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BOOK REVIEW

Rethinking Legal Reasoning

by Geoffrey Samuel. Cheltenham: Edward Elgar, 2018, 416pp (£95.00 hardback). ISBN 978-1-78471-260-0

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Geoffrey Samuel is a leading legal comparatist and epistemologist whose decades-long scholarship has made seminal contributions to the academic debate on the nature of legal reasoning in both the common and civil law traditions. Students, scholars, and practitioners alike have significantly benefited (and will continue to benefit) from Samuel's deep acquaintance with the inner dynamics of both traditions and their respective legal languages and mentalities. In his latest monograph, *Rethinking Legal Reasoning*, Samuel offers a valuable summary of his scholarship on the subject while at the same time, as the title makes clear, pushing his reflections one step further to meet the increasing demand for intellectual reconfigurations on the nature, scope, and modalities of legal reasoning.

In this sense, Samuel's effort is part of a more general attitude widely shared in the academic circle, particularly by legal historians, theorists, and philosophers, regarding the urgent need for a reconsideration of (or, in some cases, a departure from) established categories and modes of thought capable of efficiently theorising law's nature and working logic in an age, such as ours, characterised by increasingly regulatory density, complexity, and uncertainty. Samuel fully embraces this theoretical need for discontinuity which, for the purposes of the analysis developed in *Rethinking Legal Reasoning*, is 'understood … as just a different way of approaching legal reasoning'.[1]

In the Introduction, Samuel paves the way for the discussion which follows by setting the book's overall aim and method of inquiry. Samuel first outlines what distinguishes legal reasoning from legal argumentation ('one has the aim of both arriving at and justifying a decision while the other aims to convince'[2]) and then explains why the former can be 'approached from a variety of disciplinary and theory perspectives, each which gives a rather different account'.[3] Ultimately, the development of legal reasoning (and the corresponding Dworkinian 'attitude' which underpins legal argumentation[4]) can be approached via two analytical frameworks: the diachronic and the synchronic. The former, which studies historical processes comprehensively, witnessed a 'major resurgence[5] in the twentieth century, when such thinkers as Gaston Bachelard and Thomas Kuhn 'presented an historical vision that was at odds with the traditional linear and progressive view of the development of scientific knowledge'.[6] The latter compartmentalises historical development by giving priority to methodological shifts and paradigm breaks. In an earlier essay, Samuel had warned of the perils hidden in either approach while also outlining why and how they mutually reinforce each other.[7] *Rethinking*

[1]G Samuel *Rethinking Legal Reasoning* (Cheltenham: Edward Elgar, 2018) p ix.
[2]Samuel, above n 1, p 2.
[3]Ibid, p 2.
[4]Ibid, pp 7, 115, 331.
[5]Ibid, p 4.
[6]Ibid, p 4.
[7]G Samuel 'Comparative law and the legal mind' in P Birks and A Pretto (eds) *Themes in Comparative Law: Essays In Honour of Bernard Rudden* (Oxford: Oxford University Press, 2002) pp 35–47.

Legal Reasoning masterfully blends both methods[8] so that the reader can fully appreciate the multi-faced development of legal reasoning in both the civil and common law traditions. And indeed, Samuel specifies from the very beginning of his discussion that to achieve this objective, the book makes 'two assumptions':[9] that an inquiry into legal reasoning has to focus on 'professional jurists and lawyers ranging from Roman to modern times';[10] and that 'this European-inspired idea of law embraces [both] traditions'.[11] While admitting that both assumptions are 'open to question',[12] Samuel convincingly justifies his methodological choice through discussion in the Introduction which anticipates the intellectual *tour de force* of the following chapters.

Quite unconventionally, the first chapter is dedicated to the impact that medieval juridical thinking has had (and continues to have) on the Western legal tradition's later development. Roman juridical thinking is discussed in chapter 2. Samuel is, of course, fully aware of the singularity of starting with the medieval jurists.[13] The significance of medieval juridical thinking is that it produced a highly sophisticated method of reality-decoding via recourse to old (i.e. Roman) as well as new ontological categories and argumentative practices.[14] Further, all of this was combined with the establishment of systematic, and thus, modern legal education and practice.

The importance of this chapter lies in the fact that it shows Samuel's particular attention to context and questions of (legal) culture – two much-discussed notions in comparative law scholarship. This approach is pursued throughout the book. Examples include the outline of the philosophical and theoretical contexts which underpinned the works of the Roman jurists;[15] the spirit which defined legal reasoning during the codification era;[16] current debates over whether legal reasoning is any different from medical reasoning[17] or even, every-day (ie common sense) reasoning.[18]

Arguably, the book has three main strengths. First, it allows readers to comprehend why, from an epistemological point of view, legal reasoning is about factual categorisations (taxonomies).[19] Secondly, and relatedly, it makes it clear that the way lawyers categorise reality (including, of course, in textbooks[20]) has profound repercussions on society at large.[21] This feature makes the book particularly attractive not only to legal comparatist and historians, but to students too (especially postgraduate ones, given the depth and practical orientation of Samuel's analysis). The discussion on causation, for instance, sheds new light on the production and dynamics of schemes of intelligibility in legal reasoning and adjudication. The third strength of Samuel's analysis is that it ultimately shows why, despite all the methodological shifts which have characterised its development to date, there have not been Kuhn-like 'revolutions' in Western jurisprudence.[22]

This leads to another important feature of this book, namely the wealth of case and statutory law analysis readers will enjoy. More generally, at a time when history-based subjects are increasingly disappearing from the law curricula, it is one of Samuel's merits to have based his epistemological

[8]Samuel, above n 1, p 9: 'A diachronic approach has … much to offer. But so does a synchronic approach if one is prepared to look beyond the legal literature'.

[9]Ibid, p 8.

[10]Ibid.

[11]Ibid.

[12]Ibid.

[13]Ibid, pp 12–13.

[14]Ibid, pp 15, 331.

[15]Ibid, pp 41–42.

[16]Ibid, pp 67–70.

[17]Ibid, pp 168–196.

[18]Ibid, pp 258–284.

[19]See in particular Samuel's statement at p 190: 'Legal reasoning is about manipulating facts (*accomodatio factorum*) to make them conform in an isomorphic way with a conceptual structure implied by a legal text (statute, contract, or will) or by a precedent or line of precedents'. Samuel further explores this 'epistemological attitude' in chapter 9.

[20]Samuel, above n 1, p 141.

[21]Ibid, p 47; G Samuel *Epistemology and Method in Law* (London: Routledge [2003] 2006).

[22]See also G Samuel 'Have there been scientific revolutions in law?' (2017) 11(1) Journal of Comparative Law 186.

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analysis of the origins and development of Western legal thinking on specific historical sources in both the civil and common law traditions. This is an aspect of Samuel's analysis which fits well with the contextual, pluralist turn that jurisprudence and legal theory have recently taken.

The book suffers three minor flaws. The first one is that the narrative is, at times, repetitive. In particular, because Samuel draws from his previous scholarship, in various instances the reader finds claims which he had already made. Secondly, while one of the book's strengths is that it has a considerable amount of scholarly, judicial, and statutory extracts that help better appreciate the author's claims, these are at times neither explained nor referred to in the main text. Finally, the book says little on the nature, role, benefits, and perils of the spread of artificial intelligence technology (AI) in the legal domain. True, Samuel does not specifically aim to cover this topic. Yet if we live in an age in which a rethinking of legal reasoning has become all the more urgent, it is also because of the increasing use of virtual information-retrieval and processing mechanisms – particularly, of computational models of legal reasoning and argument – in law.[23] Samuel's lack of analysis on this point is, in this sense, at odds with some meaningful statements he makes on AI throughout the book,[24] as well as with his remarks on the legal reasoner's processes of 'categorisation and virtualisation'.[25]

To the last comment it might be objected that Samuel's primary concern lies somewhere else. *Rethinking Legal Reasoning*'s last two chapters make it clear that, according to Samuel, a serious rethinking of legal reasoning requires a reconsideration of the notion of 'interest' within the legal dimension. This is, arguably, Samuel's most innovative contribution to the interrogative about how legal reasoning should be rethought. So, after having 'offer[ed] an epistemological context for [such] rethinking',[26] Samuel offers the readers 'something more practical' – ie an account as to why 'the notion of interest should be taken at least as seriously as the notion of a right as a means of approaching legal reasoning through the prism of an enquiry paradigm'.[27] This should be done, Samuel clarifies, 'because it can be just as amenable to the institutional taxonomical structure often said to be at the basis of rights thinking in law [and] because … it has more epistemologically convincing explanatory power with respect to reasoning in law and its relation to social facts'.[28]

Samuel introduces the interest model in chapter 4, where he says that, along with the notion of 'reasoning in terms of policy', that of 'interest' might act as an 'alternativ[e] to the rights and rules view of law'.[29] As with the other three, interests too are legal 'artefacts' – a notion which Samuel deploys drawing from Maksymilian Del Mar.[30] A legal artefact is defined as a 'fabricated notion designed to capture one's attention in order that the notion can be used for some purpose, but, equally, once formulated also reflects back on itself'.[31] Lawyers should prefer the interest model because, all things considered, this model 'provides the most promising means of understanding legal reasoning in relation not just to legal concepts and other legal artefacts but also to what judges do when they reason and search for a solution'.[32] Yet, Samuel is clear that if 'interests' are to have any epistemological value in the legal dimension,[33] they need to be meaningfully distinguished from 'rights'[34] – a consideration Samuel makes drawing from the Roman and French traditions. Scholars

[23]KD Ashley *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age* (New York: Cambridge University Press, 2017).
[24]Samuel, above n 1, pp 8, 51–52, 166–167, 255, 272.
[25]Ibid, p 160.
[26]Ibid, p 285.
[27]Ibid, p 285.
[28]Ibid, p 87.
[29]Ibid, p 88.
[30]Ibid, p 87.
[31]Ibid.
[32]Ibid, p 107.
[33]Ibid, pp 292, 306, 327.
[34]Ibid, p 303.

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who have recently explored whether law itself is an artefact and if so why, how, and to what extent, will find Samuel's reflections relevant and thought-provoking.[35]

All too modestly, Samuel introduces *Rethinking Legal Reasoning* by noticing that '[i]n truth it would be idle to think that there is much to be said that has not, in some way or other, been said before given the very long history of legal thought in Europe'.[36] In fact, Samuel has given us another excellent piece of work on Western legal reasoning's defining elements and inner dynamics whose analytical depth and richness make it unique and worth reading over and over again. It is a much-needed account at a time when there is an urgent need for new reflections on the challenges that Western law and jurisprudence are currently facing.

[35]L Burazin et al *Law as an Artifact* (Oxford: Oxford University Press, 2018).
[36]Samuel, above n 1, p 1.

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