# REVIEW OF THE CRITERIA AND FORMS OF LEGAL REASONING

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## 1. Introduction

The relationship between law and reasoning is intuitive one and universally acknowledged. Law, which is frequently narrated as open-textured way, provides scope for multiple interpretation and analysis, and judicial decisions are often reached through practical argumentation. Judges and lawyers apply legal reasoning in one form or another in their day to day affairs in providing solutions to immediate problems before them. In addressing 'legal reasoning', we have to first define the expression 'reasoning'. The expression 'reasoning' is used to mean the process of guiding, deciding, on a given course of action and decision-making process. Thus, the expression 'legal reasoning' can refer to the following three situations "(a) reasoning to establish the existing content of the law on a given issue, (b) reasoning from the existing content of the law to the decision which a court should reach in a case involving that issue which comes before it, and (c) reasoning about the decision which a court should reach in a case, all things considered."[1] In essence, a legal reasoning can be defined as a reasoning that is used for explaining, guiding, interpreting, evaluating laws, legal principles, and norms. According to Martin P. Golding, 'legal reasoning' is used in both broad and narrow sense. In the broad sense, it refers to the psychological processes by which judges reach decisions in the cases that are before them. Such processes are comprised of ideas, beliefs, conjectures, feelings, and emotions. In the narrow sense, according to Golding, legal reasoning is concerned with a judge's decision on questions of law. In the narrow sense of the term, "legal reasoning" refers to the arguments that judges give in support of the decisions they render. These arguments consist of the reasons for the decisions, and the reasons are intended as justifications for the decisions.[2]

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1 Interpretation and Coherence in Legal Reasoning, Stanford Encyclopaedia of Philosophy, May 29, 2001, available at: http://plato.standford.edu/entries/legal-reas-interpret/ (Last visited on 03/06/2005).

2 Golding Martin P., *Legal Reasoning*, Alfred A. Knopf Inc., New York, (1984), p. 1.

Legal reasoning is usually applied in three areas -a. judicial decision-making, b. argumentation in jurisprudence and c. law-making. Thus, legal reasoning is applied to the application of law, in jurisprudential argumentation and creation of law. However, legal reasoning is predominantly associated with judicial application and interpretation of law. Legal reasoning in the common law system places considerable weight on arguments about the consequences of applying legal rules and of judicial decisions.[3] There are three categories of consequences: first, legal consequences, which refer to the effects of a given rule on the body of the law; secondly, logical consequences, which refer to the result of logical development of the rule; and thirdly, the behavioural consequences, which refer to the effect of the rule on how people actually behave in society.[4]

Legal reasoning is different from other kinds of reasoning. For example, it differs from moral reasoning in many ways. However, moral content is a universal requirement of legal reasoning. Legal reasoning also differs from scientific reasoning. While the scientific reasoning is concerned about discovering the truth, legal reasoning deals with normative statements, which are based essentially upon a value judgement made by legislature or a judge that a particular consequence should or ought to follow certain behaviour.[5]

Contour of legal reasoning can be shaped by both formal legal rules and extra-legal considerations. Formal legal rules are main guiding factors for legal reasoning. However, the contour of legal reasoning is not solely determined by legal arguments. Extra-legal considerations like principles of justice, morality, social policy may be applied in legal decision-making process. Thus, strictly legalistic approach to legal reasoning may not achieve the desired social goals that are intended. The purely legalistic approach in legal reasoning had long been refuted by jurists. Indeed, the contours of legal reasoning is profoundly shaped by "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellow-men" [6] These extra-legal considerations are more relevant in reaching decision in a 'hard case' when the applicable law does not

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3 Neil MacCormic, *Legal Reasoning and Legal Theory*, Clarendon Press: Oxford, 1994.

4 Rudden, *Juridical Review*, (1979), 193, 194.

5 Holland, James A. & Julian S. Webb, *Learning Legal Rules*, Fifth edition, Oxford University Press, 2003, p. 331.

6 Holmes, O.H., "The Path of the Law", 10 *Harvard Law Review* (1897), 457.

dictate any particular result. On the other hand, in the 'easy cases', the judge is strictly bound to reach a particular decision because of the existence of a formally valid legal rule, which he must apply.

## 2. Objectives of Legal Reasoning

As mentioned earlier, legal reasoning is primarily understood in relation to judicial decision. In this sense, a judicial decision must be principled in the sense that it can be justified only by an appeal to a general rule or principle, the applicability of which transcends the case at hand. Through offering legal reasoning, judges justify their decisions to the interested public, which includes the parties to the case, all other people who may be immediately affected by the decision, the legal profession, and the community at large.[7] Legal reasoning in the proper sense denotes a belief in objectivity in finding answers to questions of law that judges can arrive at decisions through applying principles. Thus, legal reasoning always requires principled justifications.[8] Justification, according to John Rawls, "seeks to convince others or ourselves, of the reasonableness of the principles upon which our claims and judgements are founded."[9] Justification also implies that good legal reasoning should be disciplined by the same rules of logic. Logical soundness is one of the important aspects of legal reasoning.[10]

Lon L. Fuller argues that 'judicial activity is predicated on reason'.[11] For Fuller, judicial activity "cannot be predicted or even talked about meaningfully, except in terms of reasons that give rise to it."[12] In producing a reasoned decision, the judge, instead of acting on 'personal predilections', is attempting "to discover the natural principles underlying group life, so that his decision might conform to them."[13]

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7 Golding, supra note 2, p.1.

8 Markovits Richard S., "Legitimate Legal Argument and Internally-Right Answers to Legal Rights Questions," 74 Chicago-Kent Law Review, 415 (1999).

9 Rawls, John, *A Theory of Justice*, Cambridge, Massachusetts, (1971), p. 580.

10 Boukema H. J. M., *Judging Towards a Rational Judicial Process*, W.E.J. Tjeenk Willink, Zwolle-Holland, (1980), p. 98.

11 Fuller, Lon L., "Reason and Fiat in Case Law", 59 *Harvard Law Review* (1946), pp. 376-384.

12 Ibid., p. 386.

13 Ibid., p. 378.

Some writers argue that persuasion rather than justification is the objective of legal reasoning. Chaim Perelman is main proponent of this view. According to him, the decision which is rendered authoritative necessarily entails argumentation which is to be evaluated by the persuasiveness of the reasons given for the decision. He observes that the argumentation, which is the ultimate method of legal reasoning necessarily employs reasons which are ultimately tested by their effect in persuading those whom it addresses. The vitality of a legal opinion as precedent ultimately depends on the effectiveness of the argumentation which it employs. Perelman observes: "Legal reasoning is...but an argumentation aiming to persuade and convince those whom it addresses, that such a choice, decision or attitude is preferable to concurrent choices, decisions and attitudes."[14] For Perelman, legal reasoning is a practical argumentation which aims to persuade rather than to establish truth. The effectiveness of argumentation turns upon the persuasiveness of the reasons given for a decision. The argumentation itself employs a number of techniques and forms of argument to establish its effectiveness. Perelman concludes that the reasons given for the conclusions reached are to be measured by their persuasiveness, not by reference to some established true state of affairs.[15]

However, there is a predominant view that justification as an objective of legal reasoning is more convincing and more acceptable than persuasion.

### 3. Criteria of Legal Reasoning

Since the purpose of legal reasoning involves justification of a legal decision, it must conform to certain criteria, and relevant legal norms. The following are the criteria that judges must observe in legal reasoning:

### 3.1 Objectivity and Reasonableness

Legal reasoning in judicial decisions must be based on objective standards and reasonable moral judgement, and must testify to a standard of rational justification. In fact, 'moral requirements' is considered as one of the major criteria of good reasoning.[16]

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14 Chaim Perelman, *Justice, Law and Argument*, Dordrecht 1980, p. 129.

15 Id.

16 Perry Thomas D., *Moral Reasoning and Truth*, Clarendon Press, Oxford, 1976, pp. 76-77.

Requirement of moral reasonableness as the criteria of good reasoning implies the following issues: firstly, a judge must carefully study the case before him, consider the precedents, statutes and legal principles which have been cited to him, and must be attentive to all the facts of the case which may have legal significance. Secondly, a judge must be impartial in the sense that his decision must not be influenced by his personal interest or bias. It also implies that a judge is supposed to disqualify himself from sitting in a case where his personal interests are involved and in deciding cases, he must not give special weight to the interests of his own socio-economic or professional class, or to his own racial or religious group, and so on. Third, he must render reasons for his decisions.[17]

Thus, in order to avoid arbitrariness in their decisions, judges should articulate the reasons for their decisions to justify them. Thus, a reasoned decision also ensures justifiability of a decision. Here justification is concerned with normative aspect of a decision and the truths of logic in tracing the correctness between the conclusion and premises of arguments.[18] Reasoned decisions serve as guidance to other individuals on what the law is and on how their cases are likely to be decided in similar cases. In this way, individuals can adjust their future conduct.[19] According to Neil McCormic, "The reasons they (judges) publicly state for their decisions must therefore be reasons which make them appear to be what they are supposed to be: in short, reasons which show that their decisions secure 'justice according to law', and which are at least in that sense justifying reasons."[20] Reasoned decision is an integral to the sound adjudication and rationality of the legal process.

### 3.2 Consistency

The judges should be consistent in legal reasoning in the sense that he applies the same reasons that he gives in one case to the deciding of another case which involves a similar set of facts or which raises a similar legal issues.[21] A legal reasoning should be relatively clear,

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17 Ibid, pp. 85-86.

18 Levenbook Barbara Baum, "On Universal Relevance in Legal Reasoning", 3 *Journal of Law and Philosophy*, 1984, p. 1-23.

19 Golding, supra note 2, p. 10.

20 MacCormic, supra note 3, pp. 13-14.

21 Golding, supra note 3, p. 10.

detailed, and objectively comprehensible rules, and to provide an inter-personally trustworthy and acceptable process for putting these rules into effect. The requirement of consistency figures prominently in the discourse of precedent which involves development of law by judges through deciding particular cases, with each decision being shown to be consistent with earlier decision by a court. The central idea of precedent derives from a basis notion of justice that like cases should be treated alike. Principled consistency is the basic rule governing the common law principle of precedent.[22]

### 3.3 Coherence

Coherence plays an important role in providing integrity in legal reasoning and in guiding judges seeking to interpret the law correctly.[23] Coherence is not mere logical consistency in the decisions rather it is treated as integrity in legal interpretation. It also means that in good legal reasoning the judge tries to consider all the relevant factors in a way that is appropriately dispassionate. As a result of this consideration and reflection, the judge can arrive at a coherent decision.[24]

MacCormick views coherence in terms of unity of principle in a legal system, contending that the coherence of a set of legal norms consists in their being related either in virtue of being the realisation of some common value or values, or in virtue of fulfilling some common principle or principles. In his famous book *Legal Reasoning and Legal Theory*, MacCormic proposes a model of legal reasoning in which it is a necessary condition for a judicial decision to be justified that it have "value coherence" with existing laws. Value coherence depends on application of 'principles.' Principles state some value or policy that guides reasoning. MacCormic recognises that coherence can be a virtue of an entire legal system. He observes:

> ...in arguing from coherence, we are arguing for ways of making the legal system as nearly as possible a rationally structured whole which does not oblige us to pursue mutually inconsistent general objectives.[25]

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22 Bix, Brian, *Jurisprudence: Theory and Context*, 2nd ed. Sweet and Maxwell, 1999, p. 133.

23 Interpretation and Coherence in Legal Reasoning, *Stanford Encyclopaedia of Philosophy*, May 29, 2001, supra note 1.

24 Hermann, Donald H.J., "Legal Reasoning as Argumentation", 12 *Northern Kentucky Law Review* (1985), p. 467.

25 MacCormic, supra note 3.

Joseph Raz also characterises coherence in law in terms of unity of principle. In his view, the more unified the set of principles underlying those court decisions and legislative acts which make up the law, the more coherent law is. Alexy and Peczenik define coherence in terms of the degree of approximation to a perfect supportive structure exhibited by a set of propositions. They provide a list of ten criteria by reference to which coherence thus defined can be evaluated: (1) the number of supportive relations, (2) the length of the supportive chains, (3) the strength of the support, (4) the connections between supportive chains, (5) priority orders between reasons, (6) reciprocal justification, (7) generality, (8) conceptual cross-connections, (9) number of cases a theory covers, and (10) diversity of fields of life to which theory is applicable.[26] Levenbook contends that it is a necessary condition for a judicial decision to be legally justified that it coheres with some part of the established law.[27]

Ronald Dworkin's theory of integrity in adjudication is perhaps the most influential and persuasive one in shaping the notion of coherence in modern time. In his influential book *Law's Empire*, Dworkin argues that justification through legal reasoning can best be provided when the law is viewed as the organised and coherent voice of what he refers to as a 'community of principle' i.e., a community whose members accept that their fates are linked by virtue of the fact that their rights and responsibilities are governed by common principles.[28]

Dworkin's account of integrity in adjudication requires judges to attempt to view the legal system as a whole and coherence should be exhibited in interpreting the law.

Dworkin also argues that the application of legal rules should be impartial in the sense that similarly situated individuals should be treated similarly and the treatment of any given individual should not depend on the identity of the judge. Finally, according to him, legal rules should promote planning, stability, and predictability.[29]

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26 Alexy, R. & A. Peczenik, "The Concept of Coherence and Its Significance for Discursive Rationality", 3 *Ratio Juris* (1990), pp. 130-147.

27 See, Levenbook, B.B., "The Role of Coherence in Legal Reasoning", 3 *Law and Philosophy* (1984), 355-74.

28 Dworkin, Ronald, *Law's Empire*, Hart Publishing, Oxford, (1998), chapter six.

29 Lewis, A. Kornhauser, "A World Apart? An Essay on the Autonomy of the Law", 78 *Boston University Law Review* (1998), p. 747.

## 4. Different Forms of Legal Reasoning

There are two main forms of legal reasoning: reasoning by analogy which is also called inductive reasoning and deductive reasoning, though judges seldom use these technical vocabularies in their decisions.

### 4.1 Legal Reasoning by Analogy

Analogical reasoning refers to noting similarities between cases and adapting them to fit new situations. Argument by analogy is common both to judicial decision and statutory interpretation. However, analogical reasoning is frequently used by judges and lawyers in arguing that previous decisions are or are not sufficiently similar to be relevant to the issue in question.[30] In other words, analogical reasoning demands that similar cases should be treated equally.[31] The important significance of analogical reasoning lies in the fact that it introduces a degree of stability and predictability in the interpretation of law. Analogical reasoning is usually used in the development of new law and in learned commentary about the law. Thus, it can also be used in legal reform.

The leading authority on analogical reasoning is Edward Levi, an American jurist who in his famous book, *"An Introduction to Legal Reasoning"*, described the process of analogical reasoning in the following way:

> The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. The finding of similarity or difference is the key step in the legal process. The determination of similarity or difference is the function of each judge. Legal process is not the application of known rules to diverse

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30 Farrer, John H. and Anthony M. Dugdale, *Introduction to Legal Method*, 3rd ed., Sweet and Maxwell, (1990), p. 80.

31 Maris, Cess W. "Milking The Meter-On Analogy, Universalizability and World Views", in: Patrick Nerhot (ed.), *Legal Knowledge and Analogy*, Kluwer Academic Publishers, Dordrecht/Boston/London, (1991), pp. 71-106.

> facts. But is a system of rules, which are discovered in the process of determining similarity or difference.[32]

The main proposition of Levi's treatment of legal reasoning is that the determination of analogies is a crucial element in such reasoning. Legal reasoning is frequently concerned with whether the case presently before a court is relevant like other previously decided cases. Levi emphasizes that general principles typically do not play a decisive role in answering such questions. Analogy can guide the application of rules in such situations.

According to Raz, a court relies on analogy whenever it draws on similarities or dissimilarities between the present case and previous cases which are not binding precedents applying to the present case.[33] According to him, analogical argument is a form of justification of new rules laid down by the courts in the exercise of their law-making discretion.[34] The test of relevance of similarities is the underlying justification of the rule which forms the basis of analogy. Argument by analogy is essentially an argument to the effect that if a certain reason is good enough to justify one rule, then it is equally good to justify another which similarly follows from it.[35] Analogical arguments establish coherence of purpose with certain parts of the law. However, according to Raz, it is often felt that analogical arguments are inconclusive because there are many incompatible analogies which can be drawn and the courts should choose them on the ground of their inherent moral relevance. [36] According to him,

> there is no point in saying that judges are legally obliged to use analogical arguments. There are no legally agreed standards on how such arguments should be used beyond the general advice that they should be used to establish harmony of purpose between the proposed and established rules and that they should be assigned the weight which it is morally right to give them. Analogical arguments are and should be used according to their inherent moral relevance. There are no special legal requirements concerning their use.[37]

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32 E. H. Levi, *An Introduction to Legal Reasoning*, University of Chicago Press, (1948), p.1.

33 Raz Joseph, *The Authority of Law*, Clarendon Press: Oxford, (1979), p. 202.

34 Ibid, p. 202.

35 Ibid, p. 204.

36 Ibid, p. 205.

37 Ibid, p. 206.

Every legal system employs analogical reasoning in one form or another to justify judicial decisions. For instance, in civil law system, analogical reasoning is used as a tool to fill a gap in legislation or code. In civil or continental legal system, the basic concept of analogical reasoning derives from the fact that codes are enacted to supply guidance on any legal question in the area of law encompassed by the code but it is assumed that legislature inevitably leaves some gaps in a code. Analogical reasoning can be used as a tool to fill such a gap. Thus, it is mainly used as a tool of interpretation of a code.[38]

Analogical reasoning is one of the fundamental principles of common law. In the common law system, the most common form of analogical reasoning is the use of precedent by which court decisions are recognized as a valid source of law. In precedent, judges are required to decide the cases before them according to existing precedents in the domain. It means that when a previously decided case discovers a new rule, it governs similar cases to be decided. The legal basis of the precedent derives from the fact that it was decided on the basis of legal rules and standards, which in turn provides a justification of the application of a particular precedent. Precedent is thus a matter of applying prescribed legal rules and standards.[39] As a result, conclusions drawn by inference from analogy by applying precedent are not causal but the similarities referred to in the legal argument support a normative inference about correct legal outcome.[40] Precedent plays an important role in promoting certainty in the judicial process and predictability in law. In the words of Roscoe Pound:

> The chief cause of the success of our common law doctrine of precedent as a form of law is that it combines certainty and power of growth as no other doctrine has been able to do so. Certainty is insured within reasonable limits in that court proceeds by analogy of rules and doctrines in the traditional system and develops a principle for the cause before it according to known techniques. Growth is insured in that the limits of the principle are not fixed authoritatively once for all but are discovered gradually by a process

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38 See for details, Langenbucher Katja, "Argument by Analogy in European Law", 57 *The Cambridge Law Journal* (1998), pp. 481- 521.

39 White, Jefferson "Analogical Reasoning", in: Patterson, Dennis (ed.), *A Companion to Philosophy of Law and Legal Theory*, Blackwell Publishers, (1996), p. 583.

40 Ibid.

> of inclusion and exclusion as cases arise which bring out its practical workings and prove how far it may be made to do justice in its actual operation.[41]

Analogical reasoning, however, does not necessarily mean that such previous case needs to be precisely on the point with the case to be decided. In other words, analogical reasoning must satisfy the requirement of formal justice that like cases should be treated alike but it does not mean that two cases should be identical.[42] In the circumstance of like cases, the court must decide whether the previous case is sufficiently analogous for its rule to govern the new case to be decided. It may also happen that there is more than one case that arguably applies to the case at hand. In that circumstance, courts must determine which of the previous cases is most similar to the case to be decided.

In common law, analogical reasoning is mainly associated with the invocation of precedent, but courts operating under common law system can also invoke it in interpretation of statutes. For instance, a new statute or provision may be interpreted in the light of the statute that it replaces. Since legislative supremacy is basic principle of common law, the court can not draw conclusions which the legislature did not intend. Under the common law system, in interpreting law, a judge or commentator may draw analogies between the two pieces of legislation in order to derive similarity in outcome that the statutes seek or similarity in policy considerations underlying their adoption.

As far as use of analogical reasoning in interpretation of statutes is concerned under the common law system, in Raj's account, it involves interpreting the purpose and rationale of existing legal rules. According to him, analogy is used in law-making to show harmony of purpose between the existing laws and a new one. It is also used in interpretation of laws on the assumption that the law-makers intended to presume harmony of objective and their acts should be interpreted to preserve goals compatible with those of related rules.[43]

Many scholars have noted that analogies may be either formalistic or realistic. A formalist analogy is one based upon the similarities between the facts of the cited case and the facts of the case under

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41 Pound, Roscoe, *The Spirit of the Common Law*, Marshall Jones Company, (1921), p. 182.

42 Ibid, p. 584.

43 Ibid, pp. 208-209.

consideration. On the other hand, a realist analogy is based upon the similarities between the values served by the rule of law from the cited case and the values that are at stake in the case at hand.[44] In fact, realistic form of legal reasoning is closely related to the notion of legal realism. Legal realism, which is also called policy analysis, or practical reasoning, emerged from the British school of utilitarianism and the American philosophy of pragmatism. Legal realism is a method of legal reasoning that determines what the law is, not by invoking categorical legal principles, but rather by considering the law's probable consequences. It demands that law should be interpreted not by referring to text, but by inquiring into the underlying purposes of the law. The courts should not seek a literal definition of the terms of the law, but should rather seek to fulfil the values that the law is intended to serve.[45]

The guiding principle of realistic reasoning has been expressed by Benjamin Cardozo, in the following way:

> ... when there are two existing rules of law that arguably apply by analogy to the present case, legal realists choose between them by determining which rule better achieves the underlying purposes of the law in the case. This is realistic analogical reasoning. But what if neither of the existing rules precisely serves the values that are at stake in the case under consideration? In these circumstances, it is necessary to construct a new rule of law, taking into account all of the values and interests that will be affected by the new rule. Legal realism is the identification, interpretation and creation of rules of law in light of the intended purposes, underlying values and likely consequences of the law.[46]

The reasoning by analogy also closely resembles "inductive reasoning". In general, the process of inductive reasoning involves making a number of observations and then proceeding to formulate a principle which will be of general application.[47] Inductive reasoning starts with observations of the facts and arrives at general conclusion. Thus, inductive reasoning is a process of reasoning by example. However, inductive reasoning cannot be conclusive. Inductive

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44 Wilson, Huhn "The Stages of Legal Reasoning: Formalism, Analogy, and Realism" 48 *Villanova Law Review*, (2003), p. 305.

45 Ibid, p. 305.

46 Cardozo, B. *The Nature of the Judicial Process*, (1921), p. 21.

47 Mcleod, Ian *Legal Method*, 5th ed., Palgrave Macmillan, (2005), p. 10.

reasoning is not about proof, but it is purely about justification.[48] The inductive reasoning fundamentally differs from the deductive form of reasoning. The difference between induction and deduction is primarily the difference between providing justification for and proof of an outcome. According to one author,

> The difference between deductive and inductive reasoning is that deductive reasoning is a closed system of reasoning, from the general to the general or the particular. In an inductive argument, the premises only tend to support the conclusions, but they do not compel the conclusion. Judges are involved in a type of inductive reasoning called reasoning by analogy. This is a process of reasoning by comparing examples.[49]

Thus, induction is closely related to analogical reasoning because both rely on the use and interpretation of prior experience. In inductive reasoning, lawyers and judges find a general proposition of law through surveying of relevant statutes and case laws.

### 4.2 Deductive Reasoning

In deductive reasoning, logical conclusion is drawn from major premise and minor premise. The process of deductive reasoning involves stating one or more propositions and then conclusion is reached by applying established principles of logic.[50] Deductive reasoning is only applicable once a clear major premise has been established.[51] According to a learned commentator, deductive reasoning is of limited use in legal reasoning because this form of reasoning leaves no space for examining the truth or otherwise of the premises.[52] Deductive arguments only hold true of factual propositions, not of norms.[53] As any mode of evaluative argument in deductive reasoning must involve, depend on, or presuppose, some ultimate premises which are not themselves provable, demonstrable or confirmable in terms of further or ulterior reasons.[54] According to

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48 Holland James A. & Julian S. Webb, supra note 5, p. 323.

49 Sharon, Hanson *Legal Method and Reasoning*, 2nd edition, Cavendish Publishing: London, (2003), p. 218.

50 Ian Mcleod, supra note 47, p. 11.

51 Farrer and Dudale, supra note 30, p. 79.

52 Sharon Hanson, Supra note 49 p. 216.

53 Harris, J.W. *Legal Philosophies*, 2nd ed., Butterworths, London, (1997), p. 213.

54 Ibid, p. 21.

Dworkin, the deductive method is suitable in a legal system that follows strict, formal, rules for the solution of conflicts between rules. Thus, deductive legal reasoning establishes a formal logic through a process of identification or adoption of basic premises from which determinate legal conclusions can be deduced. However, even a pure deductive reasoning can provide justification of a judicial decision sometimes if the major premise is an established rule of legal system, the minor premise consists of proven facts, and then conclusion arrived must be true and can be normatively justified. [55]

**5. MacCormick's 'Consequence-based Reasoning'**

Professor MacCormick in his influential book titled *Legal Reasoning and Legal Theory* gives a theory of reasoning which is called 'consequence based reasoning'- which is largely concerned with the justification of rules in law. MacCormic argues for consequence based reasoning as the preferred form of legal reasoning. In essence, MacCormic presents an argument in favour of the view that purely deductive reasoning is possible in justification of a judicial decision. MacCormic contends that in cases where deductive reasoning can not justify judicial decisions, courts may apply non-deductive arguments based on the ideas of consistency, coherence and consequences in fashioning a rule or principle of law to resolve the case. He suggests that judges may look, or should look, to the policies underlying the outcome of the precedent and the case under consideration. MacCormic contends that two factors in particular may be considered by a judge when justifying his decision. The first is the extent to which a proposed decision will cohere with existing principles and authorities: the greater the inconsistency with the existing legal framework that will result from a proposed decision, the less likely it is to be adopted. The second concerns the broader consequences of the decision for potential litigants, the legal system and indeed the role of law in society. Here the main issue is whether the consequences should be acceptable in terms of justice or common sense.[56]

MacCormic's account for 'consequence' based reasoning is a kind of practical reasoning, which is the application by individuals of their reason to decide in situations of choice. MacCormic contends that,

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55 Harris J.W., Supra note 53, p. 215; Richard Warner, "Three Theories of Legal Reasoning", 62 *Southern California Law Review* (1989), p. 1523.

56 Farrer and Dugdale, supra note 30, p. 81.

within the limits set by the requirements of formal justice, consistency and coherence, legal reasoning is essentially consequentialist. MacCormic identifies consequences of three types: first, there are considerations of corrective justice-'for every wrong there ought to be a remedy'. Second, there are considerations of 'common sense'- a judicial expression which denotes the perceptions of community moral standards. Third, there are considerations of public policy. According to him, "Consequence-based reasoning is a common feature of judicial decision-making, often appearing in the guise of 'policy consideration.' Policy consideration typically concerns the expected effects of legal rules."[57] Thus, consequence based reasoning should be desirable in terms of corrective justice, community morality and public policy.

The 'consequence based reasoning' propounded by MacCormic is normative one and necessity of such reasoning arises when deductive justification is not possible. The consequence based reasoning, however, should be consistent and coherent with the rest of the legal system and existing principles.

**6. Legal Reasoning in 'Hard Cases'**

Before embarking on analysis on reasoning in hard cases, we should highlight the distinction between 'easy case' and 'hard case.' Generally, in 'easy case', the decision follows from a legal rule, a description of the facts of the case and other legal norms. In the 'hard' cases, formal rules of law can not help to reach a correct decision. In hard cases, judges often exercise discretion in reaching decision and legal reasoning in hard cases is inextricably linked with the underlying philosophy of judicial discretion. In reaching decision in hard cases, judges may refer to common sense, the supposed view of a reasonable man or they may refer to notions of justice and fairness.[58] Coherence also plays an important part in the legal justification of a judicial decision in a hard case.[59] In generally, in the hard case scenario, where no applicable precedent exists, judges resort to principles to develop new rules. According to Rolf Sartorius, in a hard

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57 Cane, Peter, "Consequences in Judicial Reasoning", in: Horder Jeremy (ed.), *Oxford Essays in Jurisprudence*, Fourth Series, Oxford University Press, 2000, p. 42.

58 Farrer , John H. and Anthony M. Dugdale, supra note 30, p. 82.

59 Levenbook, supra note 27.

case, all substantive reasons for a legal decision are supplied by legal principles or by extra-legal principles from them.[60]

H. L. Hart expounds theories of 'easy case' and 'hard case' for the first time and distinction between them are relevant to his proposition of judicial discretion. According to Hart, in easy cases like in routine cases of legal rules, judges do not exercise discretion. In that type of case, the rule is applied as a matter of routine, as a deductive syllogism leading to a unique rule.[61] On the other hand, in hard cases e.g., in case of indeterminacy, inconsistency, or ambiguity in law, judges can decide such cases only by adding determinate content to the law and by engaging in "creative judicial activity". According to him, in case of 'hard cases', judge exercises discretion in proper sense in applying his legal reasoning.

One of the convincing theories on legal reasoning in 'hard cases' has been propounded by John Bell. According to him, the judges make value choices in hard cases and in doing so they give political direction to society. In justifying the choices they make, judges often have to recourse to policy arguments. Such policy arguments propose a strategy for resolving similar disputes in the future.[62] He defines policy arguments as "substantive justification to which judges appeal when the standards and rules of the legal system do not provide a clear resolution of dispute."[63] Such substantive justifications can be both ethical and non-ethical. Ethical reasons justify a result by showing that it will conform to some ethical standard, such as, fairness. Non-ethical reasons justify a decision by showing that it advances some accepted goal, such as greater wealth for the community or a better environment. However, he contends that policy arguments do not have to be used in every case, which comes before a judge. They are confined to 'hard cases', where there is no settled answer. He characterises judicial discretion as 'judicial creativity' which can be given any of the three senses. Firstly, all interpretation and rule-definition is 'creative' in the sense that the

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60 See, Sartorius, "The Justification of the Judicial Decision", 78 *Ethics* (1968), pp. 171-87.

61 See also George P. Fletcher, *Basic Concepts of Legal Thought*, Oxford University Press, (1996), pp. 56-57.

62 Bell, John, *Policy Arguments in Judicial Decisions*, Clarendon Press: Oxford, (1988), p. 22.

63 Ibid, pp. 22-23.

judge has to state something, which has not been expressed before. Secondly, 'creativity' may be defined as making a choice of the values to be applied where there is no consensus on what is the appropriate standard for the situation in question. In a third, more restricted sense, 'creativity' may apply to situations in which the judge simply gives effect to his personal views where there is no settled legal answer to the question before him.[64] Bell gives emphasis on second sense of judicial discretion in the form of creativity and considers it as the most appropriate circumstances in which judicial discretion can be exercised.[65]

He continues: "Policy arguments do not have to be used in every case which comes before a judge. They are confined to 'hard cases', those where the settled legal standards do not provide a clear answer."[66] In the decisions reached in 'hard cases', the reasons given by the judges reflect not only his own perception of the job he performs in society, but also what is expected of him by his audience. In formulating justification of his reasoning, the judge approaches his task in the light of his social function.[67]

Dworkin proposed theory of adjudication for 'hard cases', which is mainly based on analogical reasoning. According to him, judges are obliged to solve all legal cases on the basis of a total analogy of all the existing statutory and common law rules. Such a total analogy is necessary to yield the best theory of political morality which best justifies all existing statutory and common law rules and which entails a legally binding correct solutions to all 'hard cases'.[68] However, Dworkin makes a distinction between arguments of principle and arguments of policy in relation to hard cases. Dworkin suggests that judges do not decide cases on the basis of policy in the sense of giving effect to particular social or economic goals and such policy in this sense must be left to the legislature. Rather judges decide cases on the basis of principle in that they seek to give effect to rights that protect interests of individuals.[69]

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64 Ibid, p. 30.

65 Ibid, p. 31.

66 Ibid, p. 24.

67 Id.

68 See Dworkin, Ronald *Taking Rights Seriously*, Cambridge: Massachusetts, 1977.

69 John H. Farrer and Anthony M. Dugdale, supra note 30, p. 83.

Dworkin asserts that his distinction between principles and policies affords a description of how judges decide cases and gives a normative account of how they should decide cases. He puts forwards his arguments against judicial reliance on policy on two premises: first that judges are not responsible to the electorate and therefore, should not make law; and second, because judicial decisions have retroactive effect it is unfair to the losing party to base a decision on newly made law. Dworkin argues in favour of 'principle' as a guiding force in 'hard cases' on the ground of consistency in judicial reasoning. According to him, judges are expected to decide with "articulate consistency." They are supposed to decide like cases alike and to base particular decision on reasons they would be willing to apply to other cases that the reasons cover. In Dworkin's view, decisions based on policy may not require such consistency.

**7. Conclusion**

Legal reasoning is frequently found in the interpretation and application of law or legal norm in a particular case. An acceptable form of legal reasoning must fulfil the requirements of both formal legal rules and moral considerations. The legal reasoning must also be persuasive, consistent and coherent to make a decision rationally constructed and integrated. The integrity of legal principles is central to coherent set of legal reasoning.

Amongst the various forms of legal reasoning, argument by analogy is most commonly used one which is applied in both judicial decision and statutory interpretation. Analogy plays a great role in legal reasoning to make the decision coherent and consistent. In this way, analogical reasoning promotes legal certainty and predictability in judicial decisions. The process of analogical reasoning involves determination of likeness between the previous case and the case in hand and determination of *ratio decidendi* of the previous case and its application to the case in hand. On the other hand, deductive reasoning is relevant only in the case of clearly established statutory rules or case law, rules and principles. Analogical reasoning, however, can not solve the problem of indeterminacy of law that give rise to 'hard cases.' Legal reasoning in 'hard cases' involves weighing of extra-legal principles and public policy considerations. Legal reasoning in 'hard cases' involves the creation of new norms which are necessary to fill up the gaps in law which can occur due to vagueness or ambiguity of the statute or established legal norms.