

LEGAL REASONING

Legal reasoning is the particular method of arguing used when applying legal rules to particular interactions among legal persons. While particularly relevant to the tasks of lawyers and judges, the requirements of legal reasoning also affect the legislator because addition of new rules or modification of existing ones needs to be done in ways that permit effective functioning of the entire ensemble of legal rules. Thus legal reasoning appears in two forms, legislative drafting and application of rules to cases. While each has its own distinct character and function in a legal system, both draw on the same set of reasoning skills.

The process of legal reasoning in law-application begins by accepting the relevance of the law and proceeds to work within the existing legal system. This acceptance and spirit of working within does give legal reasoning some bias towards maintaining the existing rules; however that bias does not amount to an unthinking assumption that the law as it stands is always just, fair, or practical. History contains many examples of judges using the “margins of appreciation” allowed within the law to avoid applying the existing rules in ways that would likely result in unfair or otherwise undesirable outcomes. It also contains many examples of efforts to change the legal system by moving away from law-application and returning to the law-making process to secure revisions of the rules.

Both legislative drafting and application of rules to cases require awareness of the different types of legal rules in a complete legal system. A complete legal system has four types of rules. The first, what Ronald Dworkin called the “rules of recognition,” specify how legal rules are made, rescinded, or amended. In national legal systems these are typically found in constitutions or basic laws. In international law, they are specified in the doctrines about sources of evidence for international law and the law of treaties. The others are what Dworkin called “rules of law” because they specify the particular content of the legal system at any time, and he divides them into the constitutive, the . Dworkin then divided them into constitutive, regulatory, and consequential rules.

Constitutive rules provide definitions of actors, things, and situations. They are “constitutive” (creating) because they specify what counts as a particular actor, object, relation, or situation. Recall the controversy that arose about the constitutive rule defining the term “marriage” after the Massachusetts Supreme Judicial Court ruled that the definition of that term does not include a specification that one marriage partner must be female and the other must be male. Many people in the USA (and elsewhere) believe that such a stipulation is a necessary part of the definition of marriage; and the difference in definitions entail very different ideas about the number of possible pairings of adult humans who are eligible to marry and be treated as spouses for such things as health insurance, ownership of property, visiting rights in hospitals, and inheritance. The drafters of the UN Charter never used the term “war” in the substantive articles; they preferred the longer phrase “threat or use of armed force” because they could remember situations in the 1930s when there was a lot of fighting, but both governments involved denied that they were “at war.” Drafters of the Charter wanted to be able to limit the use

of armed force in world politics without leaving governments and others much leeway to deny that they were engaged in armed conflict.

Regulatory rules specify guidelines for action by types of actors in relation to each other and/or various types of objects in various situations. They are the “you must”s, “you may”s, and “you may not”s that apply to behavior. In national and local law speed limits inform drivers of the highest speed they may attain on a particular stretch of road. In international law, the rule that foreigners need coastal state permission to fish in its exclusive economic zone warns them to get permission before they set their gear.

Consequential rules specify the legal consequences of having acted or omitted to act in a particular way on some particular occasion. The “\$250 fine” part of a “No Littering” sign specifies what can happen to you if you are caught throwing stuff out your car window along a highway. The international law rule that a state is responsible for the actions of its officials told the USA that it had to provide reparation (in the form of financial compensation since reviving those killed was beyond human capability) after the *USS Vincennes* mistakenly shot down an airliner in 1988.

Legislators seldom arrange their legal systems into neatly separated “constitutive” “regulatory” and “constitutive” portions of the law code. At times constitutive rules are separated out in a section on “definitions” but constitutive rules can appear elsewhere while the regulatory and consequential parts of the statute or treaty are seldom divided into different sections. Rather, statutes and treaties are usually organized by substantive subject-matter. Thus the 1982 UN Convention on the Law of the Sea has sections on “the territorial sea,” “the contiguous zone,” “the exclusive economic zone,” “the continental shelf,” “the high seas,” “the area” (seabed not within any state’s continental shelf), “marine scientific research,” and “marine pollution” that include all three types of rules of law. Good legal reasoners know this, and pay close attention to the type of rule.

Legislative drafting, which in international law means writing treaties, is part of the law-making process. This form of legal reasoning consists of expressing political decisions about how values (desirable things) should be allocated among actors or what general rules of conduct should apply to their various types of activity in a form that fits them within the categories and other rules already in the legal system. It is through this process that ideas about desirable rules are refined into elements of the existing legal system.

Take, for example, the political perception that coastal states (states whose territories are next to an ocean) should be able to control fishing fairly far out to sea. In 1950, international law specified that coastal states could regulate fishing within 3 nautical miles of shore, in their territorial sea. Beyond the three-mile limit, anyone with a boat could fish as they wished. However, better fishing technology created a situation in which unregulated fishing was depleting fish stocks and many people believed that some system limiting opportunities to fish was needed to prevent extinction of whole species. Since national governments were regarded as the only entities capable of enforcing any allocation scheme, people worried about fish began proposing that national jurisdiction be extended further out to sea. In Latin America in the late 1940s and 1950s, several governments proposed establishing a 100 or 200 mile wide “patrimonial sea” that would include rights to regulate fishing. While some people opposed the idea because they did not think the situation with fish stocks was so dire (and on 1950s data this was a

reasonable argument), others were put off by the name “patrimonial sea,” because it sounded too much like “territorial sea”. Arguing for adopting a 200 mile fishing zone became a lot easier in the 1970s because of two changes. First, the evidence of overfishing was greater and coming from several widely-respected scientific sources. It became harder to argue that there was no problem. Second, some proponents of wider coastal state jurisdiction came up with an alternate label, “exclusive economic zone” that did not sound like “territorial sea” and made clear that the authority being claimed was to regulate resource activity, not navigation. The new term made the idea more compatible with the existing legal rules about regulating activity at sea, easier to accommodate within international legal doctrines, and less likely to arouse political opposition from governments and others who were worried about coastal state efforts to regulate navigation far from their shores.

Legislative drafting, therefore, is a skill of fitting innovations within an existing legal framework in a way that leaves the legal system functioning even as it is used to foster new goals or to encourage new ways of doing things.

We will see many examples of legislative drafting as we read actual treaties, proposed treaties, and national implementing legislation. In the problems, however, we will be relying much more on the form of legal reasoning that arises when legal rules are applied to particular actors in particular situations. Here, the task is to determine what each actor should or should not do (or, if we are dealing with after-the-fact dispute resolution, should have or should not have done) in a particular situation. This form of legal reasoning is most highly developed in courtroom argumentation, but occurs whenever people begin appealing to the existing legal rules when deciding whether to act or not act in a particular way in reaction to some situation. In spring 2003 international law rules regarding the use of armed force were mentioned by both sides in the debate about whether the USA should invade Iraq.

Whether dealing with interpretation of written law (statute) or customary law (consistent past practice now regarded as defining an obligatory mode of conduct), legal reasoning in law-application mode involves three steps.

First, arguers must identify the applicable legal system. Within countries this is usually not a problem, though in federal states there are lots of occasions for arguing about whether federal or provincial law applies, or for arguing about which province’s law applies if some activity involves persons from or locations in more than one province. However, in the hierarchical context of national law it is assumed that anyone or anything within a state’s legal jurisdiction is bound by all of its legal rules. In international law, the situation is not as simple. Though all states are bound by the rules of “general international law,” they are only a small portion of the rules. There is no central international legislature; states can pick and choose among other rules by accepting or avoiding particular treaties. Since the basic rule about treaties is that they create neither obligations nor rights for non-parties, a treaty cannot be invoked against a state that is not party to the treaty (except in the limited circumstances when they express preexisting customary law or have been so widely followed even by states not party to the treaty that they have become customary law). This means that when applying international law you always have to check to see what rules have been accepted by all the states involved in the situation at hand. You can’t just assume that all the potentially relevant legal rules apply.

The second step begins once you know which set of legal rules apply. In this step, the legal reasoner determines which rules in that set apply directly to the particular situation at hand. At this point, attention shifts to the facts of the situation and asking “of what category of actions defined in the law is this an example?” You are familiar with this step in legal reasoning from domestic law. Take the sort of problem that comes up a lot in cop shows and mystery novels: person A has a pistol, points it at person B’s head and pulls the trigger. Assuming the pistol is loaded, works properly, and is aimed with sufficient precision, the outcome of this chain of action is a dead B. We know the observational data: A had the pistol, A fired it at B, the bullet went into B’s head, and B dropped dead. What no one knows from this very spare account of observed action is whether the shooting fits best with the legal category of accident, act of self-defense, homicide, or murder. These legal categories are irrelevant to B, who is dead anyway, but they are important to A and anyone else on the scene.

Properly categorizing A’s shooting of B, requires considering the circumstances surrounding it and ask which legal concept matches those circumstances most closely. Had A and B been looking at what they thought was an unloaded gun? Was B brandishing a weapon and yelling abuse at A? Were A and B involved in the outdoor continuation of a barroom fight? Had A been muttering about how B had done something really nasty to A and deserved to be killed? As you find out more about the details, you develop the contextual knowledge about occasion and mindset that allows you to determine whether this shooting should be categorized as accident, self-defense, homicide, or murder.

The same problem of categorizing action also occurs in international law. In 1961, the government of India ordered its army to occupy Goa and other Portuguese-held enclaves on the western coast of India. Everyone agreed that this was a “use of armed force.” Portugal complained about the action to the UN Security Council, saying it was an “act of aggression” prohibited by Article 4, paragraph 2 of the Charter and asking the Council to impose sanctions on India until India withdrew its forces. India acknowledged that it had used force (this was too obvious to hide), but insisted that it was not an “act of aggression.” The government of India was also smart enough to realize that it could claim that it was an act of self-defense, because the Portuguese were not threatening India in any way; they were simply continuing to administer small coastal areas that they had held as colonies since the 1500s. The Government of India came up with an innovative argument, that their action was an effort to end a colonial situation undertaken only after the Portuguese had repeatedly refused to negotiate or let the people of the areas decide whether they wanted to remain under Portuguese rule. The Indians ventured the claim that with colonialism now widely condemned (not just by newly-independent Third World states but also by both superpowers and several European states) continuing to exercise colonial rule without allowing a popular vote on it amounted to a form of “permanent aggression” against which peoples and governments may use force.

Most of the Security Council did not accept the Indian attempt to develop a new legal concept of colonialism as “permanent aggression” (though radicals around the world did like the idea). At the same time, however, it agreed that Portugal’s refusal to discuss the situation or allow a plebiscite put it enough in the wrong that it had no real complaint against India. No doubt this result was helped by the fact Portugal was ruled by a rightwing dictatorship at the time, but for our analysis of legal reasoning what is interesting is that while India’s action was not defined as an “act of aggression” neither

was the Indian proposal to define colonialism as “permanent aggression” accepted. An equally anticolonial legal concept was developed soon afterward, the notion of a “war of national liberation.” However under this concept it was up to the people of the colony to decide when to use force, not the government of an outside country.

Once they have categorized the situation and determined which legal rules apply, legal reasoners move on to the third step in legal reasoning, establishing the legal consequences of the action. For A with the pistol, a determination of “accident” or “self-defense” means no punishment. B’s death is unfortunate, and A may feel moral remorse about it, but from the community point of view it was either an unintended result or the B’s deserved comeuppance for being aggressive first. A determination of “homicide” or “murder” means punishment for A. Similarly, the Security Council decided that India had not committed an “act of aggression” or otherwise used armed force in a way contrary to the UN Charter, so did not impose sanctions on India. However, debate did suggest that countries thinking about using force to grab nearby colonial areas had to be careful about when they did it. It became much safer legally and politically to support an internal rebellion among the colonial population rather than to attack from outside.

During step three, legal reasoners can encounter two types of situation. The majority of situations fall into the first type where the facts of the particular situation are so much like those of the abstract category defined in law that they can move right to establishing the legal consequences. In some situations, however, there are aspects of the particular interaction that places it in a grey area, and legal reasoners must pause to consider which category is the most relevant. The Goa situation is an example a situation falling into a grey area. It had some features that looked like aggression, but it had a number of others that did not. The Security Council debate registered a collective conclusion that because the differences outweighed the similarities the “aggression” category should not be used. Once all the participants settled on that, determining the legal consequences for India was easy: it was not put under sanctions and was allowed to keep Goa and the other enclaves.

It is useful to divide the legal reasoning used in law-application into three distinct steps because the second and third steps each use a different form of reasoning. Step 2 of determining exactly which legal rules apply to the situation involves using inductive logic. This starts from the particular facts of the situation and works up to the abstract categories of actions established in legal rules to identify which category most closely fits. Step 3 of determining the legal consequences for the participants involves using deductive logic. This starts with the abstract rules identified as relevant and works down by applying the consequences specified in those rules to the actors and actions involved in the particular situation.

Though we often think of law-application as coming after something has happened or an action has been taken, the law application form of legal reasoning can also be used while considering possible actions ahead of time. On these occasions legal reasoners focus on asking whether some course of action is legal, can be modified to come within the law, or can’t be modified enough and remains illegal. An actor determined to commit an illegal act anyway needs to consider the consequences it will face if it goes ahead.

Remember that whether used in applying rules later or thinking ahead, legal reasoning starts with and works within the current legal rules. Good legal reasoning requires clear understanding of the legal rules, a good appreciation of the particular situation, and both deductive and inductive logic skills. It is this mix of abstract and concrete thinking and of inductive and deductive logic that makes legal reasoning such a challenge for beginners.