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The Role of Ideology in Adjudication

Introduction

This article will seek to map out the methodological and theoretical problems of some contemporary theories of adjudication in the context of the process of European integration. I submit that the openness of the interpretive process of the European courts poses problems for the theoretical claims of ideological neutrality of the process of adjudication. My approach will be critical in the sense that I will to some extent bother with the dismantling of the normative distinctions between law and politics.

1. Europeanisation of national law

Throughout the member states of the European Union one can discern a strand of thought which claims that EU membership and the influx of international law in day-to-day legal practice has led to a reinforcement of the role of law in the national polities.

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 has significantly narrowed. 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.

Simultaneously more and more policy areas are subject to the jurisdiction of the European Court of Human Rights. 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 for present changes in the landscape of national law has been characterised with 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 one finds aggressive neo-liberals suggesting that Europeanisation and the withering of the power of national sovereigns is a good thing since it transfers powers from the political democracy to the market or one will hear cries for social justice and increased protection of human rights on global or supra-national level executed and enforced on the basis of transnational constitutional documents.

To put it briefly, the forces that trigger the ongoing transformation of the European politics are hard 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 the social scientist approaches the law head on and treats 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 is not surprising that the majority of the college of European lawyers applaud the Europeanisation of national law and the judicialisation of politics. Lawyers are in this respect no less interest-oriented than politicians are. The process of Europeanisation of law strikes a new power balance between lawyers and politicians for the benefit of the former.

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 nation-state 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 ECJ'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.

How shall we deal with the principal question of competing principles? How shall we reconcile the concept of sovereignty and competing sources of principles 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 forces legal positivism to refer conflicts of constitutional principles to the political arena.

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 unveils what can be described as a crisis of formal reasoning.

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 European Courts and national courts interpretive process pose a 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?

I will treat these queries through a discussion of the role of ideology in adjudication. I will do this by exploring legal theories operating in the continuum between rule application and rule making from a fairly critical perspective.

The justification for my categorisations turns on both epistemological and normative assumptions. One either believes that it is possible to assess the "true" content of normative meaning to a legal norm with reference to a normative criteria external to the norm through principled legal reasoning, or one believes that the normativity of the legal norm always is subject to an interpretative operation where constraining external legal criteria is 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 judgements about whether

factual circumstances in the order of events correspond or do not correspond to the concepts. As a logical matter, the basis for these judgements cannot 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.

The presented lines of thought also differ with regard to ideas of the end or objective of legal decisions. One 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**.^{*1}

2. Traditional view

A traditional definition of judicial discretion could be spelled out as 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 the law.^{*2} The choice has to be based on a valid legal norm. The emphasis here is on legal validity. This requirement raises a number of problems. Will this mean that two conflicting outcomes of a dispute would lie within the discretion of the judge? Could the judge convict or acquit in a criminal case and still remain within the boundaries of legitimate discretion?

But the focus on outcomes is of limited importance if we try to launch an investigation into the constraining force of the legal system. In the foreword of Takis Tridimas' "The General Principles of EC Law" Advocate General Jacobs claims that ".../ the role of general principles cannot be assessed in the abstract but only by reference to results reached in concrete cases: to be of any use, the study of such principles has to be the study of outcomes."^{*3} This proposition reflects a traditional pragmatic approach applied by legal scholarship.

It is maybe true that we can learn something about general principles of EC law merely by studying court cases and their outcomes or results. But if we are to assess the constraining force of principles in the interpretive process of the ECJ we need a broader approach. We must try to assess the constraining force of rules and principles with regard to their "normative quality" and operation in the legal reasoning of litigants, courts and academics. We may learn more from the discourse about rules and principles than from the judicial outcomes.

Another version of the traditional view contends that the judge has no discretion in the process of fact finding. The judge has no discretion in his rulings on the law. But when, having made any necessary finding of fact and any necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies he then exercises discretion. It is only when he reaches this stage of asking himself what is the fair and just thing to do or order in the instant case that he embarks on the exercise of discretion.^{*4}

This suggests that there exist two completely different stages in the process of decision: one in which the judge first finds that the existing law fails to dictate a decision either way; and the other in which he turns away from the existing law to make law for the parties *de novo* and *ex post facto* according to his idea of what is best.

A typical form of critique of the ECJ from the traditional corner relies heavily on legal validity and the premise that the meaning of the Treaty text could be objectively ascertained and puts significant constraints on the judge. Professor T.C. Hartley criticises the judgement in **Chernobyl** and claims that the ECJ:

".../ does not consider itself bound by the Treaties if they conflict with what it regards as desirable in the interests of the constitutional development of the Community."^{*5}

¹ J. Habermas. *Between Facts and Norms*. Cambridge Mass, 1996, p. 198.

² A. Barak. *Judicial Discretion*. New Haven, 1989, p.7.

³ T. Tridimas. *The General Principles of EC Law*, Oxford 1999, p. X.

⁴ T. Bingham. *The Discretion of the Judge*. *The Denning Law Journal* 1990, p. 28.

⁵ T. Hartley. *The European Court. – Judicial Objectivity and the Constitution of the European Union*, *Law Quarterly Review*, 1996, p. 101.

Hartley submits that this judgement contravenes the wording of article 173 EC (now 230). It cannot be justified with reference to any legitimate methods of interpretation. The judgement can according to him only be justified, on the basis of considerations specific to the European Court.⁶ His attempt to found the critique theoretically goes as follows:

“/.../ the Court prefers to interpret texts on the basis of what it thinks they should be trying to achieve; it moulds the law according to what it regards as the needs of the Community. This is sometimes called the ‘teleological method of interpretation’, but it really goes beyond interpretation properly so-called: it is decision-making on the basis of judicial policy.”⁷

“/.../ what the Court did was to say that the acts of the Parliament **ought** to be reviewable; therefore, they **were** reviewable. This logic /.../ ignores the distinction between what the law ought to be and what law is, a distinction which is fundamental to the Western concept of law.”⁸

The normative distinction introduced here is rather dogmatic in character. Even though legal positivists like H. L. A. Hart acknowledge the centrality of interpretation to the understanding of law they deny or at least ignore the possibility of a middle term, arguing that what is not law application is for all intents and purposes judicial legislation.

A basic problem with this approach is that there are a large number of cases in which the judge at least reformulates the existing rule of law. But is he or she then behaving as a legislator? Hardly, the institutional contexts of adjudication and legislation are so different that identical ideological motives are likely to produce very different substantive rule-making outcomes. The crucial question for our purposes is instead, different in what way?

The traditionalist theory of dogmatic normative distinctions and ideas of “intuitive constraints” or natural meaning downplay both the epistemological and contextual preconditions of discretion in adjudication.

Primarily one has to ask how can law be understood in isolation from politics and social values when so much of it is a matter of judicial interpretation (of constitutional and legislative provisions, and of earlier judge-made law) and of interpretation of what judges say?⁹

Secondly, whether or not judges legislate, they are significant actors in managing the process of legal development.¹⁰ A judgement is not a segment of being, but, like the anecdote, a process of becoming.¹¹ Judges do not simply respond to demands generated by social relationships. They authoritatively adapt the abstract legal rules to the concrete exigencies of those individuals engaged in social interactions.

Hence, at the heart of the traditional view on discretion lies one of the great dichotomies of political theory in general and legal theory in particular, that between is and ought or adjudication and legislation. The distinction between adjudication and legislation is relevant for an analysis of the anatomy of judicial discretion since it focuses on the ideological element in adjudication.

One could take the initial distinction head on from a descriptive point of view and simply assert the adjudication is what judges and courts do and legislation is what the legislature does. Now the distinction appears sharp and unproblematic. One could also view the couple as modes of decision making. Adjudication is simply applying law to the facts of a case and legislation is to make new law.

The distinction is closely related to a number of other distinctions: court and legislature; applying and making law; law and politics; between professional and elected officials; between objective and subjective questions.

These distinctions lie at the heart of a larger normative theory of Liberalism. By Liberalism I mean Belief in individual rights, majority rule, and the rule of law. Liberal theories of the rule of law contain an idea of separation of judicial and legislative powers. Legislatures should legislate and the judiciary should adjudicate even though they often stand the risk of violating these constraints.

The development of liberal theories of adjudication is part of a broader political project. As soon as we shift from understanding adjudication as rule application to understanding it as interpretation, we threaten to destabilize the larger Liberal conceptual structure that distinguishes courts from legislatures, law from politics and the Rule of Law from tyranny. The question of the role of ideology in adjudication is therefore an ideological question.

⁶ *Ibid.*, p. 103.

⁷ T. Hartley. *The Foundations of European Community Law*. Oxford, 1994, p. 85.

⁸ *Ibid.*, p. 87.

⁹ R. Cotterrell. *The Politics of Jurisprudence* 1989, p. 150.

¹⁰ *Ibid.*

¹¹ L. Fuller. *The Law in Quest of Itself*. Chicago, 1940, p. 9. See also L. Fuller. *American Legal Philosophy at Mid-Century*. – *Journal of Legal Education*, 1954, Vol. 6, p. 457.

In this normative view, the law-making process requires value judgements, which are inescapably subjective, and therefore political. I use **subjective** as referring to the more general personal convictions and beliefs of the judge. The judges' ideological orientation in this sense is not something merely personal.

It is here important to make a distinction between on the one hand a judicial decision that complies with the value judgements set out by the legislator and on the other values judgements that depart from the legislators normative preferences. It is in the latter situation we may use the concept of **judicial legislation**.

Adjudication traditionally need not be political because it involves questions of meaning and questions of fact that are independent of value judgements and therefore objective. The judge just mechanically applies a rule to a special set of facts and makes the will of the legislator alive and concrete. In this view "judicial legislation" has a negative normative meaning.

The underlying theoretical underpinnings of this view reads as follows: the rule of law means that the exercise of power and coercion against citizens must be justified in two ways; first, by appeal to a norm enacted by the democratic decision-making process; second, by the application of the norm to the facts in a process that is independent of the process that generated it.

According to this theory, judicial legislation is problematic since it violates the first requirement of the exercise of power in a democratic society. Judicial legislation means that the judge does something more than just creating a norm for the solution of the case at hand, he or she creates a new rule with general application which is based on value judgements that are more or less foreign to the legislator.

The familiar rhetoric of the judicial process in some quarters seems to encourage the idea that there are in a developed legal system no legally unregulated cases. At the faculty in Stockholm law students are given the impression that the legal system is a self-referential, autonomous and comprehensive system of rules within which a judge or a scholar will solve any legal problem by reference to established argumentative techniques and accepted methods of interpretation.

If we are to take this rhetoric seriously we have to distinguish between the ritual language used by the judges and lawyers in deciding and arguing cases in their courts and theoretical assessment and more reflective statements about the judicial process.*¹²

As legal scholars we must ultimately refer not to a law but to a jurisprudential criterion. Ultimately one must refer to a general statement that does not describe a law but a general truth about law.*¹³

On the latter level of discourse, it seems like an accepted wisdom that judges do something else than just merely apply the law to a special set of factual circumstances. Judges often have to resolve gaps, conflicts and ambiguities in the legal system. When there is a gap or a conflict there is agreement that the judge makes a new rule and applies it to the facts rather than merely applying a pre-existing rule.

In most cases the singular normative statement which expresses a judgement resolving a legal dispute does not qualify as a logical conclusion derived from formulation of legal norms presupposed to be valid taken together with statements of fact which are assumed to be proven or true." The obvious reasons for this are: "(1) the vagueness of legal language, (2) the possibility of conflict between norms, (3) the fact that there are cases requiring a legal statement which do not fall under an existing valid legal norm, and finally (4) the possibility, in special cases, of a decision which is contrary to the wording of the statute."*¹⁴

Hence, if we identify the contrast between law application and law making with the adjudication/legislation dichotomy we are trapped since the dichotomy does not seem to permit a middle way.

But as soon as we shift focus to a broader account of legal interpretation it suggests that adjudication involve references to the broader normative structure of the legal system.

3. Coherence or fit

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 objec-

¹² H. L. A. Hart. *The Concept of Law*. Oxford, 1994, p. 274.

¹³ J. Raz. *The Concept of a Legal System*. Oxford, 1970, p. 200.

¹⁴ R. Alexy. *A Theory of Legal Argumentation*. Oxford: Clarendon Press, 1989, p. 1 (footnotes omitted).

tives 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 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.

Hence, the judicial discretion of the ECJ raises theoretical questions stemming from the continuum between strict rule application and judicial legislation. A middle term found here 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.

Coherent 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 of it the best possible example of the form or genre to which it is taken to belong.”

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 *leitmotif* of integrity or coherence.

Despite the conquests of the post-modern critique of the authority of law and legal reasoning, most academics and practitioners of European law conduct their work within the epistemological framework of coherence and fit. Their point of departure is based on the assumption that the judicial interpretation by the ECJ is subject to constraints posed by the EC legal system and its underlying principles.

Jurisprudentially this can be expressed as follows: Firstly, the European judge should act conformably with the principle of formal justice (‘treat like cases alike’) and base the instant decision on some **ruling** which settles the **type** of case to which the instant case belongs and the proposed decision for that type of case.

Secondly, he ought to **evaluate** that ruling and any possible rival rulings in the light of the **consequences** which would follow from adopting it as a ruling in general application. That evaluation should be made by reference to legally appropriate values, including justice, common sense, public policy and legal convenience, as the judge sees those.

Thirdly, the ruling must be shown to be **coherent** with the rest of the legal system or the relevant branch of it. This depends upon its being either an analogical extrapolation from already settled rules of law or precedents of binding or persuasive character, or a particular application of some general principle already at least implicit in the pre-established law in the sense that it does not conflict with any previously established legal rule.*¹⁵

But also coherence is a fuzzy criterion. Its meaning seem closely related to the guiding principles of the legal order and the legal order as a whole*¹⁶ and stresses the need for discretionary decisions to absorb the distinctive features of the system such as normative structure, sources of law and methods of interpretation.

A coherent interpretation is one that most intelligently and creatively ‘fits’ into the complex web of social and legal practices. A coherent interpretation could press beyond or criticise existing conventions and traditions. For if law’s legitimacy is not mechanically established by a rules pedigree or its process formulation, the interpreter has a grave responsibility to re-establish the productivity or normativity of law every time he or she construes a statute.*¹⁷

The method of coherence permits the judge to do ideological work when he furthers a particular legal regime by developing it in the face of a gap, conflict or ambiguity. But maybe this is as far as we have to go. The position that there is a middle methodology between law application and judicial legislation admits that there are rules that constrain the scope of judicial law making and thereby serve to limit the impact of ideology on adjudication.

¹⁵ R. Dworkin. *Law’s Empire*. Cambridge Mass, 1986, p. 52.

¹⁶ N. MacCormick. *Legal Reasoning and Legal Theory*. Oxford, 1978, pp. 250–55.

¹⁷ W. N. Eskridge. *Dynamic Statutory Interpretation*. Cambridge Mass, 1994, p. 201.

But coherence advocates moves in the direction of blurring the difference between the middle term of coherence and judicial legislation. They concede or even affirm the political character of adjudication. They affirm the possibility of rightness in even the hardest cases while abandoning any claim that this rightness is objective or demonstrable in the sense that any rational practitioner of legal reasoning would accept it.

Nevertheless, the method of coherence provides a response to the fear that such rules only push the problem of judicial legislation back from the interpretation of substantive rules to the interpretation of the constraining rules. The Community judge who interprets his political theory of integration through the requirement of coherence with prior cases and other rules and principles of the system could be said to enact the system's ideology of judicial constraint or judicial activism rather than his personal subjective view.

But what are these political theories? If we are coherence theorists we have to believe that the Community legal regime taken as a whole only expresses a particular combination of political theoretical conceptions. Hence, we have to exclude other political conceptions from the interpretative process.

Thus, for the coherence theorist a hard case may require judgements of political theory because there may be more than one solution that meets the requirement of coherence or fit. But the investigation whether a proposed solution passes the coherence-test or not will be influenced by the same political theories that the judge appeals to when he or she at the end of the day has to choose between outcomes that are equally coherent.

Finally, we end up asking ourselves whether there is a metacriterion for choosing between political theories or between versions of coherence influenced by those theories other than the judge's conviction that a given theory is the best.

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

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. 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 cannot 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.

4. Critical view

A group of jurists and legal theorist 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 does not constrain the judge's interpretation in any significant way.¹⁸ 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 adopting a choice consciously distance themselves 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, there nevertheless remains the question of 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.

¹⁸ D. Kennedy. Freedom and Constraint in Adjudication: A Critical Phenomenology. – Journal of Legal Educ, 1986, p. 518.