Konrad Walter: Rechtsfortbildung durch den EuGH, Eine rechtsmethodische Untersuchung ausgehend von der deutschen und französischen Methodenlehre

Duncker & Humblot, Berlin, 2009, 414 S

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Legislation by adjudication of the European Court of Justice is the topic of this well structured book. It is not surprising that the court is more enterprising than e.g. the German Constitutional Court as it is composed not only by former national judges but also seasoned politicians with a legal education.

In order to create room for judicial legislation, the court has developed the doctrine of contractual gaps that need to be closed; this doctrine is widely accepted in the literature.

In order to structure this gap, the court uses basically two argumentative lives, the “effect utile” (useful purpose) and the goal of (European) integration. These basic goals are further structured through classical legal rhetorical figures

1. argumentum a fortiori and
2. argumentum e contrario.

In addition, hidden legislation can take on the form of interpretation or through obiter dicta.

Looking at limits of the legislative powers of the court, Walter considers primarily the principle of subsidiarity. (Art. 5 CI), he finds it fairly limited. However, where the court is not just amending but altering the Treaty, it clearly is operating beyond its competences (*ultra vires*); in principle, *ultra vires* decisions are void, not enforceable in any Member State. Even *ultra vires* decisions are however become effective when they are explicitly included in later contractual amendments.

Until that occurs, these decisions cannot be counted as part of the *acquis communautaire*.

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