ISSA Proceedings 2002 – Legal Argumentation Theory And The Concept Of Law

1. Premise

There has been wide recognition over the last three decades that argumentation plays a pivotal role in shaping the law, since practically any stage of what is ordinarily considered the legal domain involves recourse to reasoning**[i]**. Legal scientists put forward interpretive statements: they propose what they see as reasonable interpretations of laws and defend these interpretations with arguments. Both of these tasks requires reasoning. Lawyers, when they bring cases to court, must do more or less the same (even if the aims here are more specific and concrete): they interpret general norms and precedents, qualify concrete cases and offer reasons in support of their conclusions. Judges decide cases, an activity which makes it necessary to find and sometimes reconstruct the rule of law, interpret rules and apply them to concrete circumstances, weigh principles, settle conflicts between norms encased in the same legal order, follow precedents, ascertain and qualify facts, determine the most reasonable solution to the case at hand, and put forward justifications for their decisions. All such operations are argumentative. And lastly, in a constitutional democratic state the legislators, too, will tend to offer reasons backing their deliberations, so to make these last more easily acceptable to the people they govern. In doing so even the legislators accept to take part in the game of argumentation.

Clearly, these types of reasoning differ markedly from one another: some are aimed at finding solutions; others are intended to enable making a choice among competing interpretations of norms, qualifications of facts, or decisions of cases; and others still are designed to uphold a point of view and show it to be reasonable. But they have a general feature in common in that they are all deliberative procedures and so not entirely rule-bound. In other words, reasoning and argumentation in law differ from a mere subsumption of concrete facts under general rules. It is precisely because legal argumentation is not entirely deductive that it warrants careful investigation and has attracted the attention of several

researchers in different fields of study. Legal scholars, philosophers and argumentation theorists have shown in recent years a growing interest in legal reasoning**[ii]**. They have been concerned with legal reasoning at different levels of abstraction: philosophical, theoretical, methodological, empirical and practical**[iii]**. We owe it to their effort if legal argumentation is "no longer considered as merely a part of a broader field of research, but as an object of study it its own right" (Feteris, 1999, 13). In this essay, argumentation in law is approached from a particular perspective, that of jurisprudence. More specifically, the aim here is to make explicit the implications which the recent development of studies in legal reasoning carries for the concept of law. The argument is laid out as follows. In Section Two I introduce and point up some specific theoretical consequences resulting from the awareness that argumentation plays an important role in law. In this framework, it will be stressed that some traditional jurisprudential notions (such as source of law, validity, and norm) have undergone significant changes as a result of this focus on reasoning. In Section Three I argue that a critical revision of these notions impacts directly on the very concept of law and calls for a shift from the idea of law as a product to that of law as an activity. However, it is submitted, thus far only a handful of legal theorists have seen the need to revise the more traditional and widely accepted image of law, and they have been insufficiently coherent in pursuing this reform. So the studies in legal argumentation have hardly yielded anything like a truly innovatory rethinking of the concept of law: a more radical set of implications could (and should) have been drawn from the premise of the centrality and importance of reasoning in law. This supports the conclusion that legal theorists will profit from paying more attention to the argumentative nature of their main object of study, in such a way as will make possible a more satisfactory treatment of this object.

2. Traditional Legal Theory Revisited

Only in the seventies did legal theory begin to address frontally the question of argumentation**[iv]**. But since then, significant results have been attained as several long-standing debates were taken up in a new light. One example illustrating paradigmatically the fruitful contribution given to a traditional debate by the studies in legal reasoning is to be found in the way legal-argumentation theorists have recast Herbert Hart's distinction between easy cases and hard cases.

Hart (1958, 606-615) grounds this distinction on the structure of language. He calls “easy” the cases in which the meaning of the words is so plain that no interpretation is needed and legal rules can be applied straightforwardly. By contrast, “hard” cases arise when “the words are neither obviously applicable, nor obviously ruled out” (Hart ,1958, 607). Here, the rule cannot be applied directly, and an interpretive decision is required to set straight the meaning of the words used by those who have framed the rule. It was Fuller (1958, 661-669) who questioned forcefully the sustainability of a distinction so conceived and the theoretical validity of its linguistic foundations. He argued that Hart grounds his assumptions on the mistaken theory of meaning by which the meaning of a word is largely context-insensitive, making the ordinary usage of language an adequate basis on which to determine that meaning. While Fuller’s criticism seems well-grounded (to a vast part of jurisprudence at least)**[v]**, the issue raised by Hart is anything but futile or pointless: situations are commonly experienced in which the rules seem to dictate of themselves the solution to the case at hand, and no less common are those situations whose outcomes do not appear to flow directly from the literal meaning of the general and abstract rules making up a legal order.

The contribution of legal-argumentation theorists to a better understanding of the problems involved here has been significant. They argue that Hart’s distinction, far from being grounded on the structure of language, reflects the existence of different forms and levels of reasoning: whereas deciding easy cases can be solved simply by first-order reasoning – a form of argumentation that can be reconstructed as deductive – hard cases need “external” justification and second-order arguments, meaning by this a form of reasoning whose premises need further discussion and justification**[vi]**. Second-order reasoning allows greater play for the interpreter’s discretion. Consequently, when a hard case comes up, its decision may be perceived to be less strictly held down by legal texts and by the formal criteria set out in positive laws. As much as external justification may be discretional, it is not necessarily arbitrary or irrational. In no form does legal argumentation depend entirely on acts of will, since it can be given course to by means of rational tools. Moreover, contrary to Hart’s reading, the difference between easy cases and hard cases is in quantity, not in kind: easy cases and hard cases alike require argumentative activities to be settled, but these argumentative activities differ as to the discretionary leeway left to interpreters. There are strong merits to this approach. First, it recasts a debate that was heading for a linguistic cul-de-sac in terms which are more adequate from a theoretical point of

view. Second, it brings to light a new problem to be attacked, namely, the conditions under which discretional argumentation can be rational, or non-arbitrary, even if not entirely bound by pre-existing legal standards. Thus, the present approach shows up the need for a two-pronged analysis, by which we can investigate more deeply the way decisions are made (analytical level) and the way they *ought to* be made (normative level).

These achievement are significant indeed, but they are only part of the story. The most innovative contribution to a better understanding of law offered by legal-argumentation theories consists in their revision of several basic notions in traditional jurisprudence**[vii]**. In what follows, I will sketch how three key concepts of legal theory, namely those of legal source (a), legal validity (b) and legal norm (c), have been critically revisited by those scholars who endorse the view that deliberative reasoning is a necessary component of any juridical undertaking.

(a) In traditional legal literature "source of law" is known to be an ambiguous term, used by and large to designate acts productive of law, meaning the acts by which the substantive content of rules is established. The main sources of law identified by positivistic jurisprudence are international treaties, constitutions, statutes, acts issued by governments, kindred formal normative enactments by other subjects institutionally empowered to produce legal rules, court decisions (or precedent), and customs.

However, when legal argumentation is conceived of as a central feature of ordinary functioning of law, this set of acts will have to be extended. Aware of this consequence, some legal-argumentation theorists have felt the need to expand the traditional notion of a legal source to embrace anything that may be employed in legal reasoning and may contribute to determining the contents of law in concrete circumstances. Stated otherwise, the concept of legal source is redefined as "every reason that can – according to the generally accepted rules of the legal community – be used as the justificatory basis of the interpretation"**[viii]**. Consequently, we can qualify as sources of law some items that traditionally are not deemed such, examples being draft statutes, legislative preparatory materials, judicial arguments used in precedents, juristic literature, general principles and moral values presupposed by legal interpretation**[ix]**.

This is not to say, however, that all sources carry equal weight. There are various

kinds of legal source and they differ as to their binding force**[x]**, institutional foundation**[xi]**, and hierarchical importance**[xii]**: rules, principles, customs, arguments, values, and doctrinal opinions play different roles in determining the contents of legal decisions, and each is brought to bear to a different extent. Therefore, expanding the catalogue of legal sources does not amount to accepting the sceptical thesis that interpreters are free to decide cases arbitrarily. Rather, by this expansion we underline the structural complexity of law and acknowledge that the relationships between legal sources are only seemingly prefixed.

(b) The concept of legal validity is another notion requiring to be critically reconsidered once the recognition is made that the activities of reasoning and argumentation are integral part to the law's domain. According to the positivistic view, validity has to do with the observance of prefixed procedures by authorities having appropriate competence: valid legal orders exist in so far they meet certain procedural criteria. By contrast, in a perspective aware of the role played by argumentation in law, enactment by a competent authority may be a necessary condition for a rule to be valid, but hardly a sufficient condition. Apparently, the validity of laws cannot derive solely from their provenience. If laws are to be valid, they will also have to be rationally arguable from the legal system as a whole. To put it otherwise, the mere enactment of a rule by the competent authority is only a *prima facie* reason for its validity and binding force. The *all-things-considered* validity of law – the only legal validity properly so called – depends, too, on whether this rule can be derived by argumentation from the other parts and the general principles of the legal system.

This claim results in large part from a pairing of two view: that reasoning plays a central role in the legal domain, and that legal reasoning has to follow given forms and rational criteria if it is to be legitimate and acceptable. In other words, if argumentation – a major component of law – has to be reasonable, then this feature transfers over the law, and the law will be found to be, among other things, a *product* of interpretive *rationality*. It follows from this that the validity of law is a complex notion, a balanced mixture of will, social effectiveness and reasonableness. Thus, an approach to law which takes argumentation in due account will uphold the thesis that the validity of rules depends not only on the rules' authoritative enactment and social effectiveness, but also on their reasonableness, or rational acceptability**[xiii]**. This appreciation amounts to a radical negation of the positivistic idea that laws are merely acts of will, and

hence announces a radical revision of traditional legal thought.

These changes in the concept of validity also call to account the positivistic distinction between moral, i.e. extra-legal, and legal discourses. The existence of a conceptual distinction between law and morality, espoused by positivistic jurisprudence, is bound to wear away in a consistent argumentative perspective. A great deal of evaluation goes into such acts of reasoning as constructing the rule of law, interpreting norms, weighing principles, and putting forward justifications, to name but a few of the commonest forms of legal argumentation. In these form of reasoning the judgements put forth will necessarily be making reference to extra-legal arguments. This being so, we will have to recognise that a conceptually necessary connection exists between law and morality: the two are only partially separated, autonomous and independent and reveal significant structural and substantive overlapping**[xiv]**. Hence, the thesis that the validity of laws depends on reasonableness (among other things), coupled with the idea that argumentation is a central feature of the legal domain, makes it necessary to recognise that there exists a conceptual link between law and morality. As Alexy (2000, 138) puts it, "law consists of more than the pure facticity of power, orders backed by threats, habit, or organized coercion. Its nature comprises not only a factual or real side, but also a critical or ideal dimension"**[xv]**.

(c) Finally, when argumentation is taken seriously into account, the notion of norm, traditionally equated with that of rule, likewise undergoes significant conceptual changes. It is a settled acquisition of studies in legal reasoning that rules are not the only inhabitants or even the most important inhabitants of the normative world. Not only rules constitute the law, but also normative standards (quite different from rules) that operate in close conjunction with argumentative practices. These standards are generic and vague enough to support the claim that their real meaning can be determined only when reasoning out and deciding a concrete case. In other words, to work out which of these standards applies to a legal case – i.e. to determine the content and scope of these standards – we are required to go through an argumentative procedure that has us balance and weigh them by taking account of the factual situation and the legal possibilities involved. Therefore, some normative standards depend for their contents not only on the textual wording in which they are framed, but also on the procedure by which we apply them. Such standards are commonly labelled "general principles of law". They are worthy of the same consideration accorded to rules, since they

are as much a necessary component of a legal order as rules are, and they too play a role in determining the overall features of law. For these reasons, it seems advisable to use the term "norm" for both rules and principles, in a theoretical pairing where "norm" designates a *genus* comprising two *species*: rules and principles**[xvi]**. This way the notion of norm expands to embrace standards other than general and abstract rules.

In this newer meaning, the notion of norm is understood to be semantic rather than syntactic. On the semantic conception, a norm does not identify with the text issued by the legislator, but with the meaning or meanings ascribed to a prescriptive expression: a norm is the outcome of legal interpretation (Alexy, 1993, 50-55). This semantic notion of norm results directly from the stress placed on the role of argumentation in law. The idea that the text setting out a norm is only the beginning of a story – the end and most significant development of it being the reasoning by which it proceeds – originates from the thesis that posited norms are not simply understood and described, but are "manipulated" by lawyers and by judges in the course of legal reasoning. In other terms, because interpretative issue are involved in the identification and the use of norms, it is not the posited prescriptive statement, but its meaning – the interpreted norm – which becomes the focus of legal studies.

3. The Concept of Law

In the previous section I outlined the main theoretical implications of the thesis that law is deeply influenced by argumentation. On the face of it, this thesis may strike one as an inconsequential truism, but when taken seriously and pursued in full, it calls on us to recast some basic concepts that lawyers have long been using. Some legal-argumentation theorists have made the point already, but have fallen short of grasping all of what this thesis implies (not only for some specific legal issues, but also) for the concept of law as a whole. This final part of the paper is mainly devoted to arguing that the centrality of argumentation in law, and the consequent changes occurring in some fundamental notions of traditional jurisprudence, compels us to make over the concept of law.

The full scope of the thesis that reasoning affects the ordinary functioning of legal systems will perhaps prove easier to appreciate in this rephrasing of the thesis: legal norms cannot be followed without resorting to deliberative argumentation**[xvii]**. As a result, legal reasoning too (and not just the rules) can be argued to contribute significantly to shaping the contents, structures and

boundaries of legal orders. This is to say that reasoning, in addition to affecting specific stages in the development of a legal system, impacts incisively on the features of law as a whole. The focus on argumentation in law makes it possible to appreciate the reasoning that legal subjects engage in when seeking out appropriate solutions to concrete cases, and this reasoning is no less central to the meaning and nature of law than are the general and abstract rules making up a legal order: argumentation is part and parcel of the legal order, not something external to it. Otherwise said, law consists, in the main, of argumentative and interpretative activities which take place at different levels and are carried out by different subjects. On this ground, reasoning should be considered a defining element of law.

This view, under which the law is influenced by reasoning and by modes of argumentation, carries with it a change in the idea of law itself: the underlying argumentative processes are not only central to legal practice, they make up the bare bones of the very concept of law. Accordingly, the law is not a product – something clearly marked off from non-law and independent of the reasoning by which we come to be aware of what the law is – but rather a practice, a stream of activities. This approach constructs the law as the outcome of reasoning, as an argumentative social practice aimed at finding reasonable solutions to legal cases in a number of ways and not necessarily only by following posited rules that are general and abstract. The law is a set of activities that connect up with rules but go beyond them; it is a flux of reconstructive processes by which we manipulate, transform and determine the contents, reciprocal relationships, and applicative scope of norms. This is to say that law is a dynamic articulation of defeasible reasons, a trial-and-error process aimed at finding a right solution to the case at hand, an effort – only partly institutionalised – to seek justice, not only control and certainty. If so, law is to be conceived mainly as a reasonable enterprise shaped by legal conflicts, disputes, clashes of opinions and conflicting values. On this view, a legal system cannot de defined entirely before the argumentative activities by which it takes shape: the legal order does not precede, but rather follows, the argumentative activities carried out by judges, lawyers and legal scholars. Therefore, when argumentation is taken seriously the system of laws is to be understood as a dynamic ordering rich in potentialities, an order constantly in process and open to external influences, a set of premises to be developed by argumentation.

The upshot of these remarks is that the traditional image of law as a unitary system of posited rules is disbanded. Law cannot be presented as a stable order grounded on the existence of an impartial, neutral, authority, in the manner of traditional jurisprudence. Likewise disqualified is the conception of law as an objective entity, a finite set of social facts that can be identified and brought back to unity without resorting to complex, deliberative, and evaluative forms of reasoning. Law cannot be conceived of as an autonomous system clearly marked off from non-legal or extra-legal realms; it cannot be identified on the basis of variously elaborate formal criteria of recognition; it does not consist mainly of the rules (the finite number of them that varies over time) enacted by institutionally identifiable powers; finally, it is not to be understood as a plain fact, a fixed and predefined reality. Reassuring and comfortable as this set of images of law may be, it is false and deeply misleading because it is grounded on a misunderstanding of the role played by argumentation**[xviii]**.

This transformation of the concept of law opens up a completely new research programme for legal theorists, calling on them to redirect the focus of jurisprudence and flesh out an argumentative concept of law, in a joint undertaking that will bring to bear the efforts of legal scholars, argumentation theorists, epistemologists and moral philosophers. With contributions from researchers having such diverse theoretical backgrounds and scientific knowledge, we may just be able to develop a comprehensive theory of law with which to understand current legal systems – their fundamental traits and the changes they have undergone with the state's constitutional evolution – and to attack the problems attendant on them.

As the reader may well know, a leading group of legal theorists set out in the 1980s to arrive at an integral doctrine of law informed by such an ideal**[xix]**, but the research programme they laid out was brought up short at some point and failed to meet expectations. This shortfall, I believe, cannot be accounted for by pointing out any conceptual mistakes made by the original proponents: the fault does not lie with the concept of law as an argumentative practice, but rather with the insufficient coherence with which these legal theorists pursued this ideal. More to the point, they figured it enough to reform specific legal notions and so did not recast the concept of law in general, in such a way as would have made it possible to accommodate fully the element of reasoning in law.

To be sure, there have been a few attempts to question the traditional concept of

law and redefine law as an argumentative practice. The most well-rounded of these are Robert Alexy's and Ronald Dworkin's. To make due allowance for the conceptual scope of reasoning, Alexy (1992, 201) has redefined law as a "system of norms that 1) lays a claim to correctness; and 2) contains norms of two kinds: norms set forth in a constitution – a largely effective and not extremely unjust constitution – and norms enacted in conformance with constitutional directives and likewise effective, or at least workable. Figuring in the latter group are principles and normative arguments designed to ground applicative procedures and support the claim to correctness"**[xx]**. In this definition – where the law is made to consist, not only of rules, but also of principles, arguments, applicative procedures and a claim to correctness – Alexy presents us with different kinds of norms, with an expanded notion of legal source, with an idea of validity as a balance of reason and will, and with the connection thesis. To the extent that it is so, he can be said to have endorsed the assumption that argumentation plays a pivotal role in law.

In a similar vein, Dworkin (1986, 410) writes that "law is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is". Here, the law is made out to be primarily a practice: "law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theatre of behaviour. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or power or process. … It is an interpretive, self-reflective attitude addressed to politics in the broadest sense" (Dworkin, 1986, 413). Accordingly, he refuses the thesis that "law exists as a plain fact" and that "what the law is in no way depends on what it should be" (Dworkin, 1986, 7). This way, Dworkin is referring to the existence of different kinds of norms, to a complex notion of validity, and to the thesis that a necessary connection obtains between law and morality.

Innovative as these redefined concepts of law may be, their authors, Alexy and Dworkin, fail to break with traditional jurisprudence and so fall short of paying the attention due to the thesis that argumentation is central to legal practice. So they tend to uncritically follow the research priorities and main issues set out by traditional legal theory. This much is evidenced paradigmatically in what Alexy has to say about the concept of basic norm and about the traditional canons of legal interpretation: he substantially accepts both, amending them but slightly. As

concerns the basic norm, he finds the concept to be theoretically useful still, once its contents, as Kelsen sets them out, are reformulated to account for the conceptual connection between law and morality. With the traditional canons of legal interpretation, he sets them in a broader normative framework, that of discourse theory, but without questioning any of them. Likewise Dworkin: he does not push through far enough into a coherent argumentative turn, since his potentially innovative statement that law is an interpretive enterprise is couched in a framework where the strong version of the right-answer thesis is upheld**[xxi]**. This thesis presupposes a conception of reasoning as something by which we come to know something objectively. Hence, on Dworkin's view, arguing correctly is not any different conceptually from knowing truthfully, in that both activities are in large measure descriptive and independent from the subjects carrying them out. This analytical perspective – beside being theoretically ungrounded, as MacCormick (1984, 130) rightly observes – defeats the innovative import introduced with the definition of law as an argumentative practice. This last thesis, if coherently developed, asks us to shift from the idea of law as an objective entity, fully defined and out there only to be comprehended, to an idea of law as a slippery activity, as it were, which consists in evaluating reasons and confronting arguments. In this process, the right solution is not *discovered* and *described*, as Dworkin would have it, but *shaped* and *reconstructed*. In other words, law should be considered more akin to an exercise of rational criticism than to an act of knowledge.

To sum up, the revised concepts of law advanced by legal-argumentation theorists (Alexy and Dworkin in particular) is worthy of attention, but insufficiently coherent with the premise that argumentation is central to legal practice: if on the one hand these theorists roughly endorse the basic idea by which reasoning plays a role in law, they do not on the other hand introduce any research programme that can be understood as distinctively different from the traditional programme. But by proceeding thus, the scope of the idea that law is mainly an argumentative practice gets almost completely lost, and the consequent changes in theoretical perspective turn out to be more apparent than real. Such falling short has stunted legal-argumentation theorists' ability to effectively transform positivistic legal theory into a truly comprehensive and integral doctrine. Hence, I would urge that a more radical revision of the concept of law be develop in the near future: this to bring to fruition the valuable insights expressed in the legal-argumentation theorists' original programme, and to complete the transition of

contemporary jurisprudence from a still pervasively legal-positivistic approach to a full-fledged argumentative paradigm of law, such as may mark an improvement over the former paradigm from both an analytical and a normative standpoint.

NOTES

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[i] In this essay, the terms "argumentation" and "reasoning" are employed as synonyms. For a similar use see Dworkin (1986, VI), Alexy (1989a, 231-232; 1996, 66) and MacCormick (1991, 211; 1993, 16).

[ii] Some contemporary legal theorists who have investigated deeply the structure and limits of (rational) reasoning in law are Aulis Aarnio, Robert Alexy, Ronald Dworkin, Neil MacCormick, Aleksander Peczenik and Jerzy Wróblewski. Among contemporary philosophers and argumentation theorists, Jürgen Habermas, Chäim Perelman, Steven Toulmin, and Theodor Viehweg, not to mention the main advocates of the Amsterdam Pragma-dialectical School, have contributed significantly to the development of the studies in legal reasoning.

[iii]For an overview of the main topics addressed at diverse levels of abstraction in the literature on legal reasoning see Feteris (1999, 13-25).

[iv]There are ideological factors explaining why legal theorists have paid attention to argumentation only recently. Legal positivism, the dominant approach to legal questions during the past two centuries, has ideologically depicted reasoning in law as merely a mechanical rule-following, a subsuming of particular facts under general rules. Even when this view was revised in more recent times, it was only to argue that whatever falls outside deductive legal reasoning is totally arbitrary, dependent on the judge's whims and set free from all normative statements. Both of these extreme pictures of argumentation in law are not only fallacious: they also rule out legal reasoning as a subject of rational discussion. For an introduction to these aspects, see La Torre (1998, 357-360).

[v] For a dissenting opinion, see Marmor (1992, 124-154).

[vi] See MacCormick (1994, 19-73). The distinction between internal and external justification is original with Wróblewski (1974, 39), and the main legal-argumentation theorists accept it substantially. The distinction between first-order justification and second-order reasoning is laid out in MacCormick (1994, 100-108).

[vii] As a consequence of the fact that legal positivism has been the dominant approach to legal studies over the latest two centuries, in this essay I will refer to it as the traditional stream of jurisprudence. Therefore, here the terms "positivistic" and "traditional" will be considered largely synonyms.

[viii] Aarnio (1987, 78). Along these lines Peczenik (1989, 318) claims that "all texts, practices etc. a lawyer must, should or may proffer as authority reasons are sources of the law".

[ix] See MacCormick and Weinberger (1986, 8 and 19), Aarnio (1987, 77-107), Peczenik (1989, 313-371), and Alexy (1992, 199-206).

[x] For example, Peczenik (1989, 319-322) draws a distinction between must, should, and may source: must sources are binding source that have to be proffered as authority reasons in support of a decision or a standpoint; should sources are guiding reasons which lawyers as a rule will invoke in support of a standpoint; may sources are permitted sources, meaning that it is possible, but not compulsory, to use them as authority reasons in support of a decision. See also Aarnio (1987, 89-92), and Alexy and Dreier (1991, 91-92).

[xi] By this criterion legal sources are classed as authoritative or substantial: authoritative sources are so regarded because of their institutional position in society, that is, because they have been posited by a competent authority; substantial sources are reasons that figure in justification because of their material significance, regardless to their origin. Cf. Aarnio (1987, 92-95); see also Peczenik (1989, 313-318).

[xii] This is the more traditional distinction, operative in all developed positive legal orders, between sources of different importance. Here, legal sources are distinguished as primary, sub-primary, secondary, reserved etc.

[xiii] See Alexy (1992, 39-44) and MacCormick (1982, 271). This is not to say that these components carry the same weight: the institutional nature of law is such that the positive and the social elements can be argued to be more important than the rational element (Alexy, 1992, 64-70). Still, however much the former may be dominant, they cannot completely overshadow the rational component.

[xiv] These aspects are underlined by MacCormick (1982, 282), Alexy (1989b; 1992, 39-44), and Peczenik (1989, 287-289).

[xv] In other words, the ideal element, meaning the "ought", determines at least to some extent the contents, the "is", of positive law. Here Peczenk (1989, 287) claims that "ought-making facts" should be regarded as "law-making facts". Thus, to embrace this argumentative perspective is to call into question the longstanding positivistic tradition upholding the distinction between what the law

is and what it ought to be. A sustained argumentation for the positivistic position is to be found in Hart (1958).

[xvi] This is not to suggest, however, that principles and rules are conceptually akin. As Dworkin (1978, 22-28), Peczenik (1989, 74-82), and Alexy (1993, 82-86) point out, significant differences exist between these two types of normative standards. Principles are more generic in content than rules because they express values and evaluative programmes, not obligations to act in certain ways. Furthermore, the structure of principles differs from that of rules: while rules are definitive commands, principles are optimisation commands characterised by the dimension of "weight" rather than by that of validity (which is proper of rules).

[xvii] The two formulations of the thesis are conceptually identical, and any differences to be had are differences of emphasis: the first formulation is more general; the latter focuses on a specific consequence strictly entailed by the broader statement. Here, the adjective "deliberative" is to remind that legal argumentation differs radically from the merely mechanical application of rules because the procedures of reasoning in law are partly independent of the rules posited (cf. the premise of this essay).

[xviii] This concept of law, which to a large extent ignores the role played by argumentative activities within a legal system, has been theorised by Hart (1961) and Raz (1972 and 1979, 37-159), among others.

[xix] This programme of research has been expressly set out by Aarnio, Alexy and Peczenik (1981, 131-136).

[xx] My translation.

[xxi] The strong version of the right-answer thesis consists in the idea that for every legal case there exists one correct solution, which judges and lawyers can discover by rational inquiry. This is a two-part thesis: (1) contemporary legal systems are developed enough to provided for one solution (nothing less and nothing more than that) to each questions arising within them; (2) legal scholars and practitioners are in a condition to always ferret out this solution by bringing to bear their professional expertise and rational capabilities, since the right-answer is hidden in law and only needs to be uncovered. For an introduction to the main versions of the right-answer thesis, see Aarnio (1987, 158-161).

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