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Judicial Argumentation: Law's Distinction from Fact

Argumentación judicial: la distinción de la ley a partir del hecho

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Abstract: The paper, focusing on statute law, argues that judicial argumentation, one branch of legal argumentation, differs from argumentation in general in requiring a distinction between law and fact premises, in accordance with a particular understanding of the rule of law, arguably a constitutional principle, and that both judicial institutions and analysts of judicial decision-making consider the distinction workable. It then examines logical, linguistic, chronological, procedural and hermeneutical features that distinguish the law and the fact premises.

Keywords: Constitution, the rule of law, jury and pleadings, syllogism, statis theory, Toulmin, statutes, legal language and interpretation.

Resumen: Este trabajo sostiene que la argumentación judicial, un brazo de la argumentación legal, difiere de la argumentación en general en requerir una distinción entre ley y premisas factuales, en relación con un entendimiento particular de la regla de justicia, discutiblemente un principio constitucional, y en que tanto las instituciones judiciales como los analistas de la decisiones jurídicas consideran la distinción de trabajo. Luego examina las características lógicas, lingüísticas, cronológicas, procedimentales y hermenéuticas que distinguen la ley de las premisas factuales.

Palabras clave: Argumentación judicial, lenguaje legal, la regla de justicia, jurado.

1. Introduction

The general purposive definition of research, here submitted, derives from Aristotle's definition of 'thesis' in *Topics*. A thesis, for Aristotle (104b18-

28), is 'a belief contrary to general opinion' or 'a reasoned view contrary to received opinions'. Under that definition of thesis, the purpose of research is to make the questionability of opinion (doxa) endoxical and beyond that to make either a paradoxical claim endoxical (non-paradoxical) or an endoxical claim paradoxical.[1] An endoxical proposition is one that opinion at large or within a given community considers as true or valid. A paradoxical proposition is one that opinion does not consider as true or valid. One can extend the contrast, derived from Aristotle's *Topics*, to questions. An endoxical yes-no question is one to which the two answers are endoxical. A paradoxical question is a question for which only one of the two answers is endoxical.

The question here is endoxical. The expression 'legal argumentation' implies there is something specific about legal argumentation. Yet there are authors who, notwithstanding the implication of the expression 'legal argumentation', apply general models of argumentation or reasoning to legal argumentation, as if there was nothing specific about legal argumentation. The syllogistic model has often been used and recommended for the presentation of judicial argumentation as applicable to individuals (Golding, Schroeder), despite Aristotle's repeated claim that about individuals, for instance Socrates, nothing could be predicated. Toulmin's model, although apparently derived from an analysis of judicial argumentation, as in the famous example of Harry's citizenship, has been thought appropriate for all instances of argumentation.

Where the question is endoxical, research has a lesser task: to provide more weight to one or the other answer. In this paper, restricting the discussion to judicial argumentation, it is argued (in contrast with McEvoy, 2011) that judicial argumentation is specific in requiring a clear categorical distinction between the two foreground premises from which a decision is drawn: one premise must be a rule of law; the other, a factual proposition. The first part of the paper shows that the requirement is deeply rooted in the English constitution. The second shows that it is presumed to be work-

[1] For a recent analysis of *Topics*, see Slomkowski (1997). In *Topics*, Aristotle uses the term 'thesis' interchangeably with 'problema' (104b34-105a2), although elsewhere in the work he distinguishes the two terms (104b29-34). The word 'thesis' is a transliteration and the words, 'problem', 'paradoxical' and 'endoxical', derivatives.

able both in English institutions and in argumentative analysis. The third part considers features that distinguish law and fact premises.

2. Constitutionality

However else one understands it, the rule of law is generally taken to mean that a law must be distinct ontologically from the case or cases to which it is applied. The principle, thus understood restrictively, figures among the most enduring principles of the English Constitution: if such a thing there be, which one must first consider, before examining whether the rule of law is a constitutional principle and if it does require a distinction of law and fact.

The English Constitution,[2] contrary to the constitutions of other democracies, is not enshrined in a single document nor does it in theory unarguably prevail over other laws. It remains a heterogeneous patchwork of statutory provisions, case law and unwritten conventions. Admittedly, the US Constitution only appears to be a single written document, since the US Constitution arguably includes all the related decisions of the US Supreme Court. However, the US Constitution forms the framework within which the three branches of power (in US English, 'Government') are constitutionally empowered to operate. In the English constitution, there is no such limitation to the exercise of power. Under the constitutional principle of Parliamentary Sovereignty, the roots of which include the Bill of Rights 1689, but are several and uncertain, no text or institution restricts the power of Parliament to make law: Parliament can, in principle, enact any provision, including of the sort that, under the US Constitution, one would describe as constitutional. Although arguably, the courts, under the Human Rights Act 1998, are now in a better position to check and balance, as in the US, the legislature, Coke's claim in *Dr Bonham's Case*[3] that 'in many cases, the common law will control Acts of Parliament, and sometimes ad-

[2] The expression 'English Constitution' is preferred here to the expressions 'British Constitution' or 'the Constitution of the United Kingdom', because it enables reference back to the Constitution before the Act of Union 1707 that unified England and Scotland in 'the United Kingdom of Great Britain' and the Act of Union 1800 that added Ireland to the UK.

[3] [1610] 77 E.R. 638, 646. Although the present issue focuses on legal argumentation, this is not a law journal: therefore, in this article, references to law (statute law and judge-made or case law) will be kept to a minimum. Whenever possible, reports of judicial deci-

judge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void' has been discarded.[4] Parliament (or 'the Queen in Parliament', that is to say, according to the performative enactment formula of all Acts of Parliament, 'the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled') can make, amend or repeal any law it pleases, including its own. Until the fifteenth century, statute books, which were privately produced, were of two types: the *Vetera Statuta*, compilations of statutes from Magna Carta up to the end of Edward II's reign; and the *Nova Statuta*, collections of statutes from the reign of Edward III until the manufacture of the book. The statutes in the first type of book, which laid down the fundamental principles of common law, were intended to be irrevocable.[5] Under the doctrine of Parliament Sovereignty, no statute is irrevocable. Moreover, as statutory rules of law, under that doctrine, prevail over all other rules of law, no rule of law is irrevocable. There is an English constitution. It would be paradoxical to deny it. Yet it can be identified neither with any single document nor with a relatively permanent set of provisions requiring a specific procedure to be changed.

Thus, in the course of history, the above quoted enactment formula, which appeared in varied terms as from the Middle Ages and can be read verbatim for instance in the Triennal Act 1640, is descriptive of a constitutional reality in respect of legislation that was gradually established in the wake of the Second Barons' War and Simon de Monfort's Parliament 1265, the first to include the commonalty, but it has indeed become a mere for-

sions will be cited only under the neutral citation system, which is sufficient for internet retrieval through the BAILII (British ad Irish Legal Information Institute) website. The English Reports (E.R.), the collection of reports from before 1865, are available through the Common LII (Commonwealth Legal Information Institute) website. Dates are here given only between brackets, contrary to usual citation rules, which require use of parentheses in certain cases.

[4] Some, for example Helmholz (2009), have argued that the case does not instance judicial review.

[5] The information on early statute books is derived from Christies' note for sale 7088 lot 19 (16 November 2005): *Nova Statuta*, Statutes of the Realm from the first year of the reign of Edward III to the 20th year of Henry VI, in Middle English. The note refers to Pronay and Taylor (1980, pp. 18-19).

mula. In other words, it has ceased to be descriptive. The balance of power between the three institutions it refers to and which Charles I belatedly advocated in his answer to the Nineteen Propositions 1642 as a combination of Aristotle's three constitutions (monarchy, aristocracy and democracy)[6] has completely altered, not cryptically, but overtly, to the benefit of an offshoot of the Commons, a change that one may well call a 'revolution', even if not sudden, but drawn out over the centuries. The Royal Assent has not been withheld since Queen Anne vetoed the Scottish Militia Bill in 1708. The Parliament Act 1911 and its Amendment in 1949 have for public bills, the most important, reduced the House of Lords, one of the two Houses of Parliament, to a mere advisory body, not to the monarch, but the other House, the House of Commons. Finally, instead of the monarch as of yore, it is the Prime Minister and more generally the Government (in UK English, the Executive), an emanation of the Majority in the Commons, that directly or indirectly initiate the majority of bills. The meaning of 'Parliamentary Sovereignty' itself has therefore changed.

Arguably, in some respects, it has not: its meaning has merely become explicit. The English Constitution, as said at the outset of this argument, is a heterogeneous patchwork of written and unwritten provisions. One could also compare it to a stone and glass wall, with parts of both having been broken down and parts of the latter replaced by stone. Thus, before 1911, there was no written (stone) provision preventing the House of Lords to veto a money bill. There was however an unwritten (glass) convention according to which the Commons should prevail for such bills, which is

[6] 'We call God to witnesses, that as for Our Subjects sake these rights are vested in Us, so for their sakes, as well as for Our own, We are resolved not to quit them, nor to subvert (though in a Parliamentary way) the ancient, equal, happy, well-poised and never-enough commended Constitution of the Government of this Kingdom. There being three kinds of Government amongst men, Absolute Monarchy, Aristocracy and Democracy, and all these having their particular conveniences and inconveniencies, the experience and wisdom of your Ancestors hath so moulded this out of a mixture of these, as to give to this Kingdom (as far as humane Prudence can provide) the conveniences of all three, without the inconveniencies of any one, as long as the Balance hangs even between the three Estates, and they run jointly on in their proper Chanell. The ill of absolute Monarchy is Tyranny, the ill of Aristocracy is Faction and Division, the ills of Democracy are Tumults, Violence and Licentiousness. The good of Monarchy is the uniting of a Nation under one Head to resist Invasion from abroad, and Insurrection at home: The good of Aristocracy is the Conjunction of Counsel in the ablest Persons of a State for the public benefit: The good of Democracy is Liberty, and the Courage and Industry which Liberty begets.'

implied already in Parliament's request to Richard II in 1378 for the Commons rather than the Lords to be allowed to audit his expenditure of the extraordinary revenues obtained through Parliament. When the Lords attempted to assert a right to veto 'the People's Budget', which involved a land tax, they hit a glass part of the Constitution, and were forced with a threat of governmental flooding of the Lords with a 100 liberal Life Peers into voting the Parliamentary Reform Act 1911, which turned into statute (stone) the convention (glass).

Notwithstanding Parliamentary Supremacy, as redefined in the above paragraphs, there is at least one principle that has subsisted ever since the Middle Ages: the rule of law, which is argued here to require the distinction of fact and law in judicial argumentation. It is noteworthy that Parliament, in the Constitutional Reform Act 2005, s1(a), should declare that 'the act does not affect the existing constitutional principle of the rule of law' (as, in accordance with Parliamentary Supremacy, it could do) and that the act does not define the principle, which has been understood in a diversity of ways. The rule of law is admittedly multiple and uncertain in meaning. In part, it is arguably obsolete. To be more precise, therefore, one must say: the rule of law, in one of its senses (the sense desired here), has subsisted, although perhaps not in others.

The rule is often understood to mean that the monarch is under, not above the law. Magna Carta 1215 can be read as having set down the rule of law in that sense. Clause 61 provided that, should the monarch breach its provisions, he should be bound to redress the breach. Magna Carta 1297, which replaced the text of 1215, reiterated the same provision, albeit in weaker terms. Parliament, however, has repealed almost the whole of Magna Carta 1297, including that provision, although in clause 1, which has not been repealed, Edward I states 'We have granted also, and given to all the Freemen of our Realm, for Us and our Heirs for ever, these Liberties under-written, to have and to hold to them and their Heirs, of Us and our Heirs for ever', thereby making Magna Carta 1297 suitable for a book of 'vetera statuta'. The repeal of that provision is nevertheless coherent with the doctrine of Parliamentary Sovereignty, since Parliament, under that doctrine, is empowered to repeal its own laws and is, in that sense, above them, subject only to the General Election, due at least every five years under the Parliament Act 1911, s 7, which amended the Septennial Act 1715.

Setting apart clause 1, just quoted in part, and clause 9, which concerns the liberties of London, the only clause of Magna Carta 1297 that Parliament has been not repealed is clause 29, which reiterates in varied terms Magna Carta 1215, clause 39: 'No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him/deal with him, but by lawful judgment of his Peers, or by the Law of the Land. (...).' The clause sets down two, possibly alternative ('or')[7], principles: the rule of law ('by the Law of the Land'), in the sense desired here and that remains arguably valid; trial by jury ('Lawful judgement of his Peers'). The 'due process of law' clause, in the third of Edward III's 'Six Statutes' (28 Edw. 3, c 3), was probably understood to mean observance of those two principles. Although Magna Carta 1297 clause 29, like Magna 1215 clause 39, appears to be concerned especially with criminal cases, due process of law (at Common Law, as opposed to Equity, which had not yet emerged as a separate source of the law) came to require, among other things, trial by jury for both criminal and civil cases.

It will be noted that Magna Carta 1215 and 1297, clause 39 or 29 respectively, does not make it explicit that justices are empowered to resolve question of law and juries, questions of fact, but the relevant point here is that trial by jury has been restricted, and the clause therefore amended, if not actually repealed. Trial by jury has been on the decline for about a century and a half, as part of the remodelling of procedure in the Royal Courts, the source of Common Law, along the lines of procedure in the court of Chancery, the source of Equity, firstly for civil trials, but also, recently, for criminal trials. Trial by jury was habitual in civil courts until the Common Law Procedure Act 1854, which allowed justices of the common law courts (now represented in the High Court by the Queen's Bench Division) to try cases without a jury, upon the parties' consent, and the County Courts Act 1846 (Baker, 1979, pp. 80-81). Since then the civil jury has gradually disappeared. The Administration of Justice Act 1933, s 6 guaranteed trial by jury either with leave of the court or of right only for fraud, libel, slander, mali-

[7] The effect of jury nullification, which overrides whatever a justice may declare to be the law, suggests that the two principles may be identical: that whatever a jury decides manifests the law of the land.

cious prosecution, false imprisonment, seduction and breach of promise of marriage. The Senior Courts Act 1981, s 69 further restricted the right, which is conditional, by suppressing the latter two types of cases. Now the Criminal Justice Act 2003, ss 43-46 has opened the possibility of trials without jury even for indictable offences, for the same reason that led to juryless trials in the Court of Chancery in the late Middle Ages: to counter jury tampering.[8] Magna Carta 1297 clause 29 has not been repealed, but the rule of law, in that sense, has been considerably restricted in application, even if one considers that, originally, it applied only for criminal cases.

The rule of law principle and the due process of law principle (taken to be synonymous on this point) remain unchanged, however, in respect of the other or alternative requirement that persons should be judged under the law of the land. The requirement, as stated in Magna Carta 29 must be taken to mean that the law, under which a person is judged, cannot be ad hoc, but must have a separate, anterior existence. In Magna Carta, the requirement is stated in relation to offences, which remains the case today. It was invoked by Jeremy Bentham in *Truth versus Ashurst* to denounce English case law, which he called 'dog-law' (that is, not law at all). Recently, in *R v Rimmington,*[9] Lord Bingham, recalling Bentham's denunciation, made the reassuring remark that English law (more exactly, case law) had 'set its face firmly against' creating ad hoc offences and thereby breaching the rule of law. Thus restricted to criminal law, the requirement has become international or supranational. Both the Universal Declaration of Human Rights 1948 and the European Convention on Human Rights 1950, to which the UK was a signatory before undertaking in the Human Rights Act 1998 to further its effect on domestic law, require, respectively in articles 11(1) and 7, that a person cannot be guilty of an offence for an act or omission which was not already an offence when he committed the act or omission. The principle, however, extends beyond criminal cases. It underlies the declarative theory of case law, under which justices rather than confess their creativity declare that an arguably new rule of law has in fact always existed. It accounts for the *stare decisis* doctrine, which requires

[8] Interestingly, the present President of the French Republic, inverting the English development, has announced that trial by jury should be extended.

[9] [2005] UKHL 63, paragraph 33.

justices to follow 'binding precedents', whether or not they personally agree with them, and so limits their creativity. Arguably, John Selden invoked the requirement in the early seventeenth century when he denounced the instability of Equity with the Lord Chancellor's foot analogy.

3. Workability

The opposition between law and fact, which is frequent in the community of lawyers and legal scholars, is also current in ordinary language. According to John Austin's axiom for his form of linguistic phenomenology, based on ordinary rather than scholarly language, an ordinary language in its development retains only those words and verbal contrasts that the speakers of that language deem useful (Austin, 1979, p. 182). If that is so, then one may suppose the opposition is generally thought to be useful. Usefulness must surely imply workability. It must be possible to oppose law and fact in practice. The law suggests that is the case in using the opposition to define jurisdiction: the opposition between law and fact governs the jurisdictional opposition between justices and juries, to whom pleadings for centuries were purposed to submit questions of fact, not law, and it partly governs the definition of appellate jurisdiction. Justices, lawyers, legal scholars often make the same suggestion, in their analytical presentations of judicial decisions.

The rule that no man should be condemned but by 'Lawful judgment of his Peers' was already stated in Magna Carta 1215 (June), clause 39, at almost the very time when the Council of Latran IV 1215 (November), canon 18, prohibited members of the clergy from bestowing blessings in ordeals as they done. At common law, the dichotomy between law and fact governed the jurisdiction of justices as opposed to juries for centuries and still does, albeit to a lesser extent, as stated in part 2. In trials by jury, justices decide questions of law, not facts, and jurors, questions of fact, but arguably, not law. The jurisdictional delimitation between justices and jurors presupposes the possibility of always distinguishing law and fact and the observance of the delimitation on both sides. Both the presupposition and the observance are questionable, as the long and complicated history of trial by jury suggests. It has been observed for instance that the verdict

may be contrary to law and evidence. Such was the issue in *Bushell's case*:[10] had the jury covertly circumvented the application of the law or was it to be presumed to have relied on evidence not submitted? The former possibility has been called 'jury nullification'. Relatively recently, in *R v Smith*,[11] the House of Lords commented on this phenomenon without naming it in relation to provocation, a partial defence for murder, which if proven results, under the Homicide Act 1957, s 3, in a conviction for manslaughter. (Since then, Parliament has modified the law on that defence.) Justices, who may withdraw questions from the jury, have developed the habit of providing arguments for their decisions, but a jury is not required to provide any reason for its verdict, indeed is prohibited from doing so. In principle, verdicts are, or rather were,[12] final, even when suspected of nullification. The effect, as said previously, is that the distinction between law and fact collapses, since the jury, in such cases, may well apply another rule of law than the one stated by the justice(s).

Pleadings, however, developed on the assumption that the jurisdictional distinction between justices and juries was possible and observed. Part of pre-trial proceedings, the pleadings, originally, had the purpose of making the parties 'join issue': that is to say, reduce their conflict to a question of fact, which the jury was empowered to decide. A 'demurrer', a question of law, had the effect of interrupting the pleadings. Thus, Mathew Bacon (VI, 354), formulating the opposition between demurrers (that raised a question of law) and pleas (the denial or 'traverse' of which raised a question of fact), said 'a demurrer is so far from being a plea, that it is an excuse for not pleading'. Following Baker's etymological suggestion (Baker, 67), an issue, contrary to present usage, could only be a question of fact: the expression 'issue of law', however frequent today, is a misnomer. The joinder of issue ('exitus'), submitted to the courts at Westminster, was, he adds, the 'way out into the country' where a local jury would answer the question. The distinction between law and fact was less relevant in the Court of Chancery,

[10] [1669], 124 E.R. 1006.

[11] [2000] UKHL 49.

[12] The Supreme Court Act 1981, s 28 and, on a suspicion of jury tampering, the Criminal Justice Act 2003, s 76, have now overridden the common law 'double jeopardy' rule ('autrefois acquit' plea), according to which a defendant cannot be tried twice and a jury's 'not guilty' verdict questioned.

the source of Equity, because justices dealt with questions both of law and fact without a jury and pleadings as required by that court were 'relatively informal' (Baker, 88). Reforms as from the first half of the nineteenth century have made that model prevail over the common law model and its procedural distinction between law and fact. The Common Law Procedure Act 1854 started a contrary, assimilative movement, by empowering the Court of Chancery to try issues of fact by jury and to award damages (a common law remedy) and the common law courts to grant injunctions (an equitable remedy), but the Supreme Court of Judicature Acts 1873-1875 integrated the two in a single court, the High Court, and confirmed that the Court of Chancery model should prevail over the common law model, not only in substantive law, but adjectival law. The Supreme Court of Judicature Acts 1873, s 25(11) gave statutory status to James I's prerogative preference for Equity over common law as affirmed in his decree which put an end to the conflict which in 1616 opposed Edward Coke (Chief Justice/common law) and Lord Ellesmere (Lord Chancellor/Equity), although it had then been deemed illegal. Before the Judicature Acts 1873-1875, the County Courts Act 1854 had launched the disappearance of civil trial by jury and the Uniformity of Process Act 1832 the simplification of pleadings. Those reforms, which have reshaped common law along the lines of Equity for civil cases, have had the effect of diluting the opposition between law and fact. 'The judges, Baker says (1979, pp. 81-82), give discursive 'judgements' in which the findings of fact are intermingled with legal comment. [...] it is never certain to what extent judgements turn on the facts. [...] Equity, in the old sense, has begun to replace and not merely to supplement the law.' At the end of his next chapter, Baker defines what he means by equity 'in the old sense': 'an approach to justice which gave more weight than did the law to particular circumstances', in other words the facts of the case.

Whether those reforms have actually affected the possibility of distinguishing law and fact or merely highlighted the difficulty, the opposition continues to be relevant and to be taken for granted for the definition of appellate jurisdiction. The Supreme Court, which on October 1 2009 replaced the Appellate Committee of the House of Lords, under the Constitutional Reform Act 2005, hears appeals from decisions of the criminal division of the Court of Appeal only if the latter has 'certified' that the case involves 'a point of law of general public importance' (Criminal Appeal Act 1968, s

33(2)). The High Court (Queen's Bench Divisional Court) has jurisdiction over appeals from the Crown Court and the Magistrates' Courts only 'by way of case stated', that is to say exclusively on questions of law or procedure, not facts (the Supreme Court Act 1981, s 28(1), the Magistrates' Court Act 1980, s 111(1)).

Notwithstanding the difficulties in distinguishing law and fact, the opposition remains relevant also for the analysis of judicial discourse as both the justices' presentations of their decisions and, ever since its beginnings, argumentation theory have suggested. Justices themselves, in delivering their 'opinions' (that is the word they use) occasionally isolate 'the facts' with a subtitle: see for instance Lord Hoffmann's opinion in *R v Smith*, mentioned above. Passages thus subtitled are interesting material to elucidate justices' own understanding of what 'facts' are as opposed to 'law'. The opposition is manifest already in Roman rhetoric in its guidelines for judicial oratory and continues to be adopted for the syllogistic or Toulminian analysis of judicial decisions. An orator, according to Roman and partly Aristotelian rhetoric, which were largely imitated until beyond the Renaissance, had five tasks (*officia*) to accomplish in preparing a speech: the definition of the issue and the discovery and assessment of arguments (*inventio*); the persuasive arrangement of arguments (*dispositio*); their persuasive wording and phrasing (*elocutio*); their persuasive vocal, physiognomic and so on delivery (*actio*); and, normally before the latter, the memorisation of the whole (*memoria*). In Roman, as opposed to Aristotelian rhetoric, invention for judicial discourse was rooted in the *statis* or *constitutio* system. The system, which Hermagoras of Temnos (first century B.C.), a theoretician of the Rhodian school, is believed to have developed first, is comparable to the pleading system, except that it includes, not only questions of fact (issues), but also questions of law (demurrers).[13] The orator, according to that system, had to select the question he would argue an answer to from a system of all the possible questions that could arise in a judicial debate and then discover the relevant arguments for that conclusion. Among other distinctions, the presentation of the system invariably distinguished questions of law (*juridicalis constitutio absoluta*) and ques-

[13] There are numerous articles on the stasis system, for instance Heath's. For a presentation of the status system and its comparison with pleadings: see McEvoy 1988 and 1991.

tions of fact (*conjecturalis constitutio*), with few nominal variations. If the opposition between law and fact holds, as Roman rhetoric suggests, then the frequent adaptation of classical logic to formulate judicial arguments appears acceptable. In the simple instances, the major premise is the law, the minor the fact, and the conclusion, the application of the law to the fact. Instead of predicate and propositional logic or categorical and hypothetical syllogisms, one can also fit the components of legal arguments into the slots of Toulmin's simple and extended models,[14] as his most often quoted example invites one to do, legalistic as it is, bearing on whether Harry born in Bermuda is a British subject. The warrant [W] is a statement of the law. The backing [B] is the citation of the relevant statute or precedent. The data [D] is the fact. Defences and extenuating circumstances (justifications and excuses), but also other factors, for instance erroneous directions to the jury which can result in the Court of Appeal's quashing a conviction, might well fit into the rebuttal slot [R], which accounts for qualifiers [Q], such as 'presumably'.[15]

Admittedly, the syllogistic formulation of the judicial arguments in an actual case often results in several interrelated syllogisms; likewise, a Toulminian analysis. Indeed, both the major and the minor premises may themselves be the conclusion of other syllogisms. The complexity does not prejudice the validity of the analysis. Thus, one can formulate the decision in *Esso Petroleum Co. Ltd v Customs and Excise Commissioners*[16], as developing a syllogism or Toulminian argument within which another one is imbedded. At the first level, there is the relevant statutory provision as the major premise [P1 ≡ Q1] or warrant (W1) and backing (B1) and the facts as the minor premise [p1] or data [D1]. (There will be no Toulminian rebuttal or qualifier for this case.) If a contract is a contract of sale [P1], then it is subject to taxation [Q1] [W1], under the Purchase Tax Act 1963,[17] s 2(1), as

[14] The warrant in Toulmin's examples is not always legalistic. Interestingly for the discussion on law and fact, it can be statistical.

[15] Extenuating circumstances do not suspend the conclusion, but argue an appropriate degree of punishment on the scale provided for in the warrant. Moreover, the same factors can be, not only defences or extenuating circumstances, but also part of the definition of an offence, which figures as the warrant.

[16] [1976] 1 WLR 1, [1975] UKHL 4.

[17] The VAT (Value Added Tax) replaced the purchase tax, as a consequence of UK's EEC (European Economic Community) membership.

coming within Group 25 in Schedule 1 of the act [B1]. Esso offered a non-monetary World Cup coin to motorists for every four gallons of Esso petrol they bought [D1]. If the coins were part of the consideration in the contract of sale of petrol [p1], as the Commissioners claimed, then Esso were liable to pay purchase tax for the sale of those coins to the amount of £200,000 [q1]. The main issue was to decide whether the data [D1] did amount to a contract of sale. Here, the case involved another statute and so a second level argument. Under the Sale of Goods Act 1976, s 2(1) [B2], 'a contract of sale of goods [Q2] is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price' [P2] [W2]. The case reached the House of Lords. With one dissenting opinion, the Appellate Committee answered negatively: the coins were not part of the consideration in the contract of sale of petrol [non-q2, non-p1]. The majority held the coins were either a gift or Esso's non-monetary consideration for a collateral contract.[18] In that second hypothesis, Esso offered the non-monetary coins as consideration, not for money, but for the motorist's undertaking to form another contract: the contract of sale of petrol. Consequently, Esso were not liable [non-q1].

However satisfactory the syllogistic or Toulminian model may appear for the analysis, it will have been noted that, in that case, the minor premise is not purely factual. The material fact that the transaction as regards the coins did not amount to a contract of sale is dependent on the statutory definition of a contract of sale. This dependence of the fact premise on the law premise must be kept in mind for the next section when considering law's semantic distinctiveness: before facts, in the usual sense can be tried, legally material or relevant facts expressed in legal language must take the place of case data (i.e. the facts in the usual, non-technical sense).

[18] The majority rule that governs decision-making in the Supreme Court and the Court of Appeal requires the majority of the justices to concur as to the decision, but not as to the arguments to support that decision. An argument of that sort is called 'ratio decidendi', which is the only part of a judgment that can bind the court and lower courts as a statement of the law. If not one, but several, the ratio can be difficult, if not impossible, to extract.

4. Distinctiveness

Judicial argumentation involves two categories of premises, which apparently distinguishes it from argumentation in other fields. Yet, general argumentative models are thought appropriate for judicial argumentation. In this last part, it will be argued that the law or legal premise in judicial argumentation must have features which, except for the first, argumentation does not generally require. Those characteristics are logical, linguistic, chronological, procedural and hermeneutical. The word 'law' here will be used restrictively to mean statute law (which Bentham saved from his condemnation of English law as 'dog-law'), with an extension of the argument to contract law.

Law, in its statutory form, is often logically dissociated from the facts to which it may be applied. Laws are then represented as general, repeatable in application, the legally relevant or material facts as individual, unrepeatable. Moreover, they do not usually state that the facts have occurred, but consider their hypothetical occurrence. Aristotle, several of whose texts, among which *Nicomachean Ethics*, influenced Thomas Aquinas and through him all Western thought for centuries, adopts such a representation of law as general in contrast with the facts of a relevant case when he considers equity: 'Law, he says, is always a general statement, yet there are cases which it is not possible to cover in a general statement' (*Nicomachean Ethics*, 1137b4). Statute law provides countless examples to support that representation of the law. One recurrent logico-linguistic form will be considered here: If P, Q, where P is composed of an indefinite article ('a') + noun group (N) + predicate (P) and where 'if' means either that P implies or is equivalent to Q. The Companies Act 2006, s 3 speaks of 'a company' being a 'limited company if…'. The Theft Act 1968, s 1 of 'a person' being 'guilty of theft if…'. In all such examples, 'a + N' stands for a universal or general term. The expression of universality or generality through the same or an equivalent noun group was apparently already current in the remotest times and elsewhere than in England. Setting aside clauses where the monarch refers to his own obligations, Magna Carta 1215 used other forms with the same logical meaning as in 'quis', meaning 'anyone' (clauses 2, 10 and 11) or 'no widow' (clause 8), but also the 'a + N' form as in 'heres', meaning 'an heir' (clause 3). Likewise, at least as translated in English, the Babylonian Code of Hammurabi, which dates from around 1700

B.C. and was discovered in 1902 by Gustave Jéquier, already stated laws by predicating of 'anyone/a + N'. Moreover, Magna Carta does use the modals 'shall' or 'will', as in 'heirs shall be married without disparagement" (clause 6), which statutes have continued doing, but the provisions target the audience no more than statutes do, contrary to the commands of the Decalogue ('You shall…'/'You shall not…'). Statute law is also similar to the Code of Hammurabi in that it does not consider facts relevant to its provisions as having occurred. Like many statutory provisions, the Code formulates the hypothesis of their occurrence in an 'if P' clause and attaches a legal consequence Q. Instead of 'if', statutes sometimes use 'when'. Statutory provisions of the sort considered here, like those of the Code of Hammurabi, formulate the possibility of a thing's or a person's being attributed a given predicate ('if a company is …', 'if he [a person] dishonestly appropriates…') and states the legal consequence, should there ever be an actual instance of the predication. In the Code, the consequence is punishment. In a statute law, it can be 'a person is guilty of…' and punishment also, but it can be anything else too, for instance the legal name of a type of company (as in the Companies Act 2006, s 3) or a type of contract (as in Sale of Goods Act 1976, s 2(1)). Moreover, statutes set down their provisions without citing exemplary judicial decisions in which those laws were applied to facts. The Code of Hammurabi did likewise, even if some of its provisions might well have been extended by analogy. The Code considers a man's pulling out another's man's eye or knocking out one of his teeth. Perhaps as from those two provisions, further provisions were implied about other categories of bodily harm. The other source of the English law, case law, proceeds differently from statute law as here described. Its formulation coincides with its factual exemplification in a case. Moreover, there are countless statutes, 'private acts', that are not universal, but specifically enacted for individual entities, local councils, schools, ports, lighthouses and so on ('local acts') and individual persons ('personal acts').[19] However, the representation of

[19] The legislation.gov.uk website provides chronological tables for local acts from 1797 to 2008 and for private acts (personal acts since 1947) from 1539 to 2008, noting that there have been none of the latter as from 1987. Before the Matrimonial Causes Act 1857, abolishing the divorce jurisdiction of the ecclesiastical courts, instituted the Court for Divorce and Matrimonial Causes, a costly private act of parliament was necessary for a divorce other than a mensa et thoro (now called judicial separation), Baker (1979, p. 408).

law as being general and hypothetical in its formulations and the facts individual and actual satisfies the constitutional principle which the rule of law principle includes as one of its meanings: that the law, whatever the branch, not only criminal law, should exist independently from the facts that may be subsumed under it.

Those logical differences between the legal and the factual premises are not specific to judicial argumentation: in categorical syllogisms, the major, by definition, is more general than the minor; in a hypothetical syllogism, the first premise is, by definition, hypothetical. The second feature of the legal premise is more specific, although it may be found in other fields than legal argumentation. A profession or discipline has recourse to a specialised language or jargon, with corresponding specialised concepts, for one of at least two purposes: like uniforms (wigs, robes and so on), to mark itself off as distinct within a society; to avoid the ambiguities of ordinary language. The use of a specialised language may conflict with the requirement that the law should be knowable, which is implicit in the perennial presumption that all (should) know the law. Yet, statutes, more or less covertly, do have a specialized language and for centuries, they were not even in English, which was the case also for most legal communication. It is only since the fourth year of Henry VII's reign that all statutes have been written in English (Timberley, 1939, p. 290; Tomlins and Granger, 1835, II, 'statute'). Until then, statutes were sometimes in English, but usually in French; they were entered on the parliament roll in English and on the statute roll in French or Latin (Tomlins and Granger, ibid). The foreignness of legal language remained in other areas. True, in the Court of Chancery, English had been used for the exercise of the court's equitable jurisdiction as from the mid-sixteenth century (Baker, 1979, p. 87). During the Interregnum, the Rump Parliament on 22 November 1650 allowed English as some, for instance the Levellers, had demanded. Already, during the reign of Edward III, the Pleading in English Act 1362 allowed the debate of cases in court to be carried out in English, not in French, so that 'every man, says the act, may the better govern himself without offending the law'. However, it is only the Proceedings in Courts and Justice Act 1730 (repealed by the Civil Procedure Repeal Act 1879) that put an end to the use of Latin, Law French, but also court-hand, the style of handwriting that had been particular to the courts. Yet, since the abandonment of French or Latin,

statutory language has remained foreign to ordinary language otherwise, notwithstanding repeated clear law endeavours, such as the plain English explanatory notes attached to public acts as from 1999 on the legislation.uk.gov website. For instance, statutes are semantically distinct from ordinary language through the interpretation acts (1889, 1978) and interpretation sections within statutes, which provide the more or less general legal meaning of ordinary words. Thus, according to the Interpretation Act 1978, s 6, the word 'he', unless otherwise stated, means also 'she' and vice versa. Using the BAILII website UK legislation search with the input 'interpretation' in the 'exact phrase' box, 16,524 statutory documents have been found. Chronologically, the first to include an interpretation section was the Lands Clauses Consolidation (Scotland) Act 1845. The second was the Evidence Act 1851, s 19 of which defines 'British Colony'. As argument for the semantic distinctiveness of law, it is the complex definitions that interpretation sections sometimes provide that are the most appropriate. The definition of theft in the Theft Act 1968, s 1 is a good example. S 1 provides the definition of 'theft', the following sections (ss 2-5) then define its key terms: 'dishonestly', 'appropriates', 'property', 'belonging to another', 'with the intention of permanently depriving the other of it'. Coke, in *Institutes*, book III, chapter 7, preceded likewise, for 'murder'. Here again, the characteristic is not unique to law. Complex definitions of that sort can also be instanced in other disciplines and far older texts than Coke's. For example, in *Poetics*, Aristotle, having provided an essentialist definition 'tragedy', then goes on, in much of his treatise, to define the key terms of that definition. Definitions of that type, in law and other disciplines, have the effect of creating a language within language and, in the case of law, of isolating the law from its verbal context. Interpretation sections can also be included in contracts. Furthermore, the Sales of Goods Act 1979, ss 10-14 implies terms within contracts of sale should those terms not be explicit and the Unfair Contract Terms Act 1977 has the reverse effect of making certain explicit terms void or voidable in consumer-to-business and business-to-business contracts. The Unfair Terms in Consumer Contracts Regulations 1999 further the latter act in respect of consumer contracts. To understand the law and the legal premise of judicial argumentation, ordinary semantics is unreliable. Moreover legal semantics, however distinct from ordinary semantics, is itself uncertain. In its attempt to define words taken from ordinary language restrictively for

the purposes of statutes in general or a particular statute or particular sections within that statute, statute law implies that ordinary language is subject to semantic uncertainty. Yet, the majority of appellate cases, according to Lord Hailsham revolve around the meaning of words. Many such cases turn around the meaning of statutory words, including the ordinary (and undefined) words that define them in the interpretation sections. Parliament's effort to define words appears Sisyphean and its would-be detachment from facts vain, in that, case after case, it is the facts of cases that call for a furtherance of the definitional process.

However distinct they may be from facts logically and linguistically, laws usually are and arguably should be distinct from facts chronologically. (From the previous paragraph, it appears that anteriority and understandability are separate issues. The requirement here is that the law should exist before the fact.) A statute is chronologically distinct from the facts to be subsumed under it, through the commencement section, which stipulates when the statute comes into force. There are statutes the quality or success of which is inversely proportionate to the number of times they are referred to in the courts in relation to facts; the fewer the better. One could call them 'scarecrow laws'. Thus, Ormerod (2008, p. 3) mentions the Children and Young Persons (Harmful Publications) Act 1955, which was deemed 'completely successful' as long as there had been no prosecution under it. One can therefore imagine laws that are or will never be applied and there are no doubt contracts that never come into affect because the parties explicitly or tacitly agree to discharge each other of their obligations. In criminal law, laws are constitutionally required, as part 2 has shown, to be proactive, not retroactive. A person should not be convicted of an offence on account of an act or an omission which was not an offence at the time he committed that act or omission. Criminal law is not exceptional in its proactive requirement. Contract law provides that consideration cannot be past: that is to say, when the contract is formed, one party cannot have already executed his consideration.[20] The requirement that a law should be proactive is not absolute, even in criminal law. Thus, the European Court of Human Rights has dismissed an appeal against a conviction for marital rape that was not

[20] Typically of rules, there are exceptions. Under *Lampleigh v Braithwait* [1615] 80 E.R. 255, consideration can be past, if it was provided at the other party's request.

yet an offence at the time of its committal, on the grounds that article 7 of the Convention did not prohibit conviction under rules that were in the air, even if not actually enacted or set down by the courts.[21] More generally, both in criminal law and civil law, case law, which can state a rule at the very moment of its exemplification in a case, and more generally the uncertainty of the law, which is momentarily stabilized for a particular case, run contrary to the requirement that a law should exist as such before its application.

Notwithstanding the quiet revolution that has turned the enactment formula into a formula indeed (as argued in part 2), and the fact that a law is not always proactive (as argued at the end of the above paragraph), a statute is anterior to the facts to which it may be applied, in that the rules of enactment are anterior to the actual enactment of individual statutes, including retroactive statutes and private statutes. Regarding procedure in each House, the Antiquarian Sir Simonds d'Ewes, in his *Journals of all the Parliaments* during the Reign of Queen Elizabeth, published posthumously in 1682 shows for example in a record of parliamentary meetings for the first two readings of a bill, on 3 February 1559, and, for the third reading, on 7 February 1559, that the present legislative procedure already existed in the mid-sixteenth century. Similarly, the rules for the formation of contract, which have been elaborated as from the Middle Ages, pre-exist the formation of any actual individual contract. The parties are not free to form a contract without abiding by those rules, which include the provision that they should do so in a state of freedom, that is to say knowingly and willingly. The legality of the contractual obligations further limits contractual freedom. One of those rules has been mentioned in the previous subsection: consideration must not be past, in other words a contract, normally, cannot turn something into consideration retroactively.

Statutes, once enacted in accordance with the pre-established enactment procedure, have been interpreted, until recently, under the explicit prohibition to consider their contexts, the circumstantial facts of their enactment. A similar exclusionary rule has been applicable for the interpretation of contracts. The subjective and contextual roots of a statute or contract were deemed irrelevant to its meaning. A statute is distinct from its factual context, the circumstantial facts of its enactment. Setting apart

[21] SW v UK, CR v UK [1996] 1 FLR 434.

the year of its enactment, its chronological order in the enactments of that year (indicated by the chapter number), its long title, which is supposed to indicate its purposes, a statute is extracted from the context of its enactment, except through the enactment formula, which part 2 has argued to be indeed formulaic. The economic or other scientific reasons for the statute, the debates in the public and within Parliament, the person or persons responsible for suggesting the bill and then introducing it in Parliament, the names of the drafters, all is swept away from the statute, which stands monolithically, as though it had been voted unanimously, like the text of a single anonymous author. Indeed, until Brass Crosby's release from the Tower in 1771, which eventually led to Thomas Hansard's publications, the publication of parliamentary proceedings was a punishable breach of parliamentary privilege and even when their publication was allowed, reference to those proceedings for the purpose of interpreting statutes remained prohibited. Under the traditional rules of statutory interpretation, the literal rule, the golden rule and even the mischief rule, the courts, in their interpretation of a statute, were disallowed to refer back to the circumstances of the enactment. The 'four corner' rule for the interpretation of contracts also required the silencing of whatever went on before the contract was actually formed. Parliament's and the contracting parties' intentions were and to a lesser extent still are to be constructed objectively as from the wording of the statute or contract and, in the case of statutes, but only if all else had failed to provide an acceptable meaning, as from the state of the law before the bill was enacted, nothing else. Even the purposive approach, which the courts began to develop in the later years of the twentieth century, in *Pepper v Hart* [1993] AC 593 for statutes and in *Prenn v Simmonds* [19711 WLR 1381 for contracts, has not as yet discarded the construction of an objective intention in favour of an attempt at reaching back to Parliament's or the contracting parties' subjective intention.

5. Conclusion

Whether or not judicial argumentation, a type of legal argumentation, is specific can be argued both ways. In this paper, one answer has been argued: that judicial argumentation is specific and so that general models

are insufficient to account for it. The rule of law, a constitutional principle, requires that judicial argumentation distinguish law and fact and both judicial institutions and argumentation theories have presumed that the distinction can be made. The legal premise or the rule of law has then been argued here to have characteristics that may enable the distinction from the factual premise. Those characteristics are generality, linguistic foreignness, chronological anteriority, prior procedural rules and hermeneutical isolation or interpretative objectivity. The legal premise or warrant is not unique in having one of those characteristics, but perhaps in having them all together. Such is the heuristic hypothesis that emerges from this paper.

The Toulminian model, based as it is on judicial argumentation, is more adequate for judicial argumentation than the syllogistic model, but it is submitted that the highlighting of the distinction between the law and fact premises needs to be furthered by taking into account all the features of the law premise considered in part 3 and that the factual premise, as has been noted, is more complex than general argumentation theory usually makes it out to be. In case law, studied elsewhere (McEvoy, 2012), the distinction between law and fact premises or warrant and data is observed, but at the cost of doubtful arguments, especially in those cases where the two premises, contrary to the rule of law principle, are arguably formulated simultaneously. However, even where it is statutory, the law premise, the meaning of which is altered or clarified case after case, informs the fact premise. The factual premise (or Toulminian 'data') is not 'given'. To be actionable, it must be translated into legal language after a selection of legally relevant facts from case data and this operation, which often results in contradictory fact premises from the two parties and sometimes successive courts, itself requires compliance with the law of evidence. Thus, in *Esso Petroleum Co. Ltd v Customs and Excise Commissioners*, the Appellate Committee of the House of Lords decided that there was no 'contract of sale', because such a contract requires monetary consideration, but the claimant and the trial judge had argued there was such a contract. Clearer examples of the difference between general models of argumentation and actual judicial argumentation in relation to the factual premise are cases where the legal meaning of a word and its ordinary or other meaning clash. For instance, until relatively recently, a husband and wife, however they felt about it, could not, in the legal sense, 'steal' from one another (David

Ormerod, 2008, p. 795-796). The law's distinction from fact is such that it requires the fact premise itself to be formulated in legal terms, which are semantically unstable, and in that manner to be distinct from a factual narrative in ordinary language.

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