

Mid-semester Writing Assignment Memo: Question 2
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Question 2 [19 responses]

In a speech in 2013, Lord Mance, a Justice of the UK Supreme Court said:

“Legal certainty is important... for all those affected by EU law... the general willingness of all Member States and their institutions to engage unreservedly in the development and implementation of EU law depends upon confidence that the outcome will be predictable: above all, that it will respect the EU legislators’ apparent intentions. It is not the Court of Justice’s role to act as a legislator.... The Court of Justice has with good reason itself stressed the virtues of legal effectiveness and certainty. The Court of Justice commonly sits as a court of first and last resort and the effects of its decisions are difficult to reverse or change. When changes involve Treaty interpretation, they even require Treaty amendment to achieve.... There have however been cases where certainty and predictability can be said not to have been achieved. A well-known example is the Court’s decision in *Mangold v Rüdiger Helm* CaseC-144/04.”
Using the course materials please write a critical assessment of this statement.

It would be a good idea to begin with some discussion of what the idea of legal certainty means. In Packet 1 there is a footnote which states: "legal certainty is a principle of community law. It is a rather amorphous principle but is related to ideas in us law such as the doctrine that criminal laws can be void for vagueness." The footnote was to a reference in the recitals to the directive on unfair commercial practices to the idea of legal certainty. The idea here is that uniform rules eliminate consumers' uncertainties about what rules apply when they transact across borders. Thus differences in rules are problematic from the perspective of legal certainty. Also in packet 1 this idea comes up again in the context of the explanatory memorandum for a proposal for a European Sales Law. In Packet 2 the idea of certainty turns up in *Kobler*: the idea of liability based on national courts’ misapplication of EU law was argued to involve a legal certainty problem. The Court (para 53) accepts this: "regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the member states which submitted observations in this case have also contended. State liability for an infringement of community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law." The idea of legal certainty then appears in Packet 3 in the context of direct effect. In particular Advocate General Bot is concerned about legal certainty in his opinion in *Kücükdeveci*.

I think it might make sense to think about whether - based on your study of law so far in general - law can in fact ever be certain in the sense that we can perfectly predict how the law will apply to a given set of facts. Many people would argue that law is indeterminate (and sometimes this is extended to mean that powerful people are able to manipulate the law to suit themselves - I am not sure this second set of ideas is necessarily compelled by a recognition that law isn’t always determinate). Some of you will be familiar with *Getting to Maybe*. In the business law context an idea of certainty is often invoked by businesses (e.g. rules should be certain because compliance involves expense and compliance with more uncertain rules is more expensive). I think that even where rules are argued to be clear that isn't necessarily the case. As a group, the class members probably have different views about how certain law - in the US - is and also

about how certain it should be. That is fine. I am more interested in your making a coherent argument using and supported by the course materials than the content of the argument. I don't much mind what perspective you are adopting, although I do think that it is a useful skill for a lawyer to be able to see issues from multiple perspectives.

The quote raises a number of issues that could be discussed: legal certainty, and the relationship between certainty and predictability, courts as legislators (which I think really means establishing rather than interpreting rules (although cf. The development of the common law) and for Mance it seems that the difficulty of reversing what the court decides is part of this issue although query how different this is from decisions of any Supreme Court). To the extent that the Court in Mangold is giving effect to the provisions of a directive which reflect, surely the views of the EU legislator while ignoring the (sometimes merely formal) role of the national legislator thinking about the legislative part of this is rather complicated. The rest isn't simple though.

Anyway, in terms of the predictability of law, Mangold was rather shocking - and people reacted to it as such (e.g. the quote in the materials). Having said for many years that directives don't produce horizontal direct effects suddenly the Court of Justice, while not explicitly abandoning this idea, comes pretty close. Küçükdeveci is less of a surprise as it builds on Mangold. Directives that give effect to general principles of EU law are now to be treated differently from directives which do not. This leads to new uncertainties: how do we determine what are the relevant general principles of EU law going forward (e.g. AMS). There's an issue of ambiguity here: it is not always easy to figure out what the court's decisions really mean, and Mangold (and Küçükdeveci and AMS) is an example of this.

There is a general question here of whether EU law is predictable based on the material we have studied. We have learned that EU law evolves over time. The Court often justifies the evolution in terms of the effectiveness of EU law. And by constantly building on the foundations of earlier decisions the Court tries to show that what it is doing is explaining the natural consequences of its teleological approach. Thus the Court often seems to work to make it seem that its decisions follow from earlier decisions.

I think that legal certainty matters more for individual and firm obligations and liabilities rather than for states - it's a fundamental right to be protected from excessive use of state power. Although the idea that the Member States might have a right to be protected from excessive use of EU power is perhaps worth thinking about a bit. And I think that Defrenne is worth thinking about - when the Court in that case reached a surprising decision given what had gone before it limited the retrospective effect of the decision. This did not happen in Mangold. Perhaps it should have.