GENERAL INTRODUCTION

> When lawlessness and disease multiply in a city, you know the consequences. Courts of law and hospitals open everywhere, and the studies of law and medicine give themselves airs and even cultured men take these studies very seriously.[1]

Plato, the Greek philosopher, would undoubtedly have advised you against studying law. Aren't cultured people perfectly able to decide for themselves what is lawful and what is illegal? Isn't it a shame and a compelling demonstration of underdevelopment if a society needs specialised lawyers? You will probably have heard similar opinions, perhaps put less bluntly, from family members and friends when they enquired which subject you would study at the university. When you admitted you were going to study law, they may have reacted with disapproval: '*Law?* That must be one of the most boring studies of all, requiring you to memorise all kinds of provisions by heart.' Well, perhaps the first part of this remark is true, but the second part portrays a false conception, one that is frequently encountered among laymen. By the way, the use of the condescending phrase 'laymen' is already a typical characteristic of the haughty attitude of the professional lawyer, who looks down on ignorant people. 'Provisions', he will tell you, 'are not meant to be learned by heart. You possess a legal code in which you can look them up. The important thing is to know how to *apply* the provisions, in other words, how to interpret laws and in order to be able to do so you must take note of the interpretation given to the provisions by the authority on laws, the judge.'

The cases on Brightspace attempt to provide you with practical examples of the theory that you have to familiarise yourself with during the course *Legal History*. It focuses on the concept of codification. You will study the creation of the modern legal codes, in particular those containing private law, the codes that are used nowadays as the exclusive source of law in the majority of the countries on the continent of Europe. This has not always been the case. The abovementioned countries only started to record their laws in civil codes in the end of the eighteenth and the beginning of the nineteenth century. Perhaps this will sound strange to you, accustomed as you are to be able to look up the relevant provisions in your civil code. However, you need to realise that the use of a codification as the exclusive legal source is a rather recent phenomenon. In the many centuries the creation of civil codes, the law was found in many sources that competed (and often conflicted) with eachother. In general, one could say that in the pre-codification era every 'country' had its own specific legal sources, for instance customary law, which was supplemented by what is called the 'common law', *ius commune*, i.e. Roman law that was used almost everywhere in continental Europe as a subsidiary (complementary) source of law.

The concept 'interpretation' plays an important, if not crucial, role in the application of these legal sources, whether it is the 'modern' codification or the more complicated legal sources that were used before. As the introductory lecture will focus on the two concepts codification and interpretation, we need not pay more attention to them here. Suffise to say that generally one first needs to determine what a provision exactly means, regardless whether it stems from a statue or is derived from another legal source. This is to say, that if a judge wants to adjudicate a case presented to him, he first needs to determine if one of the many rules of law is applicable to the factual situation of the case. If he believes to have found a rule that might apply to the facts, he needs to determine the meaning of the rule in order to establish if it is indeed applicable.

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[1] Plato, *The Republic* (Politeia) 405a

The determination of the meaning of a rule of law is called interpretation. Interpretation of legal rules is always needed when rules are applied, because a rule cannot be used sensibly without a prior determination of its content and its exact extent.

An example. The Dutch Penal Code makes punishable certain behaviour by using the phrase *He who commits…* (this or that). But it will come as no surprise to you that not just male criminals are punished, but female ones, too. However, it means that the judge has interpreted the word 'he' to include 'she'. Of course, a judge will do this routinely, and only rarely mention it explicitly, but it is important to realise that he has interpreted the rule nonetheless, albeit silently.

Interpretating rules that are somewhat more complicated than the one used in the example is even more important when it appears that there are several conflicting legal sources that can be applied to the case. Then, determining the precise extent of each provision is essential in order to select the relevant one. In the era prior to codifications, a number of separate interpretation rules governed the question which provision needed to be applied when, for example, both a statutory provision and a 'common law' provision could be applied. Usually, the result was that the 'common law' was preferred.

Interpretation is ultimately left to the judge. He is the authority that is to apply the law to the facts of the specific case that is presented to him. But before he can start applying the law, he needs to determine its content. Obviously, a judge is free in his interpretation of rules. Only a superior judge is authorised to overturn his decision. In the end it is the highest court of a country that determines how a rule of law has to be interpreted. Should the drafter of the rule, the legislator, feel that the interpretation differs from what he intended, then he can only react by creating a new provision that expresses his intention more clearly. The decision already made by the judge is inviolable.

As a consequence, the interpretation of rules is to be found in case law, and this is the reason why you will be confronted with so many decisions during your studies. If you want to find out how a rule is applied, you need to study the relevant case law. This explains why we will present case law from different countries and ages. Our aim is to familiarise you with the way the judges use their legal sources. You will learn several ways to interpret rules and we hope to show you that a judge is always confronted with the same problems when applying a rule to a certain case.

It goes without saying that you need to acquire the skill of reading legal decisions. You will be able to practice that skill when you study the decisions contained in the cases in Brightspace, of course combined with the material treated in the lectures. Every case is followed by a number of questions that aim to enable you to focus on the relevant parts of the decision. However, you also need to study the cases separately, as you will be questioned during the tutorials in order to verify whether you have understood the material. This is why we present you now with some general guidelines for studying case law.

When presented with a new case, a judge will first determine the facts on which he has to decide. You should realise that the parties that go to court generally tend to disagree on what exactly happened. Yet a judge can only decide once the facts are clearly established. In practice, especially in the first instance, in the inferior court, the procedure focuses on evidence: one of the parties needs to offer proof that the facts are indeed as it claimed. Put differently, the main part of the procedure is frequently preceded by a phase exclusively oriented on establishing the facts. The cases will not confront you much with this particular phase, as the majority of its cases were decided by hierarchical superior judges, or even by judges from the highest court. The highest judges in a country, for instance the *Hoge Raad der Nederlanden* in the Netherlands, are usually charged with the task of determining whether the inferior judges have appplied the law correctly to the facts that were presented to them. In general, these inferior judges are free in determining

the facts on which they apply the law, but the application of the law itself is subject to supervision. As a rule, this means that the facts are not debated in the decisions of the highest court. So, in the first place you should be able to find the relevant facts in the case. But you need to consider that you only need to present the facts that are relevant for the adjudication. Frequently parties bring up numerous facts that are sometimes disputed – conflicting parties tend to deny every single partial claim made by their opponent – but that are often absolutely irrelevant for the decision. Every single time, the judge will select the relevant facts for his decision, and for a proper understanding of the decision, it is important that you understand which facts are the relevant ones. So, when you study a case, you should first write down which facts are relevant for the solution of the dispute.

The next phase in each case is the stage in which the judge searches for the appropriate rule of law. If he finds a rule, he needs, as sketched above, to determine the content of that rule by interpreting it in order to find out whether or not the rule is applicable to the facts he selected. This means that the second thing you should write down is the rule of law that the judge uses and how he interprets it. It goes without saying that here, too, it is essential that you read very carefully and phrase your writing very accurately, because the tiniest difference in wording can sometimes lead to a completely different legal effect. In this phase, especially in the case law from the era before the codifications, you may encounter the problem of potential conflict between various rules of law that all seem to be applicable. That is why you should consider very attentively the method of interpretation that is used in order to select one of these rules for application.

When one is considering whether a certain rule of law may be applied to the facts, it is hard to overlook the specific question of law that is to be resolved. These questions are often difficult, and frequently a judge is forced to decide them independently. That is to say, he needs to decide about the applicability as well as the content of the rule of law he found. A judge makes this decision by means of interpreting the rule of law. In theory, he simply applies the particular rule, but for a student of law the importance of his decision is not the application itself, but how the judge decides. In other words, a student is particularly interested in the question of law the judge had to answer. After he has decided, it is said that ‘the law has spoken’ and in future reference is made to this decision. This means that the more precise the question of law is formulated, the more accurate one can indicate whether a similar decision should be made in a similar case.

Finally, it is necessary to fully understand and to be able to put into words the decision that is given to a certain question of law. This decision, in turn, can give rise to new questions of law and various interpretations. Thus, legal literature builds on case law in order to try to provide answers for future cases. Accordingly, one frequently encounters explanatory notes from writers in publications of legal decisions. In such notes, scholars comment on the decision and try to explain its meaning and significance for other cases. Such notes can provide useful clues in understanding the decision, but you should never forget that they only express the individual opinion of the writer in question, who, however authoritative he may be, is not the judge and therefore not vested with authority by the state.

Please bear in mind the following complication when reading the different cases in Brightspace. Frequently, students are confused by the various claims from both parties in different stages of litigation and the different decisions of hierarchical lower and higher judges that tried to solve their case. For a proper understanding, it is essential that you distinguish between these stages. The decision of hierarchical inferior judges are of specific importance, because the superior judges decide if the previous decision is valid, or if it must be overturned. It is simply impossible to understand a decision if you don’t know who decided what.

In short, when you study a case you need to pay particular attention to:

1. The facts.
2. The applicable rule of law.
3. The question of law.
4. The decision.

In every tutorial, these points will be discussed ad nauseam, and you will soon find out that it pays to use this procedure. You will profit from this approach in every course you take – not to mention in your future legal career. The focus is always *interpretation*, because without interpretation of the rule of law (2), it cannot be applied to the facts (1) and the question of law (3) cannot be decided (4).

The tutorials will be given during the first six weeks of this block, whereas the lectures will be given one more week. We expect you to study the material on Brightspace independently, but they act, as indicated, as illustrations of the material treated in the lectures. If certain aspects of the cases are unclear to you, you should ask your teacher. Please bother him or her with your questions! The division of the cases is evident: it is based on the six tutorials offered to you. As far as the lectures are concerned, you can refer to the weekly schedule announced on Brightspace.

You have just recently started your studies and you may need to get used first to the legal jargon. Naturally you can look up unfamiliar words in an 'ordinary' dictionary, it will explain most of the phrases you will encounter. There are also many specific legal dictionaries available. We advise you to try as much as possible to understand the meaning of the words independently. Careful re-reading will often clarify what was unclear the first time. Much of your future work as a lawyer will consist of the independent solving of legal problems, and the more you practice now, the better you will be able to perform later. Finally, when studying the cases, please pay attention to the sources of law and the way they are applied. This is also the theme of the lectures. The more technical legal problems you will encounter again in other courses. You are not expected to master them in this course, even though it is self- evident that it pays off to understand them as soon as possible.