

Law Department

Theories of Legal Argumentation
and Concepts of Law
An Approximation

MASSIMO LA TORRE

LAW No. 98/1

EUI WORKING PAPERS



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DEPARTMENT OF LAW

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Printed in Italy in March 1998
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy**

Theories of Legal Argumentation and Concepts of Law. An Approximation

by Massimo La Torre

I.

I. 1. Until the Eighteenth century an important place in a lawyer's training was reserved for education in reasoning about the rules or principles of law. This reasoning was indeed understood more as rhetoric, as the art of the orator, as the capacity to exercise persuasion. Nonetheless, the less pragmatic, more formal aspect of legal discourse was not neglected. Little treatises on "legal logic" burgeoned, generally, though not only, applications of Aristotelian logic to the structure of the arguments used in legal dispute¹. And it may be recalled that Vico was teacher of rhetoric, *professor eloquentiae*, in the law faculty of Naples University, though as we know he never succeeded, to his great vexation, in landing a post teaching civil law. Rhetoric was, however, a qualifying subject at the time in the curriculum of the law student.

Everything changed in a way I do not hesitate to term dramatic with the assertion of Enlightenment ideology and the great codifications, especially the French one, since the Prussian one was still very indulgent towards the corporative social structure and plurality of legal orders handed down by the class State, and the Austrian one still left ample room open for so-called natural reason, i.e. assessment in accordance with extra-positive principles (recall in this connection Article Seven of the ABGB, the 1811 Austrian civil code, written by Franz von Zeiller, a Kantian jurist much criticized for his "philosophical" attitude by the historicist Friedrich Carl von Savigny). It was, then, the French codification and the Enlightenment ideology it was nourished on that, so to speak, made the difference.

This is not the place to dwell on the history of the French codification and its difficult gestation, on the drafts by Cambacérès and Portalis. Suffice it to recall that thanks to elimination of the original Article Nine in the Portalis Draft, which provided for recourse to equity where the law was silent, the dogma of the completeness of the legal

¹ See e.g. C. REGNERI, *Demonstratio logicae verae iuridica* (1638), ed. by G. Kalinowski, Bologna 1986.

system was asserted². Nor should it be forgotten that in 1793 the Convention had decreed the abolition of the Law Faculty, an extreme manifestation of suspicion of the jurist as interpreter ("traduttore traditore") of the law, and of maximal trust in the clearness and exhaustiveness of the legislator's work.

Note that when speaking of the legal system in Enlightenment, legal positivist language, what is meant is exclusively the set of statutes explicitly issued by the legislative authority, that is, by the representative of popular sovereignty. The order's completeness here means, then, completeness of the system of laws. Put in other words, the Enlightenment and the Napoleonic codification marked a move from a theory of law centred on arguments, however heterogeneous, frequently mutually contradictory and unsystematized, to a theory of law centred round the notion of source. What made headway was what a British scholar, Joseph Raz, has called "source theory"³, and Ronald Dworkin has termed "conventionalism"⁴.

But if there is a source, some sort of fact, from which the law springs, its application becomes primarily a question of finding the source itself. The judge's role is thus conceived -- in line with Enlightenment suspicion of the figure of the judge and desire to make it the mere "mouthpiece of the law" -- as that of a sort of natural scientist. In this perspective the judge's activity becomes eminently cognitive; he is regarded as using theoretical reason, not practical reason, that is, "descriptive" statements, not prescriptive evaluations. It was believed that the judge should operate solely in syllogistic fashion, with as major premise rigorously the law, and as minor premise the fact, the conclusion being the verdict⁵.

So strong was the model of the syllogism⁶ -- a syllogism, I repeat, seen essentially as a purely cognitive operation -- that the

² See N. BOBBIO, *Il positivismo giuridico*, 2nd ed., Torino 1979, pp. 79 ff.

³ See J. RAZ, *The Authority of Law*, Oxford 1979, chapter 3, and J. Raz, *On the Autonomy of Legal Reasoning*, in "Ratio Juris", pp. 1 ff. Vol. 5 (1992).

⁴ See R. DWORKIN, *Law's Empire*, II ed., London 1986, pp. 14 ff.

⁵ Read the famous fourth chapter of Cesare Beccaria's "Of Crimes and Punishments". For German doctrine on the subject, at any rate as far as last century goes, see R. OGOREK, *Richterkönig oder Subsumptionsautomat? Zur Justiztheorie im 19. Jahrhundert*, Frankfurt am Main 1986, passim.

⁶ On this see L. GIANFORMAGGIO, *Modelli di ragionamento giuridico. Modello deduttivo, modello induttivo, modello retorico*, in *La teoria generale del diritto*.

separation of powers itself and the rule of law were conceived of as a consequence of the model. Kant, but Condorcet before him too, affirm that judicial power is to legislative power as the conclusion of a syllogism is to its major premise⁷. The novelty in this model is however not so much the importance given the syllogism. That is something not even such a confused, lax jurist as Manzoni's Azzecagarbugli could do without. Use of the syllogism is in a certain sense a platitude. To speak is already to function syllogistically, at least where a term with an inevitably general extension -- a meaning -- is applied to a specific object, thus denoting the latter through the term. (If I call this table "table", I am operating syllogistically with the term "table", reaching the conclusion of designating the object in front of me as "table").

It is not, then, the syllogism as such that is the novelty in the Enlightenment and legal-positivist model. The novelty lies in what it is held ought to constitute the major premise of the syllogism, and in the qualities attributed to it. The major premise is the law, and this is already regarded as clear, its meaning as evident, as unambiguously given by the letter of the law itself. The novelty lies further in the epistemological, let us say, quality attributed to the judicial syllogism: it is conceived of as an essentially cognitive operation, as a theoretical rather than practical syllogism. Very suggestive in this connection is a passage from one of the founding fathers of legal positivist dogmatics, Paul Laband : "Die rechtliche Entscheidung besteht in der Subsumtion eines gegebenen Tatbestandes unter das geltende Recht, sie ist wie jeder logische Schluß vom Willen unabhängig; es besteht keine Freiheit der Entschlieûung, ob die Folgerung eintreten soll oder nicht; sie ergibt sich - wie man sagt - von selbst, mit innerer Notwendigkeit"⁸.

I. 2. At this point I feel it needful to mention one fundamental distinction in philosophy and theory of knowledge: between theoretical rationality and practical rationality, or, if you will, between two different models of reason. Very approximately, we may say that theoretical reason is the set of arguments that justify descriptive

Problemi e tendenze attuali (Studi dedicati a Norberto Bobbio), ed. by U. Scarpelli, Milano 1983, pp 131 ff.

⁷ Read I. KANT, *Metaphysische Anfangsgründe der Rechtslehre, Metaphysik der Sitten*, Erster Teil, ed. by B. Ludwig, Hamburg 1986, § 45, p. 129.

⁸ P. LABAND, *Das Staatsrecht des Deutschen Reiches*, Vol. 2, Tübingen 1911, p. 178.

statements, assertions about states of affairs. Practical reason consists instead of a set of arguments that justify prescriptive or normative statements, preferences, value judgements or norms. This distinction obviously has meaning only if it is assumed that descriptive and normative statements are not semantically and epistemologically homologous; that is, if it is assumed that the meaning and rightness of a value statement are not deducible from the meaning and rightness of a descriptive statement, and vice versa.

Theoretical or descriptive reason or rationality can be reduced to two series of arguments: (a) the basically deductive formal ones, founded on certain principles and logical operations; (b) the material ones, basically inductive, founded on empirical observations and data from experience. Formal arguments serve to develop material or substantive arguments. They are, then, auxiliary in relation to the latter. This means that theoretical rationality, at least in the sphere of empirical knowledge, is fundamentally based on experiential data. Within the province of the so-called formal sciences, mathematics for instance, one might by contrast do without such experiential data or observational situations of empirical events. Here, principles and logical operations suffice.

But practical reason, the reason that justifies value judgements or deontic statements, does not precisely coincide with theoretical reason. This is because experiential data and logical operations are not enough to supply us with indications of preference and guides to action. There is a need for a further type of premise, for criteria or normative principles.

Having clarified the sense in which I use the terms "theoretical reason" and "practical reason", I shall now move to the conclusion of this first section. We have seen that it was with codifications and legal positivism that the syllogistic model, or better a theory of law centred around the notion of source, became what dominated legal epistemology on the European continent. But in the last few decades this model has, after a century of ups and downs, fallen into deep crisis. This is motivated by two principal factors: (i) one eminent theoretical, (ii) the other more contingent and historical.

(i) The great theoretical problem with what I here for brevity's sake call the "syllogistic model" is that it does not fit the reality of the operations done by the judge in applying the law. The law cannot be applied mechanically, above all because it is never absolutely clear.

What is applied is instead a provision of law which is often constructed by gathering, combining and breaking down various legal texts⁹, and reconstructed by attributing a meaning to these materials. These accordingly have to be interpreted, and handled logically.

Then comes the fact to apply the law to. This has to be regarded as legally relevant. This is a decision that cannot be derived simply from applying the law to the fact, since the reconstruction or indeed construction of the legally relevant fact often precedes consideration of what provision is appropriate to the facts. A legally relevant fact is something more than an empirical fact.

But the decisive problem that explains why the syllogistic model is (theoretically) in crisis is that even where a clear provision is available, appropriate to the case under consideration, and the factual elements have been adequately classified and tested, it is not always possible to reach a single correct answer. The syllogism allows various conclusions, all formally (logically and legally) correct. For the norms, from their generality and abstractness, often lend themselves to multiple concrete manifestations. On the other hand, it is hard to be sure that all the factual circumstances relevant for constructing the minor premise have been brought into consideration. These difficulties worsen still further in those legislations, like our contemporary ones, where special laws abound, and codifications take on even the character of residual or auxiliary provisions, in which moral and political principles are explicitly adopted in constitutions and other legal documents.

(ii) The syllogistic model further faces more contingent problems deriving from the evolution of contemporary legal systems. Two aspects of this evolution have just been mentioned: the proliferation of ad hoc statutes, the so-called "motorization of legislation", and the move from the rule of law in which the "fundamental" is the principle of legality and hence the reservation of law (for some areas like individual "rights"), to the constitutional State, in which rights are taken to be a "material" hierarchically superior to the law, and the principle of equality before the law is reinterpreted as a principle of reasonableness or substantive rationality¹⁰.

⁹ See what is written in this connection by G. TARELLO, *L'interpretazione della legge*, Milano 1980, pp.31-32.

¹⁰ In this connection I wish to recall the words of an outstanding jurist, the late lamented Francisco Tomás y Valiente, judge of the first constitutional court of

In this context of problems the most important crisis factor is undoubtedly the growing mass-juridification of our legal systems, in turn a response to the growing decline of the law. The latter, understood as a general norm and abstract rational expression motivated by a legitimate instance of popular sovereignty, is in deep crisis. This is so because it is no longer so general and abstract, but increasingly particular and concrete, an ad hoc law or "mini-law". And it is increasingly less justified and rational because the instance producing it has lost much of its legitimacy because of its inability to pursue the general interest in transparent fashion. We are seeing what has been called the "juridification" of social life, or also, in Habermas's words, the "colonization of the life-world", but this over-production of laws and decrees, this instrumental and "situational" use of law, does not do any good to the legislator's prestige. The mass production of laws necessarily escapes discussion of principles or pondered public debate, obeying instead more corporative, not to say clientelist, logics. The "public reason" thus driven out of legislative assemblies is often transferred to courtrooms, and democracy -- in order to escape the corrupt and corrupting logics of part clientelism and technobureaucratic opacity -- tends to become, so to speak, "judicial"¹¹.

It is today the judge that is put forward as the new centre of the legal system, no longer the legislative power, like it or not. And in the judge's view central importance inevitably attaches to the procedure whereby the decision is arrived at. Here, the law is not enough, other criteria of choice have to be resorted to.

democratic Spain: "Legal reason is the projection of practical reason. It never operates in a vacuum. It proceeds from a universe of values, principles and concepts developed in positive law and seeks to solve problems posed by the interpretation of norms (the supreme one being the Constitution) or by the doubtful classification of individual situations arising in social reality in the framework of the normative system. The constitutional judge has to solve problems that in the last analysis consist in a conflict among various ways of understanding and applying the Constitution. The Court, as constitutional organ of the State, solves political problems through legal argument: it is legal reason that is its instrument, not the reason of (or of the) State, or of the Government or of this or that party" (F. TOMAS Y VALIENTE, *A orillas del Estado*, Madrid 1996, p. 266).

¹¹ For a comparative perspective on this phenomenon see C. GUARNIERI, P. PEDERZOLI, *La democrazia giudiziaria*, Bologna 1997.

Also to be stressed is the growing part played by constitutional law in many democratic systems. But constitutional law by its nature operates not so much with laws as with principles and with rights. These are often balanced using argumentative operations that are more complex than a mere either-or. Constitutional justice, in order to justify its own decisions, must then use argumentative strategies much more highly structured than in the syllogistic model¹².

Moreover, in the presence of the possibility of constitutional review of a law, it may also be considered that over and above the differences between centralized and diffused systems, every judge (whatever be the organ or instance he belongs to), insofar as he may accept a finding of unconstitutionality, or ask for it to be made, assumes a power of assessing the constitutionality of norms, and thus in a way himself becomes a "guardian of the constitution". The argumentative style proper to constitutional justice consequently spreads throughout the whole judicial system. Here, then, is a further reason for the rebirth and the prospering of theories of legal reasoning turned towards determining a broad spectrum of criteria for the rightness of a judicial decision.

II.

II. 1. Since the Second World War, two pieces of research have foreshadowed the new theories of legal reasoning: (A) Theodor Viehweg's *topica* and (B) Chaim Perelman's "*nouvelle rhétorique*".

(A) There are three main ways in which *topica* may be understood: (a) as a technique of searching for premises in practical discourse, in discourse directed towards taking a decision, in which, accordingly, legal discourse would only be one element; (b) as a theory of the content of the premises of practical discourse; (c) finally, as a theory of the use of those premises. In the first case *topica* suggests collecting and classifying the various types of argument used in legal discourse, so as to arrive at a sort of catalogue of *topoi*. These, as Alexy rightly notes¹³, are however fairly inhomogeneous: ranging from

¹² For the Italian case see R. BIN, *Diritti e argomenti*, Milano 1992.

¹³ See R. ALEXY, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, 2nd ed., Frankfurt am main 1991, pp.39 ff. Cf. also J. A. GARCIA AMADO, *Teorías de la tónica jurídica*, Madrid 1988, pp. 364-365.

principles like *lex posterior derogat priori* to the interpretative technique of referring back, say, to the legislator's intentions.

From the viewpoint of the theory of the content of the premises of practical discourse, *topica* denies that they can be true or false, and trusts to the concept of likelihood or plausibility. As a theory of the use of premises in practical legal discourse, *topica* prescribes the rule of considering the various viewpoints, and is based on the principle that debate is "*die einzige Kontrollinstanz*", the sole check on the correctness of decisions.

Topica, just as is the case with rhetoric, concentrates too much on the pragmatic side, on the effects or "results" of reasoning. Putting it better, while rhetoric is a technique aimed at reaching certain effects on an audience, namely persuading it, *topica* is a technique directed to securing particular results on the speaker: the finding by him of the arguments he needs. *Topica* is, then, oriented to the conduct of the orator, viz. whoever has to or wishes to put forward or articulate a discourse or an argument, that is, the utterer of a linguistic communication, partly irrespective of the presence or reactions of his audience, or of the recipients of the message. What matters -- at least in *topica* as developed starting from Cicero's work -- is that the speaker should in fact have at his disposal the arguments, whatever be their value (truth or rightness): just as rhetoric is basically interested in the orator's actually persuading his audience, irrespective of the formal quality of his theses. Thus, *topica* ends up being hard to deal with from a viewpoint of logic and argumentation¹⁴, and is reduced to a sort of apology for the orator, just as rhetoric often degenerates into a sort of audience psychology.

Moreover, *topica*, by starting from *topoi*, from generally accepted "commonplaces", before any further epistemological check on their content, risks becoming a bearer in the theoretical and normative sphere of traditional concepts without reflexive verification, and hence of prejudices¹⁵, and in the artistic sphere of ideas of no originality at all,

¹⁴ Recall Viehweg's insistency in rejecting the possibility of articulating *topoi* in logical chains: "Lange Folgerungen vertragen sich nicht mit ihrer Funktion, das logische Gewicht der von ihnen aufgebauten Begriffs- oder Satzgefüge bleibt deshalb stets gering" (TH. VIEHWEG, *Topik und Jurisprudenz. Ein Beitrag zur rechtswissenschaftlichen Grundlagenforschung*, 5th ed., München 1974, p.38),

¹⁵ Something closer to *topica* is, accordingly, the hermeneutic proposal of someone like Gadamer, so proud of rehabilitating -- against the Enlightenment --

of canons, not just outwith the artist's creativity and inventiveness, but even often incompatible with them. It is certainly no coincidence that the term "commonplace" has taken on a highly negative coloration in the last few centuries.

"Topics", in the version sketched out by Viehweg, nonetheless has two important merits. The first is that of subjecting to criticism the traditional mode of procedure of so-called legal science based on "institutes", in short, on a doubtful ontology, on an essentialism according to which there are, behind legal concepts, substances that the lawyer can "distil" and then "combine" anew. "Denn hier werden sehr häufig Produkte der Rechtssprache als außersprachliche, von der Rechtssprache lediglich abgebildete Gegenstände vorgestellt. Auf diese Weise schuf man zuweilen selbständige Gegenstandsfelder, die das Rechtsdenken anzutreffen vermeinte und dementsprechend beschrieb, obgleich es sie selbst herstellte. In der deutschen Jurisprudenz hat der geniale Ihering die krassesten Exempel dieser Art geliefert"¹⁶. It is this criticism, more or less explicit, that sparked off the recent argumentative revolution in legal knowledge, which prefers to speak of "arguments" and "reasons" rather than of "sources", and of "principles" rather than of "institutes". This is, if you wish, the revenge of "philosophers" like Franz von Zeiller over "historians" like Friedrich Carl von Savigny. The other merit is that of stressing the procedure of balancing, of "pros and cons", as typical of practical reasoning and of legal reasoning in particular.

(B) Much more articulate is Chaim Perelman's theory. After an initial period when he defended rigidly non-cognitivist metaethical postulates, and trusted in order to "test" the rationality of practical decisions purely to formal justice, summarized in the principle of treating like cases alike, he then sought, starting from the ancient tradition, to reconstruct techniques enabling us to go beyond the determination of dissent, the sole end-point of radical non-cognitivism. This gave birth to the "new rhetoric". It too, like topics, starts from the Aristotelian idea of *endoxa*, that is, the thesis that the premises of

the notion of "prejudice": see GADAMER, *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*, 6th ed., Tübingen 1990, pp. 281 ff.; on this see Jürgen Habermas's critical observations in the third chapter of his *Zur Logik der Sozialwissenschaften* (see J. HABERMAS, *Zur Logik der Sozialwissenschaften*, 5th enlarged ed., Frankfurt am Main 1982, pp. 271 ff.).

¹⁶ TH. VIEHWEG, *Topik und Jurisprudenz*, 5th ed., pp. 113-114.

practical discourse can be founded only on probable or likely statements, or ones accepted by general opinion.

In Perelman too, as in Viehweg, it is discussion as such that is the founding element of practical argumentation. Perelman's theory is, however, more articulated than Viehweg's. In particular, it escapes the latter's typical defect of being insufficiently analytic in reconstructing arguments.

Perelman starts from a close critique of the dominant doctrine in both philosophical and legal spheres, which tends to equate theoretical reason and practical reason, that is, to deny the independence of the latter and reduce it to the former. His explicitly polemical objective is the "conception of reason and of reasoning born with Descartes, which has marked the last three centuries of Western philosophy"¹⁷, and conceives reasoning as a binding discursive procedure.

Perelman's Leitmotiv is that formal logic is incapable of yielding fruit in practical reason, and that nonetheless there is a practical reasoning distinct from the theoretical discourse of the scientist. It is a discourse equipped with its own internal rationality criteria, in no way condemned to decisionism or reduced to a mere beating of fists on tables, as authoritative representatives of logical neopositivism and of analytical philosophy try to make out, in the sphere of legal theory too (e.g., Alf Ross¹⁸).

Perelman's basic concept is that of the audience. The audience is the set of subjects that the speaker wishes to influence by his argumentation. The object of argumentation is to secure audience support for the speaker's theses. Accordingly, rhetoric "has as its object the study of discursive techniques likely to promote or enhance the acceptance by minds of theses offered for their assent"¹⁹.

The audience is accordingly decisive in characterizing an argument. "The notion of audience is central in rhetoric. For a discourse cannot be effective unless it is adapted to the audience that is to be persuaded or convinced²⁰. An argument may be convincing or not,

¹⁷ CH. PERELMAN, L. OLBRECHTS-TYTECA, *La nouvelle rhétorique. Traité de l'argumentation*, Vol. 1, Paris 1958, p. 1.

¹⁸ See A. ROSS, *On Law and Justice*, London 1958, p. 274.

¹⁹ CH. PERELMAN, *Logique juridique. Nouvelle rhétorique*, Paris 1976, p. 105. See L. GIANFORMAGGIO, *La nuova retorica di Perelman*, in *Discorso e retorica*, ed. by C. Pontecorvo, Torino 1981, pp. 110 ff.

²⁰ CH. PERELMAN, *op. ult. cit.*, p. 107.

depending on the audience it is addressed to. This, according to Perelman, implies that the fundamental rule of argumentation is suitability of the discourse to the audience, whatever that be.

Put this way, it would seem that Perelman's theory is nothing but a strategic theory of argumentation aimed at securing consensus irrespective of the quality of the thesis under discussion and of the arguments employed. But it is not always so. For Perelman, in fact, the criterion of the rationality and objectivity of all argument lies not in support from a specific audience, as expression of a given situation, but only in acceptance by the universal audience.

Perelman, however, as Alexy notes²¹, is ambiguous on the composition of this audience. Initially, in his 1958 *Traité de l'argumentation*, he states that the universality of the audience is only that of a particular community or historical culture and in any case depends on the speaker's psychological representations. Subsequently, the Belgian scholar seems instead to maintain that the universal audience consists of all rational beings, of all human beings, or still more simply, of all²².

Equally, while in the 1958 treatise he maintained that it was persuasion (of the audience) that was the criterion of the rationality of argument, in subsequent works he has distinguished clearly between persuasion and conviction. Now it would seem to be conviction rather than persuasion that is the criterion for argumentative rationality. On this last view, not every effective argument (which persuades a certain local audience) is also valid (convinces the universal audience). "It will, then, be said that appeal is made to reason, using convincing arguments that should be accepted by any reasoning being"²³. Nonetheless, later on Perelman takes care to specify that the audience is defined "instead, as the whole set of those at whom the effort of persuasion is directed"²⁴. One may, thus, address oneself to various audiences. The universal one is the audience only for the philosopher; the jurist by contrast has to refer to a specific context and a specific social community²⁵.

²¹ See R. ALEXY, *Theorie der juristischen Argumentation*, pp. 203 ff.

²² None can fail to note the closeness of the idea of "universal audience" to Peirce's one of a "community without definite limits, capable of an indefinite increment of knowledge" (C. S. PEIRCE, *Collected Papers*, Vol. 5, p. 311).

²³ CH. PERELMAN, *op. ult. cit.*, p. 107.

²⁴ *Ibid.*, p. 122.

²⁵ See *ibid.*, p. 123.

Perelman has also denied that the argumentative model he sketches out is necessarily monological. The "new rhetoric" he proposes would not, then, exclude dialogical argument, and thus the exchange of roles between speaker and audience, and a conception of impartiality and formal justice no longer based solely on the generality or universality of the speaker's statements, but also on the possibility for the audience to require reasons of the speaker, and hence to change from mere passive recipient of the message into active participant in a discourse²⁶.

II. 2. Viehweg's and Perelman's pioneering work has more recently been followed by reconstructions or proposals for models of legal reasoning. The latter are, by comparison with these first two attempts, marked by greater trust in the resources of formal logic, or else less suspicion of theoretical reason. While in Perelman and in Viehweg one sometimes notes a certain antirationalist pathos²⁷, this is no longer the case for the major contemporary theories of legal reasoning, both MacCormick's and Alexy's and Ronald Dworkin's; the first two being undoubtedly more formalist, the last more "communitarian", or if you wish antiformalist.

Behind the syllogistic model of legal reasoning there is in general, maintains MacCormick, the "validity thesis". The Scots scholar puts this as follows: "Legal systems have criteria, sustained by 'acceptance' in the society, satisfaction of which is at least presumptively sufficient for the existence of a rule as a 'valid system' of the system"²⁸. These criteria in essence correspond to what H. L. A. Hart calls "recognition norms", norms that supply us with criteria whereby we "recognize" the other norms as forming part of a particular legal order and hence as valid. Yet the "recognition norm" too has to be "recognized", in a different sense from the one in which the other norms may be said to be

²⁶ See CH. PERELMAN, *Cinq leçons sur la justice*, in idem, *Droit, morale et philosophie*, Paris 1968, p. 54.

²⁷ For instance when Viehweg rules out the possibility of topics having anything to do with the syllogistic model, or in general with deductions of a formal-logical nature: "Die Topik ist eine von der Rhetorik entwickelte Techne des Problem Denkens. Sie entfaltet ein geistiges Gefüge, das sich bis in Einzelheiten hinein eindeutig von einem deduktiv-systematischen unterscheidet" (TH. VIEHWEG, *Topik und Jurisprudenz*, V ed., cit. p. 14).

²⁸ N. MACCORMICK, *Legal Theory and Legal Reasoning*, Oxford 1978, p. 62.

recognized as valid: it must namely, to be "recognized" as such, first and foremost be effective, de facto observed and applied. Yet this is sufficient only from a purely external viewpoint, say that of an ethnologist studying the norms of a particular community and seeking to offer a survey of them. From the internal viewpoint, of someone operating within the legal system for which a particular norm is the "recognition norm", the ascertainment or "recognition" of its being "recognized", viz. practised and observed as "recognition norm", is not enough. Since this norm has to justify other norms and ultimately practices, it has to possess such a normative character as to justify ought statements: that is, it must be legitimate.

To be such, the "recognition norm", continues MacCormick, has to be screened against reasons like: (i) it is good for legal decisions to be predictable and hence to adopt objectively or intersubjectively recognizable criteria (hence the "recognition norm"); (ii) it is good for judges to confine themselves to applying the law and not producing it (making law), so as through separation of powers to secure greater guarantees of public and private liberties. And the presence of a recognition norm as a public criterion enables the law and its application to be distinguished. For were the law not objectively recognizable, depending accordingly on the mere interpretation of whoever is applying it²⁹, the distinction between the norm and its application would dissolve, and with it that between legislation (production of norms) and jurisdiction (application of norms). (Not to mention, one might add, the very reason for the existence of the norms: what use could a norm ever be if its meaning were reduced in everything and for everything to the mere act of application?). Only if the norms (and their meanings) pre-exist application can application be separated from the production of the norms themselves and be checkable by reference to them, so that the norms can maintain their function (their main one, if not the only one) of guiding human conduct. A further reason to screen the "recognition norm" against would then be the following: (iii) the constitutional order of which the "recognition norm" is the expression is a just order and therefore to be complied with (along with the norm in question).

²⁹ A position brilliantly defended in Italy by Giovanni Tarello. See G. TARELLO, *Il "problema dell'interpretazione": una formulazione ambigua*, in idem, *Diritto, enunciati, usi. Studi di teoria e metateoria del diritto*, Bologna 1974, pp. 389 ff.

Deductive justification (on the basis of a particular norm taken as "valid") thus comes about within the framework of the legitimacy of a particular institutional order. This, for MacCormick, is a first fundamental limit of the syllogistic model: that for better or worse it has to start from some sort of assumption of a political and normative nature. That is always there in any legal order and in whatever political system.

But in his view there are two other limits present especially in hard cases. The first is that of "interpretation", the second that of "relevance". The norms are expressed through linguistic statements, that is, in order to be communicated and apprehended, they have to be formulated in linguistic expressions. But language is often vague and ambiguous: accordingly, to derive meaning from it it has to be "interpreted". But by syllogism alone, which is nothing but the deduction of a conclusion from a major premise combined with a minor premise, one cannot, where normative syllogisms are concerned (that is those deriving from a norm as the major premise),³⁰ either produce or interpret norms (the major premises). It is to the production of norms that the "validity thesis" is directed, with the associated reference to the legitimacy of the recognition norm. To interpret the norm, assuming that the language is in any case "open-textured", one must have recourse to hermeneutic criteria outside the deductive justificatory model. Assuming that the logical structure of a norm can be reduced to the pattern "if p then q", and that the problem of interpretation means answering the question "what does p mean: p' or p" or even p""?", the problem of "relevance" is to know whether the norm "if p then q" applies, that is, is relevant, to the state of affairs under consideration. In this case, MacCormick goes on, one may ask the question: "Does the law in any way justify a decision in favour of this party against that party in this context?"³¹.

³⁰ There are also those who deny the possibility of the normative syllogism, excluding the applicability of logic to norms. This, as we know, is the case for the "later" Kelsen (see H. Kelsen, *Allgemeine Theorie der Normen*, Wien 1978). On this view one is therefore constrained to deny the very possibility of legal argument, and hence to uphold radically irrationalistic, decisionistic theses. Behind judicial decision there are, on this view, not reasons but motives, sociological, psychological or even physiological causes (say indigestion), unreflexively determining the judge's conduct.

³¹ N. MACCORMICK, *op. cit.*, p. 69.

In the hard cases produced by problems of interpretation and relevance, a first guiding criterion is that of formal justice, according to which like cases must be treated alike, and hence the decision of a case oriented on a general, or universal, or universalizable, criterion. "Any justification of a decision in such areas of dispute must involve the making of a 'ruling' which is (in the strict logical sense) 'universal', or 'generic', even though the parties' own dispute and its facts are irreducibly individual and particular, as must be the order or orders issued to them in termination of the dispute"³². But these "rulings", these general or universal rules, whereby the decision of the hard case is justified, must in turn be justified. We then move on to what the Scots scholar calls "second-order justification". "Second-order justification must therefore involve justifying choices; choices between rival possible rulings. And these are choices to be made within the specific context of a functioning legal system; that context imposes some obvious constraints on the process"³³.

The guiding criteria for this sort of "second-order justification" are basically: (i) "making sense of the perceptible world" and (ii) "making sense within the given legal system"³⁴, that is, the legal principles must at this level be compatible with knowledge of the structures of the empirical world, and be consistent with the set of principles, norms and values that constitute that particular legal order. In particular, "making sense of the world" refers to the consequences that the rules have on reality. The rules active at the "second level" must accordingly be assessed for their consequences.

As far as "making sense within the legal system" goes, this means that the criteria identified must (i) be logically compatible (or not contradictory) with the system's valid norms and (ii) be "consistent" or "congruent" with the general principles and values of the legal system under consideration. "Consistency" or "congruency", "coherence", means that the manifold rules of a legal system must "make sense" if considered as a whole³⁵. This is possible as far as certain specific sets of norms are concerned thanks to rules of a still more general nature (the

³² *Ibid.*, p. 100.

³³ *Ibid.*, p. 101.

³⁴ *Ibid.*, p. 103.

³⁵ See also N. MACCORMICK, *La congruenza nella giustificazione giuridica*, in N. MACCORMICK, O. WEINBERGER, *Il diritto come istituzione*, ed. by M. La Torre, Milano 1990, pp. 335 ff.

"principles"), of which the norms in question can be regarded as representing an emanation. A principle is accordingly the rationalization of a specific norm. The principles then play a twofold role: justification and explanation. "Justification" is when a norm can be subsumed under a principle P, assessed as such as positive or good, so that norm N can consequently likewise be assessed as positive or good. "Explanation" is when there is doubt as to the intrinsic meaning of norm N, and its being subsumed under principle P supplies the key to understanding the meaning of the norm; one application of this mode of procedure is analogy, a very common procedure in legal reasoning.

Neil MacCormick, in short, reconstructs the theory of legal reasoning on the basis of the idea of formal justice. Anyone raising a legal claim in relation to certain circumstances, says MacCormick, and asserting that this claim is legitimate, also implicitly asserts the position that that particular claim is legitimate in any other circumstance similar to the one giving rise to the claim.

The principle of formal justice, that what is equal (in every essential aspect) should be treated equally, is for the Scots scholar the Grundprinzip, the fundamental principle, of legal reasoning. He sees this principle as acting in two directions. In one direction, it is assumed by anyone raising a legal claim, claiming a certain right, for instance; in the other, the principle of formal justice is seen as leading, in legal reasoning, to a principle of still more general scope: the principle of universalizability.

A legal decision will be correct, on this view, only if it is capable of being universalized, that is, can be applied consistently in the future too to similar cases. In this sense every legal decision, even when it has to do with questions of fact, turns round a point of law. The criterion of "coherence" obviously does not rule out the possibility of deductive justification of legal decision. MacCormick accordingly does not question what was earlier called the "syllogistic model". He merely seeks to integrate it, complete it and refine it.

It should further be specified that a decision's capability of being universalizable here represents only a necessary, but not also sufficient, condition for its correctness. In addition to the principle of universalizability, recourse has to be had to consequentialist considerations about the acceptability of the decision itself, that is, its practical consequences for the parties. For MacCormick, however, universalizability and consequentialism have to be combined: a decision

acceptable only to the parties in question but not for all others who might be in the same position, that is, a decision acceptable to the parties in question but inconsistent with the legal order, would, for the Scots scholar, have to be rejected³⁶.

II. 3. Ronald Dworkin identifies three chief conceptions of law. The first two are those he calls "conventionalism" and "pragmatism". Conventionalism is roughly the equivalent of what Raz calls "source theory"³⁷. The fundamental idea here is that there are social conventions that once and for all determine what the law is, and the judge thus merely has to "find" these. Nonetheless, Dworkin's "conventionalist" recognizes that his conventions are not complete, so that in certain "hard cases" the judge cannot have recourse to any "source" in deciding, and has to base himself on a discretionary choice³⁸. "Conventionalism" is, then, a decisionist variant of "source theory", fairly faithfully reproducing the image of the "reformed" legal positivism proposed by Hans Kelsen and H. L. A. Hart. For both, the judge is no mere applier of norms, but has considerable powers to produce norms.

Pragmatism is instead an instrumentalist conception of law, seen solely as an instrument towards certain ends, over and above any faithfulness to texts, forms or procedures. What counts here is a certain "policy", an objective to be reached, in relation to which the legal means proves particularly appropriate, and to which, so to speak, it can be bent. Whereas conventionalism looks back to decisions taken in the past, intending in general to reproduce them, pragmatism does not have these concerns for historical continuity, and instead looks forward to the objects to be achieved. Using some old terminology of Niklas Luhmann's, we might say that "conventionalism" represents or is moved by a "conditional programme", that is, lays down the conditions for certain conduct, and that "pragmatism" is a "purposive programme",

³⁶ McCormick's is, then, not so much a "consequentialism of the act" as a "consequentialism of the rule": see N. MACCORMICK, *On Legal Decisions and their Consequences : From Dewey to Dworkin*, in "New York University Law Review", 1983, pp. 240 ff.

³⁷ For a similar use of the term "conventionalism", see L. STRAUSS, *On Natural Law*, now in idem, *Studies in Platonic Political Philosophy*, ed. by T. Pangl, University of Chicago Press, Chicago 1983.

³⁸ See R. DWORKIN, *Law's Empire*, II ed., cit., pp. 114-117.

sets the objectives to be pursued by legal activity irrespective of constitutive or regulatory conditions. To explain the difference between pragmatism and conventionalism, Dworkin uses the figure of subjective right. While for conventionalism, which is a non-sceptical theory, there are rights that the subject can claim by referring to legal texts and judicial precedents, "pragmatism, on the contrary, denies that people ever have legal rights; it takes the bracing view that they are never entitled to what would otherwise be worse for the community just because some legislature said so or a long string of judges decided"³⁹. According to the "pragmatist", norms and rights are merely, so to speak, the servants of a better future; as such, they have no strength or value of their own.

To these two conceptions, regarded as unsatisfactory particularly because they do not take norms and rights sufficiently seriously, and trust to judicial decisionism, Dworkin counterposes the conception of law as "integrity"⁴⁰. This asserts that the law is basically an interpretive practice guided by the fundamental principles of a certain community, aimed at supplying the "best possible theory" of these. This "integrity", note, is not the tradition of a particular legal order, but its strong normative content (political and moral): it is a synchronic rather than diachronic principle. "It insists that the law contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them"⁴⁰.

Now this "integrity" has a specific content, given by three principles, namely "fairness", "justice" and "due process of law"⁴¹. "Fairness" is the procedure that enables political power to be distributed in the justest possible way. "Justice" has instead to do not so much with procedures as with the outcomes of political decisions. It is mainly a criterion for redistributing goods and rights. "Due process" is a procedure for assessing when a subject has breached the laws laid down by the political decisions⁴².

Once the concept of law as "integrity" is accepted, Dworkin derives three consequences, namely (a) that the law is an interpretive (reconstructive) practice, (b) that this practice is guided by principles, and (c) that it therefore aims – as normative, "principled" practice -- at

³⁹ *Ibid.*, p. 152.

⁴⁰ *Ibid.*, p. 227.

⁴¹ See *ibid.*, p. 243.

⁴² See *ibid.*, pp. 164-165.

the "one right answer", i.e. the justification for its choices, and accordingly at the assertion that its choices are "justified". Dworkin further derives from the concept of "integrity" a number of interpretive criteria that should guide the judge's action. The first, basic one is fairly obviously that of the "best possible theory" implicit in the normative point of view. The American scholar also preliminarily identifies three stages in any interpretive practice. (i) A first pre-interpretative phase in which the rules and criteria to refer to for identifying a particular practice are identified. (ii) Second, a stage of *interpretation* in the strict sense, presenting the reasons why a particular practice is considered in a particular way, or particular meanings are ascribed to it. (iii) Third, a post-interpretative stage, in which the practice interpreted is reconsidered in the light of the reasons established at the interpretive stage. Interpretation thus amounts to a sort of "reformation", however minimum and imperceptible, of the object interpreted⁴³. The theory of interpretation then becomes eminently a theory of argumentation.

If one starts from a conception of law as "integrity", the central aspect of the judge's activity is interpretation. At this level, two further stages of the judge's argumentative operations must be distinguished: "fit" and "justification". The criterion of "fit" allows us to make a first selection among the available interpretations: only those should be accepted that take account of, or are consistent with, the "fit", the set of norms, principles and values that make up that particular order. However, since the meshes of this first sieve are still rather broad, it is likely that more than one interpretation among those available will pass the test of "fit". There then has to be a further selection: "justification"⁴⁴. Justification differs according to the relevant judicial sphere and according to the legal system concerned. It will thus be different according to whether one has to do with "common law" or with interpreting statutes. In the latter case -- which is what interests us "continental lawyers" -- the criteria of justification identified by Dworkin number three: "fairness", "textual integrity", "legislative history"⁴⁵. "Fairness" can be understood here as a sort of criterion of "reasonableness" or "constitutionality"; "textual integrity" corresponds to our grammatical and systematic interpretation; and "legislative history" represents the criterion of recourse to the legislator's will.

⁴³ See *ibid.*, pp. 65-67.

⁴⁴ See *ibid.*, pp. 255-256.

⁴⁵ See *ibid.*, pp. 348 ff.

The requirement of legal certainty is, as we see, by no means ignored by Dworkin, whatever many of his critics may say. It might even be maintained that he is obsessed by it, to the point of supplying a veritable catalogue of rules of legal argumentation. And this is confirmed by the interest that constitutes the guiding theme of all his work: rejection of the idea of the judge's verdict as a discretionary decision.

From the viewpoint of legal theory, for Dworkin the central question in relation to a judge's decisions is not whether they are "judicial", i.e., decisions by a judge exercising his functions, but whether these decisions are right. Just as, one might add, from the epistemological viewpoint the central question regarding linguistic statements about a particular state of affairs is not whether they are "linguistic", but whether they are true. This obviously takes no relevance away from the preliminary question of identifying a particular event as a judge's decision (or a linguistic statement), for the solution of which the criteria identified by an empiricist, legal-positivist methodology (in particular, recourse to a "norm of recognition") may prove very useful⁴⁶.

Accordingly, retorting, to those asserting that legal decisions constitute a special case of practical decision, that legal decisions are "judicial" and hence different from other types of practical decision (especially the moral kind) and that the decisions of judge Hercules (the ideal judge in Dworkin's picture) are just as "legal" as those of the lowest magistrate⁴⁷ amounts to upholding a thesis that the theorist of the "special case" in no way intends to dispute. Legal decisions cannot, in the latter's view, be reduced to specifically moral decisions, since they too constitute a special kind, though a different one, of practical decision. On the other hand, what is at stake here (in attributing to judicial decisions the quality of being a "special case" of practical

⁴⁶ It is only this function, the methodological or gnoseological one, that a non-ideologizing legal positivism is left with (that is, one that does not assert that the law always deserves obedience as such, and does not simply identify State and law). On legal positivism as "theory", "ideology" or "methodology", I refer to the classic contribution by N. BOBBIO, *Giusnaturalismo e positivismo giuridico*, Milan 1965, pp. 101 ff.

⁴⁷ Cf. e.g., F. J. LAPORTA, *Ética y derecho en el pensamiento contemporáneo*, in *Historia de la ética*, Vol. 3, *La ética contemporánea*, ed. by V. Camps, Barcelona 1989, pp. 253-254.

decision) is not the descriptive qualification of an event (the decision in question) and hence its "legality", but the normative description of that event (the "rightness" of a decision), as the only thing that can justify a normative conclusion (the provision in the judicial verdict).

The theory of argument and interpretation developed by Ronald Dworkin might at first sight seem very far away from MacCormick's theory. While MacCormick is a legal positivist and (moderately) non-cognitivist, Dworkin appears in the opinion of many as the renewer of a sort of more-or-less sociologizing natural-law approach. While Dworkin defends the idea of the "one right answer", MacCormick does not abandon Hart's thesis of the discretionariness of judicial decision⁴⁸, fiercely disputed by the American scholar⁴⁹.

Properly considered, though, Dworkin and MacCormick are much closer than might seem. For Dworkin -- as we have just said -- there are three main guiding criteria for the rightness and fairness of the legal decision.

(i) First, it must be aimed at placing a certain norm in the "best light" possible. If a norm is applied, it is applied, from the viewpoint of the one applying it, in the best possible way. In the same way, if a play is put on, it is interpreted from the actor's viewpoint according to what is the best probable interpretation possible. Just as it would be pragmatically contradictory to play a Mozart piece deliberately badly, in the same way it is, for Dworkin, contradictory to apply a legal provision in accordance with a meaning that is not the best possible.

(ii) The judge must further follow two other criteria, integrity and fit (or "consistency"). The criterion of fit is that a judge has the obligation, as he puts it, to interpret the legal story as it comes to him already told, not to invent a different story, even if a better one. The decision must thus be consistent with the legal order enforced; it must, so to speak, constitute another link in an already existing narrative chain, and therefore extend that chain in a direction that suits ("fits") the one already taken by the story, that is, the series of verdicts and legal decisions handed down.

(iii) But the decision must also aim at the criterion of integrity. This is not so much the historical consistency of the legal order, but represents the decision's content of formal justice. A decision meets the

⁴⁸ Cf. H. L. A. HART, *The Concept of Law*, Oxford 1961, pp. 121 ff., 138 ff.

⁴⁹ Read R. DWORKIN, *Taking Rights Seriously*, 2nd ed., 6th reprinting, London 1991, pp. 14 ff., 46 ff.

criterion of integrity if it meets the principle of treating like cases alike. Integrity in short amounts to universalizability⁵⁰. But fit as coherence and integrity as universalizability are the criteria on which, as we have seen, MacCormick too builds up his proposals.

Moreover, the thesis of the one right answer does not for Dworkin, at least the later Dworkin, mean that for every case there is already one single possible right decision. It means instead that for whoever is taking a legal decision, it represents the one right answer for the case in question⁵¹. But this position is fairly similar to MacCormick's other

⁵⁰ In this connection note what Klaus Günther has written: "Das Prinzip der integrity muß jedoch nicht zwangsläufig am gegebenen Kontext einer politischen Moral seine Grenze finden. Das Recht auf equal respect and concern, als dessen Verkörperung Dworkin integrity einführt, weist nämlich einen universalistischen Gehalt auf" (K. GÜNTHER, *Der Sinn für Angemessenheit. Anwendungsdiskurse in Moral und Recht*, Frankfurt am Main 1988, p. 351).

⁵¹ Those who take the normative viewpoint, asserting the validity of a particular statement, whether "thoretical" or "practical", ipso facto imply that, *rebus sic stantibus*, that is, given the state of available knowledge, it is the best possible, and therefore represents the "one right answer". (Subject, obviously, to revisions due to increases in knowledge relevant to the case under consideration, and to the assessment of arguments thitherto unknown to anyone, nor adopted by anyone). This is proved very well and emphatically by Immanuel Kant, in extending the normative viewpoint to the whole of philosophy: "Wenn also jemand ein System der Philosophie als sein eigenes Fabrikat ankündigt, so ist es eben so viel, als ob er sagte: 'vor dieser Philosophie sei gar keine andere noch gewesen'. Denn wollte er einräumen, es wäre eine andere (und wahre) gewesen, so würde es über dieselben Gegenstände zweierlei wahre Philosophie gegeben haben, welches sich widerspricht" (I. KANT, *Metaphysische Anfangsgründe der Rechtslehre, Metaphysik der Sitten*, Erster Teil, ed. by B. Ludwig, cit., p. 7). Accordingly the target is missed by all those criticisms that either take the "one right answer" thesis as a sociologizing descriptive hypothesis (meaning that this right solution actually exists), or else reduce the idea to a "regulatory ideal", in the sense of one of the various possible "ideologies of judges" (for this attitude towards the American scholar's work, cf. e.g. L. PRIETO SANCHIS, *Cuatro preguntas a propósito de Dworkin*, in "Revista de ciencias sociales", Universidad de Valparaíso (Chile), Vol. 38 (1993), pp. 69 ff.). Nor should it be forgotten that the thesis of the "one right answer" as regulatory ideal is, as Habermas shows, the basis of the legitimacy of the democratic political order: "Die deliberative Politik würde ihren Sinn -- und der demokratische Rechtsstaat seine Legitimationsgrundlage --

idea that any legal decision turns round a point of law, and therefore as such has an intrinsic claim to rightness.

II. 4. I come finally to Robert Alexy's theory of legal reasoning. He develops in the legal sphere ideas of Jürgen Habermas's. Alexy, like Habermas, starts from the assumption that ideas and concepts have a discursive origin. One speaks, or thinks too, only because one is in and has been incorporated into a context of discourses from which our socialization takes its origin. But this transcends individual cultures. The discursive practice Habermas and Alexy refer to is universal, that is, independent of local contexts.

These two authors then hold that they can identify a series of transcendental principles, that is, ones implicitly assumed by any participant in a discourse, and even by any speaker. Anyone uttering a statement, or performing a speech act, is ipso facto said to put forward the claim, or to assert, that (i) his linguistic utterance is sincere (that is, fits what the speaker really thinks), (ii) is correct or "happy" (fits the social norms governing that act and is appropriate to the specific situation it is uttered in), and finally (iii) is true or valid (that is, universally acceptable to subjects affected or "interested" by the statement itself)⁵². All of these claims can come about and be met only

verlieren, wenn wir als Teilnehmer an politische Diskussionen nicht andere überzeugen und von anderen lernen können. Der politische Streit würde seinen deliberativen Charakter einbüßen und zum ausschließlich strategischen Machtkampf degenerieren, wenn die beteiligten nicht auch - gewiß in dem fallibilistischen Bewußtsein, sich jederzeit irren zu können - davon ausgehen würden, das die strittigen politischen und rechtlichen Probleme eine 'richtige' Lösung finden könnten. Ohne die Orientierung am Ziel einer durch Gründe auszuweisenden Problemlösung wüßten die Teilnehmer gahr nicht, wonach sie suchen sollten" (J. HABERMAS, *Replik auf Beiträge zu einem Symposium der Cardozo Law School*, now in idem, *Die Einbeziehung des Anderen. Schriften zur politischen Theorie*, Frankfurt am Main 1996, pp. 325-326).

⁵² For an anticipation of this thesis cf. TH. VIEHWEG, *Topik und Jurisprudenz*, V ed., cit., p. 118: "Wer sich auf eine Redesituation einläßt, übernimmt Pflichten, die wiederum dem Verständnis des praktizierenden Juristen sehr naheliegen", and in Italian legal-philosophical culture E. DI ROBILANT, *Sui principi di giustizia*, Milano 1961: "That a criterion is capable of being 'founded' means - that arguments can be adduced in its justification; but these are aimed at proving to anyone, especially the unconvinced, that the criterion itself deserves approval.

in discursive situations. These implicit claims then become still stronger in the case of judicial decisions, where the claim to rightness takes on the features of a veritable claim to justice. For it would be inconceivable, and hence performatively contradictory for the judge to add to his verdict, after reading the measure, "and this is unjust".

Alexy counterposes his proposal to four alternative models: (a) the decision model, (b) the deductive one, (c) the hermeneutic one and (d) coherence. The first maintains that in reality there is no discourse or argumentation that is valid in law, and indeed that judicial experience sanctions an opposite situation from that of discussion. This is a radical decisionist model, the paradigmatic representative of which might be regarded as one brand of American legal realism⁵³.

The second model is the one we earlier called the "syllogistic model", on which I do not feel it necessary to add anything else. The third is the one proposed by Gadamer and Betti: Alexy recognizes its importance, but regards it as too self-satisfied. All the hermeneutic problems, in particular those raised by the so-called hermeneutic circle in its various parts, can in his view be solved using adequate principles of argumentative rationality. The theory of interpretation must accordingly, for Alexy, inevitably come down to a theory of argumentation.

The fourth model criticized by Alexy is the one known as "coherence", coherence with the normative order. An order, says the

Adducing arguments to justify a criterion, that is, implies the at least implicit claim to its universal validity".

⁵³ Oliver Wendell Holmes's: he stresses that "judges are called on to exercise the sovereign prerogative of choice" (see O. W. HOLMES, *The Theory of Legal Interpretation*, in idem, *Collected Papers*, New York 1952, p. 203), or else Jerome Frank's: he condemns the principle of "certainty of law" to the role of a rhetorical ornament on the permanent irrationality of legal decision, the real motivations of which are sometimes instead to be sought even in the more-or-less troubled digestive processes of the judging subject (cf. J. FRANK, *Law and the Modern Mind*, 6th reprint, New York 1963, chapter 12). However, Jerome Frank's decisionism is attenuated by the consideration that decision is an event that escapes the subject's free disposal, and is instead largely determined by processes over which human will has very little grip. In this connection see the critical considerations by N. BOBBIO, *La certezza del diritto è un mito?*, in "Rivista internazionale di filosofia del diritto", Vol. 29 (1952), pp. 146 ff., and B. ACKERMAN, *Law and the Modern Mind by Jerome Frank*, in "Daedalus", 1974, pp. 119 ff.

German scholar, is never complete. Accordingly, coherence alone cannot be enough. A model of legal reasoning centred on coherence must necessarily prove insufficient.

Alexy's alternative is a procedural model. Discourse, any discourse, presupposes principles for conducting discourse itself. (This is significantly adumbrated in Viehweg's own topics, at first sight the expression of a "realist", anti-rationalist and anti-normativist Weltanschauung. For Viehweg writes: "When anyone speaks, he has to be able to justify his discourse"⁵⁴). The point is, then, for Alexy, to make explicit what is implicit, and universalize it. Universalization is in turn a transcendental (implicit) requirement of discourse on norms, values and principles.

Asserting that something (a piece of behaviour) is just, or that A is a valid norm, implies a claim to the validity or rightness of the statement, and hence the anti-sceptical thesis that there is a "right answer". (This is put similarly by Dworkin: "So there is no important difference in philosophical category or standing between the statement that slavery is wrong and the statement that there is a right answer to the question of slavery, namely that it is wrong. I cannot intelligibly hold the first opinion as a moral opinion without also holding the second"⁵⁵). The idea of the validity claim, continues Alexy, in turn contains the idea of being universally valid for all cases like the one in question. However, in order for this claim to validity and universality to be legitimate, it must satisfy the principles that can be derived from the normative -- procedural -- nature of our practical discourses.

The rules of practical discourse for Alexy have two principal types: (a) rules on the structures of arguments (for instance, the consistent use of predicates, or linguistic clarity), or else (b) rules on the procedures employed for the discourse (for instance, the rule that any speaker can take part in a discourse). For the German scholar, practical discourse is distinguished from legal discourse because the latter is tied to certain substantive limitations: for instance, legal discourse by contrast with practical discourse cannot go on endlessly but instead has specific time-limits. Nonetheless, with a few adjustments and additions,

⁵⁴ TH. VIEHWEG, *Topik und Jurisprudenz*, V ed. cit., p. 119.

⁵⁵ R. DWORKIN, *Law's Empire*, cit., p. 82.

legal discourse according to Alexy represents a special case of practical discourse⁵⁶.

III.

I now come to the concluding section of these brief considerations, on the impact or influence of theories of legal reasoning on specific questions of legal philosophy. A first influence is methodological in nature. Theories of reasoning and argumentation help to make legal philosophy itself more argumentative, to enrich its dialectic and make it an object of apposite reflection. Legal theory thus becomes the silent prologue to any legal dispute.

But I see further influences on two of the most classical themes in the philosophical study of law. (i) The first is the very concept of law. The theories of legal reasoning, by highlighting determining aspects of legal decision that are external to the law, call in crisis the formalist, legal positive (statist) concept of law. They open up a broader, more liberal, more pluralist notion of legal experience. One can now calmly assert, as Guido Calabresi does, that convictions, ideals and modes of thought are an integral part of our law⁵⁷. What is asserted is what Robert Alexy calls a "three-level model", a "Regel/Prinzipien/Prozedur Model"⁵⁸, an image of law no longer obsessively dominated by the idea of the rule, of the norm, with a central role instead assigned to

⁵⁶ See R. ALEXY, *Theorie der juristischen Argumentation*, pp. 263 ff. Note that this is also the opinion of Neil MacCormick (see N. MACCORMICK, *Legal Theory and Legal Reasoning*, cit., pp. 263 ff.) and of Jürgen Habermas (see J. HABERMAS, *Replik auf Beiträge zu einem Symposium der Cardozo Law School*, cit., pp. ?), who has however declared his opposition to the thesis of the special case (see J. HABERMAS, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt am Main 1992, pp. 283 ff.), to that extent accepting the theses of Klaus Günther (see K. GÜNTHER, *Der Sinn für Angemessenheit*, cit., pp. 309 ff., and especially K. GÜNTHER, *Critical Remarks on Robert Alexy's "Special Case Thesis"*, in "Ratio Juris", 1993, pp. 143 ff., in relation to which read Alexy's prompt reply, *Justification and Application of Norms*, in "Ratio Juris", 1993, pp. 157 ff.).

⁵⁷ See the "conclusion" of G. CALABRESI, *Ideals, Beliefs, Attitudes, and the Law. Private Law Perspectives on a Public Law Problem*, Syracuse, N. Y. 1985.

⁵⁸ See e.g. R. ALEXY, *Rechtssystem und praktische Vernunft*, now in idem, *Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie*, Frankfurt am Main 1995, pp. 23 ff.

principles, which Alexy defines as "optimization precepts" of the values they express⁵⁹.

(ii) These theories, then, since they hold that decision is the outcome of non-legal (not located in texts of law) criteria of rightness, instead justified by more general or stronger normative praxes (like Alexy's and Habermas's ideal discourse), end up referring to vaguely moral criteria. This goes some way to filling up the gap between law and morality dug by modern legal positivism. In particular, on a prospect that favours the discursive or communicative element over the decisional or instrumental one, the very concept of law loses much of its more truculent features as a coercive order. Violence is shaded out of the picture of the essential features of the phenomenon of law, and the more human features of rights clearly asserted. It is then not so much the monopoly of violence as its domestication that is imposed through the form of the State.

Theories of legal reasoning further contribute to changing our perception of the State based on rule of law. This is no longer the State where judges and administration are subject only to law, but also and especially one where jurisdiction and administration are governed by procedures able to satisfy exacting principles of argumentative correctness. Once the law is conceived of as argumentative practice, the rule of law will be the political form that best reflects, or gives most space to, this practice⁶⁰.

⁵⁹ See R. ALEXY, *Theorie der Grundrechte*, Frankfurt am Main 1986, pp. 71 ff. It is interesting to recall that Habermas, on whom too Alexy's thought largely draws, is obstinately hostile to this reconstruction of the notion of principle, since he feels it opens the door to an economistic instrumentalization of the institution of law and is too generous with the need to coordinate rights (expressed by norms of principle), with the consequence of making every fundamental right able to be compensated for or derogated from by considerations or another sort (for instance, assessments of the public good). See J. HABERMAS, *Faktizität und Geltung*, cit., p. 255.

⁶⁰ Cf. T. CAMPBELL, *Legal Studies*, in *A Companion to Contemporary Political Philosophy*, ed. R. E. Goodin and Ph. Pettit, 2nd ed., Oxford 1996, p. 184: "The most distinctive concern of legal philosophers is the nature of legal process itself, and in particular the analysis and criticism of legal argumentation as it is manifest in the selection, interpretation and application of laws, principally in the setting of _court room. This central aspect of legal philosophy has important implications for political philosophy in that it raises issues about the institutional and

Ronald Dworkin explicitly disputes the prevailing conception of the rule of law, in which the "law" in question is understood purely formally, so that the State's action is right and just as being conducted in respect for the legal forms prescribed by statute, by law in the formal sense, that is, by what the American scholar calls the "rule book"⁶¹. To this conception Dworkin counterposes a "rights-based rule of law", one founded on fundamental rights, and hence a substantive conception of the rule of law. State conduct, in order to meet the principles of the rule of law, cannot be just formally correct and, like Kelsen's *Stufenbau*, respect the hierarchies of competences laid down by the legal order. A legal order that respects the rule of law cannot, à la Kelsen, be just a "dynamic" order in which the norms are linked to each other according to relationships of *Ermächtigung*, or empowerment delegations. It must instead, if we still wish to follow Kelsen's terminology, be a "static" order, in which, that is, the norms are linked with each other according to relations of logical inference, so that the State's individual action, the "individual norm", but also the legislator's "general norm", can be interpreted as a deduction from the material content expressed by fundamental norms of the system, from its principles. Moreover, this is what is practised in States with "rigid" constitutions and hence forms of constitutional justice in which the individual norm can be reviewed in relation to the constitution's substantive principles and perhaps abrogated should it, though issued in conformity with the hierarchy of State powers, not fit the principles of the constitutional order, or not be deducible from them.

Moreover, a common doctrine in constitutional interpretation does not limit principles constitutionally in force to those explicitly expressed in the written norms of the constitutional text. Is it, for instance, often asserted that the part of the constitution devoted to fundamental rights, and even the form of government, are not subject to constitutional amendment, even though there is no specific norm that sets such limits. It is also maintained that the fundamental principles stated in the constitution are not necessarily a closed list, but

philosophical presuppositions of the idea of the rule of law, one of the principal ideological foundations of liberal politics and the theory of democracy. For this reason competing philosophies of legal argumentation feature centrally in this exposition of those aspects of the discipline of law which are of evident relevance to political philosophy".

⁶¹ See R. DWORKIN, *A Matter of Principle*, London 1985, chapter 1.

rather have an exemplary role, showing what the system's highest values are⁶². These can then be derived from the constitutional text as a whole, from its "sense", and hence from the State's political structure and normative ideals of reference, and thus -- à la Dworkin -- from the "best theory" of that particular political community.

Dworkin's "rule of law" proposal is not, however, only "non-formal", substantive, but also "non-negative", i.e. positive⁶³. That is, the American scholar, having tied the "rule of law" down to a material concept of justice (as, by the way, Hayek also does⁶⁴), does not believe that the substantive justice in question is purely negative, as, for instance, Hayek himself believes, and has more recently been said by Joseph Raz⁶⁵; that is, does not believe that it is solely a matter of defending negative freedoms of individuals. What is rather at stake in the idea of justice evoked here as a basis for the rule of law is an exacting equality requirement, which may on certain occasions entail an active attitude by the State in social life.

This attitude finds a counterpart in Alexy's complex, articulated theory of fundamental rights, as being first and foremost expressed by principles: that is, the norms that guarantee fundamental rights are said to have the nature of principles. These rights can then be balanced against each other and asserted even irrespective of any explicit action by their bearers⁶⁶. The fundamental rights, being the product of principles, need not necessarily take the form of *Abwehrrechte*, rights protecting individual freedom from undue interference by the State, hence establishing a duty of abstention on

⁶² This is for instance, Gregorio Peces-Barba's thesis on Article 1 (1) of the 1978 Spanish Constitution, despite intransigently legal-positive positions elsewhere taken by the same author. Cf. G. PECES-BARBA, *Los valores superiores*, Madrid 1986, and G. PECES-BARBA, *Los valores superiores*, in "Archivo de filosofía del derecho", 1987.

⁶³ Cf. C. L. TEN, *Constitutionalism and the Rule of Law*, in *A Companion to Contemporary Political Philosophy*, ed. by R. E. Goodin and Ph. Pettit, London 1996, pp. 401-402.

⁶⁴ His critique of legal positivism and the "constructivism" it is allegedly an expression of is certainly not far from similar formulations of Dworkin's: see F. A. HAYEK, *The Constitution of Liberty*, London 1993, pp. 205 ff.

⁶⁵ See J. RAZ, *The Politics of the Rule of Law*, in "Ratio Juris", 1990, pp. 331 ff.

⁶⁶ For a similar position cf. J. WALDRON, *Rights*, in *A Companion to Contemporary Political Philosophy*, ed. by R. E. Goodin and Ph. Pettit, cit., pp. 537 ff.

the State's organs. They may also have as their content positive actions of the State⁶⁷.

The normative model of democracy also changes. (This is explicit in such authors as Carlos Nino and Jürgen Habermas, who refer unambiguously to theories of practical discourse⁶⁸). Democracy is no longer defined as the system in which popular sovereignty prevails and is expressed, but as the institutionalization or, putting it with Dworkin, the "best theory" of the rules of practical discourse, especially of its three fundamental rules. These are: (1) anyone able to speak can take part in the discourse; (2) anyone can question any statement in a discourse; (3) no-one can be barred from exercising rights deriving from the foregoing rules⁶⁹.

This seems *inter alia* to confirm the centrality of freedom of expression among the fundamental rights -- despite some recent declarations by Roman Herzog, president of the German Federal Republic⁷⁰, and in line with an intuition of Nicola Chiaromonte's: "Political freedom is the necessary and natural consequence of everyday human speech"⁷¹. Political freedom and democracy, that is, have a "discursive" hard core that theories of argumentation as normative reconstructions of practical discourse (such as, notably, Robert Alexy's one) serve to highlight.

Similar consequences have been explicitly drawn by Alexy himself in a work later than his *Theory of Legal Argumentation*, dedicated specifically to the concept of law: *Begriff und Geltung des Rechts*. Here the German scholar offers us a definition of the concept of law that in a certain sense represents the point of arrival of his whole

⁶⁷ See R. ALEXY, *Theorie der Grundrechte*, cit., pp. 395 ff.

⁶⁸ See J. HABERMAS, *Faktizität und Geltung*, and C. S. NINO, *Derecho, moral y política*, Barcelona 1993, and C. S. NINO, *The Constitution of Deliberative Democracy*, New Haven, Conn. 1996.

⁶⁹ See R. ALEXY, *Theorie der juristischen Argumentation*, pp. 234-235.

⁷⁰ See R. HERZOG, *Die Rechte des Menschen*, in "Die Zeit", Sept. 6, 1996. One might instead, plausibly, maintain that thinking and communicating are such mutually connected activities that any attack on the one would have negative repercussions on the other. One may, that is, hold that the very act of thinking has an intrinsic communicative component, such that any restriction placed on the free expression of thought impinges on thought, limiting its operability. .

⁷¹ N. CHIAROMONTE, *Che cosa rimane - Tacchini 1955-1971*, Bologna 1996, p. 186. Cf. also J. HABERMAS, *Faktizität und Geltung*, p. 274.

legal-philosophical thinking: "The law is a normative system, which (1) puts forward a claim to rightness, (2) consists of the totality of norms forming part of a generally socially efficient constitution which are not extremely unjust, as well as the totality of norms adopted in conformity with that constitution that show a minimum of efficacy or of likely social efficacy and are not extremely unjust, and (3) contains the principles and other normative arguments on which is and ought to be based the procedure for applying the law in order to meet the claim to rightness"⁷².

The theory of discourse has the further advantage of being able to provide a foundation for democracy and tolerance on a non-relativistic meta-ethics. One is democratic and tolerant, on this view, not because all opinions are equivalent, a position that condemns democracy and tolerance to unjustifiability, and ends up turning against itself; we are so instead because discussion, discourse, dialogue, require in order to happen the plurality and liberty of opinions, and because discussion, discourse, dialogue, are "objective" the goods, that is, are not relative to the subject. One is democratic and tolerant, one accepts others' opinions (in the sense of granting full freedom of expression to them), because this is required by the procedural rules of ideal discourse, and this is an analytical and normative reconstruction of the deep structure of actual discourses, deriving from the "universal pragmatics". In short, it is assumed, as one Spanish political thinker of the Baroque period said, that "where there is a dispute ... it is necessary that there be defenders of all opinions [*donde se disputa ... es fuerza que haya valedores de todas opiniones*]"⁷³.

The theories of legal argument have, then, a direct impact on our conception of power and of politics. They lead us to consider political experience as not so much a fight to the death between irreconcilable adversaries, a friend-foe ruthless relationship in the terms of Carl Schmitt's political realism, or a *magnum latrocinium* in the sombre tones of a Dürer etching, as a public space in which solutions to the community's problems are debated and adopted in accordance with criteria acceptable to an audience that is tendentially universal. They can thus help determine and strengthen that democracy of rules being demanded from several quarters today.

⁷² R. ALEXY, *Begriff und Geltung des Rechts*, Freiburg 1992, p. 201.

⁷³ D. DE SAAVEDRA FAJARDO, *República literaria*, ed. by J. C. De Torres, Barcelona 1985, p. 125.



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