Taking Statutes Seriously[•]
A Comparatists' Thoughts on the Role of Primary Legal Sources in Legal Education

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Abstract

The role of primary legal sources becomes apparent when looking at the way legal reasoning works. Logic is crucial for legal reasoning. The use of basic logic in the legal field differs, depending on whether one is dealing with statutory law or with case law. The concept of statutory law is based on the syllogism. And in the absence of statutes, the syllogism does not work as easily. Dealing with case law requires a different approach. Overall, using primary sources, mainly statutes, in the process of legal reasoning increases the precision and convincing nature of an argument. Reasoning on the basis of knowledge of law alone will usually be quicker, but rarely achieve the same amount of precision and consistency. If, however, the main aim of legal education consists in enabling the students to "think like a lawyer", to be able to apply the law and analyze it, them using primary legal sources gains in importance.

• The title is obviously a reference to RONALD DWORKIN's famous work Taking Rights Seriously, New edition, Duckworths (1996). I do not claim in any way that this article will be of an originality and depth comparable to Dworkin

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INTRODUCTION

I have been having the privilege of teaching and studying within the stimulating framework of Kathmandu School of Law for over a year now. This experience of getting to know a different legal system in a foreign cultural and social context has been very inspiring. My aim as a comparative researcher consists in identifying similarities and differences in order to understand the Nepali legal system and in finding out more about law in general. Often, thoughts come up when observing difference to what one is "used to". One such observation stands at the beginning of this article.

Already early on, I observed Nepali students were not bringing their collection of statutes to class – while in Switzerland you can recognize a law student by the fact that she is carrying a Code or a collection of statutes. As a student, I realized that the teacher was hardly ever citing, reading or even referring to the literal wording of statutes. For me as a foreigner still struggling to master the difficulties of the Nepali language, I did not mind, as I depended on English accounts of what the Nepali law was anyway. However, when time of exams approached, this changed. I found out that I was not allowed to use any statute for answering the exam-questions. Thus, I attempted to learn the content of the statutes by heart, and I am still wondering how future Nepali advocates manage to learn all relevant laws by heart in order to pass the bar exams. These observations show a significant difference in the way a Nepali and a Swiss future lawyer is dealing with primary legal sources in their legal education.

This personal experience as a comparative researcher in Nepal was very thought-provoking. I first started wondering why there is such a difference. My first idea was to see Nepal as a system where case-law was more important than statutes, thus I assumed that there were only few statutes. This hypothesis was proven wrong, when I discovered the existence of the *Muluki Ain*, the main codification covering core areas of law as well as other important Acts. Thus, I needed to come up with other ideas.

One reason for the habit of learning statutes by heart might be a general culture within the education system of 'learning by heart', which I was told about by several people. Connected to that culture might be the very high and respected position of the teacher, which might incite relying on the words of the teacher alone without relying on other (more authoritative) sources. Another reason probably lies in the complexity of the language in

which Nepali statutes are generally formulated. Already the English translation of a recent Act such as the Nepali Contract Act 2000 contains complicated formulations, and my students tell me that understanding parts of the Muluki Ain are very difficult. Thus, it is much easier and quicker to tell the students what the statutes say than to have them read what is written in it. The complexity of the legal language again might be politically explained. Political leaders since the 18th century were autocratic until the advent of democracy in 1990. They were probably not so much interested in making clear and understandable laws. Rather, they used law to strengthen their own position. The officials applying law were thus more dependent on (direct or indirect) instructions of the powerful than on their own and independent interpretation of the text. Thus, the political circumstances did not favour a culture of primarily dealing with texts.

All answers which had come to my mind on the first question (why are statutes rarely used?) refer to the broader background of the Nepali life: the general culture, the education system and the political system. Scientifically verifying or falsifying any hypothesis was far beyond my possibilities, capacities and specialization. I therefore gave up this enterprise - and continued thinking.

The second question was more limited to the legal field. I started wondering about the consequences of not using statutes in legal education. In order to obtain a preliminary answer, I started thinking about what, working with primary legal sources had meant to me during my legal education in Switzerland. I realized that through the emphasis on reading and analysing the wording of primary legal sources, working with them has become an indispensable part in my process of reasoning. For me, the thorough analysis of statutes is essential in dealing with a legal question. A legal argument is often built around the wording of a statute. It becomes logical, understandable and, most importantly, verifiable due to the constant reference to primary legal sources. In my opinion, legal reasoning is one of the essential lessons I learned during my studies[1]. In fact, I once left a first year student puzzled: on her modest remark, that she did not know much law yet, I replied that I did not do so either (in spite of working on my doctoral thesis). This still holds true. I have some idea of how to deal with law, how to analyze and apply statutes and precedents, but generally I do

[1] In the western world, many writers state that making one "think like a lawyer" is an essential aim of legal education. See e.g. GLANVILLE WILLIAMS, Learning the Law, 13th edition, Sweet & Maxwell (2006), 2 and 26.

not have detailed knowledge of statutes. Without primary legal sources, my legal reasoning is likely to become vague and to lack in precision and vigour. Thus, for me, primary legal sources are essential in reasoning.

This realization of the role of legal sources also affected my teaching. Teaching, in my perception, is not in the first place transmitting knowledge, but more importantly trying to create understanding. My main aim as a teacher is to make students think. As methodology enables one to think like a lawyer, I started using primary legal sources in class. When asked about contributing to this Journal of the Law Students Society, I gratefully accepted this opportunity of addressing a greater public. This article explains the methodological issues which lie at the heart of my approach to use legal sources in legal education. Its aim consists thus in encouraging students to consciously and actively work with primary legal sources in order to improve their methodology and critical thinking.

Admittedly, for a comparative researcher, this enterprise can appear doubtful. If the non-use of statutes in legal education is a part of Nepali legal culture (and thinking), does a proposal to increase using statutes not go against that culture? Does it not risk changing that culture? I do admit that it does. However, for several reasons I think that it is not a fundamental, intrusive or negative change in the legal culture. First of all, in my experience, my way of reasoning was generally understood and accepted in interactions with Nepali lawyers. I did not perceive any fundamental difference when discussing legal question. What is more, my way of critically analyzing judgements by Nepali courts was thought to be convincing, and the judgement had even been criticized before, by Nepali lawyers. Thus, my way of reasoning, which has formed in years of dealing with primary legal sources, seems generally acceptable and understandable in the Nepali context. Second, using statutes in legal education was recently recommended at a teacher-training event at Kathmandu School of Law. In addition, when I enquired practicing lawyers about their working method, they indicated that consulting the relevant statutes was part of their dealing with a case. The proposal thus aims not at fundamentally changing the way lawyers work with law, but to improve the quality of legal reasoning by integrating legal statutes at an earlier step, more consciously. Third, as will be argued later on, dealing with primary legal sources might be a step to address several issues in the Nepali legal system which lawyers and laypersons complain of. Fourth, one advantage of comparative work consists in being able to bring in new ideas and, due to a difference in perspective, observe other issues than domestic lawyers. Sharing my

thoughts is therefore one way of making comparative study useful. Finally, the article is only a proposal – any one is free to follow it or not. Thus, in my opinion, the possible gains from this article outnumber the risk of destroying a part of Nepali legal culture.

The role of primary legal sources becomes apparent when looking at the way legal reasoning works. This article therefore starts by describing the theoretical logical application of law. It would however be an illusion to believe that this is the whole story. Therefore, the second part discusses the practical issues when proceeding according to this approach. The third part analyzes advantages and disadvantages of working with primary legal sources at each of the respective steps. The final part will present the conclusions following out of this analysis.

THE LOGICAL APPLICATION OF LAW IN THEORY

1) Basic Concepts of Logic

Logic is a way of valid reasoning. It is the process of validly arriving at a new conclusion by the way of inferring or deducting from given premises. In the Western world, it was the Greek philosopher Aristotle (384 – 322 BC) who first systematically studied formal logic[2]. His findings have had tremendous influence on western thinking[3]. Even though formal logic has progressed vastly in the 20th century[4] and brought to light many limitations of Aristotelian logic[5], the basic concepts of his logical argument remain influential. For the purpose of this article, it is sufficient to discuss the two most influential ways of traditional logic reasoning: inductive and deductive.

Deductive reasoning is the process of deriving a particular conclusion from a general proposition[6]. It generally takes the form of syllogism, the most

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2 See ROBIN SMITH, 'Aristotle's Logic', The Stanford Encyclopedia of Philosophy (Winter 2006 Edition), Edward N. Zalta (ed.), http://plato.stanford.edu/archives/win2006/entries/aristotle-logic/ (accessed on 22.11.2007).

3 In detail see .GALINA SORINA, Logic and Law in Russian and Western Culture, http://www.bu.edu/wcp/Papers/Law/LawSori.htm (accessed on 21.11.2007).

4 PETER SUBER, "Legal Reasoning. After Post-Modern Critiques of Legal Reason", Legal Writing, The Journal of the Legal Writing Institute, 3 (1997) 21-50, http://www.earlham.edu/~peters/writing/leglreas.htm, (accessed on 21.11.2007).

5 SMITH, supra note 2.

6 IAN MCLEOD, Legal Method, 3rd edition, Palgrave Macmillian (1999), 14.

famous achievement of Aristotle[7]. A syllogism requires two premises, i.e. two categorical sentences, which have exactly one term in common and allow for a conclusion connecting the two terms not in common in the two premises[8]. In abstract terms, syllogism operates along the following formula: If A=B and B=C, then A=C[9]. Aristotle's illustrates a syllogistic argument with the following famous example: If all men are mortal (major premise) and Socrates is a man (minor premise), then Socrates is mortal (conclusion). The example is very compelling. In fact, deductive reasoning allows for a guarantee of the correctness of the conclusion[10] and is therefore the strongest argument[11]. Thus, deductive reasoning is the clearest form of logic reasoning.

Inductive reasoning is the process of formulating a principle of general application out of individual observations[12]. After observing the same connection between phenomena for many times, one concludes that there is a general connection between the two phenomena. Inductive reasoning most commonly consists in reasoning by analogy[13]. Analogy is the process of inferring that a number of different things which are similar in some ways might also be similar in other ways[14]. For example, from observing 50 different dogs (same species, different colour and size) having four legs, one can conclude that every dog has four legs (similarity in species equals similarity in the number of legs). Similarly, after having observed the sun rising in the east for 200 days, one might expect the sun to rise in the east also on the 201st day. Inductive reasoning is however less convincing than deductive reasoning, it only gives some degree of strength to the conclusion[15]. Inductive reasoning allows prediction but will not give

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7 SMITH, supra note 2.

8 Ibid.

9 MCLEOD, supra note 6, 12; see also PATRICK KEYZER, Legal Problem Solving, A Guide for Law Students, Butterworths (1994), 44.

10 JAMES HAWTHORNE, "Inductive Logic", The Stanford Encyclopedia of Philosophy (Winter 2007 Edition), Edward N. Zalta (ed.), http://plato.stanford.edu/archives/win2007/entries/logic-inductive/ (accessed on 22.11.2007).

11 PATRICK KEYZER, Legal Problem Solving, A Guide for Law Students, Butterworths (1994), 45.

12 MCLEOD, supra note 6, 14.

13 IRVING M. COPI/CARL COHEN, Introduction to Logic, 9th edition, Macmillan (1994), 5th Indian Reprint, Prentice Hall (2000), 452.

14 MCLEOD, supra note 6, 15.

15 KEYZER, supra note 11, 45.

hundred percent of certainty[16]. Depending on the accuracy and numbers of observations, the conclusion might be more or less probable – and thus more or less convincing. In spite of these limits, inductive reasoning is a very powerful tool in scientific reasoning.

2) The Application of Logic in Legal Issues

Logic is essential in legal reasoning[17], at least in the western legal culture[18]. For this reason, reference works on legal methodology generally deal with logic. The use of basic logic in the legal field differs, depending on whether one is dealing with statutory law or with case-law.

a. Three Steps in the Application of Statutory Law

The concept of statutory law is based on the syllogism. Lawyers applying statutory law constantly think (and argue) in terms of syllogism. The legal rule is the first (major) premise, the facts of the case are the second (minor) premise and the legal consequences of the individual case are the conclusion[19]. Thus, if the legal rule says that the person above 18 who intentionally kills another person will be imprisoned for twenty years and, according to the facts of the case, Sita (a human being) has intentionally shot Hari (another human being), Sita will be imprisoned for twenty years. If, however, Sita shot a buffalo, if she negligently shot Hari or if Sita hits an animal which by some accident came in contact with the trigger, the conclusion is not possible. Thus, the Court can only convict Sita if the minor premise (the facts) corresponds with all elements of the major premise (the law).

Working with statutes invites for deductive reasoning. Any lawyer arguing in the syllogistic way should be able to convince, at least on the issue whether that legal rule applies or not. The conclusion is logically absolutely binding. For this reason, I recommend all students to construe their argument in the syllogistic manner: start with the relevant rule, then explain the facts of the case, and finally analyze how the facts correspond to every element of the rule in question. If this argument is successful, it is safe to conclude that the rule applies. It is equally possible, from the point of view

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16 HAWTHORNE, supra note 10.

17 KEYZER, supra note 11, 40.

18 According to SORINA, supra note 3, logic plays a much greater role in the western legal tradition (common and civil law) than in the Russian legal culture.

19 MCLEOD, supra note 6, 12.

of logics, and even more customary in the legal field, to start by explaining the facts, then discuss the legal rule and then analyze the application of the rule to the facts. The important element is to separate the argument in four different parts (facts, law, application, conclusion). In that way, the conclusion of the argument can be shown as logically necessary and valid.

b. Two Approaches of Working with Case-Law

In the absence of statutes, the syllogism does not work as easily. Dealing with case-law requires a different approach. Basically, there are two possibilities: a more sophisticated (and compelling) three step approach, leading to a more compelling conclusion, or a simpler two step approach.

The first possibility starts with inductive reasoning. On a specific issue, the lawyer starts by compiling many cases which the court decided in a certain way. The cases need to be similar in the relevant facts[20]. On the basis of similar factual cases, it will be possible, by inductive reasoning, to formulate a legal rule. The following example illustrates how this might work. The court convicted Ram who shot Hari to twenty years of imprisonment. The court also convicted Raj who killed Sushila with a khukuri to the same amount of imprisonment. In another case, the court convicted Puja, who killed Sita by throwing stones at her. With the use of these and more cases, the following rule can be established: a person who kills another person will be punished with twenty years of imprisonment.

Once the rule is established, it is possible to follow the syllogistic reasoning described above. The concrete facts of the case will be analysed as to their coincidence with the rule. It will then be possible to conclude. While the last conclusion is logically absolutely correct, the strength of the entire reasoning depends on the amount of cases (and possible contradicting cases) used in order to establish the rule. The inductive step is more fragile – and therefore often contested in the legal field[21]. Nevertheless, an argument carefully constructed along this line will be logically convincing and understandable.

There is another, simple possibility of legal reasoning with cases. According to that approach, the case is interpreted as affirming a legal rule by itself. The decision of one single case will thus establish the rule and serve as

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20 JAMES A. HOLLAND / JULIAN S. WEBB, Learning Legal Rules, 2nd edition, Blackstone (1993) 2nd Indian Reprint, Universal (1996), 222.

21 KEYZER, supra note 11, 45.

major premise. The facts of the new case will be the minor premise. If the facts of the new case correspond to the situation in the old case, it is possible to logically deduce that the new case will be decided in the same way as the old case. The same example as before might illustrate this approach. The court convicted Sita who had shot Hari to twenty years of imprisonment. In a new case, Nirmala shot Raj. Logically, the court will convict Nirmala to twenty years of imprisonment.

This second approach appears simpler in the method. However, it will generally be more difficult to establish the logical consequence. Two cases are never identical – maybe Puspa was Raj's wife, while Sita had nothing to do with Hari, Puspa was provoked by Raj, etc. Life is full of differences. Deciding when a case is similar and when not is one main difficulty of a case-law system[22]. In that context, the common law methodology speaks about the distinguishing one case from another – an art in its own[23]. Thus using the first approach makes it possible to eliminate the difficulty of absolute identity between cases by making an abstract rule. Even though the logical concept in the first approach is inductive and deductive reasoning, the argument might be stronger compared to the second approach.

THE PRACTICAL ISSUES

As shown above, applying statutes and case-law does involve a logical process. However, following the logical process is not necessarily easy in practice. There are several reasons for this. One reason lies in the fact that a lawyer needs to decide what premises might apply to the facts of the case. Another reason might be the differences of the objectives of logic and law functioning of law. In spite of these difficulties, using logic in law has some benefits also in practice.

1) The Hidden Issue: Selecting the Premises

Syllogistic reasoning starts with premises: law and facts. Facts do exist independently of any process of reasoning. However, getting to know the facts requires reasoning. Thus, in legal proceedings, the court first has to establish the first premise, i.e. what situation of facts actually existed. Direct

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22 BONITA ROBERTS/ LINDA L. SCHLUETER,, Legal Research Guides: Patterns & Practice, Contemporary Legal Education (1990), 3.

23 GLANVILLE WILLIAMS, Learning the Law, 13th edition, Sweet & Maxwell (2006), 101-103.

proof generally enables deductive reasoning, circumstantial evidence calls for inductive reasoning[24]. The process of establishing facts therefore uses logic, but it is dominated by analogical reasoning[25] and by more or less fortuitous circumstances such as the rules of evidence, the credibility of witnesses, etc. In addition, analogies rely heavily on what the people involved consider as 'normal', 'usual' and 'true', according to their opinion and experience. Thus, establishing the first premise does not follow pure logic, but is a difficult process.

The second premise (what law is relevant) is even less given – not even in cases at law school or to be decided by upper courts. Thus, the major premise, i.e. the relevant statute or case(s), has to be found. Theoretically, the process of finding the relevant premise is also a logical process. One could go through all the legal rules and test with every legal rule whether the facts match with the rule or not. Ideally and ultimately, end up with the applicable rule(s).

However, this process would be very time consuming. Therefore, lawyers generally approach the legal issue and then look for the relevant rule in that field. The big difficulty lies in overlooking a premise, a rule or case that would be relevant to the case at hand. As it is impossible to look at all rules and cases, the problem of not finding a relevant premise for the case is indeed real.

The second difficulty lies in the fact that there are so many premises in the legal system (Cases, Acts, Regulations) that some of them are inconsistent[26]. For this reason it is often possible to find a premise that fits the desired result[27]. In that situation, the choice between different premises becomes a paradox. Here, only the reference to some higher validity (e.g. constitutional principle) might help. If such higher authority is lacking it is necessary to define the scope of the rule and to choose between competing rules or competing interpretations[28]. This issue in the search for premises indicates that some practical difficulties stem from the difference between logic and law. The different characteristics might explain more difficulty.

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24 COPI/COHEN, supra note 13, 610-616.

25 Id. 616.

26 SUBER, supra note 4.

27 Ibid.

28 HOLLAND/WEBB, supra note 20, 221.

2) The Different Nature of Logical and Legal Reasoning

Even though legal reasoning uses logic, legal and logical reasoning are different in at least two significant aspects. First, formal logic usually operates in terms of symbols while law operates in the form of language. Second, logic is a way of valid reasoning; it aims at establishing that a certain way of reasoning is valid, while the purpose of legal reasoning ultimately consists in deciding a normative issue.

a. Symbols and Language

Language is the main form of communication between human beings. As law is a form of communication (about what behaviour is legal and what not), it operates in language: statutory and case-law both take the form of language, and lawyers and judges argue and reason using the general language of the specific country, with the exception of some specific technical terms. Because law is (or at least should be) public, known to all citizens, and because it is, to some extent, elaborated by a parliament of elected representatives (without legal qualification), it has to take the form of language. Using a specialized, formalized symbolic language incomprehensible to laypersons would make law inaccessible to the public and therefore remain largely ineffective. In addition, such an incomprehensible language would take law beyond the control of the public and therefore be vulnerable to abuse. Thus, even though a small degree of specialization is required for the sake of precision, law necessarily takes place in the form of language.

In logic, the use of symbols has been advocated since the days of Aristotle[29]. Even though it is possible to formulate logical arguments in the form of language, modern logic has developed a powerful technical language on the basis of symbols[30]. Symbols make it possible to analyze the validity of the reasoning process without regard to its contents. Using language would automatically give some content to the statement, evoking some emotive and rational reaction or assessment. This might have an impact on the analysis of the reasoning process. In addition, language is ambiguous – one term or sentence can be understood in more than one ways, its understanding depends on the style, the context, and many other factors[31].

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29 COPI/COHEN, supra note 13, 322.

30 Id. 323.

31 Id. 79 and 322.

Using symbols avoids all these difficulties. Thus, symbols enable pure logic.

As law is not possible without language, the application of law will have to deal with the difficulties of language. The imprecision of terms is one major issue in that context. Remaining within the framework of deductive reasoning, applying statutory law is often not a three-staged process as described above, but it requires an additional stage. In order to construct the terms of a statute, it is necessary to look at the cases decided on the basis of the statute. In the simple statutory sentence "no animals are allowed on the lawn", for example, it is necessary to consult cases in order to find out for what animals the prohibition is applied. Does the bee-owner have to take measures to prevent her bees from landing on flowers on the lawn? Bees are animals, but it would be surprising to find a case actually requiring such behaviour. If the prohibition is rephrased, e.g. to "dogs are not allowed on the lawn", the biological significance of the terms alone indicates that goats, cows, tigers, elephants and cats are allowed. But the owner of the lawn would probably not agree… The logical and legal way out is to find cases on the issue, to construct the terms. Maybe the courts previously had to decide on a case involving a cat, or a goat. However, case-law will not provide a solution in all cases. Deductive reasoning in law has thus its limits due to the imprecision of language.

Given the lack of case-law, analogical reasoning is another possibility of dealing with the imprecision of language. As already mentioned, analogical reasoning does not allow drawing conclusions with certainty. It depends heavily on what appears similar or different – and therefore appeals to general knowledge, experience, and also values. What might appear as relevant difference (or similarity) to one person might not be for another. Purely objective and logically absolute analogies are not possible. Imprecision in language therefore lead to argument and disagreement in law.

To a certain extent, it is possible to avoid the difficulties mentioned by using a precise language. Legal language should be as precise as possible, and it is essential to define and delimit the terms to a maximum extent[32]. However, the precision should not hamper the quality and comprehensibility of the legal text. The drafters of statutes have to strike a balance between the two.

[32] Id. 608.

The quality of the law (public access, applicability) and the scope for logic depend on this balance.

b. Reasoning and Valuing

Logic deals with the process of reasoning. The subject of logic, at least today, is not the truth of the result, but the validity of the process[33]. Whether the result of logic reasoning is true or not depends on the quality of the premises – false premises will lead to false results, even if the reasoning is logically valid. Logic enables finding out whether the process of getting to the conclusion was correct or not[34]. The result will however only be true if both, the premises and the reasoning process are correct.

Like logic, law is also not about the truth. Law is a normative science: it deals with what ought to be, not with what is (fact)[35]. Law therefore requires valuing. Judges and lawyers have to justify every solution they reach or propose with regards to values. The values might be expressed or implied in the law. The task of the lawyer consists in identifying and weighing the different values.

Depending on the source, values might be expressed in a text or not. If values are mentioned in a text (constitution, statute, case-laws), values are accessible for logical argument. The importance of the source can indicate the weight of the values. However, the hierarchy of the text alone will not exhaustively determine the rank of the value. In addition, values on the same level of hierarchy might compete. In order to give priority to one or the other, logic does not help[36]. Therefore, the decision between competing values cannot be reduced to purely logical argument.

As law deals with values and logic with reasoning, two consequences follow for the use of logic in law. First, logic does not help against incorrect (or illegal) premises. An argument might be perfectly logical, but if the premise does not apply or is incorrect, it is not convincing. The typical example is the use of statutes which contradict some provision of superior law (constitutional law). The mere logic of an argument might be deceptive, and due attention is to be paid to the premises. Second, as law requires valuing, even logically reached solutions can be criticized. In law it is

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33 SUBER, supra note 4.

34 See KEYZER, supra note 11, 41.

35 HOLLAND/WEBB, supra note 20, 227-228.

36 COPI/COHEN, supra note 13, 622.

absolutely necessary to normatively evaluate the result of the logical process in view to its accordance with fundamental values. Unjust results do not become just on the basis of formal logic.

3) The Benefit of Logic in Law

The above analysis has shown that logic has only a limited role to play in the application of law. When choosing the premises (law and fact), contradictions in legal provisions and accounts of facts make it difficult to decide which one to follow. In addition, the language is not a precise tool which permits absolute logical conclusions. In some cases, the lack of precision might be compensated by case-law, but often logic alone will not help. Thus, the lawyer has to use other tools than mere deductive logic in order to arrive at a conclusion. Inductive reasoning by analogies helps, but it is logically less compelling and depends more on individual experience and attitudes, if not intuition. In that context, it is important to realize that law is a normative science. The lawyer thus has to decide upon competing values and check the premises as well as the result for the compatibility with the fundamental values. In this process of valuing, logic has only a marginal role to play. Thus, logic is only one element in the process of legal reasoning.

Any lawyer either makes a legal argument (e.g. the judge deciding a case, the advocate pleading) or criticizes one (e.g. the lawyer refuting the point of her opponent, the judge refuting the position of the parties, the academic lawyer criticizing a judgment). To illustrate and conclude on the practical use and limits of logic, I will describe these two processes of making and criticizing a legal argument.

a. Making a Legal Argument (Case – Solving)

The first step in making a legal argument or solving a legal problem consists in identifying the legal issue[37]. Even though it will often be necessary to re-identify the issues during the process, the subsequent steps will be carried out more efficiently if the issue is clear in the beginning. Generally, the preliminary information available in the beginning will allow for sufficient identification of that issue. On that basis, it is necessary to identify the two premises, i.e. the facts and the law.

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[37] KEYZER, supra note 11, 8.

The identification of facts depends on the information and means available. It will usually follow an analogical reasoning. However, the legal issue and even the legal rules will direct the search for facts: the legal rule might have an influence on the relevancy of the existence or non-existence of a fact. In a divorce case, the family situation of a person will probably be a relevant fact, while in a business-case it generally is not necessary to establish it.

Identifying the relevant legal premise requires logic, but also valuing. Generally, the legal issue will point to the legal provisions and cases likely to apply. In this preliminary selection, the factual situation will show what premises are suitable: the different elements of the rule have to exist in the fact situation. This process is predominantly deductive in nature. It might however require going back and forth between possible legal propositions and fact-finding: the existence or non-existence of every element in the legal provision possibly to be applied needs to be verified in the factual situation. Ideally, this logical process will permit identifying one single legal rule. However, in most cases there will be more than one legal premise (statutory provision and case) that match the facts. The reasons therefore lie in the imprecise nature of language as well as the possible contradiction between statutory rules and/or cases. Logical reasoning will thus only permit identifying a number of rational options[38].

Establishing the possible legal proposition might also follow an inductive approach. A new rule can be established on the basis of different similar cases. Here again, there will rarely be only one possible option – analogical reasoning requires deciding what is relevant similar and what is not. In that process, the facts of the case will have some influence – establishing a rule with no connection to the facts will be of little use in the argument. Thus, identifying the relevant facts and delimiting the possible legal proposition are two closely connected actions. In both of them, logic plays an important role, even if it does not provide only one solution.

After identifying the possible premises, the lawyer has to choose the one or the several compatible propositions he or she will use in their argument. That choice will depend to a large extent on the values he or she is prioritizing. On the basis of the choice, it will be easy and straightforward to come to a conclusion by deductive reasoning. The conclusion will thus be presented as a logical conclusion.

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38 HOLLAND/WEBB, supra note 20, 229.

The process of making the argument is however not finished. Two more important steps remain. First, it is necessary to check whether the solution proposed corresponds to principles of justice and equity. If this is not the case, either another premise needs to be chosen or another solution might be directly derived by normative reasoning. This second option is however only admissible in grave cases. The last step is one of the most important ones. The option chosen and the solution arrived at need to be justified. In the process of justification, logic is a valuable argument[39]. However, intellectual honesty and transparency equally requires that the deciding values (public policy) are clearly mentioned. Only then, the argument will be entirely convincing.

Proceeding in the suggested way combines logic and values in order to formulate a compelling legal argument. Both elements are required – thorough logic reasoning does not dispense from valuing, and expressing values alone, without reference to existing (logically applicable) law will hardly be convincing. The way in which the two elements are expressed might vary from one country to the other – a system of codified law typically leads to hiding value-based argument behind logic, while a system of case-law is more open to policy argument. Nevertheless, no rational legal system is possible without combining the two.

b. Criticizing a Legal Argument

Criticizing a legal argument might be perceived as easier than making a sound argument. Unstructured and unreasoned criticism is however hardly convincing. Using the right criticism at the right place is therefore equally challenging.

In a legal argument, the three basic steps are open to criticism. First, the choice of the premise might be wrong, second, the process of reasoning might be faulty, and finally, the result reached can appear unjustifiable. As the reasoning process uses logic and values, criticism also operates on the two levels. Thus, at each step, one or/and the other argument might help for showing weaknesses in the argument.

In the first step, the choice of premise can be faulty because it does not follow the basic concepts of logic or because the prioritization of values is not convincing. If one manages to show that the wrong premise was used

[39] COPI/COHEN, supra note 13, 622.

(e.g. using a rule about the breach of contract when one is dealing with an issue about formation of contract, using a rule in contradiction with a rule of higher validity), the whole argument will fail. Criticising a wrong prioritization of values (e.g. the right to privacy instead of the duty to investigate a crime) requires further justification. Thus, using logic will be a strong argument in the first step.

Logic is equally strong when criticizing the process of deduction. If the facts do not fit the rules (e.g. the victim of an attack did not die, and the argument assumes that murder took place), the argument will not be tenable. However, a well constructed argument will rarely be faulty to that degree. It is more likely open to criticism when it comes to values (e.g. when arguing that bees are no animals when applying the rule of "no animals are allowed in the park"). Thus, due to the lack of precision in language, values are likely to raise the most criticism in the second step.

The final step of criticism only looks at the conclusion. If the process of selecting the proposition and making the reasoning were logically valid, there will be no possibility to plead lack of logic in the result. The only argument inspired by logic might be inconsistencies with other premises, which are more important. Thus, values will inevitably have a role to play.

In conclusion, when making and criticizing a legal argument, one needs to use logic and values. Only then, the reasoning becomes understandable, credible. Reasoning on the basis of logic and values is thus a requirement of open and transparent justice.

USING PRIMARY LEGAL SOURCES

In order to assess benefits and disadvantages of using primary legal sources, it is suitable to start with the process of legal reasoning. On that basis, it will be possible to deal with the core question of this article and assess the use of primary legal sources in legal education.

1) The Process of Legal Reasoning

The above analysis has shown that the process of legal reasoning involves several steps. At each of those steps, working with primary legal sources has its advantages and disadvantages.

Identifying the legal issue requires in the first place an analysis of the facts. In order to be able to do so, thorough knowledge of the law is equally

required. Without knowing the legal remedies and their basis as well as the possibilities and pitfalls of the law, legal issues cannot be identified. Thus, an overview and overall knowledge of the law is required. If one starts to look at the statutes at this phase, the process will be difficult and time-consuming. Thus, at the first phase, knowing the law will be more efficient than working with the law.

When choosing the premises, a more thorough look at the legal (statutory) provisions is required. As described above, every element of the factual situation needs to correspond to the legal rule – and the other way around. While the preliminary selection of possible premises can easily and quickly be done on the basis of the knowledge of the law, there needs to be precise analysis at the end. In that latter stage, working with the legal sources allows for a high degree of accuracy and a thorough, detailed examination. The exact wording of the statute needs to be submitted to a technical, linguistic and logic analysis. Working with the statutory provision out of memory leaves a degree of uncertainty which is detrimental to that analysis. Thus, while selecting the premises, working with the law allows a thorough and rational legal reasoning. Knowing the law might speed up the process, but it can never permit an equally precise argument. The rational, logic part in the process is thus best achieved when directly using the statutes. When choosing between different possible premises, referring to underlying values and principles is required. The wording of a statute is thus not indispensable. It might nevertheless facilitate this reference. Thus, the process of choosing premises gains in precision and credibility when using primary sources.

The process of arriving at the conclusion starts with a logic step: the facts of the case are compared to every element of the legal rule. If there is correspondence, the consequence of the legal rule applies. In that process, using the legal rule will add to precision.

The next step consists in assessing the conclusion, mainly on the basis of values. In that process, legal sources can give inspiration, but the process lives essentially from values and general principles. Thus, the assessment of the conclusion will generally be equally feasible without using primary legal sources.

Overall, using primary sources, mainly statutes, in the process of legal reasoning increases the precision and convincing nature of that argument. It will force the lawyer to argue logically and analyse every element of the

statute. Reasoning on the basis of the knowledge of law alone will usually be quicker, but rarely achieve the same amount of precision and consistency. In addition, using legal sources will increase credibility, as direct reference to the law is constantly made. However, for the valuing element in that process, using primary legal sources is not essential. As also in that part, it will not be detrimental in any way, using legal sources should be encouraged.

2) Legal Education

The benefits of using primary legal sources in legal education depend upon what one expects from legal education. If one considers knowing the law as the main objective of legal education, using primary legal sources is not absolutely necessary. In the Nepali context, where the statutes are often formulated in a complicated manner and sometimes in a language difficult to understand, passing on knowledge about the law is quicker and easier, done by relating only the content. It can then be left to the students to strengthen their understanding by reading and understanding the law.

If, however, the main aim of legal education consists in enabling the students to "think like a lawyer", to be able to apply the law and analyze it, then using primary legal sources gains in importance. In order to teach legal reasoning, passing on knowledge of the content of statutes and cases is not enough. Students only learn to work in a logical way, according to the wording of statutes and cases, if they are encouraged to read and use the statutes. Thus, using statutes in legal education seems an appropriate way to sensitize and prepare the students for legal reasoning.

There are many ways to use primary legal sources in legal education. First, students have to bring their statutes to class. Then, constant reference to the wording of the statute and a thorough analysis of the wording of the statute itself shows students the importance of the wording of that statute. In addition, doing an analysis of the text and illustration with a case provides students with an example on how to apply that statute. In that process, the independent reflection of students on the meaning of the text is to be encouraged – and corrected / commented upon. This shows the possible multiple interpretation of a text – and sensitizes students for the necessity of valuing.

After having explained (and analyzed) the statutes, it is essential to have the students resolve small cases with the help of the law. In that process,

students are forced again to read the law, to analyze it and to understand it. Additionally, the ability to use the law in cases shows that students have really understood the implications of law. Thus, solving and discussing small cases (group wise or individually) is one important step in using primary legal sources in legal education.

Finally, working with primary legal sources can also be encouraged by letting students use the bare statutes (without commentary or reference) in their exam. In that way, they are made aware of the importance of statutes, and they are equally encouraged to train accordingly. The exam question can then focus to a bigger extent on the capability to understand and analyze the law.

Prima facie, encouraging students to use primary legal sources has one disadvantage: the knowledge of law looses importance. One might even fear that students become lazy – not willing to study, as they just need to look up the sources and then the result will be obvious. However, my experience shows that this is not the case. If students are using primary legal sources in several exercises, they are not only understanding the impact and meaning of the law, but, by frequently using the same provisions, they also start knowing the content of the law by heart. In that way, practice is the most efficient (and most comfortable) way of learning. Using primary legal sources in exercises (cases) leads thus to a broader understanding and knowledge of the law than simply memorizing the content of the statutes.

There is one disadvantage of using statutes in legal education. It requires active involvement of the students. Any education is more efficient with active participation of students. However, legal education focussed on primary legal sources entirely depends on involvement of the students. Starting to study the night before an exam will not work. Using primary legal sources will only create understanding and knowledge if students read the law, solve exercises and analyze the law. Thus, in an environment where students are unwilling to involve themselves actively, only passing on knowledge might bring about better results.

To conclude, legal education focused on legal reasoning should encourage students to use statutes and other primary legal sources. This increases the ability to work with the text, which is essential for logic, precise and convincing legal reasoning. The memory keeps an essential place, as the overall understanding, the speed of reasoning as well as references to cases depend on memory power. In addition, using primary legal sources

emphasizes the understanding of the law, as memorizing the text of statutes becomes superfluous. Thus, using primary legal sources in legal education increases the efficient use of brain-power.

CONCLUSION

Legal reasoning is a process in which both, logic and valuing play an important role. Some issues require a logic analysis while other issues have to be decided with regards to values and general principles. The exact wording of a statute or a case becomes essential when dealing with issues of logic. In that part of legal reasoning, using primary legal sources is essential, as it allows precise, clear and convincing argument. Thus, using primary legal sources in legal reasoning is essential.

In legal education, the student should be introduced to legal reasoning. If legal education provides the tools of legal reasoning, the student is more prepared for his professional life than if it is limited to passing on knowledge about the law. As the law constantly evolves and changes, knowing the law at a specific moment is not enough. One has to be able to follow the evolution. When legal education focuses on legal reasoning, the students will be able to deal with changes in law as well as with areas not covered in class. Thus, legal reasoning should be the aim of legal education.

As legal reasoning requires working with primary legal sources, legal education focussed on reasoning should equally work with primary legal sources. Students should be introduced to the possibilities and limits of logic in applying law. This process is best achieved when students have to read the text of the law and solve cases in exercises. Using primary sources in legal education is nothing more than constant teaching of (applied) methodology of law. Thus, the student who works with primary legal sources in legal education learns best to "think like a lawyer".

Using statutes in legal education might have several side gains. First of all, students who constantly read the text of the law are more likely to develop a critical attitude towards the law. In solving exercises, they will realize the limits and difficulties of the text of the law. On the long term, this critical attitude can have an impact on the process of lawmaking and thus lead to better law.

Using primary legal sources might also be an incentive for the student to think independently. When using the law instead of learning what the teacher says about the law, the student has to analyze, argue, and apply by herself. While his argument gains in authority, as it is based on the primary

legal source, it nevertheless requires an independent process of thinking. In that way, legal education becomes a tool to encourage students to think by themselves.

On the long term, using primary legal sources in legal education might have other benefits. When students basing their argument on primary legal sources become lawyers, judges or politicians, they will have an impact on the law. They are then sensitive to the gains of having clear laws and might fight for such as parliamentarians. As judges, they might feel the need to logically justify their decisions, referring to texts and values, and thereby increase the comprehensibility and consistency of court decisions. Overall, when used to constantly using primary legal sources, the authority of law might increase. When there is a habit of reading and working with the law, illegal practices will lose legitimacy. Thus, using primary legal sources in legal education is likely to strengthen the rule of law.

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