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The Case-bound Character of Legal Reasoning

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Abstract
Reasoning from case to case not only characterizes the heuristics in common law tradition, but also legal adjudication on the basis of statutory rules. Both the interpretation of rules and the weighing and balancing of principles are directed by the plain cases. They serve as the heuristic starting points in legal reasoning, while the decision ensues from mutual comparison of cases rather than from interpretive strategies.

Keywords:
Legal reasoning, linguistic interpretation, meaning and use, philosophy of language, weighing and balancing.

1. Introduction

In *The Concept of Law*, Hart depicts the pitfalls of formalism and rule-scepticism. In so doing, he offers an intriguing account of the functioning of rules in difficult cases, an account that seems to bridge the alleged differences between statutory interpretation and legal adjudication through precedents.

Hart's starting-point concerns the way how legal standards are conveyed in legislation and in precedents. Legislation seems to have a huge advantage over precedents. Whereas precedents leave open ranges of possibilities as to the standard that has to be followed, the communication by rules, that is, by explicit general forms of language, is relatively clear, dependable, and certain. The addressee, says Hart, has only to recognize instances of clear verbal terms, to 'subsume' particular facts under general classificatory heads and draw a simple syllogistic conclusion.[1]

The advantage of rules over precedents is nevertheless a limited one. General terms do have a core meaning, in that it sometimes will be clear whether an object or act is to be qualified under the general term, but there will always be cases where it is not clear whether the general term applies or not. As rules are composed of general terms, rules are equally deficient, in that in some cases the applicability of rules is clear, but in other cases evoke doubts.

[1] Hart (1994): 124-126.

At this point, Hart continues, the authoritative general language in which a rule is expressed may guide only in an uncertain way much as an authoritative *example* does:

> The language of the rule seems now only to mark out an authoritative example, namely that constituted by the plain case. This may be used in much the same way as a precedent, though the language of the rule will limit the features demanding attention both more permanently and more closely than precedent does. [2]

The decision that the rule applies, says Hart, is in fact a choice to add to a line of cases a new case because of resemblances, which can reasonably be defended as both legally relevant and sufficiently close, and in this respect the reasoning process in statutory interpretation resembles the modes of legal reasoning of common law, despite the differences.[3]

Hart is, of course, a representative of the common law tradition. His emphasis on the role of precedent in legal reasoning might therefore be conceived as an exaggeration due to prejudices, as much as the lawyers of the civil law systems are disposed to exalt the importance of rules in legal reasoning.[4] But I think that Hart rightly emphasizes the role of concrete cases in legal reasoning, even in statute law regimes. Reasoning from case to case not only characterizes the heuristics and legitimization in common law tradition, but also legal adjudication on the basis of statutory rules. In this article I would like to examine the correctness of this thesis. I will therefore analyze two modes of statutory interpretation that are located on the outer edges of the techniques of legal interpretation: linguistic interpretation and the weighing and balancing of interests.

2. Linguistic interpretation

To enter the realm of the text, one has to read the words and sentences that together fabricate the text and its meaning. From this perspective, it seems to follow that knowing the meaning of the individual words of the provision is not only a necessary, but also a sufficient condition to know the meaning of the provision. At first sight, this seems to be Hart's approach. He characterizes the plain case as a case to which the general expressions of the rule are clearly applicable ('If anything is a vehicle a motor-car is one'). Therefore, the rule that no vehicle may be taken into the park fixes by language the necessary conditions which anything must satisfy if it is to be within its scope:

> [C]ertain clear examples of what is certainly within its scope may be present to our minds. They are the paradigm, clear cases (the motor-car, the bus, the motor-cycle); and our aim in legislating

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[2] Hart (1994): 127.
[3] For an introduction into the internal rationality of the common law, see Eisenberg (1988): ch. 6.
[4] See MacCormick & Summers (eds.) (1996): ch. 18 ('Further General Reflections and Conclusions'), who conclude that common law and civil law systems converge as to the role of precedent.

> is so far determinate because we have made a certain choice. We have initially settled the question that peace and quiet in the park is maintained at the cost, at any rate, of the exclusion of these things.[5]

But it is only in the context of the provision's alleged purpose that it becomes clear in which sense the word 'vehicle' has to be understood: as *motorized* vehicles, not as play things, carts or prams, although these objects are also part of the linguistic meaning of 'vehicle'. It is only in the context of a text or provision that it becomes clear in which sense the words have to be understood. Grace to this context, says Holmes, their meaning is even more refined than any given in the wordbook (Holmes 1992, 297). But how do we know the purpose of the rule?

From a methodological point of view, the determination of the meaning and purpose of a rule is an circular process. For the individual words derive their meaning from the sentence; yet the sentence is made up of the very elements to which it gives meaning.[6] To break into this methodological circle, we need a starting point, a meaning that is attributed to the sentence or rule in advance. According to Wittgenstein, it is our participation in practice that starts the processes of meaning. 'There is a way of grasping a rule', says Wittgenstein, 'which is *not* an *interpretation*, but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases.'[7] We follow the rule *blindly*,[8] for we are trained to respond this way.[9]

Hart's plain cases might be understood this way. Both words (like 'vehicle') and rules (like 'No vehicle may be taken into the park') evoke certain clear examples of what is certainly within their scope. In case of the rule 'No vehicle may be taken into the park', our participation in social life explicates that the core meaning of 'vehicle' is confined to motorized vehicles. This meaning fits in with the *prima facie* purpose or meaning of the rule: to further peace and quiet in the park – something that can reasonably be realized by excluding motorized traffic, but wouldn't make sense if the ban also comprises toys and prams.

Linguistic interpretation, so conceived, is not a heuristic directive that stipulates that the meaning of a legal rule has to be determined by a literal reading of the words – whatever that might be. What we call the plain meaning of a rule is a reading of the rule that is conformable with cases that are conceived as its paradigm or clear cases – that is, clear examples that are present to our mind when reading the rule. Its wording seems to cover all instances of automatic of *blindly* application of the rule – that is, of an application that cannot reasonably be challenged. 'The meaning of a word,' says Wittgenstein, 'is its use in the language'.[10] We could add: 'The meaning of a legal rule is its use in legal practice. And the *plain* meaning of a legal rule is its *unproblematic* use in legal practice'.

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[5] Hart (1994): 129.
[6] Palmer (1969): 111.
[7] Wittgenstein (1953): § 201.
[8] Wittgenstein (1953): § 219.
[9] Wittgenstein (1953): § 198, 206.
[10] Wittgenstein (1953): § 43.

From this perspective, it seems that the choice between possible readings is primarily directed by these paradigm cases. Understanding, therefore, is nested in practices, that is, in our participation in social life. A ruling from the Dutch Supreme Court might vindicate this thesis.

3. Linguistic interpretation: an example

Does the rule "A man can only be married with a woman, a woman can only be married with a man" prohibit same sex marriages?[11] The Dutch Supreme Court answered this question affirmatively in response of the proposition of plaintiffs who hold that neither this article, nor the Civil Code exclude a marriage between two persons of the same sex. Up till this case, this article was usually understood to prohibit polygamy. Therefore, the plaintiffs argued, it should be read as follows: that a man can only be married with *one* woman, and a woman can only be married with *one* man. As such, it does not prohibit same sex marriages. But the Supreme Court rejected this reading:

> [This reading] departs from a literally reading of several sections, a reading that is already contestable as such, and ignores the law's purport as the legislator, taking into account the preceding legislation, had in mind when establishing Book 1 Civil Code. Even when the social developments afterwards would advance the opinion that the legal ban on a lawful marriage between two women or two men is no longer justified, this would not legitimize a reading that deviates from the unequivocal tenor of the law, all the more because marriage is a matter of public order and asks for legal certainty.

The Supreme Court rejects the interpretation of the plaintiffs, based as it is solely on a literal reading, for this interpretation ignores the unmistakable tenor of the law. The law's tenor is inferred from legislative intent ('the law's purport as the legislator envisaged when establishing Book 1 Civil Code'), conceived in light of the preceding legislation.

The Supreme Court's reading highlights both numerals and the objects of the presupposition: 'A man can only be married with *one woman*, a woman can only be married with *one man*.' It is this reading of article 33 that the Supreme Court decided to be the correct one, at least in the case at hand. But this reading is also "to the letter", although one that dissents from its standard interpretation. What is the difference between the literal reading of plaintiffs and the Supreme Court's literal reading?

The difference is that the plaintiff's contention rests on just one argument, the argument that the law nowhere explicitly expresses a ban on equal sex marriage, not even in the above mentioned article 33. This is correct, the Supreme Court admitted, but the explanation for an existing ban on equal sex marriage, though not explicitly pronounced, is that, at the time of the enactment, the legislator – and not just the legislator, one may add – considered it a fact of self-evidence that a marriage could only exist between persons of different sex. The plaintiff's reading of the provision fails to appreciate this basic assumption, as

[11] Former article 1:33 Dutch Civil Code.

it rests solely on the words and neglects all sorts of counter-indications, like legal history, that challenge this reading. If we take Hart's example, it would be as if a police officer would fine a mother for walking in the park with a pram, arguing that from a linguistic point of view a pram can be qualified as a vehicle.

We are now in a better position to expound why the claimants' reading of the provision of marriage was inadmissible *as such:* their reading ignores society's traditional opinions on marriage, the institution that makes up the nucleus of family life at the time of the enactment and, therefore, the obvious context to understand this provision. Obvious, because this reading is underpinned by all methods of interpretation, except one: linguistic interpretation.

To put it differently: the paradigm case of marriage is the association between man and woman. To confine the institution to the traditional form – in Wittgenstein's vocabulary: to obey or follow the rule of marriage – can be justified with many legal arguments. The ample evidence is, in turn, a sign that the traditional form of marriage is deeply nested in our form of life.[12] The paradigm case of marriage and the proposed one are, from the perspective of society's traditional view on marriage, unequal. To unseal the institution of marriage for same sex associations as well, more substantive arguments are needed than a mere literal reading of a provision, a reading that at the time of the ruling only by coincidence – that is, by its phrasing – endorses plaintiffs' highly controversial view on marriage.

4. Weighing and balancing of interests

More substantive types of legal reasoning, like weighing and balancing principles and interests, are as much case-oriented as linguistic interpretation. The processes of weighing and balancing is at the heart of legal adjudication, and might be conceived as the juristic heuristic tool *par excellence.* According to common parlance and legal jargon, reasons, interests and principles do have weight. We weigh and balance reasons pro and con an interpretation, the reliability of a witness, the evidence in a case, and we weigh and balance competing interests and principles. But which balance is needed to weigh and balance things that do not have material weight? What exactly is weighed? And how do we determine the insubstantial weight of reasons, principles and interests?

In answering these questions, I would like to focus on the weighing and balancing of *interests*. In legal theory, linguistic argumentation and argumentation on the basis of substantive reasons are situated on the outer edges of the scale of interpretative arguments.[13] Although both modes of argumentation differ in many ways, my hypothesis is that the weighing and balancing of interests resembles the reasoning processes of linguistic interpretation, in that the relative weight of interests is determined by comparison of different cases. In this respect, weighing and balancing of interests is as much case bound as linguistic interpretation is, as the next specimen of legal reasoning will show.

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[12] Wittgenstein (1953): § 241: '"So you are saying that human agreement decides what is true and what is false?" – It is what humans beings *say* that is true and false; and they agree in the *language* they use. That is not agreement in opinion but in form of life.'

[13] MacCormick & Summers (1991).

5. Weighing and balancing: an example

The legal issue addressed in this case, decided in 2000, was whether a shipbuilding yard could be held liable for the physical injury of a former employee more than thirty years after he had been exposed to asbestos, a notorious carcinogen. The legal problem here concerned the limitation period for damages like these. According to Dutch law (art. 3:310 paragraph 2 Civil Code)[14], claims of damages for injuries caused by exposure to hazardous substances expire thirty years after the event that caused the damage. In its decision, the Supreme Court considered that the legislator had explicitly rejected a limitation period spanning more than thirty years, partly because of the interests of employers and insurers, and partly because the injuries were supposed to reveal themselves within thirty years after exposure to hazardous substances.

But the problem with physical injury caused by asbestos is that the injury often reveals after *more* than thirty years. As a result, a whole class of victims of hazardous substances – those who have been exposed to asbestos – is more often than not excluded from the opportunity to sue the company or (former) employer for the injury, a result which not only happened to be at variance with the legislator's intent, but also contrary to the principle of legal equality. To expel the class of asbestos victims from compensation that can be claimed by other victims of hazardous substances discriminates between both classes without justification.

In these preliminary considerations, the Supreme Court outlined the legal dilemma that had to be settled. In short, the question was if the victim's claim should be dismissed following the demand for legal certainty, or should it be assigned because of the principle of legal equality? According to the Supreme Court, this decision was entwined with the facts of the case. Although the principle of legal certainty entails that the ultimate limitation period of thirty years should be applied strictly, it allows for deviation from this rule in exceptional cases. The Supreme Court, then, enumerates seven circumstances that have to be taken into consideration when weighing and balancing the competing interests or principles in cases like these. The judges must take into account, among other issues:

- the type of damage (pecuniary or moral damage);
- whether or not the victim or relatives are entitled to benefits on account of the damage;
- the degree of reproach with which the author of the damage can be charged;
- whether or not the author is still able to defend himself against the claim.

In enumerating these and other circumstances, the Supreme Court actually refers implicitly to those facts of the above case that made it so unsatisfactory to apply the limitation period strictly. In fact, by listing reverse factual circumstances (pecuniary or moral damage, little or much reproach, etc.), the Supreme

[14] Supplemented after the ruling of the Supreme Court with a 5th paragraph, which provide for particular cases like the asbestos-case.a

Court contrasts two (semi-)imaginary types of cases, in which the decision whether or not to derogate from the rule of limitation is less doubtful or even plain.[15] The reasoning process that directs the judge to the decision in this case can properly be characterized as Hart does: by a choice to add to a line of cases (the paradigm or semi-imaginary cases) a new case because of resemblances which can reasonably be defended as both legally relevant and sufficiently close.[16]

The analysis of the reasoning processes in this case, reveals that the metaphor of weighing and balancing principles and interests is, in a sense, misleading. The Supreme Court did not primarily weigh and balance *competing principles*, but *cases*, that is, a variety of cases comparable to the case at hand, in order to decide which circumstances, or mixture of circumstances, no longer justifies a strict application of the fixed limitation period. As a result, one of the competing principles outweighs the other one. Seen from the angle of heuristics – the reasoning process – the judges focus on the comparison of cases, asking which decision in the case at hand is the fairest one, all things considered. It is this judgment *in advance* that serves as the starting point for the justification, which then grounds the decision in the verdict.

6. Conclusion

The purpose of this article is to examine the role of concrete cases in legal reasoning – real ones or imaginary. In civil law systems, the doctrine is that interpretation is directed by rules of interpretation, like linguistic, systematic, and evolutionary interpretation. Although in most cases the interpretation is legitimized through a few basic types of argument – that is, by several standards of interpretation and justification – the problem is that no fixed hierarchy between these arguments exists. Sometimes, arguments that appeal to the ordinary or technical meaning of the words of a provision (linguistic interpretation) are deemed to justify the meaning and application of the rule, but in other cases the judges dismiss the linguistic argument in favor of arguments that appeal to, for example, legislative intent or substantive principles of law.[17] But how and for which reasons is decided that one type of argument, or cluster of arguments, outweighs the other ones? Although decisions can be *justified* by appeal to standards of interpretation,[18] those standards do not determine the decision. When the interpretive standards allow different decisions to be taken, the choice between competing interpretations or applications is no longer directed by standards of interpretation, but by comparison of the case at hand and comparable cases, in which the decision is less doubtful (plain cases).

This is, in short, how legal reasoning is guided by plain cases, in common law as well in civil law systems: they function as point of departure of the processes of interpretation, and offer the conditions that every interpretation must meet in order to be a reasonable one. Every interpretation must, at least, include

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[15] See for an elaborate description of the 'comparison method' former Chief-Justice Wiarda (1988): ch. 12.
[16] Hart (1994): 127.
[17] MacCormick & Summers (1991): 465-474.
[18] See Koskenniemi (2005): 568: '[W]hatever else international law might be, at least it is how international lawyers argue, that how they argue can be explained in terms of specific 'competence' and that this can be articulated in a limited number of rules that constitute the 'grammar' – the system of production of good legal arguments.'

the plain cases; the plain cases, in turn, serve as indisputable starting points when considering the reasonableness and appeal of an interpretation that envelops a new line of cases that resemblance the paradigm cases in relevant aspects.

When interests or principles has to be weighed and balanced, the judge is also directed by paradigm cases, that is, by real or imaginary cases in which the preponderance of one principle or interest is beyond challenge. Here, too, the judge has to choose 'to add to a line of cases a new case because of resemblances which can reasonably be defended as both legally relevant and sufficient close'.[19]

The differences between the common law and civil law systems become manifest in the legitimization of the ruling. In the civil law systems, the judges will be disposed to justify the interpretation not casuistically, but with reference to other rules, principles, and values. In so doing, they will invoke the whole apparatus of generally accepted modes of interpretative strategies in such way that the final interpretation allegedly ensues from interpretative strategies rather than from mutual comparison of cases.

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[19] Hart 1994, p. 127.

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