The Rule of Dual-Natured Law

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Abstract

Both the concept of legal argumentation and the concept of the Rule of Law are contested and subject to irrationality objections. The present article refutes these objections by analysing the two concepts and focussing on their mutual relation. Based on a new account of the rule of dual-natured law, it elaborates in detail on how law's dual nature play out in the various forms and problems of legal reasoning, allowing for a third theory of legal argumentation which integrates formal and material elements by means of optimization.

Keywords: Balancing, Concept of law, Dual-nature thesis, Further development of the law, Interpretation, Irrationality objection, Legal argumentation, Principle of legality, Proportionality, Rule of Law.

1 The Irrationality Account

In a cursory, yet pragmatic way one could rather quickly grasp what legal argumentation is about and what the Rule of Law requires. But what exactly is the relation between the two? This issue of relatedness is the focus of the present article. Many scholars argue that legal argumentation was not ruled by law. According to this view, it is rather ruled by what we could call the five I-s of legal reasoning: legal argumentation is said to be intuitive, incidental, indeterminate, ideological, and irrational.

A core argument for this rather sceptical view, inspired by sociological research, is the lack of a clear hierarchy among the various canons of interpretation. Due to this absence of hierarchy, it seems to be impossible to justify the free choice of one or the other judgement, particularly in hard cases. This line of argument is, as regards the interpretation of precedent, present in Llewellyn's (1950, pp. 401, 396) classical observation:

> There are two opposing canons on almost every point. [...] In the work of a single opinion-day I have observed 26 different, describable ways in which one of our best state courts handled its own prior cases, repeatedly using three to

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> six different ways within a single opinion. What is important is that all 26 ways (plus a dozen others which happened not to be in use that day) are correct.

The irrationality account is by no means limited to the realm of legal argumentation. It also stretches out to the Rule of Law. The Rule of Law is described as a mask to hide the unjustified usurpation of political power. It is seen as an instance of western imperialism, imposing upon foreign states a particular model of the law which is at odds with local legal culture (Krygier, 2012, pp. 233, 247-249). What is more: we seem to be unable to give an even minimally precise account of the meaning of the Rule of Law. Is the Rule of Law limited to formal aspects of authority and procedure? Or is it rather the material dimension of justice which forms its core? Or, this is a third option, some combination of the two? The endless debate on these points has caused Loughlin (2010, p. 313) to deliver the following assessment:

> The rule of law [...] is mere rhetoric, a conviction which is reinforced by its intrinsic ambiguity: the ubiquity of the expression "rule of law" is matched only by the multiplicity of its meanings.

There is actually a German study demonstrating that no less than 140 different legal concepts are claimed to be aspects of the Rule of Law (Sobota, 1997, pp. 471-526). Loughlin concludes that the Rule of Law was "entirely unworkable in practice" and goes on: "[T]he fact that it is unrealizable in practice renders it peculiarly susceptible to being used for ideological purposes". (see also Endicott, 1999; Loughlin, 2010, p. 314).

It is precisely at this point where the two irrationality accounts – that of legal argumentation and that of the Rule of Law – perfectly match together. Loughlin's words 'in practice' can be read as 'in the practice of legal argumentation'. And thus the situation can be summarized like this: legal argumentation is not ruled by law, and the Rule of Law is not enabled by legal argumentation either. If both legal argumentation and the Rule of Law are unclear, contested, full of paradoxes and dilemma, how much more unclear and contested must be the relation between the two.

Nonetheless, it is precisely this question of relatedness I am going to address, and I will proceed in three steps. I will first address in more detail the concept of the Rule of Law. Second, I will draw consequences for the character of legal argumentation, resulting in what I will call the 'dual nature of legal argumentation'. Third, I will discuss the main challenge against my own account.

2 The Rule of Law

The Rule of Law is a contested concept which is employed to a "set of closely interrelated principles that together make up the core of the doctrine [...] of constitutionalism" (Allan, 2001, p. 1). We can distinguish two different conceptions of the Rule of Law. Dworkin (2001, pp. 9-18) has labelled them the 'rule-book' conception and the 'rights' conception.

2.1 "Rule-Book" and "Rights"

The rule-book conception focuses on procedures and authority. It safeguards legal certainty and the separation of powers (Dicey, 1915, pp. 120-121; Fuller, 1969, pp. 33-34; Raz, 2002, pp. 214-219). Its core idea is that the power of the state must be exercised in accordance with rules explicitly set out in a public rule-book available to all. The whole legal system must play by these rules until they are changed. The rule-book-conception does not stipulate anything as to the content of the rules. However, this does not imply that questions of the material justice of the rules cannot be addressed. It simply means that such questions do not belong to the ideal of the Rule of Law. The rights conception, in contrast, incorporates the requirements of material justice into the Rule of Law. The Rule of Law necessarily safeguards, for example, fundamental rights which can be defined as human rights which are transformed into positive constitutional law (Alexy, 1998a, pp. 259-260; Dworkin, 2001, pp. 11-13). The rights conception of the Rule of Law necessarily entails the principle of proportionality (Allan, 2011, p. 159; Klatt & Meister, 2012b). In this conception, questions of the material justice of the rules are internal to the Rule of Law.

This distinction between the formal and the material conception is fairly straightforward. Far more complex is the normative problem of which conception we should follow. This difficulty is due to a dilemma (cf. Allan, 2001, p. 23): when we adopt the formal conception, we run the risk that the Rule of Law is transformed into a mere mask misused to legitimize the existing structures of power, hiding substantial injustice (Unger, 1976, pp. 176-181, 192-223). When, alternatively, we follow the material conception, we are vulnerable to the objection from rational disagreement and value pluralism (Craig, 1997, p. 487). In the material conception, the Rule of Law, as Raz reminds us, may refer to just about every political ideal (Raz, 2002, pp. 211, 221). The Rule of Law seems to collapse into a complete social philosophy and may lose any independent function. It is hence not a convincing idea to interpret the Rule of Law as the rule of the good law. I would like to suggest that we can solve this dilemma by clarifying the relation between the Rule of Law and the concept of law.

2.2 *The Rule of Law and the Concept of Law*

The close relation between the Rule of Law and the concept of law is clearly indicated by the very words 'Rule of *Law*'. It was Waldron, however, who most clearly made that relation explicit (Waldron, 2008b, pp. 5, 44, 58). The Rule of Law and the concept of law are "two perspectives on the same basic idea" (see also Craig, 1997, p. 479; Waldron, 2008b, p. 45). Our concept of law strongly influences our concept of the Rule of Law. The two are closely connected. This influence is surprisingly rarely acknowledged in the literature on the Rule of Law. In order to get a precise conception of the Rule of Law, we need to clarify what we mean by law. For this purpose, I will employ a specific concept of law, based upon Alexy's dual nature thesis.

2.3 *The Rule of Dual-Natured Law*

Law has a dual nature, comprising both a real or factual dimension and an ideal or critical dimension (Alexy, 2010). The ideal dimension of law is established by law's claim to correctness (Alexy, 1998b). The claim to correctness comprises moral correctness. Hence, the ideal dimension of law implies non-positivism. The main challenge against the ideal dimension of the law is the objection from moral irrationalism: practical propositions, this objection argues, are necessarily subjective, relative, or pure decisionism (Mackie, 1977, p. 35). Legal non-positivists, however, can point to the possibility of engaging in rational practical discourse (Alexy, 2013b, pp. 101-102).

Yet, the attempt to integrate moral pluralism by means of rational discourse and procedural theories of practical rationality does have its limits. The forms and rules of rational discourse, however, do not always lead to a single right answer. We experience rational disagreement (Rawls, 1993, p. 55). The insufficiencies of the ideal dimension are the reason why we have the real dimension of law as its complement. The real dimension of law consists in the positivity of law which is defined by authoritative issuance and social efficacy (Alexy, 2010, p. 173). Legally established procedures guarantee the achievement of decisions and their enforcement, thus solving the problems of practical knowledge and social coordination the ideal dimension is leaving us with. The real dimension of law originates from the need to legal certainty (Radbruch, 1990, p. 50). The real dimension thus originates in the ideal dimension, since "the nurture and development of legal order are important moral aims" (Allan, 2015, p. 25; Finnis, 1982, pp. 231-233; Finnis, 1987, pp. 376-377).

When we fully acknowledge the relation between the Rule of Law and the concept of law, the philosophical basis of the constitutional principle of the Rule of Law becomes clear. On the basis of a non-positivistic concept of law, it follows that the Rule of Law is a rule of dual-natured law. This is the concept of the Rule of Law I am going to work with

in the remainder of this article. In the next section, I will spell out the implications the rule of dual-natured law has for legal argumentation.

3 The Dual Nature of Legal Argumentation

The close relation between the concept of law and the Rule of Law can naturally be witnessed in the realm of legal argumentation, because "different models of adjudication [...] reflect contrasting conceptions of law and legality" (Allan, 2015, p. 2). Therefore, one implication of the rule of dual-natured law is that legal argumentation also has a dual nature: legal argumentation comprises both real and ideal elements (cf. Kloosterhuis, 2014). The application of law does not consist in mere interpretation of authoritative texts, as representing the real dimension of law (cf. Finnis, 1987, pp. 358, 363). Rather, it requires practical reasoning and moral judgment irrespective of whether the applied principles of justice and fairness are source-based in the positivist sense (Allan, 2015, p. 6; Perry, 1987, p. 215). The Rule of Law, then, is a rule of reason. The ultimate meaning of the Rule of Law is the equal dignity and freedom of citizens. This understanding poses a fundamental requirement for legal argumentation: legal reasoning must entail moral justification. Allan (2001, p. 315) has put this point most clearly:

> The rule of law is ultimately a governance of reason: it is satisfied by rigorous debate about the demands of justice, suitably attuned to the circumstances of the particular case [...].

And, we could add, suitably attuned to the authoritative dimension of the law as well.

I would like to illustrate the dual nature of legal argumentation by going through all three categories of legal methods, namely interpretation, further development of the law, and balancing. Law's dual nature has important consequences in all three categories.

3.1 Interpretation

The norm-categorical distinction between rules and principles is of high importance for the analysis of legal argumentation. Rules belong to the real dimension, whereas principles belong to the ideal dimension of the law (Alexy, 2010, p. 180). This is so because rules express a definite or real ought, while principles express a prima facie or ideal ought (Alexy, 2009, pp. 21-33). One could think, then, that due to this connection between the categories of norms and the two dimensions of law, the entire process of subsumption belonged to the real dimension, for it is concerned with the application of rules. In contrast, balancing would belong to the ideal dimension.

This picture, however, is far too rough. We have to distinguish between two different types of subsumption. The first type can be labelled as 'balancing-free subsumption'. It applies a rule whose validity can be established on the basis of authoritative issuance und social efficacy alone. No aspects of the ideal dimension are needed, authoritative and institutional reasons suffice to justify the legal decision. Countless easy cases are decided each day with the help of balancing-free subsumption. The second type of subsumption is 'balancing-dependent subsumption'. It necessarily includes elements of the ideal dimension, most importantly in the form of objective-teleological arguments.

Looking briefly at the various canons, we can state the following results as to the presence of law's dual nature in legal interpretation: the *semantic* argument uses the wording of a norm and establishes how the legal terms are actually used (Klatt, 2008, pp. 45-46, 52-54). Therefore, the semantic argument belongs to the authoritative dimension of the law (cf. Alexy, 1989, pp. 239: "special case of empirical reasoning"). This is all the clearer when the genetic-semantic argument draws to the use employed by the original legislature. The *historical* argument uses "facts concerning the history of the legal problems under discussion" (Alexy, 1989, p. 239), so it also uses reasons from the real dimension of law. This historical argument, however, must also entail at least one normative premise from the ideal dimension (Alexy, 1989, p. 239). Similar considerations are valid for *comparative* legal reasoning drawing to solutions taken in another legal system. Law's claim to correctness transcends the facticity of local legal systems. The dual nature of law is thus present in the historical and in the comparative argument.

It is the *systematic* argument that displays the dual nature in the clearest possible way. The systematic argument aims at consistency and coherence. Consistency is of formal character and consists in the absence of any logical contradiction between the elements of a legal system, e.g. norms, interpretations, precedents, and doctrinal accounts (MacCormick, 1984, p. 37). Coherence, in contrast, is a material quality, aiming at substantial connectedness of these elements to a whole. Both aspects of the systematic argument can be explained quite well with the help of Dworkin's account of legal interpretation. He combines them in his idea of interpreting the law as system ('integrity'). Consistency is grasped by Dworkin's element of 'fit': the judge must fit her judgments into the chain of precedents (Dworkin, 1982, pp. 166 ff., 1986, pp. 228-232). Coherence, in contrast, is established by means of 'justification', which necessarily entails substantial questions of political morality (Dworkin, 1986, pp. 231, 256). Consistency and 'fit' regard the real dimension of law, while 'justification' concerns law's ideal dimension.

Law's dual nature can also be witnessed in the *teleological* argument which can take two different forms. The subjective-teleological interpretation draws to the aims pursued by the original legislature, and hence it belongs to the real dimension of the law. Establishing the will of the historical legislature is tantamount to establishing facts (Alexy, 1989, pp. 239, 241). It is therefore a specific case of empirical argumentation. Objective-teleological

arguments, in contrast, open the subsumption for arguments stemming from law's ideal dimension (cf. Alexy, 1989, pp. 241-244; for a critical view, see Waldron, 2008a). Compared to the positivistic limitation to authoritative-institutional arguments of the real dimension, the objective-teleological argument significantly broadens the repertoire of legal arguments.

Aspects from the real and from the ideal dimension of the law are hence intertwined in the canons of interpretation. This can also be demonstrated by the classical conflict of a collision between the semantic and the objective-teleological argument (cf. Alexy, 2010, pp. 171 with fn. 2). When the wording of a statute suggest a certain alternative of interpretation, which is however unjust, the judge must choose between giving preference to either legal certainty or to justice. There are two alternatives: Either the principle of legal certainty requires that the statute is applied in spite of its injustice, or the principle of justice requires not to apply the unjust law. What matters in the present context is that the ideal dimension of the law is necessarily engaged in both alternatives. Even in the first scenario the principle of legal certainty can only take precedence due to its own moral value (Habermas, 1992, pp. 550-551, 560, 563).

Similar considerations are valid even when there is no conflict between the two principles, so when the wording and considerations of justice demand exactly the same decision in the given case. In that scenario, the decision can be understood as entailing the at least implicit proposition that justice does not require a decision deviant from the wording. These considerations lead us to a very important result: the old debate on the hierarchy of the canons is nothing else than an expression of the problem of the correct integration of the real and the ideal dimension of the law in legal argumentation.

It is worthy to note that the above argument is perfectly in accordance with the special case thesis. Legal argumentation is a special case of general practical discourse (Alexy, 1999). As in general practical discourse, legal argumentation concerns what is obligated, forbidden, or permitted in practical questions. In contrast to general practical discourse, however, legal argumentation takes place under limiting conditions, which follow from the bindingness of statutes, precedents, or established legal doctrines. These two elements of the special case thesis directly picture law's dual nature (Alexy, 2010, p. 179; Habermas, 1992, pp. 552, 565). The similarities between legal discourse and general practical discourse lend an ideal character to legal argumentation, whereas the differences between the two implicate the real character of legal argumentation. The special case thesis can thus be interpreted as the most general expression of law's dual nature in the theory of legal argumentation.

There is a second problem which can be enlightened with the integration of the real and the ideal dimension in legal reasoning. This is the puzzle of law's open texture. The real dimension of the law does not guarantee legal certainty in all cases (Hart, 1994, p. 128; Kelsen, 1960, pp. 348-349). Rather, in the open areas of the law legal positivists ask the judge to follow extra-legal reasons. When the repertoire of authoritative arguments is

exhausted, without bringing about a clear decision, then the judge must rest her decision on non-authoritative reasons, if the decision is to be rested on reasons at all (Alexy, 2008, p. 283). Thus, from a positivistic point of view, it is quite consistent that Hart and Kelsen advise the judge to create new law, in the same way as a legislator would, in the open area of the law (Hart, 1994, p. 135; Kelsen, 1960, pp. 350-351).

The dual nature thesis, in contrast, has more to offer in this respect. It can look more closely on the space of non-authoritative reasons and, thereby, it can repress pure decisionism in the open areas. Non-authoritative reasons are most notably reasons of justice. They belong to the ideal dimension of the law. The ideal of rational discourse allows for assessing the quality of those reasons that lie beyond the real dimension of the law. Kelsen's claim that all non-authoritative reasons are of equal value is thus refuted (Alexy, 2013a, pp. 58-59).

3.2 *Further Development of the Law*

A further development of the law is a specific legal method, distinct from interpretation by the fact that it transgresses the limits of the wording of a legal norm (Klatt, 2008, pp. 5-7, 240-241, 274-275). There are two variants of the further development of the law, namely the analogy and the teleological reduction. It is impossible to justify the court's competence to further develop the law *contra legem*, i.e. to decide against the wording and the will of the original legislature, without accepting an ideal dimension of the law. This becomes clear from the classical justification of the judge's competence to further develop the law in the famous *Soraya* decision of the German Federal Constitutional Court:

> Justice is not identical with the aggregate of the written laws. Under certain circumstances law can exist beyond the positive norms which the state enacts [...] The judge's task is not confined to ascertaining and implementing legislative decisions. He/she may have to make a value judgement (an act which necessarily has volitional elements); that is, bring to light and implement in his/her decisions those value concepts which are inherent in the constitutional legal order, but which are not, or not adequately, expressed in the language of the written laws. [...] Where the written law fails, the judge's decision fills the existing gap by using common sense and general concepts of justice established by the community. (BVerfG, 1973, p. 287; cf. Kommers, 1997, p. 125)

It is decisive that at the same time the real dimension of the law persists. Considerations of justice cannot always and not offhandedly cancel the principle of legal certainty. State authorities competent to apply the law may not in general control positive law for its cor-

rectness (Alexy, 2013a, p. 61). We may therefore accept a prima facie preference of law's authoritative-institutional dimension over its ideal dimension (cf. Alexy, 1989, p. 248).

3.3 *Proportionality and Balancing*

The dual nature of law is also present in the application of legal principles. This draws our attention to the third category of legal methods, namely balancing, as it occurs in the last step of the proportionality test. Looking at the proportionality test, the sub-tests of suitability and of necessity are shaped by law's real dimension. Both sub-tests concern the optimization as far as empirical conditions are concerned, for example by avoiding avoidable costs (Klatt & Meister, 2012b, p. 10). In contrast, one could argue that the balancing last sub-test, balancing, was concerned with the ideal dimension. After all, balancing requires arguments of justice which belong to the ideal dimension.

However, this simplistic correlation of the proportionality sub-tests with the two dimensions is too rough a picture. Balancing is a rather complex method, as in particular principles theory has demonstrated (Klatt, 2013). The clearest account of the structure of balancing is to be found in the weight formula (Alexy, 2007; for the weight formula in its complete form see Klatt & Schmidt, 2012, p. 91). What is the relation between the two dimensions of law and the variables of the weight formula? One could think to categorize the intensities of interference (I_i, I_j) and the abstract weights (W_i, W_j) of principles as belonging to the ideal dimension; the epistemic reliability (R_i, R_j) would accordingly belong to the real dimension. This categorization would overlook, however, the fact that both the intensities of interference and the abstract weights depend not only on normative premises, but also on empirical premises, in their external justification. Furthermore, epistemic reliability is not an aspect of the real dimension, but denotes knowledge about both the real and the ideal dimensions. It is therefore located at a meta-level, as compared to the two dimensions (Klatt & Schmidt, 2012, p. 91).

It is more convincing, therefore, to say that the variables of the weight formula are neutral as to the two dimensions. In other words, the internal justification of balancing is neutral as to law's dual nature. The two dimensions of law take effect rather in the external justification of balancing, which concerns the statement of grounds for a certain grading of both the intensities of interference and the abstract weights (Klatt & Meister, 2012b, p. 54; on the distinction between internal and external justification in balancing see Klatt & Schmidt, 2012, p. 74). In order to justify this analysis one may simply refer to the dual nature of legal argumentation, as stated above, which influences any external justification in law.

I would like to demonstrate the neutrality of the variables as to law's dual nature with the help of the German Federal Constitutional Court's (FCC) jurisdiction on social rights.

In an early decision, the FCC declined to derive a right to survivors' social security rights directly from Art. 1 (1) or Art. 2 (1) of the German Constitution (BVerfG, 1951). The FCC decided that it was the competence of the legislature in the first place to implement protection from material hardship. The FCC said it was not permitted to put itself in the place of the legislature, by means of exercising control over the legislature's omission. The complainant was hence referred to the ordinary statutory law. We can explain this decision as a positivist interpretation of the constitution, putting too much emphasis on the real dimension of positive law.

In contrast, in a recent decision on the question of whether the amount of the standard benefit paid to secure the livelihood of adults and children under German social security law the FCC directly inferred a fundamental right to the guarantee of a subsistence minimum from Article 1 (1) in conjunction with the principle of the social welfare state contained in Article 20 (1) of the German constitution (BVerfG, 2010). In essence, the FCC had now used law's ideal dimension in order to justify that the legislature had infringed with fundamental rights of the complainant by not enacting more thorough protection. A comparison of these two decisions reveals that the variables of balancing are neutral. Only in the external justification they are filled in by means of law's dual nature.

This also clarifies that and how law's real and ideal dimensions are integrated in the proportionality test. This integration is sometimes misunderstood. Tremblay has argued that balancing was morally neutral and allows the judges to avoid the difficult normative, political or philosophical questions when applying the law (for a critical view, see Klatt, 2014, pp. 897-899; Tremblay, 2014, pp. 866, 869, 887). This argument can be labelled as a relief thesis. The relief thesis can be construed as arguing that balancing could manage with law's real dimension alone and that it was not dependent upon law's ideal dimension. The relief thesis is of high originality since the objection against balancing normally runs the other way round: the alleged moral neutrality of balancing is criticized for its pure formality, while Tremblay claims neutrality to be the advantage of balancing (for a critical view, see Klatt & Meister, 2012a, pp. 694-695; Tsakyrakis, 2009, p. 474; Webber, 2010, p. 191). The relief thesis is, however, mistaken. While the internal structure of balancing qua pure form is indeed morally neutral, this is precisely not true for the external justification of the assignments by means of the triadic scale. As a formal structure, balancing is dependent upon the employment of normative premises, which will be provided from law's ideal dimension (Klatt, 2014, pp. 897-899). I conclude that law's dual nature is not only present in the application of rules, but also in the application of principles.

4 The Main Challenge

An opponent to this model could concede that both ideal and real elements are used in legal argumentation. Still, the opponent could maintain that they were not really integrated with each other, but only added. She could argue that they were added in a way that gave rise to all sorts of inconsistencies. This is the main challenge against the dual-natured account of legal argumentation. The vital question, therefore, is this: how can we achieve integration, rather than mere addition, of formal and material elements in the Rule of Law, and in legal argumentation?

4.1 Integration as Optimization

I would like to submit that the integration problem can be interpreted as a problem of optimization. The tension between formal and material elements can be solved by means of balancing. A balancing exercise will decide upon the degree of realization of both dimensions required in each case. That way, it is possible to arrive at a case-sensitive, hence flexible solution which realizes both material and formal elements of the Rule of Law to the respective utmost degree possible. It is decisive that in this context I am not referring to the well-known balancing of material principles, as it is familiar from the last prong of the proportionality test (cf. Klatt & Meister, 2012b, pp. 45-73). Rather, I am referring to a different balancing of a material principle (justice) and a formal principle (legal certainty), as has recently been introduced by Alexy (2013a). In this balancing exercise, the rule-book-elements of legal argumentation are balanced with the rights-elements.

The balancing account defended here must not be confused with Raz's account. Raz also acknowledges some sort of balancing relation: he explicitly states that conformity to the Rule of Law (purely formally understood) was "a matter of degree" and that "it is to be expected that [the Rule of Law] possess [...] no more than prima facie force. It has always to be balanced against competing claims of other values." (Raz, 2002, p. 228). What Raz has in mind is a balancing which can be labelled external to the Rule of Law. He equates the Rule of Law with the purely formal side and then acknowledges that it is being balanced against material values. In contrast, the balancing exercise in my model, being based on a broader concept of the Rule of Law, is internal in the Rule of Law (see Allan, 2011, p. 156 for a similar account). This difference between an external and an internal optimization is important for reasons of distribution of competences (Allan, 2011, pp. 160 with fn. 22).

In consequence of this understanding, the old problem of the hierarchy of the canons can be easily reconstructed as the problem of integrating the formal and the material dimensions of law. How? As an example for how this integration works in practice, I would

like to mention a rule on the burden of proof in argumentation formulated by Alexy (1989, p. 248):

> Arguments which give expression to a link with the actual words of the law, or the will of the historical legislator, take precedence over other arguments, unless rational grounds can be cited for granting precedence to the other arguments.

We can interpret this rule as a prima facie preference of the authoritative or institutional dimension, over the material or correctness dimension. I would like to label this rule the 'Radbruch Formula of legal argumentation'.

The challenge of integrating the formal and the material dimension of legal argumentation is not convincingly mastered if too much weight is assigned to one or the other side. One-sidedness in unjustified favour of the formal dimension occurs, for example, in the UK's doctrine of absolute sovereignty of Parliament which in effect makes "all legal values [...] vulnerable to the fluctuating views of a current parliamentary majority" (Allan, 2011, p. 155) Another example is Mackie's statement that "[...] the finding out of what is the law is an empirical task, not a matter of a priori reasoning." (Mackie, 1984, p. 161).

The opposite mistake – one-sidedness in unjustified favour of the material dimension, is present in classical natural law doctrine, as summarized by Blackstone (2009, p. 41):

> This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times.

This universality claim neglects that the authoritative dimension plays out differently all over the globe, in the various countries, and at different times.

In contrast to these unbalanced positions, the middle-way I propose does allow for moral reasoning in the law, while at the same time acknowledging the institutional dimension of legal argumentation. The judge must include considerations of justice in her reasoning, rather than removing all such questions from the province of law and relegating them to the uncertain political realm (cf. Allan, 2011, p. 162). But she may not rely on her personal conviction of some eternal natural law in order to overrule what appears to be the settled law of the land. Dworkin's Hercules does not directly grab for eternal truths into the blue sky of justice. Rather, Hercules tries "to find the best justification he can of a past legislative event" (Dworkin, 1986, p. 338), drawing on principles implicit in his own legal order. Even though legal argumentation is open to moral considerations of justice, the rule-book conception continues to exert its influence (Dworkin, 2001, p. 17). The balancing weight of the principle of legal certainty persists. The authoritative content of

legislative enactments and previous judicial decisions limit the scope of the judge's interpretative freedom.

This idea of combination and integration leads to a third theory of law, as opposed to theories that put either the formal or the material side front and centre. In the following sections, I would like to discuss two examples of how such a third theory of law may work in practice.

4.2 *The Principle of Legality in UK Constitutional Doctrine*

The principle of legality in UK constitutional doctrine allows basic rights to be overridden by act of Parliament, providing that "the curtailment of rights is quite explicit, signalling a deliberate legislative intention to that effect" (cf. Allan, 2011, p. 158). This can be interpretation as a conditional preference relation between the rule-book and the rights-conception of the Rule of Law, which represent the principle of legal certainty and the principle of correctness respectively: the principle of legal certainty takes precedence on condition that the curtailment of the principle of correctness is made explicit in a clear and specific provision by Parliament. However, as Allan has underlined that this conditional preference relation may well change in different circumstances. It holds true only if the infringement with rights is not very serious:

> In practice, the graver the threat to a constitutional right, and the more fundamental the right in issue, the greater is the courts' reluctance to find the necessary parliamentary sanction. (Allan, 2011, p. 158)

Hence, in cases of severe curtailment of rights, the substantial aspect of the Rule of Law will take precedence over its formal aspect. This change between the two preference relations, depending on conditions, very well matches the balancing account of the Rule of Law defended here.

4.3 *Fit and Justification*

Dworkin has advocated a third theory of the Rule of Law. It is worth looking more closely on how the integration between the two dimensions works in his theory. The way in which Dworkin integrated the two dimensions changed over the years. In Law's Empire, Dworkin separates the two elements of fit and justification too much, as we can learn from Allan. Imagine a situation in which the legal record is utterly complex or confused. Dworkin says that when the element of fit turns out to be not helpful, Hercules may simply abandon all considerations of fit in favour of more plainly substantive issues of political morality

(Dworkin, 1986, pp. 248-250). Allan objects, and I think correctly, that Dworkin at this point neglects the internal connection between fit and justification. The two are "inextricably intertwined" (Allan, 2015, p. 22), and when the judge ceases to search for inspiration in the legal sources themselves, she takes up an external viewpoint about the practice. She loses her internal, interpretive standpoint in the practice.

Dworkin's earlier account of legal reasoning, Allan (2015, p. 13) observes, was far superior because it integrated fit and justification better:

> Judgments of fit are [...] intimately bound up with considerations of moral appeal, which will determine which features of the practice should be treated as critical [...] from the perspective of fit.

In applying the test of fit, the judge must inevitably attend to the substantive arguments. This interaction between fit and justification, between institutional practice and moral principle, was clearer by far in the Dworkin of *Taking Rights Seriously* (1977, p. 125):

> Hercules does not first find the limits of law and then deploy his own political convictions to supplement what the law requires. He uses his own judgment to deter-mine what legal rights the parties before him have, and when that judgment is made nothing remains to submit to either his own or the public's convictions.

This intrinsic relatedness of fit and justification is, after all, no surprise. Because the formal dimension exists precisely in order to promote justice and fairness in a pluralistic society, as we have seen earlier. The formal dimension is not as detached from the material dimension as the later Dworkin assumes. Legal records are "merely summary guides to the judge's current understanding of the balance of moral principles" (Allan, 2015, p. 13, see also p. 17).

An opponent could try to argue that the relation between fit and justification was too close in this theory. After all, if legal materials ran out, what else could the interpreter do? She must take resort to the balancing of purely material principles. The decisive point, however, is that these material principles are still part of the law. The judge does not step outside the practice, but applies principles internal to the practice, as Allan (2015, p. 8) aptly remarks:

> But it does not follow (as Dworkin supposes) that legal obligations may give way to countervailing demands of justice; the appropriate moral balance between justice and conflicting political values is struck in the very process of determining the content of law.

The objection therefore does not succeed. While it is useful to distinguish formal and material elements of the Rule of Law in order to achieve analytical clarity as far as possible, ultimately they are closely connected. Otherwise, it would be impossible to fully reflect law's dual nature in legal reasoning.

5 A Third Theory of Legal Argumentation

In the present article, I have argued that the cornerstone for clarifying the relation of the Rule of Law and legal argumentation is the concept of law. I have followed a non-positivistic concept, based on the dual nature thesis. In consequence, the rule of dual-natured law is a rule of reason. It integrates the formal and the material dimensions of the law. The concept of the rule of dual-natured law has important consequences for the character of legal reasoning. It provides a third theory, combining descriptive, authoritative, institutional elements of legal argumentation with prescriptive, ideal elements of justice and moral correctness.

The main challenge to this account is the problem of integration. I have reconstructed this integration as an optimization problem. Legal argumentation must take account of the fact that many arguments have already been worked through in the past. The upshot of past legal reasoning appears in the set of precedents, in the various legal doctrines, in authoritative decisions, in short: in the real dimension of the law. The real dimension of legal argumentation provides us with legal certainty, stability, and predictability. The real dimension remedies the uncertainty that arises out of law's argumentative character, out of its ideal dimension, in a world of value pluralism (Waldron, 2008b, p. 54). The real dimension guarantees that public morality does not collapse into personal morality (Allan, 2001, p. 315). The real dimension secures that our democratic conception of the common good is not identified with whatever individual conceptions of the good we happen to pursue.

At the same time, however, the rule of dual-natured law reminds us that the real dimension of legal argumentation can provide a prima facie certainty only. The rule of dual-natured law reminds us that the game of giving and asking for reasons never comes to a definite stop (Cohen, 2010). The ideal dimension of law never ceases to be present in "the argumentativeness of legal practice" (Finnis, 1987, p. 358). It is therefore not unjustified to end this article with what is at the same time the most motivating and the most disturbing aspect of legal argumentation: we do have the freedom to think afresh.

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