MODERN STUDIES IN EUROPEAN LAW

THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU

GUNNAR BECK

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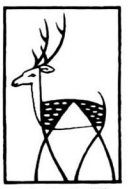

• HART •
PUBLISHING
OXFORD AND PORTLAND, OREGON
2012

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: http://www.isbs.com

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84946-323-2

Typeset by Hope Services, Abingdon
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU

The Court of Justice of the European Union has often been characterised both as a motor of integration and a judicial law-maker. To what extent is this a fair description of the Court's jurisprudence over more than half a century?

The book is divided into two parts. Part one develops a new heuristic theory of legal reasoning which argues that legal uncertainty is a pervasive and inescapable feature of primary legal material and judicial reasoning alike, which has its origin in a combination of linguistic vagueness, value pluralism and rule instability associated with precedent. Part two examines the jurisprudence of the Court of Justice of the EU against this theoretical framework. The author demonstrates that the ECJ's interpretative reasoning is best understood in terms of a tripartite approach whereby the Court justifies its decisions in terms of the cumulative weight of purposive, systemic and literal arguments. That approach is more in line with orthodox legal reasoning in other legal systems than is commonly acknowledged and differs from the approach of other higher, especially constitutional courts, more in degree than in kind. It nevertheless leaves the Court considerable discretion in determining the relative weight and ranking of the various interpretative criteria from one case to another. The Court's exercise of its discretion is best understood in terms of the constraints imposed by the accepted justificatory discourse and certain extra-legal steadying factors of legal reasoning, which include a range of political factors such as sensitivity to Member States' interests, political fashion and deference to the 'EU legislator'. In conclusion, the Court of Justice of the EU has used the flexibility inherent in its interpretative approach and the choice it usually enjoys in determining the relative weight and order of the interpretative criteria at its disposal, to resolve legal uncertainty in the EU primary legal materials in a broadly *communautaire* fashion subject, however, to i) regard to the political, constitutional and budgetary sensitivities of Member States, ii) depending on the constraints and extent of interpretative manoeuvre afforded by the degree of linguistic vagueness of the provisions in question, the relative status of and degree of potential conflict between the applicable norms, and the range and clarity of the interpretative *topoi* available to resolve first-order legal uncertainty, and, finally, iii) bearing in mind the largely unpredictable personal element in all adjudication. Only in exceptional cases which the Court perceives to go to the heart of the integration process and threaten its *acquis communautaire*, is the Court of Justice likely not to feel constrained by either the wording of the norms in issue or by the ordinary conventions of interpretative argumentation, and to adopt a strongly *communautaire* position, if need be in disregard of what the written law says but subject to the proviso that the Court is assured of the express or tacit approval or acquiescence of national governments and courts.

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Meiner Mutter und im Andenken an meinen Vater

Acknowledgements

It is customary to thank those who have facilitated academic work. This is a good convention.

The Leverhulme Trust deserves particular mention. Of the officers and members of staff I dealt with at the Trust over a period of over two years, not one has been unnecessarily bureaucratic or difficult. When I had a request, this was assessed on its merits, with reference to the research task at hand and in a quick and uncomplicated fashion. It is rare to find institutions of this kind today. It was a pleasure to deal with Jean Cater, Anna Grundy and Bridget Kerr and indeed anyone else I contacted at the Trust.

I would also like to thank Professors Lynn Welchman and Mashood Baderin of SOAS, University of London, for dealing with my faculty leave arrangements in the same cooperative and unbureaucratic manner.

I am especially grateful to Sir Konrad Schiemann, Britain's judge at the Court of Justice of the EU until September 2012, for several helpful discussions and for facilitating my visits to the Court of Justice in Luxembourg, which afforded me the opportunity of meeting, and of discussing my work and hypotheses about the nature of legal reasoning and the Court of Justice's approach with, many of the Court's judges. I wish to thank President Vassilios Skouris, Judge Koen Lenaerts, Judge Christiaan Timmermans, Judge Allan Rosas and the then Advocate General (now Professor) Paolo Maduro for very interesting and helpful discussions. I am also especially grateful to Advocate General Eleanor Sharpston QC for sharing some of her views with me and for the time she took in answering many of my questions during her very busy year as First Advocate General. Finally, I wish to thank Advocate General Niilo Jääskinen for a brief but intellectually very stimulating discussion over lunch in London.

I have also benefited from discussions with experienced practitioners. For their many helpful comments and case law references, I am very grateful to Judge Christopher Vajda QC (formerly of Monckton Chambers, and now of the Court of Justice of the EU), Tim Ward QC, Paul Lasok QC, Aidan O'Neill QC, Paul Farmer, Hugh Mercer QC and Professor Derek Wyatt QC, Paul Berman, Malcolm Gammie QC and David Milne QC.

My thanks further go to Elizabeth McKnight, Professor Tony Carty, Professor Bill Bowring, and Robert McCracken QC with each of whom I have had enjoyable and interesting conversations over the years and who have all enriched my understanding of the law and other things besides. The same applies to Professor Takis Tridimas and Professor Alan Dashwood QC. I am grateful to my academic friends for supporting my career at important points. Professor Tridimas was also the first to point me in the direction of further research at the intersection of

European Union law and legal theory. I am further grateful to Professor Anthony Arnull whose initial interest in my work on judicial 'reasoning' and the problem of 'Kompetenz-Kompetenz' proved crucial during the early stages of my academic career as an EU lawyer. Professor Damian Chalmers also deserves mention in this context.

My thanks further extend to Thomas Schneider of the German Embassy in London for facilitating my visits to Berlin, where I had very interesting exchanges of views with Dr. Thomas Henze and Nikolaus Graf Vitzthum of the Bundeswirtschaftsministerium and with Dr. Ulrich Karpenstein of Redeker Sellner Dahs Rechtsanwälte.

I would like to thank Herbert Smith Freehills International Lawyers for agreeing to host and fund the book launch for this publication. I am very grateful to James Quinney, head of the EU & Competition Law Group, and in particular to Kristien Geeurickx for the interest they have shown in my work over the years. Lucia Schwochow has very efficiently helped me with proofreading and research assistance.

Sympathetic encouragement and practical advice at critical or difficult junctures even of academic endeavours are often more important than intellectual discussion. I am indebted to Tara Healy-Singh, Dr Christina Petsoulas, Simon Canelle, and Dr Ian St. John for their friendship, help and/or encouragement over the years. The need to order the relevant empirical information was a problem at the beginning. Tara's good sense and advice on how best to cope with the amount of material and case law was invaluable. Simon and Ian read parts of this manuscript – it cannot have been enjoyable. I thank both for their perseverance and advice, and Simon in particular for the admirable care he took in reading 'his' part of the manuscript, and for the many hours of work this took. I am also grateful to Dr Anna Odby for many conversations about and beyond the law.

My publishers, Hart Publishing, have been consistently helpful, efficient and generally uncomplicated and unbureaucratic wherever possible. I am grateful to Rachel Turner, Tom Adams and Mel Hamill for their help and sometimes also their patience. I would also like to thank Richard Hart for his help on one or two specific matters.

London, December 2012

Recht ist die Fortsetzung der Politik mit anderen Mitteln. Es unterliegt dabei nicht Gesetzen, sondern Gesetzmäßigkeiten – politischen wie psychologischen, rhetorischen wie methodischen.

Legal reasoning is ordinary reasoning in extraordinary language.

In Ausnahmesituation setzen sich Richter über Wortlaut und jede Konvention im Gebrauch der Auslegungsmethoden hinweg. Dann weicht die stets imperfekte Objektivität des Rechts ganz der Subjektivität des richterlichen Willens und wird bestimmt von der normativ prägenden Kraft des Politischen. Verfassungsrecht wird zur Rechtfertigung von Politik mit normativen Mitteln. Damit ist der Rechtsstaat immer auch eine Schönwetterveranstaltung.

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Introduction

THE TERM *LEGAL reasoning* can be used in a number of ways. The most common use of the term refers to the justificatory reasoning involved in the judicial process. Legal reasoning in this sense is concerned with the question of how judges *ought to* or how they in fact *do* decide cases. It may thus be defined as the process of practical reasoning involved in applying written laws[1] and other sources of law, especially precedents, general principles of law and, in certain legal systems, academic opinion, to specific cases.[2] The term *legal reasoning* in this sense may therefore be regarded as a synonym for *judicial reasoning*, and it may be said equally to apply more generally to the reasoning of practising lawyers aimed at understanding and predicting judicial decisions when advising clients, or by academic lawyers seeking to describe, explain and possibly justify such decisions. In the latter sense as employed by lawyers and academics, legal reasoning remains concerned with the judicial process and may best be described as an explanation and anticipation of judicial behaviour. It remains reasoning about judicial reasoning.

The term *legal reasoning* as described so far, however, contains one central ambiguity: it may be understood either normatively or descriptively. In the *normative* sense legal reasoning may best be understood as a theory of adjudication which aims to prescribe how judges ought to decide cases. Normative legal reasoning generally presupposes a specific legal method, formula, decision-making procedure or theory of some kind which judges must follow to arrive at correct decisions. On the normative view of legal reasoning there will thus often, indeed commonly, be a gap between legal reasoning and judicial behaviour. For judges may not reason as they *should* according to the normative theory. This study is not concerned with legal reasoning in the normative sense.[3]

Descriptive legal reasoning, which may also be referred to as *explanatory* legal reasoning, does not aim to prescribe judicial behaviour; instead, it seeks to explain how judges do in fact decide cases. Nor does descriptive legal reasoning necessarily

[1] Such as statutes, constitutional provisions, international treaties or conventions or delegated legislation.

[2] Legal reasoning is here referred to as practical because it is reasoning about how legal actors like judges *ought to* act or do in fact act.

[3] Or, to be absolutely precise, it is not concerned with normative legal reasoning except in so far as prescriptive ideas about how judges ought to reason and decide, in fact influences actual judicial behaviour.

presuppose the existence of a specific method or formula for interpreting the law and applying it to specific sets of facts. Depending on whether it presupposes such a legal method, descriptive legal reasoning may be divided into *scientific* and *heuristic* accounts of legal reasoning.

Scientific accounts of legal reasoning ultimately assume there is or can be a specifically legal method of reasoning which allows judges to resolve legal uncertainty through interpretation. This legal method is made up of certain rules of analogy, logic and interpretation. Scientific legal reasoning therefore focuses on the discovery of the rules of that method, the proper relationship between them, and how they are to be applied to problems of legal interpretation. It follows that successful or good legal or judicial reasoning, on the scientific view, is defined essentially in terms of the extent to which it conforms to the 'right' legal method and the rules for its proper application. Finally, scientific legal reasoning assumes that judicial practice broadly or commonly reflects 'right' legal reasoning. If it did not, the underlying theory of adjudication should be more appropriately categorised as a *normative* rather than *descriptive* theory of legal reasoning.

By contrast, *heuristic* legal reasoning denies that a specific legal method exists, or may be discovered or developed. The denial of even the possibility of a specifically legal method of interpreting must not, however, be taken as equivalent to the suggestion that judicial decisions are necessarily unreasoned, random, inexplicable and/or wholly unpredictable. Rather, heuristic legal reasoning asserts that instead of an identifiable legal method of reasoning, judicial decisions reveal discernible heuristics or patterns consisting of recurring legal and extra-legal explanatory factors and constraints of judicial decision-making. These patterns, which partly underlie the official justificatory legal discourse, differ from the ideal type of a legal method of interpretation in that they do not refer to an ordered set of strict rules but to broad determinants and underlying motives of judicial decision-making which, though of no precise, determinable weight, are of recurring importance and which the American legal realist Karl Llewellyn famously called steadying factors.[4]

These steadying factors, which may be legal and extra-legal, range from the accepted terms of orthodox legal justificatory discourse, which include reasoning by analogy, argumentation by deduction and the various theories of statutory interpretation as one variable amongst several, to precedents, rule-avoiding norms, the constraints of ordinary language, to the institutional interests and ethos of the relevant courts and other political, socio-economic and institutional constraints on judicial decision-making no less than the congeries of psychological, sociological and ethical motives that account for the more unpredictable personal element in all judicial decisions. The realist school of legal reasoning expressly acknowledges the relevance of both legal and extra-legal determining factors of judicial decision-making. Another variant of the heuristic model of legal reasoning is the topical jurisprudence school which is associated with the

[4] K Llewellyn, *The Common Law Tradition* (Boston, Little, Brown, 1960) 19 et seq.

German legal theorist Theodor Viehweg and which abandons the idea of a method for the notion of legal reasoning as problem-oriented thinking by which the legal issues, is investigation from a variety of angles from different perspectives based on an accepted catalogue of legal topics.

Whereas scientific legal reasoning implies, at least in principle, the predictability of judicial decisions if only the right legal method is identified and applied, heuristic legal reasoning abandons the idea of predictability in favour of the notion of the 'reckonability' of judicial outcomes. Heuristic legal reasoning maintains that the relative influence of the various factors explaining judicial outcomes may vary from case to case, that not all factors will be relevant in all cases, and that there will always remain a residual unpredictability of judicial decisions due to the inescapable personal element of all decision-making, so that no one formula could ever be devised to determine the precise relative weight and effect of each of the determining variables. In the absence of such a method, an imperfectly rational evaluation of the relevant factors and their importance based on incomplete information, is all that is possible. It follows that the various legal and extra-legal factors 'steadying' judicial behaviour, undeniable as their significance may be, can at the same time never be more than heuristics, imperfect aids to prediction, which only allow for reckonability. Reckonability means that outcomes may be correctly predicted in most but not all cases. As variants of the heuristic view, the topical and realist schools of legal reasoning are agreed in all these respects. They differ, however, in that topical reasoning emphasises the indeterminacy of the various legal terms of argumentation or *topoi*, whereas realists regard the terms of legal justificatory discourse as one amongst a broader range of determinants of judicial reflection. The present study seeks to integrate both perspectives in a unified heuristic theory whereby the accepted repertory of legal *topoi* provide the flexible context of justification beneath which a range of steadying factors influence judicial behaviour at a motivational level. The two levels interact in that the justificatory discourse – its flexibility as well as its limits – is itself a steadying factor influencing, and not merely 'dressing up', judicial reasoning.

The distinction between scientific and heuristic legal reasoning is central to this study, which is divided into two parts. Part I develops a theoretical framework which forms the basis for the subsequent analysis in Part II of the judicial reasoning of the European Court of Justice (also referred to either as 'ECJ' or 'Court of Justice') as evidenced in its case law. That theoretical framework is based on a synthesis of an account of the sources of linguistic, conceptual and normative legal uncertainty with the juxtaposition between *scientific* legal reasoning, which emphasises the formalistic justificatory discourse and legal method as the fount of objectively valid answers to legal problems, and *heuristic* legal reasoning, which denies the possibility of objectively final answers in the law and, instead, seeks to explain judicial decisions as best as possible on the basis of the congeries of legal and extra-legal 'steadying' factors that regularly influence judges. In addition to the distinction between these two models of legal reasoning, the theoretical framework in Part I also draws three further pervasive distinctions: first, the distinction

between clear and hard cases which has been a familiar feature of legal theory since Hart's *The Concept of Law* but of limited practical significance; secondly, the distinction between primary and secondary legal uncertainty; and, finally, that between primary and secondary legal justification. Part I consists of five chapters.

Chapter one develops the two rival concepts of scientific versus heuristic legal reasoning. *Scientific* legal reasoning broadly treats and presents law as legal science. It is formalistic and systematic, and it maintains that legal reasoning essentially consists in the discovery amidst the vast body of judicial decisions of the 'right' legal method. That method, if applied correctly, will then point judges and lawyers alike to the right legal outcome and allow the latter by 'right' reasoning to predict the decisions of the former. *Heuristic* legal reasoning, by contrast, is realistic or pragmatic and topical or problem-oriented rather than formalistic and based on the belief in a distinct 'legal method'. It treats formalist legal methodology and doctrine not as the sole determinant but as a constraint on or one of the determinants of judicial reasoning. Accepted justificatory legal discourse and argumentation, on the heuristic view, cannot yield a single 'right' answer to every legal problem, but it is one the 'steadying' factors which imperfectly explain judicial behaviour.

Chapter one also briefly addresses the subject of the familiar distinction between clear and hard cases. The existence of rule-avoiding norms[5] means that there are no absolutely clear cases. To varying degrees, the law in hard cases is unclear as a result of the two prime sources of legal uncertainty: linguistic vagueness and normative pluralism. Legal reasoning refers to the thought processes by which judges arrive, and justify arriving, at resolving problems of interpretation posed by vagueness, norm pluralism and other sources of legal uncertainty.

Chapter two focuses on *linguistic uncertainty or vagueness* in legal language which emanates from a variety of sources, including:

i. the open-ended nature of many concepts;
ii. ambiguity and other forms of context-dependence;
iii. imprecision;
iv. incompleteness;
v. essentially contestable or interpretative concepts; and
vi. 'dummy' standards such as 'substantial', 'reasonable' or 'proportionate' etc, and other instances of pragmatic vagueness.

The various sources of vagueness are not mutually exclusive. They describe sources of vagueness as much as different ways of looking at the nature of vagueness. The various categories often overlap. Instances of conceptual vagueness typically exemplify features of two or more of them. 'Dummy' standards or pragmatic vagueness, for example, may coincide with one form of ambiguity or

[5] These norms allow judges to avoid the rigidity of rules even in seemingly clear cases where both the applicability of a norm and its meaning are assumed to be settled facts. An example for the uncertainty created by rule-avoiding norms is provided by the famous US case of *Riggs v Palmer* although less well-known cases can be found in other legal systems.

another, or they may be viewed as a sub-category of either the open-ended nature of concepts or as standards essentially characterised by imprecision. Similarly, the ideas of open-ended concepts and essential contestability partly overlap and thus often coincide in practice.

Chapter three addresses the problem of norm uncertainty in the law which has its origin in value pluralism as a general theory of the impossibility of rational choice between incommensurable conflicting values. In the law, value pluralism exists wherever there is no clear hierarchy between potentially conflicting norms or values applicable in a particular case.

Chapter four deals with the *doctrine of precedent* which, as a matter of practice, exists in all legal systems. Precedent uncertainty has three dimensions: vagueness and value pluralism (to which judge-made rules are subject in broadly the same manner as written provisions) and rule instability (which is specific to judge-made rules) which results from the imprecision of the notions of the relevant similarity or the material facts of cases.

Chapter four also briefly examines the one major source of legal uncertainty in national legal systems, that is, the uncertainty which results from the law 'being silent' on a question which nevertheless requires a legal solution. This problem, which is referred to as that of 'gaps in the law', exists in all legal orders. It has been of pivotal importance in the early decades of the development of EU law.

Legal uncertainty, it is concluded as a result of the discussion in chapters two to four, is a necessary feature of all legal systems. At the same time the precise importance of each of its various sources and aggravating factors – vagueness, pluralism, precedent and gaps – inevitably varies between legal systems, depending on the relative importance of statutory versus common law, on drafting styles and techniques, and respective traditions of textual interpretation.

Chapter five focuses on the techniques courts employ to resolve legal uncertainty. In addition to the distinction between scientific and heuristic legal reasoning, this chapter assumes two further distinctions which complete the theoretical framework developed in Part I which is then applied to the EU Treaties and the case law of the ECJ in Part II: the distinction between primary and secondary legal uncertainty, and that between the primary and secondary stages of legal justification. In particular this chapter argues that syllogistic reasoning, which is the *primary stage of* and a basic ingredient of all *legal reasoning*, is sufficient to provide answers in clear cases. In practice most cases are more or less hard cases,[6] where legal justification requires a secondary stage: *secondary legal justification* which consists of argumentation based on certain interpretative rules or *topoi* designed to select the appropriate norm and/or determine its meaning, to be followed by a syllogism which then applies the legal rule to the facts. The interpretative criteria applied in hard cases are traditionally classified into the three main categories of

[6] Hard(er) cases differ from clear cases in that the relevant legal rule (whether written or derived from precedent) may need interpretation or it may be unclear which rule(s) may apply or which of several applicable but potentially conflicting rules is to take precedence.