Comparative Studies
in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

Band 25/1

Ratio decidendi

Guiding Principles of Judicial Decisions

Volume 1: Case Law

Edited by

W. Hamilton Bryson
Serge Dauchy

Duncker & Humblot · Berlin

Ratio decidendi

Comparative Studies
in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

Herausgegeben von

Helmut Coing (†), Richard Helmholz, Knut Wolfgang Nörr
und Reinhard Zimmermann

Band 25 / 1

Ratio decidendi

Guiding Principles of Judicial Decisions

Volume 1: Case Law

Edited by

W. Hamilton Bryson
Serge Dauchy

Duncker & Humblot · Berlin

Printed with support of the Gerda Henkel Stiftung, Düsseldorf

Bibliographic information published by the Deutsche Nationalbibliothek

The Deutsche Nationalbibliothek lists this publication in
the Deutsche Nationalbibliografie; detailed bibliographic data
are available in the Internet at http://dnb.d-nb.de.

Typesetting and printing:
Berliner Buchdruckerei Union GmbH, Berlin
Printed in Germany

ISSN 0935-1167
ISBN 3-428-12216-X
978-3-428-12216-5

Gedruckt auf alterungsbeständigem (säurefreiem) Papier
entsprechend ISO 9706 ♾

Internet: http://www.duncker-humblot.de

Preface

Although the problem of *ratio decidendi* concerns the essence of law and justice, very little comparative work between the Continental and Anglo-American legal systems has been done on the topic. Legal literature often repeats that it is one of the sharpest points of contrast between the two legal cultures. Within the English speaking legal system, multiple opinions, both concurring and dissenting, prevail where dissent among Continental judges only occurs behind closed doors: the published decision indeed is always presented as the single and incontestable opinion of the whole court. Historical reasons are generally put forward to explain that contrast. Where in the Anglo-American Common Law system judges are asked – and always have been asked – to present the materials and reasons upon which they based their judicial opinions, in Ancien Régime continental Europe it was not considered necessary to formulate the reasons of a decision and in most courts of the European Continent it was even formally forbidden to the judges, until the end of the eighteenth century, to write down or even communicate orally "the secrets of their discussions and deliberations".

To comparatists, this reveals two different cultures among judges and lawyers. In Continental Europe there is much emphasis on the idea of judging as a science which can be learned and reproduced with an impersonal rigour. The Anglo-American judge is not considered to be such a trained scientist, he is merely a practised craftsman. Can the history of *ratio decidendi* – but also the history of law and justice from the Middle Ages to the nineteenth century – therefore be reduced to a total contradiction between two legal cultures? Is there no possible comparison? As well in the Continental as in the Anglo-American legal system materials always have been presented and argued to the judges by the lawyers in order to persuade them to rule in favor of their clients and, exposed in public or not, the authorities put forward have always been used and discussed by those judges.

As it is the purpose of the *Comparative Studies in Continental and Anglo-American Legal History,* we thought one would gain new insight into the problem of *ratio decidendi* by studying the question in a historical comparative way in order not only to understand the guiding principles of judicial decisions in the Continental and the Anglo-American legal systems but also to search in their legal history why both systems have known separate evolutions. Studies are, of course, in hand on the history of court records, though these address the nature of the records rather than the jurisprudential problem of how and why decisions came to be accompanied by reasons. Our purpose is therefore to compare the Continental tradition – through the study of the Roman and Canonical doctrine, the commentaries

of Ancien Régime jurists and in particularly the practice of the continental superior courts – with England and the American colonies and, after 1776, also with the federal courts and the states of the United States in order to search for an answer to some more particular questions including: the emergence of the practice of giving or recording reasons for judicial decisions, the forms which such records take, and the problem about their accurancy and the interaction between respect for rules (*stare decisis* or *non quieta movere*) and the critical re-examination of reasons for past decisions when put to a later court. Our focus in this first volume is to study the particular reliance on "Case Law Jurisprudence" through examples of constitutional, national, regional and local law.

Lille, 2005 *Serge Dauchy*

Contents

LAURENS WINKEL

Ratio Decidendi – Legal Reasoning in Roman Law

I. Introduction[1]

An analysis of *rationes decidendi* in Roman legal literature meets comparable difficulties as in modern common law: at first, the *ratio decidendi* in legal decisions is very often only implied. There are further in both domains considerable difficulties to define even the very notion of *ratio decidendi* and the border between *ratio decidendi* and forms of interpretation is equally quite vague.[2] Further, it is difficult to distinguish between the *dictum* and the *ratio decidendi.* An extra difficulty in modern common law is that the decision is made by several judges with their concurring and dissenting opinions. This difficulty is not present in Roman law.

But there is similar uneasiness and vagueness in Roman law: the relation between "Begründung" and subsumption under a rule is also there problematic. In Roman law this is also partly caused by the only gradually developing notion of analogy, upon which Arthur Steinwenter[3] has extensively published some fifty years ago. But there is also a reason that is not to be found in modern law: it is difficult to take into account the horizontal structure of the Roman legal order, linked with the predominance of the *ius honorarium.* Modern legal systems, common law and civil law alike, have a hierarchy which is lacking, at least in classical Roman law.

Many decisions of the Roman jurists are not motivated, or justified, and even words like *quia, cum* and *quod,* which grammatically could seem to refer to reasoning, are sometimes misleading. They often refer only to the factual circumstances of the case. Significantly, a more or less complete analysis of *rationes decidendi* was only in recent times carried out in the Roman legal literature of the pre-

---

[1] This article is partially a further elaboration of a previous article, *The role of general principles in Roman law,* published in the South African review *Fundamina* 2 (1993), 103–120.

[2] *C.K. Allen,* Law in the Making, Oxford 1964, 259 ff.; 291 ff.; cf. *S. Vogenauer,* Die Auslegung von Gesetzen in England und auf dem Kontinent, I, II, Tübingen 2001. No mention of *ratio decidendi* is made in the index of this work.

[3] *A. Steinwenter,* Prolegomena zu einer Geschichte der Analogie, Studi in onore di Emilio Albertario, Milano 1953, II, 105 ff.; Studi in onore di Vincenzo Arangio Ruiz, Milano 1953, II, 169 ff.; Festschrift für Fritz Schulz, Weimar 1951, II, 45 ff.

classical period, the first century B.C., by Franz Horak.[4] He analyzed about 300 decisions ascribed to Roman jurists of that period. This is only a very small percentage of the available Roman legal literature! A promised second volume of his book, covering the period of classical Roman law till 250 A.D. never saw the light of day.

At first the Roman "case method" has to be examined, which can – as stated above – be compared with the case method in common law, but there are at least some differences, from which the "horizontal structure" of the sources is certainly here the most important.[5] Therefore we are first devoting attention to the structure of the sources of Roman law as such. Then we examine some of the possible *rationes decidendi* as found by Horak: he distinguished application of a legal norm; application of logic or linguistic rule (for examples *in maiore minus inest*[6]); *ratio decidendi* from earlier jurisprudence, where the jurist invokes the equal opinion of one of his predecessors; *ratio decidendi* found in a *regula iuris; ratio decidendi* found in a legal construction; *ratio decidendi* found in legal concepts; *ratio decidendi ex iure controverso; ratio decidendi* from ordinary language; *ratio decidendi* from the will of the parties or one concerned party; *ratio decidendi* from philosophy; *ratio decidendi* from decency; *ratio decidendi* from analogy; *ratio decidendi* from an example (simpler than the case); *ratio decidendi* from *deductio ad absurdum.* A.M. Honoré, who somewhat earlier wrote an instructive article on legal reasoning in Rome[7] distinguishes the arguments of the Roman jurists between "appeal to rules of law", "open arguments (topos or principle)", "the facts" and *"argumenta ex auctoritate"*. Quite often, he concludes, a *ratio decidendi* is lacking altogether.

We will concentrate in the following paragraphs on a few topics only: the hierarchy of sources in Roman law (Section II), the historiography of *rationes decidendi* in Roman law is dealt with in Section III; some pre-classical (Section IV) and classical *rationes decidendi* (Section V) will be discussed briefly, followed by a few remarks on the topic in medieval and later jurisprudence (Section VI). We end with some conclusions (Section VII).

---

4 *F. Horak,* Rationes decidendi – Entscheidungsbegründungen bei den älteren römischen Juristen bis Labeo, I, Innsbruck 1969.

5 Comparative studies in the Roman "case method" were done recently by the Italian Romanist Letizia *Vacca,* Contributo allo studio del metodo casistico nel diritto romano, Milano 1976, 2nd edition Milano 1982.

6 *R. Backhaus,* In maiore minus inest, Eine justinianische "regula iuris" in den klassischen Rechtsquellen – Herkunft, Anwendungsbereich und Funktion, ZSS rA 100 (1983), 136 – 184; *O. Behrends,* Die Wissenschaftslehre im Zivilrecht des Q. Mucius Scaevola pontifex, Nachrichten der Akademie der Wissenschaften in Göttingen, Phil.-Hist. Klasse, 1976, Nr. 7, Göttingen 1976. See lately *K. Tuori,* The myth of Quintus Mucius Scaevola: founding father of legal science?, TRG LXVII (2004), 243 – 262.

7 *A.M. Honoré,* Legal Reasoning in Rome and Today, South African Law Review 91 (1974), 84 – 94.

II. Hierarchy of Legal Sources

As has been said, a very important difference between old and modern case law is that the Roman legal order was not characterized by a clear hierarchy of norms, but a preliminary question is to find a full survey of sources of law. There are indeed some legal and non-legal texts in which such a survey of sources of law is given. The question is: are these sources really giving a complete survey or are they only giving examples? The question is acute, because sometimes a reference to custom seems to be lacking. Dieter Nörr has dealt with these texts in his important study *"Divisio und partitio"*[8] in which he showed that these texts conceived as *divisio* are supposed to be complete; conceived as *partitio* they can give only examples of sources of law and therefore may be incomplete. This is his ingenious explanation for the fact that in some texts no reference to customary law is made. The surveys of Roman legal sources are to be found mainly in Cicero and in the Digest.[9] These texts were analyzed by other scholars as well, primarily in order to investigate the role of customs and customary law, but all this research has been fruitful for the better understanding of the Roman legal order.

So we distinguish in classical Roman law statutes (*leges, plebiscita*), decisions of the Senate (*Senatus Consulta*), edicts of Roman magistrates, customary law, and finally opinions of earlier individual jurists, all of which exist side by side. As to the last category we meet the problem linked with the so-called *ius respondendi* on which again much has been written.[10] The question here is: are all jurists entitled to give their legal opinion or only the ones given the *ius respondendi* by the emperor? We must leave this question aside here. It is enough to say that all these sources can be referred to as a *ratio decidendi* in a case.

An important element is that the praetor has, at least until the codification of the *Edictum Perpetuum* about 138 A.D. in his edict, but also in a special injunction (*decretum*), the possibility to correct and to adapt the rules of the *ius civile.*[11] So he could set aside a rule from ancient (unwritten) *ius civile* or even an explicit provision of a *lex.* He can then provide one of the parties a legal remedy in the form of an *actio* or an *exceptio* against existing rules. A famous example of the latter is the introduction by the praetor Aquilius Gallus in 69 B.C. of the *exceptio doli.* This is

---

[8] *D. Nörr,* Divisio und partitio, Bemerkungen zur römischen Rechtsquellenlehre und zur antiken Wissenschaftstheorie, München 1972 [= D. *Nörr,* Historiae iuris antiqui, II, Goldbach [2003], 705 – 774].

[9] Pomponius, Ench. D. 1, 2, 2, 12; Papinianus, D. 1, 1, 7; *Cicero,* De inventione, 2, 22, 65.

[10] *F. Wieacker,* Respondere ex auctoritate principis, Satura R. Feenstra, Fribourg 1965, 71 – 94. The dissenting opinion of J.W. *Tellegen,* Plinii min. Epistula VII, 24, 8, ZSSr.A.105 (1988), 278 ff., links the *ius respondendi* with the existence of the schools of the Sabiniani and the Proculiani, but this is not fully convincing.

[11] See D. 1,1,7,1: Ius praetorium est quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam. Quod et honorarium dicitur ad honorem praetorum sic nominatum.