case at hand and would lead to the conclusion that the murderous spouse would not receive half of the marital estate. However, if Legrand would take this way out, his argument about the difference in mentality between the common law system and the civil law system loses its edge, because then rules would not be posited prior to the cases to which they are to be applied.

Let us therefore assume that the difference between civil law and common law really operates in the way Legrand suggests. Then Legrand would be right that the difference in *mentalité* between the civil law and the common law tradition would devastate the effects of a common civil code. I will argue, however, that the difference does not operate in this way and that, as a consequence, Legrand's argument is not as strong as it might seem at first sight. Later in this chapter I will return to the case of the murderous spouse and the way it was really dealt with in the Dutch civil law tradition. But first I must set out the path of the chapter.

I will argue that Legrand's argument hinges on the issue whether the law is an open system. In fact, his argument can be interpreted as stating that in a case-based system, the law is necessarily open, while in a rule-based system it is necessarily closed. This difference between a case-based approach and a rule-based approach makes that the introduction of a European civil code would not lead to uniform private law.

Legrand's argument might also be interpreted differently, namely as stating that common law systems just *happen* to be more open, without endorsing the view that this openness derives from common law systems being case-based. On this interpretation, the argument of this chapter loses much of its force, but the same counts for Legrand's argument, because it would not have presented any reason *that*, let alone *why* common law systems happen to be more open. So the argument of this chapter has two versions, directed against two interpretations of Legrand's theory. If Legrand does not presuppose that the difference in style of reasoning between the common law tradition and the civil law tradition stems from the difference between case-based reasoning and rule-based reasoning, his own argument is unfounded. However, if his argument is based on the assumption that the difference in style of reasoning between the common law tradition and the civil law tradition stems from the difference between case-based reasoning and rule-based reasoning, this chapter shows his assumption to be misguided. In both cases, Legrand's argument is refuted.

After a brief discussion of what the open nature of the law amounts to, I will elaborate Legrand's argument to show why the law might be open in common law and closed in civil law. I then resume my argument against Legrand by showing how the logic of rule application allows a civil law system to be open too. In this connection I will draw from recent results in the field of legal logic and in particular the analysis of legal reasoning by

means of so-called non-monotonic logics. The conclusion here will be that the mere fact that a civil law system works with rules instead of cases, does not imply that such a system must be closed. It depends on other factors how open a rule-based legal system will be.

With this conclusion, Legrand's main argument has been refuted. What remains to be done is to show how a civil law system may be more or less open and say a little about the reasons that play a role in this connection. The same reasons are, I will argue, also relevant for common law systems.

3. THE LAW AS AN OPEN SYSTEM

One of the advantages of having a legal system, as opposed to deciding all cases on grounds of fairness, is that a legal system offers a higher degree of predictability of the outcomes. By indicating which facts of a case are legally relevant and in which way they lead to a particular outcome, it becomes easier to predict what the outcome of a case will be and this predictability makes social interaction easier. Fuller has even argued that a minimum amount of predictability is necessary for the very existence of a legal system.[4]

At the same time the limitation of legally relevant facts makes it sometimes impossible to take facts into account that seem relevant if one would not limit one's view to what is deemed relevant by the law. Legal reasoning is not only applying the relevant law to a case, but also a special case of practical reasoning, in the sense of deciding what to do.[5] From this perspective, the limitation of facts that can be taken into account as relevant for the decision at stake to only a pre-established set, is against the nature of the law, because it is not rational to leave potentially relevant facts out of consideration. Here we encounter a fundamental tension with which every legal system has to cope and it is this tension that is reflected in the issue to what extent a particular legal system is open.

A legal system is more open in the sense that is relevant here, to the extent that it allows more facts to be recognized as legally relevant that prima facie seemed to be irrelevant. As said, one of the points of having a legal system is that it distinguishes between facts that are relevant and facts that are not relevant for the solution of particular cases. Moreover, this distinction between relevant and irrelevant facts should be made before the cases arise to which the distinction is to be applied. If every case should be

4 Fuller 1969, 33f.

5 Alexy 1978, 263 and 1999, 374-384.

decided on all facts that are ex post deemed relevant, one might have a reasonable way to deal with these cases - although even this reasonableness can be disputed - but it is not a legal way. Having a legal system implies by definition an a priori determination of what counts as relevant in the eyes of the law.[6]

The question at stake concerning the openness of a legal system is how strict this determination is. If it is not strict at all, in a degree that the a priori determination of what counts as legally relevant has no practical meaning, the system in question is not a legal system anymore. If the determination is very strict, in the sense that it does not allow any exceptions, the legal system in question is closed. It is questionable whether such a closed system can function, given that the law is used to decide what should be done all things considered.[7] In reality, all legal systems are to some extent open. They allow some exceptions to the a priori determination of what counts as legally relevant, but they do not allow unlimited exceptions. The degree of openness of a legal system depends on the extent to which it allows exceptions.

If we may believe Legrand, a common law system allows principally more exceptions to the a priori determination of what is legally relevant, than a civil law system. In order to evaluate this claim, we must take a closer look at both the 'logic' of case-based reasoning and the 'logic' of rule-based reasoning. In the next section I will introduce some logical distinctions by means of which this closer look can be taken.

4. OF REASONS AND THEIR LOGIC[8]

If we have a suitable conceptual framework, the differences between common law style reasoning and civil law style reasoning are easier to understand. In this section I will try to develop such a framework in the form of reason-based logic. Reason-based logic is one example of so-called non-monotonic logics that have been developed in research on artificial intelligence to deal with rules of thumb and exceptions. In contrast to other non-monotonic logics, reason-based logic has been developed especially to deal with the peculiarities of reasoning with legal rules and principles.[9]

6 Fuller 1969, 49f. and Radbruch 1973, 164f.

7 Hage and Peczenik 2000.

8 The sections 4 to 6 exhibit a large overlap with parts of chapter 3. This overlap could only be avoided at the cost of seriously interrupting the argument line of the present chapter.

9 Verheij 1996, Hage 1996 and 1997 (RwR). See also chapter 3.

4.1 Reasons

A central notion in reason-based logic is that of a reason. I take all reasons to be facts, namely those parts of reality that make true sentences true. For instance, if the sentence 'It is raining' is true, it is made true by the fact that it is raining. I take everything denoted by a true that-phrase as a fact. This implies that I allow facts without a material basis, such as the fact that five is bigger than three and facts that are only possible on the basis of rules, such as the fact that courts have the power to sentence and the fact that a debtor ought to pay his debts. Clearly I thereby allow the presence of facts that can only obtain within the context of a legal system.

Some facts are relevant for the presence of other facts. For instance, the fact that John owns a book is relevant for the fact that he is permitted to tear the book in pieces. This kind of relevance is expressed by the word 'reason'. The fact that John owns the book is the reason why he is permitted to tear it apart and the fact that Lea is imprisoned is the reason why she cannot cast a valid vote.[10]

The word 'reason' can be used in other senses too, but the sense used above is the sense of 'reason' that I am interested in here. Reasons in this sense are *facts which make that other facts obtain or do not obtain*. I will call the fact for which a reason 'pleads', the *conclusion* of the reason. So the fact that John owns a book is the conclusion of the reason that Gerald transferred the ownership of this book to John.

Reasons can be subdivided into decisive reasons and contributive reasons. A *decisive reason* guarantees the presence of the fact for which it is a reason, or the absence of the fact against which it is a reason. For instance, the facts that there are two dogs, three cats and no other animals in the room are together a decisive reason for the fact that there are five animals in the room. Similarly, the fact that the only force that operates on a body is gravitational, is a decisive reason why this body is accelerated in the direction of the gravitational force.

Contributive reasons, on the contrary, do not guarantee the facts for which they 'plead'. They merely contribute to their presence. For instance, if Jane promised to visit Geraldine, this is a contributive reason why she should visit Geraldine. Whether she should visit Geraldine all things considered, depends on the presence of other reasons.

[10] Sometimes a reason consists of more than one fact. For instance, the facts that Frank committed a tort and thereby caused damages are together a reason why Frank is liable for the damages. Neither one of these facts would, taken on its own, be a reason, but in combination they are a reason for the existence of liability.

First, if there is a decisive reason why she should not visit Geraldine, then she should not visit Geraldine. Second, if there are contributive reasons not to visit Geraldine and if these reasons against visiting outweigh the reasons for visiting, she should not visit Geraldine either. However, if there are no reasons against visiting Geraldine, or if the reasons against visiting are outweighed by the totality of reasons for visiting, Jane should visit Geraldine.

A crucial aspect of contributive reasons is that *they have to be weighed* against contributive reasons pleading in a different direction. This weighing often boils down to taking a decision which set of reasons outweighs the other set. Sometimes, but not always, this decision can itself be guided by reasons. For instance, if two sets of reasons have been weighed before, the outcome of the earlier decision can count as a precedent for the new decision. (The same reasons must be weighed in the same way.)[11] There may also be reasons concerning the weight or even the relevance of other facts as reasons. Take for instance the following example[12]:

A small supermarket had to dismiss one of its employees for financial reasons. For this dismissal, the allowance of a judge was necessary. One of the employees, called Mary, had been longer in service and this is a reason for the judge not to permit to dismiss her. The other employee, called Richard, had better papers for the job and this is a reason not to dismiss him. Since it is clear that one of the employees has to be dismissed for financial reasons, a reason against permitting the dismissal of Richard is also a reason for permitting the dismissal of Mary.

The judge decided that, although Richard had better papers for the job, Mary was still sufficiently qualified, so that the better papers did not count for much. The fact that Mary had been longer in service should therefore tip the balance of reasons. Notice that the fact that Mary was suitable for the job was not considered as a reason not to dismiss her, but only as a reason why the seniority of Mary outweighs the better papers of Richard.

4.2 Rules

Rules are usually assumed to have a conditional structure. They consist of a condition part and a conclusion part and the point of rules is that if their conditions are satisfied, their conclusions obtain. Take for instance the main Dutch rule of tort law, which states effectively that if somebody commits a tort and this tort can be attributed to its actor, the actor is liable for the

[11] This theme is elaborated in chapter 5.
[12] Kantongerecht Rotterdam, June 12th, 1985, Praktijkgids 1985/2349.

damages caused by his act. Formulated in this way, the rule has two conditions that are necessary for its conclusion to obtain.

If a rule applies to a case, the conclusion of the rule holds for this case. In terms of reasons, we might say that the application of a rule to a case is a decisive reason for the rule conclusion to hold. This leaves the question unanswered, however, *when* a rule applies to a case. The standard situation when a rule applies is when the case satisfies the conditions of the rule. So, to stick with out analysis of the Dutch rule of tort law, if A committed a tort and this tort can be attributed to A, the rule applies to A's case and the conclusion follows that A is liable for the damages caused by his act. This standard situation is the one intended by the legislator who formulated the rule this way. It is also the normal situation in which the rule applies.[13]

4.3 Principles

Legal principles come in at least two main types. On kind of principles resembles rules in the sense that they exhibit the same conditional structure that is also characteristic for rules. I will call them *rule-like principles*. The principles of the other kind function like goals and for this reason I will call them goal principles or, briefly, *goals*.

Typical examples of rule-like principles are the principles that nobody can transfer a right that he has not got himself (nemo plus principle), the principle of the rule of law (the government has no power unless it was explicitly assigned by (written) law) and the principle that any act that violates a criminal law is tortuous. Rule-like principles differ from rules in that their application to a case does not generate a decisive reason for their conclusion, but merely a contributive reason.[14] As a consequence, the conclusion of a principle still needs to be balanced against other reasons, if there are any. For instance, a violation of a criminal law is in principle tortuous, but if there were sufficiently urgent reasons to commit this violation (a matter of balancing), the violation was justified and the act was not tortuous. In the rest of this chapter I will disregard rule-like principles.

Goal principles state goals that the law strives to realize as much as possible, within the confines of what is physically and legally possible.[15] Examples are human rights, but also governmental policies (e.g. full

[13] In section 6, I will discuss some less normal situations.

[14] In chapter 3 I wrote about abstract reasons instead of principles. Abstract reasons and principles can be translated into each other as follows: The validity of the principle 'If a then b' boils down to it that a is an abstract reason for b and the other way round.

[15] Alexy 1996 and 2000.

employment) and legal principles such as party autonomy and consumer protection in contract law. Goals are related to rule-like principles in the sense that they are merely the basis of contributive reasons. If some regulation or decision contributes to a goal, this is a contributive reason to adopt this regulation or to take this decision. This contributive reason still needs to be balanced against possible contributive reasons against the regulation or decision.

For instance, that the prohibition to publish a photograph of a recently released prisoner promotes the privacy of this prisoner is a contributive reason to prohibit the publication. This reason still needs to be weighed against a contributive reason for allowing the publication, based on another goal, namely the freedom of the press.[16]

5. THE SUBSUMPTION MODEL OF RULE-BASED REASONING

According to Legrand, rule-based reasoning allows much less leeway to adapt the law to the needs of the case at hand. Legrand sees rule-based decision making as 'deductive in the sense that the rules that structure it are posited prior to the practices that apply it'.

This phrasing is somewhat ambiguous. On the one hand it may merely mean that legal decision making can be divided into two stages. In the first stage a rule is formulated, based on the sources of the law and the needs of the case at hand, while in the second stage this rule is applied deductively to the case. This view has often been defended in the literature, under the headings of the distinction between heuristics and legitimation[17], secondary and primary justification[18], or internal and external evaluation of law application.[19] [20]

On the other hand it may mean that pre-given rules are processed in a blind way, more or less like if it were done by a computer program, without taking the needs of the case at hand into consideration. It seems that Legrand has this way of 'deductive' rule application in mind, because otherwise the rest of his observations are not to the point. Let us call this view of rule

16 Cf. Alexy 1996, 84f.

17 Nieuwenhuis 1976.

18 Alexy 1978, 273 and MacCormick 1978, 101f.

19 Wróblewski 1992, 62f.

20 This view also seems to treat rules as legal solutions for types of cases as discussed in section 1.

application the *subsumption model*. According to this subsumption model the logic of rule application is the following:

1. Determine whether the facts of the case at hand satisfy the conditions of the rule.
2. If the answer is affirmative, the rule applies and the rule consequences are attached to the case.
3. If the answer is negative, the rule does not apply and the rule consequences are not attached to the case.

The only step in this model that allows some leeway to adapt the legal consequences to the needs of the case in question is the first one, because it requires interpretation of the rule conditions and classification of the case facts.[21]

As a model of how reasoning with rules works, the subsumption model is not correct. In particular it cannot account for the possibilities to make exceptions to rules and to apply rules analogously. Clearly there have been attempts in the literature on law and logic to fit exceptions and analogous rule application into the subsumption model[22], but the upshot of these attempts has always been that the rule does not run as it seems to run given its wordings. Either it contains an additional condition that is not satisfied by the case at hand (to account for exceptions), or its conditions are actually more general than the wordings suggest (to account for analogous application). Such attempts to argue that rules do not run as they seem to run at first sight are not to be recommended, because they misinterpret what goes in on legal reasoning to make the reasoning fit a preconceived, but wrong model.[23]

It is therefore better to replace the subsumption model of rule application by a more realistic one. In this connection I want to propose the reason-based model of rule application.

[21] Arguably, an important objection against the subsumption model, apart from that it is not faithful to legal practice, is that it places a too heavy burden upon legal interpretation, thereby leading to 'interpretations' that can only with the greatest difficulty be called so.

[22] See for instance Zippelius 1974, 41 and 69.

[23] A more extensive discussion of these matters can be found in Hage 1997 (RwR), 4f.

6. THE REASON-BASED MODEL OF RULE APPLICATION

The reason-based model of rule application has as its starting point two assumptions. The first one is that if a rule applies to a case, its conclusion is attached to that case as a legal consequence.[24] For instance, if the rule that he who commits an attributable tort is liable for the damages caused by the tort, applies to a case, the tortfeasor is liable for the damages caused by his tort.

The second assumption is that whether a rule applies depends on a balance of reasons for and against application. To elaborate the same example, this means that whether the rule that he who commits an attributable tort is liable for the damages caused by the tort, applies to a case, depends on both the contributive reasons pleading for application and the contributive reasons against application and therefore *not merely on whether the rule conditions are satisfied*.

The first assumption is not really different from the subsumption model, but the second one makes a crucial difference, because

1. it allows reasons against the application of a rule that compete with reasons for application, and
2. it does not state in an a priori fashion which facts count as reasons for or against application.

In particular the second characteristic of the reason-based model makes that reasoning with rules according to this model is very well compatible with a relatively open system of the law. Let me elaborate a bit on the reason-based model of rule application, to justify this claim.

Although the reason-based model as described above does not specify which facts count as reasons for and against application of a rule, there are very plausible ways to extend this model. I will discuss three of such extensions.

6.1 The first extension of the reason-based model of rule-application

The first extension is to assume that if the facts of a case satisfy the conditions of a rule - I will say that the rule is *applicable* to the case - this is merely a *contributive* reason why the rule applies.[25] Again, this looks similar

[24] This might be interpreted as 'all or nothing application' in the sense of Dworkin 1978, 24.

[25] Notice that the applicability of a rule is not the same as its application. The point of the reason-based model is that applicability is merely a contributive reason for application.

to the subsumption model, but there is a crucial difference, because on the subsumption model, the applicability of the rule is a *decisive* reason to apply the rule. What does this difference mean?

First, it means that even if a rule is applicable, there may still be reasons against applying the rule, reasons which may, but need not, outweigh the applicability of the rule as a reason for application. This might, for instance, be the case, if application of the rule would be against the purpose of the rule.

Fuller gave an example of a prohibition to sleep in the railway station, which was motivated by the desire to retain tramps from spending their night on the station.[26] It would be against the purpose of this rule to apply it to the traveler who dozed away a few minutes while waiting on a late train, because this would not contribute to the goal of retaining tramps from spending their nights on the station.

If application of a rule to a case would be against the rule's purpose, this is normally a contributive reason against application of the rule. Normally a rule is not applicable to cases where application would be against the rule's purpose. If the rule is nevertheless applicable, there are both a reason for and a reason against applying the rule to that case. The demands of legal certainty plead for the conclusion that the applicability of the rule outweighs the fact that application would be against the rule's purpose, but this demand is not decisive (merely a contributive reason why applicability outweighs its competitor) and the balance of reasons might be that the reason against application of the rule outweighs the reason for application. The rule does not apply then, and does not attach its conclusion as a legal consequence to the case.

Second, it means that there can be a decisive reason against application of the rule, and such a decisive reason by definition brings about that the rule does not apply, even if it is applicable. A decisive reason against application of an applicable rule obtains, for instance, if another rule with an incompatible conclusion is also applicable to the case and this second rule has precedence over the first rule. In Dutch rental law, the rules concerning the rent of business accommodations are sometimes in conflict with the general rules about rent and if such a conflict occurs, the more specific rules concerning the rent of business accommodations have precedence over the general rules about rent. The applicability of a rule that has precedence over another rule is normally a decisive reason against applying the latter rule.

Third, the first extension means that if a rule is applicable and there exists therefore a contributive reason for applying the rule and there is no

[26] Fuller 1958.

reason, either contributive or decisive, against application, the rule certainly applies and its consequence is attached to the case. *This is the normal situation and in this situation the reason-based model and the subsumption model of rule application lead to the same results.* It is this kind of situation that lends some plausibility to the subsumption model, because the shortcomings of that model are not relevant in the normal situation.

6.2 The second and third extension to the reason-based model of rule-application

The second extension to the reason-based model of rule application is that *if a rule is not applicable to a case, this is a contributive reason against applying the rule to this case*. At first sight this extension seems superfluous, because if a rule is not applicable, there seems to be no reason for applying it, so the issue of application seems not to arise at all. The relevance of the second extension only becomes clear in the light of the third extension of the reason-based model of rule application.

This third extension is that *there can be other reasons for applying a rule than only the applicability of the rule in question*. The reason-based model itself does not specify what these other reasons might be; it only leaves the possibility open that there are other reasons for application.

Reasons to apply a rule to a case, even if its conditions are not satisfied, will usually be based on application of principles or goals that led the legislator to make the rule in the first place. This means that the case belongs to a type that is similar to those for which the legislator had the rule in mind. The cases to which the rule is applied although the rule conditions are not satisfied, will therefore normally resemble cases to which the rule is applicable. That is why we normally speak of *analogous application* of a rule if a rule is applied to a case in which it is not applicable.[27]

The reasons to apply a rule analogously must always be weighed against the non-applicability of the rule as a reason against application. Legal certainty provides again a contributive reason why the non-applicability outweighs the reasons for analogous application, but in the end the conclusion may nevertheless be that the rule should be applied analogously.

[27] A more extensive discussion of analogous rule application can be found in Verheij and Hage 1994 and in Hage 1997 (RwR), 118f.