Modern Approaches to Legal Reasoning

General Information
Modern Approaches to Legal Reasoning

The aim of this course is to introduce the students to the basic methods and techniques in legal reasoning, and to some modern normative theories of legal reasoning. The course, which deals mainly but not exclusively with statutory law, should be of interest to law students in general, as the judge’s methodological considerations will influence his reasoning and, therefore, his decisions, especially in hard cases.

The first part of the course (seminars 1-5) is devoted to an analysis of the so-called legal method, that is, the familiar “bag of tricks” that includes the principles of statutory interpretation, the modalities of decision (analogy, *argumentum e contrario*, liberal interpretation etc.) the concepts *ratio decidendi* and *stare decisis*, conflict-solving maxims such as *lex superior*, *lex posterior*, and *lex specialis*, and more. This part of the course also includes a discussion of the relevance of general theories of law (such as natural law theory and legal positivism) to the theory and practice of legal reasoning, and a discussion of the judicial activism/restraint debate.

Because the legal method turns out to be rather indeterminate, legal scholars have developed general, normative theories of legal reasoning that aim to give the judge the kind of concrete guidance he needs when faced with a hard case. The second part of the course (seminars 6-10) treats some of these theories. Employing a distinction between principled and pragmatic approaches to legal reasoning, we examine Neil MacCormick’s positivistic and Ronald Dworkin’s anti-positivistic theory of legal reasoning as examples of the principled approach; and we study William Eskridge’s dynamic approach to statutory interpretation as an example of the pragmatic approach. To determine whether any of these theories can actually give the judge the kind of concrete guidance he needs, we apply each theory to cases decided by the European Court of Justice and the Supreme Courts in Germany, England, and the United States, respectively.

**Instruction:** Seminar attendance is compulsory, and the students are expected to participate actively in the seminars.

**Examination:** The exam is a take-home exam. The students will be asked to analyze a case decided by one of the courts mentioned above, and to answer the usual type of questions concerning the content of the reading materials.
Modern Approaches to Legal Reasoning: Syllabus

Lectures:

(1) Introduction to Legal Reasoning

(2) Normative Theories of Legal Reasoning

Seminars:


(3) Legal Reasoning and Legal Theory. (Read Hart, “Positivism and the Separation of Law and Morals”; Radbruch, “Statutory Lawlessness and Supra-Statutory Law.” Analyze The Border Guard Case (BverGe 95, 96). Background Reading: Spaak, Sections 2.3-4)


(5) Activism and Restraint: The Case of the European Court of Justice. (Read Arnull, “The European Court”; Hartley, “The European Court”; Tridimas, “The Court of Justice.” Analyze Haegeman; Sevince. Background Reading: Herman, “Quot Judices tot Sententiae”)


(10) Comparing and Evaluating the Theories of MacCormick, Dworkin, and Eskridge I: Statutory Interpretation. Analyze Caminetti, Holyfield.

Literature

Textbook:


Articles:


Cases

American Cases:

Lochner v. New York, 198 U.S. 45 (1905)
Shelley v. Kraemer, 334 U.S. 1 (1947)

British Cases:

Hines v. Birkbeck College [1985] 3 All ER 156

German Cases:

The Border Guard Case (in English translation) (BVerfGE 95, 96)

EC Cases

Haegeman (C-181/73)
Sevince (C-192/89)
The Sex Change Case (C-13/94)

A booklet containing these cases will be available at cost price at the Students’ Office as of 3 September.
Modern Approaches to Legal Reasoning: Schedule

Lectures:

(1) Introduction to Legal Reasoning [Tuesday 4 September 10-15-12.00]

(2) Normative Theories of Legal Reasoning [Thursday 4 October 10.15-12.00]

Seminars:


(3) Legal Reasoning and Legal Theory. (Read Hart, “Positivism and the Separation of Law and Morals”; Radbruch, “Statutory Lawlessness and Supra-Statutory Law.” Analyze The Border Guard Case (BverGe 95, 96). Background Reading: Spaak, Ch. 2.3-4). [Thursday 13 September 9.15-12.00]


(10) Comparing and Evaluating the Theories of MacCormick, Dworkin, and Eskridge I: Statutory Interpretation. (Analyze Caminetti, Holyfield.) [Tuesday 23 October 9.15-12.00]

(11) Comparing and Evaluating the Theories of MacCormick and Dworkin II: Constitutional Interpretation and Case-Law Analysis. Analyze Lochner; London Tramways. [Friday 26 October 9.15-12.00]