concerns primarily an examination of the validity and tenability of the reasons for decision.¹⁹ Issues of justification and rationality belong according to this terminology to the context of legitimation and concern the motivation as a form of justification. I will here let it suffice with a simplified and summarized analysis.²⁰

As a concept, justification has two sides; the internal and external. The internal justification concerns the relationship on the one hand between legal facts and the legal norm as premises and on the other the decision and the decision’s conclusion. If the conclusion follows from the premises, the decision

15 Cf. Illum, Knud, *Some Reflections on the Method of Legal Science and Reasoning*, p. 49 et seq. Scandinavian Studies in Law 1968. Uppsala 1968.

16 Peczenik Aleksander et al., *Juridisk argumentation – en lärobok i allmän rättslära*, Lund 1990, p. 58 et seq.

17 Prawitz, Dag *Om moraliska och logiska satsers sanning*, pp. 144-155. En filosofibok tillägnad Anders Wedberg. Stockholm 1978.

18 *Ibid.*, p. 153.

19 Cf. Bergholtz, Gunnar, *Skäl och orsaker i samband med rättsliga avgöranden*. Tidskrift för rättssociologi 1983/84, p. 277 et seq.

20 See also, e.g., Alexy, Robert, *Theorie der juristischen Argumentation* (p. 273 et seq. 1. Die interne Rechtfertigung, 2. Die externe Rechtfertigung). Frankfurt am Main 1978 and Wroblewski, Jerzy, *Meaning and Truth in Judicial Decision*, (ed. Aulis Aarnio). Helsinki 1979.

is internally justified. *E.g.*, if a plaintiff seeks the legal entitlement to break a purchase of goods contract on the grounds that the goods are damaged, that particular remedy must, according to Swedish law of sales, be statutory allowed and follow from the given facts of the particular case at hand. In the reasons, the court concludes that the goods are defective and that the defect constitutes grounds according to the law of sales to break the contract. One who reads the court's reasons thus sees that the facts of the case compared with the rules of the applicable statute as stated in the judgment give rise to the particular remedy. The external justification concerns the question of the correctness of the norms which constitute the premises for the deduction. Here it may, *e.g.*, be questioned whether the legal rule relied upon, as interpreted, is applicable. It must thus be proved that the legal parts of the premises are good law and that they can and should be applicable. Here the court ought to explain in the reasons why the above exemplified rule of law is applicable. Most common are references to sources of law such as precedents and *travaux préparatoires*. If the premises are deemed acceptable and the decision follows from them, the decision is both internally and externally justified.

For the sake of clarity, it should also be noted that a justified judgment is equivalent to a rational judgment.

6 The Reasons as Description of the Decision Process

To what extent does the reasoning describe the thought processes of the judge or his course toward the judgment? It is evident that in a complicated case, *e.g.*, in an appellate court, where the judges may deliberate on a case for several weeks after a hearing, any introspection of a biographical nature concerning the context of discovery is neither possible nor desirable. If a particular judge who is preparing the case for decision gets stuck, but one night has a dream in which he gets associations which point out something relevant for the decision of the case, that mental process ought not become a part of the reasons of the judgment. The reasons can merely constitute a result of the mental process. On the other hand, the character of the practical work of the court as well as the judge's "Vorverständnis" cause the decision process to occur within the framework of the law.

7 The Reasons a Justification of the Judgment

Deliberation and the actual writing of a judgment do not as a rule give rise to discussions of a radically different nature than what is contained in the reasons. One must consider that the case has been prepared and the parties have discussed issues in legally relevant terms and the judgment will also be written in that way. What makes the issue intangible is that deliberations are secret. It would also be very strange if a judge, entrusted to prepare the case for decision in a supreme or appellate court, concurrent with the presentation of a proposed decision and the

grounds therefore, did not reason along the lines expressed in his written preliminary legal findings.

It can obviously occur that the court does not fully explain its reasoning in the reasons, possibly out of reluctance to entrench itself in a position which it subsequently must derogate from in light of a different case. Nor is it excluded that a bad or incorrect judgment will be written. Such judgments can possibly give the appearance that the reasons so to speak came afterwards. If judges who work under harsh time limitations, which is currently the case, pronounce judgment right after the hearing, the case can on second thought be found to be less well considered and then the reasons will naturally not be so good.

Lee brings up a couple of cases from England. An important decision in a case involving schools was of such character that an answer must necessarily be given before the start of the school semester, and this resulted in less than convincing reasons.²¹ The actual decision was then probably not dealt with particularly thoroughly. Lack of time explains, according to Lee, “the practice of deciding first and explaining later.”²² Lord Denning explained his “unguarded statements” in a case referring to the fact that the judgment was pronounced *ex tempore*.²³

In these described situations one might say that the judgments were not well founded, but that issue could hardly be of principal importance for the question I am addressing.

Almost all Swedish appellate courts, and in many cases district courts, pronounce judgment after a certain time. During the time between hearing and judgment – commonly one to six weeks – various lines of reasoning and legal findings can be actualized in the process. In the Swedish Parliament’s 1984/85 session a bill was introduced (concerning non-professional judge’s liability) which according to the drafters, *i.a.*, sought to increase “democracy” in court. The drafters mentioned two ways to achieve this aim. Either a recording clerk – through means common in local governmental bodies – could draw up a decision-report based on the minutes which then is verified. Another way was considered to be that the non-professional judges sign the judgment. The various committees that commented on the bill all rejected – some with very irritated wording – the drafters proposals.²⁴ To verify directly after the hearing, through the minutes, the judgment’s reasons was unworkable, considering that the reasons for the decision must be thoroughly deliberated upon, and that in some cases, when writing the judgment, it could be necessary to reconsider the decision. In those cases, it would apparently not be enough with the deliberation that has taken place between the professional and the non-professional judges.

Swedish judges, as well as judges from *e.g.*, the USA, Canada and France, have born witness to the fact that the actual writing of the reasons have caused

21 Lee, Simon, *Judging judges*, London/Boston 1989, p. 42.

22 *Ibid.*, p. 43.

23 *Ibid.*, p. 43-44.

24 JuU 1985/86:4, p. 3 et seq.

them to change their opinion of the decision.²⁵ The American legal realist and judge Jerome Frank has *e.g.*, stated that:

“Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. So too, a judge inclined to decide a case in a certain way may discover that his decision won't write.”²⁶

Eckhoff and Sundby talk about feed-back in the decision process and criticize the position that one can in a distinct way differentiate between reaching a position and justifying it.²⁷ Further more they mean that one might “say that at the same time as the premises give cause to the conclusion, it gives cause to the choice and form of the premises”.²⁸ The description above thus has the support of, *i.a.*, statements from judges.

The feed-back between the reasons and the decision per se is, *i.a.*, of such nature that a solution which does not allow itself to be justified according to common sense must be discarded. A few words on what then will be the result must here nonetheless be intercalated – a decision that appears wholly unreasonable is discarded and reasons are then sought for a contrary solution. This is surely the choice the court has – to assert or dismiss.²⁹ In such situations it is sometimes stated that the decision “steers” the reasons. However, the reasons nevertheless exhibit a defense of the decision, *e.g.*, why a particular rule of law has been modified by the court. So long as the court fulfills its obligation to state reasons, this does not constitute a ground for objections. What is at issue is the judgment as a finished product. During the work with it, hypothetical reasons and findings may naturally arise, but the sequences of mental processes while working on the judgment are of no importance as regards the justification of the result.

8 Rational Reasons

The preceding presentation has attempted to show that the practical work in the courts and the judge's “Vorverständnis” point to a process of discovery that is contained, possibly broadly, within a legal framework nevertheless. In that way the judicial decision is simpler and less creative than the scientific context of discovery. The work with the judgment moreover shows that reasons and decisions are considered in a reciprocal context. Reason and decision should exhibit congruency and hence it is the entirety that counts. What can come first,

25 Bergholtz, Gunnar, *Ratio et Auctoritas, Ett komparativrättsligt bidrag till frågan om domsmotiveringens betydelse främst i tvistemål*. Lund 1987, p. 376-381.

26 *Ibid.*, p. 379.

27 Eckhoff, Torstein and Sundby, Nils Kristian *Rettsystemer*. Oslo 1976, p. 218-220.

28 *Ibid.*, p. 220 (author's translation).

29 But compare sentencing and choice of sanctions and other cases less of an either – or alternative. For such cases the discussion should be modified *mutatis mutandis*.

“intuitions” or ideas about decision or motivation, can hardly be unraveled and is of little significance. The process of feed-back between motivation and decision indicate that such a line of inquiry is faulted. However, it could well be a requirement that the judgment, in the precedingly submitted sense, is rational. If reasons and decision comply with requirements of consistency and coherency, and if the judgment can be said to be internally and externally justified, the critique misses the mark.

9 Some Critical Voices

Strömholm has taken the position that the reasons for decision do not provide a historically correct account of how the judge comes to the result:

“Worse, it could appear that reasons – which administrators of justice often clearly state – do not constitute any historically correct accounts of how a particular result was reached. The ‘decision’ in a judgment can have been formulated long before the reasons came into being, and it could be the result of intuitive considerations and positions, which are not at all accounted for in the reasons”³⁰

Strömholm has in another context declared:

“The parties of the case are probably prepared to accept the authority of the law, but it is harder for them to accept a decision that is based on and openly states the judge’s values. It could lie within easy reach that the judge attempts to avoid criticism by setting out the path traveled, when reaching the decision as though he all along followed a marked path.”³¹

Strömberg states that a judgment created by subsuming facts under a particular rule can constitute a reversed reasoning.³² This happens when the desired decision affects the rule formulation in the justification. Hence Strömberg concludes “that it finally does not become a question of deduction but one of taking a practical position.”³³ This would then be disguised by dressing it in the cloth of logical deduction.³⁴ However, one must remember that Strömberg speaks of the written opinion.

Strömholm’s criticism hardly hits any mark. Discussions and thoughts (*i.a.*, thought processes and dreams) during the actual work with the judgment can, as earlier mentioned, only to a lesser extent be set out in the reasons. When

30 Strömholm, Stig, *Rätt, rättskällor och rättstillämpning*. Stockholm 1981, p. 358 (author’s translation).

31 Strömholm, Stig, *Allmän rättslära*. Stockholm 1987, p. 75 (author’s translation).

32 Strömberg, Tore, *Inledning till den allmänna rättsläran*, 7th ed. Lund 1978, p.187-188 (author’s translation).

33 *Ibid.*

34 *Ibid.*

Strömholm speaks of the parties' deference to the authority of the law, that must refer to older conditions of society. One ought also to remember that the parties are usually assisted by legally trained counsel. Moreover, Strömholm's criticism could also be perceived as if it were better that the context of discovery replaced the judge's own control through the actual writing of the judgment.

As to Strömberg, he assails the written reasons. It is surely those, through incomplete reasoning, that make the impression of reversed reasoning. In this regard, one could then agree with Strömberg that a judgment with incomplete reasons are insufficient as regards rational justification.³⁵

10 The Sociology of Knowledge Analogy³⁶

It is not very farfetched to think that the critique of judgments and judges often attempts to show that there are reasons or causes behind a judgment which are not part of what is legally relevant. It could henceforth be appropriate to make a comparison with the way of looking at the matter from the standpoint of sociology of knowledge.

Sociology of knowledge attempts, *i.a.*, to explain "beliefs" as an empirical problem, *e.g.*, why a scientist holds a particular view. Explanations are sought "in terms of the social situations of believers".³⁷ Laudan further states that an important task for the sociology of knowledge must be to show the roots and origins of every belief that is sought explained.³⁸ He further means that there is a need for a way to identify the situations that are accessible to a sociological analysis.³⁹ Evidently tensions between rationality and sociological explanation can here arise. Here Laudan makes an assumption concerning a-rationality (the a-rational assumption) which requires that sociology of knowledge can explain beliefs if and only if these apprehensions cannot be explained "in terms of their rational merit".⁴⁰ This assumption is a statement of principle concerning method and does not constitute any metaphysical doctrine.⁴¹ It is not a presupposition that a belief which can be explained with adequate reasons could not be socially caused. The weaker assumption is instead made that "whenever a belief can be explained by adequate reasons, there is no need for, and little promise in, seeking out alternative explanations in terms of social cause".⁴²

35 Peczenik, Aleksander, *On Law and Reason*. Kluwer 1989, p. 114 et seq.

36 The following is based on Laudan, Larry, *Progress and its problems, Towards a Theory of Scientific Growth (7 Rationality and the Sociology of Knowledge)*. London and Henley 1977.

37 Cf. Bergholtz, *supra* note 19.

38 Laudan, *op. cit.*, p. 199.

39 *Ibid.*

40 *Ibid.*, p. 201.

41 *Ibid.*

42 *Ibid.*, p. 202.

Greatly simplified, one might say: Seek out social causes first when reasons are lacking or when the reasons do not appear to be rational.

Regarding the judicial decision process, one could formulate something akin: Seek out explanations only in those cases where the judgment and its reasons do not appear to be rational. According to the previously asserted definition, a judgment is rational if it is internally and externally legitimized.⁴³ In that way the question of decision and reasons would fall into a perspective that is possible to deal with. Vedung has, regarding the interpretation of political messages, advanced similar thoughts. He too builds on the basis of sociology of knowledge.⁴⁴ With a certain ideally typical simplification one might be so bold as to understand Vedung so that he means that the so called “genetical fallacy deduction” exists if one – as regards political messages – without exploring whether they can fulfill rationality criteria, explores the conditions of the social origin of the message, or assume some other functional perspective. As to “judicial messages” there are in my view strong reasons to also examine the validity of these before seeking out an alternative explanation in terms of genesis.

Finally, I conclude by answering the initially posed question as follows:

1. The judge's “Vorverständnis”, the nature of the practical work in court and the process of feed-back all strongly indicate that the decision in no clear sense can come before the reasons.
2. If the judgment is rational, the question of different sequences of mental processes during the time when the judgment is being practically worked out becomes irrelevant.
3. If the reasons are insufficient or in some other way not rational, the following, *i.a.*, can be of interest. The wording of the justification is insufficient and the mode of presentation lacks “logic” (Strömberg). If a logical deficiency in the mode of presentation exists, that may in turn be due to the judge's lack of time or other reasons for their failure. However, from this does not directly follow that the decision would come before the reasons. Deficiencies in the mode of presentation can, however, be a symptom of something else.

If a judgment is rational despite, *e.g.*, an alleged sociological or other explanation, one could question whether not the instrument of sociology of knowledge should be aimed at the person who asserts that explanation.⁴⁵

It is a most legitimate scientific task to seek out what actually happens in that which seems to happen. If that which seems to happen actually is what happens,

43 See (note 20) previously cited works of Alexy and Wróblewski, and as regards rationality criteria in other respects, Aarnio, Aulis, *The Rational as Reasonable, A Treatise on Legal Justification*. Dordrecht 1987.

44 Vedung, Evert, *Det rationella politiska samtalet*. Stockholm 1977. See especially, p. 113-114 (4.1 Det genetiska felslutet), p. 116 (4.3.1. Mannheims lära om kunskapens ursprung och giltighet), p. 117 (Leder den kunskapsrelativistiska tesen till en logisk paradox?) and p. 118 (Kunskapsrelativismen och det genetiska felslutet).

45 Cf. Vedung, *op. cit.*, p. 117

the pursuit of that which actually happens becomes a vain search for the ghost in the machine.