

The use of economic policy arguments (efficiency) in European decision-making

1. Problem

European institutions are designed for organizing and regulating an international economic space with the help of law. The institutional framework sets up a new legal order. The *object* and *aim* of this organisation and regulation is a specific type of human activity (*i.e.*, the exchange of goods, economics).

This legal system is based on international treaties that give rise to a new type of legal order. The type of legal system is supra-national, in that it has priority over national regulations dealing with the same object.

This type of legal system reflects its overall special purpose. This purpose was initially to create a free market among the member states, and it evolves towards the harmonization of several branches of national law (*e.g.*, corporate law, intellectual property, tax law). In a further stage, the supra-national legal system integrates important parts of the national legal system, up to the level of identifying and elaborating a new *ius commune*.

While the emergence of national legal systems in the age of Modernity at the middle of the 16th century aims at integrating the overall interests of existing societies, the legal system of the EU mainly focuses on economic interests. The problem raised by this new type of legal system is how its *object* and *aim* influences the method of realising these.

2. Identification of the problem and focus of the project

Identification of the problem

The method of the EU legal system is law, *i.e.*, general rules, accompanied by executive orders that are applied by way of adjudication. This method strongly resembles the “classical” method of integration of societies. It shows some differences though with this method, in that the institutional framework (Commission, Council, Parliament, Court) has a different approach to the legitimation of the outcome. This different outlook is often argued to reflect a lack of democratic legitimation. The powers within the legal system (legislation, execution, adjudication) are functionally differentiated though not organically separated.

The method of regulation is most similar to that of the classical nation state. General rules and executive orders are issued (often accompanied with a special technique of directives that have to be transformed into national rules), while disputes are adjudicated by a court.

While the promulgation and execution of rules may be expected to contribute to the realisation of the purpose of the legal system, the position of the European Court is considerably different from courts in the member states. At the same time, national courts in many aspects operate as “ordinary” judges of the EU rules.

The promulgation and execution of rules is supposed to contribute to economic efficiency. From this perspective, the decision makers within the legal framework most of the time rely on arguments of policy, of which efficiency is one.

When it comes to adjudication however, the different types of courts (national courts, [1e aanleg](#) Lux., Court of Justice) are supposed to deal with the rules in a properly legal manner. It is their duty to identify existing rules according to the rules of recognition of the legal system, and to decide cases according to these rules. While the final products of the legal system look like the final products of a “classical” legal system, their mode of elaboration is considerably different, especially from the perspective of adjudication that is the focus of this project.

Focus of the project

Any rule is in need of interpretation. Interpretation needs a theory allowing arguing which type of interpretation is rational according to the legal system. In classical legal systems operation on *organically* differentiated powers, the model of adjudication is connected to the specific position of the judicial actor. Hence, the methods of interpretation incorporated into the theory of interpretation reflect the organic separation or division of power. Also [functional](#)

The main characterization of the method of adjudication within this framework (and the subsequent theory of interpretation) is *neutrality*. From this perspective, the methods of interpretation are rational only in as far as they aim at discovering the will of the legislator. The appropriate methods of interpretation are grammatical, teleological, historical, and systematic interpretation. The rationality of these methods of interpretation is determined by the distribution of power within the legal system.

Neutrality in adjudication means that the judge adopts a neutral position *vis-à-vis* the parties of the case. It also means neutrality towards the options adopted by the ruling actors within the legal system. The basic distinction between arguments from principle and arguments from policy, although theoretically clear, misses the mark especially when it comes to adjudication in EU law.

This is among other reasons because the positions of “the legislator” and “the executive” are not sufficiently clear. There are many different legislative and executive rulers in the field of EU law, *e.g.*, the Parliament, the Council, the Commission, national parliaments and governments, agencies, committees.

As a consequence, because of these institutional unclarities, the rationality of adjudication may be wanting. When focussing on the methods of interpretation used in EU adjudication, one may wonder whether the distinction between arguments from principle and arguments from policy still holds, since this distinction is directly related to the theory of the separation of powers.

The project focuses on the investigation of the *presence* of policy arguments in judicial decision making in EU law. Since there is no clear distinction between arguments from economic policy or efficiency and arguments from principle, the former will have a distinctive weight in judicial decision-making.

In addition to that, the project focuses on a paradoxical effect. The presence of arguments from economic policy or efficiency may not only be due to a deficient theory of the separation of powers, but also to the specific rationality inherent to EU law. Since its objective and aim is the organisation of economic interaction that is based on economic efficiency, *the judge in using this type of policy arguments, far from violating any theory of the separation of powers is on the contrary contributing to the elaboration of the EU legal system as a whole*. Even if the legislative, executive, and judicial function were separated, upon the type of arguments that is proper to the domain of EU law, judicial reasoning must be based on efficiency arguments.

While the organic theory of the separation of powers forbears arguments from policy in adjudication, a functional theory of the division of powers suggests on the contrary that the judge should contribute to the elaboration of this policy. In doing so, the use of this type of arguments shows that he is searching for “the will of the legislator”. The focus of the problem in the project then comes to the investigation of what makes this type of arguments rational.

3. Research questions

On the foregoing, the following research question underlies the project. Any decision maker (legislator, executive, judge) uses policy arguments. The first research question is: *is there a general theory of policy arguments in EU law decision making?* The answer to this question seeks to determine the use of policy arguments in legal decision making.

In addition to that, the second question is: *is there a special theory that determines the use of efficiency arguments in judicial decision making ?* This

investigation of this second question involves the determination of the influence of the object and aim of the EU law on the model of decision-making. This investigation especially focuses on the position of the judge.

Depending on the results concerning the first and the second question, the third research question is: *if there is no general or special theory of policy arguments or efficiency arguments, how do courts decide on policy questions ?* It lays off hand that courts are using new types of techniques in legal interpretation (e.g., horizontal effect of directives, direct effect of decisions of the European Court (involving legislative power of the judiciary), the use of tort technique as a method of regulation). The third research question comes to investigate *whether these new types of interpretation do fit the "classical" theories of interpretation, and so whether the arguments used to support these decisions can be held rational ?*

The three research questions come to a critical investigation of the method of law and economics.

structural rationality –

How do policy arguments contribute to coherence of decision making: if policy arguments are used, how can "consistency" be used ("deductibility" from rules/earlier decisions) ?; "policy arguments" like efficiency may require that the decision is changed (internally, by the judge, see level theory of coherence, 3rd level), but on what is the judge going to rely; do commission and court have same theory, diff theories, etc; competing theories

4. Methodology

theoretical

The methodology of this project involves a critical use of the theory of law and economics. A distinction is made between *descriptive* and *normative* law and economics. According to the first, the scientific method of economics can be used to analyse, describe, and explain the operation of a concrete legal system of law with the help of economic theory. According to the second, law operates on the same paradigm as economics, so that both are models of interaction that depend on the same theory. If the latter is correct, judges as well as legislator should decide on efficiency arguments, while on the former, economics helps to determine of which decisions, legislative and judicial, are efficient, without determining how the final decision should be made.

legal practice

The project's research material involves the setting up of a systematic catalogue of the decisions of the European Commission and the European Court over a relevant period of time (20 years). These materials are to be classified according to criteria set up on the theoretical part of the project. In addition to that, the classification has to take into account whether *c.q.* how new circumstances have influenced the decisions of both the Commission and the Court (context of decision-making). Finally, the classification takes into account the form of the policy arguments used (are policy arguments, *c.q.* efficiency arguments used in an open way, are they constructions of different arguments and so are hidden, are they used in a regressive way (from conclusion to premises), do they involve jumps in the argumentation).

literature in legal theory, institutional texts, etc.

5. Bibliography