Articles Studia Iuridica Lublinensia vol. XXIX, 3, 2020
DOI: 10.17951/sil.2020.29.3.55-65

John McClellan Marshall
The Honorable Senior Judge, USA
ORCID: 0000-0003-4504-144X
jmmvmi65@aol.com

Examining Judicial Decision-making: An Axiological Analytical Tool*

Badanie podejmowania decyzji sądowej – aksjologiczne narzędzia analizy

SUMMARY

One thing that is characteristic of the judicial decision-making process regardless of the structure of the judiciary in a particular country or region is that the judge is responsible for making a decision that is both consistent with the law and is such that the people will follow it. This presents a judge with a very complex series of variables that must be considered when formulating a decision. The axiological approach to the analysis of the process and the outcome, the decision if you will, enhances both the quality of the content and the "validity" of the decision.

Keywords: constitution; justice; fairness

Inherent in the process of judicial resolution of disputes is the question of the values that are to be included as part of the analysis of the case. Of necessity, this touches on the philosophical concept of "axiology" in the process of reconciliation of the law as written to the values that it expresses when those values come into contact with the facts of the case. "Axiology" was first used by P. Lapie in 1902[1]. Later, the term was expanded by E. von Hartmann, such that it embraced both ethics

* The paper is a result of cooperation at the realization of the research grant, entitled "Axiological Judicial Discretion. Between Legislator's Intentions and Autonomy of Judiciary" (UMO-2016/21/B. HS5/00139), conducted by L. Leszczyński and financed by Narodowe Centrum Nauki (National Science Center, Poland).

[1] P. Lapie, *Logique de la volonté*, Paris 1902.

and æsthetics[2]. In the discussion of axiology, the ethical component investigates the concept of "right" and "good", while the æsthetic deals with somewhat more subjective issues of "beauty" and "harmony". Obviously, whether discussing axiology in terms of ethics or æsthetics, the philosophical roots extend back to Socrates and Plato. To this extent, an axiological approach to judicial decision-making necessarily brings the philosophical world into what can be termed the "real world" of human day-to-day existence.

The ethical side of the analysis, in focusing on what is "right" or "good", must have an index against which the facts of the case must be measured. By implication, the decision of the judge will likewise have to be measured against some standard. In both cases, that index or standard will likely be expressed in the statutory law that is written by the legislative branch of government pursuant to the foundational document, in the USA it is the Constitution. That, of course, is not a simple process. Indeed, as O. von Bismarck noted, "To retain respect for sausages and laws, one must not watch them in the making". In both cases, the variety of ingredients necessary to culminate in the finished product is remarkably large.

The constitutional structure itself, like sausage, is the product of many varying influences that come together at a particular time in the history of a country to reflect the societal need for some stability in the government. At the threshold then, the form of the government would be a factor in the judicial process. For example, in many countries that are nominally democracies, even if there should be a written constitution, the traditional structure is essentially dual in nature. Typically, there is an executive, which may or may not be a head of state who has no real political power, as in the United Kingdom. The other half of the duality is embodied in the legislative branch, often denominated as a parliament. In this format, the prime minister, as the leader of the majority party or the coalition that comprises the majority, is normally the head of government and not the head of state.

A key characteristic of this dual form of government is that the judiciary is viewed as an extension of the legislative branch and does not have the status of an independent, co-equal branch of government. In such a situation, the judges have the responsibility of enforcing the statutes as written and, generally, do not have the power to interpret the statute. In the dual system, often expressed as the "civil law" system, there is no provision for "judicial legislation" in the form of interpretation of a statute or the establishment of precedent, particularly at the trial court level.

Similarly, this lack of flexibility in the judicial process is also the case if the constitution should be one that is not formalized in a single document, such as is found in the United Kingdom. In that case, each statute passed by Parliament becomes part of the "constitution" of the United Kingdom. In such a situation, there can be no judicial review emanating from the judiciary, since there is no standard against

[2] E. von Hartmann, *Grundriss der Axiologie*, Nikosia 1908.

which a statute can be measured except itself. The practical result of this is that the legal structure lacks the ability to evolve with changes in the society without the affirmative action of the legislature. As a result, those countries with a "common law" system inherited from the United Kingdom, with the exception of the United States, are still heavily dependent upon the legislative branch of government for adjusting their "constitution" to meet changes in societal norms and needs.

By contrast, the creation of an independent judiciary as a third, co-equal branch of government in the Constitution of the United States established a unique agency by which statutes could be measured against a standard of constitutionality not exclusively dependent upon the legislature. In the case of *Marbury v. Madison* in 1803, the Supreme Court of the United States declared, "It is emphatically the duty of the Judicial Department to say what the law is"[3]. It is "judicial review" that allows the system from top to bottom to adjust to changes in the societal norms that led to the creation of the Constitution and statutes in the first place.

The process of reconciliation of the various societal influences that would impact the composition of a constitution necessarily reflects the æsthetic aspect of axiological analysis. If a fundamental document or group of documents is to reflect the needs and desires of a random sample of humanity known as a "nation", then a sense of harmony that blends into beauty in the form of ideals is a desirable goal. This can be the result of a political revolution that eliminates a former government and, therefore, needs to be replaced with something else. It can also be a matter of what might be termed "serial constitutions", such as happened in France with three very different republican constitutions from the late 1800s to the present day. Each of these changes, whether revolutionary or serial in origin, reflected the need for "adjustment" in the government so as to be more responsive to public needs. As noted by B. Franklin in 1787, when asked what form of government would come out of the Convention in Philadelphia, he replied, "A republic, if you can keep it".

A further example of the reconciliation of popular ideals and the need to alter the governmental structure to foster those ideals is the 1876 Constitution of the State of Texas. During the 10 years prior to its enactment, Texas had been governed by a governor with wide-ranging powers that were almost dictatorial in the eyes of the people. When the opportunity came to change the constitution, the result was one that vested almost all political power in the popularly elected legislature. The governor has very little authority except the power of appointment to fill vacancies, and his veto of legislative acts is easily overridden by the legislature. It was not until the 1980s that the judiciary in Texas was formally recognized as a co-equal branch of government in this situation, even though it had long functioned as if it were, including the exercise of judicial review.

[3] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

It can be said that the Constitution of the United States and the Bill of Rights represent an attempt by the Framers to create a government that would be acceptable to the populace while at the same time protecting "life, liberty, and the pursuit of happiness" as articulated in the Declaration of Independence. As was pointed out by Justice Benjamin N. Cardozo, "The great generalities of the Constitution have a content and significance that vary from age to age"[4]. It is, therefore, the subjective æsthetic values, e.g. the desire for harmony, embodied in the constitutional structure that allow the decisions of the courts to retain validity in the eyes of the public at large. In other words, the "common law" does not have the ability to exist outside of an independent judiciary that has the authority to evaluate and interpret statutes. Conversely, as noted by Justice Oliver Wendell Holmes, Jr., "The life of the law has not been logic; it has been experience […]"[5]. It is this contrast in philosophies that draws the line between the "civil" and "common law" systems. Simply put, the common law view does not depend upon the legislative branch as the only source of "legislation". In effect, "legislation" is allowed to happen in the normal course of governmental functioning, whether initiated by the executive or legislative branches. Ultimately the "law" is interpreted and implemented by the judiciary in the event of a conflict between a statute and the constitutional norms. The point is that the judicial decision-making process at its most basic must incorporate in the background the societal values expressed in the constitution.

The mechanics of such "judicial legislation" necessarily begins at the trial court level of the judicial system. Generally speaking, the trial court, regardless of the level, will be the embodiment of the judicial system with which most people will come into contact, if at all. In understanding the content of the judicial decision-making process, it is necessary to recognize that courts, particularly trial courts, are unique to the human condition. They do not exist anywhere else in nature. "Justice" in nature is meted out summarily, such as an anthill that kills an intruding ant immediately for the protection of the colony. Because courts are intrinsically human, they are subject to error in the outcome, but the judicial process, whether civil or common law, is designed to facilitate the search for the Truth with a capital "T". The mechanics of this search is encompassed in the phrase "due process", those principles of fundamental fairness that provide legitimacy to the decision that is reached by the court.

Many people will at one time or another come before a municipal court that is responsible for dealing with minor offences, whether it be a barking dog or not obeying a traffic signal. In such a case, the judge will very often hear the evidence by himself, without a jury. At this level, the æsthetic and ethical aspects of judicial decision-making tend to be at their most important. The reason is that the judge

[4] B.N. Cardozo, *The Nature of the Judicial Process*, New Haven 1921, p. 17.

[5] O.W. Holmes, *The Common Law*, Boston 1881, p. 1.

must listen closely and base the decision not only on what is said. Such things as body language, cultural differences that condition the actions of a defendant, and, of course, the societal norms expressed in the constitution are factors in the decision-making process. In such a situation, it may be more important in a given case that the judgement be "fair", rather than strictly "legal", in its content.

For example, in a case involving a fist fight between two people, the state has the responsibility to show that the defendant is the person who violated the law of assault. In criminal cases, that burden is described as "beyond a reasonable doubt". As the case was presented by the state, it appeared that Person "A" was the actor and should be found guilty. After the formal close of the evidence, a voice from the back of the courtroom asked to be heard on this matter. The court allowed it, and the person came forward. It was the mother of Person A. She informed the court that it could not have been "A", because he was with her, but that it was his twin brother "B" who had committed the assault. The court was now confronted with a question of the weight of this testimony, which was considerable, since the mother was not protecting "B". The charge against "A" could not stand in the face of her testimony, so it was dismissed and charges brought against "B". Similarly, in another fist fight case, the municipal court granted a finding of guilt against the actor, but, rather than assess a simple fine for his actions, required him to pay the dental bills for repairing the teeth that he had knocked out. It is clear that at such a basic level of human interaction, the judicial decision-making process can have a focus based in the æsthetics more than the strict letter of the law as a function of what is most likely to be in "harmony" with the societal value of "fairness".

That said, regardless of the level of court with which a person comes into contact, "Justice", as the consequence of the search for Truth, is a key concept partaking of both æsthetics and ethics when seen in the axiological context. Put another way, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"[6].

When a claim is brought to a higher court, it becomes the function of the judge or jury to listen to the evidence and ultimately apply the law to the facts. Indeed, it is in this portion of the process that the "ethical" aspects of an axiological analysis come to the fore. The trial court is, first and foremost, concerned with the determination of the "right" or "wrong" of the case before it. At its most basic, this is the essence of the judicial decision-making process. Of course, what happens is considerably more complex, regardless of whether the court is in a "civil" or "common law" jurisdiction and without regard to whether the case is a civil or criminal one.

[6] Lord Hewart, CJ, *R v. Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

In a common law jurisdiction, a civil case is initiated by the filing of a petition by the plaintiff. This document normally contains a summary of the factual allegations that the plaintiff expects to prove. If successful, then the plaintiff will recover a judgement against the defendant. Once served with the petition, the defendant has the opportunity to present a statement of the reasons why he should not be held liable to the plaintiff. In a criminal matter, the procedure is essentially the same. The state presents an indictment charging the defendant with an offence, and the defendant enters a plea in response. Normally, that plea would be "not guilty", which effectively puts the burden on the state as the plaintiff to establish the guilt of the defendant. Normally, each side is represented by an attorney, which underlies what is referred to as the "adversarial system".

In the adversarial system, each side has the opportunity to bring to the court the evidence that it believes will best support its side of the case. Integral to this effort is what is called "discovery". This is a pretrial process in which the attorneies make inquiries of each other as to the facts that the opponent is relying upon to support that side of the case. This takes place outside the presence of the court except in limited circumstances, such as claims of attorney-client privilege, which would excuse disclosure of the information. The object of the discovery process of to obtain factually based evidence that, when presented to the court or jury, will foster an outcome that is "true". In the axiological context, this would represent the ethical outcome of "right" within the definitions applied to the judicial system.

In the presentation of the evidence to the court or jury, the attorney for the plaintiff goes first. Witnesses are presented who testify under oath as to what they saw, smelled, felt, or heard. In this process, they will identify documents or artifacts that pertain to the case. During the course of the trial, both sides will have the opportunity to object to testimony or evidence offered by the opponent, and it will be the responsibility of the judge to rule upon the admissibility *vel non* of the evidence. Just as in the case of the judgement itself, the rulings of the court during the trial are subject to many factors, not the least of which is the question of "right" or "wrong". Once a witness has exhausted his information, the opposing lawyer has the opportunity to cross-examine him or her. This is the key to the ethical side of the decision-making process, as it ferrets out truth from untruth and, thus, "right" from "wrong". It is also the mechanism by which the accuracy of the perceptions of the witness can be tested. In some cases, it can lead to a direct attack on the veracity of the witness if it should appear that he or she simply was not at the place of the event or has made up a story to help one side or the other. Of course, in that event, the witness will have perjured himself and may now be liable for criminal prosecution. The effect on the case of perjury or testimony that simply lacks credibility is obvious. Once the plaintiff has concluded its presentation, the defendant has an opportunity to present evidence on his or her side of the case, subject of course to cross-examination.

When both sides have concluded their presentations, the case then goes to the "trier of fact", the judge or the jury, for the determination of the "truth". It is in this process that not only is the veracity of the witnesses considered, but their demeanor on the witness stand. Were they hostile, relaxed, confident, evasive or prompt in answering, clear-headed or vague? As imprecise as these issues might seem, they would be components of the decision-making process because they condition the clarity of the testimony. Once that clarity has been established, then the judge or the jury will have the necessary foundation for the decision to be made because that helps with the æsthetic component of the outcome, i.e. harmony, if not beauty. It should be noted that this phase of the decision-making process can be completely perverted if one or more witnesses determine to deliberately lie, but that is relatively rare.

Once the factual basis of the decision has been determined, it remains for the judge to apply the law to the facts as the formal resolution to the dispute called a judgement. The law itself presumes that the judge knows the law to be applied, and that should make it quite simple for a judge to formulate a judgement. If that were true, then the judicial decision-making process would be reduced to what could be termed "mechanical jurisprudence" in which the human factor is almost completely absent[7].

In modern times there has been some discussion of allowing computers or juries composed of experts in the area that is the subject-matter of the case to make the decisions. Such a suggestion negates the essential humanity of the courts as a means of resolving interpersonal disputes between people or as between people and the state. Regardless of the nature of the case, from a simple breach of contract to a major custody of children decision, there is a myriad of factors, many external to the evidence presented, that comes into play for the consideration of the judge.

Perhaps the most important factor in the judicial decision-making process at the conclusion of the trial, indeed throughout the life of the case, is the integrity of the judge. This itself includes such things as knowledge of the substantive law that applies to the case, the procedural requisites, the law of evidence, common sense, and a fundamental concept of "right" and "wrong". If a judge possesses each of these qualities in some degree, then the likelihood of the process being perverted is minimized because the judge can "see it coming" and take steps to prevent a miscarriage of justice. As a whole, these characteristics support a level of fearlessness in a judge that allows him or her to rule without worrying about what the ruling looks like to bystanders. More than a half century ago, a very senior

[7] An example of this problem is most clearly presented in the original *Star Trek*® episode "Court-Martial". In that scenario, the principal "witness" for the prosecution in a criminal case was a computer record that, in fact, had been tampered with. Only a very circuitous and imaginative test of the computer by a non-lawyer uncovered the tampering.

judge summed this up to a very new judge as, "Remember, the function of a judge is to do justice; the function of the attornies is to explain to the rest of the world why it ought to be that way".

Conversely, judges are, after all, human and subject to a "bad day". An uncontested divorce case had a surprise ending on a Friday morning when, having had the lawyer ask the judge to grant the divorce, the judge replied, "Divorce denied!". The client, when informed that she was still married, understandably burst into tears, while her lawyer assured her that this would be set right. On Saturday morning, the lawyer was in his office, preparing papers to go to the appellate court, when the phone rang. It was the judge, whose voice alone contained an apology. He told the lawyer that he was very sorry, that he had had a fight with his wife that morning before court, and hearing a divorce really was not part of his plan for the day. He told the lawyer to save his time and paper and simply send the decree of divorce for him to sign. While the "bad day" can happen, in this case the integrity of the judge came to the fore, and he corrected his error. To this extent, the "bad day" exception is external to the traditional axiological considerations in judicial decision-making.

Similar to the "bad day" exception to traditional axiology is the "silver bullet" exception. Sometimes a case has become sufficiently convoluted, often through bad or incompetent lawyers, that traditional mechanisms either are rendered ineffective, or fail completely, in enabling the judge to resolve the case. With the passage of time in the life of the lawsuit, it can happen that one side or the other moves the court to dispose of the case on any one of several technical, procedural grounds that has little, if anything, to do with the merits of the case[8]. In such a situation, the judge may seize the opportunity to fire a "silver bullet" into the case to prevent its indefinite existence. This can save increased cost to the parties in attorneys fees and to the state in court time. The decision of the judge to apply this rather drastic remedy is highly discretionary with the court and subjects the decision to intense scrutiny by appellate courts. To some extent, though, the judge actually applies an "æsthetic" factor, "harmony" in terms of the decision. When this occurs, it is obvious that the definition of "Justice" can have a pragmatic component that enters the decision-making process without strict regard to "ethics" or "æsthetics", yet is a component of the axiology of the system.

Sometimes the cultural background of a judge may be an issue. This can manifest itself either in a lack of education or conduct on the bench that betrays a lack of awareness of the importance of the office. When conduct is involved, the disturbance in the harmony of the community can create an æsthetic issue in how the quality of the decision is viewed. For example, a criminal judge who, at the conclusion of the evidence, sitting without a jury, takes out a coin and tosses it in

[8] For a discussion of the relationship between the procedural law and the substantive law, see C.E. Clark, *The Handmaid of Justice*, "Washington University Law Quarterly" 1938, Vol. 297.

the air to determine guilt or innocence by "heads or tails" needs to have his or her ethics examined. In the actual case, the judge was removed from the bench.

At the trial court level, it is normally quite rare for any part of the Constitution overtly to be a factor in a decision. That said, if a statute has been held un-Constitutional by the Supreme Court, then the trial court must ignore that statute. Also, sometimes, statutes that were enacted many decades ago may have outlived their usefulness if applied literally in relation to their wording. Candidly, the court may find it appropriate either to ignore them or to adapt them to modern times. For example, a statute that refers to a "horse and wagon" enacted in the 19th century could be applied to an "automobile" in the 21st century and still have some utility. Obviously, this requires some imagination on the part of the trial judge to keep the statute in place without doing violence to its intent.

Without regard to statutory or Constitutional content, societal norms are constantly changing. For example, the definition of "abuse" has expanded and undergone major revision during the past 20 years. It is no longer limited to physical or sexual misconduct on the part of one person's actions against another. In a case in which a small child was taken into custody by child protective services social workers for apparent lack of proper hygiene, the parents were brought to court. The father wore a clean T-shirt and blue jeans, and the mother wore a simple house dress. He was a janitor in one of the public schools, and she cleaned houses for a living. They were sent for psychological evaluation which revealed that he had an IQ of 72, and she had an IQ of 68. The child was normal for his age, and there was no indication that he would not continue to develop normally. The parents were sent to parenting classes to teach them how better to take care of their child. The judge in this case had statutory authority to take the child away from his parents or let him go back. After 6 weeks, during which the parents complied with all of the instructions of the judge, the judge asked the social worker about letting the child go back to his parents. The social worker demurred, saying that the parents simply were not capable in the long run to take care of their child, so it would be better for the child to be taken away. The judge acknowledged that within a very few years the child would probably pass his parents and become the "head of the family", but asked the social worker if it would not be better for the child to be in a home where he was so obviously loved than in a perfect home? The social worker replied, "No. He should be taken…". The judge thanked the social worker and told the state's attorney to prepare paperwork returning the child to his parents that day. Obviously, such a decision had a foundation in the æsthetic side of axiological analysis. It is unlikely that this would have been the result 30 years ago because of the societal norms relating to the standards of what makes a person mentally competent.

Of course, in any human endeavor there can be missteps that lead to errors in the outcome. Axiologically speaking that would be "wrong", both in terms of ethics and æsthetics, and there would need to be a mechanism for correcting such an error.

The appellate court system is that mechanism, and its most basic component is the promotion of "harmony" within the system. The factual basis of the judgement of the lower court is not normally examined unless some of the evidence should be unbelievable as a matter of law (such as the Sun rising in the West on the day of the event). It is normally beyond the province of the appellate courts to re-write the factual findings in the court below unless there was so little evidence to support those findings that to uphold them would not be "just". In such a case, the court would look to see if the judgement could be upheld without that fact, and if so, it would be. If not, then the case would be sent back to the trial court possibly for a new trial. Generally, though, the intermediate appellate court will have the responsibility of upholding the decision of the trial judge unless it contains an error in the application of the law. Just as is the case in the trial court, the appellate court does not normally consider issues of constitutionality of a statute. At the same time, it can consider whether the trial judge correctly applied the statute in relation to the constitution, but that most often is dealt with in an "as written" context. If the trial court has "missed the point", then the appellate court has authority to render the judgement that should have been rendered or remand the case for a new trial.

Similarly, the Constitution itself is subject to some level of interpretation, though normally only by the Supreme Court of the United States. This can occur either in a direct interpretation of the document of an application of it to changed circumstances. An example of this is presented by the Commerce Clause that gives Congress the power to regulate commerce among the states[9]. In 1787, commerce moved primarily by horse and wagon, but by 1824 steamboats had come into existence. A lawsuit questioning whether New York could tax steamboats without Congressional authority was brought to answer the question[10]. The Supreme Court, with Chief Justice John Marshall writing, declared, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution". As a result, the New York statute was struck down as un-Constitutional. It should be noted that this decision from 1824 is the "ethical" basis upon which the federal government regulates railroads, airlines, telephones, radio, and shipping companies to the present day.

Although the philosophy underlying an axiological approach to the analysis of the judicial decision-making process has not been addressed in detail in modern times, it does provide a useful tool in sorting out the issues and the factors that play into the process. What is important to remember, though, is that it is a process the

[9] The United States Constitution – Article I Section 8 (3) states that the United States Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

[10] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

outcome of which is dependent upon many independent factors, both subjective or "æsthetic" and objective "ethical". Regardless of the factors that are applicable to a particular case or the outcome that they produce, it is crucial to the process that the integrity of the content of the decision as articulated by the judge is maintained. This requires that the orders of the court and any opinions issued by the judge are stated in terms that the general public can both understand and identify with. After all, ultimately it is the willingness of the people to obey the orders of the court, even one with which they disagree, that is the foundation of the judicial system and gives it its strength.

REFERENCES

Literature

Cardozo B.N., *The Nature of the Judicial Process*, New Haven 1921.
Clark C.E., *The Handmaid of Justice*, "Washington University Law Quarterly" 1938, Vol. 297.
Holmes O.W., *The Common Law*, Boston 1881.
Lapie P., *Logique de la volonté*, Paris 1902.
Hartmann E. von, *Grundriss der Axiologie*, Nikosia 1908.

Case law

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
Lord Hewart, CJ, *R v. Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

STRESZCZENIE

Jedną z charakterystycznych cech procesu podejmowania decyzji przez sądy, niezależnie od struktury sądownictwa w danym kraju lub regionie, jest odpowiedzialność sędziego za podejmowanie decyzji zgodnej z prawem i zapewniającej przestrzeganie prawa przez jednostki. Sędzia w toku orzekania bierze pod uwagę wiele zmiennych wpływających na treść podejmowanej decyzji. Aksjologiczne podejście do analizy procesu i jego wyniku wpływa zarówno na jakość treści, jak i na „ważność" decyzji.

Słowa kluczowe: konstytucja; sprawiedliwość; uczciwość