

ETHICAL REASONING IN JUDICIAL PROCESS

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1. The reasons, satisfy us to draw conclusions which affect people's lives, influence their behaviour, and sometimes change society's reactions to issues that govern life. Paradoxically, these reasons are very often not supported by reasoning, leaving people confused, as a result, raising doubt over institutional wisdom and integrity. The reasoning in support of reasons is an important function in decision making process. It assures society of the quality of the decisions, promotes healthy and informed debate and clears the way of improvement of future actions. Ethical reasoning is important in all spheres of influential decision making.

2. Judgment writing requires skills of narration and storytelling. After giving facts and discussing admissible and relevant evidence a judge is required to give reasons for deciding the issues framed by him. The reasons convey the judicial ideas in words and sentences. The reasons convey the thoughts of a judge and are part of judicial exposition, explanation and persuasion.

3. There is a difference between giving reasons and the reasoning, which may ultimately lead to a decision by a judge on the issue or the issues raised before him. The process adopted by a judge in arriving at a decision through the reasoning, tests a judge of his ability and integrity. He may adopt a syllogistic process, inferential process or intuitive process. 'Syllogism' means, a deductive scheme of a formal argument consisting of a major and a minor premise and a conclusion. A judge accepts an argument on a major premise, which overweighs the minor premise to draw his own conclusion. In case of inferential process a judge simply relies upon the evidence, and reaches to a conclusion. In the intuitive process, the Judge adopts psychological process, which may or may not be based by his subjective preference or biases. In this process the judge arrives at a conclusion more by intuition or emotion rather than reason. The judge may believe a witness in part (which is permissible in India) or whole and then draw a conclusion by justifying it from the reasoning supplied by him either by his own belief or experience. In all these methods the object is to arrive at the truth. If judge succeeds in finding out the truth, the method may be justified.

4. Reasons are the rational explanation to the conclusion. Reasoning is the process by which we reach to the conclusion. Reasoning is the mental process of looking for reasons for beliefs, conclusions, actions or feelings. In philosophy, the study of reasoning typically focuses on what makes reasoning efficient or inefficient, appropriate or inappropriate, good or bad. This is done by either

examining the form and structure of the reasoning within the argument or by considering the broader methods used to reach particular goals of reasoning.

5. 'Homer' a Greek philosopher in eight century B.C. used mystic stories that used gods to explain the formation of the world. 'Aristotle' is the first writer, who gave an extended, systematic treatment of methods of human reasoning. He identified two methods of reasoning:

(a) Analysis: in which we try to understand the object by looking at its component parts.

(b) Synthesis: in which we try to understand a class of objects by looking at the common properties of each object in that class.

'Aristotle developed syllogistic logic: which analyses reasoning in a way that ignores the contents of the arguments and focuses on the form or structure of the argument. He points out:

“[If] no pleasure is a good, neither will any good be the pleasure”

Second: Premise: “A belongs to none of B's.

Conclusion: “B [does not] belong to any of A's”.

Premise: “Most of the deaths on Delhi roads are caused by blue line buses.”

Conclusion: “All blue line buses are driven rashly and negligently.”

There are various forms of reasoning:-

Deductive Reasoning

Reasoning in an argument is valid if the argument's conclusion must be true, when the premises (the reasons that support the conclusion) are true, also known as syllogism.

Premise: Dravid, Ganguly, Tendulkar, Laxman and Dhoni have averaged 60 runs each in an inning in this season.

Conclusion: Indian team will score 300 runs in the inning.

The reasoning is valid, because there is no way that premise is not true and so the conclusion cannot be doubted.

Within the field of formal logic, a variety of different forms of deductive reasoning have developed. These forms include syllogistic logic, propositional logic and predicate logic.

Inductive Reasoning:

It contrasts with deductive reasoning. Even in the best, or strongest cases of inductive reasoning, the truth of the premise does not guarantee the truth of the conclusion. Instead, the conclusion of an inductive argument follows with some degree of probability. The conclusion of the inductive argument contains more information than it is already contained in the premises.

David Hume gives an example:

Premise: The sun has risen in the east every morning up to now.

Conclusion: The sun will also rise in the east tomorrow.

Adductive Reasoning:

Adductive reasoning or argument to the best explanation often involves both deductive and inductive reasoning. However as the conclusion in the adductive argument does not follow with certainty

from its premises, it is best thought of as a form of inductive reasoning. What separates them is an attempt to favor one conclusion above others, by attempting to falsify alternative explanations or by demonstrating the likelihood of the favored conclusion, given a set of more or less disputable assumptions.

Reasoning by Analogy:

It is also form of inductive reasoning. Reasoning by analogy goes from one particular thing, or category, to another particular thing or category. Even the best reasoning from analogy can only make the conclusion probable, given that the truth of the premises is not certain.

Very frequently analogical reasoning is used in common sense, science, philosophy and humanities, but it is only accepted as an auxiliary method. A refined approach is case based reasoning.

All these methods may contain formal fallacies and informal fallacies. Some of the examples of these fallacies are a red herring argument or an argument containing circular reasoning.

6. Rationality is a term related to the idea of reason. It has dual aspects. One aspect associates it with comprehension, intelligence or inference. Such inference is drawn in ordered ways like syllogism. The other aspect associates rationality with explanation, understanding and justification.

A logical argument is rational if it is logically valid. Rationality is, however, broader term than logical. It also includes 'uncertain but sensible' argument based on probability, expectation, personal experience, whereas logic deals with provable facts, and demonstrably valid relations between them.

A simple philosophical definition of rationality refers to "practical syllogism".

The accused did not like the deceased.

The accused always avoided him.

The deceased came and set besides the accused.

Therefore the accused attacked him.

Now all that is required to be rational is to believe the action. The argument is logically valid but not necessarily sound. The premise may be incorrect

German sociologist Max Weber distinguished between four types of rationality.

Purposive or Instrumental rationality:

Expectation about the behavior of other human beings or objects in the environment.

Value/ Belief oriented rationality:

Action for one might call reasons intrinsic to the other; some ethical, aesthetic, religious or other motive.

Effectual:

Action determined by actor's specific effect, feeling or emotion, which are meaningfully oriented.

Traditional:

Determined by ingrained habituation.

Max Weber emphasized that it is very unusual to find any one of these orientations. Combinations are the norm. First two are significant and the third and fourth are subtypes.

Bonded Rationality

Humans can be reasonably approximated or described as rational entities. Some people are, however, hyper rational, and would never do anything to violate their preferences. The concept of bounded rationality assumes that perfectly rational decisions are not feasible in practice due to finite computational resources applicable to them.

Perfect Rationality

Some people always act in a rational way, and are capable of arbitrarily complex deductions towards that end. They are always capable of thinking through all possible outcomes and choosing the best things to do.

Superrationality:

Two logical thinkers analyzing the same problem will come up with the same correct answer. If two persons are good in math's, and they are given a complicated sum to do, both will get the same answer.

7. Rational decisions and thoughts are based on reason rather than on emotion. A rational person is someone, who is sensible and is able to make decisions based on intelligent thinking. Equity justice and good conscience are the hallmark of judging. One who seeks to rely only on principles of law, and looks only for the decided cases to support the reasons to be given in a case or acts with bias or emotions, loses rationality in deciding the cases. The blind or strict adherence to the principles of law sometimes carries away a judge and deviates from the objectivity of judging issues brought before him.

8. The traditional theory of adjudication is that a judge must search for the relevant rule of law derived from settled legal principles found in precedents and then apply it to the facts of the case. The approach basically assumes that the answer to any legal problem is to be found by searching in the reports and locating the relevant case. Benjamin Cardozo likens the process of identifying a precedent to matching 'the colors of the case at hand against the colors of many sample cases'.¹ The sample nearest in shade supplies the applicable rule. Thus, the decision should be the same regardless of the identity of the judge. The traditional view is seen as 'the archetype of legal science in the practice of law'. It places 'emphasis on uniformity, consistency and predictability, on the legal form of transactions and relationships' and, sometimes, on literal, rather than purposive interpretation.

9. The principal rationale for the theory is the notion that people rely on certainty in the law in deciding how to settle their affairs. It is said, with some justification, that the willingness of people to engage in commercial activities and transactions depends on the reliability of the rights and obligations assigned by the law. The less predictability and certainty there is, the less likely it is that parties will be able to settle

disputes without litigation, and this is clearly contrary to public policy. Following precedent and treating similar cases alike enhances certainty and enables formal equality to be achieved.

10. Judge Cardozo in one of his lectures² delivered at Yale University in 1921, said: "There is an inescapable relation between the truth without us and the truth within. The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties".³

11. In recent times, a more radical view of decision-making has emerged, which has been given the label 'critical legal studies'⁴. It is described as the intellectual successor of realism, though it appears to go further than realism. Perhaps unsurprisingly, the critical legal scholars seem to be exclusively academics. They have been described, variously, as self-consciously leftist, nihilist and as people who 'sincerely want to be radicals'. The central tenet of this movement is that the act of adjudication is a political function. These theorists suggest that legal thought is necessarily incoherent and indeterminate and legal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes. It is nothing more than a sophisticated vocabulary and repertoire of manipulative techniques for categorising, describing, organising and comparing. Law is viewed as being political, and legal reasoning as a technique used to rationalise, in legal jargon, the political decisions that are actually made.

12. One cannot discount the possibility that subconscious factors are at play in the decisions. In *Garcia v. National Australia Bank Ltd.*⁵, a wife had given a guarantee for loans to businesses conducted by the husband. When the bank called in the loans, she sought to avoid liability, relying upon the principles in *Yerkey v. Jones*⁶ to the effect that married women are under a special disability and require special protection against improvident bargains. The bank countered this argument by contending that in today's society it is neither necessary nor appropriate to give special protection to married women. The High Court disagreed. The majority was bound to and did acknowledge that both Australian society and the role of women in it has changed in the last six decades. However, they went on to say that there are also things that remain unchanged. 'There is still a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other power between the parties. Their decision was clearly influenced by what they thought was right in light of what they termed 'the disparities between the parties'⁷. Kirby J. agreed in the orders but disagreed with the majority's underlying rationale. He said that:

[w]hatever may have been the position in Australian society of 1939, it

is offensive to the status of women today to suggest that all married women, as such, are needful of special protection supported by a legal presumption in their favour.

13. What produced the difference in opinion about the position of a modern married woman? It was certainly not grounded in the evidence, as no sociologist, economist or psychologist was called. The result can only partly be explained by the application of strict legal principle. It is evident that the judges did attempt to discover in what respects the position and role of women had changed since the 1930s, although they did this without the assistance of any evidence. This notwithstanding, it is likely that the judges were also influenced by their subjective views about whether or not women require 'special protection'. The extent of this influence is something we can never know, and perhaps the judges themselves will never know.

14. The reasons are very often based on personal beliefs, morality, biases and prejudices harboured patently or latently. We may not even know such prejudices which shadow our judgments. They pollute our thoughts and act as a dangerous virus which corrupts our thought process. We do not try to sanitise ourselves, perhaps because there is no accepted process to do it and more because we refuse to acknowledge such biases.

15. In law, we know of personal bias, pecuniary bias, and official bias. A predisposition to decide for or against one party without proper regard to the true merits of the dispute is bias. A biased decision also stands included in it the attributed and broader purview of the word "malice", which in common acceptation means and implies "spite" or "ill will".

16. A judicial bias in common accepted norm means, that no man can be a judge of his own cause. It is a clear rule of law embodied in principles of natural justice, as well as natural equity and is rigorously enforced.

17. The other area of decision making is objectivity, which is a particular discipline of reasoning. The pursuit of ethical objectivity takes the form of the search for some ethical objects. The argument goes, the ethical statements that presume some known or identifiable objects rely upon a fact or a quality and its evaluation, The ethics however cannot be simple truthful description of specified objects. The real ethical questions cross over to the realm of practical questions which do not involve valuing. They involve a complex mixture of philosophical beliefs, religious beliefs, and factual beliefs as well.

18. John Rawls argues in presenting his ideas on objectivity of 'justice as fairness'; the first essential is that a conception of objectivity

must establish a public framework of thought sufficient for the concept of judgment to apply and for conclusions to reach on the basis of reasons and evidence after discussion and due reflection.⁸

19. In any argument, more so in making judgments if the persons are reasonable in taking note of other peoples points of view, and in accepting information in good faith with an open mind, the gap between rationality and reason with objectivity may narrow down. The idea here is not for a person to reinforce his views with new inputs to justify himself but to allow him to be enlightened and take a more ethical decision. A reasonable person will take advantage to interactive discussion and try to reach underlying issues with greater objectivity.

20. While answering a rather difficult question as to whether a person found guilty of conduct and proof of causing disharmony in relations is entitled to divorce on the ground of irretrievable breakdown of marriage, (which is still not a ground of divorce, in law and is more in realm of judge made law) where the marriage has gone dead with no signs of revival, requires rational thinking with objectivity. The applicability of common reasoning would disentitle such person the relief. The ethical reasoning would however support not to deny relief and allow dead relations to survive, rather put the party to be blamed with punitive conditions harsh enough to meet the injustice caused to the non-blaming party.

21. Adam Smith in his 'Theory of Moral Sentiments', argues the reasoning can be judged by viewing other people and their claims with examining different grounds for respect and tolerance. There is no room for sentiments in reasoning. The instinctive psychology and spontaneous responses may not always deviate from ethical reasoning. To that extent reasoning and feeling are deeply interrelated in all moral determination and conclusions.

22. 'Benjamin N. Cardozo in 'The Nature of the Judicial Process', In his Lecture I. Introduction. The Method of Philosophy, reasons:- "The judicial process is there in microcosm. We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first we have no trouble with our paths, they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom, or social utility or some compelling sentiment of justice or some times perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge, and tell him where to go"⁹.

23. Professor Amartya Sen argues in, 'The Idea of Justice', on ethical objectivity and reasoned scrutiny:-
 "It is hard to see that ethical judgments demand *rahi aql*- the use of reason. The question that remains, however, is this: why should we

accept that reason has to be the ultimate arbitrator of ethical beliefs ? Is there some special role of reasoning- perhaps reasoning of a special kind- that must be seen as overreaching and crucial for ethical judgments? Since reasoned support can hardly be in itself a value giving quality, we have to ask: why precisely, is reasoned support so critical? Can it be claimed that reasoned scrutiny provides some kind of guarantee of reaching the truth? This would be hard to maintain, not only because the nature of truth is moral and political belief is such a difficult subject, but mainly because of such rigorous of searches, in ethics or in any other discipline, could still fail.”¹⁰

24. Although most judges strive diligently to avoid bias in making their decisions and firmly believe their rulings are free from extraneous influences, subconscious factors may sometimes lead a judge to make a factual determination on unacceptable grounds. Judges are not 'dehumanized vehicles of faultless, logical truth'. We are all prone to using subconscious simplifying strategies when processing significant amounts of information. One such strategy is to create mental categories so that when we are faced with a given set of facts, we approach them with these categories in mind. If we are not careful this may result in perceived or actual bias. Stereotypes may affect judgment through their impact on processing evidence (that is, in the findings of facts).

25. Negative stereotypes about minorities may affect decision-making in a myriad of areas. Subconscious caste and religious discrimination is one area that has been the subject of a substantial degree of analysis, particularly in India. Subjective judgments about character, motivation and intellectual ability may be applied by the decision-maker to a class as a whole. These subjective judgments may be rationalised by the decision maker to enable him to maintain an egalitarian self-image.

26. Cognitive illusions enable decision-makers to process voluminous information efficiently, though they can produce systematic errors in judgment. Common cognitive illusions include making estimates based on irrelevant starting points ('anchoring'), and perceiving past events to have been more predictable than they actually were ('hindsight bias'). Psychologists have identified many other cognitive illusions that are said to infect decisions, but the two serve as examples. Anchoring causes people making numerical estimates to rely on the initial value available to them, no matter how irrelevant it is. For example, claims for damages, awards or proposals for levels of penalties to be imposed by the court may tend to anchor the final determination of the amount. Hindsight bias consists of using known outcomes to assess how predictable an event was at a previous point in time, for example, reconstructing how foreseeable a car accident was to the motorist involved before the event.

27. As judges are not always particularly enlightening when it comes to explaining how decisions were reached, it is difficult to say with any certainty that cognitive illusions infect them.

28. Law is an interpretive concept. Ronald Dworkin in 'Law's Empire'- 'Law beyond Law', suggests:- "Judges should decide what the law is by interpreting the practice of other judges deciding what the law is. General theories of law, for us are general interpretation of our judicial practice. We rejected conventionalism, which finds the best interpretation in the idea that judges discover and enforce special legal conventions, and pragmatism, which finds in it the different story of judges as independent architects of the best future, free from the inhibiting demand that they must act consistently in principle with one another. I urged the third conception, law as integrity, which unites jurisprudence and adjudication. It makes the content of law depend not on special conventions or independent crusades but on more refined and concrete interpretations of the same legal practice it has begun to interpret."¹¹

29. Munroe Smith in 'Jurisprudence', Columbia University Press 1909, eulogized:- "In their effort to give to the social sense of justice articulate expression in rules and in principles the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypothesis, continually retested in those great laboratories of the law, the Courts of justice. Every new case is an experiment, and if the accepted rule which seems applicable yields, a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice it will eventually be reformulated. The principles themselves are continually retested, for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined."

30. Justice Oliver Wendell Holmes told us, "the life of the law has not been logic, it has been experience."

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