It should, however, be noted that the presence of this support is not sufficient to decide the new case. If case O is relevant for the decision in case N, this is a contributive reason to decide case N in the same way case O was decided. This contributive reason still has to be weighed against possible contributive reasons for a different decision than was taken in O.

10. COMPARING CASE-BASED AND RULE-BASED REASONING

Let us return from our digression into the logic of case-based reasoning and focus again on the differences between case-based reasoning and rule-based reasoning and the relevance of these differences for the issue to what extent a legal system is open. In section 8 I distinguished four ways in which the reason-based model of rule application allows the introduction of new relevant facts, namely when decisions had to be taken:

1. which of two conflicting rules has precedence over the other;
2. whether there are contributive reasons against the application of an applicable rule;
3. whether there are reasons to apply a non-applicable rule analogously;
4. in case there are both contributive reasons for and against application of a rule, whether the reasons for application outweigh the reasons against application, or the other way round.

The question that we must answer now is how these possibilities relate to the corresponding possibilities in case-based reasoning. From the three decisions required by the case-based reasoning model, the first two, the decisions concerning which facts are relevant and under which categorization they are relevant, allow the introduction of new relevant facts.

It is remarkable that the rule-based model is much more specific about when decisions concerning relevance have to be made. The reason for this is that the rule-based model of legal decision making is more structured than the case-based model. This difference in specificity makes a thorough comparison difficult, but the lesser specificity of the case-based model suggests that it allows more leeway for the recognition of new relevant facts, precisely as Legrand suggested. But let us take a closer look at the issue at stake and try to do so by paying special attention to the following question:

> *Can there be facts that are intuitively relevant for the solution of a case, which the rule-based model nevertheless disallows to be taken into account?*

Answering such a question in abstract is not so easy, but let me try. Suppose that we have a case C and that the issue at stake is whether decision D should be taken. Then there are four possibilities which I will discuss in turn:

a. There is an applicable rule R with conclusion D.
b. There is an applicable rule R with a conclusion that is incompatible with D.
c. There are two applicable rules, one with conclusion D and one with a conclusion that is incompatible with D.
d. There is no applicable rule that deals with the issue D.

Ad a.
If there is an applicable rule R with conclusion D, the normal outcome of the case should be D. Additional relevant facts F are only really relevant if they plead against this conclusion. Is it possible to conclude that not-D on the basis of these additionally relevant facts? The answer is a plain *yes*. The 'only' thing that is necessary is to make an exception to the rule R, because F outweighs the applicability of R. Logically, there is no problem to take F into account on the rule-based model. Whether F is considered to be sufficiently important to make an exception to R is an issue that cannot be dealt with by means of logic alone. That is a matter of the legal system in question, but the above shows that, otherwise than Legrand suggests, it is not a matter that is decided purely by the fact that the system belongs to the civil law tradition.

Ad b.
This situation is exactly the mirror of the previous. Now F is only really relevant if it pleads for D. Again the central question is whether F is sufficiently important to make an exception to R, and again this question cannot be answered purely on the basis of the civil law tradition of the legal system.

Ad c.
If there are two conflicting rules that are both applicable to a case, the issue at stake is to which rule an exception must be made because of the applicability of the other rule. In other words, it must be decided which of the two rules has precedence over the other.

Sometimes there is an applicable rule that deals with this question. For instance, article 7a:1623b, section 5 of the Dutch Civil Code states explicitly that the terms for giving notice for a contract of rent of housing replace the terms for rent contracts in general. If new relevant facts should play a role in such a case, it must be by making an exception to such a priority rule.

More often a conflict of rules is governed by principles that deal with their preference. The Lex Specialis 'rule' is such a principle that gives a

contributive reason why the more specific rule has precedence. New relevant facts can in this case play a role when they are either contributive reasons that plead in the different direction than such a principle (for precedence of the other rule), or reasons to balance the reasons concerning precedence in some way.

If there is neither a rule nor a principle dealing with the precedence of the conflicting rules, new relevant facts can play a role through being reasons for giving either one of the conflicting rules precedence. (This situation is not essentially different from the previous one.)

Ad d.
If under a rule-based system a case arises for which there is no rule, the case must be decided by reasons that are not based on a rule. *Logically* there is no objection against declaring any fact legally relevant, so this situation does not pose any objections against assigning facts legal relevance.

Summarizing, we find that in neither one of the four distinguishable cases, there are logical objections against assigning legal relevance to a fact or set of facts. So the answer to the question whether there can be facts that are intuitively relevant for the solution of a case, but which the rule-based model disallows to be taken into account, is negative. The rule-based model *as such* does not pose any limitations to the recognition of legal relevance.

11. THE CASE OF THE MURDEROUS SPOUSE REVISITED

The above discussion about the possibilities of rule-based reasoning and case-based reasoning has been rather abstract. Let us reconsider the case of the murderous spouse to see what the outcome of that discussion means in legal practice. To that purpose we will first look how that case might be handled under a system of case-based reasoning and then consider how the Dutch courts, who operated under a system of rule-based reasoning, actually dealt with it. Remember that the case ran as follows:

> A rich old lady was nursed by a poor young man. After some time, the two married, without making any special arrangements about their properties. According to the Dutch law, this meant that their properties were joined together and became their common property. Not long after their marriage the young man murdered his wife. The legal issue at stake was whether he could receive half of the marital estate because the marriage had ended.

The treatment of the case as if it were handled under a system of case-based reasoning is only possible if an initial difficulty is overcome, namely that the

Dutch system works primarily with rules and case law is mainly used for the interpretation of statutory rules. The most relevant antecedent legal material is a statutory rule stating that he who was convicted for killing, or for trying to kill, the deceased, is not worthy to inherit from the deceased.[41] Implicitly this rule means that such a person does not inherit. To use this rule for case-based reasoning, we will treat it as if it were a case and assume that in this case it was decided that the murderer of the deceased, who would normally inherit, in fact did not receive the estate.

To use this case as a possible precedent, it is necessary to establish which facts of the case are relevant, under which categorization they are relevant and what their logical role is. The origin of our hypothetical case in a statutory rule makes it easier than normal to determine which facts in the old case are relevant, because our hypothetical case does not contain any irrelevant facts. But this origin does not provide any help in determining which facts of the new case are relevant. Does it matter that the potential inheritor nursed the deceased, or that he married her only recently? Obviously it is relevant that the murderer actually married the deceased, because otherwise the issue could not arise whether he was entitled to half of their estate because their marriage ended, but is it also relevant that he was married to the deceased as an independent reason why he should receive half of the estate?

The second issue, concerning the categorization under which the relevant facts are relevant, is completely open. Does the murderer in the old case not inherit because he murdered the deceased, or because he inflicted some wrong on the deceased, or because he inflicted some serious wrong on the deceased, or because he inflicted a wrong that merely causally contributed to the deceased's dying, without necessarily amounting to murdering the deceased? Is the fact that the murderer was married to the deceased relevant because being married is a close relationship, or because it is a legally recognized relationship?

The third issue is relatively easy to decide for the old case. The fact that the potential inheritor murdered the deceased is a reason why he should not inherit. Presumably this is also a reason why he should not receive half of the marital estate. But what is the role of the fact that the murderer was married to the deceased? Is not this also a reason why he should receive half of the estate? And is the fact that they were married only recently a reason to make this last reason relatively less important, or is it (also) a reason why the fact that the potential inheritor murdered his wife is a stronger reason why he should not receive half of the marital estate?

[41] Article 4:3 section 1 sub a of the Dutch Civil Code.

The desirable conclusion that the murderous spouse does not receive half of the marital estate can be reached by assuming that in the old case the reason why the murderer did not inherit were that

- receiving a heritage is drawing a benefit from the deceased's passing away;
- he murdered the deceased;
- the fact that he murdered the deceased was a reason against his inheriting that outweighed the reason(s) why he should inherit.

There should also be assumptions about the new case, namely that:

- Receiving half of the marital estate is drawing a benefit from the deceased's passing away.
- The fact that the murderer was married to the deceased as a reason for letting him receive half of the estate does not outweigh the fact that he murdered the deceased as a reason why he should not receive half of the estate.

Given these assumptions about the cases, the two cases are completely analogous and this is a reason why the conclusion of the first case, that the murderer should not draw a benefit from his murdering the deceased (at this level of abstraction), should also hold for the new case.

Apparently the case-based style of reasoning provides sufficient leeway to reach a desirable conclusion. What about the rule-based style of reasoning?

The Court of Justice that decided the case had the problem that the Dutch law does not contain any other rule about the subject than the general rule stating that when a marriage ends, the marital estate is divided equally between the former spouses, which implies that if the marriage ends by the death of one of them, the division takes place between the surviving spouse and the inheritors of the deceased one. No word in this regulation about the possibility that the one spouse murdered the other one. So if the Court were to apply the applicable rule, the result would be that the murderous spouse received half of the marital estate.

That is not what happened in fact, however. The Court found that there is a legal principle underlying the rule of article 4:3 section 1 sub a of the Dutch Civil Code, the rule that a murderer is not worthy to inherit from the person he murdered.[42] This principle runs - according to the Court - that a murderer should not profit from his murder. By applying this principle to the case of the murderous spouse, the Court found that the rule about the

[42] HR December 7 1990; NJ 1991, 593.

division of the marital estate should not be applied in case the one spouse murdered the other one. In other words, the actual outcome of the case of the murderous spouse under a system of rule-based reasoning is exactly the same as the outcome would presumably be under a system of case-based reasoning and – although with a different logical construction – for essentially the same reason as under case-based reasoning.

In the case of the murderous spouse, the alleged rigidity of a system of rule-based reasoning turned out not to be as limiting as Legrand would like us to believe. Of course, this is only one example, but this example illustrates a point that was made theoretically above, namely that any fact that can be recognized as legally relevant under a system of case-based reasoning can also be recognized as relevant under a system of rule-based reasoning. Case-based reasoning and rule-based reasoning make use of different logical constructions, but this difference in form needs not lead to a difference in content. Everything that is possible under a system of case-based reasoning is also possible under a system of rule-based reasoning, although not always in precisely the same way.

12. THE POSSIBLE AND THE ACTUAL

We have found that the differences between case-based reasoning and rule-based reasoning are merely differences in form and that these differences need not lead to any differences in the outcomes of actual cases. Everything that is possible under a system of case-based reasoning is also possible under a system of rule-based reasoning. To the extent that Legrand's argument is based on the different possibilities offered by case-based reasoning and by rule-based reasoning, his argument is mistaken.

However, Legrand might try to rescue his position by pointing out that there is a difference between what is legally possible and what actually happens. Maybe systems based on case-based reasoning contingently allow the introduction of new relevant facts more easily than systems based on case-based reasoning. The attribution of this difference, if it exists, to the nature of case-based reasoning and rule-based reasoning would be less happy then, but that does not take the difference away.

Suppose that Legrand is right in the sense that there are differences in legal mentality concerning the issue how easy prima facie irrelevant facts are recognized as legally relevant nevertheless. It might even be the case that systems based on precedent just happen to be more open in this sense than rule-based systems. Whether this is so should be established by empirical research, however and cannot be argued on a priori grounds purely by considering the inherent nature of case-based reasoning and rule-based

reasoning. That is the outcome of our logical investigations of the previous sections.

Suppose, however, that empirically Legrand turns out to be right and that there is a difference in how open legal systems are (which is well possible) and that this difference coincides with whether a legal system is precedent-based or rule-based (which is not obvious). Does it follow from this finding that the enterprise of obtaining legal integration by means of a European civil code is doomed to fail?

That does *not* follow, because, if my argument in this chapter is correct, the differences are not intrinsically tied to the different logical bases of the legal systems in question, but are merely coincidental, presumably the outcome of historical developments which were different for different legal systems.[43] But differences that have grown historically can also disappear historically and the introduction of a European civil code might be a factor that contributes to the disappearance of these differences. Whether this is the case and whether this is desirable cannot be established on logical grounds and falls outside the scope of this chapter.

13. CONCLUSION

I started this chapter with the truism that asking the right question is giving half of the answer. Legrand argued against the introduction of a European Civil Code on the ground that the presence of one and the same code cannot lead to the same law if this code is to operate within two fundamentally different legal cultures, namely the cultures of civil law and of common law. Common law systems would, in my terminology, be more open than civil law systems. I hope to have shown how the issue raised by Legrand can be formulated quite sharply by means of logical models of rule application and case-based reasoning. Moreover, I have argued by means of an alternative model of rule application that, although there are logical differences between precedent-based systems and rule-based systems, these differences need not lead to differences in the recognition of new relevant facts. In other words, the differences between common law systems and civil law systems need not lead to differences concerning how open the systems in question are. Therefore, the reasons adduced by Legrand that are based on the difference between the mentality of common law systems and the mentality of civil law systems fail to achieve their purpose.

[43] A brief description of these different developments can be found in Smits 2002, chapter 3.

It is not impossible, however, that legal systems differ concerning the issue how open they are. Because these differences are not necessarily tied to differences in the logical bases of these systems, there are no logical reasons why such differences, where they exist, could not be overcome. The introduction of a European Civil Code might be among the causes why the differences in openness of legal systems can disappear.

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