

PRASSI ARGOMENTATIVA DEL GIUDICE DI LEGITTIMITA'. UN'ANALISI SULL'USO DELL'ARGOMENTAZIONE IN FUNZIONE GIUSTIFICATIVA O CREATIVA

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Abstract. In the contemporary legal-political context, the scholars' attention, philosophers and theorists of law, is moving more and more toward an interpretative and argumentative dimension of law. An example of these transformations comes from the increasing role that the so-called "living law" has assumed for the hermeneutics starting from the 1960s and the 1970s of the last century. We also should keep in account the role played by the Constitutions in the legal and political context of the second 1900s. Constitution, in fact, as the supreme normative source in the national legal system, makes "unavailable" human rights through its fundamental principles. By one side, it means that legislator cannot violate or no-apply these principles; by another side, it means that judges make a strong work of interpretative integration – the so-called "hermeneutics of principles" – for adapting them to the practical cases that they have to decide.

The most relevant consequence of these dynamics is a new understanding of the relationship between law and moral. Despite of the jus-positivist conception inspired to a strong separation between law and moral, the hermeneutics try to connect the two categories, pointing out the judge's role in balancing moral principles and in solving hard cases (Dworkin). So doing judge does not solve conflicts simply applying

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the pre-determined law but he has to include the decision in an interpretative frame co-determined both by normative texts and moral-social context. It means that judge has to justify the legal reasoning that has oriented him to the final decision.

Scholars as Perelman, Toulmin, Alexy, Peczenik, MacCormick, Aarnio and Atienza have pointed out the most relevant modern theories of argumentation keeping also in account the legal reasoning. Some of them (such as Alexy) have developed the theory of legal reasoning proposing a comparison with the rational reasoning whose frame is the original tension between law and moral. It is in this context given from the interaction, conflict and, tension between law and moral that the theory of argumentation recovers its practical origins. So doing the theory of argumentation makes itself free from the classical dichotomy of jus-naturalism and jus-positivism and it finds its humus in the neo-constitutionalist praxis where the old conflict between law and moral becomes a never ending tension where no one can prevail on the other one. With the aim of analyzing these theoretical premises in a practical perspective I will also consider some jurisprudential decisions coming from the Italian Court of Cassation that have solved two hard cases.