

The Attitudinal Model of judicial behaviour and its philosophical and legal implications

The term “judicial behaviour” refers to what judges do as judges. “The most consequential forms of judicial behaviour typically consist of decisions or contributions to decisions”¹. Of course, there are many kinds of behaviour that might influence judicial decision making in a very subtle and delicate way. Academic scholars of higher courts have depicted three ideal types of judicial behaviour: legal, attitudinal, and strategic². It is quite obvious that most judges see their own behaviour in the framework of the legal model. In this model, judges only want to find the correct interpretation of law. It does not matter what their views on the matter of interpretation are. Whether they are intentionalists or textualists, their main concern is the appropriate legal framework of decisions they are making. This attitude towards judicial behaviour is strongly embedded in the tradition of western law. The only goal that judges should seek is legality of their decisions. Here, decision-making is all about the law and doctrinal positions on the basis of legal merits. Because the law is all that a judge needs in order to support his or her decision, “(...) the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy”³.

This work focuses on the attitudinal model of judicial behaviour. This choice is justified by the fact that it is the only model that in its support presents systematically collected empirical data. Today, it is a reference point for all researchers of judicial behaviour. It has a key impact on the entire area of research into the behaviour of judges, and is increasingly becoming the subject of interest to philosophers of law.

In the attitudinal perspective, the law is merely a rationalization for judicial decision making, because it is too general and imprecise to determine the decision. Judges may be even more vulnerable than other decision makers. The attitudinal model shows us that we should think more widely about the goals that judges wish to achieve. “In a pure attitudinal model

¹ L. Baum, *The Puzzle of Judicial Behavior*, Michigan 1997, s. 2

² L. Baum, *Judges and Their Audiences*, Princeton 2005, s. 5

³ B. Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, *Legal Theory* vol. 16, (2010), s. 111

judges want only to make good public policy, so they choose between alternatives on the basis of their merits as policy”⁴. In this model the most important force, that shapes judges decisions is the Ideology, or more accurate: Judges personal ideology.

Before becoming chief justice of the U.S. Supreme Court, Charles Evans Hughes observed that, “We are under a Constitution, but the Constitution is what the judges say it is.” Several theories of judicial interpretation have attempted to demonstrate a “personal element” in judicial decision making. This effort is the hallmark of the “realistic” school of jurisprudence. The attitudinal model is the bedrock theoretical principle of legal realists and is now clearly among the leading theories employed by scholars across many disciplines to explain what transpires behind closed doors in the Supreme Court. What is intriguing about the model is its deceptively simple but powerful logic: justices come to the Supreme Court with their ideological preferences fully formed and, in light of contextual case facts, these preferences cast overwhelming influence on their decision making.

The main purpose of the work is to present the attitudinal model, analyze its assumptions, methodology and compare with other behavioural models presented in the literature. Therefore my basic subject of interest is a certain research method, and the main goal is to analyze its advantages and disadvantages, which is supposed to lead me to the conclusion about the legitimacy of its more common use for examining constitutional justices and courts. I indicate that the attitudinal model is currently the best developed, empirical method of examining the judges’ behaviour.

In Chapter I I describe the birth and development of the field of judicial behaviour. In Chapter II, I analyze the attitudinal model. I focus on presenting how the creators of the attitudinal model coped with the problem of circularity. I examine the approach of Segal and Cover, and then its development in the first work of Segal and Spaeth entitled *The Supreme Court and the Attitudinal Model*⁵. In Chapter III, I analyze the institutional position of the U.S. Supreme Court. The accuracy of the attitudinal model in predicting judicial decisions requires justification. I point out that it depends on the institutional position of the Court. Any Supreme Court or Constitutional Court does not exist in an institutional vacuum. Justices can only maximize their policy goals by reacting to the constraints imposed by other significant players in the Court’s political and institutional environment. It has been suggested that “judges

⁴ L. Baum, *Judges...*, s. 5

⁵ J.A. Segal, H.J. Spaeth, *The Supreme Court and the Attitudinal Model*, Cambridge 1993

decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do”⁶. This proposition leads to another model of judicial behaviour – strategic model.

In Chapter IV, I examine the strategic model. “In most strategic models judges seek to make good policy, but they define good policy in terms of outcomes in their court and in government as a whole”⁷. It is unquestionable that, at some level, all political and social behaviour must be explained in reference to individual values, attitudes or personalities. But all these factors should be explained in contexts of their occurrence. The institutional settings “are an omnipresent feature of our attempts to pursue a preferred course of action”⁸. Political behaviour can be explained only in institutional environment. Without taking into account this institutional context, it’s very easy to admit that attitudes are the only important factor relevant to understanding judicial decision making. But if we agree with this, we have to agree with the implication that follows this thesis: There are no constraints in judicial decision making, all justices in Supreme Courts are completely free in making their decision. They are only prisoners of their own attitudes and ideology. In Chapter V I deal with the problem of relations between legal theory and empirical legal research. Based on the analysis of the current shape and directions of research on judicial behaviour, I argue that one should remain sceptical about the potential integration of the attitudinal model and the legal model. In Chapter VI I argue that the attitudinal model, as well as other models of judicial behaviour, can be a useful tool for comparative studies on constitutionalism and constitutional courts.

Nevertheless, it is important not be a naive legal empiricist. I agree with L. Baum, who argues: “the findings from these analyses do not establish that the content of legal policy is the only consideration that motivates [United States] Supreme Court justices to a significant degree. The evidence is too ambiguous and too limited to support this conclusion”⁹. Because scholars have not arrived at a definitive explanation of judicial goals and motivations, the “empirical findings that scholars use to support a particular interpretation of judges’ behaviour typically are consistent with other interpretations as well”¹⁰. Consequently, judicial behaviour would

⁶ J.L. Gibson, *From simplicity to Complexity: The Development of Theory in the Study of Judicial Behaviour*, Political Behaviour vol. 5, (1983), s. 9

⁷ L. Baum, *Judges ...*, s. 6

⁸ H. Gillman, C.W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, [w]: *Supreme Court Decision Making. New Institutional Approaches*, (ed.) C.W. Clayton, H. Gillman, Chicago 1999, s. 3

⁹ L. Baum, *The Puzzle ...*, s. 41

¹⁰ L. Baum, *Judges ...*, s. 173

probably puzzle scholars for a long time. Nevertheless, I think that those empirical findings give a lot of interesting and illuminating insights into how supreme and constitutional courts work.