
37 Legal reasoning*

Jaap Hage

1 Preliminaries

Legal reasoning can be studied from several points of view. It is for instance possible to look at the brain processes of somebody engaged in legal reasoning. This approach may be interesting for neurologists, but has as yet little relevance for lawyers. Another approach would be to investigate which mental processes are involved in the process of reaching a decision in a legal case (Hogarth, 1971; Crombag *et al.*, 1977; Koppen and de Keijser, 2002). A third way to look at legal reasoning is to study the argumentation by means of which a legal conclusion is supported. It is not necessarily so that the arguments adduced for a legal conclusion reflect the mental process through which this conclusion was reached. In this connection it is customary to distinguish between the context of discovery and the context of justification. The context of discovery deals with the psychological side of legal reasoning, while the context of justification concerns the justification of legal conclusions. Often the context of justification is identified with the arguments produced for a conclusion, but these arguments can also have a function other than to justify their conclusions, namely to make a legal decision acceptable for the parties involved (Witteveen, 1988). This is the rhetorical aspect of legal reasoning. In this chapter, I will focus on legal argumentation in the context of justification and disregard its psychological and rhetorical aspects. This means, amongst other things, that the issue whether lawyers in the common law tradition reason in a different way than lawyers in the civil law tradition (e.g., 'inductive' instead of 'deductive'; cf. Legrand, 1997; Smits, 2004) falls outside the scope of this contribution, because the notion of reasoning in this connection concerns the mental processes of the reasoner, rather than the kinds of reasons that can legitimately be adduced for a particular conclusion.

The study of legal justification itself can be conducted in a descriptive way and in a normative way. One can study how legal justification actually takes place, but also how it should be done ideally. Since this contribution is part of an encyclopedia of comparative law, its emphasis is on the description of methods of legal justification in different countries.

* See also: American law; Common law; German law; Statutory interpretation.

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Because this is an encyclopedia entry, the size of this entry must remain limited. The following books may be useful for those who are interested in detailed studies of the methods of legal reasoning in western countries:

Atiyah and Summers (1987), *Form and Substance in Anglo-American Law*, is a comparative study of legal reasoning in England and the United States. The authors aim to show that, despite the similarities, American legal reasoning is more substantive than English legal reasoning, which is more formal. (The distinction between formal and substantive legal reasoning is discussed in section 3.)

MacCormick and Summers (eds) (1991), *Interpreting Statutes*, is one of the two results of the so-called 'Bielefelder Kreis', a group of legal theorists that aimed at giving comparative descriptions of legal reasoning in a number of western countries. This book contains a description of statutory interpretation in Argentina, Germany, Finland, France, Italy, Poland, Sweden, the United Kingdom and the United States. All studies about individual countries were written by researchers from these countries. In addition there are chapters about the methodological issues and chapters in which the results are synthesized. It turns out, according to MacCormick and Summers, that, despite obvious differences, the similarities between the different systems dominate.

MacCormick and Summers (eds) (1997), *Interpreting Precedents*, is the second result of the Bielefelder Kreis, this time devoted to the reasoning with and interpretation of precedents. The detailed studies deal with Germany, Finland, France, Italy, Norway, Poland, Spain, Sweden, the United Kingdom, the United States (New York State) and European Community law.

Vogelauer (2001), *Die Auslegung von Gesetzen in England und auf dem Kontinent*, is a detailed study of the techniques of statutory interpretation in Germany, France, European Community law and England. The author argues that, behind superficial differences, legal reasoning in these systems exhibits large similarities. More particularly, legal reasoning in England would be much more substantive than is traditionally assumed.

The comparative study of legal reasoning is a 'mer à boire' and instead of even trying to undertake this study, I will provide a number of analytical tools that may be useful for conducting it (sections 2 to 6) and apply some of these tools to legal reasoning in France, Germany, the United Kingdom and the United States (sections 7 to 10) in order to illuminate the differences between statute-based and case-based legal reasoning and between formal and substantive legal reasoning. The countries mentioned were chosen because they represent the common law and the civil law

tradition, and because legal reasoning in France and England is often taken to be relatively formal, while legal reasoning in Germany and the United States is often considered to be relatively substantive.

2 Of reasons

A discussion of legal reasoning can benefit from a distinction between different kinds of reasons. Contributive reasons are reasons which plead for or against a conclusion, but which do not determine by themselves whether this conclusion follows. The contributive reasons for a conclusion must be weighed against the contributive reasons against this conclusion, and whether the conclusion follows depends on the balance of all contributive reasons for and against it. For instance, whether a conflict of duties leads to force majeure depends on the balance of the duties, where each duty is a contributive reason for or against the behaviour at stake. Another example would be the balance that must be struck between colliding human rights (Alexy, 1994, pp. 71ff.).

In contrast to contributive reasons, decisive reasons determine their conclusions by themselves. A legal example of a decisive reason is that, if a rule is applied to a case, the legal consequence of this rule is attached to the case. When a rule applies (which is a different matter than the applicability of the rule; see section 5), there is no need for balancing any more; the consequence of the rule holds in this case without exception. In other words, if a rule applies in a case, this is a decisive reason for the legal consequence of the rule in this case. From the definition of a decisive reason it follows that there is no need to balance decisive reasons. It is just impossible that there can be both a decisive reason for and against a conclusion. It also follows that a contributive reason always gives way to a colliding decisive reason.

Exclusionary reasons (Raz, 1975, pp. 35ff.) are reasons that deal with other reasons. They make facts which normally would count as reasons not to count so because of the exclusionary reason. For instance, if a legal rule is applicable in a case, this is not only a reason to apply this rule but also a reason to ignore the values and policies that underlie this rule. Normally these values and policies would be contributive reasons to decide a case in a particular way, but if they are 'summarized' in a rule, this rule comes in the place of the values and policies that went into it (Raz, 1975, pp. 73ff.; Schauer, 1991, pp. 42ff.; Hage, 1997, pp. 110ff.). Using both the rule and its underlying values and policies would take these underlying policies and values into account twice.

3 Substantive and formal reasoning

Legal rules are made for a purpose. They can express moral rules, aim to realize values or reflect government policies. Legal reasoning is formal to

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the extent that it is based on these rules and ignores their underlying moral rules, values and policies. Legal rules and precedents provide us with formal reasons for legal decisions. Legal reasoning is substantive to the extent that it takes recourse to these moral rules, values and policies, which are said to provide us with substantive reasons for legal decisions (Atiyah and Summers, 1987, pp. 5ff.).

Formal reasons usually have underlying substantive reasons, but, where legal reasoning is formal, it takes the rules and cases on which it is based as exclusionary reasons, meaning that the formal reasons are used instead of the substantive reasons that went into them. For instance, a judge uses a statutory rule to decide a case and does not pay attention to the values and policies underlying this rule. The statutory rule is treated both as a decisive reason for its conclusion and as an exclusionary reason for the values and policies underlying this rule (*ibid.*, pp. 8–9) and, if legal reasoning is very formal, even for those values and policies that were not taken into account when the rule was made.

Factors that make for the formality of legal reasoning are the use of rules, both statutory rules and rules based on precedent, the existence of judgments and verdicts and particular kinds of procedural law, such as statutes of limitation and jurisdictional rules (*ibid.*, pp. 10–11). Methods of interpretation differ in their degree of formality. Where they follow the literal meaning of words in the texts of statutes or seek the intentions of the historical legislator, they are relatively formal. Where they seek for and use the purposes or rationales of rules, or generate interpretations with an eye to the desirability of the outcome, they are relatively substantive (*ibid.*, p. 15).

The formality of formal reasons comes in degrees. We have already seen that the applicability of a rule may set aside more or less contributive reasons that deal with the same issue. Some rules refer to substantive standards, such as the rule to attend goods received in custody as a good housekeeper. This rule requires substantive reasoning where it asks for the determination of what a good housekeeper would do, but is formal to the extent that it excludes all other possibly relevant contributive reasons. The same goes for the binding force of precedents. In the common law countries many precedents have full binding force, meaning that, if a precedent applies, all potential other reasons are excluded. In civil law countries precedents of high courts tend to have persuasive force, meaning that they are contributive reasons for the conclusions which they support. Their weight depends on how 'persuasive' they are. They are not exclusionary reasons, however. A very persuasive precedent may outweigh many contributive reasons that plead the other way, but it does not exclude them as reasons, as a binding precedent would.

4 Two kinds of 'rules'

Legal reasoning is very often seen as a form of rule-based reasoning. This is even so when the rules derive from precedents. To obtain a good picture of the role of rules in legal reasoning, it is important to distinguish between different kinds of 'rules'.

Legal conclusions can always be presented as the outcome of a deductively valid argument. If a legal case should be solved in a particular way, another case which is similar in all relevant aspects should be solved in the same way. This means that a legal solution for a particular case can be generalized into a solution for all similar cases. For instance, if John is not entitled to half of the marital estate because he murdered his wife, this can be generalized into the 'rule' that those who murdered their spouses are not entitled to their normal share of the marital estate (see, e.g., the Dutch Supreme Court: HR 7 December 1990, NJ 1991, 593). This generalization can in turn be used in arguments that justify the conclusion that somebody is not entitled to part of the marital estate. Such arguments are usually construed in the form of a syllogism: persons who murdered their spouses are not entitled to their normal share of the marital estate. John murdered his spouse. Therefore, John is not entitled to his normal share of the marital estate.

According to this type of legal justification, a conclusion for a particular case is drawn by subsuming the facts of the case under a general 'rule' stating that such cases have the legal consequence that is derived for this particular case (MacCormick, 1978, pp. 101ff.; Alexy, 1978, p. 273). This possibility of justification by means of a deductive argument exists in all legal systems in which legal judgments are assumed to be universalizable. In practice this will hold for every legal system.

The 'rule' on which this kind of justification is based is not necessarily explicitly made by a legislator or immediately based on a precedent. It may be the outcome of legal reasoning in which one or more sources of law are interpreted and possibly combined. The above-mentioned rule about persons who murdered their spouses, for instance, was the outcome of applying the unwritten principle that nobody should profit from his own wrongs to a particular case. This principle was in turn extracted from a rule in which it was embodied. I propose to call such rules, which describe the legal consequences for a particular type of case, a Case Legal Consequence Pair (CLCP). A CLCP is not a rule that brings about the legal consequence for a particular kind of case (not a constitutive rule), but rather a description of the consequences attached by a legal system to a particular kind of case. As such it is true or false, not valid or invalid. The 'logic' of these rules is deductive. If a case belongs to the type mentioned in the rule's antecedent, it must have the legal consequence of the rule's conclusion, because otherwise the CLCP would be false.

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CLCPs must be distinguished from constitutive rules which cause (in a legal, not in a physical, sense) that particular kinds of cases have particular legal consequences. These constitutive rules are often made by a legislator, or are extracted from precedents. If they are the result of legislation or based on a binding (as opposed to a merely persuasive) precedent, they result from authoritative decision making and as a consequence they lead not only to reasons for their legal consequences, but also to exclusionary reasons that block the relevance of other potentially relevant reasons. The 'logic' of these constitutive reasons is not deductive, because it is possible to make exceptions to them, or to apply them analogously. I will say a little bit more about the logic of constitutive rules, because a good picture of this logic is necessary to understand how rule-based reasoning can be more or less formal and how different legal systems can vary with respect to their formality in dealing with rules.

5 Rule-based reasoning

Reasoning with constitutive rules has two main phases, which are not necessarily separated in time. The phase which comes logically first is the determination whether a rule is applicable in a concrete case. The second phase is the decision whether the rule should be applied to this case.

A rule may be said to be applicable in a case if the facts of the case satisfy the conditions of the rule. To determine whether a rule is applicable in a case, two steps must be taken. The first step is the identification of the rule conditions. The second step is the classification of the case facts to make them satisfy the established rule conditions. Both of these steps are usually called 'interpretation', but they are different steps and they are better distinguished. I will call them rule interpretation and fact classification, respectively.

If a rule was made through legislation, it will normally be easy to identify the rule conditions. Rule interpretation is more difficult if the rule is based on case law, because then it involves the determination of the ratio decidendi of a case. The so-called 'canons of interpretation' (e.g., take the rule literally, or look for the purpose of the rule) play a role in this connection if the rule is based on legislation. To my knowledge, the idea of canons of interpretation has hardly been elaborated yet in connection with case law, although there has been considerable discussion about how to establish the ratio decidendi of a case (see section 6).

Fact classification and determination of the scope of rule conditions are two sides of the same medal. Both involve the determination whether the facts of a case satisfy the conditions of a rule. Because this step is often approached from the rule side of the argument, it is also dealt with by means of the so-called 'canons of interpretation'. This time the canons are

not used to determine what the conditions of a rule are, but rather what their individual scope is.

The canons of interpretation can be divided into two main types. Canons of the first type are hermeneutic. They aim to establish the meaning of statutory rules, and include (a) the Literal Rule, also called grammatical interpretation, which follows the literal or, if applicable, the technical meaning of the statutory text; and (b) the Mischief Rule, also called interpretation according to legislative intent, which follows the legislator's intent in making the rule.

These hermeneutic canons lead to relatively formal reasoning, because they abstract from the substantive reasons for having the rule. Canons of the second type are substantive ones, because they interpret rules with an eye to the values and policies served by them. They include (a) the 'Golden Rule', also called teleological or purposive interpretation, which aims to establish the meaning of a rule from its purpose (the expression 'Golden Rule' is also used as a synonym for the Literal Rule, or for the refusal to give a rule an interpretation that leads to inconsistency or otherwise absurd results; cf. Bell and Engle, 1987, p. 15); and (b) the use of economic analysis (Posner, 2003; Cooter and Ulen, 2004) to prefer the interpretation which has the best cost-benefit ratio.

When different canons of interpretation lead to different outcomes for a particular case, it is possible to use (implicitly) substantive reasoning in order to choose between competing canons, for instance between grammatical interpretation and following legislative intent. Even if the preferred interpretation is officially justified by formal reasons (such as legislative intent), this would assign a crucial role to substantive legal reasoning.

If it turns out to be possible to classify the facts of a case such that they satisfy the conditions of a rule, the rule is applicable in this case. This does not automatically mean that the rule's consequences are attached to the case, however. In fact, a rule's applicability is neither a sufficient, nor a necessary, condition for the rule's application. If a rule is applicable, this is a contributive reason to apply the rule. This reason must be weighed against contributive reasons that plead against application, if there are any. Such a contributive reason against application would, for instance, be that application is against the rule's purpose. If the contributive reasons against application of a rule outweigh the contributive reasons for application, including the rule's applicability, the rule does not apply although it is applicable, and then we say that there is an exception to the rule. In general, it depends on the legal system at issue: (a) whether it recognizes contributive reasons against application of an applicable rule; (b) what these reasons are; and (c) what their weight is, in particular in comparison to the weight of a rule's applicability.

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This allows for variation in the degree of formality of a legal system. If a legal system easily allows exceptions to rules for substantive reasons (e.g., the undesirability of the rule's application in a concrete case), it is relatively substantive. If a system allows few or no exceptions, or only exceptions for formal reasons such as legislative intent, it is relatively formal.

If a rule is not applicable, this is a contributive reason against application of the rule. Because it is 'only' a contributive reason, it is in theory possible that a rule which is not applicable is nevertheless applied because the non-applicability is outweighed by the contributive reasons pleading for application. This will occasionally happen in cases that are sufficiently similar to the cases in which the rule is applicable and in which application is in accordance with the rule's purpose. We then speak of analogous application of the rule. Again, it depends on the legal system in question: (a) whether it recognizes contributive reasons for application of a non-applicable rule at all; (b) what, if any, these reasons are; and (c) what their weight is, in particular in comparison to the weight of a rule's non-applicability as a reason against applying the rule.

6 Precedents

The role of precedents is different in legal systems from the common law tradition and systems from the civil law tradition. The former systems employ the rule of *stare decisis*, which implies that some precedents are binding, while the latter do not, with as a consequence that precedents have at best persuasive force. I will start the discussion of precedent-based reasoning with the role of merely persuasive precedents.

Persuasive precedents are cases that provide contributive reasons to decide a new case in accordance with the decision of the old case. As such they are formal reasons. There were probably substantive reasons to decide the old case as it was actually decided and, if a new case is similar to that old case (more or less), the same substantive reasons will be present in it too. If the new case is merely decided on these substantive reasons, the precedent did not play a role as such, not even a persuasive one. A precedent only plays a role as such if it adds to the force of the substantive reasons contained in it (Bronaugh, 1987). What is added is the force of precedent, and this is a formal reason. It depends on the legal system in question: (a) whether it recognizes persuasive precedents; (b) under which circumstances a precedent has persuasive force; and (c) what is the weight of a persuasive precedent as a contributive reason for a particular decision.

A legal system is the more formal, the more easily it recognizes persuasive precedents and the more weight it attaches to them. In fact (almost) all legal systems recognize persuasive precedents, which may be explained by

the fact that treating similar cases in similar ways is seen as a principle of fairness (Dworkin, 1978, pp. 113).

Binding precedents are not only reasons to decide new cases in a particular way, but also (exclusionary) reasons to disregard other potentially relevant reasons. Because of their exclusionary force binding precedents need normally not to be balanced against competing contributive reasons. If they are applicable, they normally determine the outcome of the cases in which they are applicable. This strong force of binding precedents means that their operation is guided by a number of rules which determine which precedents (if any) have binding force for whom, and which parts of the precedents have this binding force.

The notion of binding precedent goes hand in hand with the rule of *stare decisis* which assigns binding force to a number of precedents. In this connection it is customary to distinguish between horizontal and vertical bindingness (McLeod, 2002, pp. 148ff.). The horizontal dimension concerns the issue whether a court is bound by its own former decisions; the vertical dimension concerns whether a court is bound by decisions of higher courts, and if so, which higher courts. It depends on the legal system in question whether and to what extent (for which courts) it accepts horizontal and vertical bindingness. Because binding precedents provide reasons which are even more formal than persuasive precedents (because they exclude the relevance of other potential reasons), a legal system is the more formal, the more binding precedents are recognized.

Even if a precedent is binding, not every part of it is binding. The binding part of a precedent is called the *ratio decendi* (or, in American law, holding) of the case, the non-binding part an (*obiter*) *dictum*. There exists no unequivocal test to determine which part of a precedent is *ratio decendi* and which part *obiter dictum*. One test, proposed by Wambaugh, runs that those parts of an argument are part of the *ratio decendi* that are necessary conditions for the conclusion (Cross, 1991, pp. 53ff.). Another test, popularized by Goodhart, runs that those case facts that were seen by the judge as material constitute the *ratio decendi* (*ibid.*, pp. 66ff.). It has also been argued that it is impossible to devise a test to distinguish between *ratio decendi* and *obiter dictum* (Stone, 1985, pp. 123ff.).

The necessity to distinguish between *ratio decendi* and *obiter dicta* provides a legal decision maker with some leeway that can be used for substantive legal reasoning. Another way to achieve some leeway is to adopt the so-called 'declaratory theory of precedent', which holds that case law is evidence of independently existing law (Cross, 1991, p. 26ff.). By declaring a case to be misguided evidence, it is possible to discard it. The prevalent theory, however, is that precedents are not so much evidence of pre-existing law, but constitutive for the law (McLeod, 2002, p. 131; for an argument

that in Australia the situation is different, see Wesley-Smith, 1987, p. 75). On this prevalent view, the possibility to replace formal reasoning by means of precedents, by substantive reasoning is lacking.

Again other techniques to limit the effects of binding precedents are to distinguish cases by pointing out relevant differences between the precedent and the new case, applying the so-called 'per incuriam doctrine', which holds that a precedent based on disregard of a relevant precedent or statute needs not be followed, or application of the doctrine of changed circumstances (see McLeod, 2002, pp. 141ff. for details).

7 France

The ideological background of legal reasoning in France was set at the time of the French Revolution. According to art. 10 of the Law of 16–24 August 1790, which is still in force, courts are not permitted to take part, directly or indirectly, in the exercise of legislative power. This law was a reaction to the pre-revolutionary practice according to which the royal courts made kinds of rules in the form of so-called 'arrêts de règlements' (Steiner, 2002, p. 77). The strong emphasis on the separation between the legislative and the judicial power expressed by this law still influences the ideology of French legal reasoning. This means that in France case law is, barring a few exceptions, officially not binding and that individual cases are not an official source of law (Vogenauer, 2001, p. 338). Reference to case law is not allowed as the foundation of a legal decision (Steiner, 2002, pp. 80–81). In practice, however, decisions of, in particular, the higher courts play an important role (Vogenauer, 2001, p. 339) and case law as a whole (as opposed to individual cases) is considered as a source of law, albeit officially one of low ranking (Tropes and Grzegorzczuk, 1997, p. 112). Because precedents cannot function as an independent source of law, their use lies in the interpretation of statutory law (*ibid.*, p. 126).

The same ideological background which makes the role of case law problematic in France assigns a central role to statutory law (Troper *et al.*, 1991, p. 211). It also influences the 'official' canons for statutory interpretation. Traditionally (Portalis', *Discours Préliminaire for the Code Civil* in 1799), these canons are taken to be as follows: (a) the law should be followed where it is clear; (b) the law should be interpreted according to legislative intent where it is unclear; and (c) in case of a gap, recourse should be taken to customary law and equity (Steiner, 2002, pp. 57–8).

The relative importance of the third guideline is small, and the first two guidelines together suggest a rather formal approach to statutory law. However, these traditional hermeneutically oriented canons have been supplemented by 'modern' ones (Troper *et al.*, 1991, p. 179; Steiner, 2002, pp. 64ff.). One of these modern methods is the 'libre recherché scientifique'

proposed by GénY (1899), according to which the role of the judge is taken to be similar to that of the legislator in that the judge must pay attention to private autonomy, the public order and the balance of private interests (Vogenauer, 2001, p. 332). Another modern method is the evolutive (or historic) method propagated by Saleilles, which pays attention to the developments in society to which the law must be adapted. The intention of the original legislator therefore becomes less important.

The overall picture is that legal reasoning in France is far less formal than its ideology would have it (Vogenauer, 2001, p. 338). One reason is that the canons for statutory interpretation have shifted towards more substantive methods. Another reason is that precedents are not formally binding, with the consequence that judges have leeway to adapt the use of case law to the needs of new cases as determined by substantive reasons.

8 Germany

According to Alexy and Dreier (1991, p. 117), the German legal culture is to a significant degree substantive and value-oriented. They mention three reasons for the existence of interpretational issues and doubts, namely the openness of statutory law, the uncertainty of legal methodology and – most important in the present context – the divergence of ideas about rightness or justice (*ibid.*, pp. 74ff.). Apparently these ideas play an important role in German law.

That the German law is relatively open also becomes clear from the recognition that gap filling is often possible. The following (translated) quotation from the German Federal Constitutional Court is telling:

The law is not identical with the whole of the written statutes. Over and above the positive enactments of the state power there can be a surplus of law which has its source in the constitutional legal order as a holistic unity of meaning, and which can operate as a corrective to the written law. (BVerfGE 34, 269 (287))

Another factor which makes German law relatively open is that the interpretation of statutes is not only a matter of determining legislative intent (although this is important), but also a matter of establishing the right decision. In this connection ethical arguments can play a role.

In Germany, it is possible (for the Constitutional Court) to review statutes against the constitution and to review ordinary statutes against EC law and treaties. Moreover, statutes should be interpreted in accordance with the constitution. Since the constitution protects a number of human rights, interpretation in accordance with the constitution and review of statutory rules against the constitution often amount to substantive legal reasoning.

Another factor which makes German legal reasoning relatively substantive is that in Germany precedents are not binding, with the exception of judgments of the Federal Constitutional Court (Alexy and Dreier, 1997, p.26). Nevertheless, they play a crucial role in statutory interpretation (Vogenauer, 2001, pp. 224ff.) and, as a consequence, they have a considerable impact on legal argumentation (Alexy and Dreier, 1991, p.90). Precedents in Germany have a high *de facto* authority, which even goes so far that deviation from precedents may constitute a legal error (*ibid.*, Vogenauer, 2001, p. 225). In this sense, the role of precedent in German law makes German legal reasoning more formal than the officially non-binding nature of precedent may suggest.

Another factor which increases the formal nature of German legal reasoning is the important role of legal doctrine. Germany has a longstanding tradition of legal doctrine in which the law is systematized (Zweigert and Kötz, 1998, pp. 135ff.). This doctrine has a considerable influence on German judges (Alexy and Dreier, 1997, p. 118), thereby making legal reasoning more formal.

In summary, it may be said that the German legal culture has both a tendency towards substantive legal reasoning and a countervailing tendency towards formalism. Of these two tendencies, the one towards substantive reasoning seems to prevail (Vogenauer, 2001, pp. 224, 227).

9 The United Kingdom

Legal reasoning in the UK differs fundamentally, at least in theory, from legal reasoning in France or Germany, because the UK (with to a certain extent an exception for Scotland) belongs to the common law family. This means that the general background of legal reasoning is precedent-based, with the rule of *stare decisis* with regard to precedents and with an attitude towards statutory rules that is at least *prima facie* different from that in the civil law tradition. Part of this attitude stems from the fact that statutory rules are traditionally meant as exceptions to the common law. Where statutory law is available, it has precedence over the common law, but there is a tendency to give this exception a limited scope. There are diverging opinions with regard to the question whether the influence of a statutory rule extends beyond its proper scope of application and, more particularly, whether it should be used for analogical reasoning in a vein similar to precedents. The prevailing opinion seems to be that the influence of statutory law remains confined to what is the proper topic of the statute and that the common law remains unaltered except where it is expressly altered (Bell and Engle, 1987, pp. 41ff.).

There are several traditional canons for statutory interpretation (*ibid.*, p.47; see also Holland and Webb, 2003, p.209). First, if possible, a

statutory provision should be interpreted according to its ordinary meaning (the Literal Rule), or its technical meaning where appropriate. In this connection, the context of general words can play a role. Second, if the first prescript would lead to an interpretation against the purpose of the statute, a secondary meaning of the words may be chosen. The purpose of a statute should in this connection be taken to be the purpose of the legislator (the Mischief Rule, so called because the interpreter considers the mischief which the rule was intended to remedy). Finally, in order to avoid absurd consequences, there are limited possibilities to make small amendments (additions, alterations, implied meanings) to the literal text (the Golden Rule).

The general picture is that statutory interpretation is mainly aimed at establishing legislative intent, where the text of the statute is the main indication of what this intent was. In this respect legal reasoning in the UK is mainly formal. This view is confirmed by Atiyah and Summers (1987, pp. 100ff.). However, since the mid-20th century, according to Vogenauer (2001, pp. 1235ff.), there has been a tendency in English legal culture towards substantive reasoning. As one of the causes of this development, Vogenauer mentions the decreasing importance of the Literal Rule, brought about by a change in legislative technique that puts less emphasis on precise formulation (see also the entry 'Common Law' in this encyclopedia).

The rule of *stare decisis* gives case-based reasoning in the UK a formal flavour, because adherence to previous decisions stands in the way of substantive legal reasoning. Although judges have a number of techniques available that allow them to disregard unwanted precedents (some of them mentioned in section 6), the general tendency is nevertheless that adherence to precedent prevails in the UK over substantive reasoning (Bankowski and MacCormick, 1997, pp. 348ff.; Atiyah and Summers, 1987, pp. 118ff.). Vogenauer (2001, p. 1243) argues, however, that the formal approach with regard to case law loses importance because of increasing judicial activism, which is in turn evoked by the failure of the legislature to remedy defects in the common law.

10 The United States

Although the UK and the US are both common law countries, the mode of legal reasoning in the US is more substantive than in the UK, at least if we follow an extensive analysis of Atiyah and Summers (1987). They list, amongst others, the following differences between the two systems.

With regard to statutory interpretation, English judges would, far more than American ones, emphasize the ordinary meaning of words. American judges would pay relatively more attention to the purpose of rules and their underlying policies. Moreover, where purpose is looked for, English judges

would limit themselves to the text of the statute itself, or other statutes, while American judges would more often look for evidence in legislative history. It would even be the case that American judges see rules as encompassing values, purposes and rationales, even where they are not explicitly mentioned in them, while English judges do not. These differences are, amongst others, explained by the more precise drafting of English statutes, the greater importance attached in England to legal certainty, and a greater willingness on the part of American judges to engage in politically loaded issues.

With regard to case law, Atiyah and Summers argue that American legal reasoning is less formal because the doctrine of *stare decisis*, which is in force in the US too, is applied there less rigorously. Part of this is brought about because American courts are less bound to follow their own earlier decisions, in particular if the court feels that the earlier decisions were wrong. Moreover, in most branches of the American common law, a case is only considered as a binding precedent if it has passed a period of evaluative trial in which also lower courts participate. A judgment that is found wanting during this process will wither away. Such a period of 'testing' is absent from English legal practice. Still another relevant factor is that there are cases without a clear *ratio decidendi* because the judges were not unanimous. American judges feel more free to disregard such cases with 'pluralist opinion'. Finally, the power of judges to overrule wrongly decided cases would be more extensive in the US.

These findings of Atiyah and Summers seem to be contradicted by those of Vogenauer, who mentions empirical research that seems to show that, in the 1990s (after the publication of the study by Atiyah and Summers), English judges more often invoke the purpose of statutory rules than in the decennia before. However, Vogenauer immediately points out that these statistics are not decisive, and that the interpretation of what goes on in English law depends on the interpreter (Vogenauer, 1991, pp. 1148ff.).

11 Conclusion

Although it is difficult to offer hard conclusions about the differences in legal reasoning between different countries, it seems nevertheless possible to draw some more tentative conclusions. There are historical and (as a consequence thereof) institutional differences between the various legal systems, that *prima facie* result in differences in the style of legal reasoning. Obvious differences are found in the common law or civil law background of a system, the amount of emphasis a system places on the separation of powers and (as a consequence) the possibility of review of rules against (constitutional) values and human rights. Pro tanto, a system that belongs to the civil law tradition will be more formal than a system that belongs to the common

law tradition, and a system that strongly emphasizes the separation of powers will be more formal than a system that does so to a lesser degree. These differences suggest, amongst others, that the American system makes more use of substantive reasoning than the English system, and the German system more than the French system.

Whether these *prima facie* differences hold in practice is subject to debate. It seems that the more theoretical accounts of legal reasoning stress the differences that should obtain given the institutional differences, while the legal practices of the different systems, in particular in recent years, tend towards a substantive style of legal reasoning, whether this is explicitly recognized or not.

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