The Limits of Legal Reasoning and the European Court of Justice

The ECJ is widely acknowledged to have played a fundamental role in developing the constitutional law of the EU, having been the first to establish such key doctrines as direct effect, supremacy, and parallelism in external relations. Traditionally, EU scholarship has praised the role of the ECJ, with more critical perspectives being given little voice in mainstream EU studies. From the standpoint of legal reasoning, Gerard Conway offers the first sustained critical assessment of how the ECJ engages in its function and offers a new argument as to how it should engage in legal reasoning. He also explains how different approaches to legal reasoning can fundamentally change the outcome of case law and how the constitutional values of the EU justify a different approach to the dominant method of the ECJ.

Gerard Conway is a lecturer in law at Brunel University in London. He has also been a visiting lecturer at the University of Buckingham.
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The Limits of Legal Reasoning and the European Court of Justice
Gerard Conway
The Limits of Legal Reasoning and the European Court of Justice

Gerard Conway
To my parents
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Series Editors’ Preface

Legal reasoning in the European Court of Justice has always been a source of much lively debate, often conducted in perhaps less than temperate terms. Allegations abound of Europe governed by judges, judges out of touch with the desires of the Member States and their populations, and judges making disastrous decisions. The debate really attracted attention with the Judicial and Academic Conference held at the Court in September 1976¹ in which Hans Kutscher lifted the veil to a certain extent on the Court’s methods of interpretation: a lively debate ensued. That the Court has on many occasions been sensitive to criticism of its judgments is well known, but judicial toes should not be easily trodden on, as criticism does not have to be purely negative. A central part of the problem is that the judgments are often poorly reasoned in terms which can be readily understood. They have all the hallmarks of the definition of a picture of a camel (a horse, drawn by a committee), and recourse must frequently be had to the Opinion of the Advocate General to understand what is or may be meant. The canons of legal reasoning applied by the Court must be viewed in light of the objectives of the European Union and the fact that the Court is a creature of the Treaties, albeit a creature which takes account of general principles of law, both written and unwritten, and seeks to ensure that the actions of all the Union’s institutions (including itself), agencies, other bodies comply with fundamental rights recognized in particular in the European Convention and in the Union’s Charter. Against this

¹ Court of Justice of the European Communities, Judicial and Academic Conference 27–28 September 1976, Reports (Luxembourg, 1976); Conway refers to Judge Kutscher’s contribution, which was undoubtedly the lead document, but the report also contains a number of other stimulating contributions.
background it might be thought that consistency and (to a certain extent at least) predictability in litigation should be achieved through the use of the known methods of interpretation. That this is not always the case gives cause for concern: on the one hand critics of European integration sense (rightly or wrongly) judicial activism; on the other hand it can be argued that the Court is merely confronting the Member States, the EU’s institutions and indeed individuals with the logical consequences of what has been agreed. And yet further it is sometimes argued that the Court is not always willing to follow the line of logic and consistency to reach a result which conforms to perceived expectations, sacrificing coherence on the altar of political convenience: the Court stands then accused of uncommunautaire reasoning.

Gerald Conway’s work is not simply yet another critical sally at the Court of Justice, but a most stimulating and constructive discussion with concrete proposals, looking at the work of classic legal theorists as well as at the work of celebrated writers discussing the pro-integration approach of the Court of Justice. This is a work which, the editors hope, will stimulate considerable discussion, not only in scholarly circles; it undoubtedly advances the literature on the methodology of the Court of Justice and contributes forcefully to the debate on legal reasoning in the Court of Justice. For these reasons in particular, we are very happy to welcome this work to the series Cambridge Studies in Law and Policy.

Laurence Gormley
Jo Shaw


Preface

This book seeks to offer a critical perspective on the legal reasoning of the European Court of Justice (ECJ). In particular, it focuses on the question of the limits of legal reasoning: how far creativity and freedom from constraint can go in the task of legal reasoning by the EU judiciary. This question has two aspects to it: the epistemic or descriptive possibility of conserving versus creative interpretation and the normative desirability of conserving versus creative interpretation. The argument of the book is that interpretation by the judiciary linked to the understanding or interpretation of the law-maker is both epistemically possible and normatively desirable. This conserving (or originalist or historical) approach to interpretation coheres much better with the rule of law and democracy, the twin pillars of accepted political morality in Europe, than the relatively creative, teleological approach to interpretation that is widely recognised to be the hallmark of the ECJ. It is in this sense that the book is ‘critical’ in its approach. However, it does not just engage in criticism, but also proposes an alternative methodology of interpretation that could be a practical guide for legal reasoning by the Court.

This is a relatively unorthodox approach in EU scholarship. As Shaw has been one of the first to note, a dominant tendency in writing in EU studies is to eulogise the contribution of the ECJ to enhancing integration, with the ‘language of love’ being suitable to describe how many EU specialists view the Court.1 This comment echoes other sporadic observations in the literature. Alter has commented that many EU law academics act as a lobby

group for the promotion of the jurisprudence of the ECJ, while Klabbers observes that the community of EU law scholars tends to be a close-knit one that resists alternatives to its basic assumptions. Schepel has also very accurately captured this tendency, with the observation that critical approaches to the ECJ tend to be either denounced or ignored, and referred to the ‘complex stranglehold’ exercised by the ECJ on the academic literature. Rasmussen, the best known critic of the ECJ, whose important work was strongly attacked in reviews, referred to the Court’s ‘privileged relationship with academia’, a climate of opinion that, Shaw further noted, meant ‘few dared criticise the pre-eminent position of the Court of Justice’. It is hoped that the present work may be just one contribution to a more balanced academic treatment of the ECJ, and that it will contribute to a more open and diverse debate on the proper exercise of the competence of one of Europe’s most powerful institutions.

The book grew out of a long-standing research interest in the issue of creativity and constraint in judicial interpretation, which I began to study as an undergraduate student. I continued this interest on the Master of International and Comparative Law Programme at the University of Uppsala, Sweden, from which I greatly benefited. I developed the research interest especially as the subject of my doctoral thesis, which I completed at Brunel University, London. There are a large number of people to whom I am indebted. First, I would like to say special thanks to Professor Roda Mushkat, my principal supervisor at Brunel and now at John Hopkins University. The professionalism, skill and all-round helpfulness that she brought to the task made a very big contribution to the success of the research and made enjoyable the task of PhD research, and I remain very indebted for this. Two other

6 Shaw, 'European Union Legal Studies in Crisis?', 246. The quite intense pro-integration ideology that can pervade EU studies is also captured, for example, in the comment of Dashwood that ‘... there was a time when it would have been considered impolite in Community circles to talk about drawing lines [or limits of Community competence] at all. That has changed; and I believe the change is healthy, and evidence of the growing maturity of the order’: A. Dashwood, ‘The Limits of European Community Powers’, European Law Review, 21 (1996), 113–128, 113.
people also deserve particular mention: Professor Tom Hadden, Queen’s University Belfast, and Professor Abimbola Olowofoyeku, Brunel University. Professor Hadden was of help and support over several years, especially at one very important stage that facilitated the completion of my doctoral research. Professor Olowofoyeku was first a very helpful and supportive Head of School at Brunel Law School, and then a very fair and incisive internal examiner for my Brunel thesis. All three exemplify for me the values of professionalism, integrity and independence of mind that I would be like to emulate in my own career. I should also thank particularly the two external examiners at Brunel, Professor Christian Joerges (University of Bremen) and Professor Jo Shaw (University of Edinburgh), for their very helpful questions and comments on the parts of the thesis in the present work (although considerable parts were not in my Brunel thesis, and needless to say they do not necessarily endorse the parts that were), as well as for a fair and very thorough assessment of the thesis. Their own works were important sources I drew on in my research.

At Brunel, I would also like to thank the Library staff, who have been exceptionally helpful, especially Claire Grover, the Law Librarian, and Jo-Ann Nash, the Inter-Library Loans Librarian. Part of the research on which the book is based was facilitated by a PhD fees scholarship from the Department of Education of Northern Ireland and by a Modern Law Review Doctoral Scholarship (2006–2008). In particular, I am grateful to Mr Bob Simpson, London School of Economics and Political Science, and Mrs Michelle Madden, Queen’s University Belfast, for overcoming administrative difficulty and facilitating the scholarship from the Modern Law Review. I would also like to thank all those colleagues at Brunel who have assisted my work during the preparation of the book. Part of this research was conducted while a visiting scholar at the University of Navarra, Spain, and I am grateful to Professor Rafael Domigo and Dr Nicolás Zambrana-Tévar for providing me with this opportunity. Dr Nicolás Zambrana-Tévar and Dr Fernando Simón Yarza also provided help subsequently, for which I also thank them.

I am very grateful to Sinéad Moloney, Joanna Breeze, and Richard Woodham of Cambridge University Press. Sinéad Moloney guided the publication process from the beginning with much tact and professionalism. All were patient with the extension of the submission deadline on several occasions. I would also like to thank Deborah Hey and Ramakrishna Reddy Syakam for their work on the manuscript. Further, I am very indebted to two anonymous reviewers from
Cambridge University Press. They provided detailed and insightful comments on the first book proposal I submitted, which enabled me to develop the ideas in it considerably. Professor Emily Finch and Dr Stefan Fafinski provided valuable advice at an important point. I would also like to thank the following for facilitating my research directly or indirectly or discussing the issues raised in this book with me over the past number of years (though they may disagree with much of the content), in alphabetical order: Dr Gunnar Beck, Professor Iain Cameron, Dr Patricia Conlan, Dr Alpha Connelly, Dr Vicki Conway, Professor Gráinne de Búrca, Stephen Dodd BL, Dr Susan Easton, Professor Susan Edwards, Gianluca Gentili, Dr Ester Herlin-Karnell, Amanda Kunicki, Dr Leanne O’Leary (for help and advice over several years), Professor Roberto Toniatti, Terese Violante and Professor Emilio Viano. Some of the ideas in the book were presented at a master’s course in international law I taught at the University of Buckingham in 2009, and I am grateful to Professor Edwards for inviting me to teach the course and to the students who took it for their comments.


I would like to express my thanks and gratitude to my family for their support while I was writing this book: my parents (to whom the book is dedicated) and brothers Brian, Noel, Joe and Paul. In particular, my parents supported my education long after they were entitled to think their job in that respect was done.

Finally, the book has been written in the belief that discussion of legal reasoning and legal theory should be expressed as clearly as possible (it is easy to get the impression that some writing in legal theory are pleased at the perceived inaccessibility of their work). The present work seeks to eschew this tendency, though it may well be that the end result falls short of the intention. The usual caveat applies: the content and any errors in the book are the sole responsibility of the author.

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1 Articles 251–281 of the Treaty on the Functioning of the European Union refer to the ECJ as the ‘Court of Justice’ (the latter term alone was generally used in previous Treaty Provisions), but the commonly used terms ‘European Court of Justice’ or ‘ECJ’ are used throughout the present work.
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