WHAT IS THE REASON FOR THIS RULE?
AN INFERENTIAL ACCOUNT OF THE *RATIO LEGIS*[+*]

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> The final cause of the law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.
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> (B.N. Cardozo)

1. Two Examples

What is the *ratio legis*? It is the purpose of a legal rule; in particular, in civil law systems, the purpose of a statute enacted by the legislature. The *ratio legis* is important for legal theory and legal argumentation for two reasons at least. First, it plays a relevant role in the intellectual process leading to a legal decision, when the judge chooses one or more interpretive techniques for determining the content of law. Second, it is not less relevant in the context of public justification, when legal arguments are used to support the adjudication. In fact, several legal arguments make appeal to the *ratio* in order to justify a normative conclusion: this is true, in particular, of the argument from analogy and of some forms of teleological argumentation, where an appeal to the *ratio* is often considered an ultimate move in legal justification.
This can be seen in the following two examples.

1.1. Smoke without Smoking

Suppose that a given legal system contains the provision: "Smoking is prohibited in all stations". Despite being apparently clear, this provision might raise several interpretive problems: there might be forms of behavior of which we are not sure whether they fall or not under the rule so stated[1]. For instance, what about holding a lit cigarette? Suppose that someone, waiting for her train in a station, holds in her fingers a lit cigarette: Is she smoking? If we interpret the provision literally, she is not. The standard ordinary meaning of 'smoking' does not refer to that[2]. But we feel uncomfortable with this, namely with the conclusion that the law permits to hold a lit cigarette in a station. Why do we feel like that? For such an

[+] Published in "Argumentation", vol. 24, 2010, pp. 197-210.
[*] We wish to thank Constanza Ihnen, Jules Coleman, Scott Shapiro and two anonymous referees of this Journal for their helpful comments on previous versions of this paper.
[1] In this sense, despite the *prima facie* clarity of its wording, the provision has an "open texture". Cf. Waismann 1945 and Hart 1994 (Ch. 7). See also Endicott 2000.
[2] The Shorter Oxford English Dictionary gives the following definition of 'smoking': "the action of inhaling and exhaling smoke from a cigarette, cigar, etc." (ed. 2002, p. 2889).

interpretation would run counter to our intuitions about the purpose of the rule, or, in other words, about the *ratio legis*. In fact, purposive interpretation mainly comes into play in doubtful cases, where an interpretation according to the "ordinary" or "literal" or "technical" meaning of the words of a statute is not convincing, and other legal arguments are not able to solve our interpretive doubts either. What might be the purpose of the rule in our example? We can imagine it is protecting public health from smoking risks, in particular from passive smoking risks. Thus, if that is the purpose or the aim of it, prohibiting smoking in all stations is a means to that end[3]. Once this is made explicit, we can again consider the bizarre conduct of holding a lit cigarette in one's fingers. Is it permitted or prohibited by the law? We saw it is not explicitly regulated (so one might say there is a gap in the law to that extent); but such a conduct constitutes a risk factor for public health, and prohibiting it would be a means to protect the latter. So an interpreter could make use of a teleological argument to justify her interpretation of the provision, claiming that

(1) The *ratio* of the rule is protecting public health from the risks of smoking
(2) Holding a lit cigarette brings on the risks of smoking

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(3) Prohibiting the holding of a lit cigarette is a means to accomplish the *ratio* of the rule.

We shall return later to the inferential character of this argument and the legal implications it has. We shall now concentrate on a further legal argument which typically resorts to the notion of *ratio legis*: the argument from analogy.

1.2. When a Girlfriend Counts as a Spouse

The argument from analogy draws the conclusion that a target case has a certain property since it is relevantly similar to a source case[4]. A major issue of the argument is the notion of relevance. When is a target case relevantly similar to a source case? What criteria can we provide for such relevance? In legal matters, the standard answer refers to the notion of *ratio legis* or, in judicial contexts, *ratio decidendi*: it is the *ratio* which fixes what is relevant for what. This is largely uncontroversial[5]. What is more challenging is to understand what we mean by such a notion, and when one is justified in claiming that a certain rule has a certain *ratio*.

Suppose that Sappho, lesbian girlfriend of Atthis, claims to have the right to accept or refuse medical treatments on Atthis' behalf since the latter actually lacks the capacity to make reasoned medical decisions[6]. A lawyer claiming that Sappho has such a right might use an argument from analogy of the following sort:

(4) Spouses are permitted to make medical treatment decisions for the partner who lacks capacity

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[3] We take 'purpose', 'aim' and 'end' to be substantially synonyms.
[4] Cf. Holyoak and Thagard 1995.
[5] Cf. e.g. Bobbio 1938 and 1994, McJohn 1993, Sunstein 1993, Brewer 1996, Weinreb 2005, Hage 2005, Kloosterhuis 2005. Notice that we will not deal with the notion of *ratio decidendi* in this paper: we shall confine ourselves to the notion of *ratio legis* and to statutory law.
[6] We discussed this imaginary case in a previous paper: see Canale and Tuzet 2009.

(5) Spouses and lesbian girlfriends have a close personal relationship to their partner

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(6) Lesbian girlfriends are permitted to make medical treatment decisions for the partner who lacks capacity.

In this argument the analogy is justified by the shared relevant property of having a close personal relationship: lesbian girlfriends have it as well as spouses. However, a rival lawyer might challenge this and claim that the relevant property is that of having a close *legal* relationship, not a personal one. This being the case, the analogy is not justified, since lesbian girlfriends, in our example, do not have such a legal relation. How is the case to be settled then? One needs to refer to the *ratio* of the rule permitting spouses to make medical treatment decisions for the partner. We need to refer to that, according to the argument from analogy, since the relevant property is not relevant *per se* but only in the light of the *ratio*. Therefore, Sappho's lawyer might claim that the law aims to assure that the decision made by the surrogate *reflects what the patient would most likely have wanted*. Therefore what is relevant here is a close *personal* relation between surrogate and patient, since the person who has a close personal relation with the patient most likely knows the preferences and values of the latter. If the *ratio* is such, the argument from analogy is justified.

2. A Controversial Notion: Some Methodological Remarks

The examples considered above show that the resort to the *ratio legis* might rise several problems in the context of legal justification, i.e. when judges use legal arguments involving the *ratio* in order to justify their decisions, or lawyers have recourse to them so as to strengthen the solution of the case most favorable to their clients. In fact the intuitive force of an argument based on the *ratio* is challenged by other legal arguments, in particular by the argument from the wording of the statute, as we have seen in the example of smoking prohibition. Moreover, one cannot just make appeal to the *ratio legis* and pretend that some legal consequence is drawn in the light of it: as the Sappho's example shows, one must also give an argument in favor of it, claiming that the *ratio* of the legal provision is one and not another. To put it another way, the content of the *ratio legis* is never self-evident: determining it is a difficult and controversial argumentative task.

An interesting way to address these issues is to look at the *ratio legis* not simply as an intentional entity or as part of an argumentative scheme, according to the standard approaches in legal argumentation[7]. More fruitfully, in our opinion, the *ratio* has to be seen in the context of a dialectical exchange of reasons. A claim about the *ratio* is a speech act committing the speaker, from the point of view of the other participants to a linguistic practice, to further inferential steps in her argumentative path. This is so on the side of the premises of a claim about the *ratio* and on the side of its argumentative consequences as well. When a judge, for instance, claims that the *ratio* of a given rule is *p*, she implicitly commits herself to *p*. This means that she is seen by the other judges, lawyers and legal practitioners involved in the legal process as having the duty both to assume the premises which justify that *p* and to accept the argumentative consequences which follow from *p*. If she accomplishes these duties or commitments, she will be entitled to *p* in the argumentation: she will have the

[7] See e.g. Ekelöf 1958, Larenz 1975, Alexy 1983, Barak 2005.

argumentative right to claim that *p* and *p* will be considered to be the *ratio* of the rule in that context. As Robert Brandom has pointed out, inferential commitments and entitlements have therefore a normative content: they express the rules of inference within an argumentative context[8].

This approach permits to explain our standard deductive, inductive and abductive inferences, which are taken to govern reasoning and argumentation, from a pragmatic point of view[9]. One can represent them as moves in a dialectical exchange of reasons among the participants in an argumentative practice, rather than moves of a monological argumentation.

Brandom singles out, in particular, three basic forms of inferential relations among argumentative claims: *commitment-preserving*, *entitlement-preserving* and *incompatibility* relations[10], which can be schematized as follows:

(1) if S is committed to *p*, then S is committed to *q* (*commitment-preserving relation*);
(2) if S is entitled to *p*, then S is *prima facie* entitled to *q* (*entitlement-preserving relation*);
(3) if S is committed to *p*, then S is not entitled to *q* (*incompatibility relation*).

These inferences do not primarily concern the truth or validity of the relative sentences, but the normative status of the participants to argumentation: assuming that *p* is an assertion and *q* a prescription, these relations concern the duty (commitment) of the participants to assert that *p* or to prescribe that *q* on the basis of their previous argumentative moves, and their right (entitlement) to assert that *p* or to prescribe that *q* according to the argumentative moves of the other participants.

By means of this theoretical framework, one can identify firstly the speech acts typically performed by judges and lawyers when determining the *ratio legis*, secondly the argumentative constraints put on them. This sort of pragmatic analysis hence permits to distinguish different uses of the notion of *ratio legis* and to ask on what conditions each of them is justified.

According to the pragmatic approach adopted in this paper, therefore, the *ratio* of a legal rule does not amount to a linguistic, mental or factual entity the properties of which are independent from argumentation. A claim about the *ratio* is rather the conclusion of inferences which are usually controversial and often remain implicit in legal argumentation. This being true, it cannot be considered an ultimate move in legal justification: actually such an ultimate move does not exist at all[11].

On the basis of considerations like these, the justification constraints we will consider in the following pages can be used for evaluating the different arguments a claim about the *ratio legis* depends on. This evaluation does not rest on legal principles such as legality, equality, fairness, due process, and thus on the principles of an actual or ideal legal system; nor on general or universal rules of argumentation. The justification conditions we will point out are rather the outcome of a pragmatic reconstruction of the argumentative practice itself: they

[8] See Brandom 1994.
[9] We introduced this approach in a previous paper: see Canale and Tuzet 2008.
[10] See Brandom 2008.
[11] Note that we do not discuss in the present paper the legal legitimacy of the argument, nor the priority relations among teleological arguments and other kinds of argumentation, as it is often done in legal literature comparing legal arguments and their force: such relations basically depend on the specific legal system and on the priority rules of the system in case of conflicting arguments.

express the criteria according to which, within the limits of legal argumentation, a speech act appealing to the *ratio* is meaningful and relevant, and can be considered as justified in a concrete argumentative context.
Before going through the pragmatic-inferential structure of the *ratio legis* claims in the legal practice, however, we will considered, in the next section, a distinction often pointed out by legal scholars, namely the one between *ratio* as subjective and *ratio* as objective purpose of the law. It is a primary step of any further consideration about our subject.

3. Subjective and Objective Purpose

Legal scholars dealing with purposive interpretation claim that there are two ways of interpreting statutes according to their purpose[12]. The first is that of *subjective* purpose, namely the purpose of the legislature, explicitly or implicitly stated, inferable from the text of the statute or the *travaux préparatoires*. The second way is that of *objective* purpose, that is the "intrinsic" or "reasonable" or "social" purpose of the rule. Legal practitioners use this kind of distinction, sometimes making reference to subjective purposes, sometimes to objective ones, depending on their argumentative strategy and the result aimed at[13].
When considering purpose as *subjective*, there is no serious theoretical problem in the offing, save the need to articulate what is meant by argument from purpose, on the one hand, and argument from intention (or psychological argument), on the other. In fact, these arguments get very close but do not overlap: some legal scholars seem to think that the former is a specification of the latter, since the argument from intention is not necessarily related with purpose but may simply amount to denotative intent[14].
On the contrary, when purpose is considered as *objective*, we face a serious theoretical problem. In what sense is law provided with objective purposes? As often pointed out by legal scholars, it is extremely difficult to specify the criteria necessary for grasping an objective purpose of the law[15]. This difficulty comes, in our opinion, from (the neglect of) a very basic fact: if the expression 'objective legal purposes' is meant to claim that the purpose of a legal rule is an entity whose properties do not depend on those who draft, enact, interpret or apply the law, then objective legal purposes do not exist at all.
Some short remarks can be of help in justifying this claim. For contemporary legal theorists law is a human artifact, an intellectual and social device whose specific features depend on the context[16]. Like any other artifact, law is created for some purpose. Whatever purpose it may be, however, it is not an "objective" one from an ontological point of view, since its features depend on human values, attitudes and behavior. This being true, law cannot be but *ontologically subjective*, although it can be considered as *epistemically objective*, i.e., one

[12] See Ekelöf 1958, Larenz 1975: 322 ff., Alexy 1983: 295 ff. and Barak 2005 (Part II).
[13] See e.g. the contributions collected in MacCormick and Summers 1991; cf. Goldsworthy 2005 and Feteris 2005. See also Radin 1930 and 1942.
[14] See e.g. Summers 1991: 416, Ekelöf 1958: 91. The argument from intention is also called "transcategorical" because the appeal to legislative intention can range over the whole possible range of contents of each type of legal argument. Cf. MacCormick and Summers 1991 (Ch. 13).
[15] Cf. e.g. Velluzzi 2002: 125-133.
[16] A more articulated presentation of this issue may be found in Tuzet 2007. Cf. MacCormick and Weinberger 1986, Amselek and MacCormick 1991, Peczenik and Hage 2000.

might reasonably claim to have objective knowledge of it[17]. The same is true of the specific purposes that a statute may have: they are not "intrinsic" to it but rather they depend on the attitudes and behavior of who enacts, interprets, applies the statute, or simply uses it as a guide to conduct.
Therefore, expressions like 'objective purposes' or 'voluntas legis' risk masking the real subjective and social motives determining a creation or interpretation of law[18]. In the decisions of the Italian courts[19], for instance, such expressions actually refer to:

(a) the social circumstances that originated the enactment of the statute or provision;

(b) the adapting of an old statute to new historical circumstances;

(c) the psychological intention of the actual legislator as interpretive criterion of an old statute;

(d) the coherence or consistency between the interpretation of a legal rule and the other rules of the legal system;

(e) the social, political, economical or systemic consequences attributed to a certain interpretation of the statute.

These examples show that most uses of the notion of objective purpose, at least in Italian adjudication, can be better described as examples of other argumentation forms, such as the argument from history, the argument from legislative intention, the argument from systemic coherence and the argument from principles.
This is not true of meaning (e), which is worth looking at in more detail. In this case, the purpose of the statute is identified by the courts with the predictable consequences of the conduct prescribed according to a certain interpretation of the statute. If such consequences are desirable, such an interpretation is justified. According to this use of the *ratio legis*, therefore, the aim of the law, i.e. the reason of its existence as a means to guide human conduct, depends on what is considered the best interpretation of the statute, as far as the predictable outcomes of this interpretation are concerned. The end of the law comes at the end, so to speak, because the *ratio* is determined *a posteriori*, on the basis of the expected consequences of legal interpretation and adjudication.
The standard framework of intentionality can help to explain this a little further[20]. The *subjective* purpose of a statute is inferred from the historical legislative intention, i.e., from

[17] Cf. Dworkin 1996 and Searle 1995. On the distinction between various senses of the terms 'objective' and 'objectivity' as referred to prescriptions such as legal rules, principles and values, see Marmor 2001: 118 ff.
[18] The reasons for doing that may be various and different according to the legal order and the legal institutions involved.
[19] Cf. Cass. pen., sez. IV, n. 8805/2009; Cass. civ., sez. II, n. 922/2009; Cass. civ., sez. lav., n. 3011/2009; Cass. pen., sez. I, n. 48216/2008; Cons. St., sez. VI, n. 5620/2008; T.A.R. Palermo, sez. III, n. 783/2008; Cass. pen, sez. VI, n. 31702/2008; Cass. civ., sez. I, 10935/2008; Cass. civ., sez. trib., n. 8867/2008; Cass. civ., sez. lav., n. 4425/2008.
[20] According to the inferentialist approach adopted in this paper, however, the traditional vocabulary of intentionality, including terms like 'belief', 'desire', 'intention', etc., does not refer to mental states but to normative statuses attributed to speakers within a linguistic social practice: to believe that *p* means to assume a status in the argumentation, the status according to which one is rationally committed to the claim "*p* is the case" by the other participants in the practice on the basis of her and others' linguistic contributions to it. From this point of view, therefore, "the mastery of a linguistic social practice is a prerequisite for possession of intentional states of various sorts" (Brandom 1994: 16).

the speech acts expressing the beliefs and desires which motivated the enactment of the statute, and the documental evidence we have of them. On the contrary, the so-called *objective* purpose is drawn from the predictable consequences of its interpretation: if the interpretation of the statute will bring about a consequence which is desirable, just, efficient, etc., then this interpretation is justified by the objective purpose of the statute.
Obviously, determining legislative intent can be a difficult task, for documental evidence can show the existence of multiple purposes. This is due in particular to the ontological nature of the legislature, which is strongly indeterminate and whose beliefs and desires are not less indeterminate[21]. At the same time, the application of a legal norm produces countless consequences in the world, and determining which are relevant for inferring the *ratio* of a statute can be a very controversial task[22]. Moreover, the objective purpose might be in conflict with other implicit or explicit legal purposes in the legal system, and the argumentative process of inferring the *ratio* does rarely provide a criterion to solve such a conflict, i.e., to determine a hierarchy among various purposes. The answer to these issues is not implicit in the *ratio legis* and involves other legal arguments[23].
This being said, we consider in the next section the constraints for argumentation placed on the basic uses of the *ratio legis* considered so far. This will enable us to provide some basic criteria for their evaluation from a conceptual point of view. We hope that the added value of our analysis is that of making explicit what are the inferences involved in the argumentative uses of the *ratio legis* and the problems associated with them.

4. Inferring the Ratio

Coming back to our example of the smoking prohibition, let us suppose that the legislature explicitly stated that the purpose of the rule was to protect public health from the risk of smoking. Then we have an *explicit* subjective purpose. In cases like this, the speech acts typically performed by legal practitioners in order to justify a claim about the *ratio* will simply concern what the legislature has explicitly stated. Their commitments in a possible exchange of reasons about the *ratio* will simply amount to what they are committed to by the wording of the provision, in terms of semantic and legal content. To put it another way, the *ratio* is here the conclusion of a linguistic argument.
From a pragmatic point of view, in particular, the inferential relation between the literal meaning of the provision and the *ratio* of the rule expressed in it can be described as a *commitment-preserving relation*: if one is committed to a given literal meaning, then she is

[21] See Guastini 1993: 394 ff.
[22] "Purposive interpretation assumes that every legal text has multiple objective and subjective purposes" (Barak 2005: 113).
[23] From a normative point of view, one might therefore argue that *what* purposes are aimed at, and *whose* purposes are, should be made always explicit in the argumentative practice, instead of using the dim verbiages of 'objective purposes' or 'voluntas legis'. This conclusion is obviously valid only if one praises transparency and responsibility in the interpretation and application of law. Moreover, on the consideration of law's being an artifact one might build a model of legal argumentation and interpretation according to which, at least in democratic regimes and constitutional systems enforcing human rights, teleological arguments and purposive interpretation should prevail in case of conflicting arguments, insofar as this permits to achieve the goals the artifact is created for. This is what is pursued, for instance, in Barak 2005. Against considering law as a means to an end – for it would constitute a threat to the rule of law – see Tamanaha 2006.

committed to a given *ratio*. If in the exchange of reasons lawyer L is committed to the claim that the legislature explicitly expressed the purpose of a certain rule in provision P, then L is also committed to the claim that P expresses the *ratio* of that rule. The wording of P would place a strong constraint on L and her argumentative strategy: her appeal to the notion of *ratio legis* would only be justified if she respected what the legislature explicitly said. Therefore, the burden of argumentation rests on a claim about the literal content of P[24], not on its *ratio*.

Suppose instead that the legislature did not explicitly state the purpose of the regulation: then we have an *implicit* subjective purpose (assuming there is no legislation without a purpose, vague or problematic as it may be)[25]. Cases like this may be hard at varying degrees. Starting from the least difficult, the speech acts typically performed by legal practitioners in order to justify a claim about the *ratio* will concern what can be easily inferred from the wording of the statute or provision. In these cases, even if the legislature did not explicitly state the purpose of the regulation, this may be inferred from the text itself (with some other assumption) in quite an uncontroversial way. Consider the example of a provision withholding the power from children to make wills: it is uncontroversial that this provision aims at protecting persons who lack the capacity, which adults are presumed to have, to make a rational use of their facilities[26]. Coming to the more difficult cases, the inferential moves of legal practitioners will concern some other legislative materials, the so-called *travaux préparatoires*. These are the cases where the *ratio* is not inferable from the wording of the statute but only from other sources outside the statute, such as legislative history and proceedings. Consider, as an example, the famous case *Holy Trinity Church v. US* where the Supreme Court had to decide whether or not the act prohibiting the importation of foreigners and aliens under contract to perform labor in the United States applied to a minister going to the United States to enter into the service of a church[27]. Here the commitments undertaken by legal practitioners will be more complex and various, and the constraints put on them less strong than before.

From a pragmatic point of view, the inferential relation between those sources and the *ratio* of a rule can be described as an *entitlement-preserving relation*: if one is entitled to a certain claim about the system, then she is *prima facie* entitled to a claim about the *ratio*. For instance, if lawyer L is entitled to the claim that the purpose of legal provision P is R according to the legislative history of the legal system, given that the other participants in the argumentation, or the previous courts' decisions, have explicitly recognized this as being the case, then L is *prima facie* entitled to the claim that R is the *ratio* of P. Here an appeal to the notion of *ratio legis* will be justified on the condition of inferring in a plausible way, from a consistent amount of evidence, what the purpose of the legislature was[28].

To conclude, we have to consider the cases in which the *ratio* is considered to be the "objective purpose" of a legal statute, i.e. the social circumstances of its enactment, or the intention of the actual legislator, or the systemic coherence of a certain interpretation of it. The inferential relation between these premises and the *ratio* can be described, again, as an

[24] See on this Velluzzi 2000.

[25] "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense" (Llewellyn 1950: 400).

[26] Cf. Hart 1994: 163.

[27] 143 U.S. 457, February 29, 1892. On this example see Feteris 2008 and 2005: 465.

[28] Needles to say, from a logical point of view these inferences are *abductions* or inferences to the best explanation/interpretation of the given legislative history and the *travaux préparatoires.*

entitlement-preserving relation, whose constraints on argumentation, however, are weaker than in the cases considered above. In fact, as every legal scholar well knows, in contemporary civil law systems the criteria of coherence are quite a controversial matter, and alternative means for inferring the *ratio*, such as the circumstances of enactment, or the intention of the actual legislator, are unlikely to be recognized by an interpretive community as legally binding.

The cases where the *ratio* is determined on the basis of a consequentialist argument deserve more attention in this respect. Here the inferential relation between the consequences of a certain interpretation of a legal provision and the *ratio* can be described as an *incompatibility relation*: if one is committed to a given claim about the predictable consequences, then she is not entitled to a given claim about the *ratio*. If in the exchange of reasons lawyer L is committed to the claim that C is the consequence of interpretation I of legal provision P, but C is undesirable according to which L explicitly or implicitly said, then C cannot determine the *ratio* of P, and interpretation I is not justified on the basis of the *ratio*. In other words, the *ratio* is not considered here, as it usually is, "an evaluative ground for considering the consequences of possible interpretations as favorable or unfavorable for realizing the postulated purpose"[29], but the other way round. The fact that the consequences of a certain interpretation are considered desirable or undesirable is the "evaluative ground" for determining the *ratio* of the interpreted statute, once assumed that this interpretation is a necessary condition of the expected social consequences. Therefore the *ratio* is inferred in this case *per negationem*, i.e. on the basis of what the normative content of a legal provision cannot be according to other social, economical, political or moral normative criteria. As well as a standard deductive relation, this modal relation puts strong constraints on the argumentation, but it also involves some commitments, concerning the normative criteria just mentioned, which are highly disputable. This way of determining the *ratio legis* can be said to be justified, therefore, only if such commitments are explicitly pointed out, included in the argumentation and accepted in the exchange of reasons, and if the causal relation between that interpretation and its expected consequences holds.

To sum up, the justification of a claim about the *ratio* necessarily depends on some other argument, either a linguistic/psychological argument (legislature's explicit intention), or a genetic/psychological argument (legislature's implicit intention), or a systemic argument (law's coherence), or another teleological/evaluative argument (argument from principles).

Before moving to our conclusions, we should also observe that a concrete case may somehow fall between the categories outlined above. Consider our case of the person holding a lit cigarette in her fingers. Even if the legislature explicitly stated the purpose of the rule (protecting public health from smoking risks), that conduct was not explicitly regulated: the subjective purpose concerned the protection of public health and determined the prohibition of smoking in all stations, but did not explicitly cover the act of holding a lit cigarette. Then, how is such case to be treated? One way is to argue from analogy, claiming that the *ratio* justifies an analogical extension of the prohibition. Another way is to argue from the intention of the "reasonable", or "rational", or "ideal legislator" (not the actual one), using a counterfactual argument of this sort: if the legislature had considered such an act, it would have been prohibited according to the *ratio*. In this way a purposive interpretation of the statute would be justified by something which in fact has not happened but would have

[29] Feteris 2005: 461.

happened in different circumstances[30]. It is worth pointing out that the commitments undertaken with these two argumentative techniques are rarely made explicit in legal argumentation, although the way in which the *ratio legis* is inferred can be highly controversial. Therefore, it is necessary to determine the inferential commitments and entitlements of those who take part in the exchange of reasons in order to evaluate whether their discursive contributions are meaningful and relevant within the exchange, and whether their argumentative conclusions are justified.

5. Consequences and Conclusions

What we have pointed out in the case of the smoking prohibition can be checked against the case of Sappho and Atthis. If a statute was enacted and the legislature explicitly said that the law's purpose was to reflect in the surrogate's decision what the patient would most likely have wanted, even if the legislature did not explicitly consider the case of a lesbian girlfriend one is committed to conclude that a lesbian girlfriend has the right to make decisions concerning medical treatment for the partner who lacks the capacity, unless another rule provides an exception to this. This is so because the surrogate's decision will reflect what the partner would most likely have wanted, by virtue of their close personal relationship. On the contrary, if a statute was enacted to that effect but the legislature did not explicitly state what it was aimed at, the legal practitioners would refer to what is inferable from the wording of the statute, or the legislative history, or the law's principles and coherence, or the social consequences of its interpretation.

It is the burden of proof which makes the difference: In the case where the purpose was stated, the burden is mainly on the lawyer who wants to challenge the extension of the regulation by stating that the textual interpretation of the statute is not able to determine its *ratio*. In the case where the purpose was not explicitly stated, the burden is mainly on the lawyer who wants to argue for such an extension. Inferring the *ratio* is here subjected either to the constraints of an entitlement-preserving relation, or to those of an incompatibility relation. The first group of constraints concerns the speaker's entitlement to make a claim about the *ratio*, which depends on other forms of legal argumentation, and the revision criteria of this claim. The second group of constraints concerns the incompatibility between the consequences of a certain interpretation of the statute and the aim the statute is supposed to accomplish. If such an incompatibility exists, such an interpretation is not justified according to the *ratio*.

One thing remains to be noted. Of both cases discussed (the smoking prohibition and Sappho's case), one might give two alternative versions of the extension of the regulation[31] (extending the prohibition to those who hold a lit cigarette, extending to lesbian girlfriends the right to make medical decisions): one version is that of *analogical* extension, the other is that of extensive *interpretation* of the statute. The two differ from a theoretical point of view,

[30] Perhaps, instead of purposive interpretation we should speak here of argument from purpose, since the issue is not really on the *meaning* of the text but on the application of the statute.

[31] Remember however that the argument from purpose can be used not only to extend but also to restrict the application of a legal rule. Cf. Ekelöf 1958: 81, Summers and Taruffo 1991: 472.

since the ways to produce their outcome are different[32], but they do not differ from a practical point of view, since their outcome is exactly the same. From a pragmatist point of view, therefore, their difference is a mere paper-difference[33]. Practically the argument from analogy and the argument from extensive interpretation lead to exactly the same result. So, a rational legislator should either permit them both, or prohibit them both. A legislator permitting the one and prohibiting the other is not rational, since the same outcome is permitted and prohibited at the same time.

This is the case of Italian legislature, which prohibits analogy but does not prohibit extensive interpretation in criminal law[34]. How can such a form of irrationality be explained? By the fact that the legislature leaves to the discretion of the interpreters the faculty to consider the circumstances and decide, in the case in question, how the issue has to be settled; this is particularly important when dealing with technological crimes and offences, which cannot be easily regulated in advance by the legislature. In these cases, the principle of legality is balanced with the principle of prevention and social defense, and the latter prevails. Also this is a matter of purpose and of arguments for or against, which the *ratio* evokes but is not able to settle on its own.

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[32] In one version a new rule is created, in the other the meaning of the existing rule is extended. Cf. Bobbio 1994 (Ch. 1).

[33] We refer here to Peirce's pragmatic maxim. Cf. Fisch 1942 and Miller 1975 on legal relevance of the maxim.

[34] This is also accepted by eminent legal scholars and practitioners. See e.g. Barak 2005: 17, 66.

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