

Global Legal Skills

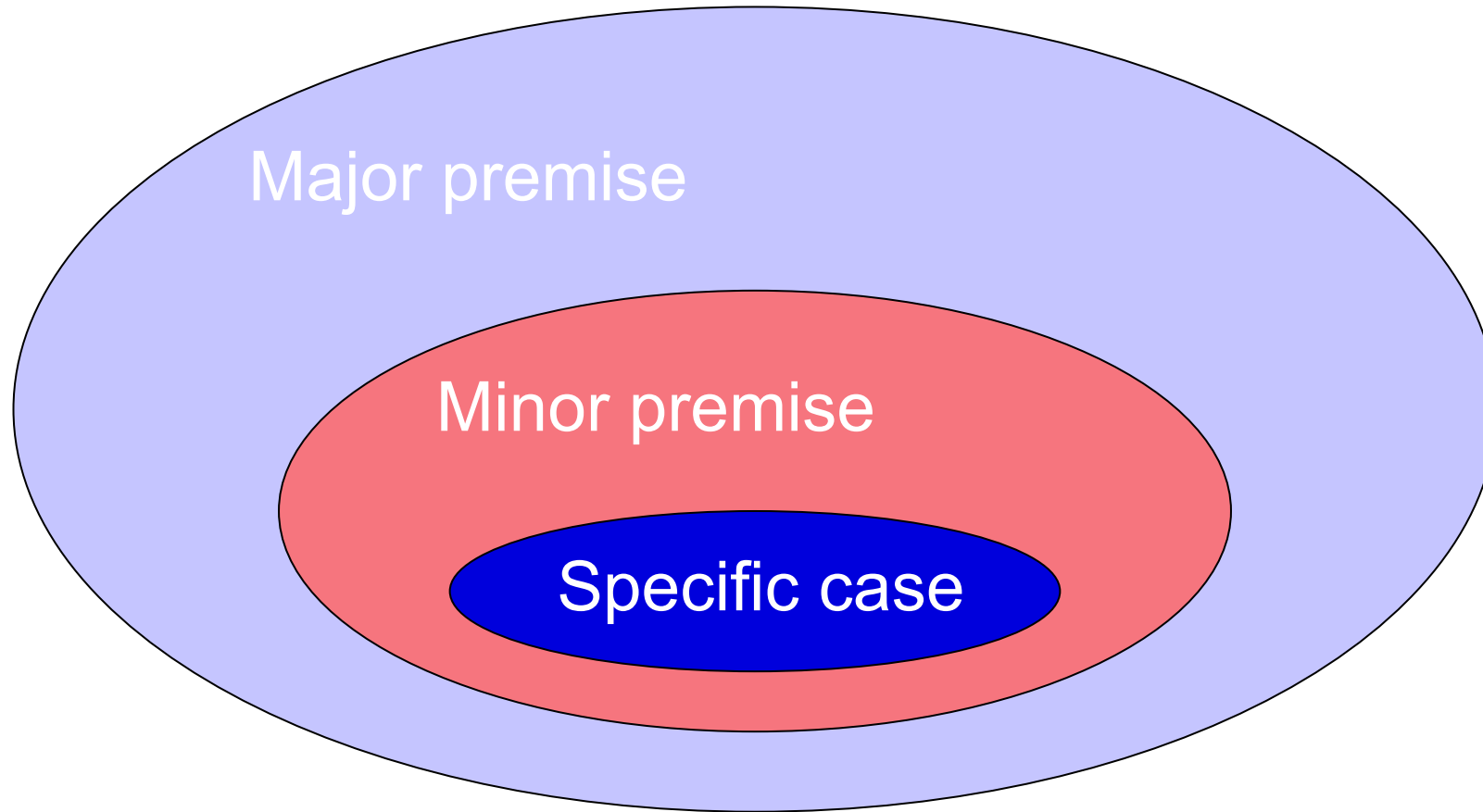
Legal Reasoning and Judicial Reasoning of the CJEU, Czech CC and ECtHR
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Law as a magic

- Words have to be used wisely, properly, in a right order and right time
- KISS principle
- Predictive vs persuasive writing/speaking
- Predictive writing
 - High degree of objectivity
 - You need to assess not only chances but also risks
- Persuasive writing
 - Depends who you are writing to, objectivity might not be your goal (still, you cannot make your own rules, tell lies or defend apparently wrong statements and positions)

Legal reasoning - introduction

- Deductive (DR) and inductive reasoning (IR)
- Example of DR 1:
 - Czech law students are not taught to write well and persuasively, therefore they must learn it themselves, by practice.
 - You are law students.
 - Therefore, you will have to learn to write well on your own - by practice
- Example of DR 2:
 - All men are mortal. (major premise)
 - Socrates is a man. (minor premise)
 - Therefore, Socrates is mortal. (conclusion)
- Example of DR 3:
 - Art. 34 THEU and the case Dassonville prohibits all quotas and measures having equivalent effect limiting the trade in the EU
 - Import licence is a measure having equivalent effect
 - therefore import licence is prohibited



Typical mistakes

- Minor premise is missing
 - Rule and its explanation in a textbook style and then suddenly a conclusion
- Major premise is missing
 - *I am informing you that the fact that my child XY is being discriminated by being denied the constitutionally protected right to education, and by the fact that he/she has been ordered to be quarantined after contact with a person who has been tested positive on the grounds that he/she is not vaccinated with a voluntary vaccine, I consider to be unjustified discrimination and a serious violation of the constitutionally guaranteed equality of citizens.*

Legal reasoning – methodology for legal analysis

- IRAC (Issue, Rule, Analysis and Conclusion)
- CREAC (Conclusion, Rule, Analysis and Conclusion)
- Meaning
 - the I section contains a legal question that must be answered
 - The R section states the law
 - The A section applies the rules developed in the rules section to the specific facts of the issue
 - The C section contains conclusions (court) or most likely conclusions (attorney at law)
- Be careful with the R section – there is the main area of your interest

Case Pl. ÚS 7/15 concerning the adoptions by same sex couples

- Czech civil code section 800
 - (1) *Both or one of the spouses may become adoptive parents. In exceptional cases, another person may become an adoptive parent; in such a case a court shall also decide that the entry concerning the other parent is deleted from the registry of births, deaths and marriages.*
 - *I will start with a case in which the Czech Constitutional Court dealt with a possibility to adopt a child by a registered couple a same sex.*
 - allows the adoption only in case of a married couple. There is however one exemption from this rule which allows the adoption by an “other person” in other words not by a couple but by an individual.
- Act on registered partnership
 - Lasting partnership precludes any of the partners became adoptive parent of the child.
- Czech Constitutional Court (CCC)
 - The regulation in the Civil code was interpreted in the light of the Charter. As a result, a provision of the act on registered partnership was found illogical and unconstitutional

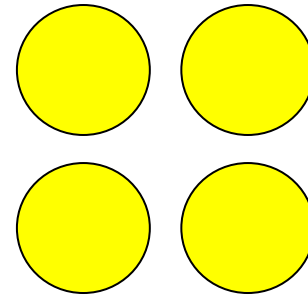
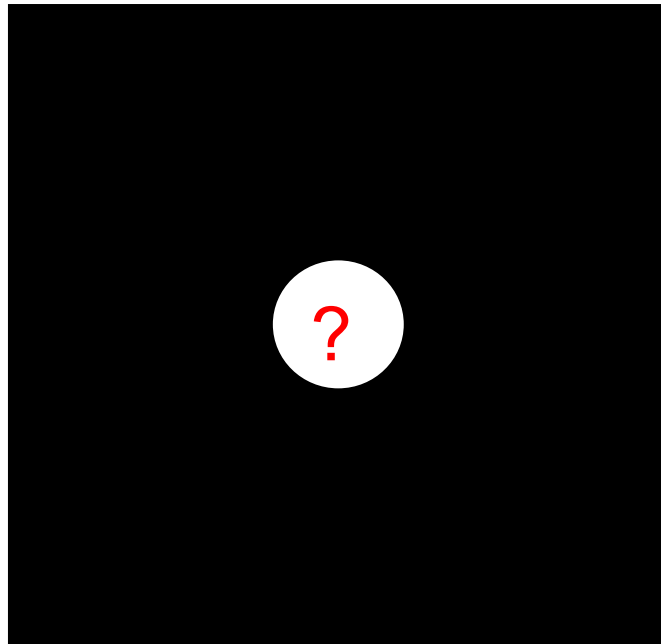
IRAC STYLE

- The law prohibits adoption by registered partners. It does, however, allow it to other individuals, whether single or married. The only distinguishing criterion is therefore sexual orientation. Charter, however, considers such a distinction to be prohibited discrimination. Therefore, adoption should be allowed even to registered partners. The legal prohibition of adoption by registered partners is therefore unconstitutional because of its conflict with the prohibition of discrimination.
- Tomoszek, Kopa, Adameova. *MOOT court ve vyuce prava*. UPOL. 2012

CREAC style

- The ban on adoption by registered partners is unconstitutional. The charter prohibits discrimination on the basis of sexual orientation to preserve equality of opportunity and equality of outcome for men and women regardless of their orientation. If the law prohibits adoption by registered domestic partners and permits it to all other individuals, regardless of whether they are single or married, the only distinguishing criterion is sexual orientation. Prohibition of adoption by registered partners is therefore unconstitutional.
- Tomoszek, Kopa, Adameova. *MOOT court ve vyuce prava*. UPOL. 2012

Inductive reasoning



Rule synthesis

- The rule synthesis is the process of integrating a rule or principle from several
- Typical for common law
- In civil law exists as well – typical for those areas of law that consist of very general rules
 - The ECHR – European convention
 - ECJ – primary law
 - CCC – Charter
- Please note that:
 - In the case of the decision of the CCC, the likelihood that the ball will be yellow is strengthened by the fact that this court is bound by its own decisions
 - The CCC also feels bound by all decisions of the ECHR (not just by those addressed to the Czechia)

Let's demonstrate it

– Article 20 TFEU

- *1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*

- Issue – can the right of residence for a TCN be derived from the EU law also in a situation where his family member who is an EU citizen has not moved to another MS (*purely internal situation*)

CJEU 1

– Zambrano

- Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

– McCarthy

- Non-dependant EU citizen cannot establish under EU law residency rights for her spouse

– Dereci

- It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole

CJEU 2

– Chavez-Vilchez

- Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence

CJEU 3

– Subdelegación del Gobierno en Ciudad Real

- Article 20 TFEU must be interpreted as precluding a Member State from rejecting an application for family reunification submitted by the spouse, who is a third-country national, of a Union citizen who holds the nationality of that Member State and who has never exercised the freedom of movement, on the sole ground that that Union citizen does not have, for him or herself and his or her spouse, sufficient resources not to become a burden on the national social assistance system, without it having been examined whether there is a relationship of dependency between that Union citizen and his or her spouse of such a kind that, if the latter were refused a derived right of residence, that Union citizen would be obliged to leave the territory of the European Union as a whole and would thus be deprived of the effective enjoyment of the substance of the rights conferred by his or her status.

Conclusion

– Article 20 TFEU

- *1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*

- Apparently, the meaning of the article 20 TFEU is way broader than it may seem from its text. It may be a basis for residence rights for TCN. Apparently, this extends not only to children and their parents, but also to other relatives. There are however some conditions that have to be fulfilled.

Reasoning by analogy

- principle of non-discrimination - do not treat similar situations differently unless the difference in treatment is objectively justified
- Analogy may be tricky – you must identify and assess similarities and differences correctly
- Example No 1:
 - Analogical application of EU Citizens Directive to a TCN of a static EU citizen
- Example No 2:
 - Analogical application of EU Citizens Directive to exemption to the free movement of persons

- Article 20 TFEU must be interpreted as precluding legislation of a Member State which requires a third-country national who has been convicted of a criminal offence to be expelled from the territory of that Member State to a third country notwithstanding the fact that that national is the primary carer of a young child who is a national of that Member State, in which he has been residing since birth without having exercised his right of freedom of movement, when the expulsion of the person concerned would require the child to leave the territory of the European Union, thereby depriving him of the genuine enjoyment of the substance of his rights as a Union citizen. However, in exceptional circumstances a Member State may adopt an expulsion measure provided that it is founded on the personal conduct of that third-country national, which must constitute a genuine, present and sufficiently serious threat adversely affecting one of the fundamental interests of the society of that Member State, and that it is based on consideration of the various interests involved, matters which are for the national court to determine.

Judicial reasoning - specifics

- written in the language of objectivity and impartiality
- Not a personal opinion of a single judge, but a court (compare opinions of advocate general, dissenting/concurring opinions)
- conclusions are based on legal principles and logical argument
- Correct interpretation of rules is crucial

Typical methods and arguments

- 1. Grammatical (textual) interpretation
- 2. Logical (linguistic-logical) arguments
- 3. Domestic systemic arguments
 - Interpretation of the Constitution on the basis of case law of the CCC
 - Interpretation of the Constitution on the basis of the case law of common courts
 - Interpretation on the basis of normative acts of other domestic state organs
- 4/A. interpretation on the basis of international treaties
- 4/B. Interpretation on the basis of individual case decisions or case law of international fora
- 4/C. Comparative law arguments
- 5. Teleological / objective teleological interpretation
- 6. Historical / subjective teleological interpretation
- 7. Arguments based on jurisprudence / scholarly works
- 8. Interpretation in light of general legal principles
- 9. Substantive interpretation / non-legal arguments – human dignity, good morals

Example of comparison of language versions – Stauder case

- **German** version states that a discount on butter should be given against ‘*Die Mitgliedstaaten treffen alle erforderlichen Maßnahmen damit ... die Begünstigten der in Artikel 1 vorgesehenen Maßnahmen Butter nur gegen einen auf ihren Namen ausgestellten Gutschein erhalten können.*’ (‘Member States shall take all measures necessary to ensure that ... those entitled to benefit from the measures laid down in Article 1 may only receive butter in exchange for a coupon issued in their names.’)
- **French** version: ‘*bon individualisé*’, **Dutch** version, ‘*op naam gestelde bon*’, **Italien** version says that a discount on butter should be given against ‘*buono individualizzato*’

Stauder case

- *“When a single decision is addressed to all the Member States the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in particular of the versions in all four languages”*

Methods of interpretation and judicial reasoning 1.

- Logical (linguistic-logical) arguments
 - auxiliary role
- Domestic systemic arguments
 - Extremely important for the CCC – open the door for application of international public law and EU law
- Interpretation on the basis of past case law
 - Extremely important for all 3 courts, facts of the case often not examined into the detail
 - Decisions are treated as de facto precedents
- External systemic and comparative law arguments
 - Very common
 - Comparison is done in an unscientific way
 - Decisions are treated as de facto precedents

Methods of interpretation and judicial reasoning 2.

- Teleological interpretation
 - Extremely important for CJEU (with effet utile principle)
 - Often silent in cases of CCC
- Arguments based on jurisprudence / scholarly works
 - Significant in case of CCC, but often used improperly – self citations, citation of colleagues or friends
 - Unknown to the CJEU and ECHR
- Interpretation in light of general legal principles
 - Quite often in case of CJEU
 - CCC and ECHR – principle of subsidiarity
 - ECHR – margin of appreciation doctrine = space for manoeuvre that the ECHR is willing to grant national authorities

Want to know more about judicial reasoning?

- Tóth, Z., J. (Ed.). *Constitutional Reasoning and Constitutional Interpretation: Analysis on Certain Central European Countries*. Miskolc: Ferenc Mádl Institute of Comparative Law & Central European Academic Publishing, 2021.
 - Upcoming
 - Offers an indepth analysis of judicial reasoning focused on Central Europe
- Jakab, A., Dyevre, A., & Itzcovich, G. (Eds.). *Comparative Constitutional Reasoning*. Cambridge: Cambridge University Press. 2017
 - Offers a general overview of judicial reasoning by a number of constitutional courts plus the CJEU and ECHR

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- Rambo, Pflaum. Legal Writing by Design. A Guide o Great Briefs and Memos. Carolina Academic Press, 2013
- Tomoszek, Kopa, Adameova. MOOT court ve vyuce prava. UPOL. 2012
- Toth, Z. (2016) ‘The Methods of Statutory Interpretation in the Practice of the High Courts of Hungary’, Annales Universitatis Mariae Curie-Sklodowska, Vol. I Sectio M
- https://www.open.edu/openlearn/ocw/mod/oucontent/view.php?id=68380§ion=1.1.1#back_longdesc_idm45984345769088

Thank you for your attention!

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- David Sehnalek