Contents

Preface vii
Acknowledgements viii
Table of cases and practice directions ix
Table of statutory texts xiii

Introduction 1

1 What judging and legal reasoning have been 5
1.1 Roman legal reasoning 5
1.2 Medieval jurists 8
1.3 Later jurists 11
1.4 Legal reasoning in the later civil law 15
1.5 Legal formalism (dogmatics) 20
1.6 Common lawyers 23
1.7 Legal reasoning in the common law 26
1.8 Interpretation of statutes 31
1.9 Legacy of the past 33
Further reading and questions 34

2 Judging and legal reasoning today ('official portrait') (1) 36
2.1 Rule model 36
2.2 Applying the rule model 37
2.3 Interpretation model 39
2.4 Interpreting texts 40
2.5 Rules of interpretation 47
2.6 Interpreting cases 50
Further reading and questions 53

3 Judging and legal reasoning today ('official portrait') (2) 55
3.1 Rights model 55
3.2 Abuse of rights 59
3.3 Policy model 60
3.4 Interest model 65
3.5 Remedies model 69

3.6 Equitable remedies 74
3.7 Remedies and reasoning 77
3.8 Reflections on the official portrait 79
Further reading and questions 82

4 The 'unofficial portrait' 83
4.1 Realist vision 83
4.2 Facts and reasoning 87
4.3 Fact reconstruction and remedies 90
4.4 Interpretation and schemes of intelligibility 91
4.5 Reasoning through images 94
4.6 Reasoning and the *persona* 97
4.7 Excursus: *persona* and fiction 103
4.8 Image: construction and representation (representation theory) 105
Further reading and questions 108

5 The relationship between the official and unofficial portraits (1) 109
5.1 Authority paradigm 109
5.2 Authority and coherence 116
5.3 Authority and justice 118
5.4 Authority and policy 120
5.5 Authority and structuralism 122
5.6 Authority as restraint 126
5.7 Authority and evidence 128
Further reading and questions 129

6 The relationship between the official and unofficial portraits (2) 131
6.1 Inquiry paradigm and schemes of intelligibility 131
6.2 Explanation (causation) versus meaning (hermeneutics) 134
6.3 Inquiry paradigm and human beings 136
6.4 Level of observation 139
6.5 Actionalism and methodological individualism 140
6.6 Structuralism versus hermeneutics (reception theory) 143
6.7 Postmodern and post-axiomatic approaches 148
6.8 Law as fiction (fiction theory) 151
Further reading and questions 155

Conclusions 156

Bibliography 166
Index 169