

## Judicial Performance and Experiences of Judicial Work: Findings from Socio-legal Research by Sharyn Roach Anleu & Kathy Mack: Commentary

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### Abstract

This commentary examines the contribution in this edition by Roach Anleu & Mack, based on arguments that reducing judicial performance evaluation (ergo any professional performance) to that which is easily measurable removes the human aspect of that performance, and is therefore less accurate. Here, “measurable” is meant as focusing only on the “outward performance”, “interaction with stakeholders” and how judges perform in relation to numbers of cases. Compared to such organisational standards, judicial codes of ethics or other written codes reflect the more traditional values of the judiciary, such as independence and impartiality. This can be seen e.g. in the experiences of the Organisation for Security and Cooperation in Europe in supporting the use of judicial performance standards. The argument in the paper, supported by this commentator, is that such exercises are superficial and more depth is needed to capture the entirety of the judicial experience using the model presented.

### Key words

Judicial Performance; Evaluation; Judicial independence; Ethics

### Resumen

Este comentario analiza el artículo de Roach Anleu y Mack en este número, en base a los argumentos de que limitar la evaluación del rendimiento judicial (ergo cualquier rendimiento profesional) a lo que es fácilmente medible elimina el aspecto humano de ese rendimiento, y es por lo tanto menos preciso. Aquí, por “medible” se entiende lo que está centrado únicamente en el “rendimiento exterior”, la “interacción con los interesados” y el rendimiento de los jueces en relación con el número de casos. En comparación con estas normas de organización, los códigos

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Commentary to the article by Roach Anleu and Mack (2014) resulting from the paper presented at the workshop *Evaluating Judicial Performance* held in the International Institute for the Sociology of Law, Oñati, Spain, 9-10 May 2013, and coordinated by Francesco Contini (National Research Council of Italy), Jennifer Elek (National Center for State Courts), Kathy Mack (Flinders University), Sharyn Roach Anleu (Flinders University) and David Rottman (National Center for State Courts).

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judiciales de ética u otros códigos escritos reflejan los valores más tradicionales de la judicatura, como la independencia o imparcialidad. Esto puede verse, por ejemplo, en las experiencias de la Organización para la Seguridad y la Cooperación en Europa en apoyar el uso de las normas de rendimiento judicial. El argumento del artículo, apoyado por esta autora, es que estos ejercicios son superficiales y se necesita más profundidad para capturar en su totalidad la experiencia judicial utilizando el modelo presentado.

**Palabras clave**

Rendimiento judicial; evaluación; independencia judicial; ética

This paper argues that reducing judicial performance evaluation (ergo any professional performance) to that which is easily measurable removes the human aspect of that performance, and is therefore less accurate. Here, "measurable" is meant as focusing only on the "outward performance", "interaction with stakeholders" and how judges perform in relation to numbers of cases. Compared to such organisational standards, judicial codes of ethics or other written codes reflect the more traditional values of the judiciary, such as independence and impartiality.

These classical judicial values of independence and impartiality, reflected in the representation of justice as an iconic goddess, create an illusion that there is a requirement of sameness in judging and of being a judge- providing an abstract and normative model which examines only the 'outward courtroom performance and inward decision making processes' (Roach Anleu and Mack 2014, p. 1019). The same classical values envision the judiciary as being a pantheon- that of the Ivory Tower, rather than recognising judges are a group of individuals who work and think very differently from one another and may work in very different contexts.

These traditional approaches are reflected in the classical systems of judicial performance evaluation, such as that elaborated by the American Bar Association (see also OSCE 2010, Annex 1): legal ability; integrity and impartiality; communication skills; professionalism and temperament; and administrative capacity. Legal ability goes to the core of being a judge- whether they know the law and have expressed the ability to apply it correctly; integrity and impartiality, and professionalism and temperament reflect how judges are expected to behave in the courtroom (outward performance). On the other hand, communication skills reflect 'inward decision making processes' including clarity and logic in giving written decisions. Administrative capacity reflects judges as bureaucrats in an 'industrial organisation' expected to produce to a high standard within a reasonable period of time- this is also a classical reflection of procedural law that manages the expectations of litigants. This model continues to be rolled out, especially in transitioning democracies, such as Armenia (see Venice Commission and Directorate of Human Rights of the Directorate General of Human Rights and Rule of Law of the Council of Europe 2014) and Moldova (See OSCE 2014, Consultative Council of European Judges 2014). It continues to be used in a number of states in the United States of America in retention elections.

Roach Anleu and Mack are critical of this traditional approach to judicial performance evaluation as being too limited and unable to accurately capture the performance of judges. To that end, they have conducted a socio-legal study to confirm their hypothesis that there is much more to judicial performance evaluation than the traditional forms. Their hypothesis envisages four further contexts outside of the traditional model that can have an impact on judicial performance, and should be taken into account for future models of evaluation:

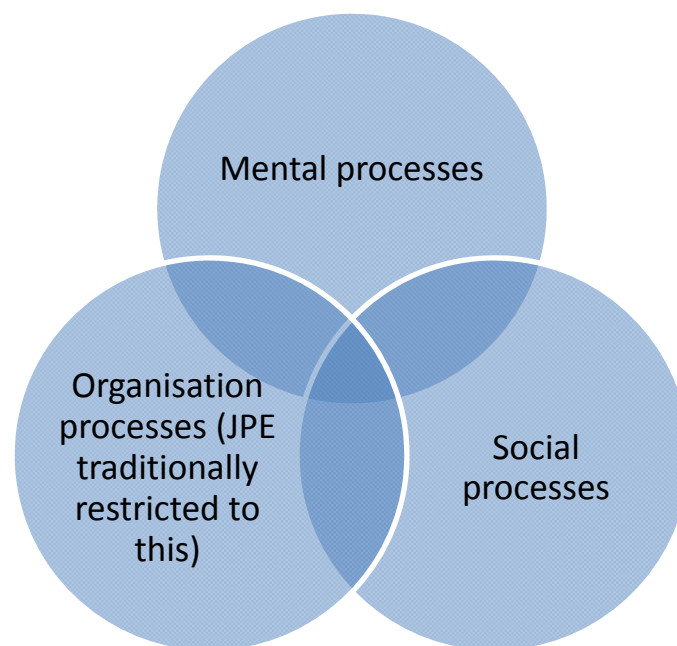
1. Level of court and type of work;
2. Activities and inputs of others;
3. Emotional dimensions of judicial work; and
4. Personal context, especially work/family interface.

These contexts described by Roach Anleu and Mack (above) reveal the existence of different types and levels of courts and the challenges created by the varieties of cases; the importance of the activities of other actors; and personal lives, and emotions. The study of Roach Anleu and Mack argues that these contexts have an impact on the mental processes of being a judge, both in the outward performance and inward decision making processes. These tensions, and how judges manage them are not fully recognised or are even ignored in formal judicial performance evaluation systems that currently operate.

To this commentator, these contexts reflect mental, organisational and social processes that go into being a judge. The 'mental' reflects the emotional and rational processes that go into sitting in hearings and deciding cases; the 'organisational' processes reflect how a judge works with the resources and technology available to not only deliver justice but to bring balance between their personal and professional lives; and the 'social' processes reflect how interaction with other actors impacts on their mental and organisational processes. These processes are not independent of each other, but, as shown by Roach Anleu and Mack, can be independently measured. The way that Roach Anleu and Mack have conducted the study therefore shows that it is possible to encompass mental, organisational and social processes that have an impact on judging in judicial performance evaluation. These processes and contexts are not just things that happen to judges, but describe in more detail what judges need to manage in order for them to function.

Roach Anleu and Mack present a multi-dimensional perspective (though I have reduced it to three dimensions for the sake of simplicity) of how judges function, in contrast to one that only provides "mechanical", "reductionist" or "asocial notions" of judging. Their approach can provide an important tool for judges to understand how they are personally performing, for (continuous) training purposes, and for or society in general and other state institutions to comprehend how judges work.

Judicial performance evaluation should encompass the various dimensions that impact on judges and their work, and where the three intersect, is the core of their work with the three processes being managed by judges:



This Venn diagram shows the processes that judges must manage. The intersecting part is but a small part. Mental processes outside of work can very much hinder the psychological state of a judge: change in personal circumstances (be it marriage, birth or death in the family) can change the personal approach of a judge to different types of cases. Organisational processes that only look at resources of the court might miss other organisational processes that may support a judge- the possibility of flexible working hours for example can have a positive impact on a woman coming out of maternity leave; or a father who wishes or needs to spend more time with family. Social processes outside the courtroom but within the court itself can change the working environment of a judge. Whilst this commentator has encountered criteria which examine social processes and social relations within a

court, (OSCE 2014, p. 39) this looked more at the comportment of the judge within the court, and not necessarily how it affected the judicial performance.

The model presented by Roach Anleu and Mack (and simplified by me in the Venn diagram) can be applied to all judicial performance evaluation exercises. One thing this commentator encounters in research about judges is that they are not frequently perceived as humans, and research often reveals, 'surprisingly' that they are. This word appears twice in the study published by Roach Anleu and Mack alone. This model adds the human dimension, rather than an abstract model of judges and judging, and can be added to the Kyiv Recommendations (OSCE 2010), and the American Bar Association model, as further guidance as to what can be evaluated in order to help improve our judges' skills. However, as a goal of human resource policy, the model should also seek to ensure that judges are able to manage the various contexts within which they live and work.

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