

The Role of Ideology in Adjudication

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1 Changes, the Law and Ideology

The aftermath of the events of September the 11th 2001 has brutally displayed that we live in a world of change. But most European citizens (notably the Swedes) seem to be convinced that our society always has been “bound” to end up in democracy, peace and prosperity backed by an idealistic normative regime of Rule of Law.

But are we really bound to be where we happen to be? I don’t think so and it’s easy to be pessimistic about our chances of staying there. The twentieth century could easily have gone in another direction: the triumph of democracy in particular looked quite unlikely as recently as in 1941. Our free markets have turned out to be fragile. This is the reason why theorists thought they require firm political oversight by supra-national structures as the European Union. We have also learned that democracy and the free market have proven enduringly compatible only under historically unusual conditions of prosperity, or else in protected domestic settings.¹

We have learned that an understanding of the Rule of Law adequate for the civilization of today, could probably not meet the demands of civilization of tomorrow. Society is truly inconstant. As long as it is inconstant, and to the extent of such inconstancy, there can be no constancy in law. The kinetic forces are too strong for us. The principle of Rule of Law is more ambiguous than ever. Some people may still think that the principles remain the same if we refuse to change the language formulas. But even in these circumstances the identity is only verbal. The legal language has no longer the same correspondence with reality as it used to have.

The constant change of European societies could be explained through a careful analysis of the interaction between reality and law in the process of European Integration. But, recent years have shown that it seems almost impossible to overestimate the complexities of the process of European Integration. After years of trying to pin down the course of integration through scholarly adventures of “law in context” and various interdisciplinary approaches we just do not know of any grand theory that would enable us to fully understand the present events of lawmaking in the European Institutions. In spite of these difficulties we should not yield. We should keep on striving to come up with a coherent and normatively attractive model of the future shape of a European Union or federation of states. This conviction is partly to blame for this collection of essays.

A significant feature of the politics of the Western World in the post-World War II-era has been the growing importance of the judiciary. International courts, supra-national courts and national constitutional courts are nowadays regarded as important lawmakers alongside with the political branches. Intense constitutional review and judicial legislation have led to a reinforcement of the role of courts in our societies and are now regarded as “politics as usual”.

This development has led to legitimate outbursts of democratic distrust: are judges getting too big for their wigs? Is it democratically acceptable that the European Court of Justice (hereinafter sometimes the ECJ) interprets, provisions

¹ Judt, Tony, *America and the World*, New York Review of Books, April 10, 2003, p. 28.

of the Treaties contrary to the natural meaning of the words used, and thereby engages in “judicial legislation”?

At the end of the day it seems fair to say that since the Community legal order, in the way it has been shaped by the European Court of Justice, clearly is intended to bring about a profound transformation in the conditions of life - economic, social, and even political - in the Member-States, and the preference for Europe is said to be determined by a genetic code transmitted to the court by the founding fathers, who entrusted to it the task of ensuring that the law is observed in creating an ever closer union among the people of Europe, an investigation of the role of ideology in adjudication is pertinent.

2 The Law and Politics of the European Courts

The European Court and the courts of the Member-States, like all judicial institutions, perform their functions in a world of more or less indeterminate norms. Their decisions, while in the first place intended to adjudicate upon concrete controversies, have to simultaneously fulfil requirements of legal certainty and coherence on the one hand and legitimacy and justice on the other hand. These requirements create theoretical tensions closely linked to the problem of judicial legislation and the role of ideology in adjudication.

A traditional definition of the task of the judge and the scope of judicial discretion goes as follows: the authority vested in the courts to make a choice between two or more conceivable lawful alternatives. The legal element of the concept appears in the form of a requirement that the choice must be found within the realm of law. The choice has to be based on a valid legal norm.

Jurists and legal theorists around the world, who claim that the legal reasoning and justifications of courts are only argumentative techniques, have questioned this definition, which safely rests within the boundaries of legal positivism. There is never a “correct legal solution”, which differs from the correct ethical and political solution to a legal problem. The critical legal theorist claims that legal texts do not constrain the judge’s interpretation in any significant way. This fundamental critique of the objectivity of law and the correctness of legal reasoning cannot be overlooked since it turns on the determination of the limits of the judicial discretion.

Despite the progress and success of postmodern critique of the authority of law and legal reasoning, most academics and practitioners of European law conduct their work within a different epistemological framework. Their point of departure is based on the assumption that the judicial interpretation by the ECJ is subject to real constraints posed by the normative structure of EC law and the judicial and legislative division of competencies between the EU and the Member-States.

The link between interpretation and the principled normative structure is reflected in the justification of the judge-made constitutional principles governing the relationship between EC law and national law. In *Francovich* the ECJ stated that the principle of non-contractual liability of the Member-States has to be viewed “... in the light of the general system of the Treaty and its fundamental principles.” In *CILFIT* the ECJ stated that “... every provision of

Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.”

The ECJ’s interpretative strategy seems to be based on the idea of EC law as a system where lacunae do exist. Thus, many situations are not governed by a rule of law. In such cases the ECJ will resolve the case by deducing from the existing rules a rule or principle which is in conformity with the underlying substantive as well as structural premises on which the legal system is based. The conventional picture implies that lacunae are more likely to arise in EC law since it is a new legal order in constant flux. In this context the ECJ (and legal scholarship) emphasises the ideal of coherence. The existence of lacunae and the quest for coherence seem to be the primary justification for the authority of the ECJ exercising extensive judicial discretion.

Judicial discretion raises theoretical questions stemming from the existence of a complex but unstructured continuum between strict rule application and judicial legislation. A technique for coping with these questions could be labelled “the method of coherence”. This is a method through which judges can make new rules of law without drawing upon their own legislative preferences. Coherence rule making is more or less distinct from the method of developing the definitions of the words in legal rules as an aid to applying them. The method focuses on the choice among different rules proposed to fill a gap, a conflict or ambiguity of a legal system seen as an ensemble of rules. The coherence method is elaborated by Dworkin who defines judicial interpretation as follows: “... constructive interpretation is a matter of imposing purpose on an object or practice in order to make the best possible example of the form or genre to which it is taken to belong.”

Hence, the ECJ will always be confronted by a *problem of system*. The rules applied to a decision with a purpose to solve societal controversies cannot simply be viewed as isolated exercises of judicial wisdom. They must be brought into some systematic interrelationship. The ECJ has taken on itself to display some coherent internal structure.

The Community judge is making law by treating the whole corpus of rules as a product of an ideology of integration. By employing the method of coherence or integrity with recourse to general principles of law as gap fillers or interpretative influence, the Community courts can carry out ideological work when they further a particular regime by developing it in the case of a gap, conflict or ambiguity. Integration thus becomes the *leitmotiv* of integrity or coherence.

3 The Europeanisation of National Law

Throughout the Member-States of the European Union you can discern a strand of thought which claims that the EU membership and the influx of international

law in day-to-day legal practice have led to a reinforcement of the role of law in the national polities.²

The conventional claim goes as follows: the areas where political decision-making has been the prime tool for solving societal problems and settling public and private disputes have significantly narrowed down. The political domain has shrunk because an ever-increasing number of policy areas are now subject to the EU system of enforcement of Community Law rights where no subject can be labelled a purely political question. This process has been broadly conceived as a process of judicialisation and constitutionalisation.³

Simultaneously an increasing number of policy areas are subject to the jurisdiction of the European Court of Human Rights (ECHR). This development is mainly due to a consistent strategy of making the European Convention of Human Rights a more effective vehicle for reviewing the legality of national measures. The method chosen has been incorporation, transformation and the establishment of new legal remedies to make the rights justiciable.

This broad account of present changes in the landscape of national law has been characterized by the fuzzy concept of Europeanisation of national law.

The concept of Europeanisation could be used for both empirical and normative purposes. In the different fields of social sciences there is no agreement on whether this is a true account of contemporary changes in the power structures of the European nation-states. But the use of the concept for normative purposes reveals perhaps even more controversies.

Either you find aggressive neo-liberals suggesting that Europeanisation and the withering down of the power of national sovereigns is a good thing since it transfers powers from the political democracy to the market or you'll hear cries for social justice and increased protection of human rights on global or supra-national level executed and enforced on the basis of trans-national constitutional documents.

To put it short; the forces that trigger the ongoing transformation of the European polities are barred to pin down and academic enterprises launched to unveil these forces are tainted by conscious or unconscious agendas of ideology.

The tale told by most lawyers of European law departs from mainstream social science in a significant way. While social scientists approach the law head on and treat it as an instrument of implementing political programs, lawyers still epistemologically remain convinced of the inherent qualities of authority and normativity of the law. It's not surprising that the majority of the college of European lawyers applauds the Europeanisation of national law and the judicialisation of politics. Lawyers are in this respect no less interest-oriented

² See Sweet, Stone, *Governing with Judges*, OUP 2000, p. 136 and Sweet, Stone, *Judicialization and the Construction of Governance*, *Comparative Political Studies* 32, p. 327.

³ On the process on the constitutionalization of the treaties, see: Mancini, Federico G *The Making of a Constitution for Europe*, in *The New European Community*, eds. Robert O. Keohane and Stanley Hoffmann (Boulder, CO: West View, 1991); For an account of the relation of legal and political integration see Alec Stone Sweet and Brunell, Thomas L., *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, *American Political Science Review* 92 (1998): 63-81; and Weiler, Joseph H. H., *The Transformation of Europe*, *Yale Law Journal* 100 (1991): 2403-83.

than politicians are. The process of Europeanisation of law strikes a new power balance between lawyers and politicians for the benefit of the former.⁴

I believe that there is evidence for the claim that national law has undergone a process of Europeanisation and that the political life of the nationstate thereby has been transformed. Something significant has occurred as a consequence of judicial enforcement of European constitutional documents. The EU membership and the enhanced effectiveness of the law of the European Convention of Human Rights have led to transformations in governance and discourse of the Member-States.

Theoretically the consequences of the European Court of Justice's structuring of EC law and its supremacy doctrine are great. In the judiciaries of the Member-States doubts have been expressed about the ECJ's doctrine of absolute supremacy of EC law as possessing the prerequisites to constitute the basis of a common European constitution. It has been pointed out that the question as to what extent the Member-States have transferred powers to the EC/EU both theoretically and practically is an issue for the constitutional law of the Member-States. The interest of uniform application of EC law must be set against the interest of Member-States asserting their constitutional integrity.

The crucial question then arises: how shall we deal with the principal question of competing principles? How shall we reconcile the concept of sovereignty and competing sources of principles and authorities with the requirement of coherence of the legal system? We claim that we have to avoid the "all or nothing" choice, and seek to describe the relationship between competing legal principles from the starting point where several applicable principles co-exist and overlap each other. The main point is that classical legal positivism cannot serve as a starting-point for proposals to solve conflicts of principles. The problematic interdependence between law and politics, reflected by the openness of the interpretive process, force legal positivism to refer conflicts of constitutional principles to the political arena.

Each time a rule is justified by an argument (supremacy of EC law) an opposing party can mechanically generate an opposing argument (supremacy of national constitutional law) to support an alternative rule. Therefore, legal discourse can be reduced to a system of contradictory buzz words that are never persuasive in and of themselves because there is no meta-rule that determines which one should prevail. The structure of this discourse is relevant to the role of ideology in adjudication in at least two ways. Firstly, when a national judge is faced with contradictory sovereignty arguments he or she is always forced to balance conflicting policy justifications. Secondly, the content of the sovereignty-language is particularly saturated with ideology. Therefore, any

⁴ Burley, Anne Marie and Mattli, Walter, *Europe Before the Court: A Political Theory of Legal Integration*, International Organisation 47 (1993): 41-76; Levitsky, Jonathan E., *The Europeanization of the British Style*, American Journal of Comparative Law 42 (1994): 347-80; Slaughter, Anne-Marie Sweet, Alec Stone, and Weiler, Joseph H. H., *The European Court and the National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context* (Oxford, UK: Hart Press, 1998); Maduro, Miguel Poiares, *We, the Court. The European Court of Justice and the European Economic Constitution* (Oxford, UK: Hart, 1998).

judge becomes an “ideological performer” by virtue of the legal language in itself and regardless of whether he or she likes it or not.⁵

The normative hierarchy of national constitutional rights in relation to European law, international and European conventions of human rights and national statutory rights has become confused and ambiguous. Normative statements in judgments or other legal decisions aiming to resolve legal disputes are no longer to be regarded, as logical conclusions derived from formulation of legal norms presupposed to be valid taken together with statements of fact which are assumed to be proven or true. Thus, the link between indeterminate principles of constitutional law and legal interpretation unfolds what can be described as a crisis of formal reasoning.

4 Ideology, Indeterminacy and Adjudication

Against this background it seems natural to raise the problem of normative distinctions in the process of adjudication. The following question seems crucial: Does the acknowledged openness of the interpretive processes of the European Courts and national courts pose problem for the claim of ideological neutrality in adjudication?

In other words, is it possible, in spite of the theoretical and methodological problems linked to the interpretation and application of law, to extract a normative criterion from the legal materials that with acceptable precision limits the area of determinacy (or indeterminacy) of the ECJ (or any court)? Can we assess the limits of judicial discretion with reference to the legal system?⁶

These queries have strong connections with the problem of the role of ideology in adjudication. The justification for any categorization of the problem turns on both epistemological and normative assumptions. You either believe that it's possible to assess the “true” content of normative meaning to a legal norm with reference to a normative criterion, external to the norm, through principled legal reasoning, or you believe that the normativity of the legal norm always is subject to an interpretative operation where constraining external legal criteria are missing.

From the latter perspective rule application cannot be objective or no rule can determine the scope of its own application, meaning that applying say *equal pay for equal work* will require judgments about whether factual circumstances in the order of events correspond or don't correspond to the concepts. As a logical matter, the basis for these judgments can't be found in the concepts themselves. But there are no objective tests of correspondence outside the text of the rule, once one agrees that language is not the mirror of nature.

⁵ Kennedy, Duncan, *A Critique of Adjudication*, Cambridge Mass. 1997, p. 156.

⁶ Most authors have answered these questions affirmatively. See Weiler, *The Court of Justice on Trial*, *CML Rev* 1987 p. 555 ff; Marin, *The Function of Judicial Decision in European Economic Integration*, The Hague 1972; Poyares Maduro, *We the Court*, Hart 1998, and even the self-proclaimed “Realist” Rasmussen, *Between Self-restraint and Activism: A Judicial Policy for the European Court*, *EL. Rev.* 1988 p. 34 f. and *Towards a Normative Theory of Interpretation*, CORE, Copenhagen 1993.

The presented lines of thought also differ with regard to ideas of the end or objective of legal decisions. You could roughly distinguish between ideas that picture the court as a *court of law* or as a *court of justice*.

The court of law idea puts emphasis on the mechanical application of law, rule of law not of men, within a *Rechtstaat* where legality and predictability are the primary ideals of adjudication. The judge here appears as a civil servant loyal to the will of the legislator.

The court of justice idea puts emphasis on the fairness or just application of the law. The end of the process could be evaluated with reference to substantive values of justice and reasonableness inherent in the legal system.

The different lines of thought reveal different approaches to the rationality problem of adjudication that could be phrased as follows: A judge is to interpret and apply a contingently emergent and more or less indeterminate body of law. This activity has to be performed with both internal consistency and rational external justification, so as to guarantee simultaneously the certainty of law and its rightness.⁷

Maybe academics and judges, when accused of engaging in ideological work or judicial legislation, should refrain from using the rhetoric of legal necessity. Maybe it's fairer to claim that only to a certain extent we are constrained by the legal materials and that we reach results to which our ideology is relevant.

From the academic perspective the openness of the interpretive process of the European Courts calls for a broader account of the role of the judiciary in the law-making process and its political significance for the process of globalisation at large. A major task for legal scholarship is to endeavour to analyse the reciprocal or non-reciprocal relationship between the European courts and the political sphere.

But in doing so we need to keep in mind that these relationships are radically indeterminate: Comparable social conditions, both within the same and across different societies continuously generate contrary legal responses and comparable legal forms have produced contrary social effects. So, if a society's law can't be understood as an objective response to objective historical processes, neither can it be understood as a neutral technology adapted to the needs of that particular society.⁸

The legal discourse has to be understood both as a consequence and a response to what is called the process of globalisation of politics, economy, culture etc. The present global situation testifies both to globalisation's enduring strength and to its complex and multifaceted nature. Globalisation is not only shorthand for international trade and investment, or what multinational corporations do; globalisation goes well beyond the links that bind corporations, traders, financiers and central bankers. It is used not just to spread ideas but also for communication by terrorists, politicians, religious leaders, anti-globalisation activists, lawyers and bureaucrats. September 11 showed that political globalisation is as powerful a phenomenon as the globalisation of the economy. It is a complex process that has gradually re-engineered and displaced the

⁷ Habermas, J., *Between Facts and Norms*, Cambridge Mass. 1996, p. 198.

⁸ Gordon, *Critical Legal Histories*, Stan. L. Rev. 1984 p. 101. Kennedy, *Duncan Freedom and Constraint in Adjudication: A Critical Phenomenology*, J. Legal Educ 1986 p. 518.

balance-of-power mechanisms that have served as the basis of national constitutionalism and international relations for the past four centuries. The aftermath of September 11 has accelerated this process.⁹

In these circumstances law has a pivotal role as a normative force structuring the ethics of a new order, a force that could prove crucial in the face of the growing importance of empirical sciences and loss of faith in religion. Law's normative force could serve to fall the self-indulgent virulent individualism created by the crude market logics with ethical standards and save capitalism from collapse.

A stream of thought that simultaneously (and maybe paradoxically) on the one hand rejects the creative idea of law as a tool for restructuring a flawed public order and on the other hand highlights the role of ideology in the law game are the proponents of Critical Legal Studies Movement (CLS).

They claim that legal reasoning and justifications of courts are *only* argumentative techniques. There is never a "correct legal solution" that is other than the correct ethical and political solution to a legal problem. The critical movement claims that legal text doesn't constrain the judge's interpretation in any significant way.¹⁰ This position collapses the distinction between rule making and rule application by showing that rule application cannot be isolated from subjective or ideological influence.

Critical investigations of the ECJ's case law aimed at empirically determining reactions to the rulings, in order then to endeavour to establish a connection between reaction and determination, involve a methodological tension. These studies are orientated at determining the *causes* of why judges adopt a choice that consciously distances itself from the legal *foundation* of the choice. It appears that the sources of law are significant as factors that actually exist as *causes* of the judge's choice in hard cases. This is a *descriptive* starting-point in the sense that the answer may be sought through socio-psychological investigations of the judge's reasons for deciding the case. This starting-point should not be confused with the issue of the normative function of the sources of law as limiting judicial discretion.

It is virtually obvious that courts do not have unlimited power to pursue their political goals. Even if it is fruitful for the understanding of judicial decision-making to endeavour to determine the political limits of judicial discretion, the question still remains whether there are any actual limits on what a court is legally obliged to do and what a court can - from the political viewpoint - avoid doing. The problem with empirical investigations is that while they in principle consider it impossible to conduct a legally normative orientated examination - which with legal norms as a basis endeavours to establish the limits on legitimate judicial discretion - they abstain from introducing a normative element in their sociological yardsticks.

But this kind of catchy empirical or sociological extremism is hard to accept. If God doesn't exist and man dies we need to be able to tell that one experience is better than another.

⁹ Naim, Moises, *A complex and enduring globalisation*, Financial Times August 4, 2002.

¹⁰ Kennedy, Duncan, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, J. Legal Educ. 1986 p. 518.

We need the Quality of Law articulated as an open discourse of quality ethics instead of quantitative ethics, as both a guarantor, and legitimizer for the strife for building a decent society, as a counterforce to the value empty hierarchically organised regime of global capitalism and as a restraining force on the economic culture that boosts inequality, as discourses, processes and civilisers of human conduct. Finally, we also need the epistemological tensions between the academics', judges' and litigants' different claims to correctness and truth.

My structural argument is (and has always been) that European law from various theoretical and practical perspectives to a large degree fails the "rationality test" of adjudication: can adjudication subject to more and less indeterminate legal norms simultaneously be coherent and just?

Instead I claim that European law both in theory and in practice simultaneously possesses a high degree of formal coherence as well as substantive indeterminacy. Even if I suggest that law is politics or that European legal practice, and notably adjudication, is "politics of law", I don't reveal what the politics of the European judges have been or presently are.

Hence, the final proposition of this piece will be a call for re-conceptualisation of European law and scholarly programmes. What research on the European Court of Justice and other courts may need is an escape from structure, theory and practice into what has been nicely characterised as a "sensitivity". The European law that rises, falls or collapses is not merely a set of ideas or practices but a "sensitivity" that involves broader aspects of political faith, image of self or society, as well as the epistemological structural constraints within which European law professionals live and work.¹¹

¹¹ In allusion to Koskenniemi, Martti, *The Gentle Civilizer of Nations*, Cambridge 2002 p. 2.