

THE ARGUMENT FROM AUTHORITY IN LAW

O ARGUMENTO DE AUTORIDADE NO DIREITO

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ABSTRACT

This essay investigates the role of the argument from authority in Law. It begins with the way (both formal and informal) Logic approaches it, trying to identify its “correct use”, as well as its legitimacy in everyday and scientific discourses, by separating logical questions from material questions. Then it investigates the use of the argument from authority in Law, distinguishing its two different forms: arguments based on authoritative material (*statutes* and *precedents*) as arguments from authority (*authoritative* or *normative* arguments) and arguments from authority provided by legal scholars (*scientific* or *intellectual* legal arguments from authority). As a conclusion, the essay provides an identification of the core element of both kinds of arguments from authority in Law, which is the figure of the presumption.

KEYWORDS: Argument from authority. Appeal to expert opinion. Fallacies. Law. Formal Logic. Informal Logic. Legal argumentation.

RESUMO

Este ensaio investiga o papel do argumento de autoridade no Direito. Começa analisando o modo como a lógica (formal e informal) o aborda, tentando identificar seu “uso correto”, bem como sua legitimidade nos discursos cotidianos e científicos, separando questões lógicas de questões materiais. Em seguida, investiga o uso do argumento de autoridade no Direito, distinguindo duas formas essenciais: argumentos baseados na autoridade da lei e dos precedentes como argumentos de autoridade (argumentos autoritativos ou normativos) e argumentos de autoridade fornecidos por juristas (argumentos jurídicos científicos ou argumentos de autoridade intelectual). Como conclusão, o ensaio fornece uma identificação do elemento central de ambos os tipos de argumentos de autoridade no Direito, que é a figura da presunção.

PALAVRAS-CHAVE: *Argumento de autoridade. Direito. Opinião de especialistas. Falácias. Lógica formal. Lógica informal. Argumentação jurídica.*

SUMMARY: 1. Introduction; 2. The logical approach to the argument from authority; 2.1. The argument from authority in formal Logic; 2.2. Informal Logic and the argument from authority; 2.3. Partial conclusion on appeal to authority: fallacy or valid argument?; 2.3.1. Formal analysis; 2.3.2. Informal Logic analysis; 3. The role of trust in authority in everyday and scientific discourses; 4. Arguments from

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authority in Law; 4.1. Types of argument from authority in Law; 4.1.1. Normative or authoritative arguments: statutes and precedents as arguments from authority; 4.1.2. Scientific legal arguments as arguments from authority; 5. Conclusion: the core element of the argument from authority in Law. References.

1 INTRODUCTION

Arguments from authority are a controversial topic in the field of Philosophy, in Logic and in Legal Theory. There are basically two reasons for that: at first place, the term authority has different meanings,¹ such as political, scientific and religious authority and, at second place, even when one overcomes the openness of the term and defines more precisely its meaning, there are both reasons for and against the acceptance of arguments from authority. Thus, if, on the one hand, it seems reasonable that one trusts more the opinion of an expert than the opinion of a laywoman, on the other hand, the fact that a person is an authority on a certain subject does not necessarily mean that what she asserts is true, or that the advices or commands she issues are legitimate or right.

In this essay I should investigate the role of the argument from authority in Law. I will start, in section 2, with the logical approach, handling both the way formal Logic (section 2.1) and informal Logic (section 2.2) deal with the argument from authority. In section 2.3. I will then be able to sketch my own view about the logical approach to the argument from authority, which not only identifies its “correct use” in the field of Logic, but also identifies its legitimacy in everyday and scientific discourses, by separating logical questions from material questions (section 3). While the former deal with the analysis of the form of the argument, the latter deal with the reliability of the information used in the process of argumentation. After that, in section 4, I will investigate the use of the argument from authority in Law. In section 4.1 I will distinguish two different forms of arguments from authority in Law: (4.1.1)

1 Cf. WALTON, *Appeal to Expert Opinion*, p. 76.

arguments based on authoritative material (*statutes* and *precedents*) as arguments from authority (*authoritative* or *normative* arguments) and (4.1.2) arguments from authority provided by legal scholars (*scientific* arguments). This analysis aims to determine what these two kinds of arguments have in common and what distinguishes them. As a conclusion (5), I will try to provide an identification of the core element of both kinds of arguments from authority and, therefore, to determine the place of the argument from authority in Law.

2 THE LOGICAL APPROACH TO THE ARGUMENT FROM AUTHORITY

Studying the role of the argument from authority in Law demands starting with the way Logic approaches it. I will begin with the way formal Logic handles it. Then I will move to informal Logic, which is the discipline that, in recent times, most has been focusing fallacies in general and, more specifically, the argument *ad verecundiam*.² In most of the analysis made by both formal and informal Logic authority means, in general, *intellectual* authority, and therefore the argument from authority means appealing to someone who is an expert on a certain subject. Thus, when handling the logical approach to the argument from authority, authority will be considered, in principle, *intellectual* or *scientific* authority.

2.1 THE ARGUMENT FROM AUTHORITY IN FORMAL LOGIC

The origin of the argument from authority can be connected to philosophical writings since ancient Greece,³ but it was John Locke who supposedly handled it for the first time, using the term “argument *ad verecundiam*” to refer to it.⁴ After that, such argument

2 *Ad verecundiam*, which is the term Locke used to refer to the argument from authority, means respect to authority. Cf. LOCKE, *An Essay Concerning Human Understanding*, p. 19-22.

3 WALTON, *Appeal to Expert Opinion*, p. 32-46.

4 WALTON, *Appeal to Expert Opinion*, p. 52-55.

(and fallacies in general) became a topic commonly handled in Logic, especially in textbooks.⁵

This tendency remains in most Logic textbooks up to current time.⁶ Gensler, for instance, defines a fallacy as “a deceptive error of thinking”,⁷ an informal fallacy as “a fallacy that isn’t covered by some system of deductive or inductive Logic”, and handles the argument from authority within the framework of informal fallacies.⁸ According to him, the argument from authority has a correct form, which runs:

X holds that A is true
X is an authority on the subject
the consensus of authorities agrees with X
there is a presumption that A is true.⁹

Gensler asserts that the incorrect form “omits premises 2 or 3” or conclude that A “*must* be true”.¹⁰ He adds that even in its correct form, the argument from authority is not conclusive, for all authorities on a certain subject can agree on something that they discover, in the future, to be false.¹¹ Yet, according to him, most of the things we know, and about which we are sure, such as that George Washington was the first president of the United States and that there is a country called Japan, are based on the fact that other people have told us that.¹²

5 For a historical evolution of the argument from authority in Logic cf. WALTON, *Appeal to Expert Opinion*, p. 32-62. He starts with Greek philosophy, handles the Port Royal Logic, Locke, Bentham and then modern Logic, up to current approaches.

6 Cf. WALTON, *Appeal to Expert Opinion*, p. 33.

7 GENSLER, *Introduction to Logic*, p. 59.

8 GENSLER, *Introduction to Logic*, p. 61.

9 GENSLER, *Introduction to Logic*, p. 61.

10 GENSLER, *Introduction to Logic*, p. 61.

11 GENSLER, *Introduction to Logic*, p. 62.

12 GENSLER, *Introduction to Logic*, p. 61-62.

Let us analyse Gensler's incorrect forms of the argument from authority. Following his definition of the incorrect forms, their structure should be an argument omitting premise 2,

X holds that A is true
the consensus of authorities agrees with X
there is a presumption that A is true,¹³

an argument omitting premise 3,

X holds that A is true
X is an authority on the subject
there is a presumption that A is true,

or an argument concluding that A "must" be true:

X holds that A is true
X is an authority on the subject
the consensus of authorities agrees with X
A is true (or A must be true).¹⁴

Now, it is possible to combine a form that asserts the necessary conclusion (A is or must be true) with the forms lacking premise 2 or premise 3. These arguments would assume the following forms:

X holds that A is true
the consensus of authorities agrees with X
A must be true

and

X holds that A is true

13 Such argument would be an argument from authority, for although it would not contain a premise referring to an individual authority (premise 2), it would refer to the consensus of authorities.

14 Theoretically, another possibility, which should be added to Gensler's incorrect forms, would be an argument omitting premises 2 and 3:

X holds that A is true
there is a presumption that A is true.

Such argument would be a fallacy, but not an argument from authority, for it would not refer to authority at all.

X is an authority on the subject
A must be true.¹⁵

Then, Gensler's incorrect forms should be redefined as follows: "the incorrect form of the argument from authority is either the one that omits premise 2, the one that omits premise 3, the one that asserts that the conclusion is or must be true (necessity), or one which combines this last form (necessity) with one of the previous". In short, reformulating Gensler would mean that there should be five incorrect forms of the argument form authority, which would run:

X holds that A is true
the consensus of authorities agrees with X
there is a presumption that A is true,

X holds that A is true
X is an authority on the subject
there is a presumption that A is true,

X holds that A is true
X is an authority on the subject
the consensus of authorities agrees with X
A is true (or A must be true),

X holds that A is true
the consensus of authorities agrees with X
A is true (or A must be true)

and

X holds that A is true
X is an authority on the subject

15 The combination of argument omitting premises 2 and 3 with the assertion that the conclusion is or must be true would be:

X holds that A is true
A must be true.

But such argument, as the argument referred in footnote 14, would not be an argument from authority, for it would not contain any reference to authority.

A is true (or A must be true).

Whether Gensler's incorrect forms of the argument from authority are really incorrect and to what extent they are fallacious should be investigated below.

2.2 INFORMAL LOGIC AND THE ARGUMENT FROM AUTHORITY

Informal Logic tries to go beyond the mere description of the formal structure of arguments in general. In the case of the argument from authority, even recognizing that this kind of argument is not logically conclusive, it accepts that we need to rely on authority (especially on scientific or intellectual authority), for we do not know everything. It tries then to analyse under which conditions arguments from authorities are valid.

There are many studies, in the field of informal Logic, handling fallacies in general, and, specifically, handling the argument from authority. Walton, for instance, affirms that such arguments are not necessarily fallacious. He asserts that there are some conditions under which appeal to expert opinion is valid. These conditions can be presented, according to him, in the form of six critical questions:

<i>Expertise question</i>	How credible is <i>E</i> as an expert source?
<i>Field question</i>	Is <i>E</i> an expert in the field that <i>A</i> is in?
<i>Opinion question</i>	What did <i>E</i> assert that implies <i>A</i> ?
<i>Trustworthiness question</i>	Is <i>E</i> personally reliable as a source?
<i>Consistency question</i>	Is <i>A</i> consistent with what others experts assert?
<i>Backup evidence question</i>	Is <i>A</i> 's assertion based on evidence? ¹⁶

16 Cf. WALTON, *Appeal to Expert Opinion*, p. 199-229, 258.

According to Walton, even when the conditions expressed by these questions are not met, the argument in question is not necessarily fallacious.¹⁷ Appeal to expert opinion becomes fallacious, says Walton, only when it confuses *intellectual* or *cognitive* authority with *institutional* authority. Cognitive or intellectual authority is “open to challenge, so that arguments resting on it are provisional and subjective in nature. They carry a weight of presumption, but it may need to be withdrawn if new evidence comes into consideration in a case.” Still according to Walton, “in contrast, administrative or institutional authority is often final and enforced coercively, so that is not open to challenge in the same way.”¹⁸ In short, according to Walton, whether appeal to authority is a fallacy or not depends on the way “it is put forward in the dialogue in the text of discourse in a given case.”¹⁹ For Walton, when appeal to authority is used so dogmatically or absolutely that it blocks out argumentation,²⁰ that is to say, when an argument that should be considered relative and fallible is absolutized, it becomes a fallacy.²¹ On this basis, Walton distinguishes three kinds of appeal to authority: (i) reasonable or presumptively acceptable, when supported by appropriate evidence, (ii) weak or presumptively not acceptable, because not supported by appropriate evidence and (iii) fallacious.²² The requirements expressed in the six aforementioned questions are important to

17 Cf. WALTON, *Appeal to Expert Opinion*, p. 239.

18 Cf. WALTON, *Appeal to Expert Opinion*, p. 252.

19 Cf. WALTON, *Appeal to Expert Opinion*, p. 239.

20 Cf. WALTON, *Appeal to Expert Opinion*, p. 239.

21 Cf. WALTON, *Appeal to Expert Opinion*, p. 248 f.

22 Cf. WALTON, *Appeal to Expert Opinion*, p. 255. Other authors present other subtypes of fallacies related to the argument *ad verecundiam*. In some classifications, the non-fulfillment of some of the requirements expressed by Walton in the six questions means that the argument is fallacious. Shipper and Schuh, for instance, consider the following five different fallacies: (i) sweeping authority, when the source is not specified well enough, (ii) dogmatic authority, when the authority is considered ultimate or infallible, (iii) misplaced authority, when the field is wrong, (iv) misrepresented authority, when what the authority said is changed in meaning and (v) venerable authority, when veneration or glamour substitutes real authority (SHIPPER; SCHUH, *A First Course in Modern Logic*, p. 38-45).

distinguish a reasonable appeal to expert opinion from a weak one, while the dogmatic use of appeal to expert opinion is the criterion to classify it as a fallacy.

2.3 PARTIAL CONCLUSION ON APPEAL TO AUTHORITY: FALLACY OR VALID ARGUMENT?

The analysis of the approaches of both formal and informal Logic provides the basis of an appropriate definition of the argument from authority. I will try to sketch this definition now, and it should be divided, following the method used above, in a formal and in an informal analysis.

2.3.1 FORMAL ANALYSIS

As we have seen, formal Logic provides the structure of the argument from authority and considers it, in some cases, as a fallacy. Is this approach appropriate? The answer to this question depends on the way one defines a fallacy. I will use Gensler's approach to the argument from authority and then sketch my own view about this topic.

As we have seen, Gensler handles the argument from authority in the framework of informal fallacies, defines a fallacy as "a deceptive error of thinking",²³ and an informal fallacy as "a fallacy that isn't covered by some system of deductive or inductive Logic". As we have also seen, He then presents the correct form of the argument from authority, which says:

X holds that A is true
X is an authority on the subject
the consensus of authorities agree with X
there is a presumption that A is true.

Now, it should not be difficult to see that Gensler's "correct form" is not the *classical* fallacy of the argument from authority,

23 GENSLER, *Introduction to Logic*, p. 59.

for it does not assert that A is true, but rather that there is a *presumption* that A is true. Whether Gensler's correct form is still a fallacy depends on the concept of a *presumption*. It is not possible to discuss it in details here. I will consider a presumption a kind of mechanism through which *something is accepted as true or valid even when it is not necessarily true or valid, but there are reasons to accept it as if it were true or valid*.²⁴ In the case of a presumption, the conclusion does not *necessarily* follow from the premises. Considering this definition, Gensler's correct form of the argument from authority *loses* its fallacious character, for it does not assert that A is true, that is to say, that the conclusion necessarily follows from the premises. The reasons that may lead somebody to presume things are many, and should not be handled here. Here it is enough to say that these reasons are in general related to the fact that, in everyday life, we need to decide about many things that we (and even experts) are not sure about.

Gensler's definition of fallacies and of informal fallacies seems to be appropriate, but his distinction between the correct and the incorrect forms of the argument of authority can be criticized. At first place, if there is a *correct* use of the argument from authority, it is not, at least in the cases of such correct use, a fallacy, for a fallacy cannot be correct or correctly used. At second place, Gensler's introduction of the presumption in the argument from authority changes the focus of the analysis from formal to informal Logic, for whether it is reasonable to presume things or under which conditions it is reasonable to presume that we should trust authorities is not a matter of formal Logic. When one separates formal and informal aspects it is possible to reach a clearer view about the validity of arguments from authority.

In my view, from a formal point of view, arguments in which the conclusion asserts a presumption (and not the necessity) of the truthfulness of authorities assertions, are not formally incorrect,

24 This concept of presumption is somehow related, but not equivalent, to Hans Vaihinger's concept of fiction, which is based on Kant's use of the expression "as if". Cf. VAIHINGER, *The Philosophy of the 'As If'*.

and therefore are not fallacious, *even when they omit premises 2 or 3!* The reason for that is very simple: such arguments do not assert that something is true, but rather that something will be assumed as true, even when there is a chance that this is not really the case. Thus, among the five aforementioned Gensler's incorrect forms of the argument from authority,

X holds that A is true
the consensus of authorities agrees with X
there is a presumption that A is true,

X holds that A is true
X is an authority on the subject
there is a presumption that A is true,

X holds that A is true
X is an authority on the subject
the consensus of authorities agrees with X
A is true (or A must be true),

X holds that A is true
the consensus of authorities agrees with X
A is true (or A must be true)

and

X holds that A is true
X is an authority on the subject
A is true (or A must be true),

Only the last three forms are formally incorrect, for only they assert the necessity of the conclusion. From the fact that someone or a group of people say something it does not necessarily follow that what she or they say is true, even when she is or they are authorities. And since they are formally incorrect, *they are fallacious*. Because of this, these three last forms will be termed “fallacious arguments from authority”. On the other hand, the first two aforementioned

Gensler's incorrect forms, which lack, respectively, premise 2 and premise 3 of the correct form, are not fallacious, for they do not assert that what the authority or authorities said is true, but rather contain the element of the presumption. Gensler's correct form is also not fallacious, for it also does not state the necessity of the conclusion. Because of this, the first two aforementioned Gensler's incorrect forms and Gensler's correct form will be termed "non-fallacious arguments from authority" or "trust in authority".

Now, in order to check whether and to what extent these three forms of "non-fallacious arguments from authority" or "trust in authority" are reasonable, informal Logic has to be considered.

2.3.2 INFORMAL LOGIC ANALYSIS

As we have seen in section 2.2, informal Logic goes beyond the formal structure of the argument from authority and tries to distinguish a good use of this kind of argument from a bad use. In my view, informal Logic does not deny the conclusions formal Logic presents, but rather focuses questions that the former does not. In this sense, the two disciplines are not opposed, but rather complement each other.

Regarding arguments from authority, informal Logic analyses the reasons we have for accepting as true something that is not necessarily true. These reasons are numerous and, in some cases, especially in some cases of use of arguments from authority, evident: it seems more reasonable to trust what your doctor has to say about your headache than what your accountant says about it. Moreover, it seems more reasonable to trust a neurologist than an orthopaedist when one needs advice about a headache. It should be clear at this point that medical doctors' assertions about a headache are not necessarily true because the persons who issue them are experts. In fact, it can be the case that an accountant's assertion about someone's headache is true while a doctor's (or, more specifically a neurologist's) assertion is false. But most of the time this is not the case; rather, the opposite is the case. Why? The reasons for that cannot be explained in details here, but in short it can be said that, although science fails, there are good reasons to believe that scientific knowledge is worth. Thus, the reason why

arguments from authority as presumptions make sense is that science is a fallible but to some extent trustable enterprise.

Walton's six questions as well as other proposals for checking the reliability of arguments from authority can be seen as attempts to verify how reasonable it is to presume that something an intellectual authority said is right.

We have already seen that Gensler's correct form as well as two of Gensler's reformulated incorrect forms of the argument from authority are not fallacies, and run:

X holds that A is true
X is an authority on the subject
the consensus of authorities agrees with X
there is a presumption that A is true (it will be assumed that
A is true although A is not necessarily true),

X holds that A is true
the consensus of authorities agrees with X
there is a presumption that A is true (it will be assumed that
A is true although A is not necessarily true),

X holds that A is true
X is an authority on the subject
there is a presumption that A is true (it will be assumed that
A is true although A is not necessarily true).

As we have seen, such forms are not, in the terminology used here, "fallacious arguments from authority", but rather "non-fallacious arguments from authority" or "trust in authority". Now, on the one hand, if the conditions suggested by Walton (and by other authors) are met, the argument will be a "reasonable" non-fallacious argument from authority, while, on the other hand, if one, some or all of them are not met it will be an "unreasonable" non-fallacious argument from authority, but it will not be a fallacy (in the terminology used here, it will not be a "fallacious argument from authority"). Among the three forms above, the first one seems more reasonable, because it contains both the mention to the authority

who has issued the opinion and the consensus of other authorities, while the second and the third seem less reasonable, because they lack, respectively, the mention to the authority who has issued the opinion and the consensus of other authorities. But concrete arguments from authority, even when they pass the first test of non asserting the necessity of the conclusion, have to be checked by the requirements of informal Logic.

Now, someone could assert that the non-fulfilment of some of the conditions suggested by Walton would deprive, at least in some cases, the authoritative character of the argument. Imagine an argument in which the second condition, the “field question”, which verifies whether the person who asserted something is an expert on the subject of the assertion, is not met:

X holds that A is true
 X is *not* an authority on this subject
 there is a presumption that A is true (it will be assumed that
 A is true although A is not necessarily true).

It could be said that this argument is not in fact an “unreasonable” “non-fallacious argument from authority”, for, since X is not an authority on the subject in question, the argument would not be an argument from authority. But if it were not an argument from authority, it could not be a “fallacious argument from authority” either. Now, is it a fallacy of another kind? It seems to me not, for it does not assert that the conclusion *necessarily* follows from the premises, since the mechanism of the presumption is explicit. The remaining question would be which reasons back the presumption is this case.²⁵ I will not deepen the question of

25 This argument is sometimes considered a different fallacy, namely, the fallacy of false authority. Since the person who is not an authority is considered an authority, it could also be considered an example of another fallacy, namely confusion. In this case it would have the following structure:
 X sustains that A is true
 X is *mistakenly considered* an authority on this subject
 there is a presumption that A is true (it will be assumed that A is true although
 A is not necessarily true).

whether the non-fulfilment of some (or all) conditions suggested by informal Logic (for instance by Walton) deprives the authoritative feature of an argument. Rather, I will now move to the reasons one has to accept arguments from authority in everyday and scientific discourses.

3 THE ROLE OF TRUST IN AUTHORITY IN EVERYDAY AND SCIENTIFIC DISCOURSES

Now that the structure of both non-fallacious and fallacious arguments from authority is clear, it should be asked: what is the role of trust in authority? Here we should distinguish two kinds of discourses: *scientific* discourses and *everyday life* discourses. Although this is a simple distinction, and although informal Logic is aware of it, it is sometimes not clearly presented. This distinction, together with the distinction between “fallacious arguments from authority” and “non fallacious arguments from authority” (or “trust in authority”) will provide the basis of my conclusion about the logical approach to the “argument *ad verecundiam*”.

The distinction between “fallacious arguments from authority” and “non-fallacious arguments from authority” or “trust in authority” allows one to conclude that “fallacious arguments from authority”, as fallacies, are never valid, even in everyday reasoning. Thus, for example, the everyday life reasoning

X holds that the origin of my bad health condition is high blood pressure
 X is an authority on matters related to health, for X is a medical doctor
 then what X says is true,

is not valid, for it asserts that the conclusion *is* true, when this is not necessarily the case. Yet, on the other hand, the reasoning

X holds that the origin of my bad health condition is high blood pressure
 X is an authority on matters related to health, for X is a medical doctor

there is a presumption that what X says is true (it will be assumed that what X says is true, although it is not necessarily true)

is not a fallacy, but rather a non-fallacious argument from authority or trust in authority. Whether it is a reasonable or an unreasonable argument should be checked by the conditions suggested informal Logic.

Trust in authority is valid in everyday life, and the reason for that is the already mentioned necessity of taking decisions and implementing them in fields about which we do not have sufficient knowledge. I will not elaborate on this point any longer. I should now check whether non-fallacious arguments from authority are valid or not in scientific discourses.

In *science*, the argument

X holds that A is true
X is an authority on this subject
then A is true,

is not valid, for, as we have seen, it is a fallacy. Now, the question is whether the argument in which the conclusion contains the assertion of a presumption, namely the argument

X holds that A is true
X is an authority on this subject
there is a presumption that A is true (it will be assumed that A is true although A is not necessarily true)

is valid in science. In my view, it is not, in principle, valid, or, in other terms, is not reasonable. Science is the *locus* of demonstrating one's assertions with evidence, not with authority. Therefore asserting that something is presumed true because someone who is a scientist has said it does not mean making science, but rather merely describing science. Yet, on the other hand, it is commonplace that scientific theories, in all fields of knowledge, are not developed from nowhere, but rather depart from other theories and elaborate new approaches based on them. Now, when

choosing from which theories to depart, it is reasonable to use ideas of a theorist who is known as an expert in the field that is being researched. Therefore, the form of trust in authority in science is, in my view, the following:

X holds that A is true
X is an authority on this subject
It will be assumed that X's argument is worth checking.

Thus, the valid use of trust in authority in science is as mere source of information and, therefore, non-fallacious arguments from authority in science can be termed "source of information arguments".²⁶ If other authorities agree with the authority issuing an opinion, this makes the argument even stronger, but it still remains as a source of information:

X holds that A is true
X is an authority on this subject
the consensus of authorities agrees with X
It will be assumed that X's argument is worth checking.

There is a presumption that someone who is an intellectual authority on a certain field of knowledge develops ideas and arguments that are *worth checking*. When other authorities agree with her, her argument is even stronger. Sometimes her argument is not strong, but most of the times, or at least some times, it is, and therefore scientific arguments from authority also contain a presumption.²⁷ This is not insignificant in a world in which

26 For an analysis of arguments from authority that somehow connects them to sources of information cf. BACHMAN, *Appeal to Authority*.

27 I will not deepen this question here. The reasons we have to assume that an intellectual authority is a valid source of information seems to me to have the form of an inductive argument, such as
X holds that A is true
X is an authority on this subject
what X has said about this subject so far was worth checking
It will be assumed that X's argument is worth checking,
or an argument from analogy, which would have the form:

information is progressively available and one needs criteria to choose sources.

The analysis just developed comprises the formal and the material aspects of arguments from authorities. The formal aspect is handled when the structure of the argument is considered, not its content. Such formal analysis enables to identify the structure of both fallacious and non-fallacious arguments from authority. The material aspect comprises everything that goes beyond the formal structure of the arguments. It allows us to assert that non-fallacious arguments from authority are a source of information in scientific discourse.

4 ARGUMENTS FROM AUTHORITY IN LAW

The first step to understand the place of arguments from authority in Law was the logical approach. The second step, which is going to be taken now, is to distinguish two kinds of arguments related to authority in the field of Law: *normative* arguments from authority (which will be also termed *authoritative arguments*) and *scientific or intellectual arguments* from authority. In order to grasp the distinction between these two kinds of arguments it is necessary to consider some basic features of the Law.

Law is a normative order that communicates patterns of behaviour, that is to say, that communicates how one should behave, and what should be done in case one does not behave the way she should have done. This basic feature is somehow present in different legal theories, but was formulated with sharpness in Hans Kelsen's theory. Therefore, in order to grasp Law's basic features I will consider Kelsen's concept of the *ought*.

In the second German edition of the *Pure Theory of Law*, Kelsen states that the *ought*, in a broad sense, comprises commanding, authorizing and permitting a behaviour.²⁸ Law, as a normative order,

X holds that A is true
 what X has said about the subject A so far was worth checking
 the statement A is similar to X's previous statements, for it is in X's field of knowledge
 It will be assumed that X's argument is worth checking.

28 KELSEN, *Pure Theory of Law*, 2nd ed., p. 15 (The second edition of the *Pure Theory*

regulates behaviours positively or negatively. It regulates them positively “when a definite action of a definite individual or when the omission of such an action is commanded” or when “an individual is authorized by the normative order to bring about, by a certain act, certain consequences determined by the order”.²⁹ An individual can be authorized to create or to participate in the creation of legal norms or when a norm permits an act otherwise forbidden by the legal order, for example, in the case of self-defence.³⁰ Law regulates a behaviour negatively when “this behaviour is not forbidden by the order without being positively permitted by a norm that limits the sphere of validity of a forbidding norm”.³¹

When the Law is considered as a normative order it does not make any sense speaking of Law’s truthfulness, but rather of its validity or, at the utmost, of its rightness, justice or correction. Yet, on the other hand, it does make sense speaking of the truthfulness of the knowledge about the Law. Thus, for instance, although it makes no sense saying that “the norm N is true” (one should rather say that the norm N is valid, right, just or correct), it does make sense saying that “the knowledge about the norm N is true”, “the interpretation of the norm N is false”, and so on.

This distinction somehow corresponds to Kelsen’s distinction between the Law and legal science, or, in other words, between *legal norms* and *legal statements*. Of course it could be said that Kelsen’s theory lacks an appropriate comprehension of the distinction (and of the relation) between Law and science, for Kelsen himself connects the concept of a norm with the idea of ‘meaning’, and therefore

of Law will always be quoted here according to the English translation). In the first edition of the *Pure Theory of Law* Kelsen had already handled the concept of the *ought* and its identification with the concept of norm (KELSEN, *Reine Rechtslehre*, 1. Auflage, p. 32-33). In 1979, in the posthumous *General Theory of Norms* (“Allgemeine Theorie der Normen”), Chapters 25 to 27, Kelsen talks about four different functions of legal norms: commanding, permitting, empowering and derogating (CF. KELSEN, *Allgemeine Theorie der Normen*, p. 76-92).

29 KELSEN, *Pure Theory of Law* (2nd ed.), p. 15.

30 KELSEN, *Pure Theory of Law* (2nd ed.), p. 15-16.

31 KELSEN, *Pure Theory of Law* (2nd ed.), p. 16.

not only a legal statement but also a legal norm is the product of interpretation. Yet, I do not wish to elaborate on this point here. Enough is to say that when I distinguish the Law and the knowledge about the Law I do not suggest a strong separation, in which the former is independent from the latter.

4.1 TYPES OF ARGUMENT FROM AUTHORITY IN LAW

According to these basic features of Law it is possible now to distinguish the two already mentioned kinds of arguments from authority in Law: *normative or authoritative arguments as arguments from authority* and *scientific or intellectual arguments from authorities*.

4.1.1 NORMATIVE OR AUTHORITATIVE ARGUMENTS: STATUTES AND PRECEDENTS AS ARGUMENTS FROM AUTHORITY

Normative arguments from authority (or authoritative arguments) are based on valid norms. Therefore their structure is the following:

the Norm N commands to perform the action A
the Norm N is a valid norm
the action A ought to be performed.

Since statutes and precedents are sources of norms, the structure of the argument can be elaborated in two further forms:

the Statute S contains the norm N
the Norm N commands to perform the action A
the Norm N is a valid norm
the action A ought to be performed

and

the precedent P contains the norm N
the Norm N commands to perform the action A

the Norm N is a valid norm
the action A ought to be performed.

Are these arguments in fact arguments from authority? The answer to this question is affirmative. Naturally they are *not* arguments from *intellectual* authority, for they are not based on the fact that persons issuing them have scientific (or intellectual) knowledge about the Law. Yet, they are arguments from authority, more precisely what Walton terms “administrative” or “institutional” authority, which, as we have seen, is, according to him, “often final and enforced coercively”, so that is not open to challenge in the same way intellectual authority is.³²

Although authoritative arguments are not to be confused with scientific arguments from authority, these two kinds of arguments have something in common, for while in the latter there is, as we have seen, a presumption that what the authority affirms is true, in the former there is a presumption that what the authority commands ought to be done. I will come back to this point below. Before doing that I should handle the connection between authoritative arguments and the idea of power.

Political or institutional authorities produce valid legal norms. Therefore, the term authority is here connected to the idea of empowerment. A political or institutional authority is the one that is authorized, by valid legal norms, to produce legal norms that are binding, or to apply them, producing what Kelsen terms “individual norms”.³³ The reason why authoritative arguments are similar to arguments from intellectual authority is the presumption: we presume that we ought to act in accordance to legal norms. We respect or have reverence to them, expressing therefore the very idea that is the core of the argument *ad verecundiam*. Recall that *verecundiam*, which was the term used by Locke to refer to the argument from authority, means veneration, worship, respect. By accepting to guide our behaviour according to the standards

32 Cf. WALTON, *Appeal to Expert Opinion*, p. 252.

33 KELSEN, *Pure Theory of Law* (2nd ed.), p. 16.

produced by officials that are foreseen by the legal system as sources of norms we respect them. Why do we do that? There are different answers in legal theory to this question, depending basically on the position the theorist takes regarding the relation between Law and moral. In positivist theories such as Kelsen's, who does not accept a necessary connection between Law and moral, legal validity is grounded on a basic norm (*Grundnorm*), which is a presupposed norm that does not determine the content of the legal order, or, in Kelsen's own words, a "dynamic principle of validity",³⁴ without which the legal system would collapse.³⁵ The separation thesis defended by Kelsen implies that the content of the norm is not subject to scrutiny outside the patterns of the legal system. Thus, the authoritative arguments take, in a theory such as Kelsen's, the following form:

the Norm N commands to perform the action A
 the Norm N has been produced by a competent authority
 the norm N is a valid norm³⁶
 the action A ought to be performed (there is a presumption that the action A ought to be performed).

At the most, in theories such as Kelsen's, the content can be verified according to the pattern of superior norms, but not according to the pattern of moral norms. Thus, the argument in such theories has, at the most, the following form:

the Norm N commands to perform the action A
 the Norm N has been produced by a competent authority
 the content of the norm N is not incompatible with the content of any superior norm

34 KELSEN, *Pure Theory of Law* (2nd ed.), p. 195-198.

35 Cf. KELSEN, *Pure Theory of Law* (2nd ed.), p. 201-205.

36 Since Kelsen considers effectiveness a condition of validity of legal norms (cf. KELSEN, *Pure Theory of Law* [2nd ed.], p. 211-214), another premise could be included in this argument. For the sake of simplification, I will let effectiveness aside.

the norm N is a valid norm
the action A ought to be performed (there is a presumption
that the action A ought to be performed).

On the other hand, in non-positivist theories such as Alexy's, which assert a necessary connection between Law and moral, legal norms are valid inasmuch they raise a claim to correctness.³⁷ In theories such as Alexy's, authoritative arguments are connected to the correctness of the norm issued by the authority. There is a kind of presumption, which means that the Law's content is morally valid. Thus, authoritative or normative arguments have, in such theories, the following form:

the Norm N commands to perform the action A
the Norm N has been produced by a competent authority
*and claims to be correct*³⁸
the Norm N is a valid norm³⁹
the action A ought to be performed (there is a presumption
that the action A ought to be performed).

4.1.2 SCIENTIFIC LEGAL ARGUMENTS AS ARGUMENTS FROM AUTHORITY

Scientific or intellectual arguments from authority in Law have features that are similar to the features of intellectual arguments from authority in general, which were handled in section 2. This is so because their reasonableness is based on the fact that somebody is an expert in Law. Yet, scientific legal arguments from authority have a peculiar feature: while intellectual arguments from authority, which I analysed in section 2, are related to theoretical scientific

37 ALEXY, *The Argument from Injustice*, p. 35-40.

38 Since Alexy defends a "weak" connection between Law and Moral, being correct means "not being extreme unjust".

39 Since Alexy also considers effectiveness a condition of validity of legal norms (cf. ALEXY, *The Argument from Injustice*, p. 4), here, as in Kelsen, another premise could be included in the argument. For the sake of simplification, here too I will let effectiveness aside.

knowledge, for their subject is the reality the way it is, even when they deal with social reality, scientific legal arguments from authority are related to the knowledge about what ought to be, and not about how things are. Thus, while intellectual arguments from authority have the following forms

X holds that A is true
X is an authority on this subject
the consensus of authorities agrees with X
there is a presumption that A is true (it will be assumed that A is true although A is not necessarily true),

X holds that A is true
the consensus of authorities agrees with X
there is a presumption that A is true (it will be assumed that A is true although A is not necessarily true)

and

X holds that A is true
X is an authority on this subject
there is a presumption that A is true (it will be assumed that A is true although A is not necessarily true),

scientific legal arguments from authority, on the other hand, are related to what the Law commands, and have therefore the following forms:

X holds that the Law commands the action A
X is a scientific authority on this subject (X is a lawyer)
the consensus of authorities (lawyers) agrees with X
there is a presumption that the Law commands the action A (it will be assumed that A is an action commanded by the Law, although this is not necessarily true),

X holds that the Law commands the action A
the consensus of authorities (lawyers) agrees with X

there is a presumption that the Law commands the action A (it will be assumed that A is an action commanded by the Law, although this is not necessarily true)

and

X holds that the Law commands the action A
X is a scientific authority on this subject (X is a Lawyer)
there is a presumption that the Law commands the action A (it will be assumed that A is an action commanded by the Law, although this is not necessarily true).

Are scientific legal arguments from authority valid or are they fallacious? From the partial conclusions sketched in section 2.3 it should not be difficult to see, at this point, that in the forms just presented above *they are not fallacious*, for they present the mechanism of the presumption. The other partial conclusions sketched in section 2.3 also apply here. Let us check them.

I have concluded that an intellectual argument from authority is fallacious when it has the following forms:

X holds that A is true
X is an authority on this subject
the consensus of authorities agrees with X
then A is true,

X holds that A is true
the consensus of authorities agrees with X
then A is true,

and

X holds that A is true
X is an authority on this subject
then A is true.

Correspondently, scientific legal arguments from authority are fallacious when they have the following structures:

X holds that the Law commands the action A
X is a scientific authority on this subject (X is a Lawyer)
the consensus of authorities (Lawyers) agrees with X
then the Law commands the action A (or it is true that the Law commands the action A),

X holds that the Law commands the action A
the consensus of authorities (lawyers) agrees with X
then the Law commands the action A (or it is true that the Law commands the action A)

and

X holds that the Law commands the action A
X is a scientific authority on this subject (X is a lawyer)
then the Law commands the action A (or it is true that the Law commands the action A).

Besides the conclusion just mentioned, I have additionally concluded, in section 2.3, that non-fallacious arguments from authority are valid in everyday life, that the conditions suggested by informal Logic, such as Walton's, are a tool to check how reasonable they are and, last but not least, that (intellectual or scientific) non-fallacious arguments from authority are, in scientific discourse, a mere source of information. Are these three conclusions valid for scientific legal arguments from authority? The answer to this question is affirmative. Let us see.

The first additional conclusion, namely, that it is legitimate to use scientific legal arguments from authority in everyday life, stems from the fact that a laywoman has to decide about matters related to the Law without being a specialist. Therefore, the argument

X holds that A is true
X is an authority on this subject, for X is a lawyer

there is a presumption that the Law commands the action A (it will be assumed that A is an action commanded by the Law, although this is not necessarily true)

is a valid argument in everyday life, exactly like the argument

X holds that the origin of my bad health condition is high blood pressure

X is an authority on matters related to health, for X is a medical doctor

there is a presumption that what X said is true (it will be assumed that what P said is true although it is not necessarily true)

is valid. Now, if the consensus of authorities (lawyers) agrees with the argument, this makes it stronger. Anyway, the reason why legal scientific arguments from authority are valid in everyday life is the same reason scientific arguments from authority in general are valid: in everyday life people have to take decisions on matters related to the Law, without being experts. One example should be enough: a person has to sign a rent contract, but she has no knowledge about the Law and, therefore, she has to trust the opinion of an expert.

The second additional conclusion was that the conditions suggested by informal Logic, such as by Walton, are a tool to check how reasonable scientific legal arguments from authority are. In Law, exactly like in the case of scientific arguments from authority in general, the conditions proposed by informal Logic say how strong the argument is, and not whether it is a fallacy or not. The strength of the argument depends on the fulfilment of these conditions: the more they fulfil it, the more reasonable they are, and vice-versa.

Last but not least, the third additional conclusion was that scientific legal arguments from authority, exactly like scientific arguments from authority in general, are, in legal scientific discourse, a mere source of information. The reason for that is simple: legal science shares with other sciences that feature, mentioned above, of being the *locus* of demonstrating one's assertions with evidence (in the case of legal science with rational arguments), not with

authority. Thus, in legal science, it is not valid presuming that the Law commands the action A because someone who is a scientific authority has asserted so. Thus, scientific legal arguments from authority also are, in legal scientific discourse, a mere (but valuable) source of information.

5 CONCLUSION: THE CORE ELEMENT OF THE ARGUMENT FROM AUTHORITY IN LAW

The analysis presented above allows a short conclusion. Authoritative arguments from authority are valid in Law, for they stem from the very normative character of the Law. Denying their validity would imply denying the very normative character of the Law. What is important to stress, once again, is that when an authoritative argument is asserted a presumption is being made. Scientific legal arguments from authority are valid in everyday life. Being valid does not mean that their conclusions are necessarily true, but rather that because the laywoman needs to decide on matters she has no knowledge, it is necessary to trust expert's opinions. Thus, it is necessary to assume that what the specialist says is true. Last but not least, scientific legal arguments from authorities assume, in scientific discourse, the role of "source of information". Here too there is a presumption: the presumption that the information and the reasoning presented by the specialist is worth checking. In the three cases, the figure of the presumption is essential, and, because of this, (valid) arguments from authority in Law can be considered arguments that assert a presumption.

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