JUDICIAL LAW-MAKING IN ENGLISH AND GERMAN COURTS

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Techniques and Limits of Statutory Interpretation

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For Praveetha

FOREWORD

In Western democracies like Germany and the United Kingdom, the legal product of the democratic process is legislation. Legislation has to be read, understood and applied by a wide range of people. These include individual citizens, legal advisers, administrators and judges. When disputes arise, it is judges in courts who produce the authoritative final reading. But in doing that they have regard to how others are likely to have understood a statute. They also try to make sense of the legislation in the context of a range of other norms and values. Because legislation is everywhere and intrudes upon almost every legal relationship, statutory interpretation makes up a large part of what judges do and is one of the most important aspects of their work.

Working from the inside as a judge, the exercise of interpretation often feels more like an art than a science, even though one often feels a strong implicit sense of how to proceed. Yet the desirability of predictability in the application of law, which is inherent in the ideal of the rule of law, seems to demand that an objective science of interpretation be articulated and applied. Every legal system has to address the gap between the abstract statement of a law laid down in advance and its application to the facts of a particular case. There is no simple metric for weighing the relative normative force of different factors which may be relevant to giving determinate meaning to a statutory provision in its application to specific facts. Values of justice and reasonableness can operate as rather vague guides for how that gap is to be bridged. So can constitutional principles or a sense of hierarchy between norms bearing on the same subject matter as is addressed in the statute. Courts have to face up to the tension between positive statements of law in legislation and the pull of natural justice in spelling out the precise content of the legislative norm which they will identify as applicable to determine the dispute before them.

In the final analysis, it is the legal culture in a jurisdiction, generated within that jurisdiction's political and constitutional structures, which constrains judges in how far they feel able to go in imaginative interpretation of legislation. The ability of judges to give persuasive reasons for adopting one interpretation in preference to another is critical to the legitimacy of what they do. So some articulation of principle is required alongside the practice of interpretation, or as an inherent part of it. As Dr Brenncke explains, the use of determinate interpretative limits and techniques are important for reasons of legal certainty, upholding the proper separation of powers between judiciary and legislature

and for the maintenance of public confidence in the judiciary. His book makes an important and sophisticated contribution to this endeavour, showing where lessons might be learned across the jurisdictional divide.

This book is a valuable study of how two jurisdictions approach the task of statutory interpretation in a complex and multivalent constitutional environment. It is the product of considerable scholarship across the two jurisdictions and a fine sensitivity to the various factors and different theoretical dimensions which inform the interpretative exercise. The exposition is clear. The argument is forceful. As with all the best works of comparative law, one reads this book and learns as much about one's own legal system as about the system with which it is compared.

As someone familiar with the English part of the comparison, I can attest that Dr Brenncke has a fine in-depth understanding of the processes of statutory interpretation used in the English courts. The detail of his exposition of the position in Germany shows that he has no lesser understanding of such processes in that jurisdiction. This makes him a guide to be listened to with attention.

Dr Brenncke's important theme is judicial law-making inherent in the process of statutory interpretation, and in particular the outer limits of what courts regard themselves as authorised to do in that regard. He rightly locates the practice of statutory interpretation in its constitutional setting in each jurisdiction. This important theoretical underpinning for what happens in judicial practice on the ground is sometimes obscured. The comparative approach reminds us of its importance and brings it to the fore. In Dr Brenncke's penetrating discussion, the practice of statutory interpretation becomes the basis for insights about the constitutional environment in both jurisdictions. Exploration of the outer boundaries of permissible judicial interpretations of legislation is a powerful way of tracing the practical implications of constitutional principles.

By comparing Germany and the United Kingdom (in particular, England & Wales) using his detailed methodology, Dr Brenncke moves beyond the abstract platitudes one often finds in works which compare and emphasise the contrasts between civilian and common law jurisdictions. He reveals that there is a considerable degree of similarity in the approach of English and German judges to the practice of statutory interpretation.

That is especially so where important norms exterior to a statute have to be brought into account when reading the statute, in relation to the production of rights-consistent interpretations which take due account of specified human rights and interpretations which are required to conform, so far as possible, with EU law under the *Marleasing*[1] principle. As Dr Brenncke points out, these interpretative obligations operate in tension with the desideratum of legal

[1] Case C-106/89, *Marleasing*, ECLI:EU:C:1990:395.

certainty in giving meaning to legislation; but if that value is given undue weight it would undermine the values which are served by those obligations and would reduce the effectiveness of human rights norms and of EU Directives. As he also observes, both approaches are likely to remain significant in English law after Brexit, notwithstanding the uncertainty as we write regarding the details of the post-Brexit settlement.

Rights-consistent statutory interpretation and interpretation in conformity with EU law are areas in which the constitutional settings in Germany and the United Kingdom have converged. The shift has been more marked for the United Kingdom, as a simple model of parliamentary sovereignty (with its own, relatively simple interpretative practice) has been replaced by a much more modulated model, which allows for the intrusion of different and competing constitutional values to a significant degree. Statutory interpretation in the United Kingdom has become more constitutionalised. The balance between will and reason, which is inherent in constitutional law and in the practice of statutory interpretation, has moved in the direction of reason. The simple statement of democratic will in the text of a statute has increasingly come to be read through the prism of constitutional reason. Nowadays, statutory meaning is derived less so by reference to simple textual analysis of what the legislating Parliament said, and increasingly by reference to an objective conception of meaning achieved through purposive interpretation and standards of reasonableness. Going still further beyond this, in relation to human rights and EU law the meaning of a statute is often the product of the judges' integration of the statutory text with human rights and EU norms. As Dr Brenncke says, the approach to interpretation becomes more result-driven (to identify what is the best rights- or EU law-compatible meaning which can be given to a statute) rather than process-driven (focusing on the process by which the statute came into existence). This is an intellectual process with which German courts have long been familiar through their own experience of the practice of statutory interpretation through integration with binding higher norms set out in Germany's constitutional Basic Law. It is fascinating to see how close interpretative practices have become in the two jurisdictions. Dr Brenncke's account bears out the impression I have obtained from discussion with German judges.

However, significant differences of approach remain, as Dr Brenncke is careful to acknowledge. Ordinary, conventional statutory interpretation is not so closely aligned in the two jurisdictions: see the discussion in Chapter 2. Again, I think he is right to trace the differences back to the respective constitutional contexts and the associated legal cultures in the two jurisdictions. The roots of the difference go back very far, reflecting the long parliamentary tradition in the United Kingdom. Franz Neumann, writing in the 1930s, observed that in the British doctrine of the Rule of Law associated with Dicey "the centre of gravity lies in the determination of the content of the laws by Parliament", while the German theory of the Rechtsstaat as developed in the 19th century

"is uninterested in the genesis of the law, and is immediately concerned with the interpretation of a positive law, somehow and somewhere arisen"; "The German theory is liberal-constitutional; the English, democratic-constitutional."[2] No doubt the German approach has now become more interested in the democratic genesis of the law, as Dr Brenncke explains. But British statutory interpretation remains primarily concerned with identifying the meaning of legislation as intended by the enacting Parliament, while the German conception of "objectivised intention" looks more to giving sense to legislation as read in the light of the current function it is taken to fulfil and of values at the time of its application in the present. The British doctrine of treating a statute as "always speaking" is not the same. As Dr Brenncke observes, this doctrine operates to help identify the intention of the legislating Parliament; it does not justify a court in departing from that intention.

This book reveals how German and British judges in many ways think in similar legal categories and engage in similar interpretative practices, participating in a real sense in a common European legal culture. It also shows how the openness and flexibility of the English common law and parliamentary tradition, with both its positive and its negative aspects, still remains distinct from the civilian tradition and the German approach to legal science and interpretation in important respects.

Philip Sales
Lord Justice of Appeal,
England & Wales

2 F. Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society*, [1935–], Berg, Leamington Spa 1986, p. 185.

PREFACE

Judicial Law-Making in English and German Courts addresses the often neglected relationship between statutory interpretation and constitutional law. The book is concerned with the limits of judicial power in a legal system. Judicial law-making occurs when judges restrict or extend the scope of application of a provision beyond or against the possible semantic meanings of the statutory language. How far do contemporary English and German judges go when they interpret national legislation? Where are the limits of statutory interpretation when judges venture outside the constraints of the text? Do these limits converge or diverge in both jurisdictions? The book critically analyses, reconstructs and compares judicial law-making in English and German courts from comparative, methodological and constitutional perspectives. It maps the differences and commonalities in both jurisdictions and then offers explanatory accounts for these differences and similarities based on constitutional, institutional, political, historical, cultural and international factors.

This book is addressed to a wide audience. It mainly appeals to an academic readership interested in the fields of statutory interpretation, legal methodology, constitutional law and comparative law. Practitioners in either jurisdiction will find it to be an accessible source of reference as this book reconstructs the fragmentary material on conventional, rights-consistent and EU-conforming judicial law-making in judicial opinions in English and German courts into a rational, coherent and systematic whole. Students of legal skills, constitutional law and comparative law will also find it a useful source of reference.

With regard to terminology, I use the term "case law" in a broad sense, meaning rulings of courts. The term "legislation" is solely used in this book to mean enacted law. "English courts" refers to the courts of England and Wales, and "English law" refers to the law applicable in England and Wales. The term "UK constitutional law" is used to refer to the constitutional law applicable in England. The term "provision" in this book refers to a specific section or part of a section either in primary or delegated legislation. "Construction" and "interpretation" are used interchangeably. All translations from German judgments are my own. Citations of German judgments do not link to the official reports as these are not available online, but rather to law journals where the judgments are published in full (these are available online via Beck-Online). Case law and literature are included up to 30 April 2018; Brexit-related legislation and legislative materials are included up to 1 August 2018.

I am immensely indebted to Rolf Sethe, Jens Scherpe and Matthias Lehmann, who have provided support and guidance since the initial stages of my career and of this book. My particular thanks go to colleagues who have read and provided helpful comments on full chapters of this book, Frances Burton, Ryan Murphy and Gayatri Patel, and to colleagues who have provided helpful feedback on specific parts of this book, James Brown, Andrea Dolcetti, Binesh Hass, Pieter Koornhof, Kristie Thomas and Stephen Weatherill. I owe a special debt to Binesh Hass and Pradeep Patalay. Both of them shouldered the arduous task of checking the language in the manuscript. I am very grateful to the team at Intersentia, especially Ann-Christin Maak-Scherpe for her help, encouragement and lots of patience and Rebecca Moffat for an excellent job in seeing the book through production.

I want to thank the universities where I was based while working on this book: the University of Zurich, the University of Oxford and Aston University. I am also grateful to the universities and institutes where I held visiting positions during this period: the British Institute of International and Comparative Law, the University of Cambridge, the Institute of Advanced Legal Studies and the Max Planck Institute for Comparative and International Private Law. Special thanks are due to the Fritz Thyssen Stiftung für Wissenschaftsförderung and the Deutsch-Britische Juristenvereinigung for funding my visiting fellowship at the British Institute of International and Comparative Law.

Last but not least, I would like to acknowledge the immense patience and support shown by my family and friends while I worked on this book.

Martin Brenncke
June 2018

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LIST OF ABBREVIATIONS

AcP	Archiv für die civilistische Praxis
AG	Advocate General
AJCL	American Journal of Comparative Law
All ER	All England Law Reports
AöR	Archiv des öffentlichen Rechts
AP	Arbeitsrechtliche Praxis
art.	article
BAG	Bundesarbeitsgericht (German Federal Labour Court)
BeckRS	Beck online Rechtsprechung
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Court of Justice)
BSG	Bundessozialgericht (German Federal Social Court)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGG	Bundesverfassungsgerichtsgesetz (Act on the German Federal Constitutional Court)
BVerwG	Bundesverwaltungsgericht (German Federal Administrative Court)
CA	Court of Appeal of England and Wales
Cf.	Compare
CJEU	Court of Justice of the European Union
CLJ	Cambridge Law Journal
CMLR	Common Market Law Review
CUP	Cambridge University Press
Deb.	Debates
DöV	Die öffentliche Verwaltung
DVBl	Deutsches Verwaltungsblatt
EBLR	European Business Law Review
ECA	European Communities Act 1972
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	(Treaty establishing the) European Economic Community
EHRLR	European Human Rights Law Review
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
ELJ	European Law Journal
ELR	European Law Review
EU	European Union

EuGRZ	Europäische Grundrechte-Zeitschrift
EuR	Europarecht
EU(W) Act	European Union (Withdrawal) Act 2018
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
FamRZ	Zeitschrift für das gesamte Familienrecht
GG	Grundgesetz (German Basic Law)
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
HC	House of Commons
HL	House of Lords
HRA	Human Rights Act 1998
ICLQ	International and Comparative Law Quarterly
I-CON	International Journal of Constitutional Law
IRLR	Industrial Relations Law Reports
JBl	Juristische Blätter
JR	Judicial Review
JuS	Juristische Schulung
JZ	JuristenZeitung
KG	Kammergericht (Berlin Appellate Court)
LG	Landgericht (German Regional Court)
LJ	Lady Justice of Appeal or Lord Justice of Appeal
LQR	Law Quarterly Review
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
MR	Master of the Rolls
n.	note
NJW	Neue Juristische Wochenschrift
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht, Rechtsprechungs-Report
NZA	Neue Zeitschrift für Arbeitsrecht
NZA-RR	Neue Zeitschrift für Arbeitsrecht, Rechtsprechungs-Report
NZS	Neue Zeitschrift für Sozialrecht
OJLS	Oxford Journal of Legal Studies
OLG	Oberlandesgericht (German Higher Regional Court)
OUP	Oxford University Press
QB	Queen's Bench Division of the High Court
PC	Privy Council of the United Kingdom
PL	Public Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RdA	Recht der Arbeit
RIW	Recht der internationalen Wirtschaft
s.	section
Sch.	Schedule
ss.	sections

SSRN	Social Science Research Network
StGB	Strafgesetzbuch (German Criminal Code)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UKSC	Supreme Court of the United Kingdom
Vol.	Volume
WLR	The Weekly Law Reports
WM	Wertpapier-Mitteilungen, Zeitschrift für Wirtschafts- und Bankrecht
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZEuP	Zeitschrift für Europäisches Privatrecht
ZfPW	Zeitschrift für die gesamte Privatrechtswissenschaft
ZfRV	Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung
ZJS	Zeitschrift für das Juristische Studium
ZRP	Zeitschrift für Rechtspolitik
ZUM	Zeitschrift für Urheber- und Medienrecht