

GEOFFREY SAMUEL, A SHORT INTRODUCTION TO JUDGING  
AND TO LEGAL REASONING (EDWARD ELGAR PUBLISHING 2016)

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Attempts in formalising law have shown that judging and legal reasoning goes beyond the mere knowledge of the substance of law and direct application of the rules.<sup>1</sup> Geoffrey Samuel in his textbook *Short Introduction to Judging and to Legal Reasoning*<sup>2</sup> has successfully captured some of the core ideas of judging and legal reasoning throughout time. Starting the journey at the point where legal reasoning initiated – Ancient Roman times where judges used bottom-up methods to reason from practical cases by applying the rules and focused on the actions - the author guides the reader to the modern days, where legal reasoners are expected to perform increasingly complex analyses and balance various interests at stake, incorporating a mix of the past legacy and new analytical methods.

There is a vast literature covering the topic of judging and legal reasoning from various perspectives.<sup>3</sup> Samuel masterfully constructs a web tying these distinct approaches together to show a more holistic view of legal reasoning. In comparison with some other textbooks in the field, this book has the advantage of capturing several centuries worth of work into a well-written guide, avoiding unnecessary verbiage. The author is inspired by Mitchel Lasser's<sup>4</sup> analysis and presents his account through a contrast between the so-called 'official portrait' and the 'unofficial portrait' of legal reasoning. This

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<sup>1</sup> Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994); Richard A Posner, *How Judges Think* (Harvard University Press 2010).

<sup>2</sup> Geoffrey Samuel, *A Short Introduction to Judging and to Legal Reasoning* (Edward Elgar Publishing 2016).

<sup>3</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Vol 5, Transaction Publishers 1962); Trevor Bench-Capon and Giovanni Sartor, 'A model of legal reasoning with cases incorporating theories and values' [2003] *Artificial Intelligence* 97.

<sup>4</sup> Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2004).

comparison provides a helpful approach for law students at their early stages to contextualise some of the abstract ideas of legal theory and provides real life examples from legal practice.

The overall goal of the book is to provide the reader with the essential skills and knowledge base to understand what it means to reach a legal decision, and what tools and reasoning methods the judge can employ to justify such decisions. It asks for instance, 'to what extent is judging and legal reasoning guided or influenced by particular theories about law and legal knowledge' or 'does the judge simply apply the code to the circumstances or does the legal decision making involve more complex reasoning levels?'.<sup>5</sup> While the author manages to answer only some of the questions posed, he enables the reader to consider these questions seriously by providing a well-curated source of reference.

## I. OVERVIEW OF THE BOOK

The book is divided into two parts: firstly, introducing the reader to what judging and legal reasoning has been in the past, and, secondly, providing an original analysis of the dichotomy of the views of the current state of the matters in this area of legal theory. The book is thoughtfully designed to encourage the readers to familiarise themselves with some of the original texts and cases. Such an exercise allows the reader to understand both the concepts and substance of the relevant law.

In the first part, the author walks the reader through the historical developments of judging and legal reasoning, starting from the early Roman law and leading up to the modern interpretation methods.<sup>6</sup> The author shows how the legal thought has changed through the years by presenting the prominent methods dominating the field, and emphasising what has been understood as the subject of the law. There is a great effort of revealing the true complexity of the law, for instance, by showing that there is no single correct way of interpreting statutes in all legal situations.<sup>7</sup>

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<sup>5</sup> Samuel (n 3) 1-2.

<sup>6</sup> Ibid 5-36.

<sup>7</sup> Ibid 23.

The second part of the book introduces and compares the official and unofficial portraits of judging and legal reasoning. The official portrait presents judging and legal reasoning from the insider's perspective, protecting the values that are important to law and those that are shown through legal education and legal decision-making. The unofficial portrait focuses on an external view on legal reasoning that, in Samuel's book, has been taken from social sciences and film studies. There is an overlap between the two. However, it is clear that both portraits are applicable to different contexts, and that neither of them is able to illustrate the full complexity of legal reasoning and decision making.

The author has chosen two characteristics that accommodate the comparison between the official and unofficial portraits – the level of observation and the type of analysis applied to the approaches. Firstly, Samuel discusses the differences between analysing law from internal and external perspectives. The official portrait is intended to present the internal views of the judges as they believe legal reasoning is and should be. It shows a formal view of the matters. In contrast, the unofficial view is represented by the social scientists who would analyse the law from an external point of view and consider what can be observed in reality.

More interestingly, the second level of comparison is based on the type of analysis performed in each of the portraits. The official portrait is linked with the authority paradigm, which emphasises the importance of respecting the order and rules, and focuses on interpretation instead of criticising the current system. The unofficial portrait uses the inquiry paradigm, which is a common approach in the natural sciences, looking for the explanation of the phenomenon observed, and take the system of law as the observable. Both sets of approaches face certain challenges in explaining judging and legal reasoning. For instance, they reveal the difficulties of the internal justification of the judge's decision-making in an objective manner.

Lastly, introducing some less traditional approaches, Samuel has chosen to present in a novel way how some ideas from film studies can be applied as useful tools for analysis. Despite the fact that law has usually been associated with text-based reasoning, he argues that legal knowledge also deals with non-

written expressions employing visual associations.<sup>8</sup> For instance, he uses an example of deploying metaphors in the court that would paint a picture that abstracts from the particular case, and, thus, allows the reasoners to model the rules and facts in a new way.

## II. DISCUSSION

There are four points that I would like to contribute to the discussion here: firstly, I wish to present some additional interdisciplinary approaches that could have provided a better overview of the legal reasoning and decision-making and that have been omitted by the author; secondly, I believe, there should have been more emphasis on the beginnings and developments of the formal approaches that have influenced a lot of the interdisciplinary work of law, logic and computing science conducted at the moment; thirdly, I will argue that there is a limited scope for the application of the representation theory and similar results could be achieved by or in collaboration with such alternatives as the linguistic analysis; and fourthly, I wish to add some further considerations about the future challenges of the judges and legal reasoners that could have benefited the final discussions in the book.

### 1. *Interdisciplinarity*

I believe that the picture drawn by the author of the legal reasoner and decision-maker could have been improved by considering a more diverse set of interdisciplinary fields. While the author focused on some interdisciplinary influences (theology, evidence studies) in understanding legal reasoning and legal decision-making, there are numerous other approaches that could have provided more insights to the readers. For instance, there has been a lot of work done to understand the mind of a judge from a medical perspective. Psychologists and neuroscientists have identified many weaknesses in human reasoning that judges are no exception to.<sup>9</sup> These include biases, overreliance on expert opinions, limited ability to reason with numbers and statistical information. Another example can be shown through

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<sup>8</sup> Samuel (n 3) 94.

<sup>9</sup> See for example, Brian L Cutler, Hedy R Dexter and Steven D Penrod, 'Expert Testimony and Jury Decision Making: An Empirical Analysis' (1989) 7 *Behavioral Sciences & the Law* 215.

the political analysis of legal judgements. Many agree that law and judges cannot be considered as completely independent from legislative and executive powers, as it is often influenced by the political views and policy matters, and also partly depends on the subjective beliefs of the reasoners. Such inconsistencies and subjectivity – in the author's words 'hunches'<sup>10</sup> – are not represented in the official portrait of reasoning. Furthermore, natural sciences are commonly concerned with closed systems in which the phenomenon is explained. Law is fluid in its nature and does not easily accommodate formal proofs due to the complex subject matters that are embedded in a human made system.<sup>11</sup> Some other fields that provide useful insights in the analysis of decision-making include economics, politics, linguistics, gender studies, anthropology, etc. At the same time, it is understandable that such endeavour might go beyond of what has been intended for this textbook.

## *2. Formalism in the Past and Current Discussions*

In the first chapter, the author identified the beginnings of some of the formal methods in the law by explaining Wilhelm Leibniz's (1646 – 1716) and Christian Wolff's (1679 – 1754) mathematical approaches solving legal cases using deduction. It would have been useful to also mention John Henry Wigmore's (1863 – 1943) approach of legal reasoning charts formalising some parts of legal decision-making from facts. Nowadays, these ideas have regained their popularity among formalists with the raising interest in argumentation, automatization and artificial intelligence applied in the law.<sup>12</sup> A brief discussion of these approaches would have provided an additional layer of interdisciplinarity to the overview provided by the author, and introduced topics that might be omitted in some other law curriculum that is still mainly focused on classical approaches to the law. Furthermore,

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<sup>10</sup> Samuel (n 3) 129.

<sup>11</sup> Ibid 133-135.

<sup>12</sup> Trevor Bench-Capon, Paul Dunne, 'Argumentation in Artificial Intelligence' (2007) 171(10) Artificial Intelligence 619.

exposure to the formal theories might reduce the remaining stigma against numbers and statistics in the courtrooms and legal discussions.<sup>13</sup>

### 3. *Representation Theory*

Samuel introduces the representation or image theory as one of the more modern alternatives to analysing law. It puts emphasis on the use of metaphors and characters to explain legal scenarios in different environments. In a way, the use of 'images' aims to simplify legal concepts and hypothetical scenarios to better explain them to both legal reasoners and layperson involved in the process of adjudication. However, the brief introduction of the representation theory does not yet justify its usefulness in legal analysis. The example given was based on case where the liability of the school on a field trip had to be decided. It showed the different ways opposing parties presented the contrast between persons (in this case, the school girls) and things (in this case, the zoo) by creating to different mental images justifying their decisions.<sup>14</sup> I argue that such analysis could have also been presented through linguistic analysis that has already established links with legal reasoning.<sup>15</sup> Law and language analysis focuses on the way legal reasoners understand and use language to express and justify their decisions. Linguistic analysis provides useful tools for the *persona* and *res* analysis that Samuel claims to be untangled by the representation theory. Indeed, for more convincing outcomes the representation theory could be closely linked with the language analysis of the judgements and other legal texts to provide a clearer understanding of the complex concepts used.

### 4. *The Future of Decision-Making*

The author mostly focused on the legacy of the past and the current approaches to judging and legal reasoning. The book would have benefited from a brief section on the future of decision-making and modern influences

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<sup>13</sup> Norman Fenton, and Martin Neil, 'Avoiding Probabilistic Reasoning Fallacies in Legal Practice using Bayesian networks' [2011] *Australian Journal of Legal Philosophy* 36, 114.

<sup>14</sup> Samuel (n 3) 107-109.

<sup>15</sup> Peter Meijes Tiersma, Lawrence Solan, *The Oxford Handbook of Language and Law* (Oxford University Press 2012).

in this field. I believe that with the legal rules and cases themselves becoming increasingly complex, it is the legal reasoners that are expected to cope with the changes and keep up with the time. The burden on judges are (at least) twofold. On the one hand, there is the substance argument, where the judges are expected to keep up with the current changes in the legal system that are becoming increasingly complex. Moreover, judges are required to have a comprehension of the increasingly technical facts of the case (statistical evidence, medical evidence, etc.). On the other hand, there is the (meta-) analytical argument of judges being criticised for not implementing newest methods of reasoning in their decision-making. As it was shown through the claims made in the official portrait, judges perceive legal reasoning from an internal point of view, and are not necessarily concerned with the external approaches. There is yet to come an internal or external theory that would seem attractive and efficient enough to be considered and implemented in the courts.

One solution to alleviate the burden on judges, is to look at the tasks that are increasing in complexity but do not necessarily require a trained legal reasoner. For instance, in criminal law, it is common to rely on forensic evidence. With the techniques of forensic evidence developing due to new practices and technologies, the field itself has become far more advanced than, say, 20 years ago. Judges are not expected to become forensic specialists to be able to make a decision in a criminal case. Therefore, some changes in the ways the evidence is presented in the case, so that the judges (and possibly the jury) could have a better understanding of the facts presented and their impact to the case, is encouraged by the field specialists. However, there are many aspects of judging that have been described to be less technical and logical. Even though the robot judges might not be seen in the foreseeable future, there are many tasks in the law firms and courts that will no longer require a human input.<sup>16</sup>

While automatization can provide many benefits, due to its early stages in development, it also poses some risks in legal decision making. It has already been shown that there is a tendency to misinterpret and overestimate the

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<sup>16</sup> Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press 2014).

importance of numeric data in the courtrooms.<sup>17</sup> Furthermore, at this point it has not yet been decided as to who is to be held responsible if the algorithm becomes 'biased' towards a certain group of people. That is to show that due to the undefined nature of legal reasoning and decision-making, it is not yet possible to capture its essence in a single theory or programme.

### III. CONCLUSION

This book is a good introductory level resource to any law student and any other curious mind interested in law and legal theory. It covers the basics of what both practitioners and academics understand as the exercise of decision-making and the processes of reaching legal conclusions.

Connecting all these theories back to legal practice, I agree with the author that:

which model dominates at any one moment will not be a matter either of correspondence or of the reliability of its coherent structure; it will be a matter of consent among those who make up the discipline of law.<sup>18</sup>

To sum up, Samuel has created a concise guide to judging and to legal reasoning that will leave the reader with sufficient knowledge and wish to explore this area in more depth. Despite there being a number of fruitful approaches to judging and legal reasoning, each of which explains an aspect of legal reasoning, none of them is able to provide a full account of the phenomenon. The main lessons that can be learnt from this book are related to understanding the complex nature of legal decision-making and the burden that has been put on the judges when reaching legal conclusions. This book is recommended to law students and practitioners alike.

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<sup>17</sup> Fenton and Neil (n 14).

<sup>18</sup> Samuel (n 3) 165.