Legal Reasoning

Jaap Hage

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The sources of law have two different functions. They indicate what the various shapes are that law can take: customary law, precedent-based law, law based on legislation and treaties, and law based on legal doctrine and reason. We have seen examples of all these shapes in the chapter on the sources of law. Sources of law also play an important role in legal reasoning; they are used to substantiate the assertion that a particular rule is a legal rule and therefore can be used to support claims in law. Conversely, if a rule cannot be traced to a source, it can be concluded that the rule in question is not a legal rule and therefore cannot be used to support claims in law. In this chapter we will focus on the role that the sources of law play in legal reasoning.

1 The Legal Syllogism

With some simplification, the most important form of legal reasoning can be represented as a logical syllogism. A syllogism is an argument with two premises (starting points) and a single conclusion. The first premise contains the formulation of a legal rule in the format: IF condition THEN legal consequence. The second premise is the description of the facts of a case that satisfy the conditions of the rule. The conclusion describes the legal consequence that results from the application of the rule to the facts of the case.

Let us consider an example inspired by Dutch tort law. Tort law deals with the compensation of damage that a person has suffered as the result of a wrongful act by another person. The facts of the case are as follows: Pierre, 18 years old, visits the house of his neighbors. He is distracted by the daughter of the house, does not look where he is walking, stumbles over the carpet, and falls against an antique Chinese vase, which breaks as a consequence. The value of the vase was €3.000. Must Pierre (or his insurance) pay his neighbor €3.000?

The relevant rule, rendered in IF ... THEN- format, reads as follows:

» IF somebody acted wrongfully toward another person, and if he thereby caused damage to this other person, THEN he must compensate this damage.

The factual premise that can be reconstructed from the case description reads:

» Pierre acted wrongfully toward his neighbors and thereby he caused damage to his neighbors.

The conclusion that logically follows from these two premises is:

» Pierre must compensate the damage to his neighbors.

2 Classification

Although this argument refers to Pierre and his neighbors, it is formulated rather abstractly. It does not mention the daughter by whom Pierre was distracted, the role of the carpet, Pierre's stumbling, nor the vase. Perhaps some of these facts are not relevant to the question of whether Pierre must pay €3.000. Some other facts, however, will be relevant. These auxiliary facts are not mentioned because the description of the facts in the second premise of the syllogism must match the conditions of the rule that was formulated in the first premise.

While the description of the facts must be based on a real and concrete case, the given rule is in the abstract. It follows that the description of the case facts in the second premise must also be in the abstract. As such, a «translation» needs to be made from the concrete case description to the abstract case description that matches the rule conditions. This «translation» is called a *classification* of the facts. The facts that Pierre was distracted, stumbled over the carpet, and fell against the vase are taken together and classified as the fact that Pierre acted negligently. The fact that the vase broke as a consequence is classified as the fact that Pierre's act caused damage. Finally, the fact that the vase represented a value of €3.000 is classified as the fact that the damage amounts to €3.000.

Classification of case facts is often also based on the application of legal rules. Therefore, a classificatory argument can usually be cast in the shape of a legal syllogism. For instance,

» IF somebody acted negligently toward another person,
THEN the former acted wrongfully against the latter.

» Pierre acted negligently toward his neighbors.

Pierre acted wrongfully toward his neighbors.

This classificatory argument still has an abstract factual premise. Therefore, we need yet another classificatory argument to justify the intermediate conclusion that Pierre acted negligently toward his neighbors:

» IF somebody paid insufficient attention and thereby caused damage to another, THEN the former acted negligently toward the other.

» Pierre paid insufficient attention and thereby caused damage to his neighbors.

Pierre acted negligently toward his neighbors.

3 Justification of the Rule: Official Legal Sources

Both the main argument, leading to the conclusion that Pierre must compensate the damage to his neighbors, and the classificatory arguments, leading to the intermediate conclusions that Pierre acted negligently and unlawfully toward his neighbors, are based on rules. In fact, most legal arguments are based on rules. Often, the rules used in legal arguments are uncontroversial. This is the case for many classificatory rules that express the normal meanings of words. For instance, if a legal reasoner classifies that a car is a vehicle, the rule that cars count as vehicles will normally be accepted without additional argument.

Other rules, however, are potentially more controversial. Take, for instance, the rule that if someone acted wrongfully toward another, and if he thereby caused damage to that person, he must compensate this damage. The person who must compensate the damage may demand that the use of the rule be justified. Why must he pay damages, if he did not intend to damage anybody? Here is where the sources of law come into play, because the use of a rule in a legal argument is typically justified by pointing out that the rule can be found in an official source of law.

For instance, the use of the rule «If somebody acted wrongfully towards somebody else and if he thereby caused damage to this other person, he must compensate this damage» can be justified by referring to the rule formulated in Article 6:162 Section 1 of the Dutch civil code (*Burgerlijk Wetboek*). If pressed even further, the person using the rule can also point out that the Dutch civil code is valid legislation, and that legislation is an official source of Dutch law.

Official Sources

The official sources of a modern legal system are typically legislation, including treaties, and – in the case of the common law – precedents. Notice that these official sources are a more limited category of legal sources than the sources discussed in the previous chapter. Taken together, legal sources are indicative of the different shapes law can take. They are identified by looking at different legal systems at different times. Not all of these sources, however, can be used as reasons why a particular rule is a valid legal rule here and now; only «official» sources can. What counts as «official source» varies from one legal system to another and from one time to another. For example, before 1066 (the Battle of Hastings), case law was not an official source of English law. Presently, case law is an official source of English law, but not of continental Europe.

The justification of a legal rule by means of an official legal source can be presented as a syllogism:

» IF a rule can be found in an official legal source, THEN this rule holds (is valid).

» The rule «If somebody acted wrongfully towards another, and if he thereby caused damage to this other person, he must compensate this damage» can be found in an official legal source.

IF somebody acted wrongfully toward another, and if he thereby caused damage to this other person, THEN he must compensate this damage.

Ratio decidendi

In the common law tradition, judges are not bound by every element of an earlier court decision, but only by its *ratio decidendi*. Rather than all possible factors, this *ratio decidendi* consists only of the decisive grounds that led the court take the decision.

Apart from these decisive reasons, the court may have mentioned other reasons that are relevant but did not determine the court's decision. These other reasons are called *obiter dicta* (things that were also said), and courts are not bound by these *obiter dicta*.

This *ratio decidendi*, together with the outcome of the case, is comparable to respectively the conditions and the conclusion of a rule. Where case law is an official source of law, the fact that a court has decided a precedent in a particular way can be used as a reason why this rule is valid law and can support new legal decisions.

A simplified version of the *Donoghue v Stevenson 1932* case can illustrate this. Miss Donoghue visited a bar and drank from a bottle of ginger beer. It turned out that the bottle contained a partly decomposed snail. She fell ill and demanded damages from the manufacturer of beer. The court awarded the damages, because it argued that the manufacturer owed a duty of care to the woman and had violated this duty. The reason why the manufacturer owed the woman a duty of care (the *ratio decidendi* for this case) was that the women was considered a «neighbor» of the manufacturer. Such a «neighbor» is a person who is so closely and directly affected by the manufacturer's acts that the manufacturer ought reasonably to have had her in contemplation when directing its mind to the production and distribution of its products.

The fact that the court awarded Miss Donoghue damages can be adduced as a reason why this *ratio decidendi* is a valid English law and can be used in subsequent arguments before English courts.

The Sources Thesis

Legal positivism can briefly be described as the view that all law is positive law, that is: law that was created by being laid down. According to a particular view of legal positivism, there is an official source for every legal rule. If a rule stems from an official source, it is a legal rule. Conversely, if there is no source for it, a rule cannot be a legal rule. This thesis, that those and only those rules which can be traced to an official legal sources are legal rules, is called the «sources thesis».

This sources thesis was defended by the twentieth century English legal positivist Joseph Raz. Raz defended the thesis by pointing out that the existence of an official easily recognizable source for every legal rule contributes greatly to certainty about what the law is.

4 Interpretation

The texts by which legal rules are created are sometimes ambiguous. Take, for example, Article 6:162 Section 1 *Burgerlijk Wetboek*:

He who commits a wrongful act against another, which can be attributed to him, is obliged to compensate the damage suffered by that other as a consequence thereof.

It is not easy to translate this section of the *Burgerlijk Wetboek* into the structured rule «IF somebody acted wrongfully towards another, and if he thereby caused damage to this other person, THEN he must compensate this damage». The

step from the text of an official legal source to the formulation of a rule with a clear structure is not always an easy one. Lawyers call this step «interpretation».

The term «interpretation» is used for a variety of related phenomena. They include the process of making the step from a source text to a rule formulation, the classification of case facts to allow their description fit the conditions of a rule, and the establishment of the legal consequences of juridical acts such as a contract, last will, or permit.

Canons of Interpretation

Lawyers use a number of techniques to deal with interpretation, which are called the «canons of interpretation». These canons are used in all three mentioned contexts: the determination of the rule formulation, the classification of facts, and the determination of the consequences of juridical acts.

Interpretation is sometimes also necessary to decide about the proper scope of application of a rule. For instance, does a rule that forbids the presence of dogs in a butcher shop also apply to guide dogs? If an issue arises about a guide dog in a butcher shop, it is necessary to take a decision about whether guide dogs are dogs for the purpose of the regulation. Further, this decision should be motivated.

The Literal Rule or Grammatical Interpretation

One method of interpreting a rule requires that the interpretation matches the literal meaning of the words in the rule. Guide dogs are dogs, are they not? Therefore, a rule about dogs in general also applies to guide dogs. The canon of interpretation that states that rules should be interpreted literally is called the «literal rule», and the resulting interpretation is called a «grammatical» or «literal interpretation».

The Mischief Rule or Legislative Intent

Often rules are created to solve problems. The legislator intended to achieve particular results, and the rule is thus a means to obtain those results. If a legal decision maker gives the rule an interpretation that suits the original intention of the legislator, she is said to apply the mischief rule.

Suppose that the legislator created the prohibition of dogs in butcher shops in order to prevent unhygienic situations in food stores. He considered the case of guide dogs but nevertheless decided not to make an exception, because hygiene was considered more important. If a legal decision maker wants to follow legislative intent, she must interpret the rule to make it also apply to guide dogs.

The Golden Rule: Purposive or Teleological Interpretation

When an interpreter looks at the purpose of a rule, she may revert to the intention of the legislator who formulated the rule. This is the application of the mischief rule. However, she may also try to determine the purpose of the rule herself. When we speak of purposive or teleological interpretation, the decision maker applies the so-called golden rule.

Assume again that the legislator created the prohibition of dogs in butcher shops in order to prevent unhygienic situations in food stores. If a legal decision maker recognizes this interest but finds the interest of visually handicapped persons more important, she might interpret the rule teleologically to make guide dogs fall outside the rule's scope.

Interpreting Precedents

Not only legislation and treaties require interpretation; the same holds for precedents. Above we discussed a simplified version of the *Donoghue v Stevenson* case and formulated – tentatively – a *ratio decidendi* for this case. Courts typically do not specify the *rationes decidendi* for their decisions themselves. Later courts or legal practitioners and scientists must interpret the precedents in order to extract the *ratio decidendi* from them. Canons of interpretation, however, as they have been developed for statutory interpretation, seem to be lacking for the extraction of *rationes decidendi* of precedents.

5 Reasoning with Rules and Cases

Applicability

Even after the precise conditions and conclusion of a rule or the *ratio decidendi* of a precedent have been established, and the facts of a case have been classified as being covered or not by this rule or ratio, the possibilities of a legal reasoner are not exhausted. A rule is *applicable* to a case only if the facts of the case after classification satisfy the conditions of the rule. The normal situation is that an applicable rule attaches its consequences to the case. For example, Pierre has to pay €3000 to his neighbors to compensate the damage of the broken vase. If a rule is not applicable, it does not attach its consequences to the case.

Analogy

Sometimes it happens that a rule is, strictly speaking, not applicable to a case. Yet, the new case may have so many similarities to older cases to which the rule was applicable, that it seems desirable to apply the rule by analogy. Assume, for example, that a civil code contains the rule that the owner of a piece of land is not allowed to have trees less than two meters from the border with his neighbor's land. In a particular case, it is not the owner of a piece of land who has a tree less than two meters from the border, but a lessee. The lessee is not the owner, so strictly speaking the rule is not applicable to his tree. However, given the similarity of the cases, and given the purpose of the rule, there is reason to apply this rule to lessees with wrongly planted trees. Because the rule was not strictly applicable, we then say that the rule was applied by analogy.

Application of rules by analogy is a somewhat hazardous enterprise, because a court that does this deviates from a decision of the legislator who created the rule. In criminal law and in tax law, rule application by analogy is therefore regarded with great suspicion.

Case-Based Reasoning

It is possible to extract *rationes decidendi* from precedents, which can then be applied to new cases in the same way as rules based on legislation. However, it is also possible to use precedents in a different way, namely, for reasoning by analogy. A new case is seldom completely identical to a precedent. There will be similarities but also differences. An old case should function as a precedent for a new case when it is the most «on point» case of all potential precedents. The number and relevance of both the similarities and differences play a role in determining which case is most «on point» and should support the decision in the new case. The reasoning for which a potential precedent is most «on point» is similar to the reasoning that is required for determining whether a non-applicable rule should be applied by analogy.

Distinguishing

The binding nature of precedent only applies to cases that are *similar* to the already decided case. Here, «similar» means identical in *all* relevant aspects. This creates leeway for the development of law because a court that must decide on a new case has to determine whether the new case is really similar to the alleged precedent. By pointing out relevant differences (distinguishing), the court can argue that the cases are not similar and that it is therefore not bound by a particular precedent.

Suppose that in an old case someone sold a sick cow. The buyer wanted to undo the sale because the cow was ill, but the court refused to do so because the buyer could have, or should have, seen that the cow was sick. This is a precedent for future cases, but for which ones precisely? Suppose that in a later case the seller explicitly stated to the buyer that the animal was healthy. Would that make a difference to the buyer who bought the cow and now wants his money back? If the court decides to distinguish this case from the prior case, the law will be changed, and this decision will also function as a precedent for future cases.

Broadening

It is possible that a court treats cases as similar when their similarity is not obvious. If a judge applies the rule that there will be no money back for unhealthy animals if their illness was detectable to a case involving defective products bought in a shop, the rule will be broadened considerably. This broadened rule will also come to function as a precedent.

6 Principles to Deal with Rule Conflicts

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There is no guarantee that all legislation brought about by one body will be consistent. However, if there are several bodies that produce legislation, such as national laws and laws of provinces, it is almost guaranteed that there will be some conflict of rules. To deal with such conflicts, several principles have been developed over the course of time. Here we will focus on three of them.

Lex Superior

Sometimes rules stand in order based on a hierarchy between legislative bodies. This is usually the case if in a particular State legislators operate on different levels. Here, the rules of the «central» legislator are considered to be superior to the rules of the local legislators. The *Lex Superior* principle then holds that in case of conflict, the superior rule overrides the inferior rule. Thus, Lex Superior holds that national laws will prevail over laws of the province and that laws of the province prevail over municipal laws. Another example would be the supremacy of EU law over the national laws of the EU member states.

Lex Specialis

It is very difficult for a legislator to foresee all possible situations to which a rule may apply. As a consequence, a rule may be either *over-inclusive* or *under-inclusive*. A rule is *over-inclusive* if it applies to cases in which it was not meant to apply. An example would be a prohibition of dogs in a butcher shop, which is not meant to apply to guide dogs for the blind. A rule is *under-inclusive* if it does not apply to the cases to which it was meant to apply. An example would be a rule against dogs in a butcher shop, which should also apply to the monkey that Mrs. Jackson likes to take for a walk.

Both problems can be dealt with by means of a rule that deals with the specific situation. This specific rule will be in conflict with the more general rule, to which it is meant as an exception. This conflict is dealt with by means of the *Lex Specialis* principle. This principle holds that the more specific rule prevails over the more general rule.

The position of guide dogs might be dealt with by a rule that blind people are allowed to bring their guide dogs to all public places. This rule would be more specific than a general prohibition in butcher shops and would therefore prevail according to the *Lex Specialis* principle. Notice that it is not always easy to see which of two conflicting rules is the more specific one.

Lex Posterior

Most often, when a new rule is created that is in conflict with a preexisting rule, the old rule is simultaneously and explicitly

repealed. However, in cases where this has not happened, the *Lex Posterior* principle may be useful. It states that the newer rule prevails over the older one.

7 The Lawyer's Toolbox

We have seen that a legal decision maker, who must justify her choice for a particular outcome for a case, has a choice of several different techniques. Some of these techniques are relatively formalist: the decision maker refers to the decision of someone else, a legislator, or a court and avoids giving a value judgment herself. Other techniques are more substantive: the decision maker engages in reasoning about what would be a good rule. She makes her own value judgment and bases her interpretation of the rule, the classification of the facts, and the way the rule is used in a legal argument, on this value judgment. In all cases, however, the decision maker must choose a technique. The different legal sources, the reasoning techniques, and the canons of interpretation can be compared to a set of decision-making tools in a lawyer's toolbox. Depending on the needs of the case, a legal decision maker picks a tool that helps her reach a desirable result.

Recommended Literature

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