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# What is Legal Reasoning?

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**Abstract**
Pursuant to the aims and scope of the Special Issue it is part of, this invited contribution seeks to shed new light on the nature and working logic of legal reasoning. It does so by engaging with two of the most authoritative views on the subject which have recently been put forward in the Common law world—namely, Lord Hoffmann's, and Larry Alexander and Emily Sherwin's. A key-concern of the Anglophone debate on legal reasoning is whether it is a specialistic type of reasoning requiring ad hoc education and training, or ordinary reasoning subject to ordinary rules of language (i.e. sentence construction, interpretation, etc.). The article argues that compelling though they are, these sorts of enquiries do not help to understand what legal reasoning really is and how it operates. In particular, it argues that if we are to understand what legal reasoning is and how it works, we ought to examine the propositions it aims to craft and support. In so arguing, the article further shows that exploring law's nature and operations as an intellectual means for social ordering also helps to understand how law works as a regulatory phenomenon more generally.

**Keywords** Legal reasoning · Lord Hoffmann · Larry Alexander and Emily Sherwin · Knowledge · Experience

> *[T]e gallorum, illum bucinarum cantus exsuscitat ... ille tenet et scit ut hostium copiae, tu ut aquae pluviae arceantur*
>
> Cicero, *Pro Murena*, 22

## 1 Introduction

Hardly any jurisprudential appraisal of the relationship between matters of fact (i.e. 'is'), matters of values (i.e. 'ought'), and global semiotics can do without inquiring into the reasoning that law teachers, students, and practitioners

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employ to find legal norms and apply them. For law is product of the intellect,[1] and reasoning is the mind's chief intellectual activity. Whence it follows that if we are to explore and shed new light on the socio-communicative and culturally diverse dynamics characterising present-day legal experiences and modes of ordering, then, inevitably, we ought to unfold, examine, and contextualise the nature and working logic of the intellectual endeavours that underpin, shape, and direct law's regulatory function. This, in turn, requires examining the nature and operations of the type of reasoning that law teachers introduce their students to, law students are required to employ, and practising lawyers' (including judges') intellectual endeavours revolve around—i.e. legal reasoning.

So, what is legal reasoning? Is it a specialistic type of reasoning, requiring special education and long training, or is it ordinary reasoning subject to the ordinary rules of language, including sentence construction and interpretation? The present article engages with this sort of enquiries on the nature and operations of legal reasoning by exploring two of the most authoritative and views on the subject which have recently been put forward in the Common law world—namely, Lord Hoffmann's, and Larry Alexander and Emily Sherwin's. The choice of discussing Common law accounts of legal reasoning is not casual, for the author is a legal comparatist with a Civilian background with extensive, first-hand academic experience in key Common law jurisdictions and mixed-legal systems with noticeable Common law elements (i.e. England, Wales, Australia, South Africa, and Scotland). Accordingly, the following reflections also draw from the author's professional and pedagogical experience with the aim to provide readers with insights of a practical, rather than merely theoretical, tenor. A second, and related, reason for centring the article on the Common law is the recent Solicitors Qualifying Examination (hereinafter, 'SQE') reform, which sets out new entry requirements and assessment methods to qualify as a Solicitor in England and Wales. As we shall see right below, the pivotal changes which the SQE reform has made to the qualifying route in two key Common law countries call for a re-appraisal of how legal reasoning is conceived and operationalised in the Common law world.

Nor, I should also note, is casual the choice of singling out for the purposes of this article the arguments set forth by Lord Hoffman, and Alexander and Sherwin. For not only all three authors are leading authorities globally with extensive and highly impactful academic and professional experience.[2] More importantly, as will be seen in what follows, Lord Hoffmann's and Alexander and Sherwin's views on

[1] Some might contend that law's intellectuality is not a feature of customary law, 'the most rudimentary but also most fundamental form of law' [26: 1]. I explore this theme in [51].

[2] See below, note 58.

In this sense, it is worth noting that Lord Hoffmann has recently been praised by William Twining [59: 297] for being 'the most intellectual judge of his generation'. That this comment is made by such a towering figure in the Common law dimension as Twining is, perhaps, the best explanation one may give as

legal reasoning are, arguably, the most analytically compelling in the Common law dimension at present.

This article starts from the premise that over the past few years, Anglophone lawyers – a term I use loosely to refer to legal scholars and judges alike – have been showing a considerable interest in what legal reasoning is and how it works. To be sure, the debate is not new (hardly anything is in law). In a magisterial study which first appeared in 1990, David R. Kelley reminded us that the very inception and development of Western legal consciousness are characterised by a profound interest for the nature and distinctiveness of legal reasoning (and legal argumentation). Striving for most of its part to become a true science ('*vera philosophia*', or Ciceronian '*civil scientia*',[3] Accursian '*civilis sapientia*'[4]), Western jurisprudence has never stopped concerning itself with this sort of enquiries.[5]

In this sense, at a general level of analysis, current debates on the nature and operational dynamics of legal reasoning in Anglophone countries can be taken as yet another confirmation of the scholarly appeal that these interrogatives continues to generate. However, various socio-political and juridical developments in the Common law world confirm that the ongoing interest in the topic of our concern has less to do with scholarly curiosity than with considerations of a more practical nature. Among such practical considerations, worth mentioning are those stemming from the SQE reform, just mentioned, as well as from current artificial intelligence developments in both legal education and practice. The SQE reform is particularly revealing for the purposes of our appraisal of legal reasoning as it removes the requirement for aspiring solicitors to be law graduates. According to the new qualifying route, candidates are only required to having obtained 'a degree in any subject, or equivalent qualifications or experience'.[6] Presumably, most candidates will still seek, strategically, to graduate in law with the aim of attaining a more solid knowledge of, and familiarity with, the rules, principles, etc. being tested in the qualifying examination. However, the fact that the regulatory authority for solicitors in England and Wales does not deem a specialistic education to be of the essence for the purposes of legal practice goes a long way in showing that, perhaps, there is nothing special about legal reasoning (and argumentation).

One may wonder what Sir Edward Coke would have thought of the SQE reform. Believing that lawyering is a matter of 'artificial reason', Coke separated

Footnote 2 (continued)
to why Lord Hoffmann's views on legal reasoning are worth serious scrutiny. For Twining 'has been at the centre of legal education and legal scholarship in the English-speaking world' [27: xi] for over six decades. Twining's commendation of Lord Hoffmann's intellectual standing leaves to doubt regarding the need to closely examine Lord Hoffmann's take on legal reasoning.

[3] [50: 122]; 'civil doctrine', quoting *De oratore*, 1.42.191.

[4] [26: 113]; 'civil wisdom', quoting the Accursian Gloss.

[5] [26: 53, 113ff, 125, 129, 137–147, 183, 197, 209, 213ff, 234ff, 252, Ch 15].

[6] [79].

the latter from ordinary, non-specialistic reasoning. Not to be confused with the general 'faculty of reason (*natural* reason)',[7] or with the Hobbesian 'natural reason of the sovereign',[8] *artificial* reason is thus called because it is a 'special'[9] form of reason which only 'Common Lawyers',[10] skilful experts learned in the complex art of legal reasoning and argumentation, possess, and know how to correctly employ. I have discussed artificial reason's nature and working logic in a recent work, where I have also outlined the role it plays in providing Common lawyers—specifically, judges—with a self-legitimating narrative of socio-political validation.[11] Here it will suffice to note that if *any* degree or equivalent qualification is considered to be appropriate for the purposes of the qualifying examination, then one may be excused for concluding that either there is nothing *artificial* (i.e. specialistic) in lawyering, or if there ever was at the time of Coke, then, that is no longer the case.

Pursuant to the aims and scope of the Special Issue it is part of, this article aims to shed new light over the nature and operational dynamics of legal reasoning. It does so by arguing that discussing whether lawyers reason any differently from non-lawyers does not help to understand what legal reasoning really is and how it works. Rather, the article argues, if we are to shed valuable light on legal reasoning, we need to investigate the nature and operations of law *qua* a product of the intellect to be used for ordering purposes. For an examination of law's intellectual nature and working logic—what I call 'law's artifactuality'—shows that, as a product of the intellect, law is, ultimately, a matter of *knowledge* (as opposed to experience, *pace* Oliver Wendell Homes, Jr. and others). Now, if law is a matter of knowledge, it follows that understanding what legal reasoning is and how it works requires investigating the type of knowledge which law's artifactuality revolves around, including how such knowledge is produced, shared, altered, and so forth. This, in turn, requires examining the type of *propositions* legal reasoning aims to craft and support—or so this article argues. In supporting this argument, the article further shows that exploring law's nature and operations as an intellectual means for social ordering also helps to understand how law works as a regulatory phenomenon more generally.

The article is structured as follow. The next Section outlines the views on the subject put forward by Lord Hoffman, and Alexander and Sherwin respectively. Section 3 sets out the article's main argument. Concluding remarks follow.

[7] [40: 30]. Emphasis added.
See also [49: 2], where the author speaks of 'simple rationality'.
[8] [40: 47]. See also ibid.: 82.
[9] [40: 30].
[10] [40: 47]. See also ibid.: 9, 32.
[11] [51: Ch 6].

## 2 Two Recent Anglophone Views

### 2.1 Lord Hoffmann

Let us start with Lord Hoffmann's views on legal reasoning. In his essay 'Language and Lawyers', published a few years ago in the *Law Quarterly Review*, Lord Hoffmann set out his views on the nature and working logic of legal reasoning. Addressing the subject of our concern from the perspective of jurilinguistics (i.e. theory of legal interpretation) and 'philosophy of language,'[12] His Lordship made a case for what, with the due caution, may be labelled a 'common sense'[13] approach to, and understanding of, legal reasoning—particularly, judicial reasoning.

Lord Hoffman's analysis starts from the preliminary, two-fold consideration that '[u]sing language to convey meaning is an activity governed by rules',[14] and that.

> The meaning conveyed by any utterance, whether orally or in writing, always requires a consideration of both the rules (semantic and syntactical) of the language and the background against which those words were used. The background may be other parts of the same utterance ("context"), or facts which the speaker expected the audience to know, assumptions which they expected the audience to make, and so on. As every utterance is an event which takes place in real life, it always has a background which may affect the meaning conveyed by the words which the speaker has used. There can be no speech act without some background.[15]

Both considerations are somewhat related to Ludwig Wittgenstein's analytical framing of 'the use of language'[16] as the same as 'playing a game'.[17] For valuable though the analogy is, His Lordship further holds, 'most games require compliance with rules which operate independently of the surrounding circumstances.'[18] Conversely, '[t]he meaning conveyed by the use of language … is often heavily influenced by context and background.'[19] Accordingly,

> a person may, within limits, achieve the object of using language, which is to communicate their meaning, even though that person breaks the rules. They may commit semantic or syntactical errors, use words in a sense not authorised by any dictionary and still convey the meaning intended. The background may sometimes enable the hearer or reader to correct the error and recognise what the speaker (mistakenly) used the words to mean.[20]

[12] [23: 557].
[13] [23: 559, 566, 572].
[14] [23: 553].
[15] [23: 554].
[16] [23: 554].
[17] [23: 555].
[18] [23: 555].
[19] [23: 555].
[20] [23: 555–556].

These two differences between playing a game and speaking a language (i.e. compliance with the given set of rules and relevance of the surrounding background) 'are particularly important for lawyers'.[21] Having set the level of discussion, His Lordship moves on to making His main argument—namely, that 'there are no rules of law which require legal documents to be interpreted differently from other utterances'.[22] In fact, Lord Hoffmann is of the view that both in and outside law, interpretation necessitates the blending of 'world meaning'[23] (i.e. meaning which is ascertained by reference to 'conventional rules')[24]and 'speaker meaning'[25] (i.e. meaning as understood and conveyed by the utterer or writer, even if not compliant with the rules of the language by means of which they are communicated): 'it would be a category mistake to speak of interpretation as an exercise into discovering word meaning [only]'.[26]

To be sure, Lord Hoffmann grants that ordinary and legal interpretation differ in some respects. A first, clear difference 'lies in the assumptions which the law makes about the person to whom the utterance is taken to be addressed'.[27] This assumption is rooted in the not dismissible fact that '[t]he law attempts to achieve a uniform standard of interpretation by assuming that the person to whom the utterance is addressed will be a "reasonable" person, which in practice usually means the judge'. Secondly, and '[p]erhaps more important, the law also prescribes the background of which the reasonable person is assumed to have knowledge. This eliminates the real life situation in which one person has more background … than another'.[28] Finally, contrary to what occurs in the case of ordinary interpretation, the objects of legal interpretation are 'legal documents [which] are intended to create legal rights and duties.'[29] While these are all theoretically significant and practically impactful differences, none impinges on the consideration that 'lawyers [do not] have their own rules for determining the meaning of an utterance which uses words which may be perfectly familiar to any user of English.'[30]

### 2.2 Alexander and Sherwin

As seen, Lord Hoffmann is of the view that the reasoning lawyers embark upon to interpret and ascertain the meaning of words, including legal terms, does not, substantially, differ from everyday (i.e. common) reasoning. Also as mentioned, this view is both theoretically compelling and practically significant. To appreciate the theoretical and practical value of Lord Hoffman's view, one has only to consider the

[21] [23: 555].
[22] [23: 560].
[23] [23: 557].
[24] [23: 557].
[25] [23: 557].
[26] [23: 560].
[27] [23: 559].
[28] [23: 559].
[29] [23: 559].
[30] [23: 553].

reflections His Lordship set forth in the leading contract law case *A-G of Belize v Belize Telecom Ltd*.[31] There, His Lordship remarked that the implication of contractual terms in fact is, fundamentally, an exercise legal interpretation (i.e. construction). More particularly, His Lordship contended that the implication of contractual terms is both an objective and contextual meaning-seeking exercise aimed at interpreting the contract faithfully to determine whether it is possible to imply terms that are substantially part of the contract despite not having been spelled out by the parties. Significantly, His Lordship based His argument both on logical and juristic evaluations. As we read in the judgment, 'The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority.'[32] In so arguing, Lord Hoffmann provided contract lawyers with valuable insights as to how solve the vexed issue regarding how to imply terms in fact—a topic which has been keeping them busy since the establishing of the 'business efficacy test' of implementation in the leading 1889 case *The Moorcock*.[33] Another leading case, *Arnold v Britton*,[34] presented the Supreme Court with the opportunity to return to the theme of legal interpretation and approach favoured by Lord Hoffman. In a key-passage of the judgment, the Court quoted Lord Hoffmann's remarks in *Chartbrook Ltd v Persimmon Homes Ltd*,[35] further stating:

> When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.'[36]

In so noting, the Court established that whenever the wording used by the parties is clear, literal interpretation suffices.[37]

Lord Hoffman's stance concerns the reasoning to be employed when interpreting legal rules and documents (i.e. contracts). Due to the generic remit of His

[31] [63].
[32] [63: 19].
[33] [77].
[34] [64].
[35] [66: 14].
[36] [64: 15].
[37] [64: 17–18]:

> [T]he reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16–26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision …
>
> [W]hen it comes to considering the centrally relevant words to be interpreted, … the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

Lordship's considerations, one may wonder whether lawyers recur to ordinary reasoning (i.e. ordinary rules of language interpretation) in *all* their intellectual endeavours in *all* their nuances and directions. For instance: do lawyers reason any differently when *finding* (i.e. searching, reading, and determining the meaning of) the norms, principles, etc. they might apply? Stated otherwise, are lawyers' law-finding endeavours of a specialistic nature, or also when researching the law lawyers rely on those common-sense, ordinary thought-processes that Lord Hoffmann places at the centre of legal interpretation? To this question Larry Alexander and Emily Sherwin provide an answer in their *Advanced Introduction to Legal Reasoning* (hereinafter, 'AILR'),[38] an insightful work which reproduces, in its entirety, the authors' earlier account of legal reasoning in *Demystifying Legal Reasoning*, published in 2008.

As the authors state right at the outset, AILR is concerned with 'the reasoning required to determine what the law is rather than the reasoning required to apply it'.[39] In a passage that is worth citing in full, Alexander and Sherwin state their main argument thus:

> Our view is that the reasoning used to determine the law is just ordinary reasoning – moral, empirical, and deductive, the view that there are special forms of reasoning unique to judges and lawyers is, in our opinion, simply false. We deny that lawyers and judges reasoning by analogy, or discover legal 'reasons' for decision in the facts and outcomes of particular prior decision. Nor do they interpret a legal text differently from how we interpret any other communication. To the extent judges give legal texts meanings the texts' authors did not intend to convey, the judges are creating a new legal text rather than interpretating an existing one.[40]

To support their argument, Alexander and Sherwin embark upon a detailed appraisal of the 'controverted matters'[41] that make up the current scholarly (and judicial) debate on the subject. These include the '[societal] circumstances that give rise to laws',[42] 'the methodology of interpreting canonical legal texts',[43] and 'the application and development of the common law' (i.e. judicial reasoning both in its adjudicating and law-making guises).[44]

Due to the length and depth of Alexander and Sherwin's analysis, it is simply impossible to reproduce their account of legal reasoning in its entirety in the short space of a journal article—nor is that my aim. Rather, I intend to focus on those aspects of Alexander and Sherwin's views that call for a close scrutiny in light of this article's aims and argument. Thus, discussing the nature and operational dynamics of the common law, Alexander and Sherwin argue that there are tow and only

[38] [1].
[39] [1: 1].
[40] [1: 1–2].
[41] [1: 1].
[42] [1: 2].
[43] [1: 2].
[44] [1: 3].

two plausible models of legal reasoning, the natural model and the rule model'. In particular,

> All judicial reasoning follows one or the other of these models or some combination of the two. Judges following the natural model … engage in ordinary moral and empirical reasoning' judges following the rule model reason deductively from authoritative rules. *Neither of these forms of reasoning is special to law: both are employed in all areas of human deliberation.*[45]

The discussion of these two models takes up a whole chapter of AILR, i.e. chapter 5. What is worth pointing out is that while the authors declare to be of the view that these two models may overlap, in fact their opinion seems more to be that the rule model takes precedence over its natural counterpart. For as they themselves write: 'if no court has announced a rule that covers the current case, the current court must engage in moral and empirical reasoning to settle on an outcome and possibly announce a rule for future cases'.[46] If that is indeed what a court must do, then the question arises as to what determines the 'the precedental value of a prior case or group of cases'.[47] According to Alexander and Sherwin, this value is determined inferentially only, for it 'depends on factual similarity or dissimilarity between past and present cases, on "reasons" found in precedent cases, or on "legal principles" thought to emerge from a set of prior decisions'.[48]

There are two prominent themes which emerge from Alexander and Sherwin's skilful analysis of judicial reasoning. The first one is that, as they see it, legal interpretation 'is nothing that requires a legal education to master'.[49] In fact, they argue in a manner than resembles Lord Hoffmann's, legal interpretation 'is commonsensical'.[50] The reason for this is that, as it occurs in everyday day life, legal interpreters are receivers of acts of communication whose meaning is – and cannot but be – that which is determined by the speaker: '[a]s in life', Alexander and Sherwin contend, 'is a search for speaker's meaning'.[51] The role, if any, of the 'utterance meaning'[52] – i.e. 'the dictionary-plus-grammar meaning of the symbols that constitute the [sentence's] formulation'[53] is 'wholly derivative of speaker's meaning'.[54]

The second important theme emerging from Alexander and Sherwin's account is that the common law is not an expression of analogical reasoning as is usually (pro) claimed. Alexander and Sherwin are clear about this: 'courts cannot, logically, be doing what they claim to be doing when they find analogies in, or extract reasons

[45] [1: 111]. Emphasis added.
[46] [1: 93].
[47] [1: 111].
[48] [1: 111].
[49] [1: 20].
[50] [1: 20].
[51] [1: 23].
[52] [1: 23, 27].
[53] [1: 27].
[54] [1: 23].

or legal principles from, prior cases'.[55] This is because, they continue in a sort of Humean fashion, '[d]rawing analogies is not, in itself, a method of reason; precedent "reasons" do not determine current decisions; and legal principles turn out to be illusory'.[56] Despite what might be first thought, with these words, Alexander and Sherwin are not suggesting (let alone, arguing) that analogical reasoning does not play a role in judicial adjudication. Rather, they are affirming that it plays a *different* role than the one that is usually portraited by orthodox accounts of the common law. Specifically,

> Analogical decision-making based on factual similarity between cases is either intuitive or deductive. If the process of identifying important similarities is intuitive, then precedent cases do not constrain the outcomes of current cases in any predictable, or even detectable, way. If the process is deductive, then the rules or principles the judge applies to determine similarity, rather than the outcomes of precedent cases, determine the results of later cases.[57]

Either way, the significance and working logic of analogical decision-making (more philosophically, we could say 'thought-processes') informing judicial reasoning is substantially curtailed.

## 3 Law as a Product of the Intellect

This article's main claim is that compelling though it is, the 'specialistic *vs* ordinary reasoning' debate fails to show what legal reasoning is and how it operates. To be sure, the debate is worth engaging with for its internal theoretical-analytical coherence and, whenever judges take part in it, real-life impact.[58] However, it does not enable one to properly uncover and contextualise the epistemic-ontological connotations of the type of reasoning that law teachers introduce their students to, law students are required to employ, and practising lawyers' (including judges') intellectual endeavours revolve around.

Aiming to overcome the debate's shortcoming, this article focuses on the nature and working logic of law as a product of the intellect. While philosophers are well acquainted with the relationship between the intellect as a faculty and law as a regulatory phenomenon,[59] lawyers are yet to fully appreciate its relevance and intricacies. This is particularly true of Anglophone lawyers, as the above accounts indicate. Intending to fill this scholarly gap, this article argues that if we are to understand what legal reasoning is and how it operates, we need to investigate the nature and

[55] [1: 112].

[56] [1: 112]. See also ibid.: 129.

[57] [1: 129].

[58] By way of an example, consider that after the judgment of *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 (HL) [68], on the implication of terms in fact, the insurance company Equitable Life Assurance Society collapsed.

[59] See e.g. *Nicomachean Ethics*, 1180$^{a}$21-22; *Politics*, 1287$^{a}$31. Earlier examples could also be given.

operations of law *qua* a product of the intellect to be used for ordering purposes. For an examination of law's intellectual nature and working logic—what I call 'law's artifactuality'—shows that, as a product of the intellect, law is, ultimately, a matter *knowledge* (as opposed to experience, *pace* Oliver Wendell Homes, Jr. and others). Now, as already mentioned, if law is a matter of knowledge, it follows that understanding what legal reasoning is and how it works requires investigating the type of knowledge which law's artifactuality revolves around, including how such knowledge is produced, shared, altered, and so forth. This, in turn, requires examining the type of *propositions* legal reasoning aims to craft and support. In supporting this argument, the article further shows that exploring law's nature and operations as an intellectual means for social ordering also helps to understand how law works as a regulatory phenomenon more generally.

Let us start by considering that the primary purpose of a lawyer's intellectual endeavours is to elaborate and support a legal proposition through which the chaoticness of life can be filtered and ordered – i.e. made sense of – legally. As an example, consider a lawyer who meets with a prospective client regarding a case concerning a potential breach of contract. In this case, our lawyer might seek to craft and support the legal proposition that the prospective client did not breach the contract they had concluded. Now, such legal proposition is and conveys *information*, i.e. the information that the contract has not been breached. Crucially, in conveying the information that the contract has not been breached, our lawyer's legal proposition is creating and sharing (new) knowledge that the contract has not been breached.

To appreciate that in producing information, our lawyer has produced knowledge we ought to remember that our intellect *actively* makes sense of whatever we encounter in life by abstracting ontologically what we feel, perceive, and 'are directly aware of',[60] and turning it into intelligible information. This is why, as observed by David Owens, 'the making sense relation is the basic normative relation'.[61] What renders the making-sense relation the basic (i.e. primary) normative relation is, I suggest, the fact that, intellectually, we make our way through whatever we encounter in life by assigning intelligible meaning to it and ordering it accordingly. The end-result of the intellect's normative (i.e. meaning-seeking) operations is knowledge—i.e. a metaphysical, sharable, and truth-indipendent end-result of intellectual processes of ontological abstraction that transcend experience's facticity and finiteness.[62]

The two considerations that legal propositions convey information, and that knowledge is information already suggest that as an intellectual activity, lawyering revolves entirely around knowledge. This insight is corroborated by one additional, though not less important, consideration—namely, that to craft and support a legal proposition one has to know – i.e. possess the information concerning – the situation which the legal proposition refers to. Thus, to argue her case satisfactorily, our contract lawyer would have to know – i.e. be informed about – whether the contract has been breached or not. In turn, this requires knowing whether the parties made a

[60] [22: unpaged].
[61] [37: 12].
[62] See further [51].

contract in the first place (for, naturally, a contract cannot be breached if it does not exist). And to establish whether there is in fact a contract between the parties, our lawyer would first need to know – i.e. be informed about – what the requirements for making a legally valid contract are and whether they are met. What this rather straightforward contract law example suggests is that as a product of the intellect, law is a matter of knowledge—that is, information. To be sure, experience plays an important role in all human endeavours; the teaching, study, and practise of law are no exception. Accordingly, when meeting with her prospective client, our lawyer would, inevitably, also have to rely on her personal and professional experience to ask questions, understand what happened, decide whether to take the case on, provide advice, elaborate an argumentative strategy, and so forth. However, experience would soon have to leave the scene to knowledge for, as just seen, our lawyer's intellectual efforts are, ultimately, aimed at crafting and supporting a legal proposition that is and conveys information—that is, knowledge.

Now, as one might expect, forming and supporting legal propositions also requires the interpretation of legal norms. I say 'also' because legal reasoning is neither theoretically reducible to, nor could factually amount to, or coincide with, the sole interpretation of legal norms. For law would never be able to dispose of and regulate life if it did not also relate itself to facts (a term I use loosely to refer to 'world', 'life', 'events', and 'reality' to not overcomplicate the discussion). This explains why legal reasoning cannot be one-dimensional or self-contained. To the contrary, legal reasoning has no alternative but to move dialectically between the plane of law (i.e. norms) and facts.

As regards the plane of norms, it is worth stressing that insofar as law is an intellectual artifact to be used for ordering purposes,[63] then two considerations follow: first, to be able to form and support a legal proposition, the legal expert ought to know *what* a norm states and prescribes; secondly, to be able to know what a norm states and prescribes, the legal expert ought to know *how* to extract and apply (i.e. say[64]) the rule(s) it contains to the given scenario the law purports to regulate.[65] Now, *qua* an intellectual artifact, law is a technique—specifically, a technique to be employed for ordering purposes. More specifically, the blending of 'what' and 'how' issues that characterises the intellectual endeavours which a lawyer embarks upon to frame and support a legal proposition signifies that as an intellectual artifact, law is both a technical *and* an epistemological entity, for it is a doing (*tékhnē*, *phrónēsis*)

[63] As Katharina Pistor [39: 17] put it, '[l]aw is a powerful social ordering *technology*'. Emphasis added. Worth recalling for what follows is also Hans Kelsen's [24] notion of law as a 'social *technique*'. Emphasis added.

[64] I refer to the '*ius-dicere*' and '*iuris-dictio*' themes: see [51]. As Lord Sumption [54: ix]: put it, '[a] lawyer's job is to say what the law is'.

[65] The history of Western jurisprudence is full of examples that may be cited to support this argument. See e.g. *Dig*., 50.17.1, to be read in conjunction with *Dig*., 1.2.2.13, already cited in the Introduction. In secondary literature, see Grossi [21: 147], commenting on Baldus de Ubaldis' views on the subject; and Cavallar and Kirshner [10: 152], who use the term '*scientia*' when referring to twelfth century's understanding of 'operational [legal] knowledge, or know-*how*' (emphasis added). Cf. [62: 114; 28: 121–122].

that involves cognition (*epistḗmē*, *sophía*).[66] Stated otherwise, in law, theoretical and practical truth, or epistemic and practical rationality, are intertwined, and mutually reinforce one another.[67] From these considerations, it follows that law simultaneously operates between the plane of the ontic (i.e. the law's sources, being them a statute, judgments, or other *vestimenta*) and that of the ontological (i.e. the nature, or 'whatness', of the law's content as phenomenologically ascertained by the appropriate extrapolation and elaboration of its meaning, or 'howness').

Regarding the plane of facts, it is instead worth stressing that for the jurist's '*sententiae et opiniones*'[68] to identify legal rules and apply them to a case, the latter too has to be studied (i.e. interpreted).[69] Put differently, for legal norms to regulate human existence and social interaction, legal reasoning ought to act as an ontological medium between law and life. Consequently, a fundamental component of the activity of *ius-dicere* as asking and answering a question of law (*quaestio iuris*) regarding the matter(s) being disputed (*res de qua agitur*, or *causa ambigendi*),[70] is the asking and answering of questions of facts (*quaestiones de facto*)[71] through analytical techniques of world-construction.[72] To be more precise, in law, a real or hypothetical[73] event has to be fictionally qualified (i.e. it has to be given legal *meaning*) in light of the given scenarios (*facti species*)[74] which are contemplated (i.e. foreseen and knowable in advance) by the legal norm(s) the interpreter is concerned with.[75] This analytical, meaning-seeking enterprise requires that the facts in question are made fit

[66] That propositions have an epistemic and technical nature has been argued, I think successfully, by Soames [52: 21]. As he sees them, propositions 'are *doings* in which things are *cognized* as being one way or another'. Second emphasis added.

Soames' work reveals that the encounter between technique and cognition is not a prerogative of the legal. In fact, it first occurred in philosophical thinking, especially that of Plato, whose influence over the inception and development of modern jurisprudence I have examined in [51].

[67] Lawyers are familiar with the fact that, in law, epistemic and practical rationality are interrelated: see e.g. [48: 14]. However, drawing a parallel with Aristotle's thought might help to better appreciate why that is so. For just as in Aristotle, despite their differences, the scientific (*tò epistêmonikón*, to which *epistḗmē* is related) and calculating (*tò logistikón*, to which *phrónēsis*, practical wisdom or prudence, is related) parts of the soul are interrelated (*Nicomachean Ethics*, $1139^{a}3$-15, $1139^{b}12$-15), so too lawyers' intellectual undertakings are better understood as an Agambenian threshold of indetermination where the scientific and calculating elements of cognition, reasoning, and argumentation coincide and mutually inform each other.

[68] *Institutes*, I.7; *Institutes Iustinian*, I.2.8 ('opinions and advice': [20: 23]).

[69] Cf. *De oratore*, 2.24.99ff. In secondary literature, see [26: 65].

[70] *De oratore*, 2.24.104.

[71] Cf. [49: Ch 2; 15; 45: 173–215; 46: 143–167, 192, 279; 16: 96, 104]. In philosophy, see *Tractatus Logico-Philosophicus*, 2.1ff.

[72] Similar remarks can be made about non-contentious juristic activities, such as the drafting of contracts, as these are carried out with the aim of avoiding litigation and putting the party in the best position possible should a controversy arise. As James Donovan [12: unpaged] put it, 'You do not get to avoid conflict by becoming a corporate lawyer'.

[73] *Ad pluribus* in case law, see [69, 70, 78].

[74] See e.g. [5: 157f, 495f; 47: 97f, 175; 47: 103; 18: 178].

[75] Thus, Mark Van Hoecke [61: 171] observes, 'lawyers are only interested in the facts that are relevant to the law'. See also [19: 9]: 'Lawyers look at the complex and moving realities of social life, which it is their duty to reduce to order, and upon varying interests involved, from a very special angle, and submit these realities to artificial processes which transform, and sometime deform, their effective nature'.

– i.e. subsumed under – one or more regulatory framework(s) of legal intelligibility through which law's epistemic-ontological categories of thought and language are articulated and operate.[76] It is through this intellectual labour that a legal proposition is formed, supported, given effect to, and thus, that experience is replaced with knowledge: '*ista scientia … quae tota ex rebus fictis commenticiisque constaret*', as Cicero put it.[77] This explains why, to return to our contract law example, a number of pre-established criteria have to be satisfied for an agreement to be recognised at law as a contract and, eventually, be enforced.[78] Kelsen made this clear right from the start of his *Reine Rechtslehre*: '[A legal] norm confers legal meaning to [an] act so that it may be interpreted *according to* [*it*]. The [legal] norm functions as a scheme of interpretation'.[79] Law normatively interprets (i.e. *assigns intelligible meaning* to) life through a binary (i.e. propositional)[80] epistemic-ontological (de)coding which revolves around such rational-conceptual categories of identity and difference as 'legal *vs* illegal', 'justified *vs* justified', 'reasonable *vs* unreasonable', 'fair *vs* unfair', and so forth.[81] For law to run *through* life effectively, however, it cannot confine itself within the theoretical plane; it must, instead, concretise[82] its regulatory reach by turning itself into a practice. Not incidentally, commenting on this normative process in her capacity as both a scholar and a judge, Jeanne Gaakeer affirms that 'theory and practice are the warp and woof of law's fabric and social order or the *ordo*

[76] Drawing from Markus Gabriel [17: 131], we could speak of law's own epistemic-ontological 'frame of reference[, which] reduces [factual] complexity by establishing [analytical] distinctions that divide up the world into what is and is not available within some particular context.' What makes Markus' conception worth mentioning for our discussion is its reference to the frame of reference's own epistemic-ontological working logic, which 'dictates the selection of elements that compose it as well as their possibilities of recombination'.

[77] *Pro Murena*, 28 ('this discipline, which only consists of fictions and fabrications'). Also cited by Moatti [33: 197].

Cf. Radin [42: 583], who reckoned that the maxim '*ex facto ius oritur*' should be rendered '*per factum* [*cognoscitur ius*]', i.e. 'by means of a fact, we recognize (or we know) the law'; and Pugliatti [41: 142]. See also Samuel [46: 192], noting that '[w]hat lawyers do … is to construct their own view of social reality in a way that makes this "reality" conform or not conform to a "reality" envisaged in a legal text or case'.

On this theme, the indispensable reading remains Thomas [56]. See also [58], and [57: 1342]:

> *Si on ne comprend pas que l'histoire du droit participe d'une histoire des techniques et des moyens par lesquels s'est produite la mise en forme abstraite de nos sociétés, on manque pratiquement tout de la singularité de cette histoire et tout de la spécificité de son objet.*

In English:

> If we were not to comprehend that the history of law participates in a history of techniques and means by which the abstract moulding of society takes places, we would then fail to understand both the peculiarity of that history, and the specificity of its object.

[78] In English case law, cf. Lord Wilberforce's remark in [72: 167], or more generally, [76, 65].

For more complex examples of legal reasoning's ontological disposition of life, consider the collateral warranties and implication of contractual terms regimes: [67, 73, 74, 63, 75, 71].

[79] [25: 4]. Emphasis added.

More generally, see [40: 326].

[80] [7: 7].

[81] *Dig*., 1.1.1.1, 1.1.10; *De legibus*, 2.13. In secondary literature, see again [25: 4].

[82] I draw from Kelsen [25: 237], who speaks of law's 'individualization and concretization'.

*ordinans*'.[83] As already noted, it is the blending of these two components – i.e. the theoretical and the practical, the cognitive and technical, the notional and the performative, 'the general (abstract) [and] the individual (concrete)',[84] the ethereal and the situational[85] – that renders law's boundaries (or limits)[86] a matter of language[87] (i.e. communication and interpretation)[88] and therefore, of both (legal) epistemology[89] and ontology.[90]

Finally, if we were to borrow from the field of semantics to further explain how legal reasoning dialectically operates between the plane of norms and that of facts to regulate life by creating and conveying legal meaning, we could refer to Paul Elbourne's compelling study of meaning. More specifically, drawing from Elbourne, we could place legal reasoning at the threshold of 'internalist' and 'referential' theories of meaning. As Elbourne explains, 'advocates of the internalist theory of meaning … suggest that word meanings are most fruitfully thought of as ideas or concepts in our heads'.[91] Thus,

> The internalist theory of meaning maintains that the meanings of sentences are internal mental structures, just as the meanings of the words are. The difference is that these mental structures [are] more complex of word meanings. Indeed they must presumably be at least partly composed out of word meanings.[92]

On the other hand,

> The referential theory of meaning proposes the most direct mechanism: meanings of words simply are things in the world. So the world Iceland, for example, has as its meaning that very island, a huge chunk of rock and ice in the northern Atlantic Ocean.[93]

[83] [16: 98].

[84] [25: 237].

[85] Or, in Aristotelian terms, the scientific (*tò epistêmonikón*, to which *epistḗmē* is related) and the calculating (*tò logistikón* to which *phrónēsis*, practical wisdom or prudence, is related). See also above, note 67.

[86] Cf. [26: 8; 28: 3–4, 39–43, 95, 174, Ch 6; 29: 10–11, 26, 29, 36; 34].

[87] As Benveniste [4: 398] observed in his semantic analysis of '*ius*': 'What is constitute of "law" is not doing it, but always *pronouncing* it'. Emphasis in original.

See further ibid.: 391–404, 412; and [9: 67–82]: The '*iu-dex*', as *Díkē* did in Ancient Greek culture, shows ('in-*dicates*') justice (*Thḗmis*). Cf. *De legibus*, 3.2.

[88] See [6; 14; 24: 3, Ch 8; 33; 34; 35: 109ff; 36: Ch 3; 43: 151–171; 8; 60: 7–11; 55: Pt 2; 49: 18; 53; 44: 75–77; 40: 325–326]. Cf. [61: 98, 109–110, Ch 26; 30: Chs 2–3; 32: 164–166].

Mariano Croce's [11: 3] image of law's 'semiotic circuit' is particularly useful to explain this, although I disagree with him that 'the legal technique of description [i.e. 'the intellectual vehicle for the production of legal truth'] does not intend to alter the meaning of something that has really happened; let alone to distort or deform facts'.

[89] [45].

[90] [26: 8; 42; 28: 8, Ch 4; 29: 7]. Cf. [31].

[91] [13: 15]. Emphasis omitted.

[92] [13: 43].

[93] [13: 14]. Emphasis omitted.

On this view, 'the meanings of many words [are] objects in the world—particular people, chairs, properties, and so on'.[94] Now, as a product of the intellect aimed at regulating societal interaction, law, I suggest, places itself in-between these two categorisations of the intellect's meaning-seeking (i.e. normative, as described above) endeavours. The notion of 'contract', for instance, is internal to law—that is to say, it is law itself that defines what amounts to the legally binding and enforceable agreement that a contract is. However, as the quote of Cicero that opens this article indicates, law would not be able to order and dispose of life if it did not also rely on notions which lie outside its analytical (i.e. discipline-specific) remit. Thus, and to state the obvious, as the rainwater in Cicero's remark is neither law nor law's product, so the notion of 'chair', to continue with Elbourne's example, belongs to an ontological and semantic plane which does not – nor could – pertain to law as an intellectual discipline and professional practice.[95] As explained above, legal reasoning dialectically moves between and combines the internalist and referential planes to craft and support legal propositions so that legal knowledge *qua* information can be attained, shared, retrieved, processed, and altered.

## 4 Conclusion

If we are to understand what law is and how it operates as a regulatory phenomenon, we ought to address its artifactual nature and working logic. This simply means that we need to explore law's nature and operations as an intellectual means for social ordering. For law is, ultimately, a product of the intellect. As legal reasoning is the main intellectual activity the mind embarks upon in the field of law, scholars' and judges' interest in its nature and operations is anything but surprising. However, debating whether legal reasoning is a specialistic or ordinary type of reasoning is both fruitless and misleading. As seen, this is particularly the case in a legal tradition, the Common law, that no longer requires the awarding of a law degree – and thus, the attainment of a specialistic education – to qualify as a practising lawyer.

To gain a more theoretically accurate and practically relevant understanding of what legal reasoning is and how it works, it is necessary to ask what its purpose is. As shown in this article, legal reasoning's purpose is to craft and support legal propositions. The latter are epistemic-ontological constructs that operate normatively by conveying (legal) information about the world and disposing of it for regulatory purposes. In conveying information, legal reasoning assigns (legal) meaning to the world and creates (legal) knowledge. Once we understand what knowledge is – specifically, once we realise that knowledge is a metaphysical, sharable, and truth-indipendent end-result of intellectual processes of ontological abstraction that transcend experience's facticity and finiteness – we can understand what legal reasoning is and how it operates.

[94] [13: 43–44].

[95] A reference could, with the due caution, also be made to both Gaius' and Baldus' treatment of corporeal/material and incorporeal/immaterial things in matters of law: see *Institutes*, I.8; II.12–14, 28. (see also *Dig.*, 1.8.1.1., and 41.1.43.1); [2: 152vb, n. 3 ad X 2.1.3], also quoted by Padovani [38: 54].

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Historical sources—i.e. Aristotle's and Cicero's works, the *Digest*, etc.—are all referenced in the footnotes

whenever they are cited. However, being works of universal literature and being mostly translations of my own, they are not included in reference list. If a particular edition and/or translation is used, then it is also reported in the reference list.