Vitalius TUMONIS

DOCTORAL THESIS

Judicial Decision-Making: Interdisciplinary Analysis with Special Reference to International Courts

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Acknowledgements

I would like to thank the Fulbright Program for the grant that took me to the United States. Not only I gained an access to the wealth of literature that is otherwise scarce outside the US, but more importantly it enthused me with interdisciplinary approach.

I would also like to thank my doctoral advisor Professor Saulius Katuoka for his fine guidance which on the one hand pressed for discipline and on the other hand respected and encouraged my creative autonomy.

Abbreviations

AB	Appellate Body of the World Trade Organization
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
ICJ	International Court of Justice
I.C.J.	Reports of the International Court of Justice
ILC	International Law Commission
PCIJ	Permanent Court of International Justice
ICSID	International Centre for Settlement of Investment Disputes
RIAA	Reports of International Arbitral Awards
UN	United Nations
UNRIAA	United Nations Reports of International Arbitral Awards
World Court	International Court of Justice and Permanent Court of International Justice
WTO	World Trade Organization

1. Introduction

1.1 Preface

Rosalyn Higgins, who eventually became a President of the International Court Justice, thus presented the traditional understanding of judicial decision-making in international courts:

> [A]t given moment of time it is the duty of the judge "to apply the law as he finds it." This view, it will be seen, entails the beliefs that law is "rules"; that these rules are "neutral"; that the judiciary is "objective"; and that its prime task is to "apply" rather than to "make" the rules. It is, however, possible to perceive international law in a fundamentally different way ...[1]

This dissertation is about that different way of perceiving judicial decision-making. The central question of this dissertation is how much of judicial decision-making depends on legal reasoning. Do judges, after finding the relevant facts of the case, consult legal rules and then arrive at their decision? Or maybe the equation that the decision equals facts plus rules is merely an illusion? What if instead of consulting legal rules and using logic to solve complex legal problems, judges rely more on intuitive thinking - heuristics or rules of thumb for decision-making? What if heuristic thinking also predisposes them to irrational patterns in their decisions? What if instead of using legal rules to decide their cases, they rather use those rules to justify their decisions and not to arrive at them? What if instead of using only statutory legal rules, judges often rely on policy principles not found in law books?

Realists vs. Formalists. Although the contemporary interdisciplinary research now allows us to come up with better answers to these questions, the questions themselves are relatively old. They have been at the forefront of the debate between the so-called legal realists and legal formalists. Legal Realism, a movement that arose in 1920s and 1930s in the US, challenged the prevailing view that judges are rational decision-makers, who apply only legal rules found in law books to the facts of the case. The realists were a sundry group: there were more differences between some realists than between some realists and formalists. Overall, however, realists asserted that often judges make up their mind about the outcome even before they turn to legal rules; often they will use policy principles and make new law; some realists asserted that judge's personality has more impact than legal rules. After making a decision, judges will justify it with formal legal rules.

For legal formalists, on the other hand, legal rules and logical reasoning are central to judicial decision-making. In more extreme versions of legal formalism, legal rules are the Alpha and Omega – the beginning and the ending of judicial decision-making. Thus, a formalist idea of judging excludes intuitive decision-making, policy considerations, and a great number of other variables.

Realism & Formalism in International Legal Theory. The influence of legal realism went far beyond the US and its influence is much greater than just a theory of judging. It would be only a little exaggeration to say that most international law theories have been offsprings of general theories. Likewise, it is fair to say that at least

[1] Rosalyn Higgins, Policy Considerations and the International Judicial Process, 17 International and Comparative Law Quarterly 58 (1968) p. 58.

until recently, most theories of international adjudication and judicial decision-making had their roots in general theories of judging. Accordingly, theories of formalism and realism clashed not only in the United States and a few other countries where the legal realism was welcomed, but also in international arena. The late Douglas Johnston nicely summarized this development in his *summa* on the history of international legal order:

> [T]he perspective of *legal formalism*, was generally accepted by Western jurists in 1905, even those on the common law side of the tracks within the Anglo-American legal cultures. However, as the United States became the dominant world power in the first half of the 20th century, the emergence of a cultural divergence within the international law community became increasingly evident. Thereafter, as American lawyers became influential in virtually all sectors of world order, the legal formalist ideal of Europe would have to contend with a very different model of law shaped by the inclusiveness of *American legal realism.* The depth of this cultural divide is now a matter of lively debate on both sides of the Atlantic.[2]

1.2 Theses and Structure of the Dissertation

1.2.1 Purpose & Objectives

The main purpose of this dissertation is to determine the importance of various factors in actual decision-making, and in particular whether the traditional understanding of judging as a rule-bound and logical reasoning can explain actual decision making.

The following are the main research objectives:

1. To analyze the general theories of judging so as to determine the prevailing approaches to judicial decision-making.

2. To analyze the empirical research on decision-making to determine whether the judicial decision-making can be considered a distinct mode of decision-making and whether there is any empirical basis for the traditional view of judging as cold, rational, rule-based, logical reasoning.

3. To analyze formal legal rules of public international law and determine whether these could as constraint on judicial latitude if judges preferred to make decisions on other grounds than legal rules.

4. To analyze other possible constraints on judicial creativity, including external and institutional constraints, and determine whether these can effectively curtail judicial latitude.

5. To analyze the role of policy preferences in actual judicial decision-making of international courts and their importance in judicial opinions.

6. Based on the findings about judicial decision-making of international courts, to analyze whether international adjudication should play a central role in interstate dispute settlement.

1.2.2 Theses

1. In the study of judicial decision-making, judicial opinions are poor indicators of actual decision-making. Thus, judges can make decisions on other grounds than formal legal rules and then use formal legal rules merely to justify those decisions.

[2] Douglas M. Johnston, The Historical Foundations of World Order: The Tower and the Arena (Leiden: Martinus Nijhoff Publishers, 2008) p. 687.

2. Judges, like people in general, have preference for intuitive decision-making over rule-based and logical reasoning. Although this intuitive decision-making can be sometimes overruled by logical reasoning, in practice this will rarely happen. Yet, intuitive thinking will be highly efficient and will produce sound judgments most of the time. On the other hand, intuitive thinking will also predispose judges to systemic decision-making errors. Also, contrary to traditional formalistic ideals of judicial decision-making, even when decision-making is characterized by logical reasoning, it will be inseparable from emotions.

3. Overall, legal training or judicial experience in itself will not provide judges with superior decision-making skills, and thus the popular idea of judges as expert decision-makers is erroneous.

4. When judges make decisions on other grounds than formal legal rules, judicial creativity is unlikely to be constrained by these formal rules. First of all, the selection effect will ensure that most cases reaching international courts will revolve around ambiguous facts or ambiguous rules to begin with. Also, judges will seldom have trouble justifying their decisions with formal rules because they will almost always find some competing legal rules that will tally their decision; this is largely because public international law is even more ambiguous than common law systems.

5. Other external or institutional constraints are also unlikely to curb judicial latitude. Deliberative process and collegiality may constrain in some cases and may have no effect in others. The only consistent constraints against arbitrary decisions will be internal constraints, such as internalization of judicial norms and judicial philosophy of individual judges.

6. Specific driving forces behind judicial decisions will be different in each case – it is even possible that in some cases formal legal rules will be the controlling factor. Overall, however, international courts will be equally if not more swayed by various policy principles and in particular by interests of conciliatory justice. It also means that judicial law-making by international courts is inevitable.

7. Policy reasoning, while indispensible for explanations of actual decision-making, should also figure more prominently in written judicial opinions because absence of policy reasoning may alienate a considerable segment of judicial audience.

8. The views that international courts should play a central role in interstate dispute settlement are flawed because they are largely based on erroneous understanding of judicial decision-making. Instead of fixation on international courts, legal scholars and policy-makers should rather accept the limited role of international courts in interstate dispute settlement and focus equally if not more on other forms of dispute settlement, such as conciliation.

1.2.3 Structure

The thesis is broken into two parts. The first part analyzes general theories of judging and empirical research on decision-making in general and judicial decision-making in particular. The second part shows with special reference to international courts and public international law that the strict rule-bound view of the judging is illusory.

Part I: General Theories of Judging and Empirical Research. Chapter 2 introduces the general theoretical debate on the nature of judicial decision-making. Theories of legal formalism and realism have driven theoretical discussions for a long time, and any discussion of judicial decision-making without these two theories would be incomplete.

Chapter 3 draws on the general interdisciplinary research on decision-making. It shows that the deeply-entrenched and the default mode of decision-making relies on heuristics, puts off strictly methodical and logical reasoning, and jumps to conclusions even when only incomplete information is available; this default mode of decision-making also predisposes judges to make erroneous judgments on particular occasions.

Assuming that human decision-making is often irrational, it does not automatically mean that judicial decision-making is also irrational in the same way. It might be, for example, that legal training and specialized legal expertise wards off cognitive biases and other unsound decision-making inclinations. This chapter, accordingly, also analyzes empirical studies of judicial decision-making that show very little difference between lawyers or judges and ordinary subjects.

Part II: International Courts and International Law. Chapter 4 analyzes whether legal rules in international law could act as constraint on judicial creativity. Assuming that judges, including international judges, tend to make decisions not on the basis of formal legal rules but on other grounds, could legal rules nevertheless constrain judicial creativity? If judges could not justify their decisions with some legal rules, they would have to change their decision to find some legal rules that could justify the new decision. In such a way, although judges do not use legal rules to make initial decisions, legal rules would nevertheless constrain their inclination to make decisions based on other grounds. This chapter also analyzes whether there are other potential constraints – external and institutional constraints that could curb judicial creativity.

Chapter 5 shows that international judges do follow some rules, but very often these are not formal legal rules, such as treaties, custom, or precedents. Instead, judges often use policy principles that fit particular political, social, historical contexts of the case. This chapter, among other things, uses conciliatory justice in cases of state responsibility as a case study. It also argues that policy considerations are not only indispensible for actual decision-making, but also should figure prominently in judicial opinions.

Finally, Chapter 6 analyzes what are the implications of these findings on international dispute settlement. Many international law scholars and some policy makers have been fixated on international courts as ideal international dispute settlement mechanisms. One reason is that the promise of international courts is interconnected with the promise of international law over international politics, right over might. This chapter argues that such views are misguided at best, and can be even damaging.

1.3 Methodology

1.3.1 Interdisciplinary Approach

Needless to mention, this work uses all traditional analytic methods, such as logical and linguistic analysis, comparative and systemic analysis, and so on.

In addition to traditional dogmatic methods, this dissertation adopts interdisciplinary approach, which has become invaluable in recent decades. Although many questions analyzed in this dissertation are not new, an interdisciplinary research conducted in the last decades now provides us with better answers. We now have a much better understanding of how and why human decision-making is prone to irrationality and biases. These

findings have already transformed many disciplines. For example, Daniel Kahneman was the first psychologist to receive the Nobel Memorial Prize in Economics in 2002 for his research on judgment and decision-making. Even general public may have a much better understanding of the decision-making thanks to the blossoming and popular literature in the field.[3] Most legal scholars, however, seem to ignore these developments and continue to analyze judicial decision-making through dubious theoretical models.

Accordingly, this thesis relies on interdisciplinary research to show that logical, rational, rule-bound judging is an illusion, and that legal rules can hardly constrain courts. In the first place, this dissertation draws its inspiration from the decision-making scholarship, which unites several disparate disciplines, including psychology, economics, neuroscience, statistics, philosophy, and others. It also uses insights from other disciplines, including economic analysis of law, legal anthropology, and rhetoric.

1.3.2 Qualitative Approach of this Work

This work uses qualitative approach by analyzing select case studies to show how judges decide their cases. Of course, the drawback of this approach is subjectivity: which cases are selected as typifying the issue depends on researcher's subjective perception. Admittedly, this shortcoming comes with a territory - qualitative studies may be indeed subjective or even impressionistic. On the other hand, they provide a more complete and detailed description, not just numerical measurements.

More importantly, as the following section argues, quantitative approach is unsuitable for most international courts. In this context, almost all notable studies of the decision-making and judicial reasoning of international courts have used qualitative approach. The best-known example of this approach is Sir Hersch Lauterpacht's famous *The Development of International Law by the International Court*.[4]

Two qualitative approaches have been used to study judicial reasoning and decision-making of international courts. The first one uses a series of cases studies, typically in chronological order; it does not use different dimensions of decision-making and reasoning.[5] This

[3] *See e.g.* Malcolm Gladwell, Blink: The Power of Thinking Without Thinking (New York: Little, Brown and Company, 2005); Dan Ariely, Predictably Irrational (New York: HarperCollins, 2008); Gerd Gigerenzer, Gut Feelings: The Intelligence of the Unconscious (London: Penguin Books, 2007); Christopher Chabris and Daniel Simons, The Invisible Gorilla: How Our Intuitions Deceive Us (New York: Crown Publishers, 2009); Jonah Lehrer, How We Decide (Boston: Houghton Mifflin Harcourt, 2009); Ori Brafman and Rom Brafman, Sway: The Irresistible Pull of Irrational Behavior (London: Doubleday, 2009).

[4] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons Limited, 1958)

[5] *See e.g.* Ole Spiermann, International Argument in the Permanent Court of International Justice: The Rise of the International Judiciary (Cambridge: Cambridge University Press, 2005); Edward McWhinney, Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-making on the Contemporary International Court (Dordrecht: Nijhoff, 1991).

work follows the second approach, which is not chronological but rather uses qualitative categories in one or several dimensions.[6]

1.3.3 Questionable Value of Quantitative Studies of International Courts

In the last decade, empirical studies of judicial decision-making in domestic courts have mushroomed. This has been particularly notable in the American scholarship. International legal scholarship, however, seems to have been affected by this trend much less. Arguably, even a few quantitative empirical studies of international courts have been of limited use because of their inconclusive proof.[7]

In regards to international courts, quantitative studies give only a false sense of reliability when in fact they are equally subjective. Quantitative empirical studies are unsuitable for international courts for several reasons.

Size of statistical samples. First, a reliable quantitative study should be based on a large sample of cases. For example, American scholars studying judicial decision-making in the appellate courts normally use the US Courts of Appeals Database, which contains about 20,000 cases from 1925 to 1996.[8] Yet, even studies relying on such large sample are criticized because in a given year each circuit court contributes only a small sample of cases and therefore the individual assessment of judges is inaccurate.[9] The output of international courts is significantly smaller. The ICJ, for example, has produced less than 150 cases in over 60 years.[10] Evidently, the quantitative study over such long period and such small sample of cases might mislead more than enlighten; quantitative analysis of shorter periods would be also misleading because of the small sample of cases.

Reliable metrics. Second, quantitative studies have to use reliable metrics.[11] Again, to take the example of the judicial decision-making scholarship in the US, one can

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[6] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons Limited, 1958) Manley O. Hudson, The Permanent Court of International Justice: 1920-1942, A Treatise (New York: Macmillan, 1943) p. 640 ff. For ICSID, *see* Cristoph H. Schreuer, Diversity and Harmonization of Treaty Interpretation in Investment Arbitration, 3 Transnational Dispute Settlement 1 (2006); Ole Kristian Fauchald, The Legal Reasoning of ICSID Tribunals - An Empirical Analysis, 19 European Journal of International Law 301-364 (2008).

[7] *See e.g.* James Meernik, Kimi Lynn King, Geoffrey Dancy, Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National, and International Factors, 86 Social Science Quarterly 683-703 (2005); Sébastien Jodoin, Understanding the Behaviour of International Courts: An Examination of Decision-Making at the ad hoc International Criminal Tribunals, 6 Journal of International Law & International Relations 1 (2010); Eric A. Posner & John C. Yoo, Judicial Independence in International Tribunals, 93 California Law Review 1 (2005); Laurence R. Helfer & Anne-Marie Slaughter, Why States Create International Tribunals: A Response to Professors Posner and Yoo, 93 California Law Review 899 (2005)

[8] Ashlyn K. Kuersten & Donald R. Songer, Decisions on the U.S. Courts of Appeals (New York: Garland Publishers, 2001).

[9] Corey Rayburn Yung, How Judges Decide: A Multidimensional Empirical Typology of Judicial Styles in the Federal Courts, available at <http://ssrn.com/abstract=1758710> (last accessed 15 May 2011) p. 9

[10] The the Court's website indicates that 151 cases entered the General List from May 22, 1947 to May 24, 2011. <http://www.icj-cij.org/docket/index.php?p1=3> (visited on May 24, 2011). Some of the cases that had entered the General List were withdrawn or the Court did not pass the judgment for other reasons. The WTO/GATT is probably an exception in this context because it provides a larger sample of cases.

[11] Gregory C. Sisk and Michael Heise, Judges and Ideology: Public and Academic Debates about Statistical Measures, 99 Northwestern University Law Review 743 (2005)

find reliable metrics because certain standards of judicial review are clearly defined. For example, American federal appellate courts rely on clear standards of deference to lower court judgments; in this context, a judge who regularly disregards lower court judgments can be considered an activist judge.[12] To take another example, the attitudinal model of domestic judicial decision-making can rely on party appointments to determine ideology of judges: if judges were nominated by a Republican president, they are conservative; if they were nominated by a Democrat, they are liberal. Other researchers of US judicial ideology rely on the so-called Martin-Quinn score.[13]

In international judicial decision-making research, it is next to impossible to find reliable metrics. For example, one quantitative study of judicial reasoning of ICSID tribunals suggested three factors to distinguish the legislator-oriented tribunals from the dispute-oriented ones. First, a tribunal deals with the legal interpretation independently of the facts. Second, a tribunal does not restrict its arguments to those presented by the parties to the dispute. Third, a tribunal relies not only those arguments that are strictly necessary to reach a conclusion but also on all the relevant arguments.[14] None of these factors is a reliable metric of judicial activism or legislator-orientation. If a tribunal goes outside arguments presented by the parties to the dispute, it does not follow that it "legislates"; on the contrary, as this dissertation will argue about conciliatory justice, international courts may use unconventional reasoning tactics to satisfy underlying interests of both parties at any cost, not to disregard them.

It is even more implausible to suggest that a tribunal is legislator-oriented if the tribunal deals with the legal interpretation independently of the facts. Such argument is similar to a claim that a person has an inclination to be a vegetarian if she eats her vegetables separate from the other food. A tribunal may discuss facts separately from the law merely because the judges are used to such judicial opinion writing style (which may be part of their domestic judicial tradition), and not because they are legislator-oriented. Overall, such superficial metrics are unreliable at best and heavily misleading at worst.

Value of Quantitative Studies in Certain Fields of International Law. Quantitative studies might be valuable in certain fields. International commercial arbitration is one example. Most claims in international commercial arbitration are monetary, and quantitative studies might reveal some decision-making patterns.[15] Quantitative approach, however, is unsuitable for the most other international courts. For example, in the ICJ, litigants argue all sorts of claims, from territorial boundaries to the unlawful use of force. In this context, quantitative results could be very misleading.

For example, the quantitative studies might suggest that the judicial reasoning of the ICJ is shifting heavily to treaties because the Court prefers to justify its decisions based on

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[12] Corey Rayburn Yung, Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts, 105 Northwestern University Law Review 1 (2011).

[13] Lee Epstein, A.D. Martin, K.M. Quinn, J.A. Segal, Ideological Drift among Supreme Court Justices: Who, When, and How Important?, 101 Northwestern University Law Review 1483–1542 (2007)

[14] Ole Kristian Fauchald, The Legal Reasoning of ICSID Tribunals - An Empirical Analysis, 19 European Journal of International Law 301-364 (2008) p. 307

[15] S. E. Keer and R. W. Naimark, Arbitrators Do Not „Split the Baby": Empirical Research from International Business Arbitration', in C. R. Drahozal and R. W. Naimark (eds.), Towards A Science of International Arbitration: Collected Empirical Research (The Hague: Kluwer Law International, 2005) p. 316.

treaties and not custom or general principles. Yet, it is likely that simply more cases have been brought regarding application and interpretation of treaties and that is all there is to it.

Quantitative Studies and Prediction of Future Votes. Finally, a litmus test of quantitative studies is the prediction of future votes. Thus, a methodologically sound study will not only explain the past judicial behavior, but will also predict future decision-making. Yet again, this is next to impossible in international judicial decision-making research because the number of cases in the same legal categories is infinitesimally small. It might work in such regional courts as the European Court of Human Rights or the European Court of Justice: the same judges handle large number cases that fall in the same legal categories. This is unworkable in the research of typical international courts.

1.4 Terms and Definitions

1.4.1 Reasoning & Decision-making

The term "judicial reasoning" is sometimes used as encompassing everything from logical thinking to general judicial decision-making process to style of arguments that courts use in their judgments. In this work, the term "judicial reasoning" refers to the logical thinking process of drawing conclusions.

The terms judicial opinion, judgment style (style of judgment), or opinion writing style will refer to the arguments that courts use in their judgments.

Decision-making (or judicial decision-making) refers to the general process of reaching conclusion or making choices, that may include logical thinking but is not limited to it.

1.4.2 International Courts

In this work, the term "international courts" refers to inter-State tribunals, such as the International Court of Justice, the Appellate Body of the World Trade Organization, the Law of the Sea Tribunal, and inter-State arbitral tribunals such as the Permanent Court of Arbitration and the Eritrea-Ethiopia Claims Commission.

It excludes regional courts such as the European Court of Human or the European Court of Justice. Although their general judicial-decision making dynamic is the same as in inter-State tribunals or any domestic court for that reason, their applicable law is usually limited. Therefore, it would be wrong to lump them together with interstate tribunals, which usually apply not only the statutory provisions, but also customary law and other sources. In addition, policy principles and strategic considerations that the regional courts follow will differ from those that are relevant to inter-State tribunals.

It also excludes international but not inter-State tribunals, such as mixed arbitration under ICSID or other of the so-called transnational arbitrations. Here again, although the underlying dynamics of judicial decision-making will be the same as in any court, their applicable law and the policy principles that these tribunals follow will be different.

1.5 Review of the Literature and Novelty of the Dissertation

1.5.1 General Literature on Judicial Decision-making

Overall, research on judicial decision-making is still underdeveloped, the American legal scholarship being a notable exception. Legal scholarship in the Continent and other

non-common law countries has shown little willingness to embrace interdisciplinary developments. On the other hand, over the last few decades, this field of study has blossomed in the United States. American legal scholars have been prolific, in both theoretical analysis and empirical research. Not only legal scholars, but also political scientists, sociologists, anthropologists, and other social scientists in the US have analyzed judicial decision-making from several angles. Even here, however, most of the research has focused on the US Supreme Court. Other federal courts, and even more so state courts, received less attention. Moreover, most of the research has centered on attitudinal dimension of decision-making (i.e. political ideology of judges); research on psychology or economic analysis of judicial decision-making is still in the periphery. So it is fair to say that even in the United States, with a few exceptions,[16] the research on judging has plenty of room for development. In many other countries, this field is awaiting to be picked up by legal scholars.

Judge Richard Posner's *How Judges Think* is arguably the most important work that appeared on the topic in the recent years.[17] Posner's work draws heavily on two fields: psychology and economic analysis of law. This dissertation likewise has been inspired by interdisciplinary insights from these two fields.

1.5.2 Literature on Decision-making of International Courts

International law scholars are slow to catch up with their domestic law counterparts. There are, however, plenty of works analyzing personalities of international judges and their judicial philosophies.[18] Some works also consider the role policy principles and

[16] *See e.g.* David E. Klein and Gregory Mitchell (eds.), The Psychology of Judicial Decision Making (American Psychology-Law Society) (New York: Oxford University Press, 2010); Lawrence S. Wrighstman, Judicial Decision Making: Is Psychology Relevant? (New York: Kluwer Academic, 1999).

[17] Richard Posner, How Judges Think (Cambridge: Harvard University Press, 2008).

[18] *See e.g.* Ole Spiermann, International Argument in the Permanent Court of International Justice: The Rise of the International Judiciary (Cambridge: Cambridge University Press, 2005); Shiv R. S. Bedi, The Development of Human Rights Law by the Judges of the International Court of Justice (Oxford: Hart Publishing, 2007); Shabtai Rosenne, Sir Hersch Lauterpacht's Concept of the Task of the International Judge, 55 American Journal of International Law 825 (1961); Gerald Fitzmaurice, Hersch Lauterpacht - The Scholar as Judge - Part I, 37 British Yearbook of International Law 1 (1961); Gerald Fitzmaurice, Hersch Lauterpacht - The Scholar as Judge - Part II, 38 British Yearbook of International Law 1 (1962); Ole Spiermann, Judge Max Huber at the Permanent Court of International Justice, 18 European Journal of International Law 115-133 (2007); Daniel-Erasmus Khan, Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations, 18 European Journal of International Law 145-170 (2007); Philip Couvreur, Charles de Visscher and International Justice, 11 European Journal of International Law 905-938 (2000); John G. Merrills, Judge Sir Gerald Fitzmaurice and the Discipline of International Law: Opinions on the International Court of Justice, 1961-1973 (The Hague: Kluwer Law International, 1998); Katharina Zobel, Judge Alejandro Álvarez at the International Court of Justice (1946–1955): His Theory of a 'New International Law' and Judicial Lawmaking, 19 Leiden Journal of International Law 1017-1040 (2006); José María Ruda,The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice, 3 European Journal of International Law 100-122 (1992); Ole Spiermann, Judge Wang Chung-Hui at the Permanent Court of International Justice, 5 Chinese Journal of International Law 115-128 (2006); James Thuo Gathii, A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias, 21 Leiden Journal of International Law 317-349 (2008); Mark Toufayan, When British Justice (in African colonies) Points Two Ways: On Dualism, Hybridity, and the Genealogy of Juridical Negritude in Taslim Olawale Elias, 21 Leiden Journal of International Law, 377-410 (2008); Karolina Wierczyska, Judge Manfred Lachs and His Role in International Adjudication, 7 Baltic Yearbook of International Law 113-119 (2007).

judicial philosophy.[19] Yet, overall no work comprehensively analyses judicial decision-making of international courts from multiple dimensions.

Most works on the International Court of Justice or other international courts usually consider only what interpretive arguments international courts make, i.e. the formal model of decision-making. In this context, there is abundant literature on international courts and the use of precedent, interpretation of treaties, customary international law, and other formal legal rules.[20] Among the most influential works, Sir Hersch Lauterpacht's *The Development of International Law by the International Court* remains one of the most important works even though it is more than 50 years old;[21] yet, it deals only with the World Court and mostly with the reasoning of the Court - only few passages analyze judicial decision-making. One of the more recent historical works by Spiermann analyses some aspects of the decision-making in the PCIJ, but the analysis is episodic; the bulk of the work concerns the development of the Court and its normative reasoning patterns.[22]

However, in recent years there have been some exceptions. One relatively recent work by a political scientist, a legal scholar, and an anthropologist, analyzes the role of international judges from a non-dogmatic perspective, including the anthropological perspective.[23] Such works, although a welcomed exception, are still rare and are far from extensive or comprehensive.

1.5.3 Novelty of the Thesis

This dissertation does not cover all possible dimensions of judicial decision-making. For example, it largely omits anthropological approaches or international relations and political science analysis of international courts.

Yet, it is the first work of its kind to combine the general empirical research on decision-making and insights from economic analysis of law (strategic theory) with the traditional dogmatic analysis and apply all of this to international courts and international public law. And in doing so, it departs from previous works which focus almost exclusively on dogmatic aspects of judicial decisions – argumentative patterns that international courts use to justify their decisions and types of legal rules they rely on.

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[19] *See e.g.* Rosalyn Higgins, Policy Considerations and the International Judicial Process, 17 International and Comparative Law Quarterly 58 (1968); Edward McWhinney, The International Court of Justice and International Law-making: The Judicial Activism/Self-Restraint Antinomy, 5 Chinese Journal of International Law (2006); Edward McWhinney, The International Court of Justice and the Western Tradition of International Law (Dordrecht: Martinus Nijhoff Publishers, 1987); Edward McWhinney, Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-making on the Contemporary International Court (Dordrecht: Nijhoff, 1991).

[20] *See e.g.* Ole Kristian Fauchald, The Legal Reasoning of ICSID Tribunals - An Empirical Analysis, 19 European Journal of International Law 301-364 (2008); Mohammed Shahabuddeen, Precedent in the World Court (Cambridge: Cambridge University Press, 1996).

[21] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons Limited, 1958).

[22] Ole Spiermann, International Argument in the Permanent Court of International Justice: The Rise of the International Judiciary (Cambridge: Cambridge University Press, 2005).

[23] Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, The International Judge: An Introduction to the Men and Women Who Decide the World's Cases (Massachusets: Brandeis University Press, 2007).

It is also one of the first works to critically relate findings on judicial decision-making with the growing view that international courts are highly desirable and should therefore play the central role in interstate dispute settlement.

1.6 Publication and Approval of Research Findings

The research articles based on this thesis have been published in *Baltic Yearbook of International Law*[24] and *University of Miami International & Comparative Law Review.*[25]

The thesis was approved on September 12, 2012, by International & European Union Law Department of Mykolas Romeris University.

[24] Vitalius Tumonis, The Complications of Conciliatory Judicial Reasoning: Causation Standards and Underlying Policies of State Responsibility, 11 Baltic Yearbook of International Law 135 (2011).

[25] Vitalius Tumonis, Judicial Creativity and Constraint of Legal Rules: Dueling Cannons of International Law, 20 University of Miami International & Comparative Law Review (2012).

PART I: GENERAL THEORIES OF JUDGING AND EMPIRICAL RESEARCH

2. General Theories of Judicial Decision-making

2.1 Introduction to Grand Theories of Judging

Any discussion of decision-making in contemporary courts, whether national or international, would be incomplete without the two grand theories of judging – formalism and realism. The antinomy between these two theories gave birth to most of the later empirical research and theoretical analysis.

The authors of a relatively recent article thus describe the two grand theories:

> According to formalists, judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way. For the formalists, the judicial system is a "giant syllogism machine," and the judge acts like a "highly skilled mechanic." Legal realism, on the other hand, represents a sharp contrast. ... For the realists, the judge "decides by feeling and not by judgment; by 'hunching' and not by ratiocination" and later uses deliberative faculties "not only to justify that intuition to himself, but to make it pass muster.[26]

This is an oversimplification no doubt. Not all formalists think of courts as giant syllogism machines; not all realists are in love with notions of judging by hunching. Both of these theories have been misunderstood, especially legal realism. Continental legal theory, for one, views realism as practical, down-to-earth, hard-nosed school of thought which is opposed to the more scientific models of judging (which happen to be purely theoretical).

The purpose of this chapter is two-fold. First, to show what legal realists really stood for - that contrary to the popular myth, they did not maintain that formal legal rules do not matter at all; that most of them considered legal rules to be important, only many of those rules are informal rules. Second, contrary to the popular understanding in Continental legal theory, legal realism by its nature was not an antiscientific theory of judging - in fact, it was either a first scientific theory of judging or at least its prototype.

2.2 Legal Formalism

2.2.1 Notions of Formalism

Essentially, formalism refers to the view that judging is a rule-bound activity. Non-legal rules have little or no bearing on the outcomes of cases. Terms such as formalism, mechanical jurisprudence, legalism, and classical legal thought are often used interchangeably. Some commentators also use such terms as legal science or positivism when discussing formalism.[27]

The term new formalism is occasionally used to represent the view that judging is a rule-bound activity, which is not necessarily purely deductive or even logical, but a rule-

[26] Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 Cornell Law Review 1 (2007) p. 2.

[27] A theorist might object that there are fine theoretical distinctions between these terms; these distinctions, however, are irrelevant in this context.

bound and predictable nonetheless. Some scholars also distinguish between rule-formalism and concept formalism.[28] Rule-formalists lay stress on clear rules and strict interpretation; concept-formalists emphasize principled and systemic coherence in all of the law.

One can sometimes come across more formalistic versions of formalism: the courts are huge syllogism machines, operating by mechanical deduction. In essence, it says that judging is a methodical and logical activity, primarily (or least sufficiently) deductive application of legal doctrines, principles, rules to the facts of the case. This view, at least in the United States, has never been strong; more often, realists used it a straw man fallacy. Yet, outside the US and especially in Europe, legal formalism has been the central theory of judging, albeit not always its extreme versions.

2.2.2 Legal Science

> Reason is the life of the law; nay, the common law itself is nothing else but reason.~
> Sir Edward Coke

Formalism owes much of its existence to the notion of law as legal science. This school of thought views law as a rational, gapless, complete, and almost geometrical system. It is a self-encompassing system in a sense that all that is needed can be found within the system, within the legal rules.

Ever since Cartesian ideals of reasoning as deduction gained momentum, legal reasoning also became epitomized be deductive logic. In Anglo-Saxon legal world, Blackstone was one of the first who brought up the idea of law as rational science.[29] This view eventually prevailed in the nineteenth century. In the twentieth century, the rise of analytical positivism in philosophy and many social sciences cemented the view of law as rational science. This was especially true in continental legal thinking.

Grant Gilmore, a noted American legal historian, thus described formalism as it appeared after the American Civil War:

> The post-Civil War juridical product seems to start from the assumption that the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules to changing circumstances; it is restricted to the discovery of what the true rules of law are and indeed always have been.[30]

Eventually, Max Weber established the best-known definition of legal science. According to Weber, five postulates represent the legal science:

> First, that every concrete legal case be the "application" of an abstract legal proposition to concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a "gapless" system of legal propositions, or

[28] Thomas C. Grey, Judicial Review and Legal Pragmatism, 38 Wake Forest Law Review 473 (2003) p. 478.

[29] Blackstone, Commentaries, II, 2 (Quoted in Daniel J. Boorstin, The Mysterious Science of Law: An Essay on Blackstone's Commentaries (Chicago: Univ. Chicago Press 1996) p. 20).

[30] Grant Gilmore, The Ages of American Law (New Haven: Yale University Press, 1977) p. 62. Some scholars noted that Gilmore probably exaggerated prevalence of this view in the US. A number of American commentators back in the nineteenth century agreed that it was a mere fiction and nothing else that courts only discover the law but don't make it. *See* Brian Z. Tamanaha, Beyond the Formalist-Realist Divide (Princeton: Princeton University Press, 2010) pp. 13-20.

must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot "construed" rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an "application" or "execution" of legal propositions, or as an "infringement" thereof, since the "gaplessness" of the legal system must result in a gapless "legal ordering" of all social conduct.[31]

Weber also noted that the notion of law as legal science accurately describes Continental law because it was largely a product of systematization. Yet, he also noted that it does not apply to common law. Weber pointed out that common law, by default, is developed in a piecemeal fashion. Common law courts adopt precedents in response to specific instances; they rarely consider how this may affect overall legal structure. Likewise, legislation in common law countries is often passed in response to specific events, not with a grand vision of a legal system: "the concepts thus formed are constructed in relation to concrete events of everyday life, are distinguished from each other by external criteria."[32]

2.2.3 Formalism and Mechanical Jurisprudence

If law is a rational science, then in a complete and gapless legal system judges need no recourse to external rules; solution to any case can be found within the system itself – a judge needs to use only rules of logic, primarily deduction. In such system, judges do not make law; there is no need to make law because the legal system is already complete, it is gapless.[33] What judges have to do is discover and declare the law which has always been there. It is of course no surprise that this view gave birth to the idea of judges as oracles of law.[34]

Many non-formalists call this view of judicial decision-making a mechanical jurisprudence. Thus, Posner writes that:

> Legalists decide cases by applying preexisting rules or, in some versions of legalism, by employing allegedly distinctive modes of legal reasoning, such as 'legal reasoning by analogy.' They do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts - mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions) - for guidance in deciding new cases. For legalists, the law is an autonomous domain of knowledge and technique.[35]

2.2.4 Prevalence of Formalism

While such understanding of formalism has been with us for almost a century, some scholars recently pointed out that its prevalence in the US has been exagge-

[31] Max Weber, Economy and Society (Guenther Roth and Claus Wittich (eds.), Berkeley: University of California Press, 1978) pp. 657-58.

[32] Ibid.

[33] Brian Leiter, Positivism, Formalism, Realism, 99 Columbia Law Review 1138 (1999) pp. 1145-46.

[34] R. W. M. Dias, Jurisprudence (London: Butterworth's, 5th ed., 1985) p. 151

[35] Richard Posner, How Judges Think (Cambridge: Harvard University Press, 2008) pp. 7-8. Posner also continues: "The ideal legalist decision is the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion. The rule might have to be extracted from a statute or a constitutional provision, but the legalist model comes complete with a set of rules of interpretation (the „canons of construction"), so that interpretation too becomes a rule-bound activity, purging judicial discretion." Ibid, at 41.

rated.[36] Probably it is probably fair to say that American legal realists used American formalism as a straw man because "every account of the [American] legal formalists and their belief in mechanical jurisprudence has been written by legal realists."[37]

Whatever is the case with American formalism, few would deny that formalism, or its various jurisprudential reincarnations, has prevailed in Europe and in the rest of the world following the civil law tradition.[38] There were good reasons why American legal realists would quote their European counterparts to describe formalism.[39]

Few contemporary legal scholars espouse the extreme versions of formalism. Yet, the distinguishing characteristic of contemporary formalists is that they consider law and judicial decision-making as a rule-bound activity. They agree that judging is not a mechanical activity and judicial discretion is unavoidable. Yet, at the end of the day, how judges decide their cases depends on what legal rules dictate.[40]

2.3 Legal Realism: Birth and Development

2.3.1 Introduction to Realism

Legal realism was arguably the most important and controversial theory of judging in the history. And in general as well, there were few intellectual developments in law that have been as influential, controversial, and misunderstood. Its influence went far beyond as a theory of adjudication. As one legal theorist notes, even contemporary legal positivism owes much of its renewal to legal realism.[41]

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[36] Brian Tamanaha, in his recent treatise on formalism and realism, points out that:
"Contrary to what Pound, Frank, and Gilmore [the proponents of legal realism] insisted, there is overwhelming historical evidence that *all lawyers knew* - as was often repeated - that judges made law. Pound and Frank relied on German discussions of civil law systems, whereas Max Weber argued that common law systems were not formally rational legal systems. Jurisprudents in the United States were enamored with saying that "law is a science," but practitioners rejected this idea and dismissed the notion that judging was a matter of pure logical deduction."
Tamanaha, Beyond the Formalist-Realist Divide, p. 44.

[37] Ibid.

38 John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America (2nd ed., 1985) p. 36 (Quoted in Posner p. 133):
"[The judge] is a kind of expert clerk. He is presented with a fact situation to which a ready legislative response will be readily found in all except the extraordinary case. His function is merely to find the right legislative provisions, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. The whole process of judicial decision is made to follow the formal syllogism of scholastic logic. The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows."

[39] *See e.g.* John M. Zane, German Legal Philosophy, 16 Michigan Law Review 287 (1918).

[40] *See e.g.* Suri Ratnapala, Jurisprudence (Cambridge, Cambridge University Press, 2009) pp. 95-96: positivists discover "law as it is" by consulting primary and secondary rules of the legal system; realists discover "law as it is" by looking beyond rules to the way courts actually reach their decisions.

[41] Ibid, at 108-109:
"[L]egal positivism owes a large debt to American realism that is rarely acknowledged. American realism jolted legal positivism out of its complacency by questioning widely held assumptions about the nature of rules. It should be remembered that Holmes exposed the weaknesses of the command theory of law long before Hart. Realism prompted the rethink of legal positivism that was brilliantly undertaken by scholars like Hart and Raz. It forced positivists to distance themselves from formalism and to reconsider the nature of legal language and judicial discretion."

Realism is a diverse school of thought and any attempts to homogenize it will distort more than simplify. When it comes to judicial decision-making, realists had two general theses.[42] First, judges have a preferred outcome of a case even before they turn to legal rules; that preferred outcome is usually based on some non-legal grounds – conceptions of justice, attributes of litigating parties (government, poor plaintiff, racial group, etc), ideology, public policy preferences, judge's personality, etc. Second, judges usually will be able to find a justification in legal rules for their preferred outcome. This is possible because the legal system is complex and often contradictory. Of course, occasionally a judge will come across a preferred outcome that just "won't write", but these are rare.[43] Normally, however, judges will find some cases, statutes, maxims, canons, authorities, principles, etc, that will justify their preferred outcome.

2.3.2 Nineteenth Century Realists

Realists before Legal Realism. Most accounts of how legal realism came to exist start with Holmes or the birth of the movement in 1920s and 1930s. Yet, as some scholars showed, there were plenty of realists in the US even before the birth of realism: when "the legal realists arrived on the scene, realism about judging had circulated inside and outside of legal circles loudly and often for at least two generations."[44] Francis Lieber, an eminent American lawyer of the mid-nineteenth century, noted that judicial decisions are rarely mechanistic; instead, experience and numerous other factors influence the outcome significantly.[45]

Likewise, William Hammond, a legal scholar who is considered a formalist, already in 1881 expressed a rather realistic attitude about law as a constraint on judging:

> It is useless for judges to quote a score of cases from the digest to sustain almost every sentence, when every one knows that another score might be collected to support the opposite ruling. The perverse habit of qualifying and distinguishing has been carried so far that all fixed lines are obliterated, and a little ingenuity in stating the facts of a case is enough to bring it under a rule that will warrant the desired conclusion. ... [T]he most honest judge knows that the authorities with which his opinions are garnished often have had very little to do with the decision of the court - perhaps have only been looked up after that decision was reached upon the general equities of the case. ... He writes, it may, a beautiful essay upon the law of the case, but the real grounds of decision lie concealed under the statement of facts with which it is prefaced. It is the power of stating the facts

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[42] Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning (Cambridge: Harvard University Press, 2009) p. 138.

[43] Ibid. As Schauer further observes, "thus, the realist-influenced lawyer will not only argue the case in terms that will appeal to actual basis of decision, but will also provide the judge with the legal doctrine, a „hook" on which to hang and justify the decision".

[44] Tamanaha, Beyond the Formalist-Realist Divide, p. 78.

[45] Francis Lieber, Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics (Boston: Little Brown, 1839) p. 236-237 (Quoted in Tamanaha, Beyond the Formalist-Realist Divide, p. 92):
"… much depends upon a certain instinctive feeling, not derived from any course of reasoning, and inclination of our mind one way or the other, in nicely balanced cases, not from whim, but in consequence of long experience, and the effect of a thousand details on our mind, which details, although properly affecting a sound mind, can nevertheless not be strictly summed up."

as he himself views them which preserves the superficial consistency and certainty of the law, and hides from carless eyes its utter lack of definiteness and precision.[46]

Policy Principles and Judicial Philosophy. A number of other prominent commentators of that era shared the same concerns about judging that realists would voice up several decades later.[47] For example, Austin Abbott argued in 1893 that courts often rely on policy principles: "common law cases are decided upon principles of utility .... This is not the jurisprudence of a system of commands; it is the jurisprudence of common welfare wrought out by free reasoning upon the actual facts of life."[48] Walter Coles noted that political ideology will often sway judges.[49] Christopher Tiedeman observed influence of judge's personality more than thirty years before Jerome Frank did.[50] In a 1908 speech before the Congress, even President Theodore Roosevelt admitted that "the decisions of the courts on economic and social questions depend upon their economic and social philosophy".[51]

2.3.3 Holmes, Cardozo, and other Predecessors of the Movement

Oliver Wendell Holmes, Jr. The birth of legal realism is largely credited to the jurist who probably would not consider himself a realist – Oliver Wendell Holmes, Jr. Holmes famously wrote that "the life of law has not been logic; it has been experience."[52] Holmes essentially argued that changes in law (at least judge-made law) were not due to logic or pre-existing law; instead, policy preferences or personal experiences of judges mattered more.

Holmes also famously stated in his dissenting opinion that "general propositions do not decide concrete cases".[53] Many commentators consider this statement as his realist position that general rules of law will never decide actual cases. It seems, however, that this may have been an exaggeration as Holmes himself believed that specific legal propositions can determine how judges decide their cases.[54]

It is probably fair to say that Holmes' views were not iconoclastic by the later standards. It might be also true that many of his ideas were voiced by a previous generation of jurists. However, his prominence as a scholar and the Justice of the US Supreme Court helped to spread his ideas in all legal circles.

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[46] William G. Hammond, American Law Schools, Past and Future, 7 Southern Law Review 400 (1881) pp. 412-13.

[47] *See generally* Tamanaha, Beyond the Formalist-Realist Divide, pp. 44-90.

[48] Austin Abbott, Existing Questions on Legal Education, 3 Yale Law Journal 1 (1893) p.2 (Quoted in Ibid., at 30-31)

[49] Walter D. Coles, Politics and the Supreme Court of the United States, 27 American Law Review 182 (1893).

[50] Christopher G. Tiedeman, Silver Free Coinage and the Legal Tender Decisions, 9 Annals of the American Academy of Political and Social Science 198 (1897) p. 205 ("while the legal reason is usually considered as controlling the judgment of the court, the judgment is really dictated by the conclusions of common sense")

[51] Tamanaha, Beyond the Formalist-Realist Divide, p. 72.

[52] Oliver W. Holmes, Jr., The Common Law (New York: Dover Publications, [1881] 1991) p. 1. In his later years, while on the bench of the US Supreme Court, he also remarked that "a page of history is worth a volume of logic". New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[53] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[54] Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning (Cambridge: Harvard University Press, 2009) p. 126.

Cardozo. Like Holmes, Cardozo was not only an outspoken legal commentator but also a prominent judge. Thus, his position probably gave additional credibility to his views. Compared to later realists, Cardozo was far from a revolutionary freethinker. His main treatise published in 1921 - The Nature of the Judicial Process – shows that most of his views rather moderate. He observed that in most cases, there are clear legal principles, which dictate the outcome. Yet, often a clear legal answer does not exist; in such cases, Cardozo thought, the judge should promote social ends; and here, Cardozo admitted, a judge may be tempted to substitute his view for that of the community.[55]

Grant Gilmore observed that "Cardozo's hesitant confession that judges were, on rare occasions, more than simple automata, that they made law instead of merely declaring it, was widely regarded as a legal version of hard core pornography."[56] Gilmore probably exaggerated Cardozo's impact,[57] but we should not make the opposite mistake of underrating Cardozo's impact.

Other Predecessors. In addition to Holmes and Cardozo, there were a number of smaller contributions to the emerging legal realism. Theodore Schroeder, for example, was one of the first to analyze the psychology of judicial decision-making. He noted that "judicial opinion necessarily is the justification of the personal impulses of the judge" and that "hat the character of these impulses is determined by the judge's life-long series of previous experiences, with their resultant integration of emotional tones".[58] While his observations would not impress contemporary psychologists, at that time this was a novel outlook on judicial decision-making.

Max Radin, already in 1925, argued that judges do not process facts and legal rules logically or rationally. Essentially, he argued that judges respond to the clusters of fact situations (the so-called situation type of judging) - judges make instant decisions once a "generalized situation of this sort is in the judge's mind and is immediately called up".[59] He further remarked that judge's mind works like that in great many situations and could hardly work otherwise.[60] In his subsequent writings, Radin noted that how judges classify events depends on "their training, their prejudices, their conscious or unconscious interests, their philosophy, their aesthetic learnings, or even by the chance circumstances surrounding the particular learning."[61] Of course contemporary scholars of judgment and decision-making would depart from Radin's model; and yet, his observations came very close to what contemporary research psychologists know about intuitive judgment and heuristic processing.

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[55] Benjamin Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921), pp. 136-137, 170.

[56] Grant Gilmore, The Ages of American Law (New Haven: Yale University Press, 1977) p. 77.

[57] Tamanaha, Beyond the Formalist-Realist Divide, p. 21.

[58] Theodore Schroeder, The Psychologic Study of Judicial Opinion, 6 California Law Review 89 (1918).

[59] Max Radin, The Theory of Judicial Decisions: Or How Judges Think, 11 American Bar Association Journal 357 (1925).

[60] Ibid.

[61] Max Radin, Legal Realism, 31 Columbia Law Review 824 (1931).

2.3.4 Birth of the Movement: Hutcheson and Frank

Hutcheson. In 1929, Joseph Hutcheson, a federal judge, published a seminal article in which he explained his own judging model.[62] As other realists, he loathed formalistic model where a judge determines the relevant facts and then consults lawbooks (statutes or cases) to determine the outcome. Hutcheson argued that judges first make up their mind about the outcome and only then turn to law books to look for justification of their decision. In essence, judges use "hunches" or intuitive decision-making first, and only then look for justifications in the statutes or caselaw. Although Hutcheson's contributions to the field were scanty, the view of judicial-decision making as an intuitive process of hunches became a signature of judicial decision-making in the realistic tradition.

Jerome Frank. One year after Hutcheson's article appeared, Jerome Frank published his "Law and the Modern Mind".[63] If there ever was a radical version of legal realism, then Jerome Frank was it. Like other realists, Frank doubted judges' ability to make decisions on the basis of general categories or general rules. Like many other eminent realists, Frank himself was an eminent federal judge. Frank thought that troubled psychological development is responsible for legal formalism.

According to Frank, the judge's preferred outcome precedes the inquiry into legal rules: "Judicial judgments, like other judgments, doubtless, in most cases are worked out backward from conclusion tentatively reached".[64] Frank was also one of few realists who was preoccupied not only with "legal rules realism", but also with "fact finding realism" – a judge will usually accept only that evidence which will support his or her preferred outcome: "A judge, eager to give a decision which will square with his sense of what is fair, but unwilling to break with the traditional rules, will often view the evidence in such a way that the facts' reported by him, combined with those traditional rules, will justify the result which he announces".[65]

Frank was also the only major realist who thought that judge's personality plays a more important role than legal rules. Legal rules, for Frank, were in general not important. Furthermore, he considered that rational element in law is an illusion. Frank argued that judicial outcomes depend on many factors, most of which can be extra-legal: judge's personality, political preferences, mood, racial views, etc.

On the other hand, Frank pointed out that a judge, after arriving at the conclusion, can consult with the general rules and principles to see if it is acceptable. So in a sense, Frank did not say that legal rules do not matter; instead, his point was that they were not leading to the decision, but they could provide guidance to a conscientious judge as a check-up.[66]

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[62] Joseph C. Hutcheson, Jr., The Judgment Intuitive: The Function of the ‚Hunch' in Judicial Decision, 14 Cornell Law Journal 274 (1929).

[63] Jerome Frank, Law and the Modern Mind (New York: Tudor, 1930).

[64] Ibid, at 101.

[65] Ibid, at 135.

[66] Ibid, at 131.

Frank and later realists have been ridiculed by saying that how a judge decides a case depends on what "the judge had for breakfast."[67] (Frank himself, apparently, never said such thing). Of course, this ridicule sets up realists for a straw man fallacy. Frank and other realists never maintained that it all comes down to what "the judge had for breakfast". Yet, he wouldn't deny that it might influence the decision. Although later criticized for his attachment to psychoanalytic school (and he also argued that judging ability would be greatly enhanced if judges underwent extensive psychological treatment), his views were well-know and to some extent influential.

2.3.5 Birth of the Movement: Pound & Llewellyn

If Hutcheson and Frank presented more radical views of judging, Pound and Llewellyn could be considered centrists.

Roscoe Pound. Roscoe Pound, like Holmes, scorned the strict reliance on logic, legal rules, and scientific law which is characterized by certainty and reason. He thought that such notions of law are responsible for fixed conceptions where premises become stiff. Like Holmes, he argued that courts should develop law by relying on public policy preferences. Already in his notable 1908 article, he assaulted the notion of "mechanical jurisprudence" (and it was he who coined that term in the same article).[68] In his address to the American Bar Association in 1906, Pound disdained mechanical application of legal rules: "The most important and most constant cause of dissatisfaction with all law at all times it be found in the necessarily mechanical operation of legal rules."[69] So for Pound, in addition to legal rules, policy reasons and techniques for deriving doctrines play equally important role.[70]

Karl Llewellyn. Karl Llewellyn was arguably the most influential realist. He also presented the version of legal realism that perhaps could lay claim for an established theory of law and judging. Like other realists, Llewellyn scoffed at the idea that judging is a rule-bound activity, where a judge proceeds downward from legal rules to the outcome of the case: "[W]ith a decision already made, the judge has sifted through these 'facts' again, and picked a few which he puts forward as essential - and whose legal bearing he then proceeds to expound".[71]

For Llewellyn, formal rules - "the paper rules" or "pretty playthings" - have little effect on what judges actually do. Llewellyn, however, argued that judges do use some rules in their decision-making, only these rules are largely non-formal rules. These are the rules that judges would not find in a law book. Such general rules could be policy preferences like "maximize efficiency", "let win the poorer party in a civil litigation" or "uphold any outcome which fosters free market competition". In addition to policy preferences, other factors determine the outcome: legal knowledge, legal indoctrination, approval of peers, the collaborative nature, institutional constraints.[72] Unlike Frank,

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[67] Alex Kozinski, What I Ate for Breakfast and Other Mysteries of Judicial Decision Making, 26 Loyola Los Angeles Law Review 993 (1993).

[68] Roscoe Pound, Mechanical Jurisprudence, 8 Columbia Law Review 605 (1908).

[69] Roscoe Pound, Address to the American Bar Association, 40 American Law Review 729 (1906) p. 729.

[70] Roscoe Pound, The Theory of Judicial Decision, 36 Harvard Law Review 940 (1923) pp. 945-946.

[71] Karl Llewellyn, The Bramble Bush: On Our Law and Its Study (New York: Oceana, 1930) p. 38.

[72] Karl Llewellyn, The Common Law Tradition: Deciding Appeals (Boston: Little Brown, 1960).

Llewellyn did not deny that there is a rational element in law.[73] Llewellyn also disagreed with Frank that judge's personality plays a crucial role in judging.[74]

Llewellyn's one of the most famous contributions to the legal realism was to demonstrate the ambivalence of legal rules. Llewellyn used a fencing metaphor: "thrust" and "parry" of dueling cannons - for every canon of interpretation that said one thing, there was a "dueling" canon that said just the opposite.[75] For example, the canon of *in pari materia* says that statutes dealing with the same subject should be interpreted so as to be consistent with each other, but another canon provides that later statutes supersede earlier ones. One canon provides that extrinsic aids to interpretation, such as legislative history, are irrelevant when the language of the statute is clear on its face; another canon, however, says that even the plain language of a statute should not be applied literally if such an application would produce a result divergent from what the legislation intended.

In his later years, Llewellyn seems to have adopted even more moderate position. In "*The Common Law Tradition*", he noted that judges do follow accepted doctrinal techniques, provide a right legal answer, and achieve just results. They also want to earn approval of their legal audience.[76] Moreover, he observed that institutional factors, like collegiality, also minimize individual inconsistencies.[77]

2.3.6 Originality of Legal Realism

European Realism. Legal Realism, by and large, was an original school of thought. There were, however, several attempts to promote similar view even before the movement. In the late nineteenth century and to some extent in the early twentieth century German Free Law School (Freirechsschule) expressed similar ideas.[78] François Gény, a famed French scholar, in his "Science and Technique in Positive Private Law", published from 1914 to 1924, also argued for a "free scientific research."[79] Gény wanted to use sciences such as sociology, economics, linguistics, and philosophy to discover origins of rules. Overall, it seems that this European Legal Realism had little impact on European lawyers.[80]

Scandinavian Realism. Legal Realism (also known as American Legal Realism) should be distinguished from its Scandinavian counterpart which had little concern

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[73] Karl Llewellyn, Some Realism about Realism-Responding to Dean Pound, 44 Harvard Law Review 1222 (1931) p. 1230.

[74] Ibid, at 1242-1243.

[75] Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed, 3 Vanderbilt Law Review 395 (1950).

[76] Karl Llewellyn, The Common Law Tradition: Deciding Appeals (Boston: Little Brown 1960) pp. 20 ff.

[77] Ibid.

[78] *See* Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning (Cambridge: Harvard University Press, 2009) pp. 124-125.

[79] François Geny, Science et technique en droit privé positif (Paris: Recueil Sirey, 1915-1924), available at <http://www.archive.org/details/scienceettechniq01genyuoft>, last accessed 2012-01-17.

[80] As Johnston points out, "the impression remains that European Legal Realism has not had a profound effect on the way that European international lawyers actually deal with their lawyerly tasks." Douglas M. Johnston, The Historical Foundations of World Order: The Tower and the Arena (Leiden: Martinus Nijhoff Publishers, 2008) p. 114.

for studies of judicial decision-making and legal reasoning.[81] Scandinavian realists like Alf Ross, Axel Hagerstrom, and Karl Olivecrona thought that law should be analyzed through the prism of social empirical sciences. Scandinavian realists wanted to explain scientifically how the law changes human behavior. American Realists, while also devoted to empirical research, were mostly preoccupied with the studies of judging, legal reasoning, and judge-made law.

Novel Contributions of Legal Realists. Some scholars argue that legal realism brought nothing new to the understanding of judicial decision-making. For example, preceding legal generations made similar observations about judging even before realists came to the scene.[82] But almost all major scientific discoveries or ideological movements were preceded by "observations" similar to the new theories. Likewise, it is true that preceding generations of lawyers made similar observations as the legal realists; however, observations are not enough.[83] It even might be that the genius of the realists was not in the discovery of their doctrinal and philosophical outlooks, but in their crystal articulation. Whatever it is, it is easy now to underrate their contribution. One can only wonder then, if the movement brought nothing new, why the awareness of the legal community and general public was so much different than before?

2.3.7 Realists: Radicals or Reformers?

Realists are often portrayed as radical skeptics. It seems that all they did was doubted the existing theoretical models of judging. This view is flawed. Realists primarily wanted to increase certainty and predictability of law by clarifying the real nature of judging.[84]

Rule of Law and Legal Education. Realists attacked the view that judging is merely the logical application of legal rules and principles. But few realists thought that legal rules and principles play no role; most realists thought that legal rules play an important role, but it is shared with non-legal rules and other factors. As one scholar observed, the realists "pointed to the role of idiosyncrasy in law, but they believed in a rule of law - hence they attempted to make it more efficient and more certain."[85] One of their primary goals was also a reform of legal education; one of their contributions was an introduction of clinical legal education, now available at almost every American law school (and still rare in European law schools).

Social Reforms. Realists called for social reforms and they wanted law to serve as an instrument for social action; to achieve this, realists thought, interrelationship between legal rules and policy objectives had to become more intimate. But realists thought that social legal reforms would be vain unless one could understand what really drives judicial decision-making. Thus, realists also vouched for empirical method in

[81] Suri Ratnapala, Jurisprudence (Cambridge, Cambridge University Press, 2009) pp. 109-116; Gregory S. Alexander, Comparing the Two Legal Realisms - American and Scandinavian, 50 American Journal of Comparative Law 131 (2002).

[82] Tamanaha, Beyond the Formalist-Realist Divide, pp. 67-90.

[83] For example, some seven hundred years before Newton's law of universal gravitation, a medieval Arab scientist and polymath Alhazen observed that magnitude of acceleration depends on the gravity of a distance. But obviously one needs more than an observation to get the full credit.

[84] Tamanaha, Beyond the Formalist-Realist Divide, pp. 94.

[85] Laura Kalman, Legal Realism at Yale, 1927-1960 (Chapel Hill: Univ. North Carolina Press 1986) p. 231.

law. Although now the empirical research has become a norm, back then the empirical method used to hold a candle to pure theoretical analysis.[86]

2.3.8 Realism as the First Scientific Theory of Judging

Legal Realism as Non-scientific Approach. In some legal circles, especially European academia, realists represent a practical, down-to-earth school of thought which is opposed to a "scientific" law of theoretical models. This is in part because most prominent realists were practitioners, mostly eminent judges; thus, a movement originated by practitioners could hardly be epitomized by scientific theories. So continental theorists often lampoon realists for their view that what matters is not what legal rules say, but the prediction of what courts will actually do.

Requirements for Scientific Theory. In this context, most critics not only misunderstand realists, but also misunderstand what a scientific theory is. Philosophers of science agree that a scientific theory can be judged by how well it performs two functions: explanation and prediction.[87] Thus, Hawking notes that, "[a] theory is a good theory if it satisfies two requirements. It must accurately describe a large class of observations on the basis of a model that contains only a few arbitrary elements, and it must make definite predictions about the results of future observations."[88] Although some philosophers of science argued that the requirement of prediction should be less rigorous for social sciences,[89] many still think that both criteria apply equally to social sciences.

Scientific Theory and Prediction. If a theory can only explain a phenomenon, but cannot predict it, it will be abandoned (in a perfectly rational world at least). Otherwise, one could claim that "it happened because that was in accordance with the higher power" can be considered a scientific theory because it can explain everything from earthquakes in Haiti to startling judicial decisions, but only after it happens. Likewise, a physicist, who can explain past events but cannot predict under what conditions it will happen, has no scientific theory.

Legal Realism & Scientific Theory. Realists likely thought along these lines but did not articulate their underlying idea that way. Realists might have challenged their formalist counterparts that if judging is all about facts of a case plus legal rules, then a formalist would have no problem predicting judicial outcomes having been told only facts of the case and given unlimited access to law books.

A realist, armed with contemporary scientific methodology, could even have assembled a group of first-class lawyers and provided them with facts of many cases and asked them to predict the outcome, and even better - the reasoning of the court. Subjects would not know anything about personality of the judge, judicial locale and its prevailing social and cultural norms, parties of the case (unless relevant to the legal

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[86] John Henry Schlegel, American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore, 29 Buffalo Law Review 195 (1980).

[87] Theodore Schick (ed.), Readings in the Philosophy of Science: From Positivism to Postmodernism (California: Mayfield Publishing, 2000) pp. 5–120.

[88] Stephen Hawking, A Brief History of Time (New York: Bantam Books, The Updated and Expanded Tenth Anniversary Edition, 1996) p. 19.

[89] *See generally* Michael Martin and Lee C. McIntyre (eds.), Readings in the Philosophy of Social Science (Boston: MIT Press, 1994) pp. 37-156.

rules), emotional appeals that lawyers made during the hearing, how tired judges were, etc – only facts and formal legal rules. A control group could be given only facts of cases and asked to make predictions without having access to formal rules, or it could even be asked to predict randomly, perhaps by flipping a coin. The control group, or at least its experienced decision-makers – i.e. those who flip a coin - in a sufficiently large statistical sample would correctly predict on average fifty percent of outcomes (in terms of wins and losses). The question would be if the lawyers, making their predictions only on the basis of legal rules, could predict significantly better than the control group?

Although the realists never conducted such experiment, for most of them the answer was clear – a lawyer knowing just plain facts and legal rules could predict barely better than random luck, i.e. fifty percent. Thus, a realist would say that formalist scientific theory of judging is either incomplete or altogether wrong because it can only explain past events but cannot make definite future predictions.

On the other hand, would it be possible to make more accurate predictions if we incorporate into a scientific theory of judging not only formal legal rules, but also personality of the judge, policy principles prevailing at that time and that place, judicial ideology, emotional components of the case, characteristics of the litigating parties, etc? For the realists, the answer to this question was a resounding yes. And contemporary empirical studies confirm this. For example, Posner has observed, based on empirical studies, that "the outcome of [US] Supreme Court cases can be predicted more accurately by means of handful variables, none of which involves legal doctrine, than by a team of constitutional law experts."[90]

Thus, the realist agenda was to study actual decision-making until one can make confident predictions about judicial decisions. Once these factors would be incorporated into the theory of judging, such theory could be called a scientific theory. It is a paradox that the realists rebelled against the idea of law as legal science, but their agenda, at its core, was more scientific than anything that had come before them.

2.4 Legacy of Legal Realism

2.4.1 Decision-making vs. Justification

One of the most important contributions of legal realism was to establish a clear distinction between actual decision-making and judicial opinions (i.e. written judgments).[91] For realists it was perfectly natural that judges used formal rules to

[90] Richard A. Posner, How Judges Think (Cambridge: Harvard University Press, 2008) p. 19.

[91] One of clearest articulations came from philosopher John Dewey, who was not a legal philosopher proper. Dewey clearly articulated the difference between actual judicial decision-making and judicial opinion as a public justification of the decision:
"Courts not only reach decisions; they expound them, and the exposition must state justifying reasons. ... The logic of exposition is different from that of search and inquiry. In the latter, the situation as it exists is more or less doubtful, indeterminate, and problematic with respect to what it signifies. If unfolds itself gradually and is susceptible of dramatic surprise; at all events it has, for the time being, two sides. Exposition implies that definitive solution is reached, that the situation is now determinate with respect to its legal implication. Its purpose is to set forth grounds for the decision reached so that it will not appear as an arbitrary dictum, and so that it will indicate a rule for dealing with similar cases in the future". John Dewey, Logical Method and the Law, 10 Cornell Law Quarterly 17 (1924) p. 24. *See also* Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (Stanford: Stanford University Press, 1961).

justify their decisions. No one could expect judges to declare that they arrived at the decision by following the hunch or because of their personality makeup and personal preferences (or even policy analyses). Neil MacCormick, a distinguished contemporary legal reasoning scholar, deftly illustrated this distinction:

> Why does the judge not make his reason explicit by granting Mrs. McTavish her divorce just because she has a ravishingly pert retroussé nose? Because such are not accepted as good reasons within the system for sustaining claims or granting divorces. Whether sincerely advanced or not, only those arguments which show why x ought to be done are reasons for demanding that it be done, or doing it.[92]

Some prominent judges likewise admitted the distinction between actual decision-making and justification. US Supreme Court's Chief Justice Charles Evan Hughes once admitted that "[a]t the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections".[93]

Jerome Frank went even further by arguing that, "Those judges who are most lawless, or most swayed by the 'perverting influence of their emotional natures or more dishonest, are often the very judges who use most meticulously the language of compelling mechanical logic."[94]

Of course, it does not mean that how judges decide a case and how they justify it never coincides. It is certainly possible. For example, sometimes judges explicitly mention judicial philosophy that drove their decision. In such case, decision-making and external judicial reasoning might overlap. Yet, just because they might overlap, it does not mean that one is a good indicator of the other.

Not all legal scholars, however, have accepted this distinction. Some scholars, especially representatives of Critical legal studies, argued that style of judicial opinions reflects the actual reasoning of judges; thus, judicial opinions couched in formal, legalistic style reflect this kind of thinking.[95]

Overall, however, now probably even hardcore legal formalists would not deny that judicial opinions do not necessarily reflect the actual judicial decision-making.[96]

2.4.2 Demise of the Movement and its Influence

American legal realism, as a self-identified movement, disappeared within a few decades after its rise, but not its influence. Several decades after realism faded, the new emerging field of Critical Legal Studies was built on the foundations of legal realism. Also, legal realism provided a foundation for a jurisprudential school which for several decades now has dominated legal analysis in the US and is rapidly spreading in other countries and international legal scholarship: economic analysis of law.

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[92] Neil MacCormick, Legal Reasoning and Legal Theory (Oxford: Clarendon Press, 1978) p. 15-16.

[93] *Cited in* William O. Douglas, The Court Years: 1939-1975 - The Autobiography Of William O. Douglas, (New York: Random House, 3rd. ed., 1980) p. 8.

[94] Jerome Frank, Law and the Modern Mind (New York: Tudor, 1930) pp. 137-38.

[95] Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, 3 Research in Law and Society 3 (1980).

[96] Of course, this is not meant to suggest that judicial opinions are unimportant.

It would be a gross overstatement to say that legal realists were right about everything. Contemporary empirical studies show that legal realists were right about many things, but also wrong about many others. For example, legal realists generalized from judicial-decision making to law in general, while we know now from studies on the selection effect in economic analysis of law that legal rules applied in courts are more ambiguous than legal rules in general.[97]

2.4.3 Contemporary Models of Judicial Decision-making

Attitudinal, Strategic, and Formal models. Most empirical studies have identified three dimensions of judicial decision-making: attitudinal, strategic, and formal. Attitudinal focuses on political ideology: how much judges' political ideology, and not legal rules, will determine the outcome of cases. The first scholars who analyzed judging applied the political science models of legislatures;[98] in the US, for example, the attitudinal dimension has been the dominating model. Strategic dimension focuses on institutional and personal incentives and goals.[99] Formal model looks at the role of doctrine, precedent, and interpretation of law. Scholars studying judicial decision-making of American courts usually focus on a single dimension, either attitudinal (political), strategic, or formal. At least regarding the US Supreme Court, it seems that the single ideological (political) dimension can explain most of the judicial behavior.[100] Yet, others argue that this is limited to the US Supreme Court and that little is known about the dimensionality of ideology on other courts.[101]

Nine Theories of Judging. Judge Posner, in his *summa* on judicial decision-making, has identified six other models in addition to the three prevailing models: sociological, phenomenological, organizational, psychological, economic, and pragmatic.[102]

Like the legal realists decades ago, Posner begins with observation that judicial latitude is inevitable because legal rules and logic do not provide all answers:

> "It is the consequence of legalism's inability in many cases to decide the outcome … and the related difficulty, often impossibility, of verifying the correctness of the outcome, whether by its consequences or its logic. That inability, and that difficulty or impossibility, create an open area in which judges have decisional discretion – a blank slate on which to inscribe their decisions …"[103]

The nine theories explain how judges fill in the open area; but of course all theories are overstated or incomplete.[104]

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[97] *See* the discussion of the selection effect in Chapter 5.

[98] *See e.g.* Glendon Schubert, The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946-1963 (Evanston: Northwestern University Press, 1965).

[99] *See e.g.* Richard A. Posner, The Role of the Judge in the Twenty-First Century, 86 Boston University Law Review 1049 (2006) p. 1056.

[100] Tonja Jacobi and Matthew Sag, Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases, 98 Georgetown Law Journal 8 (2009).

[101] Joshua B. Fischman and David S. Law, What is Judicial Ideology, and How Should We Measure It?, 29 Washington University Journal of Law and Policy168 (2009) pp. 168-170.

[102] Richard A. Posner, How Judges Think (Cambridge: Harvard University Press, 2008).

[103] Ibid, a 9.

[104] Ibid, at 19.

Formal Model – The Official Theory. The theory of legalism is of course the "official" theory of judicial behavior throughout the world and in international stage. As Posner puts it, "[t]he ideal legalist decision is the product of syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion."[105]

Attitudinal Theory. Attitudinal theory explains judicial behavior by judges' political preferences. In the US, scholars usually infer a judge's political preferences by the President's political party (so if a judge was appointed by a Democrat president, the judge will be usually considered a liberal and will vote favorably for consumers, small businesses, labor unions, environmental rights, civil liberties, etc.). Of course ideological drift is possible – judges may depart from the ideology of the party that appointed them. But overall, this model can very accurately predict the outcome of higher courts' cases.[106]

Strategic Theory. Strategic theory stands for the view that judicial decision-making depends on the anticipated reaction of the branches of government and other agents. Judges, acting according to the strategic theory, may consider the likelihood of their decision being adopted by others.[107] For example, an international tribunal's decision will depend on its estimated likelihood that State parties, international organization, or other international actors will act in accordance with that decision. Thus, sometimes an international tribunal will make a decision not based on existing legal rules, but rather on some modified version of the rule, which might be more acceptable. Essentially, courts "trade off principle against effectiveness."[108]

Sociological Theory. Sociological theory is concerned primarily with the influence of composition of the bench on the outcome of the case. It examines the impact of diverse and like-minded judges. For example, panels composed of the like-minded judges tend to make even more extreme opinions than the average opinion of the group's members before the deliberation (group polarization).[109] It also explains the role of dissent and possible dissent aversion. (Dissent aversion is unwillingness of a judge, in three-judge panels, to dissent because it may draw more attention to the majority's decision.) So this theory is essentially a mix of the psychological theory (small group dynamics and group polarization) and economic theory (rational choice and strategic calculation).

Psychological Theory. Posner defines psychological theory rather narrowly. He also points out that a promise of psychological approach lies in strategies for coping with uncertainty and the sources of preconceptions in shaping responses to uncertainty.[110] He also argues that conventional decision theory is largely inapplicable to judicial decision-making because judges in many important cases face radical uncertainty.[111] This theory also points out that judges, more often unconsciously than consciously, will bend the

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[105] Ibid. at 41.

[106] Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin, and Kevin M. Quinn, The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking, 104 Columbia Law Review 1150 (2004)

[107] Posner, How Judges Think, p. 30.

[108] Ibid, at 31.

[109] Ibid.

[110] Ibid, at 35..

[111] Ibid.

facts to fit an uncontroversial legal category to avoid reversal (reversal is unpleasant for career and power reasons).[112]

Phenomenological Theory. This theory studies the first-person experience of judging.[113] It usually uses personal accounts of eminent judges, such as Cardozo's *The Nature of Judicial Process.*

Economic Theory. Judge, according to this theory, acts as rational agent and is self-interested in utility maximization. Incentives and constraints that shape judicial behavior are central to this theory. For example, reputational costs usually play a very important role in economic theory of judging. However, accurate evaluation of judicial performance is very difficult because usually consequences of judicial decisions cannot be determined.[114] The theory treats psychological facts (cognitive limitations, emotional forces, rational calculation) as costs of processing information.

Organizational Theory. This theory analyzes judicial decision-making primarily through the principal-agent model. A principal – government or States that employ the court – usually have divergent interests and the principal is interested in institutional structure that will ensure that that the agent – the court – will not stray off.[115]

Pragmatism. This theory, also known as instrumentalism, argues that courts base their judgments on consequences of the decision and not a preexisting rule through the logical deduction from the premises.[116] Judicial pragmatism is rooted in the general philosophy of pragmatism, which was developed mostly by American philosophers William James and John Dewey. Pragmatism, as a general philosophy, argues that propositions should be evaluated empirically, by their observable consequences, not by sterile logic of a priori conceptualism. Oliver Wendell Holmes, Jr., apparently was influenced by pragmatism and best reflection of this is in his famous statement "The life of law has not been logic; it has been experience."[117]

Legal pragmatism, according to Posner, is based more on the nineteenth century loss of faith in natural law than on general philosophical pragmatism. In the US, legal pragmatism remained influential even after the legal realism as the movement faded, but only recently legal pragmatism has become self-conscious (i.e. comparing itself with other schools of thought, such as economic analysis of law).[118] Legal pragmatism is primarily the American product; outside the United States only few scholars showed affection for legal pragmatism, most notably F.S.C. Schiller and Jürgen Habermas.[119]

Nine Theories or Three? Although Posner lists the nine theories, his classification is arbitrary: most of these theories can be subsumed by three or four major theories: political science (attitudinal), psychological (psychological, sociological, and phenomenological), economic analysis of law (strategic, organizational, sociological, economic theories), and pragmatism (which shares a lot with economic analysis of law).

[112] Ibid, at 70.

[113] Ibid, at 40.

[114] Ibid., at 38.

[115] Ibid., at 39.

[116] Ibid, at 230-265.

[117] Ibid, at 232.

[118] Ibid, at 233.

[119] Ibid, at 233.

As Posner himself noted, his study draws heavily on two disciplines: economic analysis of law (esp. labor economics) and psychology.[120]

2.5 Summary

The two grand theories of judging have their differences set around the importance of legal rules. For formalists, judging is a rule-bound activity. The judge, according to this view, uses logical reasoning downwards from rules to arrive at the outcome. In its more extreme versions, a judge is seen as an operator of a giant syllogism machine. Most formalists, however, do not subscribe to the more extreme views of judging as merely deductive activity, but they nonetheless still regard formal legal rules as central to judicial decision-making.

The legal realists, however diverse they were in many other respects, had a twofold claim. First, legal rules, at least formal legal rules, do not determine outcomes of cases. Most realists agreed that legal rules play some role in judicial-decision making, but all realists argued that other rules and factors play much more important role. And a judge, influenced by other rules and other factors, will make a decision before consulting law books. In essence, judges act like attorneys who first determine their client's position and then look for legal materials to support that position. Second, after deciding on other grounds than solely legal rules, judges will be able to justify the decision with formal rules because one can usually find competing legal grounds for almost any position.

The legal realists differed in their emphasis on what factors influence judicial decision-making most heavily. Some realists claimed that personality of the judge counts most heavily; others emphasized the role of hunches; yet others focused on learned responses to the clusters of fact-situations. However, most legal realists did not deny the importance of rules; these rules, however, are not exclusively formal legal rules than can be found in law books. According to these realists, equally important if not more important rules are policy preferences embodied in a judicial philosophy of a particular judge.

Although the legal realists are often depicted as a movement that pushed a radical agenda and approached judging unscientifically, their ultimate goals were in fact the opposite: to increase certainty and stability of rule of law by uncovering real driving forces behind judicial decisions and make the study of judicial decision-making more scientific by embracing the empirical method. Even though the legal realists did not articulate their movement that way, it in fact could be considered as the first scientific theory of judging when it is compared to all the theories that came before it. Legal realism as a self-identified movement was short-lived, but its impact has been hefty and long-lasting.

[120] Ibid, at 7.

3. Empirical Approach to Decision-making

3.1 Introduction

As the previous chapter described, legal realism, as a self-identified movement, faded away after a few decades and its place was taken by other jurisprudential schools, such as Critical Legal Studies or economic analysis of law. However, the question remained controversial whether judges use logical, rule-bound thinking in their decision-making.

In the last few decades, general empirical research on decision-making has blossomed. Some of these findings have also been empirically tested on judges. Accordingly, the purpose of this chapter is twofold. First, by synthesizing empirical evidence, this chapter argues that logical and step-by-step decision-making, although possible in theory, is highly unlikely in the real-world judicial decision-making. Second, by relying on indirect empirical evidence, it argues that even when it comes to areas of decision-making that have not been specifically tested on judges, distinctive expert judgment is highly unlikely and thus judges are very likely to possess unexceptional decision-making skills.

3.2. Rule-based Thinking vs. Automatic Thinking

3.2.1 Introduction to Dual-system Theories

One of the most significant findings that emerged from the contemporary empirical research is that there are two distinct systems underlying human reasoning and decision-making.[121] First, there is an evolutionarily old system that is automatic, unconscious, fast, associative, and parallel. Second, there is a more recent system that is rule-based, controlled, conscious, serial, and slow.

Perhaps the most influential dual-process theory is System1/System2 distinction.[122] The following table summarizes the main differences between the two systems:[123]

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[121] The idea that there are two different models of reasoning and decision-making is old. Descartes distinguished between intuition and deduction. Pascal distinguished between "intuitive" mind and "geometric" mind. Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 Cornell Law Review 1 (2007) p. 6. *See also* Keith Frankish and Jonathan St. B. T. Evans, The Duality of Mind: An Historical Perspective, in Jonathan Evans and Keith Frankish, In Two Minds: Dual Processes and Beyond (Oxford: Oxford University Press, 2009) pp. 1-32.

[122] System1/System2 distinction has been formulated by a Nobel laureate Daniel Kahneman and Shane Frederick. Daniel Kahneman and Shane Frederick, Representativeness Revisited: Attribute Substitution in Intuitive Judgment, in Thomas Gilovich, Dale Griffin, and Daniel Kahneman (eds.), Heuristics and Biases: The Psychology of Intuitive Judgment (Cambridge: Cambridge University Press, 2002) pp. 49-81.
For other variations of the basic distinction, see: Jonathan St. B. T. Evans, How Many Dual-Process Theories Do We Need? One, Two, or Many?, *in* Jonathan Evans and Keith Frankish, In Two Minds: Dual Processes and Beyond (Oxford: Oxford University Press, 2009) pp. 33-54; Keith E. Stanovich, Distinguishing the Reflective, Algorithmic, and Autonomous Minds: Is it Time for a Tri-Process Theory?, *in* Jonathan Evans and Keith Frankish, In Two Minds: Dual Processes and Beyond (Oxford: Oxford University Press, 2009) pp. 55-88; Peter Carruthers, An Architecture for Dual Reasoning, in Jonathan Evans and Keith Frankish, In Two Minds: Dual Processes and Beyond (Oxford: Oxford University Press, 2009) pp. 109-128; Serena Chen and Shelly Chaiken, The Heuristic-Systemic Model in Its Broader Context, *in* Shelly Chaiken and Yaacov Trope (eds.), Dual-Process Theories in Social Psychology (New York: Guilford Press, 1999) pp. 73-96.

[123] Kathleen D. Vohs and Mary Frances Luce, Judgment and Decision Making, in Roy F. Baumeister and Eli J. Finkel (eds.), Advanced Social Psychology: The State of Science (Oxford: Oxford University Press, 2010) p. 744.

System 1	System 2
Defining Features	
Automatic	Time-intensive
Effortless	Effortful
Parallel	Serial
Reasons by association	Reasons by application of logic and rules
Intuitive	Analytical
Experiential	Rational
Holistic	Piecemeal
Contributions to Decision Errors	
Perceptual errors: The psychological impact of losses is greater than that of gains	Cognitive errors: Devoting much effort to deciding can hamper prediction of one's preferences
People confuse how easy it is for information to come to mind for trying to find base rates	At times it is better to devote less effort even if it means sacrificing decision accuracy
People confuse the representativeness of an instance for logic	
Feelings	
Preferences need no inferences: Feelings of good and bad arise very quickly	Full blown emotions contain cognition and emotion and are distinguishable from one another
Affect can automatically carry over to related decisions such as when fearful individuals make pessimistic judgments	Negative emotions such as regret are explicitly anticipated and avoided

System 1 and System 2 are often juxtaposed as being contradictory. Yet, as Kahneman points out, most of the time these systems work together rather well.[124] System 1 is very efficient – it requires little effort to perform at its peak. In general, System 1 is very good at its core functions; its initial reactions are usually very swift. Yet, System 1 is prone to cognitive biases – systematic decision-making errors. For example, it tends to answer easier questions than the ones it is really asked; it has almost no understanding of logic, statistics, and other probabilistic reasoning skills. Moreover, System 1 cannot be turned off; however, it can be overridden by System 2, but as the next section shows, System 2 is rarely eager to do that.

According to formalistic ideals, judicial decision-making is a pure product of the rule-based, controlled, and slow thinking processes – System 2. Yet, as the following sections show, such ideal is a mirage.

3.2.2 Effortful Thinking and Monitoring of Intuitive Errors

Ideally, System 2 would always correct and override System 1's mistakes: "System 1 quickly proposes intuitive answers to judgment problems as they arise, and System 2 monitors the quality of these proposals, which it may endorse, correct, or override. If it

[124] Daniel Kahneman, Thinking, Fast and Slow (New York: Farrar, Straus and Giroux, 2011) p. 24

endorses the initial proposal, the judgment is called intuitive.[125] Yet, often System 2 may be either unaware of mistakes or may fail to correct mistakes for other reasons. System 1 cannot be turned off, so to correct its error System 2 would have to be constantly vigilant. But such continuous vigilance is unrealistic and impractical because System 2 is very slow and inefficient, thus most decisions will be made by System 1.[126]

One way that researchers test the ability to resist the first response that comes to mind is through the CRT (Cognitive Reflection Test), developed by Shane Frederick.[127] The test consists of three questions:

1. A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost? _____cents
2. If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets? _____minutes
3. In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake? _____days

All three questions immediately suggest an intuitive but incorrect answer. Regarding the first question, the intuitive answer is ten cents, but since the bat costs one dollar more, that means that both would cost $1.20, so the correct answer is five cents. Regarding the second question, the correct answer is five minutes; third question: forty-seven days. Although one can answer all of these questions correctly with some reflection, most people answer correctly on average 1.24 of the 3 questions.[128] As Kahneman observes, "many people are overconfident, prone to place too much faith in their intuitions. They apparently find cognitive effort at least mildly unpleasant and avoid it as much as possible."[129]

Although the CRT seems simple on its face, it is a very precise indicator of susceptibility to cognitive errors. A recent study found that the CRT predicts performance on a wide sample of tasks from the heuristics-and-biases better than measures of cognitive ability, thinking dispositions, and executive functioning.[130]

One empirical study administered the CRT to Florida's trial judges. An average CRT score that judges obtained was 1.23 out of a possible 3.00; nearly one-third of the

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[125] Daniel Kahneman and Shane Frederick, Representativeness Revisited: Attribute Substitution in Intuitive Judgment, in Thomas Gilovich, Dale Griffin, and Daniel Kahneman (eds.), Heuristics and Biases: The Psychology of Intuitive Judgment (Cambridge: Cambridge University Press, 2002) p. 51 (Cited in Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 Cornell Law Review 1 (2007) p. 9).

[126] Kahneman, Thinking, Fast and Slow, p. 28.

[127] Shane Frederick, Cognitive Reflection and Decision Making, 19 Journal of Economic Perspectives 25-42 (2005) p.27

[128] Ibid, at 29.

[129] Kahneman, Thinking, Fast and Slow, p. 45.

[130] Maggie E. Toplak, Richard F. West and Keith E. Stanovich, The Cognitive Reflection Test as a Predictor of Performance on Heuristics-and-Biases Tasks, 39 Memory & Cognition 1275-1289 (2011).

judges failed to answer a single question correctly and less than 15% answered all three questions correctly.[131]

Overall CRT Results: Judges Compared to College Students[132]

Sample (n)	Mean	Percent with 0 correct	Percent with 1 correct	Percent with 2 correct	Percent with 3 correct
MIT (61)	2.18	7	16	30	48
Carnegie Mellon (746)	1.51	25	25	25	25
Harvard (51)	1.43	20	37	24	20
Florida judges (192)	**1.23**	**31**	**31**	**24**	**15**
Michigan/Ann Arbor (1267)	1.18	31	33	23	14
Bowling Green (52)	0.87	50	25	13	12
Michigan State (118)	0.79	49	29	16	6
Toledo (138)	0.57	64	21	10	5

Overall, if the CRT is the best predictor of ability to resist the first (and erroneous) response, and judges fare no better than average experimental subjects, it is reasonable to conclude that judges are prone to cognitive errors in the same way that ordinary experimental subjects are.

3.2.3 Decision Fatigue

Meanwhile, declining from the noon of day,
The sun obliquely shoots his burning ray;
The hungry judges soon the sentence sign,
And wretches hang that jury-men may dine;

Alexander Pope – The Rape of the Lock: Canto 3

Not only System 2 is lazy in its oversight of intuitive judgments proposed by System 1, it is also easily fatigued. A classic caricature of legal realism has been the trope that justice is "what the judge ate for breakfast." One recent study tested whether there is some scientific basis for this trope. The results are such that if formalists had predicted them, they would have never used such caricature.

The study data consisted of 1,112 judicial rulings of the Israeli parole board, collected over ten month period.[133] The study found that "the likelihood of a ruling in favor of a prisoner spikes at the beginning of each session—the probability of a favorable ruling steadily declines from ≈0.65 to nearly zero and jumps back up to ≈0.65 after a

[131] Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 Cornell Law Review 1 (2007) pp. 14-15.

[132] Ibid, at 16. *See also* Shane Frederick, Cognitive Reflection and Decision Making, 19 Journal of Economic Perspectives 25-42 (2005) pp. 27-28.

[133] Shai Danzigera, Jonathan Levav, and Liora Avnaim-Pessoa, Extraneous Factors in Judicial Decisions, 108 Proceedings of National Academy of Sciences (USA) 6889–92 (2011) p. 6889, available at <http://www.pnas.org/content/early/2011/03/29/1018033108> (last accessed 19 January 2012)

break for a meal."[134] In other words, a prisoner is 650% more likely to get a favorable parole decision if his case is heard right after the break than the last in the series before a next break. (The study of course carefully tested for other possible explanations.)

The findings of the study, although disquieting, build on numerous previous studies showing that repeated judgments or decisions deplete individuals' executive function and mental resources.[135] The mental depletion increases tendency to simplify decisions and accept status quo.[136] Thus, for parole judges the status quo is not to grant a parole. Food breaks, however, restore glucose supply to the brain and enable individuals to make effortful decisions. Authors of the study thus summarized their main findings:

> We have presented evidence suggesting that when judges make repeated rulings, they show an increased tendency to rule in favor of the status quo. This tendency can be overcome by taking a break to eat a meal, consistent with previous research demonstrating the effects of a short rest, positive mood, and glucose on mental resource replenishment. … [O]ur results do indicate that extraneous variables can influence judicial decisions, which bolsters the growing body of evidence that points to the susceptibility of experienced judges to psychological biases. Finally, our findings support the view that the law is indeterminate by showing that legally irrelevant situational determinants—in this case, merely taking a food break—may lead a judge to rule differently in cases with similar legal characteristics.[137]

3.2.4 Intuitive and Experiential Decision-making

As the previous sections have shown, while rule-based, analytical, rational, step-by-step decision making is possible in theory, in practice it is limited when it comes to both ordinary subjects and professional judges. It also means that judges make their usual decisions predominantly using System 1, which is intuitive and experiential, not rule-based or logical. Intuitive thinking, however, does not mean that a judge is flying blind at the decision. Intuitive mind is often superior – unconscious mind has greater capacity than the conscious mind and so has an access to the vast knowledge.[138] Moreover, sometimes conscious, step-by-step reasoning will actually impair the quality of decisions.[139]

The quality of intuitive thinking, however, depends on many factors, including education, upbringing, the beliefs of peers, personality, and so on.[140] Yet, as Kahneman

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[134] Ibid, at 6990.

[135] Kathleen D. Vohs, Roy F. Baumeister, Brandon J. Schmeichel, Jean M. Twenge, Noelle M. Nelson, Dianne M. Tice, Making Choices Impairs Subsequent Self-control: A Limited Resource Account of Decision Making, Self-regulation, and Active Initiative, 94 Journal of Personality and Social Psychology 883–898 (2008).

[136] Ibid. This phenomenon is also called ego-depletion.

[137] Shai Danzigera, Jonathan Levav, and Liora Avnaim-Pessoa, Extraneous Factors in Judicial Decisions, 108 Proceedings of National Academy of Sciences (USA) 6889–92 (2011) p. 6992.

[138] Richard A. Posner, How Judges Think (Cambridge: Harvard University Press, 2008) p. 108; Pawel Lewicki, Maria Czyzewska, and Hunter Hoffman, Unconscious Acquisition of Complex Procedural Knowledge, 13 Journal of Experimental Psychology: Learning, Memory and Cognition 523 (1987).
As Posner also observes, Hutcheson's equating intuition to "hunch" was a mistake – "a hunch sounds like a guess, a shot in the dark". Posner, How Judges Think, p. 113.

[139] Timothy D. Wilson and Jonathan W. Schooler, Thinking Too Much: Introspection Can Reduce the Quality of Preferences and Decisions, 60 Journal of Personality and Social Psychology 181 (1991).

[140] Posner, How Judges Think, p. 98.

points out, whether intuitive thinking will produce consistently sound judgments depends mostly on environment, available feedback, and prolonged practice:

> The acquisition of skills requires a regular environment, an adequate opportunity to practice, and rapid and unequivocal feedback about the correctness of thoughts and actions. When these conditions are fulfilled, skill eventually develops, and the intuitive judgments and choices that quickly come to mind will mostly be accurate. All this is the work of System 1, which means it occurs automatically and fast.[141]

Reliance on System 1 means that judges, like all people, are susceptible to cognitive biases. System 1 relies on heuristics – rules of thumb for decision-making. Heuristics make perfect sense in evolutionary perspective, even though they also predispose us to sub-optimal decisions in contemporary environment. Thus, heuristics also lead to cognitive biases. An example of heuristic and resultant cognitive bias is loss aversion: losses loom much larger than gains; in other words, emotional intensity of losing $100 will be compensated only by a gain of $200. For a rational economic agent, *homo economicus,* such decision-making rules seem obviously irrational.

Another example is the anchor-and-adjust heuristic; anchoring effect is the unconscious reliance on the first available information to make a decision even if the first available information is random.[142] For example, one study tested anchoring effect on experienced German judges, who had on average more than 15 years of judicial experience. Judges read a description of a woman on trial for shoplifting. The judges were asked to roll a pair of dice before indicating the exact prison sentence they would impose on the woman. The dice, however, were loaded to result in either 3 or 9. Obviously, the rolling of the dice is unrelated to sentencing, so judges should have not been influenced by it. And yet, the judges who rolled 3, sentenced the woman on average to 5 months and the judges who rolled 9 sentenced her on average to 8 months.[143]

There are dozens of other ways that System 1 can go astray. And it would be beyond the scope of the present work to mention all cognitive biases that judges may be susceptible to. Suffice it to mention that empirical studies have found little or no

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[141] Kahneman, Thinking, Fast and Slow, p. 416.

[142] In the classical experiment by Amos Tversky and Daniel Kahneman participants had to guess the percentage of African nations that were members of the United Nations. Some people were asked whether it was more or less than 10%; others were asked whether it was more or less than 65%. The question that participants heard served as the anchor – an initial and unconscious suggestion from which participants would adjust their answer. Thus, the participants who were asked whether it was more or less than 10% answered on average 25%; the participants who were asked whether it was more or less than 65% answered on average 45%. Amos Tversky & Daniel Kahneman, Judgment under Uncertainty: Heuristics and Biases, 185 Science 1124-1130 (1974).

In a relatively more recent experiment, the researchers asked participants to guess how old Gandhi was when he died. Some people were asked whether Gandhi died before or after age of 140; although the question was obviously off the mark with his possibly real age when he died, this group was still influenced by the question – they answered on average that Gandhi died when he was 67 years old. Others were asked whether he died before or after age of 9; the estimates of this group were on average lower 17 years, i.e. that Gandhi died when he was 50 years. Fritz Strak and Thomas Mussweiler, Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility, 73 Journal of Personality and Social Psychology 437–446 (1997).

[143] Birte Englich, Thomas Mussweiler, and Fritz Strack, Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making, 32 Personality and Social Psychology Bulletin 188–200 (2006).

difference between judges and ordinary subjects in heuristic decision-making and attendant cognitive biases.[144] Thus, judges, like other people, are prone not only to anchoring bias,[145] but also representativeness heuristic (neglecting statistic base rate),[146] hindsight bias (overestimating predictability of past events) and many others.

System 1 is not only susceptible to cognitive biases, but it also has little understanding of formal logic. For example, most college students consider this syllogism valid:[147]

> All roses are flowers.
> Some flowers fade quickly.
> Therefore some roses fade quickly.

But this syllogism is flawed - it commits the fallacy of unequal distribution. Likewise, System 1 is prone to make snap judgments and jump to conclusions even when only incomplete information is available.[148]

System 1 also tends to substitute easier questions for more difficult ones: whenever it faces the target question that is difficult, it will be prone to answer a heuristic question – the simpler question related to the target question.[149] This phenomenon is called attribute substitution. Attribute substitution is in turn part of a more general concept of effort-reduction, which states that people will use variety of methods to reduce decision-making effort.[150] An experimental example of attribute substitution comes from studies on contingent valuation. In one study, three groups of subjects were asked how much they would pay to save 2,000 birds, or 20,000 birds, or 200,000 birds. One would expect that rational decision maker would be willing to pay much more to save 100 times more birds. Yet, the subjects were willing to pay approximately the same amount irrespective of the number of birds saved: $80 for 2,000 birds; $78 for 20,000 birds; $88 for 200,000 birds.[151] Attribute substitution explains that the subjects were not answering the questions they were asked, which would involve complex computations like the price of one bird multiplied by the total number, adjusted to its total population, scarcity, etc. Instead, they substituted it for an easier question: how much they were willing to pay for a prototypical bird. That's why their evaluations were almost the same.

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[144] *See* Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, Inside the Judicial Mind, 86 Cornell Law Review 777 (2001).

[145] Ibid, at 790.

[146] Ibid, at 801.

[147] Kahneman, Thinking Fast and Slow, p. 45.

[148] Ibid, at 79-89.

[149] For example, the target question – "How popular will the president be six months from now?" – is difficult to answer because it requires computation of myriad of factors, including many factors which are compounded by uncertainty; therefore, System 1 will likely substitute the target question with the heuristic question – "How popular is the president right now?". Daniel Kahneman, Thinking, Fast and Slow (New York: Farrar, Straus and Giroux, 2011) p. 116.

[150] Anuj K. Shah & Daniel M. Oppenheimer, Heuristics Made Easy: An Effort-Reduction Framework, 134 Psychological Bulletin 207–222 (2008).

[151] *See* William H. Desvousges, F. Reed Johnson, Richard W. Dunford, Kevin J. Boyle, Sara P. Hudson, and K. Nicole Wilson, Measuring Natural Resource Damages with Contingent Valuation: Tests of Validity and Reliability, in J.A. Hausman (ed.), Contingent Valuation: A Critical Assessment (Amsterdam: North Holland, 1993) pp. 91 – 159.

Contrary to formalistic ideals, reliance on experiential and intuitive decision-making also means that cognition is inseparable from emotion.[152] This is not necessarily bad. Not all emotional reactions are illegitimate or bad for judicial decision-making. Emotion can be form of thought, compressed and inarticulate.[153] Sometimes, however, emotional states, especially a misattribution effect, can impair the quality of decision-making.[154] Yet, even when decision-making is characterized by System 2 processes, emotions are unavoidable.[155] Here once again the formalistic idea of judging as cold, purely rational thinking process, completely devoid of emotions, is a fantasy. And as Judge Posner further observes, judicial intuitionism is unlikely to disappear because of the institutional structure of adjudication – judges do not have time to use elaborate analytical procedures, before voting or afterwards, because of time pressures.[156]

3.2.5 Summary: Intuitive v. Rational Judicial Decision-making

As the preceding sections have shown, there are two distinct thinking systems underlying human decision-making. System 2, the slow, rule-bound, effortful system would ideally monitor judgments proposed by System 1 and correct all flawed judgments that System 1 makes. Yet, in judges, like in all human subjects, System 2 is often languid and prefers to avoid even a mild cognitive strain. System 2 is also not foolproof: soundness of its judgments depends among other factors on legal training and reasoning skills. Also, because of decision fatigue and ego depletion, decision-making is a limited resource.

All of this means that judges, like other people, will make most of their decisions by relying on the intuitive and experiential System 1. This thinking process works flawlessly most of the time. But it does predispose judges to systemic errors – cognitive biases. It also means that judges, contrary to formalistic ideals, do not reason downward from legal rules to outcomes; instead, they tend to make snap judgments even if incomplete information is available. And more experienced judges are usually more likely to make intuitive decisions.[157]

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[152] I use the term *emotion* here for both affect and emotion proper, although researchers usually distinguish between the two terms. Affect refers to low-level, non-conscious, positive versus negative twinges; emotion stands for full-blown feeling states. Kathleen D. Vohs and Mary Frances Luce, Judgment and Decision Making, in Roy F. Baumeister and Eli J. Finkel (eds.), Advanced Social Psychology: The State of Science (Oxford: Oxford University Press, 2010) p. 749.

[153] Posner, How Judges Think, p. 106.

[154] Kathleen D. Vohs and Mary Frances Luce, Judgment and Decision Making, in Roy F. Baumeister and Eli J. Finkel (eds.), Advanced Social Psychology: The State of Science (Oxford: Oxford University Press, 2010) p. 749. *See also* Posner, How Judges Think, p. 106: (It depends on the emotion felt. Some emotions – anger, disgust, happiness – engage heuristic processing and increase person's certitude, as a results she is less likely to engage in systematic analysis. Other – uncertainty, hope, surprise, fear, worry – are opposite.) Larissa Z. Tiedens and Susan Linton, Judgment under Emotional Certainty and Uncertainty: The Effects of Specific Emotions on Information Processing, 81 Journal of Personality and Social Psychology 973 (2001) p. 985.

[155] Vohs & Luce, Judgement and Decision Making, p 750.

[156] Posner, How Judges Think , p. 110.

[157] Ibid, at 109 ("The more experienced the judge, the more confidence he is apt to repose in his intuitive reactions and the less likely he is to be attracted to a systematic decision-making methodology, perhaps involving Bayes's theorem or other algorithms, decision trees, artificial intelligence, debiasing techniques, and so forth.")

3.3 Expert Judgment and Judicial Decision-making

3.3.1 Introduction

The interdisciplinary empirical research on decision-making has been blooming for at least few decades now; however, most empirical studies on judgment and decision-making have been carried out with subjects other than judges. Thus, one can reasonably question whether general research on decision-making is applicable to judicial decision-making: while there is no doubt that judges are susceptible to many cognitive biases, there is still possibility that their decision-making faculty is superior in some ways.[158]

One possible reason is that judges undergo a specialized training – legal education. Schauer, for example, suggests that legal training, subsequent legal experience, and finally the judging experience may produce significant differences between judges and ordinary people. Therefore, one possibility is that trained lawyers are expert decision-makers in their field and thus make better legal decisions.[159] Another hypothesis is that it is not legal training in general that makes judges better decision-makers, but the experience of judging itself. Hence, it is judges not as lawyers but judges as judges proper who have enhanced judgment and decision-making abilities.[160] Both hypotheses about of expert decision-making seem plausible, however, as the following sections show, such hypotheses are largely unsubstantiated.

3.3.2 Lawyers as Expert Decision-makers

It would be only too natural to expect that specialized training, including legal education, enhances decision-making and problem-solving skills. The idea that specialized training is useful goes back to ancient Greeks: Plato urged statesmen to study arithmetic because "even the dull, if they had an arithmetical training … always become much quicker than they would otherwise have been"; the medieval scholastics thought that study of logic, especially syllogisms, trains the mind.[161]

However, at the end of the nineteenth century and the beginning of the twentieth century, eminent psychologists like William James and Edward Thorndike attacked the

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[158] Frederick Schauer, Is There a Psychology of Judging?, in David E. Klein and Gregory Mitchell (eds.), The Psychology of Judicial Decision Making (American Psychology-Law Society) (New York: Oxford University Press, 2010) p. 113:
"And that is why the existing research showing that judges are susceptible to many well-discussed cognitive failings and biases – anchoring and availability, for example – is highly important. Even though important, however, this research is incomplete. Even if judges when acting as finders of fact or when reaching verdicts are prone to all or most of these familiar reasoning failures, the question remains entirely open whether there are also areas in which judges think quite differently, even supposing that with respect to those areas judges would be similarly afflicted with the same or analogous cognitive deficiencies. The existing research tells us little about whether there are such areas of differential thinking, and, if so, what they look like, but until we can answer this question we cannot know whether the conclusions of Legal Realism are correct, and whether the hidden Legal Realist premises of the existing psychological research on judging are sound."

[159] Ibid, at 105.

[160] Ibid.

[161] Quoted in Darrin R. Lehman, Richard O. Lempert, and Richard E. Nisbett, The Effects of Graduate Training on Reasoning: Formal Discipline and Thinking about Everyday-life Events, 43 American Psychologist 431-442 (1988), *reprinted* in Richard E. Nisbett (ed.), Rules for Reasoning (New Jersey: Routledge, 1993) p. 316

idea that training in disciplines like mathematics, logic, or Latin can improve reasoning abilities about everyday life events; for these critics, mathematics or formal logic have little resemblance with everyday-life events.[162] Thorndike showed that there was little transfer of training across tasks; for example, from canceling letters to canceling parts of speech, from estimating areas of rectangles of one size and shape to estimating areas of rectangles of another size and shape.[163] Later researchers likewise found that there was little or no transfer of solutions of one problem to solutions of another formally identical problem.[164]

Yet, it seems that these researchers erroneously concluded from these findings that no formal discipline can improve reasoning and problem-solving skills. A number of studies have shown that there is a difference between probabilistic and deterministic models. Probabilistic sciences, like psychology or economics, deal with unpredictable phenomena and with causes that are usually neither necessary nor sufficient; in contrast, deterministic sciences, like chemistry or physics, deal with phenomena which are characterized by the sufficient and necessary causal phenomena. Probabilistic sciences expose people to messy and probabilistic phenomena encountered in everyday life.[165]

When it comes to law, however, the contemporary empirical research, although not extensive, shows that legal education does not improve reasoning and problem-solving skills, at least beyond negligible levels or outside conditional logic. This is mostly because law, as an academic discipline (but not as a real-world legal practice), resembles more deterministic science model – solving legal issues with logic, and preferably deduction, and almost no exposure to uncertainty and probabilistic issues.

One study examined the difference in reasoning skills between graduates of psychology, medicine, chemistry, and law.[166] As a control procedure, the study looked at verbal reasoning skills; the main focus was on statistical and methodological reasoning skills, where students had to apply their reasoning skills to both scientific and everyday-life problems. The study was designed both as cross-sectional and longitudinal.[167] Initially, there were no differences in test scores across the four disciplines. Two years of training in all disciplines had no substantial effect on verbal reasoning skills. After two years of training, however, psychology graduates showed a 70% increase in methodological and statistical reasoning; medical training produced a 25% improvement in test scores; legal training, like graduate training in chemistry, had no substantial effects.[168]

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[162] Ibid.

[163] Ibid.

[164] Ibid.

[165] Thomas Gilovich, How We Know What Isn't So: The Fallibility of Human Reason in Everyday Life (New York: The Free Press, 1991) p. 190.

[166] Darrin R. Lehman, Richard O. Lempert, and Richard E. Nisbett, The Effects of Graduate Training on Reasoning: Formal Discipline and Thinking about Everyday-life Events, 43 American Psychologist 431-442 (1988), *reprinted in* Richard E. Nisbett (ed.), Rules for Reasoning (New Jersey: Routledge, 1993) p. 328.

[167] Cross-sectional study compared first-year and third-year graduate students to one another. In longitudinal, first-year students were reassessed two years later, to compare their later performance with the original.

[168] Lehman, Lempert, and Nisbett, The Effects of Graduate Training on Reasoning: Formal Discipline and Thinking about Everyday-life Events, *reprinted in* Nisbett (ed.), Rules for Reasoning, p. 328.

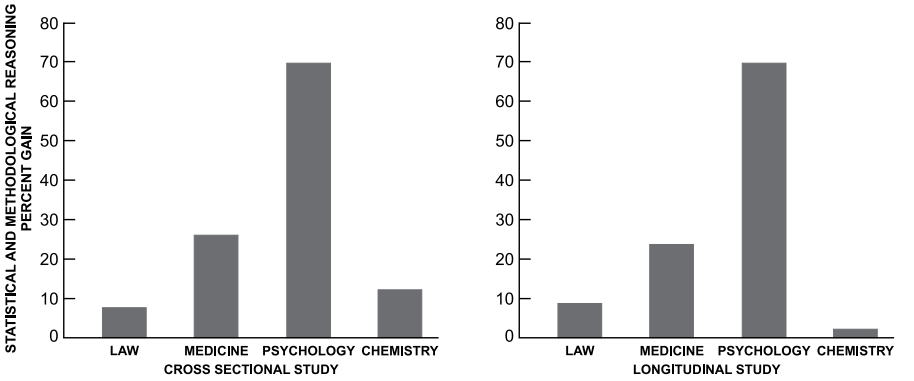

Figure from Darrin R. Lehman, Richard O. Lempert, and Richard E. Nisbett, The Effects of Graduate Training on Reasoning: Formal Discipline and Thinking about Everyday-life Events, 43 American Psychologist 431-442 (1988), *reprinted in* Richard E. Nisbett (ed.), Rules for Reasoning (New Jersey: Routledge, 1993) p. 328.

The authors of the study thus summarized their findings regarding probabilistic reasoning:

> It appears that the probabilistic sciences of psychology and medicine teach their students to apply statistical and methodological rules to both scientific and everyday-life problems, whereas the nonprobabilistic science of chemistry and the nonscientific discipline of the law do not affect their students in these respects …. The luxury of not being confronted with messy problems that contain substantial uncertainty and a tangled web of causes means that [law and chemistry do] not teach some rules that are relevant to everyday life.[169]

A more recent empirical study likewise found limited effect of legal training on problem-solving skills. As the author of that study observed, for example, "in contrast to final-year medical students, third-year law students apparently had not yet refined the skill of distinguishing adequately between relevant and irrelevant facts."[170] Similarly, Carnegie Foundation's 2007 report on legal education concludes that "a number of studies have shown that students' moral reasoning does not appear to develop to any significant degree during law school."[171] Another study on decision-making of practicing attorneys likewise found that decision-making skills of practicing lawyers are inferior.[172]

Overall, the studies suggest that legal training provides no such significant improvement in reasoning and problem-solving skills that some other disciplines may

[169] Ibid, at 335.

[170] Stefan Krieger, The Development of Legal Reasoning Skills in Law Students: An Empirical Study, 56 Journal of Legal Education 352 (2006) p. 352 (*Cited in* Randall Kiser, Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients (Heidelberg: Springer, 2010) p. 146).

[171] William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Lee S. Shulman, Educating Lawyers: Preparation for the Profession of Law (Jossey-Bass/Carnegie Foundation for the Advancement of Teaching)(California: Jossey-Bass, 2007)p. 133 (*Cited in* Randall Kiser, Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients (Heidelberg: Springer, 2010) p. 147).

[172] Randall Kiser, Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients (Heidelberg: Springer, 2010) pp. 29-141

provide. Conditional logic is the only significant reasoning skill which improves with legal education.[173] Yet, it would be a gross overstatement to suggest that conditional logic is the most important skill in legal judgment and decision-making. Therefore, legal training fails to develop most important problem-solving and decision-making skills, including judgment under uncertainty, problem-solving of irregular factual patterns that lack clear causal connections, and other features that are crucial in the real-life judicial decision-making.[174]

Moreover, the empirical studies described here have been carried out in American law schools, and American legal education is usually considered a paragon of practice-oriented education. In addition to some opportunities of clinical learning, it relies heavily on case method and Socratic teaching, which aim to improve students' legal reasoning and problem-solving above all.

Most international judges, however, undergo their legal training outside the US, where the American model of legal education is alien. Almost everywhere outside the United States, legal education is incomparably less practice-oriented than it is in a typical American law school. A typical European law school will focus heavily on doctrinal learning, with emphasis on overarching theoretical models and theoretical classifications, and some exercises where students have to use a crystallized set of facts and merely apply legal rules; furthermore, case studies are used merely for illustration, not to synthesize legal rules from numerous precedents.

But even the case method, practiced in American law schools, is insufficient, although it is anyway far superior to continental tradition of legal education. The main problem is that it foregoes evaluative reasoning skills: "reading, discussing and questioning students about cases in which the judges have already simplified, synthesized and occasionally omitted facts to support their conclusions – may not promote evaluative reasoning skills in real-life conflicts rich with factual ambiguities."[175] There are other major drawbacks of

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[173] Conditional logic is concerned with proof that follows from the assertion a conditional – essentially a proof that the antecedent necessarily leads to the consequent. Schematically, it is usually represented as follows: 1. A > B („If A, then B") 2. B > C („If B, then C"). 3. A (proof assumption - A is true) 4. B (modus ponens; - „If A then B; A, therefore B"). 5. C (modus ponens; „If B then C; B, therefore C").
In the study by Lehman and others, law students, like graduate students of psychology and chemistry, improved on all four types of conditional logic questions: arbitrary, causal wording, permission wording, and biconditional. Lehman, Lempert, and Nisbett, The Effects of Graduate Training on Reasoning: Formal Discipline and Thinking about Everyday-life Events, *reprinted in* Nisbett (ed.), Rules for Reasoning, p. 329.

[174] Gilovich thus explains why training in psychology and similar social sciences yields superior reasoning ability: "Some of the material conflicts with students' pre-existing beliefs and thus provides much more than the usual incentive to engage in critical analysis, to suggest alternative explanations, and to consider the adequacy of both existing data and other potentially informative evidence. The student is thus encouraged to engage his or her analytic faculties with unusual intensity because the very nature of the material invites it. The complexity of the phenomena, the difficulty of untangling correlated variables, and the relative scarcity of truly decisive experiments compel all but the most disengaged students to dig deeper and think harder." Thomas Gilovich, How We Know What Isn't So: The Fallibility of Human Reason in Everyday Life (New York: The Free Press, 1991) pp. 192-193.

[175] Randall Kiser, Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients (Heidelberg: Springer, 2010) p. 150.

the case method. [176] For example, the facts presented in a judicial opinion may be biased to support the stated result. Also, the case method typically relies on appellate decisions; however, these decisions are usually the result of poor decision-making in lower courts, and so studying only appellate decision may exclude models of sound decision making, i.e. cases that were not appealed.

Needless to mention, most law students who fail even primitive legal reasoning and problem-solving skills in law schools, do not become international judges. Yet, it would be equally naïve to expect that a lawyer is selected to an international court only after he or she had developed superior decision-making and problem-solving skills. Most international judges are selected either from academia or from practicing lawyers or legal advisors (diplomats), and there is nothing to suggest that any of these groups are known for superior judgment and decision-making skills.

3.3.3 Judicial Experience and Expert Judgment

Another hypothesis is that judges develop special decision-making and problem-solving skills because of the judging experience itself. This hypothesis usually falls under the rubric of expert judgment. Admittedly, there are no empirical studies that would directly falsify the hypothesis of judicial experience as a basis for expert judgment. Yet, numerous other studies on expertise, albeit indirectly, contradict such possibility.

In general, contrary to the popular myth, studies show that expert performance does not improve with years of experience.[177] For example, experienced surgeons are no better than medical residents at predicting hospital stays after surgery;[178] clinical psychologists with years of clinical experience are no better than novices at judging personality disorders;[179] auditors with years of experience are no better than novices at detecting corporate fraud.[180] The same pattern exists across the board.[181]

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[176] Ibid.

[177] *See* Geoffrey Colvin, Talent is Overrated: What Really Separates World-Class Performers From Everybody Else (New York: Penguin Books, 2008) pp. 3-6.

[178] Colin F. Camerer and Eric J. Johnson, The Process-Performance Paradox in Expert Judgment: How Can Experts Know So Much and Predict So Badly? In K. Anders Ericsson and Jacqui Smith (eds.), Toward a General Theory of Expertise: Prospects and Limits (New York: Cambridge University Press, 1991), pp. 195-217.

[179] Ibid.

[180] Jean Bedard, Michelene T. H. Chi, Lynford E. Graham, and James Shanteau, Expertise in Auditing, 12 Auditing 1-25 (1993).

[181] Geoffrey Colvin, Talent is Overrated: What Really Separates World-Class Performers From Everybody Else (New York: Penguin Books, 2008) pp. 3-4 ("In field after field, when it came to centrally important skills—stockbrokers recommending stocks, parole officers predicting recidivism, college admissions officials judging applicants—people with lots of experience were no better at their jobs than those with very little experience. (...) Bizarre as this seems, in at least a few fields it gets one degree odder. Occasionally people actually get worse with experience. More experienced doctors reliably score lower on tests of medical knowledge than do less experienced doctors; general physicians also become less skilled over time at diagnosing heart sounds and X-rays. Auditors become less skilled at certain types of evaluations."). See also Philip E. Tetlock, Expert Political Judgment: How Good Is It? How Can We Know? (Princeton, NJ: Princeton University Press, 2005).

The so-called regular, high-validity environments are the exception. Such fields are regular enough to be predictable, and most importantly, experts in these fields learn these regularities through prolonged practice.[182] Predictability depends essentially on the quality and speed of feedback. Yet, there are relatively very few fields that could be characterized as high-validity environments.[183]

Judging, if anything, is a very low-validity environment. For one, if judges receive any feedback at all about the quality of their decisions, it is usually months after the decision is made - when the appellate court reviews the case. Most likely, however, judges do not receive any feedback at all, not to mention instant feedback required for improved expert performance. In this context, even the case method has some advantages over actual experience of judging: the case method usually provides a law student with an immediate feedback about decision-making and legal reasoning quality.

Another reason that compounds the problem is that most judges are generalists, and thus any feedback, if it ever reaches them at all, is dispersed:

> With the exception of the tasks judges perform repeatedly, it might take a long time for judges to accumulate enough feedback to avoid errors. It is as if a professional tennis player divided his time or her time among tennis, volleyball, softball, soccer, and golf rather than concentrating on tennis – the player's opportunity to develop "tennis intuition" would diminish. … Moreover, because the benefit of experiential learning in a wicked [low-validity] environment is limited, training may be necessary to compensate for deficiencies in the learning environment.[184]

[182] *See generally* K. Anders Ericsson, N. Charness, P. Feltovich, and R. R. Hoffman (eds.), The Cambridge Handbook of Expertise and Expert Performance (Cambridge: Cambridge University Press, 2006); K. Anders Ericsson, The Acquisition of Expert Performance: An Introduction to Some of the Issues. In K. Anders Ericsson (ed.), The Road to Excellence: The Acquisition of Expert Performance in the Arts and Sciences, Sports, and Games (New Jersey: Lawrence Erlbaum, 1996) pp. 1–50;; K. Anders Ericsson, The Influence of Experience and Deliberate Practice on the Development of Superior Expert Performance. In K. Anders Ericsson, N. Charness, P. Feltovich, and R. R. Hoffman (eds.), The Cambridge Handbook of Expertise and Expert Performance (Cambridge: Cambridge University Press, 2006) pp. 685–706; K. Anders Ericsson, Deliberate Practice and the Acquisition of Expert Performance in Medicine and Related Domains, 10 Academic Medicine S70-S81 (2004)

[183] For example, anesthesiology is a high-validity environment because anesthesiologists receive quick feedback of their actions and thus can learn fast; radiology, on the other hand, is a low-validity environment because radiologists usually do not receive feedback for months, if ever, about accuracy of their diagnosis. Psychotherapy, as Kahneman observes, is a deceptively low-validity environment: "Psychotherapists have many opportunities to observe the immediate reactions of patients to what they say. The feedback enables them to develop the intuitive skill to find the words and the tone that will calm anger, forge confidence, or focus the patient's attention. On the other hand, therapists do not have a chance to identify which general treatment approach is most suitable for different patients. The feedback they receive from their patients' long-term outcomes is sparse, delayed, or (usually) nonexistent, and in any case too ambiguous to support learning from experience." Kahneman, Thinking, Fast and Slow, p. 242.

[184] Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 Cornell Law Review 1 (2007) pp. 39-40.

In general, the institutional system of courts[185] and the nature of judging means that judicial experience itself does not improve judicial decision-making significantly, and general empirical research on decision-making will usually apply with equal force to judicial decision-making.

3.4 Summary

Overall, the main lesson that we can draw from the empirical research is not to overrate distinctiveness of judicial decision-making. The myth surrounding judicial dispute settlement is that judges, although otherwise ordinary people, rise above ordinary human reasoning capabilities once they sit on the bench, and thus are able to demonstrate almost supreme reasoning ability: make cold, rational, purely logical decisions, which are devoid of intuitions, experiential thinking, and any emotions.

Yet, as the empirical research demonstrates, judges are no different from ordinary research subjects in their preference for automatic thinking over logical rule-based thinking, even when the intuitive thinking might lead to systematic decision errors. While the rule-based thinking system is capable of overriding judgments of the automatic system, in practice it seldom does so; moreover, this rule-based system is easily depleted, and once depleted it defers to the intuitive system.

This means that judges, like other people, will tend to make snap judgments even when incomplete information is available; these snap judgments will sometimes be reconcilable with logical thinking and sometimes not. They will also tend to substitute easier questions for more difficult ones. And all of this is only a small number of ways of how automatic, intuitive thinking system differs from the formalistic ideals of judicial decision-making. Yet again, it is important to note that System 1, by and large, will produce reasonable decisions most of the time.

In general, the empirical studies also show no substantial difference in overall decision-making quality between judges and typical experimental subjects. One reason why judges perform no better than ordinary subjects is because judging is a low-validity environment – it provides no instant feedback about the quality of decisions made and thus judges do not improve their decision-making skills.

[185] Guthrie, Rachlinski, and Wistrich suggest one way to improve this aspect:
"[J]urisdictions could adopt peer-review processes to provide judges with feedback. For example, every two years, three experienced judges from other jurisdictions could visit a target court. They could select a few cases recently decided by each target court judge, read all of the rulings and transcripts, and then provide the judges with feedback on their performance and constructive suggestions for improvement." Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 Cornell Law Review 1 (2007) p. 39.

PART II: INTERNATIONAL COURTS AND INTERNATIONAL LAW

4. Judicial Creativity and Constraints: Dueling Cannons of International Law

4.1 Introduction

Legal Rules as Constraint. It could be argued that even if judges do not make initial decisions by following formal rules, legal rules nevertheless constrain judicial creativity. The prevailing formalistic view suggests that legal rules normally have a single and clear meaning. Therefore, it is only natural to expect that there is an objectively correct legal answer to any legal issue presented in a case. Some international tribunals went even further by asserting that judicial decision-making is no different from mathematical sciences.[186]

This chapter argues that such views are misguided and legal rules in public international law, because of their ambiguity, will rarely constrain international courts. Most of the ambivalence is due to the rules for figuring out rules, such as canons of treaty interpretation or methods and techniques for ascertaining customary rules. In a sense, this chapter tries to extend Llewellyn's fencing metaphor of dueling cannons to international courts and international law.

Dueling Cannons of International Law. This chapter argues that, first, due to the selection effect, the cases that reach international courts are largely preselected for their ambiguity. Second, international legal rules are by their nature very open-ended; this is especially true of what could be called secondary rules – techniques for treaty interpretation, synthesis of customary rules, etc. In the words of Walter Wheeler Cook, legal rules and principles are "in the habit of hunting in pairs".[187] Thus, dueling cannons will usually allow judges to justify almost any position they adopt and legal rules in public international law will seldom lead to an objectively correct legal answer, thus the idea that judicial creativity of international courts is constrained by legal rules is based on a misconception.

Types of Legal Rules in Public International Law. Although this might be a contentious issue in the higher realm of legal theory, but overall most commentators agree that that there are four types of legal rules in public international law: (1) treaties, (2) customary law, (3) precedents, and (4) general principles of law. These are stipulated

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[186] Eastern Extension, Australasia and China Telegraph Company, Ltd. (Great Britain) v. United States, 9 November 1923, 6 Reports of International Arbitral Awards 112 pp. 114-115:
"International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so t*o find - exactly as in the mathematical sciences - the solution of the problem*. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals." (emphasis added)

[187] Walter Wheeler Cook, Book Review, 38 Yale L.J. 405 (1929) p. 406.

in the Article 38 of the Statute of the ICJ,[188] and it is widely acknowledged that this article reflects legal rules of general international law and not just those that the ICJ applies.[189]

4.2 Agency Conundrum

4.1.1 International Courts and Agency Relationships

The Concept of Agency. One of the best ways to look at this issue is through the concept of agency, developed in economic analysis of law.[190] In agency, a principal hires an agent to do a job that principal himself does not want to do, cannot do, or the agent can do better and cheaper. One example of principal-agent relationship is a government establishing its domestic courts or States establishing international courts.[191] The agent, however, often has its own incentives. For example, often the agent does not want to work hard or wants to stray from the principal's directions. The problem arises when the principal is not able to measure precisely how hard the agent is working or whether the agent follows the directions.[192] Moreover, agency costs arise when the principal expends resources to measure the agent's performance, or when the agent expends resources to reassure the principal that work is performed properly.

Objective Measurement of Performance. One aspect of the agency conundrum that is relevant to the present context is the measurement of performance. If States and other international actors who establish international courts would be able to measure precisely their performance, international judges would not be able to substitute their own views for the outcome that legal rules dictate. The problem, of course, is that such measurement is impossible. It is impossible because international legal rules, as this

[188] Art 38(1), Statute of the International Court of Justice, June 26, 1945, T.S. No. 993, 3 Bevans 1179:
"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[189] James L. Brierly, Humphrey Waldock (ed.), The Law of Nations (Oxford: Clarendon Press, 6th ed., 1963) p. 56. (this is the "text of the highest authority, and we may fairly assume that it expresses the duty of any tribunal which is called upon to administer international law"). Schwarzenberger went even further by asserting that "the near-universality" of Article 38 transformed it into "a certainty of the exclusive character of three law-creating processes in international law". Georg Schwarzenberger, The Inductive Approach to International Law (London: Stevens & Sons, 1965) p. 5.

[190] *See* Ward Farnsworth and Eric Posner, Agency (Chapter 9) in Ward Farnsworth, The Legal Analyst (Chicago: University of Chicago Press, 2007) pp. 87-99; Geoffrey P. Miller, Some Agency Problems in Settlement, 16 Journal of Legal Studies 189 (1987).

[191] As some political scientists observed, when it comes to international courts, the model resembles more the Principal-Trustee relationship than the Principal-Agent model properly. In the principal-trustee relationship, a trustee is given independent authority to make decisions according to its best judgment and a principal has more difficulty to influence the behavior of the trustee. *See* Karen J. Alter, Agents or Trustees? International Courts in their Political Context, 14 European Journal of International Relations 33 (2008).

[192] As Posner points out, "The problem of judicial agency costs arises only when the looseness of the principal's control over the judge enables the latter to base his decisions on a preference that is too personal, too idiosyncratic, to be acceptable." Posner, How Judges Think, p. 126.

Chapter will show, are open-ended and ambiguous. When rules are open-ended, no one can show conclusively that international judges make wrong decisions. And the thesis of this chapter is precisely that international law is too open-ended to be a significant constraint on international courts: in the competition of most open-ended legal systems, international law would likely be the first-prize winner.

Mandate of International Courts. On a side note, it is unclear whether all members of the international community equally expect international courts merely to apply legal rules. One might argue that some States want international courts to develop international law; in such case, however, still the agency conundrum is complicated because it is impossible to evaluate the performance as there are no standards against which we could measure such performance.

4.1.2 Formal Systems, Inherent Ambiguity of Language, and Impossibility of Objective Measurement

Illusion of Objectively Correct Answers. Formalistically minded legal scholars like to stress the importance of objectively correct legal answer. Yet, this misconception of "objectively correct legal answer" is the vampire myth of legal scholarship: it refuses to go away even though no one has ever practically demonstrated that objectively correct legal answers exist and despite many evidence showing that they do not exist.

Deconstructualists. In the second half of the twentieth century, many post-modernist philosophers and philosophers of law, most notably deconstructualists like Jacques Derrida, asserted that language is inherently undecidable;[193] accordingly, for Derrida and other deconstructualists, there are no rules at all. This was perhaps one of the most radical schools of thought in European legal philosophy.

Perelman: Formal Systems and Natural Language. Even before deconstructualists and other post-modernists gained prominence, argumentation scholars showed that arguments of formal logic are impossible in natural language.[194] Belgian rhetorician and philosopher Chaim Pereleman demonstrated this idea in his *The New Rhetoric* treatise,[195] in which he aimed to resurrect the classical Aristotelian notion of rhetoric and argumentation as opposed to Cartesian ideals of formal logic.

According to Perelman, only formal systems, which are complete and have no internal contradictions, allow formal logical arguments.[196] Mathematics is an example of such system. Important feature of formal systems is the principle of identity – one proposition or symbol must refer to only one meaning. Language is clearly not a formal system because it violates the principle of identity – words do not stand for only one meaning, but have multiple meanings. According to Perelman, in a formal

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[193] Suri Ratnapala, Jurisprudence (Cambridge, Cambridge University Press, 2009) p. 231.

[194] *See e.g.* Chaim Perelman and L. Olbrechts-Tyteca, The New Rhetoric: A Treatise on Argumentation (Notre Dame: University of Notre Dame Press, 1969, John Wilkinson and Purcell Weaver transl.); Stephen Toulmin, The Uses of Argument (Cambridge: Cambridge University Press, 1958) pp. 188-200. *See also* Alain Lempereur, Logic or Rhetoric in Law?, 5 Argumentation 283-297 (1991); Lyndel Prott, Argumentation in International Law, 5 Argumentation 299-310 (1991).

[195] Chaim Perelman and L. Olbrechts-Tyteca, The New Rhetoric: A Treatise on Argumentation (Notre Dame: University of Notre Dame Press, 1969, John Wilkinson and Purcell Weaver transl.)

[196] Ibid, at 1-47.

system the following statements would make no sense, but they make sense in natural language because words can have several meanings: "A penny is a penny" or "When I see everything I see, I think what I think."[197]

Role of Particular Audience. In the classical Aristotelian tradition of argumentation, arguments do not exist in nothingness - their acceptance depends on particular audience. Thus, one audience might reject the argument because it does not accept its premises while the other audience may accept it without any reservations.[198]

Judicial Audience. In this sense, decisions of international courts are rarely more objectively correct than their possible alternatives and thus it becomes impossible to "objectively" evaluate whether international courts are performing well. Whether a judicial decision will be regarded as a good one, depends on many subjective factors and randomness. Hence, judicial decisions are not correct from the beginning, but instead become correct because particular judicial audience accepts them as such.

Judicial Decisions & Hindsight Effect. If some judicial decisions seem "objectively correct" and predictable, it is mostly because of the hindsight effect: looking back at judicial decisions, legal scholars are ready to detect coherent development and predictable (but only in hindsight) outcomes. Yet, if one looks at various opinions before the adoption of particular decision, the "objectively correct outcome" is much more difficult to predict.

South West Africa in Hindsight. An example of this is South West Africa decision, when the ICJ refused to entertain a claim against South Africa for its apartheid practices in South West Africa (Namibia). Subsequently, most countries saw the Court as pro-Western Court protecting apartheid policies of South Africa. This decision caused a near universal boycott of the Court. And in hindsight it seems as the best example of utterly senseless decision. Yet, at the time of the decision, eminent lawyers considered it perfectly correct decision. Sir Francis Vallat stated that "in five or six years' time it will be realised that this Case was a great turning point because it did not give way to political pressure . . . [The Court] is not to be brownbeaten by political consideration."[199] For every decision that history eventually favored, one can find ample of criticisms at the time of its adoption, and for every terrible decision, one can find plenty of praises before the tide of criticism turned the other way. It just serves to show that "objectively correct answer" is usually a product of hindsight, not logical reasoning or some "objectively verifiable" method.

4.3 Selection Effect

The Selection Effect in General. The selection effect, another concept developed in economic analysis of law, suggests that disputes settled in courts, and especially higher courts, are not typical disputes.[200] First, many cases are settled even before any lawsuit

[197] Ibid, at 217.

[198] Ibid, at 26-45.

[199] *See* Rosalyn Higgins, Policy Considerations and the International Judicial Process, 17 International and Comparative Law Quarterly 58 (1968) p. 67.

[200] George L. Priest and Benjamin Klein, The Selection of Disputes for Litigation, 13 Journal of Legal Studies 1 (1984); Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework with Empirical Tests, 19 Journal of Legal Studies 337 (1990).
A related aspect is that we should not infer anything definite about law in general from the law that it is litigated in the courts.

is filed. In domestic as well as in international litigations, there are many incentives to settle the dispute before it reaches the court. An individual or a State would be foolish to litigate a dispute where the odds are clearly stacked against it.

Thus, if a case goes to the court, it indicates that both parties feel that legal rules provide at least some chance for them to win; so parties in a sense preselect disputes that revolve around ambiguous rules or ambiguous facts. Therefore, easy cases – i.e. those that revolve around straightforward legal rules – are settled out of court and courts are more likely to deal with hard cases. The selection effect opens up the higher one goes. Thus, as Posner notes, it will operate more strongly in appellate courts than it does in trial courts.[201] Most straightforward cases are seldom appealed precisely because the case probably revolves around clear statutory language or strong precedents.

Selection Effect in International Courts. The selection effect is likely to operate more powerfully in international courts because States usually have stronger incentives to settle out of court. First, inter-State litigation is very expensive. Costs of litigation in virtually all international tribunals are prohibitively high for developing countries.[202] Second, reputational costs for States in international affairs usually count more heavily than for individuals or corporations in domestic litigation. Third, States usually conduct extensive diplomatic negotiations before a case reaches an international court. Thus, both parties must think that there is a reasonable chance of success for both of them.

Of course, none of this means that international courts never deal with easy cases or cases that revolve around clear-cut legal rules. It does mean, however, that international courts are at higher risk of chronically facing hard cases – cases where several legal answers become equally plausible and thus enable more judicial creativity.

4.4 Treaties

4.4.1 Univocalists vs. Skeptics

There are two basic views on the nature of treaties and the function of rules of interpretation – univocalist and skeptic. These two schools are but a specific reflection of legal formalism and realism in the treaty interpretation. In large part, these divergent views are also due to the different understanding of the nature of the treaty.

Univocalists. Univocalists argue that rules of interpretation allow only one possible correct answer. Thus, for a theorist, the purpose of interpretation is to "deduce the

[201] Posner, How Judges Think, p. 45:
"Most cases are not even appealed, because the outcome of the appeal is forgone conclusion, usually because the case really is "controlled" by precedent or clear statutory language. For the same reason, many potential cases are never even filed. So legalism has considerable sway, and the lower the level at which a legal dispute is resolved, the greater that sway. The higher the level, however, and the weaker the tug of legalism …".

[202] A relatively insignificant case in the World Trade Organization would require at least $500,000 to cover legal representation costs; costs in high profile cases are well over $10 million. *See* Amrita Narlikar, The World Trade Organization: A Very Short Introduction (Oxford: Oxford University Press, 2005) p. 96; Gregory Shaffer, V. Mosoti, and A. Qureshi, Towards a Development-Supportive Dispute Settlement System in the WTO (Sustainable Development and Trade Issues, ICTSD Resource Paper No. 5, Geneva, available at www.ictsd.org). *See also* Luis Ignacio Sánchez Rodríguez, Ana Gemma López Martín, The Travails of Poor Countries in Gaining Access to the International Court of Justice, *in* C. Jiménez Piernas (ed.), The Legal Practice In International Law And European Community Law (Leiden; Boston : Martinus Nijhoff Publishers, 2007) pp. 81–102.

meaning exactly of what has been consented to and agreed."[203] For univocalists, rules of treaty interpretation will lead to the "correct" result, and even a "single autonomous interpretation."[204] As one contemporary scholar of treaty interpretation points out, this view imagines that an interpreter can arrive at a determinate result "in a completely value-free way".[205]

Positivist Hermeneutics. The univocalist approach is part of a larger positivist hermeneutics; there are several elements central to this view:[206]

(1) Judges must look for legislative intent;
(2) The interpretative method is formalized by the syllogism;
(3) Law must be separated from facts;
(4) Law is complete;
(5) Written law is the real law;
(6) Law has a single and clear meaning;
(7) The creation of law is the legislative monopoly;
(8) Judicial powers are separated and this ensures legal equality.

Theoretical Skeptics. Interpretation skeptics, on the other hand, argue that rules of treaty interpretation do not lead to one correct answer. Theoretical skeptics base their position on some general systemic inadequacies of international law. Leo Gross's theory of autointerpretation is perhaps the best-known theoretical skepticism. Back in 1962, Gross observed that:[207]

> It is generally recognized that the root of unsatisfactory situation in international law and relations is the absence of an authority generally competent to declare what the law is at any given time, how it applies to a given situation or dispute, and what appropriate sanction may be. In the absence of such an authority, and failing agreement between the states at variance on these points, each state has a right to interpret the law, the right of autointerpretation, as it might be called. (…) In consequence of the technical insufficiency prevailing in general international law, we may never know, or, in some cases, we may not know for a time, which autointepretation was correct... This is, for better or worse, the situation resulting from the organizational insufficiency of international law.

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[203] Alexander Orakhelashvili, The Interpretation of Acts and Rules in Public International Law (Oxford: Oxford University Press, 2008) p. 286.

[204] Richard Gardiner, Treaty Interpretation (Oxford: Oxford University Press, 2008) p. 6, 30. Gardiner, however, points out that rules of interpretation are not :simple precepts that can be applied to produce a scientifically verifiable result." Ibid., at 9.

[205] Ulf Linderfalk, On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties (Dordrecht: Springer, 2007) p. 4 ("In the view of the one-right-answer thesis … [one] can interpret a treaty by applying a number of legal rules and be perfectly certain of always arriving at a determinate result in a completely value-free way. There is no room for political judgment.")

[206] Robert Kolb, Interprétation et création du droit international: Esquisse d'une herméneutique juridique moderne pour le droit international public (Brussels: Bruylant, 2006) pp.74-80

[207] Leo Gross, States as Organs of International Law and the Problem of Autointerpretation, in Lipsky, G. A., ed., Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law, (University of California Press, 1953) pp. 76-7 reprinted in Leo Gross, Essays on International Law and Organization: Vol. 2 (BRILL, 1984) p. 386.

Gross made his point as a critique of Kelsen's international legal theory, but even Kelsen, perhaps the greatest positivist of the twentieth century, did not argue that there is one correct answer. On the contrary, he noted that from a logical point of view, many meanings are equally possible. His main thrust was directed at the authoritative interpretation:

> [T]he function of authentic interpretation is not to determine the true meaning of the legal norm thus interpreted, but to render binding one of several meanings of a legal norm, all equally possible from a logical point of view. The choice of interpretation as a law-making act is determined by political motives.[208]

Practical Skeptics. Like theoretical skeptics, practical skeptics doubt that a treaty provision can have only one correct meaning. However, their skepticism is based less on some overarching theory and more on brass tracks of treaty making. Practical skeptics realize that treaties do not always embody shared intentions of the parties. On the contrary, as Philip Allott famously observed, "a treaty is a disagreement reduced to writing";[209] moreover, "[n]egotiation is a process for finding a third thing which neither party wants but both parties can accept. … A treaty is not the end of a process, but the beginning of another process."[210]

For a univocalist, treaties are written declarations of intentions, they have a defined object, and at least their text has some meaning, even if not natural. Yet, this assumption ignores actual practice. Treaties do not always contain an agreement. They do not always have a shared intention. Sometimes the provision of the treaty has no meaning at all – it is a mere drafting error.

Deliberate Vagueness and Lack of Intention. First, parties do not always agree on the meaning. Sometimes they deliberately put a vague provision and expect that subsequent practice will give some meaning to it. For a theorist, this sound impossible because it is "definitionally impossible for the parties to have agreed on rendering the treaty not fully effective."[211] But as some practitioners noted, "[c]ompromise may sometimes be even more important than clarity. … Even where there is uncertainty as to the underlying purpose and effect of a compromise text it may be better to settle for the best available wording.[212] And this is not something exceptional; on the contrary, as almost every diplomat knows, this is one of basic "damage limitation" strategies.[213]

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[208] Hans Kelsen, Law of the United Nations (London: Stevens and Sons, 1950) p. xv.

[209] Philip Allott, The Concept of International Law, 10 European Journal of International Law 31 (1999) p. 43. *See also* Philip Allott, The Health of Nations: Society and Law Beyond the State (Cambridge: Cambridge University Press, 2002) p. 305.

[210] Ibid.

[211] Alexander Orakhelashvili, The Interpretation of Acts and Rules in Public International Law (Oxford: Oxford University Press, 2008) p. 397

[212] Eileen Denza, Compromise and Clarity in International Drafting, in Constantin Stefanou and Helen Xanthaki (eds.), Drafting Legislation: A Modern Approach (London: Ashgate, 2008) p. 232 ("If negotiation of a multilateral instrument had to await a decision by all delegations that the wording was from their own individual perspective clear and unambiguous, the number of Treaties and other legally binding international instruments adopted would be very small indeed.")

[213] Ronald A. Walker, Multilateral Conferences: Purposeful International Negotiation (New York: Palgrave Macmillan, 2004) p. 190 ("[A]t times, you may find yourself losing, and the emerging text not in accordance with your objectives. In those circumstances … to accommodate conflicting viewpoints, make the text somewhat ambiguous, so that different parties can read it differently. From the point of view of the defending party, this means that their position is not entirely overwhelmed.")

Drafting errors. Second, a provision may have no meaning at all. It may be a plain drafting error. One could expect some drafting errors in minor treaties, but not meaningless provisions in major multilateral treaties. Yet, one can find such example even in the ICJ Statute, which is an integral part of the UN Charter; and the United Nations Charter, according to many theorists, comes closest to the constitution of the international community. Article 36(1)of the ICJ Statute illustrates this point.[214] The article provides that the "jurisdiction of the Court comprises … all matters specially provided for in the Charter of the United Nations." The minor problem with this provision is that the Charter forgot to provide any matters, which fall within compulsory jurisdiction of the Court.[215] During the drafting phase, the drafters considered including several issues within the compulsory jurisdiction; eventually, they could not agree, but they forgot to delete the text. Drafting errors are not exclusive to international treaties; domestic legislation has ample of these.[216]

Inferior Role of Lawyers. Third, in the drafting process of international agreements, lawyers and other technical drafters are not prominent players. Most agreements are negotiated by diplomats and other non-lawyers, who could care less about rules of treaty interpretation or formal points. Thus, one observer pointed out that it illusory to expect that legalistic concerns figure prominently in negotiations:

> Lawyers – if present at all during high-level diplomatic negotiations – are usually treated as subordinate to ministers and diplomats and not invited or encouraged to raise 'legalistic' doubts as to the meaning or acceptability of a compromise brokered by politicians.[217]

So for practical skeptics it makes little sense to interpret treaties according to rules of interpretation when international legislators themselves are not committed to them.

4.4.2 Schools of Treaty Interpretation

There have been three major schools of treaty interpretation. Not all of them are mutually exclusive, but each of those emphasizes one element over the over.

Teleological. Teleological school, also known as "aims and objects", says that the object of the treaty should be the guiding principle. Thus, intention of the parties or the wording of the treaty matter less than ultimate aims that the treaty is supposed to achieve. Before the adoption of Vienna Convention, this view been advocated most heavily by the so-called New Haven School.[218] This approach perhaps had as many

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[214] Statute of the International Court of Justice, T.S. No. 993, 3 Bevans 1179.

[215] Christian Tomuschat, Commentary of Article 36 in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Christian Tams, and Tobias Thienel, The Statute of the International Court of Justice: A Commentary (Oxford: Oxford University Press, 2006)

[216] *See e.g.* Jonathan R. Siegel, What Statutory Drafting Errors Teach Us About Statutory Interpretation, 69 George Washington Law Review 309 (2001).

[217] Eileen Denza, Compromise and Clarity in International Drafting, in Constantin Stefanou and Helen Xanthaki (eds.), Drafting Legislation: A Modern Approach (London: Ashgate, 2008) p. 232-233.

[218] Myres McDougal, Harold Laswell and J.C. Miller, The Interpretation of Agreements and World Public Order: Principles of Content and Procedure (New Haven: Yale University Press, 1967) ("The main objective of an agreement is to project a common policy with the respect of future distribution of values and the purpose of interpretation is to discern the shared expectations of the Parties, which may be adjusted by the interpretator to the goals of public order, including human dignity, which realisation the authors encourage.")

critics as it had supporters.[219] One reason why it has been so controversial is that it is impossible without judicial activism.

Intentions. The intentions school, also known as the founding fathers school, emphasizes intention, or at least presumed intentions, of the parties to the treaty. The role of the judge is to discover these and give them effect. The problem of course is in discovery of these intentions. Traditionally, one way was to look at the *travaux prepatoire*. Yet, international negotiations become more multifaceted, more protracted, and treaties went from bilateral or plurilateral to multilateral. As a result of these changes, *travaux* would be usually incomplete and misleading.

Textualism. This school argues that the text of the treaty – usually ordinary meaning of its terms – reveal best the meaning of the treaty. According to this school, intentions are not necessarily irrelevant, but the best indication of intentions is the final text of the treaty.

This school has also been the most popular among those who want to find ways to limit judicial creativity. No doubt, it would be much easier to ensure that courts only apply law, and not develop it, if the courts had to apply treaties literally.

Textualism & Absurdity. But strict textualism would also lead to absurd results, if applied without common sense. As Judge Learned Hand remarked, "there is no surer way to misread any document than to read it literally."[220] The famous "Bologna law" example illustrates the possible absurdity of this approach: according to the law of Bologna, "whoever drew blood in the streets should be punished with the utmost severity"; if it would be interpreted textually, one would have to punish a surgeon "who opened the vein of a person that fell down in the street with a fit."[221] Moreover, as Judge Spender pointed out in *Certain Expenses* case, a common sense is rather personal: "What makes sense to one may not make sense to another. Ambiguity may be hidden in the plainest and most simple of words even in their natural and ordinary meaning."[222] However, if judge incorporates some common sense, then strict textual interpretation is impossible and judicial creativity inevitable.

4.4.3 To Have Rules or To Have No Rules

Questionable Value of Treaty Interpretation Rules. As the previous section showed, all schools of treaty interpretation have something to offer and they all have major drawbacks. Naturally, before the Vienna Convention was adopted and even afterwards, international lawyers questioned whether there is a need for rules of treaty interpretation. One view, rooted in the legal realism, was that multitude of rules of treaty interpretation will usually contradict and cancel each other out; thus, it is preferable to have a few basic principles of treaty interpretation instead of false sense of certainty created by specific rules of interpretation. Sir Gerald Fitzmaurice, who would later also serve as one of Special

[219] *See e.g.* Gerald Fitzmaurice, Vae Victis or Woe to the Negotiator? Your Treaty of Our Interpretation of It, 65 American Journal of International Law 358 (1971).

[220] Guiseppi v. Walling, 144 F. 2d. 608 (2nd Cir. 1944) p. 624 (Hand J., concurring) (Quoted in Aharon Barak, Purposive Interpretation in Law (Princeton: Princeton University Press, 2007) p. 274)

[221] Veronica M. Dougherty, Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation, 44 American University Law Review 127 (1994) p. 127.

[222] Certain Expenses of the United Nations, 1962 ICJ Reports 151, 184 (Sep. Op. Sir Percy Spender) (July 20).

Rapporteurs to the International Law Commission on the Draft Vienna Convention, writing almost twenty years before the Vienna Convention, summarized the debate:

> There has lately been a revolt against the overelaboration of rules of interpretation. … According to this view, the rules contradict or cancel each other out, or have to be applied with so many exceptions or variations that the rule itself tends to be lost sight of. It would be better therefore to rely on two or three basic general principles, and accept the fact that in the last resort all interpretation must consist in the exercise of common sense by the judge, applied in good faith and with intelligence. (…) The opponents of this view consider that it leaves too much to the discretion of the judge, and point to the existence of rules of interpretation in most systems of law, as being necessary to ensure that decisions are given on reasoned grounds of principle, and not arbitrarily. The practical difficulties which may arise in the application of the rules are, according to their view, due not to multiplicity or contradictoriness, but to the absence of any definite system establishing the order in which the rules should be applied, and the relative weight to be given to each.[223]

Vienna Convention Approach. Eventually, the Vienna Convention seems to have favored the second approach. As the International Law Commission noted in its commentary to the draft Vienna Convention, the Convention (Article 31) provides a single and general rule of treaty interpretation and it essentially combines the three schools of treaty interpretation.[224] Articles 31 and 32 of Vienna Convention embody the core rules of the treaty interpretation.[225]

Rules vs. Guidelines. For a realist-minded judge, the best thing about Article 31 is that it is only a guideline. Moreover, as Brownlie noted, the rules are "question-begging

[223] Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points, 28 British Yearbook of International Law 1 (1951) p. 2-3.

[224] Report of the ILC on the second part of its seventeenth and on its eighteenth session, Yearbook of the International Law Commission, 1966, Vol. II, p. 217-225. U.N. Doc. A/CN.4/SER.A/1966/Add 1.

[225] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980):

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

and contradictory."[226] As Sir Gerald Fitzmaurice noted in the above quoted passage, the proponents of specific rules want to solve the problem of judicial discretion with the rules that provide "the order in which the rules should be applied, and the relative weight to be given to each."[227] Some scholars do think that these rules are fixed rules.[228] But this view contradicts both the practice of international tribunals and even the official view of International Law Commission.[229]

Based on this, only theoretical extremists could argue that two judges, even like-minded judges, will arrive at the same conclusions because of the treaty interpretation rules. On the contrary, two judges, both using Article 31, can easily arrive at different conclusions, because one of them will give more weight to the text of the treaty and the other will rely more on the object and purpose or something else.

4.4.4 Beyond Vienna Convention

Judicial Innovations over the Vienna Convention. Even if the Vienna Convention rules of interpretation would be constraining, which they are not, they still would not limit judicial creativity. Many international and regional courts have shown willingness to openly depart from the Vienna Convention or at least renovate some of its elements.

For example, International Court of Justice went beyond Vienna Convention (which was not in force then) with its evolutionary interpretation: "[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation."[230] The Appellate Body of the WTO developed the principle of harmonious interpretation in which it keeps in mind the aggregate results of interpretation and considers its implications for the future of the treaty regime.[231] The European Court of Human Rights has discarded the ordinary meaning interpretation in favor of its autonomous interpretation concept.[232]

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[226] Ian Brownlie, Principles of Public International Law (Oxford: Oxford University Press, 6th ed., 2003) p. 602.

[227] Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points, 28 British Yearbook of International Law 1 (1951) p. 2-3.

[228] Alexander Orakhelashvili, The Interpretation of Acts and Rules in Public International Law (Oxford: Oxford University Press, 2008) p. 309 ('the rules of treaty interpretation are fixed rules and do not permit the interpreter a free choice among interpretative methods') .

[229] Report of the ILC on the second part of its seventeenth and on its eighteenth session, Yearbook of the International Law Commission, 1966, Vol. II, pp. 218-219, 220:
"[T]he Commission confined itself to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties. (…) It considered that the article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties. The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article."

[230] Namibia, Advisory Opinion, 1971 ICJ Reports 16 p. 31

[231] Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body (Oxford: Oxford University Press, 2009) pp. 275-305.

[232] John G. Merrills, The Development of International Law by the European Court of Human Rights, (Manchester: Manchester University Press, 1993) p. 71; George Letsas, Strasbourg's Interpretive Ethic: Lessons for the International Lawyer, 21 European Journal of International Law 509 (2010).

Uncodified Cannons. Various rules and canons of interpretation that are not codified are certainly not more specific or constraining. On the contrary, for almost every uncodified canon of interpretation one can easily find a "dueling" canon. Take for example the famous principle of effectiveness – *ut res magis valeat quam pereat*. According to this principle, when there are two possible interpretations of the treaty, the court should prefer the one which will make the treaty more effective.[233] But then there is a "dueling" canon – the principle of restrictive interpretation: "if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted."[234] With some ingenuity one could easily find a "dueling" canon for each interpretative canon out there.

4.4.5 Summary: Rules of Treaty Interpretation as Constraint

This section has shown that for the most part, rules of treaty interpretation are very elastic. Even if one could codify a general rule which would provide "the order in which the rules should be applied, and the relative weight to be given to each" – in essence make an algorithm for interpretation – it is still next to impossible that it would a workable one. Part of this idealistic quest to have mathematically precise rules is due to misunderstanding of the nature of treaty making: many treaties do not have a legislative intent or always have a meaningful text. Mechanical application of precise interpretation rules, even if there would such, would often cause as much damage as it intends to avoid.

A more realistic view of treaty interpretation is that judicial creativity is inevitable and constraint is unrealistic. Indeed, interpretation and development of international law operate as a "joint venture".[235] Sir Hersch Lauterpacht deftly pointed out that rules of treaty interpretation usually serve only as a cloak for a decision made on other grounds:

> In a sense the controversy as to the justification of rules of interpretation partakes of some degree of artificiality inasmuch as it tends to exaggerate their importance. *For as a rule they are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means*. It is elegant-and it inspires confidence-to give the garb of an established rule of interpretation to a conclusion reached as to the meaning of a statute, of a contract, or of a treaty. But it *is a fallacy to assume that the existence of these rules is a secure safeguard against arbitrariness or partiality*. The very choice of any single rule or of a combination or cumulation of them is the result of a Judgment arrived at, independently of any rules of construction, by reference to considerations of good faith, of justice, and of public policy within the orbit of the express or implied intention of the parties or of the legislature.[236]

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[233] Hersch Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 British Yearbook of International Law 48 (1949) pp. 67-82.

[234] Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier Between Turkey and Iraq), Advisory Opinion of 21 November 1925, PCIJ, Ser. B, No. 12, p. 25. *See* Hersch Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 British Yearbook of International Law 48 (1949) pp. 61-67.

[235] Robert Kolb, Interprétation et création du droit international: Esquisse d'une herméneutique juridique moderne pour le droit international public (Brussels: Bruylant, 2006) p. 931.

[236] Hersch Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 British Yearbook of International Law 48 (1949) p. 53. (emphasis added)

4.5 Customary International Law

4.5.1 The Notion of Customary International Law

Legal rules derived from unwritten law - customary international law – do not easily reveal themselves; instead, judges have to rely on some ancillary rules for ascertaining customary international law. But even the notion of customary international law is itself evasive. In general, for customary law to be established there must be a general practice, which is widespread, consistent, etc. This practice must be considered obligatory, i.e. there must be some sort of conviction that this practice is followed because it is obligatory. The ICJ has on several occasions upheld the requirement for both elements – objective (practice) and subjective (*opinio juris)*. Thus, in *Continental Shelf* case between Libya and Malta the Court stated that "it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States".[237]

These "simple" requirements in turn raise a number of other issues. What is the density required for practice - how widespread, how consistent, for how long, etc? What counts as practice - only physical acts or also verbal acts, such as voting in international conferences? What weight should be accorded to verbal acts if they are recognized as the form of states practice? Practice of which State organs counts - only organs' responsible for foreign relations or all State organs'? Does practice of non-state actors count? What is the nature of legal conviction or *opinio juris?*

This is not a very promising introduction for legal rules that should act as constraint on judicial creativity of international courts. As this section shows, rules derived from customary law can provide a safe haven to all sorts of judicial innovation.

4.5.2 Objective Element: What Counts as Evidence of Practice?

Forms of State Practice. First of all, a judge looking for a justification in customary international law can choose what evidence to count as state practice.[238] It is widely accepted that state practice takes many forms.[239]

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[237] Case Concerning Continental Shelf (Libyan Arab Jamahiriya/Malta). 1985 ICJ Reports 13, 29-30 (June 3).

[238] *See e.g.* Michael Akehurst, Custom as a Source of International Law, 47 British Yearbook of International Law 3 (1974/-1975).

[239] American Law Institute, Restatement of the Law: Foreign Relations Law of the United States (American Law Institute Publishers, 3rd ed., 1987),§ 102, Reporter's Note 2.
International Law Commission in its report to the UN General Assembly on "Ways and Means for Making the Evidence of Customary International Law More Readily Available" indicated the following non-exhaustive list of evidence of customary law: texts of international instruments, decisions of international courts, decisions of national courts, national legislation, diplomatic correspondence, opinions of national legal advisers, practice of international organizations. Report of the International Law Commission on "Ways and Means for Making the Evidence of Customary International Law More Readily Available". Yearbook of International Law Commission. 1950, Vol. II. P. 368-373.
Similarly, Brownlie indicates that the following are included among the possible evidence of state practice: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals on military law, executive decisions and practices, orders to naval forces, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recital in treaties and other international instruments, etc. Ian Brownlie, Principles of Public International Law (Oxford: Oxford University Press, 6th ed., 2003) p. 6

Verbal Acts. For one, there is some disagreement between authorities whether state practice includes verbal acts. Verbal acts - making statements rather than performing physical acts - are in fact more common forms of State practice than physical conduct. On one side, we find authorities who assert that only physical acts count as state practice.[240] Thus, in his separate opinion in *Fisheries* case, Judge Read asserted that "customary law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims . . . The only convincing evidence of State practice is to be found in seizures, where the coastal States asserts its sovereignty over the water in question by arresting a foreign ship".[241]

One the other side, we find authorities who argue that verbal acts do count as the evidence of practice.[242] Others yet, take a middle position and suggest including verbal acts, but ascertaining customary rules primarily "on real and concrete practice".[243] International Law Association's Committee on Formation of Customary International Law in its final report also seems to support the middle position by emphasizing that one should take into account the distinction between what conduct counts as State practice and the weight to be given to it.[244]

Of course, counting verbal acts as state practice opens up the door for using a great variety of materials, many of which will be contradictory. The only "remedy" to this inconsistency will be judicial discretion. With so many sources of state practice to choose from, all judges will be able to find something to their liking.

4.5.3. Objective Element: Density

Another issue that helps judges to ascertain favorable customary rules is the required density of practice. In international community, consisting of roughly 200 States, it is often difficult to establish a consistent practice. Friedmann voiced his concern some 50 years ago, when he noted that "custom is too clumsy and slow" to accommodate international community which went "from a small club of Western Powers to 120 or more 'sovereign' states."[245] Normally, general customary international law is created by State practice which is *uniform, extensive, and representative in character.*[246]

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[240] Anthony D'Amato, The Concept of Custom in International Law (Ithaca, London: Cornell University Press, 1971) pp. 47-98.

[241] Fisheries Case (United Kingdom v. Norway). 1951 ICJ Reports 116, 191 (December 18, 1951).

[242] *See e.g.* Mark Villiger, Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources (The Hague: Kluwer Law International, 2nd ed., 1997) p. 20.

[243] Genadij M. Danilenko, Law-making in International Community (The Hague: Martinus Nijhoff Publishers, 1993) p. 91.).

[244] I International Law Association, Final Report of Committee on Formation of Customary (General) International Law – Statement of Principles Applicable to the Formation of General Customary International Law (London Conference, 2000) p. 13. (Hereinafter – ILA Final Report). ILA noted that the practice of international tribunals is replete with examples of verbal acts being treated as examples of practice. Similarly, States regularly treat this sort of act in the same way.

[245] Wolfgang Friedmann, The Changing Structure of International Law (London: Stevens & Sons, 1964) p. 122.

[246] ILA Final Report, p. 20.

However nice and laconic is the formulation of this rule, even radical formalists would admit that in practice it is often unclear when the required density is reached.[247]

Moreover, there is no requirement of ideal consistency. The ICJ clearly stated this point in the *Nicaragua case:* "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule."[248] Thus, some general consistency of state practice will be enough for judges to "determine" the existence of a customary rule.

4.5.4 Objective Element: Class of Subjects Who Form Customary Rules

Exclusive Right of States. Another problem is the class of subjects whose practice counts is relevant to formation of customary law: is it limited only to States, to States and international organizations, to all subjects of international law? This issue splits hairs of customary rule determination even further. First, there are conservatives. They argue that only *State* practice is relevant to the formation of the customary international law. Thus, authoritative Third Restatement states that "customary international law results from a general and consistent *practice of states* followed by them from a sense of legal obligation".[249] Other commentators expressly stress the point that practice has to be attributable to States and thus "the practice of international organizations or individuals is excluded".[250]

States & International Organizations. Second, there are those who maintain that States do not have an exclusive competence, but subjects competent to form customary international law should be limited to States and international organizations.[251] This is becoming the new conventional view. [252]

Individuals & NGOs. Finally, there are progressives - those who require to accord competence to form customary law to all participants in international community. Some

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[247] Maurice H. Mendelson, Formation of Customary International Law, 272 Recueil des Cours 174 (1998). Mendelson's amusing example illustrates the difficulty: It makes no more sense to ask a member of a customary law society 'Exactly how many of you have to participate in such-and-such a practice for it to become law' than it would to approach a group of skinheads in the centre of The Hague and ask them, 'How many of you had to start wearing a particular type of trousers for it to become the fashion – and, indeed, *de rigeur* – for members of your group?

[248] Military and Paramilitary Activities in and Against Nicaragua. (Nicaragua v. United States of America). 1986 ICJ Reports 14, 98 (June 27).

[249] American Law Institute, Restatement of the Law: Foreign Relations Law of the United States (American Law Institute Publishers, 3rd ed., 1987),§ 102, Reporter's Note 2.

[250] Mark Villiger, Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources (The Hague: Kluwer Law International, 2nd ed., 1997) p. 17.

[251] *See generally* Daniel Bodansky, Customary (and Not So Customary) International Environmental Law, 3 Indiana Journal of Global Legal Studies 105 (1995).

[252] Maurice H. Mendelson, Formation of Customary International Law, 272 Recueil des Cours 174 (1998) p. 188. Mendelson defines a rule of customary international law as "one which emerges from, and is sustained by, the constant and uniform practice of States and *other subjects of international law*, in their international relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future." He further asserts the right of international organizations in their own name to contribute to formation of customary law, id. at 201., and he even acknowledges that indirectly (but only indirectly, and not in their own name) other entities – like NGOs or multinational corporations – may contribute to formation of customary law, id. at 203.

suggest including NGOs together with international (intergovernmental) organizations.[253] Others suggest that this competence should be recognized to individuals, especially in the field of human rights.[254] The day these views become the official theory of customary international law any judge should be able to easily synthesize dozens of different customary rules on the same legal issue.

4.5.5 Subjective Element

Notion of Opinio Juris. Then there is a delicate issue of ascertaining the subjective element, or *opinio juris.* Not every international usage or habit is customary law; only usage felt to be an obligatory one can be considered customary law. Thus, *opinio juris* requires that there be "present a feeling that, if the usage is departed from, some form of sanction will . . . fall on the transgressor." [255] The subjective element, as the ICJ stressed in *North Sea Continental Shelf* case, is crucial because it helps to distinguish customary legal rules from a mere usage.[256] In inter-State relations, there are plenty of international acts that "are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."[257] For example, States habitually use red carpets when greeting high-ranking foreign officials, but this habit is not part of the customary law because States perform such acts without conviction that they are obliged to do so. Thus, *opinio juris* indicates the conviction of States that certain acts are performed because they are obligatory or right.[258]

Determining *Opinio Juris*. Of course, the tricky part is determining this conviction or feeling that the usage is obligatory. Few judges, if any, are renowned for their mind reading abilities, and mind reading of abstract entities like States seems to be equally challenging. One way to deduce *opinio juris*, as the ICJ indicated in *Nicaragua* case, "with all due caution … inter alia, [is from] the attitude of the Parties and the attitude of States towards certain General Assembly resolutions".[259] But this is in fact only one possible source of *opinio juris* and not the method for deducing it. So in the end, each judge will decide for herself or himself if state practice (in international community consisting of two hundred States), which is uniform, extensive, and representative, deserves to be considered customary law because the States showed "conviction" or "feeling" that this practice is obligatory or right.

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[253] *See* I. R. Gunning, Modernizing Customary International Law: The Challenge of Human Rights, 31 Virginia Journal of International Law 211 (1991) p. 211.

[254] Christiana Ochoa, The Individual and Customary International Law Formation, 48 Virginia Journal of International Law 119 (2007); Lazare Kopelmanas , Custom as a Means of the Creation of International Law, 18 British Yearbook of International 127 (1937).

[255] James L. Brierly, Humphrey Waldock (ed.), The Law of Nations (Oxford: Clarendon Press, 6th ed., 1963)pp. 59-60.

[256] North Sea Continental Shelf (Federal Republic of Germany/ Netherlands). 1969 ICJ Reports 3, 44 (February 20).

[257] Ibid.

[258] Robert Jennings and Arthur Watts (eds.), Oppenheim's International Law: Vol. 1 (London: Longman, 1992, 9th ed.) p. 27.

[259] Military and Paramilitary Activities in and Against Nicaragua. (Nicaragua v. United States of America). 1986 ICJ Reports 14, 98, 100 (June 27).

4.5.6 Summary: Customary Rules as Constraint

In the search for the justification of the preferred outcome, only an unimaginative judge would be disappointed with customary international law. Customary international law might have been easy to ascertain when the international community was a small club of dozen States (primarily a family of Western nations). However, as the number of States multiplied, it has become next to impossible to detect a perfectly consistent practice. Of course, there might be exceptions, such as the prohibition of genocide or apartheid, where few States if any will support openly such practices; and yet, even these kinds of prohibitions may be occasionally honored more in their breach than compliance.

Accordingly, one will rarely detect a consistent practice, and much less a consistent practice coupled with clear indications that it is considered obligatory or right. Ultimately, what customary rules are chosen for justification may depend entirely on judicial discretion. Therefore, ascertainment of customary law often provides a guise for judicial legislation.[260] One could only add that customary international law is arguably the best guise of all for judicial creativity.[261]

4.6 Precedent

4.6.1 The Notion and the Influence of the Precedent

Influence of Precedent. Judging from statutes of international courts, precedents seem relatively unimportant. Yet, such inference is wrong because precedent's binding force reveals little about its actual influence.[262] Lord McNair observed long time ago that expanding jurisprudence of the ICJ "completely transformed the international *corpus juris* from a system that rested very largely upon textbooks and diplomatic dispatches into a body of hard law, resembling the common law."[263]

Constraint on Judicial Creativity. Yet, while it is true that precedent has taken over judicial opinions, the question remains whether it acts as a real constraint on judicial creativity or it is used only as a justification for decisions made on other grounds. For

[260] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons, 1958) p. 368.

[261] In quantitative empirical studies of judicial decision-making, some scholars use reliance on customary law as straightforward evidence of judicial activism. Sébastien Jodoin, Understanding the Behaviour of International Courts: An Examination of Decision-Making at the ad hoc International Criminal Tribunals, 6 Journal of International Law & International Relations 1 (2010) p. 20.

[262] Judge Jessup noted in Barcelona Traction case that "the influence of the Court's decisions is wider than their binding force." Barcelona Traction, Light and Power Company, Limited, Judgment of 5 February 1970, 1970 ICJ Reports 1, 163 (Sep. op. Jessup, para. 9).

[263] Arnold Duncan McNair, The Development of International Justice (New York: New York University Press, 1954) p. 16. John Jackson, the leading legal scholar of the WTO, similarly noticed the prevalence of the precedent in the WTO: "Now, in the WTO, we see precedent being used, no matter how you call it." John H. Jackson, Comment, Process and Procedure in WTO Dispute Settlement, 42 Cornell International Law Journal 233 (2009). *See also* David Palmeter and Petros C. Mavroidis, The WTO Legal System: Sources of Law, 92 American Journal of International Law 398 (1998); Raj Bhala, Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy), 33 George Washington International Law Review 873 (2000-2001); Adrian Chua, The Precedential Effect of WTO Panel and Appellate Body Reports, 11 Leiden Journal of International Law 45 (1998).

one, the notions precedent and judicial constraint sit uneasy together: the first precedent must be based on something else than a precedent, and that something else is usually a good dose of judicial law-making. But even if we would assume that the first precedent was based on faithful interpretation of a treaty or geometrically precise ascertainment of customary law, the view that precedent can constrain would be still troublesome.

Underlying Idea behind Precedent. In general, the underlying idea behind the precedent is that the court should make the same decision as it had made in the previous case. This is recognized as a fundamental principle in almost all legal traditions. Yet, this seemingly simple idea gives birth to plenty of complications. First, it is unclear whether international courts are legally obliged to follow their previous decisions. Second, it is unclear how one should determine whether the current case is the same or similar as the previous one. Finally, the courts can openly depart from their previous decisions under certain exceptions; and this is true even in jurisdictions where the courts are legally obliged to follow their previous decisions.

4.6.2 Precedential Systems

Two Basic Precedential Systems. In general, there are two principal systems of precedent.[264] First, a system may allow judges to consider their previous decisions but without legal obligation to do so. Second, a legal system may oblige judges to decide the case in the same way as the previous case. Some systems of this sort force judges to decide the same way even if there are good reasons to do otherwise; most systems, however, usually permit some departure from the previous case if there is a good reason for that.

In general, the legally binding precedent is distinguished from the persuasive precedent: the legally binding precedent requires that courts follow the precedent even if they are not persuaded by its rationale. The notion of legally binding precedent is sometimes referred to as the "content independent authority" – the precedent is followed because of its authority or status, not because of its persuasive content.[265] Persuasive precedent, as the name implies, operates by offering cogent reasons for the later courts who might want to follow it.

Legal Obligation to Follow. Some legal systems have historically imposed a legal obligation to follow the previous decisions.[266] The idea is expressed in the concept of *stare decisis: stare decisis et non quieta movere* – "to stand by decisions and not disturb the undisturbed". Stability and predictability are the underlying reasons for this legal doctrine. It also appears that the doctrine of *stare decisis* became more firmly established only in the beginning of the nineteenth century.[267]

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[264] *See generally* Rupert Cross and J. W. Harris, Precedent in the English Law (Oxford: Oxford University Press, 4th ed., 1991) p. 4.

[265] *See* Larry Alexander, Constrained by Precedent, 63 Southern California Law Review 1 (1989).

[266] In domestic legal systems, there are two aspects of legally binding precedent: vertical and horizontal. Vertical aspect requires lower courts to follow the decisions of the higher courts. The vertical precedent is irrelevant to most inter-State tribunals, with a limited exception of the WTO. Horizontal aspect requires the court to follow its own previous decisions or decisions of the court on a similar rank.

[267] *See* Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vanderbilt Law Review 647 (1999).

Stare Decisis in International Law. It would be difficult to sustain the view that statutes of international courts embody *stare decisis* doctrine. One problem is, for example, that the Statute of the ICJ seems to rule out any possibility of precedent, not to mention *stare decisis*. Article 59, one of the most reviled articles in the whole Statute states that, "The decision of the Court has no binding force except between the parties and in respect of that particular case."[268]

Yet, one could argue that Article 59 applies to the *dispositif* of a judgment and has nothing to do with the *stare decisis*. But overall, whatever merits of such proposition, one could hardly find a single authority claiming that the doctrine of *stare decisis* applies to international courts. As one commentator noted, the doctrine of legally binding precedent simply "was not part of the thinking on which the Court was constructed."[269] Yet, just because the Statute does not embody the doctrine of *binding* precedent, it does not automatically mean that it discards any idea of precedent.[270]

Permission to Follow. If the Statute of the ICJ (not necessarily Article 59) rules out *stare decisis,* does it mean that other models of precedent are also excluded? It would be as radical to argue this position as arguing that the Statute supports *stare decisis.* First, probably Article 59 was inserted out of abundant caution.[271] Second, it is possible to refute the literal interpretation of Article 59 by arguing *ad absurdum:* Article 38 (1) d refers to all judicial decisions, but Article 59 prohibits only the Court's own decisions - so the Court could not follow its own decisions but could follow those of other courts?! Obviously, this is the absurd proposition.[272] Third, as the Permanent Court of the International Justice (PCIJ) noted in *Certain German Interests in Polish Upper Silesia*, "object of the [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes".[273] Again, Article 59 applies only to *dispositif.*

Jurisprudence Constante. So what models of precedent are left to international courts? In the absence of the doctrine of legal binding precedent, the courts could follow the European consistent jurisprudence model ("*jurisprudence constante*"). According to this model, the courts are not bound by their first case; instead, they can wait until a consistent pattern emerges from many cases. Such approach is essentially a process of trial and error.[274] Yet, it seems that this is not the precedential model that international courts embrace: the ICJ and other courts rarely wait until the practice

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[268] Statute of the International Court of Justice, T.S. No. 993, 3 Bevans 1179.

[269] Mohammed Shahabuddeen, Precedent in the World Court (Cambridge: Cambridge University Press, 1996) p. 105.

[270] Ibid, at 2.

[271] Hersch Lauterpacht, The So-Called Anglo-American and Continental Schools of Thought in International Law', 12 British Yearbook of International Law 31 (1931) p. 58.

[272] Mohammed Shahabuddeen, Precedent in the World Court (Cambridge: Cambridge University Press, 1996) p. 100-101.

[273] Certain German Interests in Polish Upper Silesia, Merits, 1926, PCIJ, Series A, No. 7, p. 19. As Shahabudeen explains, "Article 59 is concerned to ensure that a decision, qua decision, binds only the parties to the particular case; but this does not prevent the decision from being treated in a later case as 'a statement of what the Court regarded as the correct legal position.". Shahabuddeen, Precedent in the World Court, p. 63.

[274] Arthur L. Goodhart, Precedent in English and Continental Law, 50 Law Quarterly. Review 40 (1934) p. 42.

accumulates and consistent patterns emerge; usually they refer to a previous decision even if it is the only one. [275]

Persuasive Precedent. Arguably, the precedential model that the ICJ and other courts follow is simply that of persuasive precedent. Persuasive precedent refers to any previous case, even not necessarily by the same court, which is not binding in the present case but guides judges in the present case. For example, in the *Cameroon v. Nigeria* case, the ICJ stated that "the real question is whether, in this case, there is cause not to follow the reasoning and conclusion of earlier cases." Essentially, the ICJ says that if it can be swayed by better reasons, it will follow better reasons and not the precedent.[276]

4.6.3 Why International Courts Follow Precedents

Precedent & Certainty. If international courts do not have to follow their previous decisions, why they still might want to justify their decisions with precedential reasoning? As Justice Louis Brandeis once observed, precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[277] Sir Hersch Lauterpacht likewise noted that certainty and stability ensure the sound administration of justice.[278] So legal systems place a high premium on legal certainty, and the role of the precedent is to ensure that certainty, or at least provide its illusion.

Agency Model & Precedent. Yet, this does not explain why it is in the interest of courts to ensure that certainty or at least its illusion, even when the legal system does not require them to follow the precedents. Here again, the agency model can explain this conundrum.

Both the principal and the agent are interested in minimizing the costs of agency relationship. "Following" the precedent is an extra cost for courts and it could constrain their natural inclination for judicial creativity. Thus, strict conformity to the precedent can be considered an unnecessary cost. So we should expect that courts would expend resources on precedential conformity only if there would be strong incentives for that. Yet, in the agency model, it is not only in the interest of the principal to measure the performance of the agent, but also in the interest of the agent to assure the principal that the standards are obeyed. Accordingly, conformity to precedents is the necessary agency cost that courts pay. On the surface at least, if international courts are strictly relying on their previous cases, it must mean that they are following the mandate – only applying legal rules and not working at judicial legislation.

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[275] Mohammed Shahabuddeen, Precedent in the World Court (Cambridge: Cambridge University Press, 1996) p. 11.

[276] Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (June 11), 1998 ICJ Reports 275, 292.

[277] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) (Brandeis, J., dissenting) pp. 406–407.

[278] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons, 1958) p. 14:

> The Court follows its own decisions for the same reasons for which all courts - whether bound by the doctrine of precedent or not - do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and (a minor and not invariably accurate consideration) because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.

4.6.4 The Selection Effect and Reasoning from Analogy

Precedential and Analogical Reasoning. Most legal scholars, even legal reasoning scholars, rarely distinguish between precedential and analogical reasoning. But the difference, although subtle, is important.[279] Precedential reasoning is about the court's obligation to reach the same result when the issue is the same. Precedent leaves no choice. In analogical reasoning, the issue is not the same, only similar. So precedent constrains, analogy persuades. The difference between precedential and analogical reasoning can be show schematically:

Reasoning from precedent:

Case I (precedent) has properties	**a, b, c, d, e**	> the Court made decision **X**
Case II (new case) has properties	**a, b, c, d, e**	> therefore the Court in this case must also decide **X**

Reasoning from analogy:

Case I (previous case – the source of analogy) has properties	**a, b, c, d, e**	> the Court made decision **X**
Case II (new case – the target of analogy) has properties	**a, b, e, m, s**	> the Court should decide **X**

Reasoning from Analogy & Judicial Latitude. Reasoning from analogy obviously calls for a great deal of judicial discretion – it is the judge who decides whether the similarity between the source of analogy and the target is sufficient to extend the holding of the original case to the new situations. Understandably, not all legal systems have been fond of reasoning from analogy. In Roman law for example, Justinian's *Codex* prohibited reasoning from analogy: *non exemplis sed legibus iudicandum est.*[280] Yet, reasoning from analogy is the basic pattern of legal reasoning, at least in the common law tradition[281] and especially international law.

Selection Effect & Reasoning from Analogy. Moreover, most cases that reach international courts seldom require precedential reasoning proper; more likely, they call for reasoning from analogy. And this is again due to the selection effect: States are seldom willing to litigate a case where the clear precedent exists. Naturally, the analogical reasoning dominates international courts. On the other hand, precedential reasoning may serve perhaps equally important function (if not more important) by clearing up most disputes before they become judicial disputes.

4.6.5 Ratio Decidendi: Determining the Similarity of the Previous Case & Distinguishing

Then there is a persistent question of how exactly the judge should determine the similarity to the previous case. Traditionally, the answer has been that *ratio decidendi* of

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[279] *See generally* Frederick Schauer, Precedent in Andrei Marmor (ed.,), Routledge Companion to the Philosophy of Law (Routledge, 2012), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1836384>, last accessed 2011-09-07.

[280] *See* Gerald J. Postema, A Similibus ad Similia: Analogical Thinking in Law in Douglas E. Edlin (ed.), Common Law Theory (Cambridge, Cambridge University Press , 2007) pp. 102-133.

[281] Edward H. Levi, An Introduction to Legal Reasoning (Chicago: University of Chicago Press; Rev. ed., 1962) p. 1.

the previous case determines similarity. But then again, how can the judge determine *ratio decidendi* - the rationale of the previous case?

Ratio Decidendi vs. Dictum. Not all legal reasoning in the previous case is *ratio decidendi* – reasoning that was not necessary to reach the decision is *obiter dictum* and courts are free to disregard *dicta*. There is some question whether the distinction between *ratio decidendi* and *obiter dictum* applies to international courts because there is no doctrine of *stare decisis*.[282] However, the ICJ apparently acknowledges the concept of *obiter dictum,* at least in the case of other tribunals.[283]

Determining *Ratio Decidendi.* There are several schools of thought on how the judges should determine *ratio decidendi*.[284] One way is to connect the facts with the outcome; a slight variation of this approach emphasizes connecting only material facts with the outcome and necessary reasoning.

The rule model of *ratio decidendi* looks at the actual words used in the previous decision to explain and justify its holding. In essence, the words that the Court used in the previous case serve like the written text of the statute. This approach is favored by those who are concerned with dangers of judicial creativity. One version of this approach was applied in English law, but eventually it was abandoned in the second part of the twentieth century.[285] It required that courts adhere to precedents rigidly; they did that by *literally* following the holding of the previous case, i.e. they could not paraphrase previous case or loosen up its language. That way, courts showed that they were not creating new law but merely followed the established precedents.

Distinguishing. Not only it is difficult to determine the similarity of the previous case, but it is also relatively easy to distinguish the present case from the previous. These are the two sides of the same coin. The courts usually can distinguish a new case even if the *ratio decidendi* of the old case fits the rule model. One way is for international courts to claim that the present case on its face should follow the precedent, but the principle of the previous case has been "qualified by later legal developments."[286] Likewise, international courts may state that the principle does not apply because the circumstances of the new case are significantly different.[287]

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[282] Judge Anzilotti, for one, argued that distinction between *ratio decidendi* and *obiter dicta* is unnecessary in international law: "The grounds of a judgment are simply logical arguments, the aim of which is to lead up to the formulation of what the law is in the case in question. And for this purpose there is no need to distinguish between essential and non-essential grounds, a more or less arbitrary distinction which rests on no solid basis and which can only be regarded as an inaccurate way of expressing the different degree of importance which the various grounds of a judgment may possess for the interpretation of its operative part." Interpretation of Judgments Nos 7 and 8 (Factory at Chorzow) (Germany v. Poland), 1927, PCIJ, Series A, No 13, p. 24 (Dissenting Op. Anzilotti), (Interpretation, December 16) (dis. op. Judge Anzilotti).

[283] Shahabuddeen, Precedent in the World Court, p. 152.

[284] *See generally* Arthur L. Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale Law Journal 161 (1930); Frederick Schauer, Precedent, 39 Stanford Law Review 571 (1987); James Louis Montrose, The Ratio Decidendi of a Case, 20 Modern Law Review 587 (1957); A. W. B. Simpson, The Ratio Decidendi of a Case, 21 Modern Law Review 155 (1958).

[285] Posner, How Judges Think, pp. 154-155.

[286] Shahabuddeen, Precedent in the World Court, p.115.

[287] Ibid.

4.6.6 Departing

Reasons for Departure. Even when international courts come across cases which they cannot distinguish from the precedent, they are often able to depart from it openly. This is especially pronounced in some regional courts, where they can depart from a previous decision even without giving any reasons for doing so.[288] Most international courts, however, feel compelled to provide some reason for departure. Thus, the PCIJ stated early on that "the Court has in practice been careful not to reverse precedents established by itself in previous judgments and opinions, and to explain apparent departures from such precedents."[289]

Even common law courts of the highest rank feel free to depart whenever they can find good reasons for that.[290] Likewise, the quasi-official theory of international courts admits that the courts will depart from their previous cases when the original decision was in the first place wrong or that it no longer corresponds to the requirements of international community.[291]

Departure & Establishment of New Rules. Understandably, instances of open departure are rare because when such a need arises only in an individual case the courts are usually able to distinguish the case without the need to discard the precedent. When the courts do depart, it is mostly because they want to establish the legal certainty of the new legal rules.

4.6.7 Summary: Precedent as Constraint

So what is the constraining potential of the precedent? As this section has shown, it is apparent that precedent's constraining power is more illusory than real.

Agency & Precedent. First, international judges could openly say that they do not care about the precedent because there is no statutory obligation to follow previous cases. But that would be a very bad strategy, because judicial agency model predicts that the courts themselves will want to create an impression of legal certainty; this is a necessary agency cost for international courts, and the doctrine of legal precedent serves this function very well.

Adherence to Precedent vs. Adaptation to New Circumstances. Second, although judges want to reinforce the impression of legal certainty, they do not want to be constrained by it. Rigid conformity to the precedent would conflict with the need to adapt the law to new cases and new circumstances. To paraphrase Jeremy Bentham,

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[288] Id. at 131.

[289] Id. at 129.

[290] For example, the US Supreme Court observed that "when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." Smith v. Allwright, 321 U.S. 649 (1944) p. 665.
Lauterpacht, however, noted that in some domestic jurisdictions the courts would reverse precedents "only if satisfied by the twin tests of clear error and public mischief. ... legal position as laid down by the challenged precedent decisively outweighs the injustice that may be created by disturbing settled expectations based on an assumption of continuance of that position." Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons, 1958) pp. 19-20.

[291] *See* Shahabuddeen, Precedent in the World Court, p. 134.

rigid adherence to the precedent means acting without reason, to the declared exclusion of reason, and thereby in declared opposition to reason.[292]

Flexibility & Illusion of Certainty. Third, the courts need a way out of this conundrum – to create impression of legal certainty but at the same time not to be constrained by it. As Roscoe Pound put it, these are "the conflicting demands of the need of stability and the need of change."[293] One way out of this conundrum is through various juristic techniques for distinguishing previous cases – courts thus create the impression that new cases are perfectly consistent with previous ones. This is not difficult to achieve thanks to the selection effect, which makes sure that most cases that reach international courts do not require precedential reasoning, but instead call for reasoning from analogy. Additionally, international courts may point out that the proposition in the previous case is not *ratio decidendi.* Finally, if distinguishing is unfeasible, the courts can always openly depart from the previous cases.

Power of Precedent & Persuasiveness. So in the end, what is the role of the precedent? As this section has shown, in reality the power of precedent, like the power of other legal rules, is in its persuasiveness. That is what usually lawyers mean when they say that arguments from precedent are merely forms of persuasion.[294] Arguably, the PCIJ meant something similar when it said that the Court will not depart from "the previous judgments the reasoning of which it still regards as sound."[295]

4.7 General Principles of Law

This category of legal rules has the least potential to constrain international courts, and perhaps there is not a single scholar who would contest that. It suffers from similar haziness and perplexity as customary international law does, only much more so.

Function of General Principles of Law. Suffice it to mention that general principles of law were never intended to serve as any sort of constraint, in a way that other rules might serve. Its purpose is to fill gaps in the international legal system left by treaties and customary rules.

Drafting of the Statute: General Principles & Judicial Latitude. Yet, already in the drafting process of the PCIJ Statute, some drafters opposed the inclusion of general principles or equity into the Statute. Interestingly, it was not a representative of the continental tradition, but Lord Phillimore, a common law lawyer and as such used to judicial law-making much more than his continental counterparts. In his view, the

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[292] Jeremy Bentham, The Works of Jeremy Bentham: Vol. 9 (Elibron Classics, 2000) p. 323

[293] Roscoe Pound, Interpretations of Legal History (New York: Macmillan, 1923) p. 1 ("Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. Law must be stable and yet it cannot stand still.")

[294] Julius Stone, Legal System and Lawyers' Reasonings (Stanford: Stanford University Press, 1964) p. 241.

[295] Readaptation of the Mavrommatis Jerusalem Concessions, Jurisdiction, 1927, PCIJ, Series A., No 11, p. 18. As Oppenheim's International Law puts it, "the authority and *persuasive power* of judicial decisions may sometimes give them greater significance than they enjoy formally." Robert Jennings and Arthur Watts (eds.), Oppenheim's International Law: Vol. 1 (London: Longman, 1992, 9th ed.) p. 41. (emphasis added)

inclusion of equity as a general source of law would give the judge too much liberty, unless the English technical meaning of equity would be adopted.[296]

Limited Application of General Principles. Less than a decade after the adoption of the Statute, Dionisio Anzilotti, one of the leading international lawyers of his generation, noted the very limited application of general principles of law. According to Anzilotti, an international judge may derive a legal rule from national legal systems, but that legal rule could be used only to solve that particular case.[297] So for Anzilotti there could not even be a question whether legal rules derived from general principles of law could have a constraining effect in the future cases. Other scholars likewise observed that hunches and nothing else make judges choose which general principles of law to use.[298]

Overall, whatever is the potential of general principles of law,[299] constraint of international courts is not one of them.

4.8 External and Internal Constraints

4.8.1 External Constraints

So if the legal rules do not constrain international courts, does that mean that are no other constraints on international courts? There are constraints, but they are more subtle.

Historically, straightforward external constraints rarely worked. For example, the English used several techniques to minimize judicial latitude.[300] First, the doctrine of *stare decisis* required that courts adhere to precedents rigidly; they did that by *literally* following the holding of the previous case, i.e. they could not paraphrase previous case or loosen up its language. That way, courts showed that they were not creating new law but merely followed the established precedents. Second, the principle of orality required judges to do everything in public. They had no written pleadings to read, no staff, no secret deliberations – everything had to be done in public. And because public could observe everything judges were doing, judges were unlikely to legislate from the top of their head. Not surprisingly, the English eventually found both techniques unworkable.

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[296] Permanent Court of International Justice Advisory Committee of Jurists, Procés-Verbaux of the Proceedings of the Committee (1920) p. 333.

[297] Dionisio Anzilotti, Corso di Diritto Internazionale (Rome: Atheneum, 3a ed., 1928) p. 107 (Cited in Fabian O. Raimondo, General Principles of Law in the Decisions of International Criminal Courts and Tribunals (Leiden: Nijhoff, 2008) p. 37).

[298] Rudoff B. Schlesinger, Research on the General Principles of Law Recognized by Civilized Nations, 51 American Journal of International Law 734 (1957) p. 734:
"But if we read the opinions, we look in vain for an answer to the question: How did the Court know that the particular rule or principle it relied on was in fact a general principle of law recognized by civilized nations? In case after case, the judge writing the opinion simply expressed a hunch, a hunch probably based upon the legal system or systems with which he happened to be familiar."

[299] *See e.g.* Elihu Lauterpacht, Equity, Evasion, Equivocation and Evolution in International Law, Proceedings of the American Branch of the ILA (1977–1978) p. 33; Oscar Schachter, International Law in Theory and Practice (Dordrecht: M. Nijhoff Publishers, 1991) pp. 50–55.

[300] *See* Posner, How Judges Think, pp. 154-155.

4.8.2 Deliberative Process and Collegiality

Deliberations arguably can constrain judicial latitude, but all depends on the deliberative process. In American courts, for example, deliberation is a weak constraint – a judge usually states her bottom line and sometimes a brief explanation; seldom judges change their minds in the process of deliberations.[301] In contrast, deliberations in the International Court of Justice are lengthy and reflective.[302] It is unclear whether judges are likely to change their initial positions due to these deliberations. A conspicuous feature of the deliberation in the ICJ is the exchange of written notes after the first preliminary meeting.[303] Manley Hudson noted that this practice developed soon after the Permanent Court was established.[304] Some scholars point out that the written notes usually lock judges into their initial positions:

> [I]n practice [these notes are not preliminary statements but] are often fullblown statements of a point of view and occasionally the first drafts of subsequent opinions. Of all the steps of the Court's deliberative process, the notes received severest and most widespread criticism. One judge likened the notes to the "assigned lessons" of "schoolboys"; another judge said he regarded them as fostering "academic pretensions"; all judges acknowledged that notewriting tends to harden one's views, making subsequent oral discussion of the merits of a case less fruitful. [305]

It is difficult to conclude definitively whether collegiality and deliberative process can be a significant constraint. On the one hand, general empirical research indicates that small groups, even non-professionals, usually perform much better on syllogistic decision-making.[306] On the other hand, there is ample of empirical research on the negative effects of small group dynamics, include conformity, groupthink, and polarization.[307] There is also some experimental evidence showing that groups rely on heuristics even more than individuals making decisions alone.[308]

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[301] Patricia M. Wald, Some Real-Life Observations about Judging, 26 Indiana Law Review 173 (1992).

[302] *See e.g.* Robert Jennings, The Internal Judicial Practice of the International Court of Justice, 59 British Yearbook of International Law 31 (1988); Robert Jennings, The Collegiate Responsibility of and Authority of the International Court of Justice *in* Yoram Dinstein (ed.), International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne (Dordrecht: Nijhoff, 1989) p. 343

[303] International Court of Justice, Resolution Concerning the Internal Judicial Practice of the Court (Rules of the Court, Article 33; Adopted April 12, 1976) *in* 70 American Journal of International Law 905 (1976), Article 4.

[304] "In the beginning, the Court having declined to adopt a system of rapporteurs, the judges engaged in common verbal deliberations; but written notes were often prepared, read, and later circulated, and „judges who spoke *ex tempore* often asked the Registry for very full records of their observations and subsequently had them circulated." Hence the practice grew up by which each judge wrote out his views before the general deliberation." Manley O. Hudson, The Tenth Year of the Permanent Court of International Justice, 26 American Journal of International Law 1 (1932) p. 3 (Quoted in Richard B. Lillich and G. Edward White, The Deliberative Process of the International Court of Justice: A Preliminary Critique and Some Possible Reforms, 70 American Journal of International Law 28 (1976) p. 29)

[305] Richard B. Lillich and G. Edward White, The Deliberative Process of the International Court of Justice: A Preliminary Critique and Some Possible Reforms, 70 American Journal of International Law 28 (1976) p. 34.

[306] In part, it depends on the type leadership in the group. In the so-called horse sense problem, groups with encouraging, permissive leaders outperform groups with passive leaders. *See* N. R. F. Maier & A. R. Solem, The Contribution of a Discussion Leader to the Quality of Group Thinking: The Effective Use of Minority Opinions, 5 Human Relations 277-288 (1952).

[307] Scott Plous, The Psychology of Judgment and Decision-making (New York: McGraw-Hill, 1993) pp.203-208.

[308] *See e.g.* Linda Argote, Mark Seabright, & Linda Dyer, Individual Versus Group Use of Base-rate and Individuating Information, 38 Organizational Behavior and Human Decision Processes 65-75. (1986).

Overall, it seems that collegiality might be overrated not only in common law courts, but also in international courts.

4.8.3 Internal Constraints

No Check from the Outside – Only from the Inside. One relatively recent empirical study of international judges was based on a series of interviews with judges of most international courts. Their own views show that for most of them any institutional or external constraints are either very weak or do not exist at all:

> As in domestic courts, the accountability of the international judiciary is largely a matter of conscience and collegiality. "Accountable to God, is an old-fashioned way of putting it," says one judge. He does not even see himself as accountable, exactly, to fellow judges. "I have to live with my colleagues," he says, "and it is a feature one prefers, to be well-thought-of by one's colleagues rather than to be thought a pain in the neck." Another judge emphasizes the power of pride: "If you're associated with something, you want it to be good," he say. "You don't want it to be some kind of sloppy mess kind of thing. And in that sense that's really the accountability kind of thing." Another puts it even more succinctly: "There is no check from the outside; it's only from the inside."[309]

Thus, it appears that if there are any constraints, these are mostly internal.[310] One of these internal constraints is the internalization of the norms and usages of the judicial "game".[311] The internalization depends on many factors and professional background of judges is one of the most important factors.[312] For example, former academics tend to

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[309] Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, The International Judge: An Introduction to the Men and Women Who Decide the World's Cases (Massachusets: Brandeis University Press, 2007) p. 205

[310] Scholars studying judicial decision-making of international criminal tribunals arrived at the same conclusions. Although not conclusive, there is some empirical evidence from quantitative studies suggesting that external interests influence judicial decisions only when they are in line with internal attitudes of judges themselves. Sébastien Jodoin, Understanding the Behaviour of International Courts: An Examination of Decision-Making at the ad hoc International Criminal Tribunals, 6 Journal of International Law & International Relations 1 (2010) p. 33. On the other hand, scholars studying decision-making of the European Court of Justice (ECJ) made different conclusions. For example, it appears that the ECJ, to retain its credibility, often anticipates the reactions of powerful States and chooses not to rule against their interests by choosing the outcomes most acceptable to the powerful States. *See e.g.* Geoffrey Garrett, The Politics of Legal Integration in the European Union, 49 International Organization 171 (1995); Clifford J. Carrubba, Matthew Gabel, and Charles Hankla, Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice, 102 American Political Science Review 435 (2008). Also, the ECJ's effectiveness depends a lot on its standing with domestic courts, so the ECJ accordingly crafts its opinions. *See* Damian Chalmers, Judicial Preferences and the Community Legal Order, 60 Modern Law Review 164 (1997), p. 173. However, the ECJ, in a long term , managed to expand the scope of its law and its influence against the interests of States, but doing all of that in a way that matched state preferences in a short term. *See e.g.* Karen J. Alter, Who Are the 'Masters of the Treaty'? : European Governments and the European Court of Justice, 52 International Organization 121 (1998) pp. 130-133.

[311] Posner, How Judges Think, p. 125.

[312] *See e.g.* Thomas R. Hensley, Bloc Voting on the International Court of Justice, 22 The Journal of Conflict Resolution 39-59 (1978). However, it appears that judges' domestic legal systems have little impact on their behavior in international courts. In Hensley's study, only Soviet and Polish judges showed distinct patterns. *See* ibid., at 55. *See also* Erik Voeten, The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights, 61 International Organization 669 (2007).

be more activist international judges, while former diplomats tend to be more restrained and are more responsive to national interests.[313]

Other possible constraints, which are not necessarily purely internal, include concerns for reputation[314] and reactivity (tendency to change behavior as a reaction to evaluation or observation by third parties).[315] In this context, there is some merit to the views of international courts as social systems, where the socialization of international judges and legal staff influences judicial decision-making.[316]

4.9 Summary: Judicial Latitude & Constraints

> Logic is useful for proof but almost never for making discoveries.
>
> Wilfredo Pareto

International law qualifies even better than common law systems to be called inherently ambiguous. For one, international law has no legislature, as all common law systems do. There are few or no checks and balances on international courts; even these that exist are incomparable to checks and balances in legal systems like the US. In this context, civil law systems are more definite - most of them are parliamentary republics, where legislation is relatively well-developed. Moreover, the underlying idea of these legal systems is codification and rationalization of law. Yet, even in civil law tradition, the selection effect will ensure that legal rules are not an overwhelming constraint in the highest courts.

As this chapter has shown, there is an inherent ambiguity in international legal rules, and natural language in general doesn't qualify as formal logical system. Such rules, accordingly, cannot constrain international courts if they are inclined towards judicial law-making or wish to make decisions on other grounds than legal rules. Objectively correct legal result is a myth. As Higgins puts it, "the search for 'objective determination' is a chimera."[317]

Of course, it would be wrong to think in binary terms about constraint of legal rules, i.e. that legal rules either constrain totally or do not constraining at all. Instead, the question is about the scope – how much they constrain. And even in public international law, where ambiguity is the trademark of the legal system, international courts will seldom make outlandish decisions. But as this chapter has shown,

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[313] Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, The International Judge: An Introduction to the Men and Women Who Decide the World's Cases (Massachusets: Brandeis University Press, 2007) p. 64; Sébastien Jodoin, Understanding the Behaviour of International Courts: An Examination of Decision-Making at the ad hoc International Criminal Tribunals, 6 Journal of International Law & International Relations 1 (2010) p. 30.

[314] Posner, How Judges Think, p. 125.

[315] Ibid, at 149.

[316] Sébastien Jodoin, Understanding the Behaviour of International Courts: An Examination of Decision-Making at the ad hoc International Criminal Tribunals, 6 Journal of International Law & International Relations 1 (2010) p. 31. *See also* Cornell W. Clayton, The Supreme Court and Political Jurisprudence: New and Old Institutionalisms, in Cornell W. Clayton and Howard Gillman (eds.), Supreme Court Decision-making : New Institutionalist Approaches (Chicago: University of Chicago Press, 1999) p. 32.

[317] Rosalyn Higgins, Policy Considerations and the International Judicial Process, 17 International and Comparative Law Quarterly 58 (1968) p. 71.

international courts can easily find several equally plausible legal rules applicable to a case; which legal rule will carry the day will likely depend on the preferred outcome; and the preferred outcome will likely depend on the policy preferences and other non-legalistic grounds.

Moreover, this chapter has discussed only what it is called "legal rules realism", i.e. juggling of legal rules and cannons of interpretation to justify a decision which is made on other grounds. However, judicial creativity can also find a safe haven in "fact-finding realism", when a judge will usually accept only that evidence which will support his or her preferred outcome.[318] Fact-finding in international courts is much more fluid than in most domestic courts, so fact-finding realism will likely do the job whenever judicial creativity confronts exceptionally clear-cut legal rules.

Does all of this mean that legal rules are worthless? No, only radical post-modernist philosophers would go so far. And that would be an equally wrong view. Legal rules matter, perhaps even a lot in some cases or many cases; but they are only one factor out of many. Pekelis probably expressed it best by saying that "concrete cases cannot be decided by general propositions - nor without them."[319] But perhaps even more importantly, legal rules can operate as constraint by internalization.

Most external or institutional constraints are likewise weak. Arguably, most important constraints are internal, not institutional or external. As one of the judges said in the above mentioned study, "There is no check from the outside; it's only from the inside."[320] Other legal scholars likewise noted that internal constraints are perhaps the strongest.

Yet again, it is wrong to think about judicial decision-making in mechanistic and simplistic terms – i.e. that either a specific factor has a total influence or no influence at all or that either it is one factor or another. In reality, all factors play some role - some more, some less. Internal factors interact amongst themselves and they also react with the external ones. In some cases they will converge, in others they will diverge. Any schematic and static view of influences and constraints comes with a guarantee of being overly simplistic.

Most international judges, whatever their formalist pretentions, are driven in their decision-making by several other factors, which converge around the issue of policy reasoning (instrumentalism). One of these is the plain wish to achieve a fair outcome in each case and so to live up to the fine reputation. The next chapter also shows that among other policy reasons, international courts are especially driven to achieve conciliatory justice, and this drive can be explained by the agency model.

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[318] Jerome Frank, Law and the Modern Mind (1930) p. 135 („A judge, eager to give a decision which will square with his sense of what is fair, but unwilling to break with the traditional rules, will often view the evidence in such a way that the facts' reported by him, combined with those traditional rules, will justify the result which he announces").

[319] Alexander H. Pekelis, Law and Social Action: Selected Essays (Ithaca and New York, 1950) p. 20 (Cited in Eugene V. Rostow, American Legal Realism and the Sense of the Profession, 34 Rocky Mountain Law Review 123 (1961) p. 131).

[320] Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, The International Judge: An Introduction to the Men and Women Who Decide the World's Cases (Massachusets: Brandeis University Press, 2007) p. 205

Perhaps Holmes summarized it all better than anyone by saying that the language of logic is there because of our longing for certainty in law, and yet, certainty generally is illusion, and what lies behind certainty are some policy principles:

> The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. . . . You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. . . . We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self evident, no matter how ready we may be to accept it . . .[321]

[321] Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harvard Law Review 457 (1897) p. 466.

5. Policy Reasoning in International Courts

5.1 Legal Instrumentalism in General

5.1.1 The Notion of Instrumentalism

Law as a Means to an End. Legal instrumentalism, also known as legal pragmatism or policy reasoning, is a school of thought that considers judicial creativity permissible inasmuch as it is needed to ensure that justice or social or economic interests are served. Legal instrumentalism was largely promoted by the legal realists, but one can find enough discussions about the instrumentalist interpretation even before the legal realists. Most non-American lawyers tend to think of "policy reasoning" as "political reasoning", although the word policy here has nothing to do with "politics." In this context, the word "policy" is used in a sense of a "guiding principle," "strategy," "prudence," etc. In some cases, policy reasoning can include political considerations, but these are not always part of policy reasoning. For instrumentalists, law is only a means to an end. In the end, it only matters what are the consequences of judicial decisions. As Cardozo states, "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."[322]

Backward-Looking vs. Forward-Looking Reasoning. So in essence, there are two basic types of legal reasoning: (1) backward-looking or rule-based doctrinal reasoning, and (2) forward-looking, instrumental, policy-oriented reasoning. Legal theorists sometimes also juxtapose other terms: output-oriented and input-oriented decisions; *ex ante* and *ex post* perspective; substantive and formal rationality; standards and rules; utility and rights; *voluntas* and *ratio*; interdisciplinarity and operational autonomy; *Lebensnahe* and *Lebensfremdheit*.[323] Teleological interpretation is a mixed-type: on the one hand, it is rule-based, but on the other hand, it is forward-looking.[324]

Instrumentalism & Judicial Creativity. Most formalists are not so much afraid of the idea that the law is only a means to an end, but that judicial creativity will become uncontrollable and will ultimately undermine the rule of law. This concern is of course legitimate and it has never been completely put to rest by proponents of instrumentalism.[325] For instrumentalists, however, this danger is less real than the damage that would be done by blindly applying legal rules.

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[322] Benjamin N. Cardozo, The Nature of Judicial Process (New Haven: Yale University Press, 1921) p. 66. Cardozo of course emphasized that various interests will have different force in each case:
"[L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired." Ibid, at 111.

[323] Peter Cserne, Policy Arguments before Courts: Identifying and Evaluating Consequence-Based Judicial Reasoning, 3 Humanitas Journal of European Studies 9 (2009) p.13.

[324] Ibid, at 14.

[325] *See generally* Neil MacCormick, On Legal Decisions and Their consequences: From Dewey to Dworkin, 58 New York University Law Review 239 (1983).

5.1.2 Types of Policy Reasons

In policy reasoning, we can distinguish between systemic consequences and particular case consequences. For example, when thinking about specific case consequences, the judge might apply more stringent causation standard because he or she fears that the less stringent standard will put excessive burden on the defendant. When reasoning about systemic consequences, the judge would consider what will be effects of such causation standard in the future cases and on the damage compensation throughout the legal system.[326]

It is difficult to classify all possible types of policy arguments, and even if it were possible, it probably would not be of much practical use. For instructional use, however, some legal commentators point out to the four prevalent categories of policy arguments:[327]

1. Arguments about Judicial Administration. These arguments aim at effective judicial administration of law. Typically, these are "firm vs flexible rule", "floodgates of litigation", and "slippery slope" arguments. For example, a flexible-rule-argument might point out how the flexibility of some particular rule will allow to adapt to changing circumstances and results in fairness in each case. In a "floodgates of litigation" argument, the court will refuse to adopt a certain rule because that might flood courts with lawsuits. A slippery slope argument would argue that the court should not adopt a particular rule because if it did, it could be abused and applied to a whole range of new cases that the court never intended to.

2. Normative Arguments. Normative arguments usually revolve around fairness and corrective justice, moral and social utility interests. For example, a moral argument might be that the court should adopt a certain rule because it will promote moral values that are vital to society's cohesion.

3. Institutional Competence Arguments. These arguments concern institutional allocation of competence. A typical argument of this sort might argue that the court should refuse to consider a case because the case should be decided in political organs or other institutions.

4. Economic Arguments. These arguments typically revolve around economic efficiency and the support of free market mechanisms. For example, such argument might say that the more stringent proof for damages was adopted because it will limit frivolous suits against corporations and will promote economic growth because corporations won't be sidetracked from their business by frivolous lawsuits.

5.2 Instrumentalism in International Law

5.2.1 Instrumentalism in International Legal Theory

Reception of Legal Instrumentalism in the US & Europe. Rosalyn Higgins, writing some forty years ago, noted that policy-oriented view of law had been an accepted

[326] Peter Cserne, Policy Arguments before Courts: Identifying and Evaluating Consequence-Based Judicial Reasoning, 3 Humanitas Journal of European Studies 9 (2009) p.14.

[327] Ellie Margolis, Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs, 62 Montana Law Review 59 (2001) pp. 71-72.

orthodoxy in the US, but not in England or Continental Europe.[328] It is perhaps accurate to say that judicial opinions of international courts are still rather inhospitable to the legal instrumentalism. Yet, as this chapter argues, it is next to impossible to explain decisions of international courts without instrumentalism.

New Haven School. Policy reasoning in international legal scholarship was influenced most heavily by the so-called New Haven School. The founders of this school were two Yale professors: Myres McDougal, a law professor, and Harold Lasswell, a political scientist and communications theorist. After the World War II, they wanted to integrate law, policy, and science studies into a unified field.[329] This field would draw on various disciplines, including philosophy, logic, anthropology, economics, history, and even psychiatry. The impact of this new theory, as Johnston notes, on American theory and practice of international law was profound:

> No genre of legal scholarship has moved further away from the traditional European conception of law as a system of formal rules; none has pulled the researcher further out from the core of the discipline; and none has created such a wide divergence between the European heritage and the American approach to law.[330]

Policy Reasoning in General International Law Theory. It would be an exaggeration to claim that policy reasoning in international law was a monopoly of the New Haven School. Many prominent international lawyers, not affiliated with the New Haven School, openly supported the policy reasoning in international law. Among these, one would find Wolfgang Friedman, Oscar Schachter, Lou Henkin, Philip Jessup, and others.[331] In 1980s, another school of thought emerged with similar opposition to rule-based, textual tradition of international law. Largely an offspring of critical legal studies, this school of thought argues that it is necessary to focus on the reality behind the text – the "argument" or political "discourse".[332]

Lauterpacht on Policy Reasoning. Likewise, Sir Hersch Lauterpacht, perhaps the most influential of all European international lawyers of the twentieth century, also supported the policy-oriented judicial decision-making.[333] For Lauterpacht, the function of the judge was much more than finding a "correct" legal rule. Often, especially in international law, the conflicting claims could be supported by equally strong legal rules. Accordingly, the judge would be hard-pressed to make a sound decision only on the basis of legal rules: the choice is "not between claims which are fully justified and claims

[328] Rosalyn Higgins, Policy Considerations and the International Judicial Process, 17 International and Comparative Law Quarterly 58 (1968) p. 59. It seems however that by 1980s instrumentalism was welcomed in English courts, at least in hard cases. *See generally* John Bell, Policy Arguments in Judicial Decisions (Oxford: Clarendon Press, 1983).

[329] Douglas M. Johnston, The Historical Foundations of World Order: The Tower and the Arena (Leiden: Martinus Nijhoff Publishers, 2008) p. 115

[330] Ibid.

[331] *See* Rosalyn Higgins, Policy Considerations and the International Judicial Process, 17 International and Comparative Law Quarterly 58 (1968) p. 59.

[332] Johnston, The Historical Foundations of World Order, p. 121; Philip Allott, Eunomia: New Order for a New World (Oxford: Oxford University Press, 1990); David Kennedy, International Legal Structures (Baden-Baden: Nomos Verlags gesellschaft, 1987); Marti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Cambridge: Cambridge University Press, 1989; 2006).

[333] Johnston, The Historical Foundations of World Order, p. 121.

which have no foundation at all but between claims which have varying degrees of legal merit."[334] Without policy reasoning, the courts will be troubled to resolve such cases.

Policy-oriented Approaches in the Soviet Doctrine. Similarly, although not strictly a policy-oriented approach, one could find realist influenced approaches even in the Soviet doctrine of international law. Thus, the most prominent Soviet international legal scholar Tunkin criticized Soviet legal scholars for their "weakness and incompleteness in juridical argumentation and a tendency to slip into the easier path of ready-made political argumentation reinforced by quotations."[335] Tunkin also wanted to free the Soviet legal science from "dogmatism, from the use of citations instead of creative thought, from crying hallelujah and from the isolation from actual reality which interfere with the development of the Soviet science of international law."[336]

5.2.2 Policy Reasoning in Jurisprudence of International Courts

Policy Reasoning & Equity. Statutes of international courts are usually silent on whether courts should use policy reasoning in decision-making. Many statutes provide for possibility to decide cases *ex equo et bono* if parties explicitly authorize the court to do so. Of course, the concept equity is at the same time both broader and narrower than the notion of policy reasoning – equity usually stands for justice with regard to the matter of the case, but more precise definition is hard to come by.[337] Equity may mean *contra legem* – making a decision by disregarding legal rules, only seeking justice and fairness; it may also mean equity *infra legem* (an intrinsic attribute of legal rules) and *intra legem* (the content of the rules).[338] The caselaw of the ICJ and its predecessor abounds with references to equity; this is reflected in such notable cases as *Lotus*, *Wimbledon*, *Corfu Channel*, *Barcelona Traction*, etc.[339] So in some sense, policy reasoning flows in part from equity *infra legem.*

Policy Reasoning in Judicial Opinions. Regarding specifically instrumentalist reasoning, international courts themselves have been rather discrete about their views on this issue. It is difficult to discern from their judgments how much they really reason in this way. Of course, judgments are justifications, so even if international courts use policy reasons in their judgments, it doesn't mean that they actually rely on them to make decisions; but this is unlikely in practice – if the court justifies a decision with policy reasons, it is more likely that these policy reasons influenced the judgment.

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[334] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons, 1958) p. 398.

[335] *See* Edward McWhinney, The International Court of Justice and the Western Tradition of International Law (Dordrecht: Martinus Nijhoff Publishers, 1987) p. 41

[336] Ibid, at 42.

[337] Mark W. Janis, The Ambiguity of Equity in International Law, 9 Brooklyn Journal of International Law 7 (1983); Christopher R. Rossi, Equity and International Law: A Legal Realist Approach to International Decisionmaking (NY: Transnational Publishers, 1993); Vaughan Lowe, The Role of Equity in International Law, 12 Australian Yearbook of International Law 54 (1992).

[338] Alain Pellet, Article 38, in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Christian Tams, and Tobias Thienel, The Statute of the International Court of Justice: A Commentary (Oxford: Oxford University Press, 2006) p. 725.

[339] Ibid., at 724-730.

South West Africa. Occasionally, one might come across pronouncements that scorn policy reasoning. Thus, the ICJ in *South West Africa* famously, or perhaps infamously, stated that it would not take into account moral principles:

> It is a court of law and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise it is not a legal service that will be rendered.[340]

North Sea Continental Shelf. Yet, in *North Sea Continental Shelf,* the ICJ seems to have changed its position: "whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable".[341]

Northern Cameroon. In other cases likewise, the ICJ was eager to invoke policy reasons when it was hard-pressed to justify its decisions on the basis of legal rules. Thus, in the *Northern Cameroon,* to justify its refusal to make a pronouncement on the merits, the ICJ used a judicial administration argument:

> There are inherent limitations on the exercise of the judicial function which the Court, as a Court of Justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.[342]

Barcelona Traction. In *Barcelona Traction,* the ICJ used policy arguments of judicial administration ("floodgates of litigation") and economic efficiency. The question was whether shareholders' State of nationality could exercise diplomatic protection on behalf of the company; the established rule allowed only the State of company's incorporation to exercise diplomatic protection on behalf of the company. The Court used policy reasoning to reject the diplomatic protection by shareholders' State because it would lead to multiplicity of claims and insecurity in international relations:[343]

> The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands.[344]

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[340] South West Africa Cases , 2nd phase (Ethiopia/Liberia v South Africa), 1966 ICJ Reports p. 34.

[341] North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands), 1969 I.C.J. Reports 7, 48 (20 February 1969).

[342] Case Concerning the Northern Cameroon (Cameroon v. United Kingdom), Preliminary Objections, 1963 ICJ Reports 29.

[343] There can be only one State of incorporation, but shareholders may have different nationalities, so multiple States could raise claims on behalf of the company if diplomatic protection would be allowed to shareholders' States of nationality.

[344] Barcelona Traction, Light and Power Company, Limited, 1970 ICJ Reports 49 (para. 96) (Judgment of 5 February 1970).

Maritime Delimitation Cases. Similarly, Prosper Weil observes that in maritime delimitation cases, in 1980s the ICJ began using equity as directly generating the outcome (i.e. as policy reasoning).[345]

Policy Reasoning in the WTO. Policy reasons play even more crucial role in the WTO dispute settlement. Institutional competence arguments, although not often explicitly articulated, are particularly prominent here. As some scholars showed, in many decisions the WTO Appellate Body faces a choice among several institutional alternatives.[346] The Shrimp-Turtle case illustrates the comparative institutional analysis before the Appellate Body.[347] In that case, the United States, swayed by its environmental advocacy groups, initially imposed a restriction on its domestic shrimping industry. [348] The regulation required to use the "turtle excluder devices" (TEDs) to protect sea turtles in the shrimp nets. After the domestic regulation was imposed, both the American environmental groups and the US shrimping industry urged to impose the same requirement of using TEDs on foreign shrimp importers. Eventually, the US yielded and imposed the same requirement on foreign importers. Consequently, several South and East Asian states brought the claim against the US before the WTO dispute settlement system.

In its decision-making, the WTO Appellate Body had at least five institutional alternatives:

1. Defer to the domestic political authority imposing the trade restrictions – i.e. uphold the legality of the US import restrictions and accordingly allocate decision-making to U.S. national political and judicial processes. This decision would largely favor U.S. producer groups and environmental groups.

2. Reject legality of the trade restriction, and accordingly allocate decision-making to the marketplace, which would favor shrimp industries of developing countries.

3. Refer the issue to another international political body and thus allocate decision-making to an international political process.

4. Impose a vague standard which would be applied on a case-by-case basis and thus allocate substantive decision-making to itself.

5. Defer the substance to a national body that determines substantive policy but review the process of the national decision and thus sharing decision-making authority between a national body that determines substantive policy, and an international judicial body that reviews the national procedure for due process, transparency, and "good faith" multilateral efforts. This decision would again favor U.S. constituents,

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[345] Prosper Weil, The Law of Maritime Delimitation: Reflections (Cambridge: Cambridge University Press, 1989) p. 172 (far "from trying to obscure the fact of the U-turn, [the ICJ] has rejected, in the clearest of terms, the previous concept of equity as a corrective in favour of equity as directly generating the outcome.")

[346] Gregory Shaffer, Power, Governance, and the WTO: A Comparative Institutional Approach, *in* Michael Barnett and Bud Duvall (eds.), Power in Global Governance (Cambridge: Cambridge University Press, 2005) pp. 139-150. *See also* Neil Komesar, In Search of General Approach to Legal Analysis: A Comparative Institutional Alternative, 79 Michigan Law Review 1350-1351 (1980-1981).

[347] U.S. - Import Prohibition of Certain Shrimp and Shrimp Products, WTO Appellate Body Report on , WT/DS58/AB/R (October 12, 1998), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (last accessed 2010-04-11)

[348] Gregory Shaffer, Power, Governance, and the WTO: A Comparative Institutional Approach, *in* Michael Barnett and Bud Duvall (eds.), Power in Global Governance (Cambridge: Cambridge University Press, 2005) pp. 139.

although to a lesser extent than the first option. In the end, the Appellate Body chose this proceduralist option.[349]

Other studies on judicial decision-making in the WTO arrived at even more impressive conclusions. For example, one study found that complainant success rate in the WTO dispute settlement is about 90%.[350] This figure obviously deviates from the 50% success rate which could be predicted under the random litigation model. The most plausible explanation is that the WTO adjudicators have consistently used interpretative methods to promote the major outcome – promotion of the unrestricted trade and restriction of any respondents' discretion to adopt trade-restrictive measures.[351] Thus, it seems that the WTO dispute settlement relies on its near-supreme economic policy principle – promotion of the free trade.

Power Allocation Arguments in the ICJ. The WTO AB is far from the only international judicial organ that considers institutional competence in the decision-making. In recent decades, especially after the end of cold war, the ICJ has increasingly considered how its decisions will affect power allocation within the UN:

> [A]ny developments on the International Court will be on the model of [US Supreme Court] Justice Felix Frankfurter's judicial self-restraint and a conscious respect for the constitutional role and missions of other UN policy-making organs and other important players in the international community, in any Court ventures into policy rulings on great international tension-issues sought to be brought under its jurisdiction.[352]

So international courts use various sorts of policy arguments in their judgments, but these policy arguments do not figure as prominently as the rule-based reasoning does. And yet again, it is difficult to infer from written opinions whether instrumentalist reasoning weighs heavily in the actual decision-making.

The next sections will show that specific instrumentalist reasoning is a significant driving force in international courts, even if it does not figure prominently in written opinions. More specifically, the conciliatory justice or its close relatives may be a very important factor.

5.3 Conciliatory Justice

5.3.1 Notion of Conciliatory Justice

Concept of Conciliatory Justice. Conciliatory justice "seeks above all to settle the dispute by affording minimal satisfaction to both parties, if not making them meet half-way".[353] Such arbitral and judicial practice has been controversial all along.

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[349] U.S. - Import Prohibition of Certain Shrimp and Shrimp Products, WTO Appellate Body Report on, WT/DS58/AB/R (October 12, 1998), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (last accessed 2010-04-11)

[350] Juscelino F. Colares, A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development, 42 Vanderbilt Journal of Transnational Law 383 (2009) pp 402-411.

[351] Ibid, at 435.

[352] Edward McWhinney, The International Court of Justice and International Law-making: The Judicial Activism/Self-Restraint Antinomy, 5 Chinese Journal of International Law 1 (2006) p. 3.

[353] Georges Abi-Saab, The International Court as world court, in Vaughan Lowe and Malgosia Fitzmaurice (eds.), Fifty years of the International Court of Justice (Cambridge: Cambridge University Press, 1996) p. 11.

Various terms have been coined to describe this phenomenon; most of these terms carry negative connotations: conciliatory justice, baby-splitting, transactional justice, splitting the difference, etc. Sometimes commentators simply say that the tribunal decided on equitable grounds when they mean conciliatory justice.

Of course, commentators often disagree whether a particular decision is an instance of conciliatory justice. In international commercial arbitration, in contrast to a typical public international law case, quantitative studies can show whether arbitral tribunals engage in baby-splitting;[354] this is possible because most claims are monetary. If the arbitral tribunals routinely decide the halfway between the claimant and the respondent, one can reasonably conclude that they practice baby-splitting.

Reasons for Practicing Conciliatory Justice. There are fairly intuitive reasons why international courts use conciliatory justice. On average, it increases party satisfaction and reduces risks of going to the court, increases likelihood of judgment implementation, and increases likelihood of judicial consensus.[355] Also, it probably allows courts to accept politically sensitive cases.[356]

Agency Model and Conciliatory Justice. Another way to understand this phenomenon is again through the agency model. As Posner explains, it is always in the interests of arbitrators to have a balanced reputation:

> An arbitrator who gets a reputation for favoring one side in a class of cases – disputes between investors, employment, etc – will be unacceptable to one of the parties in any future dispute. Therefore, arbitrators tend to "split the difference" in their awards – try to give each side a partial victory. This makes more difficult for parties on either side to infer a favoritism.[357]

This is especially relevant to international courts because their jurisdictional foundations resemble more arbitral tribunals than domestic courts. Typically, an international court or tribunal has jurisdiction over States only if they express their consent.[358] Unlike domestic courts, the jurisdiction of the ICJ and other courts is consensual: a State must consent to the Court's jurisdiction either in specific cases or by accepting a general compulsory jurisdiction.[359] States can endow most international courts with compulsory jurisdiction, but an unsatisfied State can withdraw its consent of compulsory jurisdiction for future cases.[360] The most conspicuous example of such

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[354] *See e.g.* S. E. Keer and R. W. Naimark, Arbitrators Do Not "Split the Baby": Empirical Research from International Business Arbitration, in C. R. Drahozal and R. W. Naimark (eds.), Towards A Science of International Arbitration: Collected Empirical Research (The Hague: Kluwer Law International, 2005) p. 316.

[355] Yuval Shany, Bosnia, Serbia and the Politics of International Adjudication, 45 Justice 21 (2008) p. 21.

[356] Ibid.

[357] Posner, How Judges Think, pp. 127-128

[358] Chittharanjan F. Amerasinghe, Jurisdiction of International Tribunals (The Hague: Kluwer Law International, 2003) pp. 77-90.

[359] Statute of the International Court of Justice, T.S. No. 993, 3 Bevans 1179 (Art. 36)

[360] Some closed-type organizations like the WTO provide for compulsory jurisdiction over all member States and members cannot withdraw their consent to this compulsory jurisdiction. However, the Appellate Body of the WTO might nonetheless be equally concerned about conciliatory justice and related interests for other political reasons. Gregory Shaffer, Power, Governance, and the WTO: A Comparative Institutional Approach, *in* Michael Barnett and Bud Duvall (eds.), Power in Global Governance (Cambridge: Cambridge University Press, 2005) pp. 130-160.

withdrawal was that of the US after its defeat in the Nicaragua case, a "bitter rejection of the Court after losing a politically charged Cold War case."[361]

5.3.2 Law of the State Responsibility and Violations of Jus Cogens Norms

The remainder of this section will use violations of peremptory norms and law of state responsibility to demonstrate that it is nearly impossible to explain many judicial decisions without conciliatory justice. Cases of state responsibility provide an excellent illustration of the tension between the requirements of legal rules and actual judicial decisions.

Legal rules, in violations of peremptory norms, require that courts impose a more severe responsibility on the wrongdoers. More severe responsibility would be achieved if respondents had to pay more damages. Respondent would pay more damages if the courts would apply less stringent causation standards. Yet, extensive damages would make respondent States very unhappy. Thus, international courts will feel a tension between following the legal rules and satisfying interests of both parties as much as possible. The hypothesis of this chapter is that in case of such conflict, the courts will ignore legal rules and will strive to simultaneously satisfy interests of both parties.

Jus Cogens. International law should discourage *jus cogens* violations more than any others; the more damages prospective violators would have to pay, the more discouraged they would be. Law of the state responsibility, accordingly, would set more lenient causation standards regarding *jus cogens* violations so that injured states could recover more damages.

Purpose of Legal Responsibility. It is the ancient idea that that law governing the responsibility must be applied so as to serve underlying purposes of legal responsibility. Roman law, for example, in its earlier period was developed not through legislation and its interpretation, but through the control of legal remedies.[362] In international practice, for example, the Umpire in *Lusitania* cases noted that "if a belligerent can be made to pay compensation for all damage done by him in violating laws of war, this will be an indirect means of securing legitimate warfare".[363]

Function of International Law of State Responsibility. In international law, however, it is a controversial question whether the law of state responsibility can punish wrongdoers. Then there is related but separate issue whether violations of peremptory norms entail different responsibility. In general, there have been two principal views about the nature of State responsibility and the role of public interest and sanctions.

State Responsibility as Bilateral Relationship. One school of thought, influenced heavily by pre-eminent Italian positivist Anzilotti, views state responsibility as bilateral relationship between the injured state and the wrongdoer.[364] This view considers

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[361] Sean D. Murphy, The United States and the International Court of Justice: Coping with Antinomies, in Cesare P. R. Romano (ed.), The United States and International Courts and Tribunals (Cambridge: Cambridge University Press, 2009) p. 78.

[362] Peter Stein, Roman Law in European History (Cambridge: Cambridge University Press, 1999) p. 8.

[363] *See* David J. Bederman, Historic Analogues of the UN Compensation Commission, in Richard Lilich (ed.), The United Nations Compensation Commission (New York: Transnational Publishers, 1995) p. 324.

[364] Report of the International Law Commission on the Work of its Fifty-Third Session, Articles on Responsibility of States for Internationally Wrongful Acts and Commentary Thereto, [2001] 2 Ybk. Int'l L. Commission 33, U.N. Doc. A/56/10 (Commentary to Article 1, para. 3).

reparation as the only consequence of the international law violation; sanctions or any similar public-law type remedies have no place in the realm of state responsibility because this would collide with the holy doctrines of sovereignty and sovereign equality. This view is reflected in the earlier arbitral awards, which naturally reflected the classical outlook of international law. For example, in *Lusitania* case, the umpire clearly stated that "the words exemplary, vindictive, or punitive as applied to damages are misnomers. The fundamental concept of "damages" is satisfaction, reparation for a loss suffered; a judicially ascertained compensation for wrong."[365] Similarly, the Portugo-German Arbitral Tribunal rejected Portugal's claim for 2,000 million gold marks against Germany by noting that the Tribunal had no powers of "repression".[366]

State Responsibility & Coercive Order. The opposing school of thought, associated with Kelsen, views state responsibility as part of multilateral relationship - the coercive order of international law.[367] Any violation of this coercive order attracts sanctions. Injured state simply acts as an agent of this coercive order vindicating public interest by invoking the responsibility of the wrongdoer. Obligation to make reparation is only a subsidiary obligation within the general coercive order of sanctions.[368]

Mixed View of State Responsibility. The prevailing middle ground,[369] influenced by Roberto Ago and Sir Hersch Lauterpacht, combines both of these schools and avoids their extremities.[370] It recognizes that international law of state responsibility may bring about various legal relationships, including reparation and "sanction". This view distinguishes between ordinary violations and violations of *jus cogens* norms. *Jus cogens*, as a notion of positive international law, has not been born when the earlier arbitral awards were made.

Liberal Recovery of Damages in Arbitral Awards. Moreover, even older awards recognize that more liberal recovery of damages must be allowed with intentional violations of international law. In the *Dix* case, the Tribunal stated that normally States are responsible only for proximate consequences of their acts; however, compensation

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[365] Opinion in the Lusitania Cases (United States/ Germany), 1 November 1923, US-Germany Mixed Claims Commissions, 7 UNRIAA 39.

[366] Responsibilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal v. Germany), 30 June 1930, Portugo-German Arbitral Tribunal, 2 UNRIAA p. 1035.
According to Portugal, the requested sum should have shown Germany that its "acts cannot continue to be performed with impunity. Apart from the sanction of disapproval by conscience and by international public opinion, they would be matched by material sanctions". The Tribunal stated that "It is therefore very clear that it is not in reality an indemnity, or reparation for material or even moral damage, but rather sanctions, a penalty inflicted on the guilty State and based, like penalties in general, on ideas of recompense, warning and intimidation. Yet it is obvious that, by assigning an arbitrator the task of determining the amount of the claims for the acts committed during the period of neutrality, the High Contracting Parties did not intend to vest him with powers of repression."

[367] Report of the ILC on the Work of its Fifty-Third Session, Articles on Responsibility of States for Internationally Wrongful Acts and Commentary Thereto, Yearbook of International Law Commission, 2001, Vol. II, U.N. Doc. A/56/10 (Commentary to Article 1, para. 3).

[368] Ibid.

[369] Ibid.

[370] *See* Georg Nolte, From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations, 13 European Journal of International Law (2002) p. 1083.

may be provided even for remote consequences if there is "evidence of deliberate intention to injure".[371] The *Dix* case does not stand alone with its pronouncement that deliberate intention to injure may warrant wider recovery of damages. Legal scholars analyzing arbitral and judicial jurisprudence have made similar conclusions. Brownlie, for example, noted that "the principles governing remoteness of damage are not constants and must be related to the substantive principles of law which have generated responsibility in the first place".[372] Gray likewise referred to *Janes* and subsequent cases by US-Mexico Claims Commission and noted that the "degree of fault of the respondent will influence the arbitrator in his calculations."[373]

Jus Cogens & Intentional Violations. Needless to say, in contemporary international law *jus cogens* and other serious violations international public order deserve at least the same treatment as intentional violations in the older caselaw. By definition, most of these norms encompass deliberate intent; even if they don't, their violation is still more damaging than intentional violations of ordinary rules. International law writers likewise argue that the seriousness of violation, and not only deliberate intention, should influence the scope of recovery.[374]

Compensation vs. Allocation of Losses. Finally, it may be noted that the injured state in reality is rarely compensated fully. Even less realistic situation is when the injured State gets 100% of its losses and then also is additionally awarded punitive damages. The real issue is whether it should be compensated 40% vs. 95% of all its losses. It is almost obvious that in cases of jus cogens violations, the injured State should be compensated more not less. By failing to require that the wrongdoer compensates all damages, arbitral tribunal would not as much abstain from "repression", as much it would reallocate losses on the injured state.

5.3.3 Causation Standards

First of all, it should be noted that there is no single standard applicable to all cases of responsibility. As the International Law Commission noted, different causation tests might be applicable to different causes of action.[375] Thus, a case involving responsibility for breach of investment treaty might call for different causation test than a case concerning compensation for violations of the use of force.

There is some terminological confusion about causation standards, but this section will try provide a clarification and overview principal standards, so that it is possible

[371] Dix case (US v. Venezuela), 17 February 1903, United States-Venezuela Mixed Claims Commission, 9 UNRIAA pp. 119-121.

[372] Ian Brownlie, System of the Law of Nations: State Responsibility (Part I) (Oxford: Oxford University Press, 1983) p. 226.

[373] Christine Gray, Judicial Remedies in International Law (Oxford: OUP, 1987), p. 24.

[374] Arthur W. Rovine and Grant Hannesian, Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission, in Richard Lilich (ed.), The United Nations Compensation Commission (New York: Transnational Publishers, 1995) p. 236 ("The more unjustified or terrible the original cause in the eyes of the law, the further the law should stretch the band and find liability.").

[375] Report of the ILC on the Work of its Fifty-Third Session, Articles on Responsibility of States for Internationally Wrongful Acts and Commentary Thereto, Yearbook of International Law Commission, 2001, Vol. II, U.N. Doc. A/56/10. p. 33. (Commentary to Article 1, para. 3)

to distinguish between less stringent causation standards which allow more damage recovery and thus serve the rules of state responsibility, and on the other hand more stringent standards which make it more difficult to prove damages and thus favor respondent States.[376]

Causation standards in international law have been developed largely by domestic law analogies.[377] Arbitral and judicial practice has articulated five principal causation standards: (1) direct vs. indirect, (2) proximate vs. remote, (3) foreseeable vs. attenuated, (4) reasonable vs. unreasonable, (5) certain vs. speculative.[378] In addition to the five principal standards, some writers add "efficient" and "approximate" causation standards.[379] Some authorities point out that direct, approximate, efficient, and proximate are often used synonymously.[380]

It is difficult to point out precise distinctions between the standards because scholarly literature on this issue is scant. [381] By and large, the International Law Commission also neglected causation in its codification of state responsibility.[382] But arbitral and judicial decisions show that there are important, even if imprecise, distinctions between these standards.

Direct vs. Indirect. The direct causation is the oldest standard articulated in the international jurisprudence. In fact, it dates back to Alabama arbitration (1872), arguably the most influential nineteenth century arbitration. Nonetheless, direct causation standard did not enjoy a widespread support in international practice. The precipitous rise of this standard was followed by even more precipitous fall: already in the beginning of the XX century, the proximate cause and other alternative standards drove out the direct causation standard. Although this standard would require exclusion of lost profits and similar damages, international arbitral practice occasionally awarded lost profits even if it relied on this standard.

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[376] These are "causation-in-law" standards. Before establishing causation-in-law, claimant should prove causation-in-fact, or factual causation, which is usually expressed in "but for" terms. E.g. but for the respondent's unlawful use of force, would injured state suffered losses in investment? Normally "causation-in-fact" is easy to prove. *See* Arthur W. Rovine and Grant Hannesian, Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission, in Richard Lilich (ed.), The United Nations Compensation Commission (New York: Transnational Publishers, 1995) pp. 240-241; J. D. Fry, Coercion, Causation, and the Fictional Elements of Indirect State Responsibility, 40 Vanderbilt Journal of Transnational Law (2007), pp. 631-634.

[377] *See e.g.* Hersch Lauterpacht, Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration) (London: Longmans, Green and Co, 1927) pp. 144-151.

[378] Decision Number 7: Guidance Regarding Jus ad Bellum Liability, 27 July 2007, Eritrea-Ethiopia Claims Commission, <http://www.pca-cpa.org/showfile.asp?fil_id=656>, visited on 13 March 2011, [hereinafter Eritrea-Ethiopia Claims Commission, Decision Nr. 7], para. 13.

[379] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge: Cambridge University Press, 1953) p. 253.

[380] Ibid, at 244.

[381] Whiteman's treatise on damages, published more than sixty years ago, remains the most comprehensive treatment of the subject. Marjorie Whiteman, Damages in International Law, Vol. 3 (Department of State Publications: Washington, DC, 1943).

[382] International Law Commission, Second report on State responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur of the International Law Commission, (1989:2 Yearbook of International Law Commission; U.N. Doc. A/CN.4/425 and Add. L), pp. 13-16

Not only arbitral tribunals disliked the direct causation standard. International Law Commission's special rapporteur on state responsibility noted that there has been no clear indication "about the kind of relationship between the event and damage that would justify their qualification as 'indirect'".[383] As the special rapporteur further remarked, "practice has kept its distance from indirect damage".[384] Majority of writers also kept their distance from this standard. Brownlie, for example, notes that "certainly, the test is not whether the damages are 'direct' or 'indirect'".[385]

Although the direct causation standard had been driven out of international arbitral awards long before the World War II, it reappeared in the UN Compensation Commission, established by the UN Security Council to apportion damages arising from Iraqi invasion in Kuwait.[386] Yet, the significance of this reappearance should not be overstated. As Eritrea-Ethiopia Claims Commission noted, the determination of direct injury in the UN Compensation Commission is made by the Governing Council, which is a political organ and does not necessarily apply international law in its decisions.[387] Overall, despite occasional appearance, direct/indirect causation standard could hardly claim to be a part of positive international law.

Proximate cause. The most prominent of causation standards is the proximate causation. Majority of the arbitral awards since the end of World War I, as well as most of the publicists, have championed this standard. Moreover, some scholars noted that sometimes when terminology of direct/indirect causation is present it in fact refers to proximate/remote causation standard.[388] A well-known articulation of this standard is found in the opinion of the Umpire of the US-German Claims Commission:

> "The proximate cause of the loss must have been in legal contemplation the act of Germany. The proximate result or consequence of that act must have been the loss, damage, or injury suffered. (...) This is but an application of the familiar rule of proximate cause - a rule of general application both in private and public law - which clearly the parties to the Treaty had no intention of abrogating."[389]

Proximate cause standard was favored in a number of later arbitral awards.[390] Also, the first ILC's Special Rapporteur on state responsibility Garcia Amador summarized the practice by stating that governments are responsible only for proximate cause.[391]

[383] Ibid., para. 35.

[384] Ibid., para. 36.

[385] Ian Brownlie, System of the Law of Nations: State Responsibility (Part I) (Oxford: Oxford University Press, 1983) p. 225.

[386] *See generally* John Crook, The United Nations Compensation Commission - A New Structure to Enforce State Responsibility, 87 American Journal of International Law 144 (1993)

[387] Eritrea-Ethiopia Claims Commission, Decision Nr. 7, para. 11.

[388] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge: Cambridge University Press, 1953) p. 243.

[389] Administrative Decision No. II, 1 November 1923, US-German Claims Commission, 18 American Journal of International Law (1924) p. 603.

[390] *See e.g.* Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité). (Portugal v. Germany), 31 July 1928, Portugo-German Arbitral Tribunal, 2 UNRIAA p. 1011-1031. (Angola case, Award I)

[391] International Law Commission, Sixth Report on International Responsibility by Mr. F.V. Garcia Amador, Special Rapporteur of the International Law Commission, (1961:2 Yearbook of International Law Commission, U.N. Doc. A/CN.4/134 and Add.1), p. 41.

Of course, it does not provide bright-line rules for all occasions. Cheng suggested two criteria to clarify the proximate cause: subjective and objective.[392] What he considers subjective criterion is usually considered a separate causation standard – foreseeability, which is discussed below. Objective criterion refers to normal consequences of the act. In *Life Insurance Claims* case, the US-German Claims Commission had to decide whether the Germany had to pay damages to US insurance companies which suffered losses because the war accelerated maturity of insurance contracts. The Commission held that Germany's acts of taking lives of individuals were not the proximate cause:

> In striking down the natural man, Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with that man. The accelerated maturity of the insurance contracts was not a natural and normal consequence of Germany's act in taking the lives, and hence not attributable to that act as a proximate cause.[393]

Foreseeability. As mentioned above, foreseeability is considered a distinct causation standard, not the part of proximate cause standard. US-Venezuelan Claims Commission, Portugo-German Arbitral Tribunal, and Lighthouses arbitration appear to have considered it so.[394] More recently, the Eritrea-Ethiopia Claims Commission also referred to foreseeability test as the distinct standard, but ultimately it adopted foreseeability as part of its proximate cause standard.[395]

Foreseeability standard does not require proving that wrongdoer actually foreseen the consequences, only that it could be foreseen.[396] One of a well-known articulations of this standard comes from US and British commissioners' joint report submitted in 1904 regarding Samoan dispute: "damages for which a wrongdoer is liable are the damages which are both, in fact, caused by his action, and cannot be attributed to any other cause, and which a reasonable man in a position of the wrongdoer at the time would have foreseen as likely to ensue from his action."[397]

Reasonable damages. The test of reasonable causation was most notably articulated in the Whiteman's treatise on *Damages in International Law*.[398] This standard, simply, allows damages which are reasonable to recover.[399] The vagueness of this test is apparent. The Eritrean-Ethiopian Commission rejected outright this standard, noting that subjective concept of "reasonableness" is likely to be "heavily shaped by the decision-maker's culture and life experience"; it further pointed out that this concept is known only in some legal systems, and thus cannot be considered a general principle of law.[400]

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[392] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge: Cambridge University Press, 1953) pp. 245-249.

[393] Provident Mutual Life Insurance Company and Others (United States) v. Germany (Life-Insurance Claims), 18 September 1924, US-German Mixed Claims Commission, 7 UNRIAA p. 113

[394] *See e.g.* Decision Number 7 of the Eritrean-Ethiopian Claims Commission, para. 12.

[395] Ibid, para. 13.

[396] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Cambridge: Cambridge University Press, 1953) p. 253.

[397] *See* Whiteman, Damages in International Law, pp. 1779-1780.

[398] Ibid.

[399] Ibid, at 1767.

[400] Decision Number 7 of the Eritrean-Ethiopian Claims Commission, para. 8.

Summary. From this overview, it is of course impossible to crystallize these causation standards one hundred percent. Some of them are inherently vague, others are less so, and in any case we cannot expect absolute precision because causation standards in international law are not the products of exact sciences. Yet, it is evident, for example, that the proximate cause standard is the most supported. And as such, it is usually applied in violations of ordinary norms of international law. Thus, if the courts are merely applying rules of international law, we can expect confidently that in cases of *jus cogens* violations the courts will apply even more lenient standards than the proximate cause, but in any case not more stringent than the proximate cause.

5.3.4 The Genocide case

The ICJ's *Genocide* case[401] and the Eritrea-Ethiopia Claims Commission's decision regarding *jus ad bellum* liability[402] are the two relatively recent cases which can demonstrate whether the courts apply correct causation standards as it would be expected if they were not affected by instrumentalist reasoning.

In the *Genocide* case, Bosnia and Herzegovina claimed Serbia's (then Serbia and Montenegro's) responsibility for the genocide during the so-called Bosnian war (1992-1995). The Genocide case, as the name implies, concerned violations of genocide; in its another case, the ICJ previously held that the prohibition of genocide has become part of *jus cogens*.[403] Eventually, the Court rejected Serbia's direct responsibility for the genocide, but ultimately found Serbia responsible for its failure to prevent the genocide.

Breach without Damages. So if Serbia is responsible for failure to prevent the genocide, then we should expect that the Court would apply at least the proximate cause standard. Yet, this is not what happened: although the ICJ found that Serbia breached its obligations to prevent the genocide, it nevertheless refused to award damages because the "sufficiently direct and certain" causal link could not be proved.[404]

Bending Causation Standards. It seems that the Court came up with a new causation standard – the *certain cause* standard. The wording of this standard indicates its stringency: there must be a "sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered."[405] So it seems that this standard is an amalgam of certainty and direct causation, which everyone thought to be extinct in international law.

Unfortunately, the Court heavily economized on its reasoning, so much so that we cannot find a single sentence explaining why the Court preferred this standard over others or how the Court arrived at this standard. It should obvious by now that the true reasons for "applying" this standard had nothing to do with its compelling legal

[401] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. Reports 165 (para. 462) (26 February 200) [Further – Genocide case].

[402] Eritrea-Ethiopia Claims Commission, Decision Nr. 7.

[403] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), 3 February 2006, ICJ, Jurisdiction and Admissibility, 2006 I.C.J. Reports 32.

[404] Genocide case, p. 165.

[405] Ibid.

rationale. In fact, probably there is no whatsoever compelling legal rationale to this standard: no leading case has ever relied on this standard.

Explaining the Outcome. How could one explain the outcome and peculiar causation standard adopted in this case? On the one hand, instead of rejecting the Bosnia's claim outright, the Court partially satisfied Bosnia's interest by finding Serbia responsible for failure to prevent the genocide. On the other hand, Bosnia was entitled to only one remedy - a formal declaration of breach (i.e. satisfaction). Legal commentators were quick to point out that this judicial remedy - satisfaction – was rather unsatisfactory.[406]

One explanation that has been proposed (and rejected) concerns the submissions of the Bosnia and Herzegovina (the applicant). Bosnian counsel requested full compensation for the damages only regarding the alleged violation of Serbia's obligation not to commit genocide; no such request was made regarding breach of obligation to prevent the genocide.[407] Yet, the Court could not have limited itself to the shared view of the parties even if it strictly applied the principle of *non ultra petita* ("not beyond the request").[408]

It seems that the only explanation that holds water is the conciliatory justice - the Court's desire to satisfy both parties by splitting their differences.[409]

5.3.5 Eritrea-Ethiopia Claims Commission

The Commission. The Eritrean-Ethiopian Commission was established to deal with claims arising from the so-called Eritrean-Ethiopian War (1998-2000), which broke out in May 1998, when Eritrean forces entered the disputed Badme region under Ethiopian administration. Eritrea-Ethiopia Claims Commission had to decide Eritrea's responsibility for its unlawful use of force against Ethiopia. Prohibition of the use of force is considered one of the least controversial examples of *jus cogens*.[410]

Juggling Causation Standards. Like the ICJ in the *Genocide* case, the Eritrean-Ethiopian Claims Commission arguably also favored too stringent causation standard – it combined the proximate cause standard with the foreseeability.[411] At first, it noted that proximate causation test "is not a general principle of law or a rule of customary international law".[412] Then, after discarding the alternative tests, it ultimately came back to it and adopted it: "Given this ambiguous terrain, the Commission concludes that the necessary connection is best characterized through the commonly used nomenclature of 'proximate cause'".[413]

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[406] Christian Tomuschat, Reparation in Cases of Genocide, 5 Journal of International Criminal Justice 905 (2007).

[407] Andrea Gattini, Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment, 18 European Journal of International Law (2007) pp. 706-707.

[408] Ibid.

[409] Yuval Shany, Bosnia, Serbia and the Politics of International Adjudication, 45 Justice 21 (2008) p. 21.

[410] *See e.g.* Ian Bronwlie, Principles of Public International Law (Oxford: Oxford University Press, 6th ed., 2003) p. 489.

[411] Decision Number 7 of the Eritrean-Ethiopian Claims Commission, para. 13.

[412] Ibid, para. 8.

[413] Ibid, para. 13.

We may only wonder how the Commission could apply proximate cause standard if it is neither general principle of law nor customary international law. (No relevant treaty existed either.) One possibility is that the Commission openly admitted that it was relying on instrumental reasons because it found no established legal rules. The other possibility is that the Commission was applying legal rules, but these were some extra-legal causation standards, which is of course a ridiculous proposition.

Reasons for Bending Causation Standards. It is easier to understand underlying reasons for this move by taking into account why the Eritrea-Ethiopia Claims Commission combined the proximate cause standard with foreseeability. As the Commission mentioned in its decision, the foreseeability element "provides some discipline and predictability" in assessing proximity.[414] Here, when the Commission uses the word "discipline" it is in fact saying that there are equitable or consequential reasons - too much damage recovery and perhaps unbalanced defeat for the respondent. And because of these equitable (instrumental) reasons the Commission will not apply the proximate cause test in its normal scope; instead, it will adjust the proximate cause standard because of compelling equitable considerations.

5.3.6 Conciliatory Justice in Other Cases

The *Genocide* case and Eritrea-Ethiopia Claims Commission's decision are far from the only instances of conciliatory justice. Reitzer, in his learned treatise on damages published before the World War II, observed that arbitral tribunals would often consider consequential reasons and make awards on equitable grounds, even if not expressly authorized by the *Compromis:*

> Still more significant, however, is that even when such a clause was not inserted in the instrument vesting him with jurisdiction, the arbitrator considered he was able to decide by equity. This was true more especially of the mixed claims commissions, which regarded themselves as veritable courts of equity. But statements in this sense are not lacking in arbitral awards themselves.[415]

Later, Schwarzenberger likewise observed that international tribunals typically "express their conclusions, which they appear to have reached on equitable grounds, in terms of a semi-technical causality".[416] Some contemporary commentators of the ICJ, for example, are not concerned that the Court relies too little on equity, but quite the opposite - that the "resort to equity and equitable principles, without sufficiently defining them or giving them an identifiable objective content, makes it much easier for the Court to reach transactional solutions on a case-by-case basis."[417]

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[414] Ibid.

[415] L. Reitzer, La réparation comme conséquence de l'acte illicite en droit international (Recueil Sirey: Paris, 1938) pp. 160-162.

[416] Georg Schwarzenberger, International Law: Vol. 1 - International law as applied by international courts and tribunals (London: Stevens, 3rd ed., 1957) p. 669.

[417] Georges Abi-Saab, The International Court as world court, in Vaughan Lowe and Malgosia Fitzmaurice (eds.), Fifty years of the International Court of Justice (Cambridge: Cambridge University Press, 1996) pp. 11-12.

Other scholars point out that conciliatory justice considerations have influenced many recent cases.[418] These include *Oil Platforms* case (US lost the case but was relieved from reparations),[419] *Gabcikovo-Nagymaros* (the Court held that both parties breached their obligations and directed them to renew negotiations),[420] and *Avena.*[421]

5.3.7 Conciliatory Justice: Policy Reasons in State Responsibility Cases

There are also other policy reasons why courts will readily twist causation standards if need to. As some commentators point out, the causation will not perform its technical function without taking into account "the particularly difficult circumstances in which most of the losses were suffered".[422] Often, there are limited resources for compensation, and international law has to set arbitrary limit. So some arbitrators might wish to avoid bottomless recovery as that will rarely lead to a happy ending. Sometimes multiplicity of claims could prejudice rights of those with more "substantial demands".[423] In other cases, the international community might be interested in only limited responsibility of a state. States might fear that heavy burden will provoke adverse reactions as it was with the German reparations after the World War I. Some writers noted that this is the reason why the UN Compensation Commission could award only direct losses caused by the Iraqi invasion to Kuwait.[424]

Other policy reasons relate to judicial administrations arguments: allowing recovery of wider categories of damages will make judicial administration of damage recovery awkward.

5.4 The Beagle Channel Effect

Policy Reasons in Judicial Opinions. As the previous sections have shown, one can find enough examples of instrumental reasoning in judicial decisions and it is indispensible for many reasons, including the need for conciliatory justice. This section goes further – it argues that absence of policy reasoning in judicial opinions can have unfortunate consequences. Ignorance of policy reasons and sole focus on straightforward and formalistic application of legal rules can be called the Beagle Channel effect because the *Beagle Channel* arbitration is a good example of how damaging can be a tactless judicial reasoning.

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[418] *See* Yuval Shany, Bosnia, Serbia and the Politics of International Adjudication, p. 21.

[419] Oil Platforms (Islamic Republic of Iran v. USA), 6 November 2003, ICJ, 2003 I.C.J. Reports 161.

[420] Gabcikovo-Nagymaros Project (Hungary/Slovakia), 25 September 1997, ICJ, 1997 I.C.J. Reports 7.

[421] Avena (Mexico v. USA), 31 March 2004, ICJ, 2004 I.C.J. Reports 128.

[422] Nicholas Wuhler, Causation and Directness of Loss as Elements of Compensability Before the United Nations Compensation Commission, in Richard Lilich (ed.), The United Nations Compensation Commission (NY: Transnational Publishers, 1995) p. 233.

[423] John Hanna, Legal Liability for War Damage, 43 Michigan Law Review (1945) p. 1058. ("Carrying causation to a logical conclusion would lead to a multiplicity of claims which would be unfair to those regarded as having more substantial demands in the event of limited assets").

[424] Arthur W. Rovine and Grant Hannesian, Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission, in Richard Lilich (ed.), The United Nations Compensation Commission (New York: Transnational Publishers, 1995) pp. 237-238.

Arbitral Award and Escalation of the Dispute. The Beagle Channel case arose between Argentina and Chile over a cluster of islands in the eastern region of Beagle Channel. The parties signed an Arbitration Agreement in 1971. In 1977, the Tribunal unanimously awarded most islands, islets, and rocks to Chile.[425] Argentina reacted furiously: just several months after the award was made, Argentina declared it null and void. On December 22, 1978, Argentina began military invasion into the Beagle Channel islands and continental Chile. Fortunately, a few hours later Argentina canceled the invasion when Pope John Paul II sent his envoy to mediate. The conflict escalated further. In 1979, the parties accepted the Vatican Mediation, but the conflict was settled only in 1984. Finally, Argentina and Chile agreed to the Vatican-mediated compromise and signed the Treaty of Peace and Friendship.[426]

Treaty of Peace. One of the most important and interesting lessons from this incident is that the Treaty of Peace and Friendship established essentially the same boundaries as the arbitral award (it also recognized Argentinean navigation rights).[427] So it was not the essence of the arbitral award that caused all problems, but rather some policy reasons which the Tribunal disregarded, but which were nonetheless compatible with the legal rules applied.

Need for Policy Reasoning. As Sir Eli Lauterpacht observes, international judges differ from their domestic counterparts - they also have to be diplomats.[428] Sir Eli points out that the Beagle Channel Tribunal could have been "less absolute in the expression of its legal conclusion"; it could also "express itself in a manner which might have limited Argentina's concerns and eased the way to an earlier solution."[429] Overall, the Beagle Channel dispute illustrates well the importance of including policy considerations in judicial opinions of international courts. Beagle Channel shows what hazards await courts that are divorced from instrumentalist reasoning.

5.5 Judicial Audience of International Courts: Formalistic Reasoning vs. Policy Reasoning

To be sure, the Beagle Channel effect does not normally follow every formalistic decision. The problem is not that the courts avoid policy reasons in actual decision-making, but that they hesitate using those policy reasons in their written opinions. And such hesitation is unfortunate because it might alienate a number of States.

Importance of Judicial Audience. All judicial opinions aim to persuade a certain audience. For example, the audience of the ICJ and other courts comprise litigants,

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[425] Dispute between Argentina and Chile concerning the Beagle Channel, 18 February 1977, 21 UN Reports of International Arbitral Awards p. 53-264.

[426] Treaty of Peace and Friendship Signed Between the Republic of Chile and the Republic of Argentina, Signed at Vatican on 29 November 1984, Came into force on 2 May 1985. United Nations Treaty Series, vol. 1399, No. 23392.

[427] *See generally* Sir Elihu Lauterpacht, „Whatever happened to the Beagle Channel Award?", in Le Droit International au Service de la Paix, de la Justice et du Developement. Melanges Michel Virally (Pedone: Paris, 1991), pp. 359-371

[428] Elihu Lauterpacht, The International Lawyer as a Judge, *in* Chanaka Wickremasinghe (ed.), The International Lawyer as Practitioner (Lond: British Institute of International and Comparative Law, 2000) p. 133-134.

[429] Ibid, at135.

the professional legal elite (academics and practicing international lawyers), national governments, various international actors like international organizations and non-governmental groups, and others.[430] Thus, a prudent court will use such style of judicial opinion that best addresses the court's audience. For most international courts, it means using variety of argumentative moves – not just formalistic reasoning which pretends to be a product of perfect syllogism.

Some legal scholars pointed out several decades ago, after the wave of decolonization, that "[t]he new audience of the Court, particularly the Afro-Asian nations, are not responsive to formal, logical, technical legal arguments which might impress Western jurists; they are far more impressed by reasoning which is based on social policy, history, culture and so on."[431] Moreover, "[t]o an audience of this way of thinking, not only does strictly logical reasoning have little force of persuasion, but it can in fact alienate."[432]

Policy Reasoning and Asian Nations. For example, Japanese way of thinking shows distaste for logical rigidity and its conceptual categories; for Japanese, "such precision seems unreal because it tries to separate A from non-A too rigidly. To the Japanese, reality is mingled and blurred and things cannot be decisively distinguished and remain true to nature."[433] One can understand why formalistic European legal argumentation is at odds with the Japanese legal argumentation.

It can explain, at least in part, why Japan and most other Asian nations have usually sidestepped international courts. So to appeal to a wider audience, international courts could steer away from formalistic reasoning and embrace instrumentalist reasoning not only in actual decision-making but also in their written opinions. True, that might make less happy some States that view the legal argumentation through the Eurocentric lens, but it is unlikely that more policy reasoning in written opinions will make those States turn away from international courts. And yet, such reasoning might make non-Eurocentric States more likely to embrace international courts at least slightly more.

Limits of Policy Reasoning in Attracting Non-Western States. Admittedly, as the next chapter will show, even if international courts do openly embrace policy reasoning in their written opinions, it is unlikely that many non-Western states will become true believers in international adjudication – some of their opposition to international courts is based on the fundamental antinomy to adjudication as a dispute settlement method.

Exhaustive Reasoning and Procedural Justice. Also, exhaustive reasoning which advances various argumentative moves and shows consideration from many viewpoints will likely make even a loss more acceptable. Ever since John Thibaut and Laurens Walker, a social psychologist and a legal scholar, popularized the concept of procedural

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[430] Lyndel Prott, The Style of Judgment in the International Court of Justice, 5 Australian Yearbook of International Law 75 (1971) p. 79

[431] Ibid, at 88.

[432] Ibid, at 82.

[433] Noda, La Conception du Droit des Japonais, *in* Collection pour J de la Marandiere (1964) pp. 421, 430 (Cited in Prott, The Style of Judgment in the International Court of Justice, p.82).

justice in their seminal work,[434] it has been widely accepted that procedural justice is as important as distributive justice,[435] if not more important. Comprehensive judicial reasoning is one the main ways to show that the court has fully considered positions of both parties. Sir Hersch Lauterpacht made a similar point about the importance of exhaustive judicial reasoning:

> Experience has shown that Governments as a rule reconcile themselves to the fact that their case has not been successful - provided the defeat is accompanied by the conviction that their argument was considered in all its relevant aspects. On the other hand, however fully they may comply with an adverse decision, they do not find it easy to accept it as expressive of justice - or of law - if they feel that their argument was treated summarily, that it was misunderstood, or that dialectics have usurped the place of judicial reasoning. Any such impression, if lasting, is bound to affect adversely the cause of international justice. A tribunal which fails to give full reasons for its decision invites the reproach that it lays down new law. Even the legislator often gives, in the preamble to the statute, a detailed explanation of the action taken.[436]

5.6 Inevitability of Judicial Law-making

The previous sections lead to a conclusion that judicial law making is inevitable. The possibility of judicial law-making does not mean that courts become legislators – it "is of course an exaggeration to suggest that the Court is a legislator; it is also an exaggeration to assert that it cannot create any law at all."[437] Also, most judges do not differentiate, in psychological terms at least, between application of rules and their own preferences; as Posner observers, judges usually blend two inquiries – the legalist (applying legal rules) and the legislative.[438]

Judicial law making is not necessarily against the mandate of international courts. True, none of the statutes of international courts says that they are established to engage in judicial law-making. Yet, the judicial role is not always reflected in the statutes. For example, international courts have inherent powers which are not reflected in statutes. Moreover, as Lauterpacht showed, the judicial role in development of international law may be explained by a sociological concept of "heterogeny of aims." According to this

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[434] John W. Thibaut and Laurens Walker, Procedural Justice: A Psychological Analysis (New Jersey: Lawrence Erlbaum Associates, 1975). Although the original laboratory experiments were criticized as methodologically flawed, numerous other experiments since then proved that procedural justice often outweighs distributive justice. *See e.g.* E. Allan Lind and Tom R. Tyler, The Social Psychology of Procedural Justice (New York: Plenum Press, 1988), especially Chapters 4 and 5.

[435] The distributive justice refers to the parties' satisfaction with the outcome; the procedural justice refers to the parties' perception whether procedure and social interactions had been just and fair. Many legal systems now recognize the importance of procedural justice under the rubric of due process.

[436] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons Limited, 1958) p. 39.

[437] Mohammed Shahabuddeen, Precedent in the World Court (Cambridge: Cambridge University Press, 1996) p. 86.

[438] Posner, How Judges Think, pp. 84-85:
"Their response to a case is generated by legal doctrine, institutional constraints, policy preferences, strategic considerations, and the equities of the case, all mixed together and mediated by temperament, experience, ambition, and other personal factors. A judge does not reach a point in a difficult case at which he says, 'The law has run out and now I must do some legislating.'"

concept, an institution may be created to achieve one set of purposes, but it grows to fulfill a different set of purposes.[439] In the case of the ICJ, Lauterpacht observed that while the Court was created primarily for peaceful settlement of inter-State disputes, its most important function became clarification and development of international law.[440]

Moreover, as other commentators argued, *travaux* of the PCIJ indicates that its drafters actually envisioned some form of judicial law-making. For example, Article 1 of the draft Statute stated that the Court will "have for its purpose to assured the continuity and progress of international jurisprudence based on judgments".[441] During the drafting process in the League of Nations, Argentina proposed to "to limit the power of the Court to attribute the character of precedents to judicial decisions". But the responsible Sub-Committee rejected this proposal: "On the contrary, it considers that it would be one of the Court's important tasks to contribute, through its jurisprudence, to the development of international law".[442] Then, after the draft was prepared, Mr. Balfour, a British delegate, noted that "the decision of the Permanent Court cannot but have the effect of gradually moulding and modifying international law"; neither Council nor the Assembly of the League of Nations dissented from this view.[443]

Even without explicit statutory provisions, many commentators have seen development of international law as indispensible function of international courts. Hudson, for example, noted that development of international law must "be an inevitable by-product of its functioning over a long period of time."[444]

Many judges and commentators have also emphasized one reason why development of international law is inseparable from international courts – the absence of legislature in international law and the resulting gaps in the legal system which only international courts are able to fill when States do not agree on precise expression of legal rules. One can find many such pronouncements in individual opinions of judges.[445]

Yet, it is possible to go overboard and argue that because of this, international courts should occupy the central place in international affairs and consequently handle

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[439] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons Limited, 1958) p. 5.

[440] Ibid.

[441] Mohammed Shahabuddeen, Precedent in the World Court (Cambridge: Cambridge University Press, 1996) p. 53.

[442] Sub-Committee of the Third Committee of the First Assembly of the League of Nations, Documents concerning the Action Taken by the Council of the League of Nations, 1921, p. 211. (Cited in Mohammed Shahabuddeen, Precedent in the World Court (Cambridge: Cambridge University Press, 1996) p. 66).

[443] Shahabuddeen, Precedent in the World Court, p. 78.

[444] Manley O. Hudson, The Permanent Court of International Justice: 1920-1942, A Treatise (New York: Macmillan , 1943) p. 628

[445] Judge Fitzmaurice in the *Barcelona Traction* case observed that:
"… since specific legislative action with direct binding effect is not at present possible in the international legal field, judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development. I agree with the late Judge Sir Hersch Lauterpacht that it incumbent on international tribunals to bear in mind this consideration, which places them in a different position from domestic tribunals as regards dealing with - or at least commenting on - points that lie outside the strict ratio decidendi of the case."
Barcelona Traction, Light and Power Company, Limited, Judgment of 5 February 1970, 1970 ICJ Reports 1, p. 64, para. 2.

the bulk of international disputes. As the next chapter shows, just because international courts are well-equipped to settle legal questions and develop international law, it does not mean that they are also ideal for handling the majority of interstate disputes.

5.7 Summary: Policy Reasoning and Development of International Law

As this chapter shows, not only international courts use policy reasoning in their written opinions, but it is also next to impossible to explain many decisions without it. Conciliatory justice, as the agency model predicts, plays a very prominent role here. So why do many commentators fear the legal instrumentalism in international courts? And it is not only legal scholars, but sometimes the courts themselves. As Higgins observes, many think that "the introduction of policy considerations will lead to intellectual laxity, whereas their exclusion is dictated by the need for precision and accuracy in legal affairs."[446] But as the previous chapter has shown, the precision and accuracy of formal legal rules is an illusion.

In this context, it is hard to overrate the importance of judicial philosophy.[447] And every judge has got one. Professor Paul Freund was able to put it even more sharply:

> Much of law is designed to avoid the necessity for the judge to reach what Holmes called his "can't helps," his ultimate convictions or values. The force of precedent, the close applicability of statute law, the separation of powers, legal preemptions, statutes of limitations, rules of pleading and evidence, and above all the pragmatic assessments of fact that point to one result whichever ultimate values be assumed, all enable the judge in most cases to stop short of a resort to his personal standards. When these prove unavailing, as is more likely in the case of courts of last resort at the frontiers of the law, and most likely in a supreme constitutional court, the judge necessarily resorts to his own scheme of values. It may therefore be said that *the most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none*.[448]

[446] Rosalyn Higgins, Policy Considerations and the International Judicial Process, 17 International and Comparative Law Quarterly 58 (1968) p.61.

[447] Aharon Barak, The Judge in a Democracy (Princeton: Princeton University Press, 2008) p. 116-121.

[448] Paul Freund, Social Justice and the Law, *in* Richard Brandt (ed.) Social Justice (Englewood Cliffs: Prentice-Hall, 1962) p. 93, 110 (Cited in Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking (Notre Dame: National Institute of Trial Advocacy, 3rd ed., 1997) p. 19). (emphasis added)

6. Judicial Decision-making and Its Implications for International Dispute Settlement System

6.1 Introduction

Promised Land of International Dispute Settlement. International dispute settlement system is strained. Interstate disputes naturally proliferate as international relations continue spreading out. Many legal scholars consider international courts to be the promised land of international dispute settlement. Like dispute settlement in domestic legal systems where courts occupy central place, so too international dispute settlement can revolve around international courts:[449]

> For many international lawyers – but especially those molded by the European heritage of legal formalism – progress in the development of world law is best evidenced in the growth of international adjudication. . . . *Adjudication is not only the ideal, most peaceful, method of settling inter-state disputes,* but also an opportunity for jurists to contribute to doctrinal development in a prestigious non-political institution.

Fallacies of International Adjudication. This chapter argues that such views are based on series of erroneous beliefs, many of them tied to flawed understanding of judicial decision-making. First, champions of international adjudication usually pay no heed to the fundamental function of international dispute settlement, which is to settle underlying disputes and not just relevant legal questions. Second, it is a fallacy of formalistic judicial decision-making and the resultant belief that adjudication is alternative to power politics, i.e. right over might. Third, it is a fallacy of farfetched domestic analogy – the belief that international courts are essentially analogous to their domestic counterparts, when in fact there are many more differences between them than similarities. Fourth, it is a fallacy of composition: finding isolated examples of successful international courts, whether in particular fields or particular regions, and concluding that international courts in general hold a great promise. These fallacies do not always appear together, nor are they always articulated explicitly. Yet, whether articulated implicitly or explicitly, these fallacies point toward adjudication as the key method of interstate dispute settlement.

Fixation on International Courts in Legal Scholarship. Regrettably, few legal scholars have paid attention to this problem.[450] Instead, most commentators have focused on various aspects that can hinder or improve judicial dispute settlement.[451] For example, in recent decades, many scholars have focused on proliferation of international courts and analyzed whether it is desirable or dangerous to have so many courts when

[449] Douglas M. Johnston, The Historical Foundations of World Order: The Tower and the Arena (Leiden: Martinus Nijhoff Publishers, 2008) p. 128-129 (emphasis added).

[450] *See e.g.* Robert Y. Jennings, The Proper Work and Purposes of the International Court of Justice, *in* A.S. Muller, D. Raic, J.M. Thuránszky (eds.), The International Court of Justice: Its Future Role after Fifty Years (The Hague; Boston: Nijhoff, 1997) pp. 36-37; Richard B. Bilder, Some Limitations of Adjudication as a Dispute Settlement Technique', 23 Virginia Journal of International Law 1 (1982) pp. 1-12; Richard A. Falk, Realistic Horizons for International Adjudication, 11 Virginia Journal of International Law 314 (1970–71).

[451] *See generally* Connie Peck and Roy S. Lee (eds.), Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/Unitar Colloquium to Celebrate the 50th Anniversary of the Court (The Hague: Martinus Nijhoff, 1997).

there is almost no coordination between them.[452] Others analyzed whether dependent international tribunals are preferable to independent.[453] Most international law scholars, however, have failed to consider whether from the bird's-eye view it is at all desirable to focus so heavily on international adjudication.[454]

This fixation on international courts has had many side effects, but an obvious side effect is that little attention has been paid to other dispute settlement methods. As Sir Robert Jennings pointed out, this is unfortunate because international adjudication cannot be developed alone; instead, its progress depends on simultaneous development of other dispute settlement methods.[455] Most supporters of international adjudication, however, fail to realize that this fixation on international courts is self-defeating.[456]

6.2 Adjudication Within the International Dispute Settlement System

6.2.1 International Dispute Settlement System

Principal Methods of Dispute Settlement. Article 33 of the UN Charter stipulates the principal methods of dispute settlement: negotiation, mediation, inquiry, fact-finding, arbitration, and the International Court of Justice (ICJ).[457] These dispute settlement methods are usually classified into two categories: diplomatic methods, also known as political or non-compulsory, and legal methods, also known as compulsory.[458]

Diplomatic Methods. Diplomatic methods comprise negotiation, mediation, fact-finding, conciliation. Legal methods comprise arbitration and adjudication. The only meaningful difference between legal and diplomatic methods is that the outcome of diplomatic settlement is not binding.

Relations between Individual Methods. Within the each category of dispute settlement methods, differences between individual methods are more theoretical

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[452] Thomas Buergenthal, Proliferation of International Courts and Tribunals: Is It Good or Bad?, 14 Leiden Journal of International Law 267 (2001); Benedict Kingsbury, Foreword: Is The Proliferation of International Courts and Tribunals a Systemic Problem? 31 New York University Journal of International Law and Policy 679 (1999); Cesare P.R. Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 New York University Journal of International Law and Policy 709(1999).

[453] *See e.g.* Eric A. Posner & John C. Yoo, Judicial Independence in International Tribunals, 93 California Law Review 1 (2005); Laurence R. Helfer & Anne-Marie Slaughter, Why States Create International Tribunals: A Response to Professors Posner & Yoo, 93 California Law Review 899 (2005).

[454] While legal scholars have paid little attention to this problem, international relations scholars and representatives from other disciplines made some valuable contributions. *See e.g.* Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, Legalized Dispute Resolution: Interstate and Transnational, *in* Beth A. Simmons and Richard H. Steinberg (eds.), International Law and International Relations, (Cambridge: Cambridge University Press, 2006) pp. 131-156

[455] Robert Y. Jennings, The Proper Work and Purposes of the International Court of Justice, *in* A.S. Muller, D. Raic, J.M. Thuránszky (eds.), The International Court of Justice: Its Future Role after Fifty Years (The Hague; Boston: Nijhoff, 1997) p. 37

[456] *See* John G. Merills, International Dispute Settlement, (Cambridge, Cambridge University Press, 4th ed., 2005) p. 177 (". . . too much is sometimes expected of judicial settlement . . . Therefore, while it is certainly worth considering what can be done to improve the Court, it is important not to become fixated with adjudication and overlook the contribution which can be made by other techniques such as conciliation.")

[457] Charter of the United Nations, T.S. No. 993, 3 Bevans 1153.

[458] Merrills, International Dispute Settlement, p. 91.

than practical.[459] The relations between specific dispute settlement mechanisms are horizontal, i.e. there is no hierarchy or superiority of particular settlement methods. For example, States at the same time can pursue negotiation and litigation. And there is almost no horizontal coordination between the different mechanisms.

6.2.3 Rise and Plateau of International Adjudication

Rise of International Arbitration. International adjudication has been largely an invention of XIX century. [460] No doubt, interstate arbitration already existed in Ancient Greece and probably even before that.[461] But it was the *Alabama Claims* arbitration which spurred the development of adjudication in international law.[462] The success of the *Alabama Claims* led to the Hague Peace conferences and increased attention to arbitration. Yet, in the Hague conventions, States excluded important disputes from the arbitration. So from the very beginning States doubted that adjudication could become comprehensive and complete interstate dispute settlement method.

Birth of the Permanent Court. After the Hague Peace conferences, the promise of international adjudication became even more enchanting. The high point of this development was the establishment of the Permanent Court of International Justice (PCIJ) under the auspices of the League of Nations. But the high hopes proved disappointing. Most States paid only lip service to the importance of judicial settlement: the political rhetoric about the importance of the PCIJ was inspiring, but States rarely submitted important disputes to the Court. The Court succeeded more in developing and clarifying international law than actually resolving interstate disputes. Overall, the PCIJ had limited success in the interwar period.

ICJ's Impact on Dispute Settlement. After the World War II, despite the limited success of the PCIJ, many political leaders and visionaries hoped that the PCIJ, reborn in the United Nations as the International Court of Justice (ICJ) would prove to be different. Yet, the United Nations in general and the ICJ had very limited impact during the Cold War. After the end Cold War, however, the docket of the ICJ became full. But most of the disputes in its docket were the traditional cases - delimitation of boundaries

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[459] According to the Advisory Committee of Jurists, which was set up to prepare the draft Statute of the Permanent Court, arbitration is distinguished from adjudication by three criteria: "the nomination of the arbitrators by the parties concerned, the selection by these parties of the principles on which the tribunal should base its findings, and finally its character of voluntary jurisdiction." Advisory Committee of Jurists, Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice (1920) p. 113.

[460] *See generally* Ion Diaconu, Peaceful Settlement of Disputes Between States: History & Prospects, pp. 123-149, in R. St. J. Macdonald & Douglas M. Johnston (eds.), The Structure and Process of International Law (An Abridged Edition) (Dordrecht: Kluwer, 1989); John Collier & Vaughan Lowe, The Settlement of Disputes in International Law: Institutions and Procedures (Oxford: Oxford University Press, 1999) pp. 31-38.

[461] Johnston, The Historical Foundations of World Order, pp. 130, 191, 194-197. *See also* Sheila L. Ager, Interstate Arbitrations in the Greek World: 337-90 B.C Hellenistic Culture and Society (California: University of California Press, 1996);

[462] The Alabama Claims arbitration resolved a dispute between the United States and Great Britain; the US claimed damages against Great Britain for its assistance to the Confederates during the American Civil War. *See* Tom Bingham, The Alabama Claims Arbitration, 54 International and Comparative Law Quarterly 1-25 (2005).

and interpretation of the treaties. The Court's track record in more politically charged cases, like the use of force or State responsibility for serious violations of international law, has been controversial. Overall, as it has been for the past hundred years, States still rarely submit their political disputes; even when they do, these are rarely cases of major political importance. As Sir Arthur Watts observed at the time when the ICJ docket apparently reached its peak, " [t]he number of disputes resolved by the Court remains depressingly small in a world which for the whole period of the Court's existence has experienced no shortage of disputes, large and small."[463]

Proliferation of International Courts. After the end of the Cold War, the proliferation of international courts became very noticeable.[464] In 1994, for example, the new World Trade Organization chose to replace the diplomatic dispute settlement of the GATT with the new legalized dispute settlement system, essentially based on adjudication. International courts became a noticeable feature in other fields, especially international criminal law. After the UN Security Council established criminal tribunals for Rwandan genocide and former Yugoslavian conflict, the international community finally established the International Criminal Court. Yet, international criminal law, like international human rights law, does not deal with interstate disputes so development of these courts does not reflect developments in interstate dispute settlement.

Limited Impact of International Courts on Interstate Disputes. So when it comes to interstate dispute settlement, and especially more politically sensitive disputes, despite the lip service paid to international courts, States are unwilling today as they were unwilling hundred years ago to submit bulk of their disputes to international courts.[465] They prefer to remain selective.

6.3 Function of International Dispute Settlement and Function of International Courts

"Litigation: A machine which you go into as a pig and come out of as a sausage."~ Ambrose Bierce

6.3.1 Settlement of Disputes vs. Settlement of Legal Questions

Settlement of Underlying Disputes. The most important function of international dispute settlement is not to settle legal questions but rather to settle underlying disputes and restore good relations. Sometimes, of course, when an international tribunal settles a legal question, the underlying dispute is also settled. Very often, however, legal

[463] Sir Arthur Watts, Enhancing the Effectiveness of Procedures of International Dispute Settlement, 5 Max Planck Yearbook of United Nations Law 21-39 (2001) p. 22.

[464] Cesare Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 New York University Journal of International Law and Politics 709-51 (1999) p. 709 ("When future international legal scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion of the international judiciary as the single most important development of the post–Cold War age.")

[465] Merills, International Dispute Settlement, p. 176 ("litigation is a wholly exceptional act and the vast majority of disputes are handled by other means") .

questions are only part of the problem. Thus, successful settlement of legal questions does not guarantee the successful settlement of the dispute itself.

This is not a new idea and it is not peculiar only to international law. This idea is cemented in various cultures around the world and anthropologists find this idea embedded even in primitive societies.[466] As Justice Brandeis observed in a slightly different context, "it is more important that the applicable rule of law be settled than that it be settled right."[467] The problem with judicial dispute settlement is that it mostly settles legal questions, not disputes.

The Beagle Channel Dispute. The Beagle Channel dispute, describe above (see Chapter 5.5), is a perfect demonstration of this point. Granted, not every time an international court settles legal question correctly the underlying dispute gets out of control; such instances, thankfully, are rare. And to argue that the Beagle Channel aftermath was caused only by the Arbitral Tribunal's decision might be a narrative fallacy – reducing countless events and alternative causes to one simple and causal narrative, where all the blame falls on one actor – the Arbitral Tribunal. Yet, even if it is an exaggeration, it is a useful exaggeration nonetheless: it shows that settled legal issues do not automatically settle the underlying dispute.

Primary Function of International Courts. International courts are well-equipped to settle legal questions, but ill-equipped to settle underlying legal disputes.[468] Even Sir Hersch Lauterpacht, one of the greatest idealists of international adjudication, had to admit that, for example, the PCIJ was created primarily for peaceful settlement of interstate disputes but its most important function became clarification and development of international law.[469] Thus, international adjudication is at variance with the main purpose of dispute settlement. It fails to serve this function well because it has a very limited focus on legal questions (which does not mean only formal legal rules). A typical international case is litigated usually after all other attempts fail. Courts usually cannot resolve a dispute when it is still underdeveloped. Sometimes it is possible for international courts to pay more attention to early phases of dispute development, like the occasional efforts of the ICJ to engage in preventive diplomacy,[470] but this is very limited because it largely depends on parties' goodwill.

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[466] Will Durant writes in his classic *The Story of Civilization* that for many so-called primitive societies it was more important to settle the dispute, not to settle it right:
"Frequently the primitive mind resorted to an ordeal not so much on the medieval theory that a deity would reveal the culprit as in the hope that the ordeal, however unjust, would end a feud that might otherwise embroil the tribe for generations." Will Durant, The Story of Civilization: Volume 1 – Our Oriental Heritage (New York: Simon & Schuster, [1935] 1954) p. 28
Similarly, in Asian cultures the parable of poisoned arrow reflects the idea that it is most important to remove the problem and not to ponder who is right, how the problem came up to be and under what circumstances. Thich Nhat Hanh & Philip Kapleau, Zen Keys (New York: Three Leaves Press, 2005) p. 42.

[467] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) (Brandeis, J., dissenting) pp. 406–407.

[468] Some scholars use the existence of underlying tension as distinguishing criterion between legal disputes and political disputes. *See* Richard A. Falk, Realistic Horizons for International Adjudication, 11 Virginia Journal of International Law 314 (1970–71) p. 321 (judicial settlement can resolve only "pure disputes" which do not reflect underlying tension).

[469] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons Limited, 1958) p. 5.

[470] Adronico O. Adede, Judicial Settlement in Perspective, *in* A.S. Muller, D. Raic, J.M. Thuránszky (eds.), The International Court of Justice: Its Future Role after Fifty Years (The Hague; Boston: Nijhoff, 1997) pp. 63-64.

Policy Reasoning & Function of International Dispute Settlement. One way for international courts to serve better the basic function of the dispute settlement is to embrace more policy reasoning and interact with litigants more diplomatically. As Sir Eli Lauterpacht noted, for example, that the fate of the Beagle Channel dispute might have been different if the Tribunal was more diplomatic and paid more attention to Argentinean concerns.[471]

But as the previous chapter has shown, most international courts have failed to openly embrace policy reasoning in their judicial opinions (but not necessarily actual decision-making). And worse yet – often they pretend to pass over it altogether. Governments, however, realize that all disputes have some political connotations. Yet, even if international courts would be more sensitive to policy reasons, litigation would still remain adversarial by its nature.

6.3.2 Litigation as Unfriendly Act

Litigation as Escalation. Another reason why adjudication is at odds with the main function of dispute settlement is that most States consider it unfriendly act. Often, whenever a State brings a case against another State, it will be seen as the escalation of a dispute to the legal plane, and not its settlement. After the litigation, the loser will usually feel resentful, and this resentment rarely helps settlement of the underlying dispute. Conciliatory justice, by splitting the difference, helps to minimize this effect; but even conciliatory justice does not eliminate it altogether.

Adversarial Nature. One of the main reasons for this is that litigation is by its nature adversarial. It is inherent in litigation because courts think in binary terms – right or wrong. An international court, as Sir Hersch Lauterpacht said, "states the law, it does not choose between the views of the parties, it states what the law is."[472] Yet, when it states the law, one party loses and the other party wins. And international courts often neglect to make the losing side save its face. Here again, courts could systematically practice conciliatory justice. Yet, even if they would practice conciliatory justice openly and in every single case, which is very unlikely, such practice still would not transform litigation from adversarial to conciliatory.

Importance of Friendly Relations in International Affairs. In international affairs, continuous friendly relations are more important than analogous relations between domestic subjects. States have to interact with the same States all the time; interstate relations resemble more a family relationship than a typical business relationship, hence the notion of family of nations or community of nations. Admittedly, it is politically correct to view litigation as a "friendly" act. Manila Declaration on the Peaceful Settlement of International Disputes proclaims that clearly: "Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be

[471] Elihu Lauterpacht, The International Lawyer as a Judge, in Chanaka Wickremasinghe (ed.), The International Lawyer as Practitioner (British Institute of International and Comparative Law: London, 2000) pp. 133-135.

[472] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons Limited, 1958) p. 21.

considered an unfriendly act between States."[473] In reality, however, filing a lawsuit against another State is like filing a lawsuit against one's cousin – not a friendly act, even if Manila Declaration would proclaim that a lawsuit against one's cousin should not be considered an unfriendly act.

Diplomatic Methods and the Main Function of Dispute Settlement. In contrast to adjudication, negotiation and other diplomatic dispute settlement methods are not adversarial and can serve the main function of international dispute settlement very well. Courts think in binary terms, but negotiators and mediators can think out of box and come up with novel solutions. International dispute settlement would get a much better payoff if legal scholars would devote as much energy on cultivating diplomatic methods as they spend on pondering ways to fix, often unfixable, adjudication flaws. This applies especially to the so-called problem-solving negotiation and other dispute settlement methods that could be based on it, such as conciliation.[474] Problem-solving negotiation strives for a mutually satisfactory agreement by finding underlying interests of both parties, not choosing between competing parties' positions. Yet, so far, most international lawyers have preferred adjudication because of the negotiation phobia – the flawed belief that negotiation, mediation, and other diplomatic methods are all about power politics, meanwhile adjudication ensures that the right will prevail over the might.

6.4 Adjudication as Alternative to Power Politics

6.4.1 Fallacy of Formalistic Decision-making

International Law as Alternative to Power Politics. The promise of right over might - international law as alternative to power politics – is one of the major reasons for the preoccupation with international courts. International lawyers often think that international courts are immune to political considerations and therefore power politics do not play important role. This seems to be especially the case with permanent courts. Thus, Rosenne stated that: "The permanency of the [ICJ], which transforms into constants most of the variables inherent in international arbitration, makes of the Court the most refined instrument at present existing for the depolitization of the process of pacific settlement and its implementation through the application of legal techniques."[475]

International Courts & Political Considerations. It might be true that permanent international courts are more depoliticized than others; however, the whole idea that international courts are immune to non-legal considerations, including political

[473] United Nations General Assembly (68th plenary meeting), 1982 Manila Declaration on the Peaceful Settlement of International Disputes, 15 November 1982, A/RES/37/10. (Part II(5)). Part I(1) also states that States "shall live together in peace with one another as good neighbours and strive for the adoption of meaningful measures for strengthening international peace and security."

[474] Roger Fisher and William Ury, Getting to Yes: Negotiating Agreement Without Giving In (New York: Penguin Books, 1981); Roger Fisher, Andrea Kupfer Schneider, Elizabeth Borgwardt, Brian Ganson, Coping with International Conflict: A Systematic Approach to Influence in International Negotiation (Upper Saddle River, NJ: Prentice Hall, 1997); Roger Fisher, Elizabeth Kopelman, Andrea Kupfer Schneider, Beyond Machiavelli: Tools for Coping With Conflict (New York: Penguin Books, 1996). This model is also sometimes called integrative model, principled negotiation or negotiation on merits; there are of course slight conceptual differences between the different variations of the basic model.

[475] Shabtai Rosenne, The Law and Practice of the International Court (The Hague: Nijhoff, 1965) p. 8.

considerations, is based on fallacy of formalistic decision-making. This formalistic fallacy takes for granted that international courts apply legal rules objectively, even mechanically, and exclude all non-legal considerations; thus, it is only natural that international courts must be unaffected by political considerations.

Yet, as previous chapters have shown, in reality even though international courts justify their decisions only by reference to legal rules, it does not necessarily mean that they actually decide cases that way. Thus, they are not necessarily better at disregarding political considerations, but they are better at pretending to do so.

Inflated Power of Adjudication and Its Dangers. Overall, it seems naïve to expect that judicial settlement is really an alternative to power politics. Moreover, as Grant Gilmore observed many decades ago, it is dangerous to believe that law can do something it is not equipped to do – to make the less powerful prevail over the more powerful:

> Governments govern and courts adjudicate, effectively, only where disputes arise between groups none of which has power to threaten the state, or where disputes arise between power groups on minor issues, which both sides are willing to submit to the arbitration of chance or justice. . . . It is dangerous to believe that "law" can do something it is not equipped to do, viz, make the less-powerful prevail over the more-powerful on the ground that the less-powerful is right - morally, economically, or traditionally - and the more powerful is wrong.[476]

Adjudication vs. Diplomatic Methods in Power Politics. In this context, judicial dispute settlement is not necessarily superior to diplomatic methods. Proponents of international adjudication like to juxtapose negotiation and adjudication. For some, international negotiation means that a more powerful State will impose its will on a less powerful one. In the words of German diplomat Konrad Adenauer, the one sure way "to conciliate a tiger is to allow oneself to be devoured." Likewise, for a small State to negotiate with a powerful one is to allow itself to be devoured. At the very least, such arguments rely on simplistic view of negotiation. For one, structural power of States – economic, political or military resources - does not predict success at the negotiating table.[477] As two noted negotiation scholars observe, "if size were power, parties could calculate ahead of time and decide (like dogs or baboons) to avoid certain social encounters, notably negotiation, because they could figure out who would lose. Yet the small and weak often do very well in negotiation."[478] In general, power dynamics in negotiation are much more complicated than many simplistic notions present it.[479] No doubt, powerful States often have better negotiators. But they likewise have better litigators.

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[476] Grant Gilmore, The International Court of Justice, 5 Yale Law Journal 1049 (1946) p. 1062.

[477] Social scientists usually define power as the ability of one party to move another in an intended direction. Most negotiation scholars distinguish between structural power and relational power. Structural power refers to resources of all kind, from economic resources and military strength to moral authority and leadership. Relational power refers to ability to get the desired outcome at the negotiating table. Hence, the so-called "structuralists' paradox": the structural power of a State does not guarantee its relational power. *See* I. William Zartman and Jeffrey Z. Rubin, The Study of Power and the Practice of Negotiation, in I. William Zartman and Jeffrey Z. Rubin (eds.), Power & Negotiation (Michigan: University of Michigan Press, 2000) pp. 3-28.

[478] I. William Zartman and Jeffrey Z. Rubin, The Study of Power and the Practice of Negotiation, in I. William Zartman and Jeffrey Z. Rubin (eds.), Power & Negotiation (Michigan: University of Michigan Press, 2000) p. 10.

[479] Ibid.

Moreover, negotiation is not the only alternative to adjudication. For example, mediation or conciliation has the same advantage as adjudication of being a third-party procedure; the only legally meaningful difference is the binding force of the final judicial decision.[480] Admittedly, diplomatic methods are also less prestigious than international adjudication. Yet, as the following sections show, the binding quality is overrated and prestige of an international court, by itself, will seldom make a substantive difference.

6.4.2 Adjudication and Resources

"Right over might" heavily depends on human and material resources that States have available for litigation. Poor States usually do not litigate their rights because they are economically incapable of litigating in the first place.

Developing States in the WTO. For example, studies have shown how true this is in the WTO system when it is compared to the old GATT dispute settlement. The GATT, a system that existed before 1994, used a diplomatic model of dispute settlement, essentially based on the concept of conciliation, although in its later years it started resembling adjudication; the current WTO model is an adjudicatory system.

Legalization of the WTO meant that some 26,000 pages of new treaty text was added; caselaw has been rapidly expanding; numerous additional stages of dispute settlement were also introduced, which include appeals, compliance review, and compensation arbitration.[481] Also, the new system allows two years or even more of permissible delays in compliance with adverse rulings.[482]

All of this, coupled with the need to hire external legal assistance to construct sophisticated legal arguments, has made it less likely that developing States will even consider litigation. Developing countries in the WTO are one-third less likely to file complaints against developed states when compared to the GATT regime; moreover, a developing country is more likely to become a target of litigation in the WTO – the possibility in the GATT was 19 percent compared to 33 percent in the WTO.[483] So judicialization, at least in the WTO, did not increase chances of weak States prevailing over the powerful ones, but instead had the opposite effect.[484]

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[480] Conciliation has been defined as:

> A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested.

See Merills, International Dispute Settlement, p. 64.

[481] Marc Busch & Eric Reinhardt, Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement, in Daniel Kennedy & James Southwick (eds.),The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec (Cambridge: Cambridge University Press, 2002) pp. 457, 467 (Cited in Gregory Shaffer, How To Make the WTO Dispute Settlement System Work For Developing Countries: Some Proactive Developing Country Strategies, ICTSD Resource Paper No. 5 (2003) p. 10)

[482] Ibid.

[483] Ibid., at 466-467.

[484] *See also* Chad P. Brown, Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement (Washington D.C.: Brookings Institution Press, 2009); Amin Alavi, African Countries and the WTO's Dispute Settlement Mechanism, 25 Development Policy Review 25-42 (2007); Gregory Shaffer, How To Make the WTO Dispute Settlement System Work For Developing Countries: Some Proactive Developing Country Strategies, ICTSD Resource Paper No. 5 (2003).

David & Goliath's Syndrome in the World Bank. The promise of right over might is likewise unimpressive in other international organizations. For example, the World Bank provides most assistance to developing countries through loan and guarantee agreements. These agreements stipulate that disputes will be settled by international arbitration. By 2005, a total number of loans and credits made by the Bank amounted to approximately 9,000.[485] Yet, out of 9,000 agreements, not a single dispute has been submitted to international arbitration. One of the reasons is the David and Goliath's syndrome – a borrower is usually in the position of weakness and is unlikely to challenge Bank's actions, probably because such actions may result in decreased future loans or development aid in general.[486]

Developing States in the ICJ. None of this is limited to economic organizations like the WTO or the World Bank. In the ICJ, for example, poor States normally have to entrust their defense to foreign nationals simply because their own nationals lack expertise.[487] And this is only a fraction of total costs.[488] But even before hiring external legal assistance, someone has to spot the legal problem and suggest at least tentative litigation strategy; this is often problematic because internal staff usually lacks sufficient expertise.

6.5 Farfetched Domestic Analogy

6.5.1 Systemic Differences

Proponents of international adjudication look up to international courts for another flawed reason: a belief that international courts, with some differences, are analogous to their domestic counterparts. Yet, this is a farfetched analogy at its best. It is largely due to the natural preference in analogical reasoning to focus on similarities and neglect differences. But when it comes to analogy between domestic and international courts, one would rather neglect similarities and focus on the differences.

Infancy of International Courts. Compared with domestic courts of most Western states, international courts are still infants. Arguably, in the last century, international dispute settlement has evolved much less than other fields of international law. For example, the basic problems of the International Court of Justice are almost the same today as they were in 1950s or even in 1920s: lack of compulsory jurisdiction, non-accessibility to international organizations, etc.

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[485] "IBRD and IDA Cumulative Lending by Country, June 30, 2005", *in* Bank Annual Report 2005, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTANNREP/EXTANNREP2K5/0,,menuPK:1397361~pagePK:64168427~piPK:64168435~theSitePK:1397343,00.html

[486] Sophie Smyth, World Bank Grants in a Changed World Order: How Do We Referee This New Paradigm?, 30 University of Pennsylvania Journal of International Law 483 (2008), p. 537.

[487] Luis Ignacio Sanchez Rodriguez and Ana Gemma López Martin, The Travails of Poor Countries in Gaining Access to the International Court of Justice, *in* The Legal Practice in International Law and European Community Law: A Spanish Perspective (Carlos Jiménez Piernas ed., Leiden: Martinus Nijhoff Publishers, 2007) p. 95.

[488] Id., at 84-85. ("Although the justice administered by the ICJ is basically free of charge, the very dynamics of an international dispute generate substantial costs. Costs of the fees of the technical and specialised personnel taking part in the action, who compile legal and other reports or items, costs of reproduction of documents and letters of all kinds, travel, supporting human resources (frontier services or marine exploration, for example)—in a word, costs of an infinitely varied nature.")

Compulsory Jurisdiction. As a minimum, dispute settlement in domestic law is compulsory. Few interstate tribunals have general compulsory jurisdiction, and none has compulsory jurisdiction like that of domestic courts. Also, international law has no safeguards that exist in domestic systems, such as appellate reviews, general checks and balances, and so forth.[489]

Ambiguity of International Law. Further, domestic law is less ambiguous than international law. International law, for one, does not even have clear constitutional principles; and even if it did, it probably would not simplify judicial decision-making. Naturally, States hesitate to accept litigation as a dispute settlement method when most of the applicable law is hazy.[490]

6.5.2 Interstate Element and Political Issues

Political Issues and Adjudication. A typical international case involves more important issues than an analogous domestic case. In domestic legal systems, political issues are also seldom settled in courts; that is usually the province of political fora. International law still revolves mostly around political issues, and for many States international adjudication is simply inappropriate method for political disputes.

Successful International Courts & Absence of Interstate Disputes. Successful international courts are successful largely because political disputes have been removed from their domain. For example, human rights courts are fortunate enough to evade interstate disputes. Thus, their typical cases are not interstate disputes; instead, a typical case looks more like a domestic issue with some "supranational" extension. Actual interstate litigation in human rights courts illustrates this point. For example, in 2010 alone, the European Court of Human Rights delivered 1,499 judgments regarding 2,607 individual applications, and since the reform of the Convention system in 1998, the Court delivered its 10,000th judgment regarding individual petitions in less than 10 years.[491] In contrast, by 2007, the Court delivered only three judgments in interstate cases since the Court's creation in 1959.[492]

Political Questions & False Dilemmas in International Adjudication. To convince States that compulsory jurisdiction is essential, early supporters of international courts presented a seemingly sound dilemma: international courts must have general compulsory jurisdiction, which would obviously cover political disputes, or there will be wars. Obviously, as Sir Robert Jennings notes, this is a fallacy of false dilemma.[493] Courts

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[489] James L. Brierly, Humphrey Waldock (ed.). The Law of Nations (Oxford: Clarendon Press, 1963, 6th ed.) p. 369.

[490] John G. Merills, International Dispute Settlement, (Cambridge, Cambridge University Press, 4th ed., 2005) p. 309.

[491] Council of Europe, European Court of Human Rights in Facts and Figures 2010, p. 8, available at <http://www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2012_VERSION_WEB.pdf> (last accessed 13 February 2012)

[492] Henry J. Steiner, Philip Alston, and Ryan Goodman, International Human Rights Law in Context: Law, Politics, Morals (Oxford: Oxford University Press, 3rd ed., 2008) p. 947. The first three judgments were Ireland v. the United Kingdom (1978), Denmark v. Turkey (2000), and Cyprus v. Turkey (2001). Judgment regarding Georgia's application filed against Russia in 2007 was the fourth.

[493] Robert Y. Jennings, The Proper Work and Purposes of the International Court of Justice, *in* A.S. Muller, D. Raic, J.M. Thuránszky (eds.), The International Court of Justice: Its Future Role after Fifty Years (The Hague; Boston: Nijhoff, 1997) p. 41.

can have compulsory jurisdiction and the war may still be unavoidable; courts may have no jurisdiction and the wars can be averted. In national crises, even domestic courts seldom successfully perform such legal rescue operations. On the contrary, as Brierly noted about American courts, it was the US Supreme Court's decision in Dred Scott case that made the American Civil War unavoidable.[494]

6.5.3 Inaccessibility of International Courts

Armed Conflicts Outside the Reach of International Courts. Another major difference between international courts and domestic courts is inaccessibility. Domestic courts usually can adjudicate disputes between all kinds of legal actors and all kinds of issues, with the exception of political and similar issues. International courts fail to contribute to dispute settlement because they keep out some of the most damaging conflicts: non-international armed conflicts, sometimes also called civil wars. Although international law does not govern these conflicts to the same extent as it governs international armed conflicts, it does prescribe the basic legal standards. Yet, only with the consent of the State involved in such conflict can an international tribunal consider it; few States are willing to give such consent because they fear this will imply the recognition of the rebel movement. This is not a new concern. Brierly pointed out at the beginning of the twentieth century that it is a "curious and unfortunate fact that discussions about war and its causes and prevention give so little attention to studying the problem of civil wars".[495] Indeed, it is unfortunate because, as development economists estimate, non-international armed conflicts usually last ten times longer than international conflicts[496] and cost the country and its neighbors ten times more - around 64 billion dollars.[497]

Inaccessibility to International Organizations. It is not only the most damaging armed conflicts that are kept out of international courts. International organizations and other prominent international actors are also excluded. Article 34 of the ICJ Statute is a classical example of this state-centric view: "only states may be parties in cases before

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[494] James L. Brierly, (Hersch Lauterpacht & Humphrey Waldock eds.), The Basis of Obligation in International Law (Oxford: Clarendon Press, 1958) pp. 93-107 (Cited in Jennings, The Proper Work and Purposes of the International Court of Justice, p. 44)

[495] Ibid, at 99.

[496] Paul Collier, The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It (Oxford: Oxford University Press, 2007)p. 26-27 ("Civil wars are highly persistent. The average international war, which is nasty enough, lasts about six months. You can do a lot of damage in six months. But the average civil war lasts more than ten times as long, even longer if you start off poor. In part, such conflicts continue because they become normal. On both sides interests develop that only know how to do well during war. Given the massive costs of war, it should be possible to find a deal that benefits everyone, but often the rebels decide to continue the struggle rather than take the risk of being lured into a peace deal on which the government subsequently reneges."). *See also* Paul Collier, Anke Hoeffler, Måns Söderbom, On the Duration of Civil War, 41 Journal of Peace Research 253–73 (2004).

[497] Paul Collier, The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It (Oxford: Oxford University Press, 2007) p. 32 ("All in all, the cost of a typical civil war to the country and its neighbors can be put at around $64 billion. In recent decades about two new civil wars have started each year, so the global cost has been over $100 billion a year, or around double the global aid budget. This is obviously only a ballpark figure, although in building it we have erred on the side of caution.")

the Court."[498] Various commentators heavily criticized this state-centric view on many occasions, and yet it remains today as it was almost one hundred years ago.[499]

6.5.4 Binding Force and Judicial Remedies

Binding Force of International Judgments. Another appeal of international courts lies in their promise to provide finality of disputes through the binding force of their decisions. Thus, an authoritative judgment of an international will end a dispute, just as judgments of domestic courts ensure finality. Yet, this is a huge oversimplification: binding force of international judgments is more of a replica and not an equivalent of their domestic counterparts.

Lack of Enforcement. There is no enforcement of decisions either at all or it is more illusory than real. Consider the enforcement of the ICJ decisions. The UN Charter provides that the Security Council may enforce ICJ judgments,[500] but in practice, this is unrealistic scenario.[501] Voluntary compliance with the Court's judgments is the way it normally works.[502]

Self-Help and Non-Compliance. Self-help always was and still remains one of the keystones of international law: each State has to use measures available to it to enforce its rights. In the end, the compliance of an international decision will have to be negotiated. In negotiations, however, a judgment is used only as a bargaining chip, important chip, but nonetheless not the only one; thus the expression - "bargaining in the shadow of law." Whether a State will comply with a decision depends on many factors; one important factor may be whether the reputational loss from non-compliance will be greater than the losses resulting from compliance.[503]

Moral Authority of International Courts. Thus, a crucial difference from domestic courts is that a judgment of an international court rests largely on its moral authority. Therefore, a dispute mediated by some authoritative body, although non-binding, might more useful than a legally binding decision that is not persuasive enough. For example, a negotiation backed up only by the good faith of both parties is more valuable than

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[498] Statute of the International Court of Justice, T.S. No. 993, 3 Bevans 1179.

[499] Jerzy Sztucki, ‚International Organisations as Parties to Contentious Proceedings before the International Court of Justice?, in A.S. Muller, D. Raic, J.M. Thuránszky (eds.), The International Court of Justice: Its Future Role after Fifty Years (The Hague; Boston: Nijhoff, 1997) pp. 141-167; Paul Szasz, Granting International Organisations Jus Standi in the International Court of Justice, in A.S. Muller, D. Raic, J.M. Thuránszky (eds.), The International Court of Justice: Its Future Role after Fifty Years (The Hague; Boston: Nijhoff, 1997) pp. 169-188; Pierre-Marie Dupuy, Commentary of the Article 34, in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Christian Tams, and Tobias Thienel, The Statute of the International Court of Justice: A Commentary (Oxford: Oxford University Press, 2006) p. 545

[500] Art. 94, Charter of the United Nations, T.S. No. 993, 3 Bevans 1153.

[501] Aloysius P. Llamzon, Jurisdiction and Compliance in Recent Decisions of the International Court of Justice, 18 European Journal of International Law 815-852 (2007); Attila Tanzi, Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations, 6 European Journal of International Law 539-572 (1995).

[502] *See generally* Constanze Schulte, Compliance with Decisions of the International Court of Justice (Oxford: Oxford University Press, 2005).

[503] Andrew T. Guzman, International Tribunals: A Rational Choice Analysis, 157 University of Pennsylvania Law Review 171 (2008).

a judgment of the ICJ against a State that refuses to comply with the judgment, as it happened in the *Nicaragua* case when the US refused to comply.[504] The judicial decision of an international court is like the voodoo curse: it is effective only as long as its victim believes in the power of the curse.

Lack of Effective Remedies. Another major problem with international adjudication is that international courts have seldom provided effective remedies. For example, although in theory the restitution is a primary remedy, international courts very rarely impose this remedy. Most often, an international court will declare that compensation or even satisfaction is the appropriate remedy.[505] International courts normally cannot impose mandatory orders or specific injunctions (e.g. an implementation of a breached treaty in a specific manner or corrective actions like modifying inconsistent domestic legislation).[506] Certainly, there are, as international relations scholars call it, "embedded" decisions - decisions that operate without governments' actions;[507] these are mostly declaratory judgments. Yet, "embedded" decisions are not the solution to the systemic problem of ineffective remedies.

Adverse Effects of Formal Rulings. Empirical research has also shown that sanctions, formal rulings, or other forms of public pressure often have counterintuitive effects.[508] For example, empirical studies of compliance with the GATT/WTO rulings from 1948 through 1999 show that a defendant is less likely to make trade concessions after the formal ruling is issued.[509] In other words, a formal ruling against the defendant makes it less likely that the defendant will make trade concessions to the complainant. There are many explanations for this. For one, uncertainty about the final outcome may induce defendants to make early concessions.[510]

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[504] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986.. *See also* Harold N. Meyer, The World Court in Action: Judging Among the Nations (Oxford: Rowman & Littlefield, 2002) pp. 183-195.

[505] *See e.g.* Christian Tomuschat, Reparation in Cases of Genocide, 5 Journal of International Criminal Justice 905 (2007); Andrea Gattini, Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment, 18 European Journal of International Law (2007) pp. 706-707.

[506] Chester Brown, Common Law of International Adjudication (Oxford: Oxford University Press, 2007) pp. 209-215; Christine Gray, Judicial Remedies in International Law (Oxford: Oxford University Press, 1987) pp.11-21, 95-110.

[507] Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, Legalized Dispute Resolution: Interstate and Transnational, 54 International Organization 457 (2000) p. 458.

[508] In the last decade, empirical studies in behavioral economics showed that the traditional deterrence hypothesis is flawed. In some cases, sanctions have a paradoxical effect of not decreasing but increasing the unwanted behavior. Authors of one study thus summarized their findings:
"The deterrence hypothesis predicts that the introduction of a penalty that leaves everything else unchanged will reduce the occurrence of the behavior subject to the fine. We present the result of a field study in a group of day-care centers that contradicts this prediction. Parents used to arrive late to collect their children, forcing a teacher to stay after closing time. We introduced a monetary fine for late-coming parents. As a result the number of late-coming parents increased significantly. After the fine was removed no reduction occurred."
Uri Gneezy and Aldo Rustichini, A Fine is a Price, 29 Journal of Legal Studies 1-18 (2000) p. 1.

[509] Marc L. Busch & Eric Reinhardt, Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes, 24 Fordham International Law Journal 158 (2000) pp. 161-162.

[510] Ibid, at 165.

Another explanation is that the compliance with the formal ruling of an international institution will make the government appear weak – being hammered by some international court – and thus government may decide that it is politically more fitting to defy the ruling. As Carl von Clausewitz famously said, "war is merely a continuation of policy by other means". Likewise, for most governments international adjudication is merely a continuation of domestic policy by other means. And if there is an antagonism between the two, it is usually not the respect for international courts that will carry the day. In this context, the empirical findings are perhaps unsurprising: "[c]ounter to conventional wisdom, *democracies*, even controlling for their (typically) greater market power, *are less likely to comply*. . . . once GATT has thrown down the gauntlet, it will be harder for a government that is highly sensitive to public opinion to cave in."[511] Of course, it is possible that in some cases, when public opinion favors compliance with international rulings, the democratic government may be more likely to comply than it would be willing otherwise. Yet, more often than not, democratic governments adopt certain measures because public opinion supports such measures in the first place, and it is unlikely that public opinion will change because of an international ruling.

Any generalizations here are hazardous: in some cases, formal rulings and public pressure will induce compliance, in other cases they may have zero effect, and yet in others they may have detrimental effect. A one-dimensional approach to this issue will likely produce unexpected and negative consequences. Until empirical research provides us with better understanding on the effects of various sanctions and formal rulings, a very cautious approach to international adjudication will be a wise policy.

Publicity vs. Privacy in International Adjudication. A related drawback of international adjudication is publicity. No doubt, there are many benefits to having arguments made in an international court being publicly available to anyone. But settlement of disputes may not be among these benefits. Often, a government may be willing in private to advance certain arguments, rely on certain censored evidence, or even concede certain points and admit certain mistakes; yet, such admissions or reliance on censored evidence, when made public, may hurt its domestic politics, and so the government would rather not use them at all than use them and suffer domestically: "The need for privacy is especially acute for resolution of disputes between democracies, which disproportionately settle early in consultations, suggesting that they find it easier to compromise in a setting that is relatively less transparent."[512]

This may not be the problem with all international adjudication - international arbitration is much more flexible than permanent courts.

6.6 Fallacy of Composition

Another reason why legal scholars are preoccupied with international courts can be explained by a fallacy of composition - extrapolation from part to whole: scholars find examples of successful judicial settlement in certain fields or in certain regions and mistakenly conclude that international adjudication in general is advantageous. In other words, because parts of international adjudication - certain international tribunals in

[511] Ibid, at 168 (emphasis added).

[512] Ibid, at 171.

particular episodes proved to be successful - it "follows" that international adjudication, as a general method of international dispute settlement, will be successful. Yet, when we look at the overall practice of international tribunals, we find mixture of failures and successes, and successes are very limited.

6.6.1 Judicial Expertise and Justiciability

Prevalence of Adjudication in Certain Fields. Judicial dispute settlement has prevailed only in a few fields of international law, such as trade and investment disputes, human rights, and boundary claims and maritime delimitation. No doubt, these are all important issues. But economic disputes and human rights cases have been adjudicated for more than a hundred years, albeit under a different rubric. In the beginning of the twentieth century, most of international adjudication revolved around the so-called state responsibility for injuries to aliens.[513] The typical causes of action that belonged to this rubric now belong to either human rights law or international economic law. Of course, now the law governing these fields is more elaborate and dispute settlement is more specialized, but the underlying nature of these disputes remains the same.

Disputes Unfriendly to International Adjudication. It is hasty generalization nonetheless to say that because economic dispute settlement is successful, it must mean that judicial dispute settlement in general is a good idea. There is much more to international law than human rights or economic disputes. A host of other disputes either stay away from international courts or have been adjudicated with very limited success. These disputes comprise political and military issues, including peacekeeping and arms limitations, serious breaches of international law, environmental issues, and economic disputes beyond trade and investment. Thus, some commentators have concluded that arbitration cannot resolve political disputes.[514] One reason is that international law governing these fields is immature and brittle; naturally, because of great uncertainty, States do not want to trust these cases to international tribunals.

Justiciability – Political vs. Legal Disputes. Further, the view that judicial settlement is not suitable for certain international disputes is embodied doctrinally. Since Vattel distinguished between political disputes and legal disputes, States also followed this distinction.[515] Thus, the doctrine of justiciability says that only legal disputes are justiciable, i.e. suitable for judicial settlement. Political disputes are the opposite - unjusticiable.

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[513] *See generally* Clyde Eagleton, The Responsibility of States in International Law (New York: New York University Press, 1928); Richard B. Lillich (ed.), International Law of State Responsibility for Injuries to Aliens (Charlottesville: University Press of Virginia, 1983); Chitaranjan F. Amerasinghe, State Responsibility for Injuries to Aliens (Oxford: Clarendon Press, 1967).

[514] Karl-Heinz Bockstiegel, The Effectiveness of Inter-State Arbitration in Political Turmoil, 10 Journal of International Arbitration 43 (1993) p. 50 ("on the basis of experience gained, highly political and perhaps even military disputes cannot be resolved by inter-State arbitration. Exceptions may come up ...").

[515] Emmerich de Vattel, Le Droit des gens : Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains (The Law of Nations or the Principles of Natural Law) (Charles Ghequiere Fenwick transl.; Carnegie Institution of Washington, (1758) 1916) §332 („In the disputes which arise between sovereigns, a careful distinction must be made between essential rights and less important rights, and a different line of conduct is to be pursued accordingly." Duty to negotiate and seek arbitral resolution applies only „where interests that are not essential, or are of small consequence, are involved").

Justiciability in the Practice of International Courts. International courts themselves usually refuse to entertain defenses based on non-justiciability. Of course, courts are unlikely to admit that they cannot solve certain disputes. More likely, courts will proclaim that in principle all disputes can be judicially resolved, and then use some juridical techniques to avoid particular decisions.

Distinction between Legal & Political Disputes. There is some doctrinal debate on the exact distinction between legal and political disputes. Usually non-justiciable disputes include vital peace and security efforts, military strategy, and others that States consider more appropriate for political institutions. Higgins pointed out that there are four diverse meanings non-justiciable disputes: (1) that the matter relates to a State's vital interests; (2) that the dispute is incapable of objective judicial determination; (3) that the motives of a State seeking judicial determination are in question; (4) that post-adjudicative compliance is in doubt.[516] All of these are unjusticiable, i.e. not suitable for judicial dispute settlement.

Battle against Justiciability. Most exponents of international courts have battled the idea of non-justiciability. They argue that international courts can settle all kinds of disputes, there are simply no disputes, which courts are unable of settling. Sir Hersch Lauterpacht was the most famous proponent of this view:

> [T]here is no fixed limit to the possibilities of judicial settlement; that all conflicts in the sphere of international politics can be reduced to contests of a legal nature; and that the only decisive test of the justiciability of the dispute is the willingness of the disputants to submit the conflict to the arbitrament of the law.[517]

Lauterpacht's contention is problematic for two reasons. First, not all conflicts in international politics can be reduced to legal questions. For example, courts cannot deal with situation where there is tension, but no specific question that they have to resolve; political institutions, however, can do that.[518] More importantly, Lauterpacht might be wrestling with the irrelevant question. The proper question is not whether courts, in theory, can turn any international dispute into a legal question and settle that question. The question is whether it will do any good. Most decisions in theory could be made by flipping a coin, but very few would consider such problem-solving approach enviable. Similarly, just because courts in theory can reduce any dispute to a legal question and then solve that legal question is a different question from whether States appreciate that.

Justiciability & Views of Governments. Although the distinction between justiciable and non-justiciable disputes seems academic, it reflects the deeper conviction of States that judicial expertise is good only for certain kinds of disputes. Thus, governments probably still thought about justiciable and non-justiciable disputes, even when this distinction became unfashionable in theory. Edward Carr, in his classic international relations treatise published before the World War II, pointed out the gap between State practice and the idealist visions:

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[516] Rosalyn Higgins, Policy Considerations and the International Judicial Process, 17 International and Comparative Law Quarterly 58 (1968) p. 65.

[517] Hersch Lauterpacht, The Function of Law in International Community (Oxford: Clarendon Press, 1933) p. 164.

[518] John G. Merills, International Dispute Settlement (Cambridge, Cambridge University Press, 4th ed., 2005) p. 20.

> No government has been willing to entrust to an international court the power to modify its legal rights . . . Some theorists have, however, been more ready than practical statesmen to brush this difficulty aside, and are quite prepared to entrust to a so-called arbitral tribunal the task not only of applying existing rights, but of creating new ones . . . .[519]

The main problem, as Carr alludes in this excerpt, is that international law is incomplete and much more so than any domestic legal system; while filling these gaps, international courts inevitably create new rights or change existing ones. And most governments are not enchanted by this prospect. Some tribunals tried to assure States that they would fill these gaps with mathematical precision.[520] Most governments, however, are unimpressed, perhaps because they know very well that judicial decision-making and mathematical sciences are very distant relatives.

6.6.2 Fallacy of Universalism

Success of Regional Courts. Some exponents of international courts think that judicial settlement holds a great promise as a general dispute settlement method because of its outstanding success in particular regions. The European Court of Human Rights and the European Court of Justice are the two courts that are usually mentioned in this context. The Inter-American Court of Human Rights also could be considered as relatively successful. Yet, it is apparent that at least Asian and African continents are missing from this picture.

Why exactly judicial settlement succeeded in these regions and in these organizations (EU and Council of Europe) is a difficult question. It is difficult to even pinpoint approximate reasons, not to mention controlled studies which would confirm any hypothesis. Some would argue that it is because of homogeneity of their Member States. Others argue that one of the main reasons is because they are based on "deep" international agreements, i.e. those that require changing the behavior significantly,[521] treaties that regulate public goods or common problems,[522] and treaties that create rights or benefits for private parties.[523]

Adjudication as Western Phenomenon. In any event, the success of these regional courts is no indication that judicial dispute settlement, as a general method, is welcomed worldwide.[524] More generally, it could be argued that judicial settlement has succeeds in certain regions because the preoccupation with adjudication is a Western phenomenon and it is the legacy of Western rhetorical tradition. George Kennedy, an

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[519] Edward H. Carr, The Twenty Years' Crisis, 1919-1939 (New York: Perennial, [1945] 2001) p. 259

[520] Eastern Extension, Australasia and China Telegraph Company, Ltd. (Great Britain) v. United States, 9 November 1923, 6 Reports of International Arbitral Awards 112 pp. 114-115:
"International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to *find - exactly as in the mathematical sciences - the solution of the problem*." (emphasis added)

[521] Laurence R. Helfer and Anne-Marie Slaughter, Why States Create International Tribunals: A Response to Professors Posner and Yoo, 93 California Law Review 1 (2005) p. 39.

[522] Ibid, at 40-41.

[523] Ibid, at 41-42.

[524] Johnston, The Historical Foundations of World Order, p. 130.

eminent rhetorician, compares Western rhetoric, influenced mostly by Greek rhetorical tradition, with many other traditions, including Chinese, Indian, Native American, Aboriginal Australian, Egyptian, Mesopotamian, Aztec, and others.[525] Greek society was characterized by contentiousness, which is reflected in not only rhetoric, but also mythology, athletics, poetry, public address, and democratic governance.[526] Because of the Greek influence on later Western thought, this competitiveness would influence Western legal traditions, including love for adjudication. As Kennedy finds in his comparative study:

> [G]enerally speaking, throughout the non-Western world, rhetoric has been used for purposes of agreement and conciliation, and emotionalism . . . The Greeks were contentious from the very beginning, and acceptance and indulgence of open contention and rivalry has remained a characteristic of Western society except when suppressed by powerful authority of church or state.[527]

Eastern Resentment of Adjudication. For Asians, adjudication is dreadful because it is based on binary thinking – right or wrong – and requires logical consistency. For Asian mind, "to argue with logical consistency . . . may not only be resented but also be regarded as immature."[528] Here again, the best explanation why Greeks created logic is that they saw its utility in argumentation.[529] Eastern thought, contrary to the Western, is comfortable with logical contradictions; instead of rejecting one of the contradictory propositions, it aims to transcend and find the truth in both of them.[530]

For Easterners, contextualization is also central to their outlook and it explains why they resent adjudication: the structure of an argument cannot be separated from its context. Naturally, it distrusts any inferences based on abstract propositions.[531] It knows no distinction between the truth of a proposition and its morality.[532] Yet, the essence of adjudication is application of abstract principles to concrete cases. In this context, we can see how easily an Eastern mind could be repulsed by judicial pronouncements such as that of the ICJ in the *South West Africa* that moral considerations are separate from legal considerations.[533]

Policy Reasoning in Judicial Opinions. As the section above on "Judicial Audience of International Courts" (see 5.5) pointed out, if international courts would embrace policy reasoning more, it might appeal to Asian nations. Yet, even judgment style based on policy reasoning is unlikely to make non-Western States true believers of international adjudication. For one, their underlying idea of responsibility contradicts the foundations of international law, which are built on Western ideals. The Eastern view

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[525] George Kennedy, Comparative Rhetoric: An Historical and Cross-Cultural Introduction (New York: Oxford University Press, 1998) pp. 46-191

[526] Ibid, at 191-214.

[527] Ibid., at 198.

[528] Richard E. Nisbett, The Geography of Thought: How Asians and Westerners Think Differently … and Why (New York: The Free Press, 2003) p. 166 (quoting anthropologist Nobuhiro Nagashima).

[529] Ibid, at 166-167.

[530] Ibid, at 174.

[531] Ibid, at 167-168

[532] Ibid, at 167.

[533] South West Africa Cases , 2nd phase (Ethiopia/Liberia v South Africa), 1966 ICJ Reports p. 34.

demands responsibility for any harmful action, regardless whether it was unintentional or indirect.[534] This view is closer to the Western concept of strict liability, only all-encompassing.

Overall, the non-Western cultural-legal aversion towards adjudication is due to the fundamental nature of adjudication and is unlikely to be decreased by fine-tuning technical concepts.[535]

6.7 Alternatives to Adjudication

Difference between Adjudication & Diplomatic Methods. As the section 6.2.1 (International Dispute Settlement System) pointed out, the only legally significant difference between adjudication and diplomatic dispute settlement methods is the binding quality of judgment and associated remedies or sanctions. Yet, as the previous sections showed, these qualities are either overrated or can even have the adverse effects. Sometimes, no doubt, binding judgment or judicial remedies can have very beneficial effects. Yet, any generalizations here are risky.

Also, when it comes to permanent international courts, the reasoned opinion has been traditionally seen as the necessary component. Yet, this is not an essential component of all international adjudication - international arbitral tribunals, for example, sometimes produced unreasoned opinions.[536]

Prestige & Moral Authority. Apart from the binding quality of judgment, prestige and moral authority is the only meaningful difference between an international court and conciliation or other diplomatic methods. Yet, the prestige and moral authority depends on particular institution and it is not something that comes automatically as a by-product of being a court. If some permanent conciliation commission would be given the same attention as for the example the ICJ (and to enhance its standing, it could be even called the "World Conciliation Commission"), it is possible that it could achieve similar standing.

Value of Diplomatic Methods. A conciliation commission, for example, can provide everything that international adjudication provides, such as proceedings based on formal legal arguments or a (non-binding) decision based solely on legal rules. And diplomatic methods such as mediation or conciliation can also provide much more – privacy, possibility of discarding certain international treaties or custom (an international court could not for example discard altogether the entire UN Charter), engaging in conciliatory justice without the additional need to juggle legal rules.

Diplomatic methods are also less resource-intensive than adjudication; they are accessible to international organizations; they can be used to settle the so-called civil wars

[534] Nisbett, The Geography of Thought, p.198.

[535] One way to increase the appeal of adjudication in the globalization era, where different value systems increasingly clash, is through the Rawlsian concept of overlapping consensus, which allows both parties to integrate a decision in their value and belief systems. *See* Andreas Paulus, International Adjudication, in Samantha Besson & John Tasioulas (eds.), The Philosophy of International Law (Oxford: Oxford University Press, 2010) pp. 207-224. Yet, even Rawlsian overlapping consensus is unlikely to increase the appeal of adjudication to Asian and other non-Western nations – they resent adjudication not necessarily because of the different value system reflected in particular cases, but because of its fundamental nature.

[536] Merills, International Dispute Settlement, p. 92.

because the governments will fear less that this dispute settlement will imply recognition of the rebel movement. They can be used to settle sensitive political or military disputes and other types of disputes. They are also acceptable to non-Western States as their procedures do not have to rely on rigid and sophisticated logical argumentation.

Development of International Law vs. Settlement of Disputes. Of course, mediation, conciliation, and other diplomatic methods will have little impact on development of international law and this is one of the main reasons why international lawyers have traditionally focused on adjudication, and especially permanent courts. Admittedly, as the previous chapter argued, development of international law by international courts is inevitable and invaluable.

Yet, just because adjudication is good for development of law, it does not mean that it is also good for dispute settlement. And to suggest that a government should consider making its disputes more legalized and complicated because it would help the development of international law is like suggesting that a patient should consider developing a rare disease because it would encourage the progress of medicine.

6.8 Summary

As this chapter has shown, adjudication cannot provide the solution to the strained intergovernmental dispute settlement. It never was a primary method of international dispute settlement and never was intended to be such. This flawed obsession with adjudication as the omnipotent dispute settlement method is largely due to various flawed beliefs about judicial decision-making in international courts.

Fundamental Function of Interstate Dispute Settlement. First, legal scholars usually conflate settlement of disputes with settlement of legal issues. Adjudication often fails to perform the main function of dispute settlement – settle the underlying dispute and restore good relations. In practice, adjudication is the last resort after all else fails; thus, it is not the primary method of dispute settlement, but rather a fallback option. Further, in international relations, bringing a case against another State is often viewed as unfriendly act and the added bitterness seldom helps settlement of the underlying dispute.

Right over Might. Second, it is the promise of right over might – international law as alternative to power politics. Thus, the triumph of international courts would mean the triumph of law over politics. The fantasy that adjudication ignores political considerations is driven largely by a flawed understanding of judicial decision-making: the formalistic view that because courts only apply legal rules and nothing else, that they are not swayed by political considerations. The "right over might" also ignores the fact that adjudication requires significant resources; in the WTO, for one, it seems that judicialization only made matters worse for the weak parties.

Farfetched Domestic Analogy. Third, it is the fallacy of farfetched domestic analogy: focusing on features that international courts share with their domestic counterparts and disregarding enormous differences. One of these is the belief that international courts provide finality through the binding decisions. A related misconception relates to overrated remedial powers of international courts.

Composition Fallacy. Fourth, it is the composition fallacy: legal scholars find several isolated examples of successful adjudication and infer that adjudication in

general can be successful as the overall method of dispute settlement. International courts are in fact successful in several fields, like human rights and trade disputes; they are also highly successful in certain regions, particularly Europe. But it does not follow that international courts have universal appeal.

Adjudication as a Specialized Dispute Settlement Method. Overall, as the former President of the ICJ Sir Robert Jennings puts it, "adjudication is a technical, intellectual, artificial method".[537] And as a technical and artificial method, it should not be considered the omnipotent method of dispute settlement.

All of this can explain, largely, why governments are not that enthusiastic about adjudication as the omnipotent dispute settlement method. For States, international adjudication is a highly specialized dispute settlement method, which is suitable only for small number of specific disputes. States themselves usually want to decide on case-by-case basis which disputes are suitable for adjudication. Another major reason is that governments find judicial decision-making unpredictable. Probably because they realize that it is hard to predict even for lawyers how an international court is likely to decide a case. If it is hard for international lawyers, then most diplomats and other public officials understandably are even less inclined to rely on international courts.

Proper Role of International Adjudication. None of this means that international courts are of little use. International courts are highly successful in some fields of international law, especially in the fields of technical expertise, such as maritime boundaries, territorial delimitation, and economic disputes. It is arguably preferable that international adjudication would be developed further along these lines.

It does mean, however, that international community would get a better payoff if it invested in development of non-adjudicatory dispute settlement, such as conciliation, at least as much as legal scholars want it to invest in international courts. International adjudication, a technical and specialized dispute settlement method, should not be viewed as the panacea for all maladies of international relations.

[537] Robert Y. Jennings, The Proper Work and Purposes of the International Court of Justice, in A.S. Muller, D. Raic, J.M. Thuránszky (eds.), The International Court of Justice: Its Future Role after Fifty Years (The Hague; Boston: Nijhoff, 1997) p. 36.

Conclusions

1. **Justification vs. Decision-making.** In contrast to the old formalistic understanding of judicial decision-making, most contemporary legal scholars agree that judicial opinions do not reflect accurately the actual decision-making. It is possible that judges may decide cases on the basis of formal legal rules. Yet, it is equally possible that judges will decide on the basis of other grounds and then merely use formal rules as justification.

2. **Intuitive Decision-making.** The contemporary empirical research has shown that human decision-making, including judicial decision-making, is a dual-process activity: decision-making relies on one of the two distinct ways of processing information – (1) heuristic, also called intuitive or experiential and (2) methodical or step-by-step logical.

The empirical research, especially on the role of heuristics in decision-making, has corroborated many of the original legal realist claims about decision-making. For one, the empirical research shows that judges, like human subjects in general, tend to rely on intuitive decision-making much more than on methodical and logical reasoning. The heuristic decision-making predisposes them to make snap judgments even when only incomplete information is available. Moreover, judicial decision-making, like decision-making in general, is sensitive to numerous seemingly unimportant factors, even such trivial features as breakfast and lunch times.

Overall, even in theory, purely rational and logical decision-making is only tentatively possible. In the real world, however, purely rational and rule-bound decision-making is next to impossible.

3. **Role of Legal Training & Judicial Experience in Judicial Decision-making.** In general, the empirical studies show no substantial difference in decision-making quality between judges and typical experimental subjects. One reason why judges perform no better than ordinary subjects is because judging is a low-validity environment – it provides no instant feedback about the quality of decisions made and thus judges do not improve their decision-making skills. Legal training likewise does not provide lawyers with superior decision-making skills; the only reasoning skill that improves with legal training is conditional logic. Yet, a host of other indispensible reasoning and decision-making skills are either unaffected by legal training or are developed only insignificantly.

4. **Legal Rules as Constraint.** Formal legal rules, at least in public international law, usually will not constrain judicial creativity. The traditional theory suggests that even if judges tend to make initial decisions on other grounds than logical reasoning downwards from legal rules, formal legal rules impose clear boundaries on this freedom.

First of all, this formalistic view ignores problems caused by the natural language, which is inherently ambiguous. Only formal systems, characterized by the law of identity, could ensure definite conclusions and impose clear constraints.

Also, the selection effect will ensure that most disputes reaching international courts will center on ambiguous legal rules or ambiguous facts to begin with. Because

States are unwilling to litigate disputes where the chance of success is negligible, seldom will a dispute reach an international court if it is controlled by clear legal rules – straightforward treaty provisions, precise customary rules or clear precedents.

When it comes to specific legal rules in public international law, international courts will usually be able to easily find some formal legal rule which will justify their preferred outcome. For example, the general rule of treaty interpretation, although it looks fixed on its face, in fact provides free choice of how to weight each element. Thus, two judges, even otherwise mechanically applying the same general rule of treaty interpretation, will arrive at two different conclusions because each of them will weigh differently different elements (text, object and purpose, intentions).

Likewise, customary international law will allow judges even more freedom synthesizing different rules. Although according to traditional theory there could be only one customary rule governing each issue, in practice each judge can synthesize several equally plausible rules. For one, in the international community consisting of almost two hundred States, one will seldom find consistent practice. More likely, one portion of States will act one way, another portion will act the opposite way, and the remainder will be silent. Moreover, different judges can rely on different sources of practice because there is disagreement, among other things, about what counts as State practice and practice of which organs of States. In the end, a judge is likely to make a choice based on his judicial philosophy or personal preferences.

Precedents, although much more important in practice than statutory provisions indicate, likewise do not constrain judicial creativity. International courts are not bound by the doctrine of binding precedent and thus, in theory at least, could easily disregard their previous decisions. Yet, as the agency model predicts, it is in the interest of international courts themselves to ensure an appearance of consistency and stability in judicial decision-making. The doctrine of precedent serves this function very well. Yet, international courts, while interested in appearance of consistency and stability, do not in fact want to be constrained by the precedent. Therefore, courts will proclaim that they abide by their previous decisions, but in practice will use various juridical techniques for distinguishing present case from the precedents. This flexibility is easy to achieve in practice. First, due to the selection effect, most cases call for analogical reasoning and not true precedential reasoning. Second, the ambiguity of *ratio decidendi* makes it easy to distinguish the present case even if the previous case on its face is very similar.

Although legal rules are clearly incapable of constraining international courts, it does not mean they are meaningless. A more accurate view is that concrete cases cannot be decided by general legal rules – but also without them. All legal rules operate more by persuasion than constraint: if a judge is not convinced that a legal rule is fair, adequate, precise, will produce economically efficient results, and so forth, the judge will find a way to choose a different rule, either by accepting the different rule in principle or by selecting only those facts which will fit the other rule. So overall, legal rules matter, but they are only one of the several other factors.

5. **Institutional and External Constraints.** Other constraints, institutional or external, are likewise usually more imaginable than real. Collegiality is important, but it

is very unlikely to bind judges to legal rules if they otherwise are not inclined to do so. Moreover, it is possible that the deliberative process may lock judges into their initial positions and only exacerbate their confirmation bias. Furthermore, it is possible that because of conformity, groupthink, and group polarization, collegiality and deliberative process could be inferior to judicial decisions made individually.

6. **Policy Reasoning.** While written opinions of international courts tend to rely more on rule-reasoning, there are also plenty of examples of policy reasoning, including policy reasons of judicial administration, economic efficiency, and normative arguments. More importantly, policy reasoning often plays a much more important role than it can be seen from written opinions. Different international courts will rely on different policy reasons, so any generalizations as to specific policy reasons will be inaccurate. Yet, one major reason for legal instrumentalism, common to many courts whose jurisdictional foundations resemble arbitration, arises because of the need for conciliatory justice, which in turn which in turn can be explained by the agency model.

7. **The Need for Policy Reasoning in Judicial Opinions.** Finally, policy reasoning is not only inherent part of actual decision-making, but its absence from written opinions can have unfortunate consequences, especially what we call the Beagle Channel effect. Moreover, a large portion of judicial audience looks more favorably at judicial opinion supported with policy reasoning than a typical Eurocentric style of judgment. Such desiccated style alienates many non-Eurocentric States.

8. **Judicial Decision-making and Its Implications for the Role of International Courts in Interstate Dispute Settlement.** The prevailing view in legal scholarship that international courts should play a central role in interstate dispute settlement is based on flawed understanding of judicial decision-making and related misconceptions. For one, most legal scholars tend to ignore the fundamental function of interstate dispute settlement – to settle underlying disputes and not just legal questions. While courts engage in conciliatory justice much more than the traditional formalistic theory suggests, they are still not fully equipped to settle the underlying disputes.

Another major culprit behind these misguided ideals is the formalistic understanding of judicial decision-making. Thus, if international courts are guided only by legal rules, then they will disregard political circumstances. Therefore, international courts must be a viable alternative to power politics. But international courts are not necessarily better at disregarding political considerations - they are only much better at pretending of doing so. It does not mean that international courts are swayed by political circumstances in the same way that political institutions are. Judges may become accustomed in their decision-making to pay more attention to legal factors. Yet, it is too idealistic to expect that judges can completely turn their back on important political aspects.

Another reason for the misguided view about the courts is the fallacy of farfetched domestic analogy: legal scholars tend to focus on similarities between international courts and domestic courts and disregard their crucial differences. For one, domestic courts have compulsory jurisdiction and do not risk that their unpopular decisions

will scare prospective litigants. Agency model in international courts predisposes them to be much more careful about the signals they send to prospective litigants, because jurisdiction of almost all interstate courts rests on consent of States. Another reason is an illusion that courts provide the finality of international disputes, accompanied by effective remedies. But voluntary compliance with judicial decisions is the only way it usually works, and international courts seldom impose other remedies than compensation or satisfaction.

Also, just because certain regional courts such as the European Court of Justice or the European Court of Human Rights proved to be successful, it does not mean that adjudication holds universal appeal. In fact, it could be more properly characterized as Western phenomenon, which is antithetical to many non-Western legal cultures.

This preoccupation with judicial dispute settlement has had some unfortunate effects. For one, in legal scholarship, negotiation and other non-judicial settlement methods still hold a candle to international courts; in essence, diplomatic methods are viewed as a back alley of international dispute settlement. This is unfortunate because negotiation, especially problem-solving negotiation, has a much greater potential to serve underlying purposes of international dispute settlement – settle the underlying disputes and not just legal questions.

The only significant different between international courts and some diplomatic methods such as conciliation is the binding nature of judicial decision and associated remedies. Yet, this quality is overrated, and moreover, empirical research has found that sanctions (in a broad sense), including formal rulings, can have more unfortunate effects than fortunate. Diplomatic methods like conciliation, on the other hand, can provide everything that international courts provide, except binding judgment and legal remedies. However, its success depends on how much both legal scholars and policy-makers invest their time and effort into its development, especially permanent institutional conciliation and similar methods. So far, the fixation on international courts has had the unfortunate effect of disregarding the viable alternatives.

None of this means that international courts are of no use. Arguably, development of international courts is desirable as long as it goes along the existing lines. Yet, it is a defective view which suggests that international courts should become top players in interstate dispute settlement and settle all kinds of disputes, including political and other sensitive disputes, between all kinds of States, including Western and Asian states, rich and poor.

Postscript: Unconstrained and Constrained Visions of Judicial Decision-making

Thomas Sowell, influential American economist and social theorist, distinguishes two grand visions: constrained and unconstrained.[538] These two grand visions are reflected in all visions of justice, equality, power, knowledge and reason, science, social processes, values and paradigms, and so forth.

The unconstrained view maintains that human nature can be changed, and changed significantly for the better. Our imperfections, if any, are temporary, and can be easily removed. Thus, Sowell observes that according to this view, "human nature itself is a variable, and in fact the central variable to be changed. The fact that particular individuals or groups have already exceeded the mass in intellect, morality, or dedication to the social good demonstrates what is possible."[539] This vision says that our goal is to work against our nature and conquer it eventually. The unconstrained view influenced all principal utopian and idealistic movements, including Communism, which wanted to change individualistic human nature based on self-interest and preservation to an altruistic nature with devotion for common good.

The constrained vision, on the other hand, views human nature as unchanging – it remains essentially immutable despite intensive efforts to change it. The constrained vision relies on empirical evidence of human nature and social processes. (In contrast, the unconstrained vision tends to rely on some high-flying theories.)

The constrained vision further suggests that it is best to accept our imperfections or constraints, and then work to optimize them by creating processes and social institutions that will use our imperfections to achieve the best possible result. So followers of this vision accept human nature as it is and then construct social institutions around it. Thus, capitalism uses self-interest of each individual to achieve a better welfare for all. Adam Smith, therefore, had a high opinion of capitalism, despite his low opinion of capitalists.[540]

The traditional theory of judicial decision-making reflects the unconstrained vision. It wants to ignore any human imperfections that judges possess and views judges as rational decision-makers, free from emotions, irrationalities, personal preferences, and judicial philosophies.

The thesis of this dissertation reflects more the constrained vision: that judges, like all humans, have ample of imperfections, which include inclination for intuitive decision-making, systemic irrationalities, consideration of policy reasons and even political considerations, tendency to make snap judgments based on incomplete information, and even dependence on such trivial factors as breakfast and lunch times.

Such constrained view, understandably, is very unpleasant to supporters of exalted ideals of rational judicial decision-making. As Posner explains, "judges want to deny the role of subjectivity in judicial decision making lest they undermine their claim to be

[538] Thomas Sowell, A Conflict of Visions: Ideological Origins of Political Struggles (New York: Basic Books, 2007).

[539] Ibid, at 93.

[540] Thomas Sowell, Basic Economics (New York: Basic Books, 4th ed., 2010) p. 68.

deservedly independent branch of government in which reason rules …. They want to convince people they wear blinders to keep them from straying off the beaten path; that they are society's dray horses. They also want to duck blame for unpopular decisions ("the law made me do it")."[541]

Unpleasant it may be, but if judicial decision-making will ever be improved for the better, the constrained view will have to be embraced. In science, major discoveries were possible only after scientists accepted limitations imposed by the laws of nature and then worked on them and around them. Likewise, unless we accept the fact that judicial decision-making is not rational or fail-proof by default, it will not change for the better.

Yet, submission to such constrained view, if it will ever happen at all, is very likely to be thorny and recalcitrant - it undermines the institutional ethos and the foundations of legal mythology because "judges have convinced many people – including themselves . . . [that judicial decision-making is] unmarred by willfulness, politics, or ignorance".[542]

Arthur Schopenhauer once observed that "all truth passes through three stages: first, it is ridiculed; second, it is violently opposed; and third, it is accepted as self-evident." Like the original legal realist movement, the insights from contemporary empirical sciences on judicial decision-making, once they start spreading in all legal circles and their repercussions become apparent for both domestic and international courts, will probably be ridiculed at first, then strongly opposed because of the fear that they might destroy sociopolitical foundations of judiciary, and eventually they might become self-evident.

[541] Posner, How Judges Think, p. 72.

[542] Ibid, at 3.

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Vitalius Tumonis

JUDICIAL DECISION-MAKING: INTERDISCIPLINARY ANALYSIS WITH SPECIAL REFERENCE TO INTERNATIONAL COURTs

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Vitalius Tumonis

JUDICIAL DECISION-MAKING: INTERDISCIPLINARY ANALYSIS WITH SPECIAL REFERENCE TO INTERNATIONAL COURTS

Summary

Introduction

Rosalyn Higgins, who eventually became a President of the International Court Justice, thus presented the traditional understanding of judicial decision-making in international courts:

> [A]t given moment of time it is the duty of the judge "to apply the law as he finds it." This view, it will be seen, entails the beliefs that law is "rules"; that these rules are "neutral"; that the judiciary is "objective"; and that its prime task is to "apply" rather than to "make" the rules. It is, however, possible to perceive international law in a fundamentally different way ...[543]

This dissertation is about that different way of perceiving judicial decision-making. The central question of this dissertation is how much of judicial decision-making depends on legal reasoning. Do judges, after finding the relevant facts of the case, consult legal rules and then arrive at their decision? Or maybe the equation that the decision equals facts plus rules is merely an illusion? What if instead of consulting legal rules and using logic to solve complex legal problems, judges rely more on intuitive thinking - heuristics or rules of thumb for decision-making? What if heuristic thinking also predisposes them to irrational patterns in their decisions? What if instead of using legal rules to decide their cases, they rather use those rules to justify their decisions and not to arrive at them? What if instead of using only statutory legal rules, judges often rely on policy principles not found in law books?

Although the contemporary interdisciplinary research now allows us to come up with better answers to these questions, the questions themselves are relatively old. They have been at the forefront of the debate between the so-called legal realists and legal formalists. Legal Realism, a movement that arose in 1920s and 1930s in the US, challenged the prevailing view that judges are rational decision-makers, who apply only legal rules found in law books to the facts of the case. The realists were a sundry group: there were more differences between some realists than between some realists and formalists. Overall, however, realists asserted that often judges make up their mind about the outcome even before they turn to legal rules; often they will use policy principles and make new law; some realists asserted that judge's personality has more impact than legal rules. After making a decision, judges will justify it with formal legal rules.

For legal formalists, on the other hand, legal rules and logical reasoning are central to judicial decision-making. In more extreme versions of legal formalism, legal rules are the Alpha and Omega – the beginning and the ending of judicial decision-making. Thus,

[543] Rosalyn Higgins, Policy Considerations and the International Judicial Process, 17 International and Comparative Law Quarterly 58 (1968) p. 58.

a formalist idea of judging excludes intuitive decision-making, policy considerations, and a great number of other variables.

The influence of legal realism went far beyond the US and its influence is much greater than just a theory of judging. It would be only a little exaggeration to say that most international law theories have been offsprings of general legal theories. Likewise, it is fair to say that at least until recently, most theories of international adjudication and judicial decision-making had their roots in general theories of judging. Accordingly, theories of formalism and realism clashed not only in the United States and a few other States where the legal realism was welcomed, but also in international arena. The late Douglas Johnston nicely summarized this development in his summa on the history of international legal order:

> [T]he perspective of *legal formalism*, was generally accepted by Western jurists in 1905, even those on the common law side of the tracks within the Anglo-American legal cultures. However, as the United States became the dominant world power in the first half of the 20th century, the emergence of a cultural divergence within the international law community became increasingly evident. Thereafter, as American lawyers became influential in virtually all sectors of world order, the legal formalist ideal of Europe would have to contend with a very different model of law shaped by the inclusiveness of *American legal realism.* The depth of this cultural divide is now a matter of lively debate on both sides of the Atlantic.[544]

Purpose & Theses

The main purpose of this dissertation is to determine the importance of various factors in actual decision-making, and in particular whether the traditional understanding of judging as a rule-bound and logical reasoning can explain actual decision making.

The dissertation puts forward the following theses:

1. In the study of judicial decision-making, judicial opinions are poor indicators of actual decision-making. Thus, judges can make decisions on other grounds than formal legal rules and then use formal legal rules merely to justify those decisions.

2. Judges, like people in general, have preference for intuitive decision-making over rule-based and logical reasoning. Although this intuitive decision-making can be sometimes overruled by logical reasoning, in practice this will rarely happen. Yet, intuitive thinking will be highly efficient and will produce sound judgments most of the time. On the other hand, intuitive thinking will also predispose judges to systemic decision-making errors. Also, contrary to traditional formalistic ideals of judicial decision-making, even when decision-making is characterized by logical reasoning, it will be inseparable from emotions.

3. Overall, legal training or judicial experience in itself will not provide judges with superior decision-making skills, and thus the popular idea of judges as expert decision-makers is erroneous.

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[544] Douglas M. Johnston, The Historical Foundations of World Order: The Tower and the Arena (Leiden: Martinus Nijhoff Publishers, 2008) p. 687.

4. When judges make decisions on other grounds than formal legal rules, judicial creativity is unlikely to be constrained by these formal rules. First of all, the selection effect will ensure that most cases reaching international courts will revolve around ambiguous facts or ambiguous rules to begin with. Also, judges will seldom have trouble justifying their decisions with formal rules because they will almost always find some competing legal rules that will tally their decision; this is largely because public international law is even more ambiguous than common law systems.

5. Other external or institutional constraints are also unlikely to curb judicial latitude. Deliberative process and collegiality may constrain in some cases and may have no effect in others. The only consistent constraints against arbitrary decisions will be internal constraints, such as internalization of judicial norms and judicial philosophy of individual judges.

6. Specific driving forces behind judicial decisions will be different in each case – it is even possible that in some cases formal legal rules will be the controlling factor. Overall, however, international courts will be equally if not more swayed by various policy principles and in particular by interests of conciliatory justice. It also means that judicial law-making by international courts is inevitable.

7. Policy reasoning, while indispensible for explanations of actual decision-making, should also figure more prominently in written judicial opinions because absence of policy reasoning may alienate a considerable segment of judicial audience.

8. The views that international courts should play a central role in interstate dispute settlement are flawed because they are largely based on erroneous understanding of judicial decision-making. Instead of fixation on international courts, legal scholars and policy-makers should rather accept the limited role of international courts in interstate dispute settlement and focus equally if not more on other forms of dispute settlement, such as conciliation.

Methodology

This work uses all traditional analytic methods, such as logical and linguistic analysis, comparative and systemic analysis, and so on.

In addition to traditional dogmatic methods, this dissertation adopts interdisciplinary approach, which has become invaluable in recent decades.

Accordingly, this thesis relies on interdisciplinary research to show that logical, rational, rule-bound judging is an illusion, and that legal rules can hardly constrain courts. In the first place, this dissertation draws its inspiration from the decision-making scholarship, which unites several disparate disciplines, including psychology, economics, neuroscience, statistics, philosophy, and others. It also uses insights from other disciplines, including economic analysis of law, legal anthropology, and rhetoric.

Review of the Literature and Novelty of the Thesis

Overall, research on judicial decision-making is still underdeveloped, the American legal scholarship being a notable exception. Legal scholarship in the Continent and other non-common law countries has shown little willingness to embrace interdisciplinary

developments. On the other hand, over the last few decades, this field of study has blossomed in the United States. American legal scholars have been prolific, in both theoretical analysis and empirical research. Not only legal scholars, but also political scientists, sociologists, anthropologists, and other social scientists in the US have analyzed judicial decision-making from several angles. Even here, however, most of the research has focused on the US Supreme Court. Other federal courts, and even more so state courts, received less attention. Moreover, most of the research has centered on attitudinal dimension of decision-making (i.e. political ideology of judges); research on psychology or economic analysis of judicial decision-making is still in the periphery. So it is fair to say that even in the United States, with a few exceptions, the research on judging has plenty of room for development. In many other countries, this field is awaiting to be picked up by legal scholars.

Judge Richard Posner's *How Judges Think* is arguably the most important work that appeared on the topic in the recent years.[545] Posner's work draws heavily on two fields: psychology and economic analysis of law. This dissertation likewise has been inspired by interdisciplinary insights from these two fields.

International law scholars are slow to catch up with their domestic law counterparts. There are, however, plenty of works analyzing personalities of international judges and their judicial philosophies. Some works also consider the role policy principles and judicial philosophy. Yet, overall no work comprehensively analyses judicial decision-making of international courts from multiple dimensions.

This dissertation also does not cover all possible dimensions of judicial decision-making. For example, it largely omits international relations or political science analysis of international courts or anthropological approaches.

Yet, it is the first work of its kind to combine the general empirical research on decision-making and insights from economic analysis of law (strategic theory) with traditional dogmatic analysis and apply all of this to international courts and international public law. And in doing so, it departs from most previous works that focus almost exclusively on dogmatic aspects of judicial decisions – argumentative patterns that international courts use to justify their decisions and types of legal rules they rely on.

It is also one of the first works to critically relate findings on judicial decision-making with the growing view that international courts are highly desirable and should therefore play the central role in interstate dispute settlement.

General Theories of Judging: Legal Realism & Legal Formalism

Legal realism and legal formalism are the two grand theories of judging that have their differences set around the importance of legal rules. For formalists, judging is a rule-bound activity. The judge, according to this view, uses logical reasoning downwards from rules to arrive at the outcome. In its more extreme versions, a judge is seen as an operator of a giant syllogism machine. Most formalists, however, do not subscribe to the

[545] Richard Posner, How Judges Think (Cambridge: Harvard University Press, 2008).

more extreme views of judging as merely deductive activity, but they nonetheless still regard formal legal rules as central to judicial decision-making.

The legal realists, however diverse they were in many other respects, had a twofold claim. First, legal rules, at least formal legal rules, do not determine outcomes of cases. Most realists agreed that legal rules play some role in judicial-decision making, but all realists argued other rules and factors play much more important role. And a judge, influenced by other rules and other factors, will make a decision before consulting law books. In essence, judges act like attorneys who first determine their client's position and then look for legal materials to support that position. Second, after deciding on other grounds than solely legal rules, judges will be able to justify the decision with formal rules because one can usually find competing legal grounds for almost any position.

Overall, one of the most significant legacies of legal realism is the understanding now shared by most contemporary legal scholars that judicial opinions do not reflect accurately the actual decision-making. It is of course possible that judges may decide cases on the basis of formal legal rules. Yet, it is equally possible that judges will decide on the basis of other grounds and then merely use formal rules as justification.

The legal realists differed in their emphasis on what factors influence judicial decision-making most heavily. Some realists claimed that personality of the judge counts most heavily; others emphasized the role of hunches; yet others focused on learned responses to the clusters of fact-situations. However, most legal realists did not deny the importance of rules; these rules, however, are not exclusively formal legal rules than can be found in law books. According to these realists, equally important if not more important rules are policy preferences embodied in a judicial philosophy of a particular judge.

Although the legal realists are often depicted as a movement that pushed a radical agenda and approached judging unscientifically, their ultimate goals were in fact the opposite: to increase certainty and stability of rule of law by uncovering real driving forces behind judicial decisions and make the study of judicial decision-making more scientific by embracing the empirical method. Even though the legal realists did not articulate their movement that way, it in fact could be considered as the first scientific theory of judging when it is compared to all the theories that came before it. Legal realism as a self-identified movement was short-lived, but its impact has been hefty and long-lasting.

Judicial Decision-making from Empirical Perspective

Legal realism, as a self-identified movement, faded away after a few decades and its place was taken by other jurisprudential schools, such as Critical Legal Studies or economic analysis of law. However, the question remained controversial whether judges use logical, rule-bound thinking in their decision-making.

In the last few decades, however, general empirical research on decision-making has blossomed and some of these findings have also been empirically tested on judges. Overall, the main lesson that we can draw from the empirical research is not to overrate distinctiveness of judicial decision-making. The myth surrounding judicial dispute

settlement is that judges, although otherwise ordinary people, rise above ordinary human reasoning capabilities once they sit on the bench, and thus are able to demonstrate almost supreme reasoning ability: make cold, rational, purely logical decisions, which are devoid of intuitions, experiential thinking, and any emotions.

The empirical research, especially on the role of heuristics in decision-making, has corroborated many of the original legal realist claims about decision-making. The empirical research demonstrates that judges are no different from ordinary research subjects in their preference for intuitive thinking over logical rule-based thinking, even when the intuitive thinking might lead to systematic decision errors. The heuristic decision-making predisposes them to make snap judgments even when only incomplete information is available. Moreover, judicial decision-making, like decision-making in general, is sensitive to numerous seemingly unimportant factors, even such trivial features as breakfast and lunch times.

This means that judges, like other people, will tend to make intuitive and snap judgments even when incomplete information is available; these snap judgments will sometimes be reconcilable on logical thinking and sometimes not. They will also tend to substitute easier questions for more difficult ones. And all of this is only a small number of ways of how automatic, intuitive thinking system differs from the formalistic ideals of judicial decision-making. While the rule-based thinking system is capable of overriding judgments of the automatic system, in practice it seldom does so. Yet, it is important to note that the intuitive system, by and large, will produce reasonable decisions most of the time.

Overall, even in theory, purely rational and logical decision-making is only tentatively possible. In the real world, however, purely rational and rule-bound decision-making is next to impossible.

In general, the empirical studies also show no substantial difference in overall decision-making quality between judges and typical experimental subjects. One reason why judges perform no better than ordinary subjects is because judging is a low-validity environment – it provides no instant feedback about the quality of decisions made and thus judges do not improve their decision-making skills. Legal training likewise does not provide lawyers with superior decision-making skills; the only reasoning skill that improves with legal training is conditional logic. Yet, a host of other indispensible reasoning and decision-making skills are either unaffected by legal training or are developed only insignificantly.

Judicial Creativity & Constraints

It could be argued that even if judges do not make initial decisions by following formal rules, legal rules nevertheless constrain judicial creativity. The prevailing formalistic view suggests that legal rules normally have a single and clear meaning. Therefore, it is only natural to expect that there is an objectively correct legal answer to any legal issue presented in a case. Some international tribunals went even further by asserting that judicial decision-making is no different from mathematical sciences.

Yet, such views are erroneous. First of all, this formalistic view ignores problems caused by the natural language, which is inherently ambiguous. Only formal systems,

characterized by the law of identity, could ensure definite conclusions and impose clear constraints.

Also, the selection effect will ensure that most disputes reaching international courts will center on ambiguous legal rules or ambiguous facts to begin with. According to the selection effect, developed in economic analysis of law, many cases are settled even before any lawsuit is filed. In domestic as well as in international litigations, there are many incentives to settle the dispute before it reaches the court. Because States are unwilling to litigate disputes where the chance of success is negligible, seldom will a dispute reach an international court if it is controlled by clear legal rules – straightforward treaty provisions, precise customary rules or clear precedents. Thus, if a case goes to the court, it indicates that both parties feel that legal rules provide at least some chance for them to win; so parties in a sense preselect disputes that revolve around ambiguous rules or ambiguous facts. Therefore, easy cases – i.e. those that revolve around straightforward legal rules – are settled out of court and courts are more likely to deal with hard cases.

When it comes to specific legal rules in public international law, international courts will usually be able to easily find some formal legal rule which will justify their preferred outcome. For example, the general rule of treaty interpretation, although it looks fixed on its face, in fact provides free choice of how to weight each element. Thus, two judges, even otherwise mechanically applying the same general rule of treaty interpretation, will arrive at two different conclusions because each of them will weigh differently different elements (text, object and purpose, intentions).

Likewise, customary international law will allow judges even more freedom synthesizing different rules. Although according to traditional theory there could be only one customary rule governing each issue, in practice each judge can synthesize several equally plausible rules. For one, in the international community consisting of almost two hundred States, one will seldom find consistent practice. More likely, one portion of States will act one way, another portion will act the opposite way, and the remainder will be silent. Moreover, different judges can rely on different sources of practice because there is disagreement, among other things, about what counts as State practice and practice of which organs of States. In the end, a judge is likely to make a choice based on his judicial philosophy or personal preferences.

Precedents, although much more important in practice than statutory provisions indicate, likewise do not constrain judicial creativity. International courts are not bound by the doctrine of binding precedent and thus, in theory at least, could easily disregard their previous decisions. Yet, as the agency model predicts, it is in the interest of international courts themselves to ensure an appearance of consistency and stability in judicial decision-making. The doctrine of precedent serves this function very well. Yet, international courts, while interested in appearance of consistency and stability, do not in fact want to be constrained by the precedent. Therefore, courts will proclaim that they abide by their previous decisions, but in practice will use various juridical techniques for distinguishing present case from the precedents. This flexibility is easy to achieve in practice. First, due to the selection effect, most cases call for analogical reasoning and not true precedential reasoning. Second, the ambiguity of *ratio decidendi* makes it easy to distinguish the present case even if the previous case on its face is very similar.

Although legal rules are clearly incapable of constraining international courts, it does not mean they are meaningless. A more accurate view is that concrete cases cannot be decided by general legal rules – but also without them. All legal rules operate more by persuasion than constraint: if a judge is not convinced that a legal rule is fair, adequate, precise, will produce economically efficient results, and so forth, the judge will find a way to choose a different rule, either by accepting the different rule in principle or by selecting only those facts which will fit the other rule. So overall, legal rules matter, but they are only one of the several other factors.

Other constraints, institutional or external, are likewise usually more imaginable than real. Collegiality is important, but it is very unlikely to bind judges to legal rules if they otherwise are not inclined to do so. Moreover, it is possible that the deliberative process may lock judges into their initial positions and only exacerbate their confirmation bias. Furthermore, it is possible that because of conformity, groupthink, and group polarization, collegiality and deliberative process could be inferior to judicial decisions made individually.

Of course, it would be wrong to think in binary terms about constraint of legal rules, i.e. that legal rules either constrain totally or do not constraining at all. Instead, the question is about the scope – how much they constrain. And even in public international law, where ambiguity is the trademark of the legal system, international courts will seldom make outlandish decisions. But international courts can easily find several equally plausible legal rules applicable to a case; which legal rule will carry the day will likely depend on the preferred outcome; and the preferred outcome will likely depend on the policy preferences and other non-legalistic grounds.

More importantly, it is wrong to think about judicial decision-making in mechanistic and simplistic terms – i.e. that either a specific factor has a total influence or no influence at all or that either it is one factor or another. In reality, all factors play some role - some more, some less. Internal factors interact amongst themselves and they also react with the external ones. In some cases they will converge, in others they will diverge. Any schematic and static view of influences and constraints comes with a guarantee of being overly simplistic.

Policy Reasoning in International Courts & Judicial Law-Making

Legal instrumentalism, or policy reasoning, maintains that judicial decision-making should be based not on formal rules (backward looking reasoning), but on consequences of the judicial decision (forward-looking). Legal instrumentalism is a broad category and it encompasses different types of policy arguments.

Most formalists are not so much afraid of the idea that the law is only a means to an end, but that judicial creativity will become uncontrollable and will ultimately undermine the rule of law. This concern is of course legitimate and it has never been completely put to rest by proponents of instrumentalism. For instrumentalists, however, this danger is less real than the damage that would be done by blindly applying legal rules.

While written opinions of international courts tend to rely more on rule-reasoning, there are also plenty of examples of policy reasoning, including policy reasons of judicial

administration, economic efficiency, and normative arguments. More importantly, policy reasoning often plays a much more important role than it can be seen from written opinions. Different international courts will rely on different policy reasons, so any generalizations as to specific policy reasons will be inaccurate.

Yet, one major reason for legal instrumentalism, common to many courts whose jurisdictional foundations resemble arbitration, arises because of the need for conciliatory justice, which in turn which in turn can be explained by the agency model. Conciliatory justice "seeks above all to settle the dispute by affording minimal satisfaction to both parties, if not making them meet half-way". There are fairly intuitive reasons why international courts use conciliatory justice. On average, it increases party satisfaction and reduces risks of going to the court, increases likelihood of judgment implementation, and increases likelihood of judicial consensus. Also, it probably allows courts to accept politically sensitive cases. Another way to understand this phenomenon is through the agency model because it is always in the interests of arbitrators to have a balanced reputation:

> An arbitrator who gets a reputation for favoring one side in a class of cases – disputes between investors, employment, etc – will be unacceptable to one of the parties in any future dispute. Therefore, arbitrators tend to "split the difference" in their awards – try to give each side a partial victory. This makes more difficult for parties on either side to infer a favoritism.[546]

This is especially relevant to international courts because their jurisdictional foundations resemble more arbitral tribunals than domestic courts.

Also, policy reasoning is not only inherent part of actual decision-making, but its absence from written opinions can have unfortunate consequences, especially what we call the Beagle Channel effect.

All judicial opinions aim to persuade a certain audience. For example, the audience of the ICJ and other courts comprise litigants, the professional legal elite (academics and practicing international lawyers), national governments, various international actors like international organizations and non-governmental groups, and others. Thus, a prudent court will use such style of judicial opinion that best addresses the court's audience. For most international courts, it means using variety of argumentative moves – not just formalistic reasoning which pretends to be a product of perfect syllogism. Regarding international courts, a large portion of judicial audience looks more favorably at judicial opinion which is additionally supported with policy reasoning than a typical dry Eurocentric style of judgment. Such desiccated style alienates many non-Eurocentric States.

Reliance on policy reasoning leads to an inevitable conclusion that judicial law making is unavoidable. The possibility of judicial law-making does not mean that courts become legislators – it "is of course an exaggeration to suggest that the Court is a legislator; it is also an exaggeration to assert that it cannot create any law at all."[547] Also, most judges do not differentiate, in psychological terms at least, between application

[546] Posner, How Judges Think, pp. 127-128.

[547] Mohammed Shahabuddeen, Precedent in the World Court (Cambridge: Cambridge University Press, 1996) p. 86.

of rules and their own preferences; judges usually blend two inquiries – the legalist (applying legal rules) and the legislative.

Judicial law making is not necessarily against the mandate of international courts. True, none of the statutes of international courts says that they are established to engage in judicial law-making. Yet, the judicial role is not always reflected in the statutes. For example, international courts have inherent powers which are not reflected in statutes. Moreover, as Lauterpacht showed, the judicial role in development of international law may be explained by a sociological concept of "heterogeny of aims." According to this concept, an institution may be created to achieve one set of purposes, but it grows to fulfill a different set of purposes.[548]

Many judges and commentators have also emphasized one reason why development of international law is inseparable from international courts – the absence of legislature in international law and the resulting gaps in the legal system which only international courts are able to fill when States do not agree on precise expression of legal rules.

In this context, it is hard to overrate the importance of judicial philosophy. And every judge has got one. Professor Paul Freund was able to put it even more sharply:

> Much of law is designed to avoid the necessity for the judge to reach what Holmes called his "can't helps," his ultimate convictions or values. The force of precedent, the close applicability of statute law, the separation of powers, legal preemptions, statutes of limitations, rules of pleading and evidence, and above all the pragmatic assessments of fact that point to one result whichever ultimate values be assumed, all enable the judge in most cases to stop short of a resort to his personal standards. When these prove unavailing, as is more likely in the case of courts of last resort at the frontiers of the law, and most likely in a supreme constitutional court, the judge necessarily resorts to his own scheme of values. It may therefore be said that *the most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none*.[549]

Judicial Decision-making and Its Implications for International Dispute Settlement System

International dispute settlement system is strained. Interstate disputes naturally proliferate as international relations continue spreading out. For many legal scholars, international courts are the promised land of international dispute settlement. Like dispute settlement in domestic legal systems where courts occupy central place, so too international dispute settlement can revolve around international courts:[550]

For many international lawyers – but especially those molded by the European heritage of legal formalism – progress in the development of world law is best evidenced in the growth of international adjudication. . . . *Adjudication is not only the ideal, most peaceful, method of settling inter-state disputes,* but also an opportunity for jurists to contribute to doctrinal development in a prestigious non-political institution.

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[548] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons Limited, 1958) p. 5.

[549] Paul Freund, Social Justice and the Law, in Richard Brandt (ed.) Social Justice (Englewood Cliffs: Prentice-Hall, 1962) p. 93.

[550] Douglas M. Johnston, The Historical Foundations of World Order: The Tower and the Arena (Leiden: Martinus Nijhoff Publishers, 2008) p. 128-129 (emphasis added).

Yet, such views are misguided. This flawed obsession with adjudication as the omnipotent dispute settlement method is largely due to various flawed beliefs about judicial decision-making in international courts.

First, legal scholars usually conflate settlement of disputes with settlement of legal issues. Adjudication often fails to perform the main function of dispute settlement – settle the underlying dispute and restore good relations. In practice, adjudication is the last resort after all else fails; thus, it is not the primary method of dispute settlement, but rather a fallback option. Further, in international relations, bringing a case against another State is often viewed as unfriendly act and the added bitterness seldom helps settlement of the underlying dispute.

Second, it is the promise of right over might – international law as alternative to power politics. Thus, the triumph of international courts would mean the triumph of law over politics. The fantasy that adjudication ignores political considerations is driven largely by a flawed understanding of judicial decision-making: the formalistic view that because courts only apply legal rules and nothing else, that they are not swayed by political considerations. The "right over might" also ignores the fact that adjudication requires significant resources; in the WTO, for one, it seems that judicialization only made matters worse for the weak parties.

Third, it is the fallacy of farfetched domestic analogy: focusing on features that international courts share with their domestic counterparts and disregarding enormous differences. One of these is the belief that international courts provide finality through the binding decisions. A related misconception relates to overrated remedial powers of international courts. Empirical research has also shown that sanctions, formal rulings, or other forms of public pressure often have counterintuitive effects. For example, empirical studies of compliance with the GATT/WTO rulings from 1948 through 1999 show that a defendant is less likely to make trade concessions after the formal ruling is issued. In other words, a formal ruling against the defendant makes it less likely that the defendant will make trade concessions to the complainant.

Fourth, it is the composition fallacy: legal scholars find several isolated examples of successful adjudication and infer that adjudication in general can be successful as the overall method of dispute settlement. International courts are in fact successful in several fields, like human rights and trade disputes; they are also highly successful in certain regions, particularly Europe. But it does not follow that international courts have universal appeal.

Overall, as the former President of the ICJ Sir Robert Jennings puts it, "adjudication is a technical, intellectual, artificial method".[551] And as a technical and artificial method, it should never be considered as the omnipotent method of dispute settlement.

All of this can explain, largely, why governments are not that enthusiastic about adjudication as the omnipotent dispute settlement method. For States, international adjudication is a highly specialized dispute settlement method, which is suitable only for small number of specific disputes. States themselves usually want to decide on case-

[551] Robert Y. Jennings, The Proper Work and Purposes of the International Court of Justice, in A.S. Muller, D. Raic, J.M. Thuránszky (eds.), The International Court of Justice: Its Future Role after Fifty Years (The Hague; Boston: Nijhoff, 1997) p. 36.

by-case basis which disputes are suitable for adjudication. Another major reason is that governments find judicial decision-making unpredictable. Probably because they realize that it is hard to predict even for lawyers how an international court is likely to decide a case. If it is hard for international lawyers, then most diplomats and other public officials understandably are even less inclined to rely on international courts.

It also means that international community would get a better payoff if it invested in development of non-adjudicatory dispute settlement, such as conciliation, at least as much as legal scholars want it to invest in international courts. Diplomatic methods like conciliation can provide everything that international courts provide, except binding judgment and legal remedies. However, its success depends on how much both legal scholars and policy-makers invest their time and effort into its development, especially permanent institutional conciliation and similar methods. So far, the fixation on international courts has had the unfortunate effect of disregarding the viable alternatives.

Of course, conciliation and other diplomatic methods will have little impact on development of international law and this is one of the main reasons why international lawyers have traditionally focused on adjudication, especially permanent courts. No doubt, development of international law by international courts is inevitable and invaluable.

Yet, just because adjudication is good for development of law, it does not mean that it is also good for dispute settlement. And to suggest that a government should consider making its disputes more legalized and complicated because it would help the development of international law is like suggesting that a patient should consider developing a rare disease because it would encourage the progress of medicine.

None of this means that international courts are of little use. International courts are highly successful in some fields of international law, especially in the fields of technical expertise, such as maritime boundaries, territorial delimitation, and economic disputes. It is arguably preferable that international adjudication would be developed further along these lines. Yet, international adjudication, a technical and specialized dispute settlement method, should not be viewed as the panacea for all maladies of international relations.

Approbation of the Thesis

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Publications

The research articles based on this thesis have been published in the following journals:

1. Vitalius Tumonis, The Complications of Conciliatory Judicial Reasoning: Causation Standards and Underlying Policies of State Responsibility, 11 Baltic Yearbook of International Law 135 (2011).
2. Vitalius Tumonis, Judicial Creativity and Constraint of Legal Rules: Dueling Cannons of International Law, 20 University of Miami International & Comparative Law Review (2012).

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TEISMINIŲ SPRENDIMŲ PRIĖMIMAS: TARPDISCIPLININĖ ANALIZĖ SU YPATINGA NUORODA Į TARPTAUTINIUS TEISMUS

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Santrauka

Įžanga ir tyrimo objektas

Rosalyn Higgins, kuri galiausiai tapo Tarptautinio Teisingumo Teismo pirmininke, štai taip apibūdino tradicinį supratimą apie teisminį sprendimų priėmimą tarptautiniuose teismuose:

> „Bet kuriuo metu teisėjo pareiga yra „taikyti tokia teisę kaip jis ją aptinka". Šis požiūris, kaip matysime, remiasi tikėjimu, jog teisė yra „taisyklės"; jog šiuos taisyklės yra „neutralios"; jog teismai yra objektyvūs; ir pirminė pareiga yra „taikyti" o ne „kurti" teisines taisykles. Tačiau įmanoma įsivaizduoti fundamentaliai kitokią tarptautinę teisę ..."[552]

Ši disertacija ir analizuoja visiškai kitokį teisminių sprendimų priėmimo supratimą. Centrinis šios disertacijos klausimas yra kiek teisminių sprendimų priėmimas priklauso nuo samprotavimo teisinių taisyklių pagrindu. Ar teisėjai, nustatę bylos faktus, viso labo suras reikiamas teisines taisykles ir tuomet priims sprendimą? O gal lygtis pagal kurią sprendimas lygus faktams plius teisinėms taisyklėms yra viso labo iliuzija? Kas jeigu vietoje to, jog remtis teisinėmis taisyklėmis ir naudotis logika kad išspręsti kompleksines teisines problemas, teisėjai linkę pasikliauti intuityviu mąstymu – euristika arba praktiniais sprendimo metodais? Kas jeigu euristinis sprendimų priėmimas taip pat dažnai priveda teisėjus prie neracionalių sprendimų priėmimo modelių? Kas jeigu vietoje to, jog teisėjai naudotųsi teisinėmis taisyklėmis tam kad priimtų sprendimus, jie naudojasi tomis taisyklėmis tik tam kad pateisintų savo sprendimus bet ne priimtų juos tuo pagrindu? Kas jeigu teisėjai naudotųsi ne tik formaliomis teisinėmis taisyklėmis, bet ir pasekminiais ar instrumentalistiniais argumentais kurie nėra įtvirtinti jokiose formaliuose teisiniuose šaltiniuose?

Šiuolaikiniai tarpdisciplininiai tyrimai dabar mums leidžia daug geriau atsakyti į šiuos klausimus, tačiau patys klausimai yra sąlyginai seni. Jie buvo debatų centre tarp taip vadinamų teisės formalistų ir teisės realistų. Teisės realizmas, judėjimas atsiradęs 1920-ais ir 1930-ais metais JAV, metė iššūkį vyravusiam požiūriui, jog teisėjai yra racionalūs sprendimų priėmėjai, kurie viso labo taiko bylos faktams teisines taisykles aptinkamas formaliuose teisės šaltiniuose. Realistai nebuvo vienalytė grupė – tarp kai kurių realistų buvo daugiau skirtumų nei tarp kai kurių realistų ir taip vadinamų formalistų. Nepaisant to, apskritai realistai teigė, jog dažnai teisėjai priima sprendimą apie bylos baigtį dar iki tol, kol jie imasi analizuoti teisines taisykles taikytinas bylai; dažnai jie vadovaujasi instrumentalistiniais principais ir sukuria naujus precedentus; kai kurie realistai net įrodinėjo, jog teisėjo asmenybė turi daugiau įtakos nei formalios teisinės taisyklės.

Kita vertus, teisiniams formalistams teisinės taisyklės ir loginis protavimas yra teisminių sprendimų priėmimo esmė. Kraštutinėse teisinio formalizmo versijose, teisinės

[552] Rosalyn Higgins, Policy Considerations and the International Judicial Process, 17 International and Comparative Law Quarterly 58 (1968) p. 58.

taisyklės yra Alfa ir Omega – teisminio sprendimų priėmimo pradžia ir pabaiga. Atitinkamai, teisinio formalizmo požiūris į sprendimų priėmimą atmeta intuityvų sprendimų priėmimą, instrumentalistinius svarstymus ir daugybę kitų faktorių.

Teisinio realizmo įtaka pasireiškė ne tik JAV ir ne tik kaip bendroji teisėjavimo teorija. Galima teigti, jog dauguma tarptautinės teisės teorijų yra bendrųjų teisinių teorijų atmainos. Atitinkamai, teisinio formalizmo ir teisinio realizmo teorijos susikirto ne tik JAV ir kai kuriuose kitose šalyse kur teisinis realizmas buvo laukiamas, bet ir tarptautinėje arenoje. Douglas Johnston'as visą tai puikiai apibendrino savo *summa* skirtai tarptautinės teisės raidai:

> Teisinio formalizmo perspektyva buvo įsitvirtinusi tarp Vakarų teisininkų 1905 metais, net ir bendrosios teisės barikadose Anglo-Amerikiečių teisinėse kultūrose. Tačiau Jungtinėms Amerikos Valstijoms tapus dominuojančia pasaulio jėga pirmoje XX amžiaus pusėje, kultūrinis susiskaldymas tarptautinės teisės bendruomenėje tapo vis pastebimesnis. Nuo to laiko kai Amerikiečių teisininkai tapo įtakingi visuose tarptautinės teisės sektoriuose, Europos teisinio formalizmo idealas nuolatos turėjo kovoti su visiškai skirtingu teisės modeliu kurį sukūrė *Amerikietiškas teisinis realizmas*. Šio kultūrinio susiskaldymo intensyvumas dabar yra intensyvių debatų objektas abiejose Atlanto pusėse.[553]

Darbo tikslas ir ginamieji teiginiai

Šio disertacinio darbo pagrindinis tikslas yra nustatyti įvairių teisminio sprendimų priėmimo veiksnių svarbą ir ypatingai ar tradicinis sprendimų priėmimo modelis, paremtas loginiu protavimu ir teisinėmis taisyklėmis, gali paaiškinti tikrąjį sprendimų priėmimą.

Šios disertacijos ginamieji teiginiai yra šie:

1. Tiriant tikrąjį teisminį sprendimų priėmimą, teismo nutartis (t.y. išoriniai sprendimai ar nuosprendžiai) nebūtinai atspindi faktinį sprendimo priėmimo procesą ir lemtingus sprendimo priėmimo veiksnius. Pavyzdžiui, teisėjai gali priimti sprendimą dėl bylos baigties visiškai nesivadovaudami teisinėmis taisyklėmis ir tik tuomet naudotis formaliomis taisyklėmis, tik tam kad pateisinti savo sprendimą.

2. Teisėjai, kaip ir visi žmonės, teikia pirmenybę ne loginiam ir taisyklėmis paremtam samprotavimui, o intuityviems sprendimams. Nors loginis samprotavimas gali pakeisti sprendimus priimtus intuityviu pagrindu, tai praktikoje nutiks retai. Nepaisant to, intuityvus sprendimų priėmimas yra itin produktyvus ir dažniausiai garantuos pagrįstus sprendimus. Kita vertus, tam tikruose situacijose intuityvus mąstymas paskatins sistemines sprendimo priėmimo klaidas. Be to, priešingai formalistiniams idealams, net tuomet kai sprendimų priėmimas vadovausis loginiu samprotavimu, jis bus neatsiejamas nuo emocijų.

3. Apskritai, teisinis lavinimas ir teisminė patirtis savaime nesuteikia teisėjams išskirtinių sprendimo priėmimo įgūdžių ir atitinkamai populiari idėja, jog teisėjai turi ekspertinius sprendimo priėmimo įgūdžius, yra klaidinga.

4. Jei teisėjai priims sprendimus kitais pagrindais nei formalios teisinės taisyklės, formalios taisyklės nesuvaržys teisminio kūrybingumo. Pirmiausiai, atrankos efektas

[553] Douglas M. Johnston, The Historical Foundations of World Order: The Tower and the Arena (Leiden: Martinus Nijhoff Publishers, 2008) p. 687.

užtikrins, jog dauguma ginčų kurie pasieks tarptautinius teismus bus paremti dviprasmiškais faktais arba neaiškiomis teisinėmis taisyklėmis. Be to, teisėjams retai iškils sunkumų pateisinant sprendimus formaliomis taisyklėmis todėl kad jie beveik visuomet suras tarp konkuruojančių teisinių taisyklių kokį nors teisinį pagrindą, kuris pateisins jų norimą sprendimą. Tai bus įmanoma nes tarptautinė viešoji teisė yra dar labiau dviprasmišką nei bendrosios teisės sistemos.

5. Kiti išoriniai ar instituciniai suvaržymai taip pat faktiškai nesuvaržys teisminio kūrybingumo. Kolegialumas ir aptariamasis procesas gali tam tikrais atvejais suvaržyti, tačiau daugeliu kitu atveju jis gali neturėti jokio poveikio. Vienintelis svarus saugiklis prieš kaprizingus sprendimus remsis vidiniais suvaržymais, kaip kad teisminių normų įsisavinimas ir teisėjų teisminė filosofija.

6. Konkretūs lemiami sprendimo priėmimo veiksniai skirsis kiekvienoje byloje. Kai kuriuose bylose visiškai įmanoma, jog formalios teisinės taisyklės iš tikrųjų nulems bylos baigtį. Tačiau apskritai tarptautiniai teismai bus veikiami taip pat stipriai, jeigu ne stipriau, įvairių instrumentalistinių principų ir ypatingai sutaikinamojo teisingumo interesais. Visa tai taip pat reiškia, jog teisminė teisėkūra tarptautiniuose teismuose yra neišvengiama.

7. Instrumentalistinis argumentavimas yra ne tik neišvengiamas aiškinant tikruosius sprendimo priėmimo veiksnius, bet turėtų užimti svarbią vietą ir teismų nutartyse nes instrumentalistinių argumentų nebuvimas gali atstumti nemažą dalį tarptautinių teismų auditorijos.

8. Įsivyraujantis požiūris, jog tarptautiniai teismai turėtų užimti centrinį vaidmenį tarpvalstybiniame ginčų sprendime yra ydingas nes remiasi klaidingu supratimu apie sprendimų priėmimą tarptautiniuose teismuose. Vietoje to, jog fiksuotųsi ties tarptautiniais teismais, teisės mokslininkai turėtų susitaikyti su ribotu tarptautinių teismų vaidmeniu ir skirti bent tiek pat dėmesio kitoms tarptautinių ginčų sprendimų formoms, kaip kad sutaikinimas.

Metodologija

Šis darbas remiasi įprastais analitiniais metodais, kaip kad loginė ir lingvistinė analizė, lyginamoji ir sisteminė analizė, ir panašiai.

Be tradicinių dogmatinių metodų, ši disertacija taip remiasi tarpdisciplininėmis įžvalgomis, kuriuos pastaruoju laikotarpiu tapo neįkainojamomis.

Atitinkamai, ši disertacija remiasi tarpdisciplininiais darbais tam kad parodytų, jog griežtai logiškas, racionalus, taisyklėmis paremtas sprendimų priėmimas yra iliuzija, ir teisinės taisyklės negali suvaržyti teisminio kūrybingumo. Pirmiausiai ši disertacija remiasi empiriniais darbais iš taip vadinamos sprendimų priėmimo teorijos – tarpdisciplininės srities kuri vienija psichologiją, ekonomiką, neuromokslą, statistiką, filosofiją, ir kitas šakas. Taip pat ši disertacija remiasi įžvalgomis iš kitų disciplinų, ypatingai ekonominės teisės analizės ir šiek tiek retorikos bei teisinės antropologijos.

Literatūros apžvalga ir darbo naujumas

Apskritai, teisminio sprendimų priėmimo literatūra yra ganėtinai neišsivysčiusi, nors JAV teisės mokslininkai sudaro išimtį šioje srityje. Europos teisės mokslininkai

ir teisės mokslininkai kitose civilinės teisės tradicijos šalyse kol kas šiai sričiai skyrė itin mažai dėmesio, ir ypatingai parodė mažai pasiryžimo naudotis tarpdisciplinine pažanga. Kita vertus, per pastaruosius pora dešimtmečių ši sritis suklestėjo JAV teisės moksle, tiek teorinėje analizėje, tiek ir empiriniuose tyrimuose. Ir ne tik teisės mokslininkai, bet ir politikos mokslų, sociologijos, antropologijos, ir kitų socialinių mokslų atstovai bandė analizuoti teisminių sprendimų priėmimą iš įvairių perspektyvų. Tačiau netgi JAV mokslininkai, nepaisant jų išskirtinio produktyvumo, daugiausiai analizavo JAV Aukščiausiojo Teismo sprendimų priėmimą. Kiti federaliniai teismai, ir juo labiau valstijų teismai, susilaukė daug mažiau dėmesio. Be to, didžioji dalis tyrimų analizavo sprendimų priėmimo politinės ideologijos dimensiją. Tyrimai iš psichologinės ar ekonominės teisės analizės perspektyvos yra nepalyginamai mažiau išvystyti. Todėl galima pagrįstai teigti, kad net ir JAV, su keliom išimtim, vis dar turi daugybę erdvės vystymuisi šioje srityje. Daugybėje kitų šalių ir tarptautinės teisės moksle, ši sritis dar laukia kol bus deramai atrasta teisės mokslininkų.

Teisėjo Richardo Posnerio *How Judges Think* yra ko gero svarbiausias darbas šioje srityje pasirodęs pastaraisiais metais.[554] Posner'io darbas daugiausiai remiasi dviem disciplinomis: psichologija ir ekonomine teisės analize. Ši disertacija, be tradicinės dogmatinės analizės, yra irgi panašiai įkvėpta daugiausiai šių dviejų disciplinų.

Tarptautinės teisės mokslininkai, kaip ir dauguma kitų mokslininkų už JAV ribų, kol kas skyrė nepakankamai dėmesio šiai sričiai. Tačiau yra pakankamai nemažai darbų analizuojančių tarptautinių teisėjų asmenybes ir jų teismines filosofijas. Kai kurie darbai taip pat analizuoja instrumentalistinių principų įtaką ir bendrąją teisminę filosofiją. Tačiau nėra nei vieno darbo išsamiai nagrinėjančio tarptautinių teismų sprendimų priėmimą iš įvairių perspektyvų.

Ši disertacija taip pat neapima visų įmanomų teisminio sprendimo priėmimo dimensijų. Pavyzdžiui, joje sąlyginai mažai remiamasi moksliniais tyrimais iš tarptautinių santykių ir politikos mokslų ar antropologinių tyrimų.

Tačiau šis darbas išsiskiria tuo, jog sujungia tradicinę dogmatinę analize su įžvalgomis iš empirinių tyrimų iš sprendimų priėmimų teorijos ir ekonominės teisės analize (t.y. strateginiu modeliu) ir visą tai pritaiko tarptautiniams teismams ir tarptautinei teisei. Taip pat šis darbas išsiskiria iš visų ankstesnių tarptautinės teisės darbų tuo, jog jie beveik išimtinai analizavo dogmatinius tarptautinių sprendimų aspektus, kaip kad formalius pagrindimo modelius kuriais remiasi tarptautiniai teismai.

Be to, šis darbas yra vienas iš pirmųjų kuris remdamasis išvadomis apie sprendimų priėmimą tarptautiniuose teismuose kritiškai vertina įsivyraujantį požiūrį, jog tarptautiniai teismai yra itin pageidaujami ir todėl turėtų užimti centrinį vaidmenį tarpvalstybiniame ginčų sprendime.

Bendrosios teisėjavimo teorijos: teisinis realizmas ir teisinis formalizmas

Teisinių taisyklių svarba yra centrinis skirtumas tarp dviejų didžiųjų teisminių sprendimų priėmimų teorijų – teisinio realizmo ir teisinio formalizmo. Anot formalistų, teisėjai vadovaujasi loginiu mąstymu tam kad prieitų prie sprendimo nuo teisinių

[554] Richard Posner, How Judges Think (Cambridge: Harvard University Press, 2008).

taisyklių iki bylos baigties. Kraštutinėse formalizmo versijose, teisėjo vaidmuo yra panašus į didelės silogizmo mašinos operatorių. Dauguma formalistų nesilaiko požiūrio, jog teisėjavimas yra viso labo deduktyvus darbas; tačiau nepaisant to, dauguma formalistų laiko, jog formalios teisinės taisyklės yra teisminių sprendimų priėmimo centrinė dalis.

Teisiniai realistai, nepaisant jų įvairiapusiškumo, įrodinėjo dvejopą tezę. Pirmiausiai, teisinės taisyklės, arba bent jau formalios teisinės taisyklės, nenulemia bylos baigties. Dauguma realistų sutiko, jog teisinės taisyklės vaidina tam tikrą vaidmenį teisminiame sprendimų priėmime, tačiau visi realistai įrodinėjo, jog kitokios taisyklės ir kitokie veiksniai vaidina daug svarbesnį vaidmenį. Atitinkamai teisėjai, paveikti kitų taisyklių ir kitų veiksnių, paprastai priims sprendimą dėl bylos baigties dar iki tol, kol jie nustatys taikytinas formalias teisines taisykles. Iš esmės teisėjai veikia panašiai kaip advokatai, kurie pirmiausiai nustato kliento poziciją ir tuomet ieško teisinių taisyklių kurios palaikytų tą poziciją. Antra, po to kai jie priims sprendimą kitu pagrindu nei formalios teisinės taisyklės, teisėjai beveik visuomet sugebės pateisinti tą sprendimą formalių taisyklių pagrindu; tai įmanoma, nes teisinėje sistemoje dažnai yra konkuruojančios taisyklės taikytinos tai pačiai situacijai.

Apskritai, vienas iš svarbiausių teisinio realizmo palikimų yra supratimas, jog teisminiai sprendimai (nutartys, nuosprendžiai) paprastai neatspindi tikrojo teisminių sprendimų priėmimo; dabar šį požiūrį pripažįsta dauguma mokslininkų net ir nepritariančių kitiems teisinio realizmo teiginiams.

Skirtingi teisės realistai akcentavo skirtingus veiksnius įtakojančius sprendimų priėmimą. Kai kurie realistai teigė, jog teisėjų asmenybė yra svarbiausias veiksnys; kiti akcentavo nuojautos svarbą; dar kiti akcentavo išvystytą intuityvų atsiliepimą į tam tikras faktų grupes. Apskritai, dauguma realistų neneigė teisinių taisyklių svarbą; tačiau teisinės taisyklės, anot realistų, yra ne išimtinai formalios teisinės taisyklės aptinkamos formaliuose teisės šaltiniuose. Anot realistų, neformalios taisyklės yra lygiai tiek pat svarbios jei ne svarbesnės; dauguma šių taisyklių yra instrumentalistiniai principai atspindėti kiekvieno teisėjo teisminėje filosofijoje.

Nors teisės realizmas yra dažnai vaizduojamas kaip judėjimas palaikęs kraštutines pozicijas ir nagrinėjęs teisėjavimą nemoksliškai, tačiau jo tikrieji tikslai buvo visiškai priešingi: sustiprinti teisės stabilumą ir aiškumą išsiaiškinant tikruosius veiksnius lemiančius teismų sprendimus ir nagrinėti sprendimų priėmimą moksliškai remiantis empiriniu metodu. Ir nors teisės realistai neartikuliavo savo judėjimo tokiu būdu, tačiau jis galėtų būti laikomas pirmąja moksline teisėjavimo teorija lyginant su visomis kitomis prieš tai buvusiomis teorijomis. Teisinis realizmas, kaip sąmoningai save identifikavęs judėjimas, gyvavo neilgai, tačiau jo poveikis buvo stipus ir ilgai trunkantis.

Teisminis sprendimų priėmimas iš empirinės perspektyvos

Teisinio realizmo judėjimui išnykus ir jo vietai užėmus kitoms analitinėms teisės mokykloms, klausimas išliko kontroversiškas ar teisėjai, priimdami sprendimus, vadovaujasi loginiu ir taisyklėmis paremtu mąstymu.

Per pastaruosius porą dešimtmečių, suklestėjus empiriniams sprendimų priėmimo tyrimams, kai kurie teisminių sprendimų priėmimo aspektai buvo empiriškai ištirti.

Apskritai, viena pagrindinių išvadų kurią galima padaryti empirinių tyrimų pagrindu yra nepervertinti teisminių sprendimų priėmimo išskirtinumo. Mitas supantis teisminius sprendimus yra, jog teisėjai, visais kitais atvejais būdami įprasti žmonės, sugeba pakilti virš eilinių žmonių sprendimų priėmimo galimybių iškart kai tik imasi teisėjo vaidmens ir atitinkamai sugeba vadovautis neeilinėmis protavimo galimybėmis: priimti šaltus, racionalius, grynai logiškus sprendimus, kurie atsieti nuo intuicijų, patirtimi pagrįstų sprendimų, ir bet kokių emocijų.

Empiriniai tyrimai, ypatingai dėl euristikos vaidmens sprendimų priėmime, patvirtino daugumą teisinių realistų tezių apie sprendimų priėmimą. Empiriniai tyrimai parodė, jog teisėjai nesiskiria niekuo nuo eilinių tyrimo subjektų savo polinkiu remtis intuityviais sprendimais labiau nei loginiu mąstymu, net ir tais atvejais kai intuityvus mąstymas sistemiškai priveda prie klaidingų sprendimų. Euristinis sprendimų priėmimas taip pat reiškia, jog teisėjai bus linkę priimti staigius, logiškai neapgalvotus sprendimus net tuo atveju, kai jiems bus prieinama tik nepilna informacija. Be to, teisminis sprendimų priėmimas, kaip kad bendras sprendimų priėmimas, priklauso nuo daugybės tariamai nesvarbių faktorių, įskaitant tokius tariamai nereikšmingus veiksnius kaip pusryčių ir pietų metas.

Visa tai reiškia, jog teisėjai dažniausiai priims intuityvius sprendimus; šie intuityvūs sprendimai kartais bus suderinami su loginiu mąstymu ir kartais ne. Teisėjai taip pat bus linkę nesąmoningai sukeisti sunkesnius klausimus su lengvesniais. Ir visa tai yra tik maža dalis visų aspektų kaip automatinis, intuityvus sprendimų priėmimas skiriasi nuo formalistinių idealų. Nors loginė ir taisyklėmis paremta sprendimų sistema gali pakeisti intuityvius sprendimus, praktikoje tai įvyksta gana retai. Tačiau būtina pastebėti, jog intuityvi sistema, dažniausiai priims pagrįstus sprendimus.

Apskritai, net ir grynoje teorijoje, grynai racionalus ir loginis sprendimų priėmimas yra tik iš dalies įmanomas. Realiame pasaulyje, grynai loginis ir taisyklėmis paremtas sprendimų priėmimas yra iš esmės neįmanomas.

Apskritai, empiriniai tyrimai neparodė esminių sprendimų priėmimo kokybės skirtumų tarp teisėjų ir eilinių tyrimų subjektų. Viena iš priežasčių kodėl teisėjavimo patirtis pati savaime teisėjams nesuteikia geresnių sprendimo priėmimo įgūdžių yra todėl, kad teisėjavimas yra silpno svarumo aplinka – t.y. nėra skubaus grįžtamojo ryšio apie priimtų sprendimų kokybę. Teisinis lavinimas taip pat nesuformuoja geresnių sprendimo priėmimo įgūdžio. Vienintelis protavimo įgūdis kurį patobulina teisinis lavinimas yra sąlyginė logika. Tačiau daugybė kitų būtinų protavimo ir sprendimo priėmimo įgūdžių arba apskritai nepagerėja dėl teisinio lavinimo arba jų pagerėjimas yra neženklus.

Teisminis kūrybingumas ir suvaržymai

Net jei teisėjai yra linkę priimti pirminius sprendimus ne teisinių taisyklių pagrindu, teisinės taisyklės vis dėl to galėtų suvaržyti teisminį kūrybingumą. Vyraujantis formalistinis požiūris teigia, jog teisinės taisyklės paprastai turi aiškią ir vienintelę prasmę. Atitinkamai, galima pagrįstai tikėtis, jog egzistuoja objektyviai teisingai teisinis atsakymas bet kuriam klausimui byloje. Kai kurie tarptautiniai tribunolai pasisakė dar stipriau teigdami, jog teisminis sprendimų priėmimas savo tikslumu iš esmės nesiskiria nuo matematikos mokslų.

Tačiau šis požiūris yra klaidingas. Pirmiausiai šis formalistinis požiūris ignoruoja problemas kurios kyla dėl natūralios kalbos, kuri yra natūraliai dviprasmiška. Tik formalios loginės sistemos, pasižyminčios tapatumo dėsniu, užtikrina neabejotinas išvadas ir nustato aiškius apribojimus.

Be to, atrankos efektas užtikrina, jog dauguma ginčų, kurie pasiekia tarptautinius teismus, koncentruosis ties dviprasmiškais faktais arba dviprasmiškomis teisinėmis taisyklėmis. Šis atrankos modelis, išvystytas ekonominėje teisės analizėje, teigia jog dauguma ginčų yra baigiami dar iki bet kokio teisinio pareiškimo. Tiek nacionaliniuose teismuose, tiek ir tarptautiniuose teismuose, yra daugybė paskatų pabaigti ginčą ikiteisminėje stadijoje. Kadangi valstybės yra nelinkusios bandyti bylinėtis kai sėkmės tikimybė yra maža, todėl retai tarptautinius teismus pasieks ginčai kuriuos reglamentuoja aiškios taisyklės – tiesmukos tarptautinių sutarčių nuostatos, vienareikšmiškos paprotinės taisyklės arba aiškūs precedentai. Tad jei byla pasiekia tarptautinį teismą, dažniausiai galima numanyti, jog kiekviena šalis mano jog ji gali laimėti. Tam tikra prasme, šalys atrenka ginčus kurie yra pagrįsti dviprasmiškais faktais arba dviprasmiškomis teisinėmis taisyklėmis. Todėl lengvos bylos, t.y. bylos kurias kontroliuoja vienareikšmės taisyklės, yra dažniausiai išsprendžiamos ikiteisminėje stadijoje ir tarptautiniai teismai paprastai turės spręsti sunkias bylas.

Tarptautiniai teismai paprastai lengvai galės surasti formalias teisines taisykles tarptautinėje viešojoje teisėje, kuriuos pateisintų jų norimą bylos baigtį. Pavyzdžiui bendroji sutarčių aiškinimo taisyklė, nors iš pažiūros ir atrodo griežta, iš tiesų leis kiekvienam teisėjui pasirinkti kokį svorį suteikti kiekvienam interpretavimo elementui. Taigi du teisėjai, net ir visais kitais aspektais mechaniškai taikydami bendrąją tarptautinių sutarčių aiškinimo taisyklę, galės lengvai prieiti prie dviejų skirtingų išvadų nes kiekvienas teisėjas suteiks skirtingą svorį kiekvienam elementui (tekstui, objektui ir tikslui, arba šalių ketinimams).

Tarptautinė paprotinė teisė suteikia dar daugiau laisvės kiekvienam teisėjui atrasti palankias taisykles. Nors tradicinė teorija teigia, jog kiekvienam teisiniam klausimui egzistuoja tik viena taikytina paprotinė taisyklė, praktikoje kiekvienas teisėjas gali lengvai sintetinti kelias panašiai pagrįstas paprotines taisykles. Pirmiausiai, tarptautinėje bendrijoje, kurią sudaro beveik du šimtai valstybių, labai retai bus galima aptikti nuoseklią valstybių praktiką. Labiau tikėtina kad dalis valstybių elgsis vienaip, kita dalis elgsis priešingai, ir likusioji dalis apskritai nebus pasireiškusi. Be to, skirtingi teisėjai gali remtis skirtingomis praktikos formomis, kadangi nesutariama, tarp daugybės kitų klausimų, kas gali būti laikoma valstybių praktika ir kurių valstybės organų praktika skaitysis. Galiausiai, kiekvienas teisėjas pasirinks tą taisyklę kuri labiausiai derės su jo teismine filosofija ar kitais veiksniais.

Precedentai, nors daug svarbesni praktikoje nei tarptautinių teismų statutai formaliai tai pripažįsta, irgi nesuvaržys teisminio kūrybingumo. Tarptautiniai teismai neprivalo vadovautis privalomo precedento (stare decisis) doktrina, todėl bent jau teoriškai, galėtų ignoruoti savo ankstesnius sprendimus. Tačiau kitas modelis išvystytas ekonominėje teisės analizėje - atstovavimo modelis, nuspėja jog tarptautiniai teismai bus norės sudaryti stabilumo ir nuspėjamumo įspūdį teisminiame sprendimų priėmime. Todėl tarptautiniai teismai formaliai pripažins, kad jie vadovaujasi ankstesniais sprendimais,

tačiau praktikoje naudosis įvairiomis juridinėmis technikomis kad išskirti senesnius sprendimus. Šį lankstumą atskiriant senesnes bylas bus lengva pasiekti nes vien atrankos efektas užtikrins, jog dauguma bylų reikalaus ne tikrojo precedentinio argumentavimo, o analoginio argumentavimo. Be to, *ratio decidendi* neaiškumas leis teisėjams lengvai atskirti naują bylą nuo senos net jei faktai bus laba panašus.

Nors formalios teisinės taisyklės akivaizdžiai negali suvaržyti tarptautinių teismų, tai nereiškia kad jos yra bereikšmės. Tinkamesnis požiūris yra jog konkrečios bylos negali būti išspręstos abstrakčiomis taisyklėmis, bet taip pat ir be jų. Visos teisinės taisyklės veikia labiau įtikinėjimu, nei suvaržymu: jei teisėjas bus įsitikinęs, jog teisinė taisyklė yra neadekvati, neteisinga, netiksli, neturės veiksmingų ekonominių pasekmių, ir panašiai, teisėjas suras būdą pasirinkti kitą taisyklę – arba pasirinkdamas kitą taisyklę iš principo arba atrinkdamas tik tuos faktus kurie pateisins kitos taisyklės taikymą. Taigi apskritai, teisinės taisyklės rūpi, tačiau jos yra tik vienas iš daugelio veiksnių.

Įvairūs išoriniai ar instituciniai suvaržymai yra irgi labiau įsivaizduojami nei realūs. Kolegialumas yra svarbus, tačiau ne itin tikėtina, jog kolegialumas galės pririšti teisėjus prie teisinių taisyklių kurias jie netaikytų kitu atveju. Be to, svarstymo procesas gali paskatinti teisėjus tik dar stipriau įsikabinti į jų pradines pozicijas. Be to, dėl konformizmo, grupinio mąstymo (angl. groupthink), ir grupės poliarizacijos, kolegialumas ir teisminis svarstymas gali privesti teisėjus prie prastesnių sprendimų lyginant su tais kuriuos jie priimtų individualiai.

Suprantama, būtų klaidinga galvoti apie įvairius suvaržymus binariniu principu – arba taisyklės absoliučiai suvaržo arba nesuvaržo apskritai. Esminis klausimas yra dėl apimties – kiek jos gali suvaržyti. Ir netgi tarptautinėje viešojoje teisėje, kur dviprasmiškumas yra sistemos skiriamasis bruožas, tarptautiniai teismai retai priims groteskiškus sprendimus. Tačiau tarptautiniai teismai gali lengvai aptikti kelias vienodai tikėtinas teisines taisykles taikomas tam pačiam klausimui; kurią teisinę taisyklę teisėjai pasirinks priklausys nuo jų norimos bylos baigties; o norima bylos baigtis dažniausiai priklausys nuo instrumentalistinių principų ir kitų neformalių pagrindų.

Itin svarbu negalvoti apie teisminių sprendimų priėmimą mechanistiniais ar supaprastintais terminais, t. y. jog konkretus veiksnys turi visišką įtaką arba neturi jokios įtakos, arba įtaką turi vienas veiksnys bet ne kitas. Tikrovėje, visi veiksniai vaidina tam tikrą vaidmenį – kai kurie daugiau, kai kurie mažiau. Vidiniai veiksniai sąveikauja tarpusavyje ir jie taip pat sąveikauja su išoriniais veiksniais. Kai kuriuose bylose jie susirinks, kitose išsiskirs. Bet koks schematinis ar statiškas požiūris į suvaržymus ir lemiamus veiksnius bus garantuotai per daug supaprastintas.

Instrumentalizmas Tarptautiniuose Teismuose ir Teisminė Teisėkūra

Teisinis instrumentalizmas, arba pasekminis argumentavimas, teigia jog teisminis sprendimų priėmimas turėtų būti pagrįstas ne formaliomis taisyklėmis (atgalinis arba taisyklėmis grįstas argumentavimas), bet sprendimo pasekmėmis (žvelgiantis į ateitį). Teisinis instrumentalizmas yra plati kategorija ir ji apima įvairius tipus pasekminių argumentų.

Dauguma formalistų ne tiek priešinasi idėjai jog teisė yra viso labo priemonė tikslams pasiekti, bet kad teisminis kūrybiškumas gali tapti nekontroliuojamu ir taip su-

griauti teisės viršenybę. Šis rūpestis yra pagrįstas ir jo niekuomet instrumentalizmo pasekėjai visiškai nepašalino. Tačiau instrumentalistams šis pavojus yra mažiau realus nei galima žala, kurią padarys mechaniškas teisinių taisyklių taikymas.

Nors tarptautinių teismų sprendimuose taisyklėmis grįstas argumentavimas yra daug pastebimesnis, yra pakankamai daug pavyzdžių ir instrumentalistinio argumentavimo, įskaitant pasekminius argumentus dėl teisminio administravimo, ekonominio efektyvumo, ar normatyvinių pasekmių. Daug svarbiau yra tai, jog instrumentalistiniai principai dažnai vaidina daug svarbesnį vaidmenį realiame sprendimų priėmimo procese nei tai galima įžvelgti iš teismų sprendimų. Skirtingi tarptautiniai teismai remsis skirtingais instrumentalistiniais argumentais, todėl bet kokia generalizacija apie konkrečius instrumentalistinius principus bus netiksli.

Tačiau vienas instrumentalistinis principas, bendras daugeliui tarptautinių teismų kurių jurisdikciniai pagrindai panašūs į arbitražo, yra susijęs su taikinamuoju teisingumu, kurį numato atstovavimo modelis. Taikinamasis teisingumas „siekia pirmiausiai išspręsti ginčą suteikiant bent minimalų pasitenkinimą abiems šalims, jei ne paraginant jas susitikti pusiaukelėje". Yra keletas intuityvių priežasčių kodėl tarptautiniai teismai vadovaujasi sutaikinamuoju teisingumu. Apskritai, tai padidina šalių pasitenkinimą ir sumažina bylinėjimosi teisme riziką, padidina šansus jog teismo sprendimas bus įgyvendintas, ir padidina teisminio konsensuso tikimybę. Taip pat, tai turbūt leidžia teismams drąsiau nagrinėti politiškai jautrias bylas.

Šį fenomeną dar galima nagrinėti iš atstovavimo modelio perspektyvos, kuris teigia jog arbitrai visuomet suinteresuoti turėti subalansuotą reputaciją:

> Arbitras, kuris įgauna reputaciją dėl palankumo vienai šaliai tam tikros klasės bylose – ginčuose tarp investuotojų, darbdavių, ir pan. – bus nepriimtinas kitai šaliai ateities ginčuose. Todėl arbitrai bus linkę savo sprendimuose „padalinti skirtumą" – suteikti kiekvienai šaliai dalinę pergalę. Dėl to kiekviena šalis bus linkusi manyti, jog arbitras nėra palankus tik vienai iš šalių.[555]

Visa tai yra ypatingai aktualu tarptautiniams teismams nes jų jurisdikciniai pagrindai labiau primena tarptautinį arbitražą nei nacionalinius teismus.

Be viso to, instrumentalistiniai principai yra ne tik neišvengiama dalis tikrojo sprendimų priėmimo, bet jų nebuvimas teismų sprendimuose gali turėti blogų pasekmių, ypatingai tai ką mes vadiname „Beagle Channel" efektu. Visi teismų sprendimai siekia įtakoti tam tikrą auditoriją. Pavyzdžiui į Tarptautinio Teisingumo Teismo ir kitų tarptautinių teismų auditoriją įeina bylinėjančios šalys, profesinis teisinis elitas (akademikai ir praktikuojantys teisininkai tarptautininkai), nacionalinės vyriausybės, įvairūs tarptautiniai veikėjai kaip kad tarptautinės organizacijos ir nevyriausybinės grupės, ir kiti. Atitinkamai, apdairus teismas naudos tokį teisminių sprendimų stilių kuris labiausiai įtikina teisminę auditoriją. Daugumai tarptautinių teismų tai reiškia rėmimąsi įvairiais argumentaciniais pagrindais, o ne tik formalistiniu samprotavimu kuris atrodo kaip idealaus silogizmo produktas. Didžioji dalis tarptautinių teismų auditorijos palankiau žiūri ne į tipinį sausą Europinio pobūdžio teismo sprendimo stilių, o į tokį stilių kuris remiasi ir instrumentalistiniais pagrindais.

[555] Posner, How Judges Think, pp. 127-128.

Vadovavimasis instrumentalistiniais principais reiškia, jog teisminė teisėkūra yra neišvengiama. Tai, jog tarptautiniai teismai užsiima teisminė teisėkūra nereiškia, jog jie tampa įstatymų leidėjais: „požiūris, jog teismas yra įstatymų leidėjas yra perdėjimas; bet panašus perdėjimas yra teiginys, jog teismas negali kurti jokios teisės".[556] Be to, dauguma teisėjų neskiria, bent jau psichologiškai, tarp taisyklių taikymo ir savo asmeninės filosofijos taikymo; teisėjams legalistinis (taisyklių taikymo) ir teisėkūros metodai paprastai yra dalis to paties proceso.

Teisminė teisėkūra nebūtinai prieštarauja tarptautinių teismų mandatams. Tiesa, jog tarptautinių teismų statutai atvirai neįtvirtina teismų teisės užsiimti teisėkūra. Tačiau teisminis vaidmuo ne visuomet atsispindi teismų statutuose. Pavyzdžiui, tarptautiniai teismai dažnai vadovaujasi taip vadinamomis „įgimtomis" teisėmis kurios nėra atspindėtos statutuose. Be to, kaip seras Herschas Lauterpachtas parodė, teismų vaidmuo vystant tarptautinę teisę gali būti paaiškintas sociologine koncepcija vadinama „tikslų heterogeniškumu".[557] Anot šios koncepcijos, institucija gali būti sukurta pasiekti vienus tikslus, tačiau galiausiai perauga kitų tikslų siekimui.

Daugybė teisėjų ir akademikų taip pat akcentuoja kitą priežastį kodėl tarptautinės teisės vystymas yra neatsiejamas nuo tarptautinių teismų – įstatymų leidėjo nebuvimas tarptautinėje sistemoje ir dėl to atsirandančios teisės spragos kurias gali užpildyti tik tarptautiniai teismai tuo atveju kai valstybės nesugeba susitarti dėl konkrečių taisyklių įtvirtinimo.

Šiame kontekste yra sunku pervertinti teisminės filosofijos svarbą. Ir kiekvienas teisėjas ją turi. Profesorius Paulas Freundas tai išreiškė dar aštriau:

> Didžioji dalis teisės yra skirta padėti teisėjui išvengti tai ką Holmes'as vadino „jo negaliu" – jo asmeninių įsitikinimų ir vertybių. Precedento galia, aiškus rašytinės teisės formulavimas, valdžių atskyrimas, įstatyminė prevencija, senaties terminai, įrodinėjimo ir teisminių ieškinių taisyklės, ir svarbiausia pragmatiniai fakto nustatymai kurie lydi prie vieno sprendimo nepaisant paties teisėjo vertybių – visi šie saugikliai apsaugo teisėją nuo naudojimosi jo asmeniniais standartais. Kai šių saugiklių nepakanka, kaip kad dažnai būna aukštesnio rango teismuose, ir beveik visuomet aukščiausiuose konstituciniuose teismuose, teisėjas neišvengiamai vadovausis savo asmenine vertybių sistema. Ir galima sakyti kad svarbiausias dalykas apie teisėją yra jo teisminė filosofija; ir jeigu yra pavojinga jam turėti teisminę filosofiją, tai yra bet kuriuo atveju mažiau pavojinga nei iliuzija kad jis jos neturi.[558]

Teisminis sprendimų priėmimas ir jo reikšmė tarptautiniam ginčų sprendimui

Tarptautinių ginčų sprendimo sistema yra įsitempusi. Tarpvalstybiniai ginčai natūraliai daugėja nes tarptautiniai santykiai vis labiau vystosi. Daugumai tarptautinės teisės mokslininkų, tarptautiniai teismai yra pažadėtoji žemė tarptautiniame ginčų sprendime. Kaip kad ginčų sprendimas nacionalinėse teisės sistemose kur teismai užima centrinę vietą, taip ir tarptautinis ginčų sprendimas gali būti paremtas tarptautiniais teismais:

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[556] Mohammed Shahabuddeen, Precedent in the World Court (Cambridge: Cambridge University Press, 1996) p. 86.

[557] Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons Limited, 1958) p. 5.

[558] Paul Freund, Social Justice and the Law, in Richard Brandt (ed.) Social Justice (Englewood Cliffs: Prentice-Hall, 1962) p. 93.

> Daugumai teisininkų tarptautininkų – ir ypatingai tiems kurie yra paveikti Europinio teisinio formalizmo paveldo – progresas pasaulinės teisės raidoje geriausiai siejamas su tarptautinių teismų augimu. . . . Teisminis ginčų sprendimas yra ne tik idealus ir taikingiausias metodas tarpvalstybinių ginčų sprendimui, bet taip pat ir galimybė teisininkams prisidėti prie tarptautinės teisės raidos prestižinėje nepolitinėje institucijoje.[559]

Tačiau šis požiūris yra klaidingas. Keletas priežasčių lemia šią ydingą maniją dėl tarptautinių teismų kaip idealaus ginčų sprendimo metodo; dauguma šių priežasčių siejasi su ydingu supratimu apie teisminių sprendimų priėmimą.

Pirmiausiai teisės mokslininkai dažnai tapatina ginčų sprendimą su teisinių klausimų sprendimu. Teisminiam ginčų sprendimui dažnai nepasiseka atlikti pagrindinės ginčų sprendimo funkcijos – išspręsti pamatinį ginčą ir atkurti gerus santykius. Praktikoje, teisminis ginčų sprendimas yra paprastai galutinis gelbėjimasis po to kai visa kita žlunga; tad dažniausiai bylinėjimasis yra ne esminė ginčų sprendimo forma, bet atsarginė priemonė.

Antra, tarptautiniai teismai suteikia viltį dėl pergalės „teisiesiems prieš stipriuosius“, t.y. teisminis ginčų sprendimas kaip alternatyva jėgos politikai. Tad tarptautinių teismų triumfas reikštų teisės triumfą prieš politiką. Ši fantazija, jog teisminis ginčų sprendimas ignoruoja politines aplinkybes, yra daugiausiai nulemta formalistinio požiūrio į teisminių sprendimų priėmimą – kadangi iš teismų sprendimų atrodo, jog jie kreipia dėmesį tik į teisines taisykles, todėl jie „matyt“ nekreipia dėmesio į politinius veiksnius. „Teisiųjų prieš stipriuosius“ pažadas taip pat ignoruoja faktą, jog teisminis ginčų sprendimas reikalauja didelių resursų, kurių skurdesnės valstybės paprastai neturi; pavyzdžiui, tyrimai parodė, jog Pasaulio Prekybos Organizacijoje ginčų sprendimų legalizavimas tik pablogino silpnųjų šalių padėtį.

Trečia, tai yra ydinga analogija su nacionaliniais teismais. Teisės mokslininkai susitelkia ties panašumais tarp tarptautinių ir nacionalinių teismų ir ignoruoja milžiniškus skirtumus. Vienas iš šios ydingos analogijos aspektų yra įsivaizdavimas, jog tarptautinių teismų sprendimai, dėl jų privalomumo, užtikrina ginčo teisinę baigtį. Susijusi klaida priveda prie teismų suteikiamų teisinių gynybos priemonių pervertinimo. Tačiau empiriniai tyrimai rodo jog sankcijos, formalus sprendimai ir kitos viešojo spaudimo formos dažnai turi priešingą poveikį. Pavyzdžiui empiriniai tyrimai dėl GATT/PPO sprendimų įgyvendinimo parodė jog yra didesnė tikimybė jog atsakovai nusileis iki formalaus sprendimo, o ne po jo, t.y. formalus sprendimas prieš atsakovą reiškia jog sumažėja tikimybė jog atsakovas suteiks prekybos koncesijų besiskundžiančiai šaliai.

Ketvirta, tai yra klaidingo generalizavimo klaida. Teisės mokslininkai analizuoja regioninių teismų sėkmę ir prieina prie klaidingos bendros išvados kaip apskritai teisminis ginčų sprendimas yra labai gera idėja. Tarptautiniai teismai iš tiesų yra sėkmingi kai kuriuose regionuose ir kai kuriuose srityse, kaip pavyzdžiui žmogaus teisės ar prekybos ginčai. Tačiau tai nereiškia, jog tarptautiniai teismai yra mėgstami visame pasaulyje ir visose tarptautinių ginčų sprendimo kategorijose.

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[559] Douglas M. Johnston, The Historical Foundations of World Order: The Tower and the Arena (Leiden: Martinus Nijhoff Publishers, 2008) p. 128-129.

Apskritai, kaip buvęs Tarptautinio Teisingumo Teismo pirmininkas seras Robertas Jenningsas pastebėjo, „teisminis ginčų sprendimas yra techniškas, intelektualus, dirbtinis metodas“.[560] Ir kaip techniškas ir dirbtinis metodas, jis neturėtų būti laikomas visaapimančiu ginčų sprendimo metodu.

Visa tai gali paaiškinti kodėl pačios valstybės daug mažiau entuziastingai žiūri į teisminį ginčų sprendimą kaip visagalį sprendimo metodą. Valstybėms tarptautiniai teismai yra itin specializuota ginčų sprendimo forma, kuri yra tinkama tik mažam kiekiui specifinių ginčų. Valstybės paprastai pačios nori nuspręsti kiekvienu atveju kurie ginčai yra tinkami tarptautiniams teismams. Kita svarbi priežastis yra tai, jog vyriausybėms teisminis sprendimų priėmimas atrodo nenuspėjamas. Ko gero jei net teisininkams sunku nuspėti kaip tarptautinis teismas išspręs bylą, tai dauguma diplomatų ir kitų valstybės veikėjų yra dar mažiau linkę pasikliauti tarptautiniais teismais.

Visa tai reiškia jog tarptautinei bendrijai yra geriau fokusuotis į neteisminių ginčų sprendimo vystymą, kaip kad sutaikinimą, bent jau tiek pat kiek teisės mokslininkai nori kad būtų vystomi tarptautiniai teismai. Diplomatiniai ginčų sprendimo metodai kaip kad sutaikinimas gali suteikti viską ką suteikia teisminis ginčų sprendimas išskyrus privalomą sprendimą ir teisines gynybos priemones. Tačiau neteisminių ginčų sprendimo raida priklauso nuo to, kiek teisės mokslininkai ir tarptautinės politikos formuotojai skirs tam dėmesio. Bet iki šiol, susitelkimas ties tarptautiniais teismais turėjo neigiamą šalutinį poveikį perspektyvioms alternatyvoms tarptautiniams teismams.

Suprantama jog sutaikinimas ir kiti diplomatiniai ginčų sprendimo metodai turės mažą poveikį tarptautinės teisės vystymui ir tai yra viena iš priežasčių kodėl teisininkai tarptautininkai tradiciškai susitelkdavo ties teisminiu ginčų sprendimu ir ypatingai nuolatiniais tarptautiniais teismais. Be abejonės tarptautinių teismų vykdoma tarptautinės teisės raida yra neišvengiama ir neįkainojama.

Tačiau vien todėl, kad tarptautiniai teismai yra naudingi tarptautinės teisės raidai nereiškia kad jie yra lygiai taip pat naudingi ir ginčų sprendimui. Teigti jog vyriausybės turėtų legalizuoti ir komplikuoti savo ginčus todėl kad tai bus gerai tarptautinės teisės raidai yra tas pats kas teigti jog pacientai turėtų išvystyti retą ligą nes tai padės medicinos progresui.

Visa tai nereiškia, jog tarptautiniai teismai yra nereikalingi ar nereikšmingi. Tarptautiniai teismai yra itin sėkmingai kai kuriuose tarptautinės teisės srityse, ypatingai techninės kompetencijos srityse, kaip jūrinių sienų nustatymo, teritorinių ribų nustatymo, ar ekonominių ginčų srityje. Ko gero tarptautinių teismų tolesnė raida šia kryptimi yra labai vertinga. Tačiau teisminis ginčų sprendimas, kaip techniškas ir specializuotas ginčų sprendimo metodas, neturėtų būti laikomas panacėja visiems tarptautinių santykių negalavimams.

[560] Robert Y. Jennings, The Proper Work and Purposes of the International Court of Justice, *in* A.S. Muller, D. Raic, J.M. Thuránszky (eds.), The International Court of Justice: Its Future Role after Fifty Years (The Hague; Boston: Nijhoff, 1997) p. 36.

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The central question of this dissertation is how much of judicial decision-making depends on legal reasoning. Do judges, after finding the relevant facts of the case, consult legal rules and then arrive at their decision? Or maybe the equation that the decision equals facts plus rules is merely an illusion?

This dissertation argues that judges usually can make decisions on other grounds than formal legal rules and then use formal legal rules merely to justify those decisions. Also, judges will have preference for intuitive decision-making over rule-based and logical reasoning.

When judges make decisions on other grounds than formal legal rules, judicial creativity is unlikely to be constrained by these formal rules. Also, judges will seldom have trouble justifying their decisions with formal rules because they will almost always find some competing legal rules that will tally their decision; this is largely because public international law is even more ambiguous than common law systems.

Specific driving forces behind judicial decisions will be different in each case – it is even possible that in some cases formal legal rules will be the controlling factor. However, international courts will be often swayed by various policy principles, including conciliatory justice. It also means that judicial law-making by international courts is inevitable.

Centrinis šios disertacijos klausimas yra kiek teisminių sprendimų priėmimas priklauso nuo samprotavimo teisinių taisyklių pagrindu. Ar teisėjai, nustatę bylos faktus, viso labo suras reikiamas teisines taisykles ir tuomet priims sprendimą? O gal lygtis anot kurios teismo sprendimas lygus faktams plius teisinėms taisyklėms yra viso labo iliuzija?

Teisėjai paprastai gali priimti sprendimą dėl bylos baigties visiškai nesivadovaudami teisinėmis taisyklėmis ir tik tuomet naudotis formaliomis taisyklėmis, tik tam kad pateisinti savo sprendimą.

Teisėjai, kaip ir visi žmonės, teikia pirmenybę ne loginiam ir taisyklėmis paremtam samprotavimui, o intuityviems sprendimams. Nors loginis samprotavimas gali pakeisti intuityvius sprendimus, praktikoje tai nutiks retai.

Jei teisėjai priims sprendimus kitais pagrindais nei formalios teisinės taisyklės, formalios taisyklės nesuvaržys teisminio kūrybingumo. Teisėjams retai iškils sunkumų pateisinant sprendimus formaliomis taisyklėmis todėl kad jie beveik visuomet suras tarp konkuruojančių teisinių taisyklių kokį nors teisinį pagrindą, kuris pateisins jų norimą sprendimą. Tai bus įmanoma nes tarptautinė viešoji teisė yra itin dviprasmiška.

Konkretus lemiami sprendimo priėmimo veiksniai skirsis kiekvienoje byloje. Kai kuriuose bylose visiškai įmanoma, jog formalios teisinės taisyklės iš tikrųjų nulems bylos baigtį.

Vitalius Tumonis
JUDICIAL DECISION-MAKING:
INTERDISCIPLINARY ANALYSIS WITH SPECIAL REFERENCE TO INTERNATIONAL COURTS

Doctoral Dissertation

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