II – Arguing about values

Practical Rationality at Work – A New Argumentation Model

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Introduction

Conceptual ideals typically provide unobtainable standards from which to measure and evaluate the real. In philosophy, ideals are often conceptualized and articulated not with the intent of literally dictating practice, but with the hope of providing norms from which reflective evaluation might lead to improved practice. Such is the case with any ideal model of reasoning or argumentation. No philosophy working with ideal reasoning or argumentation expects real reasoners or arguers to follow the ideal model perfectly or always. Rather, many of the models of reasoning and argumentation put forward thus far serve as standards against which poor or fallacious practices become apparent. Thus, the 'philosophical punch' of an ideal model is two-fold: the model itself is an articulation of the way things ought to be, and if correct, the way things ought to be informs, motivates, and justifies articulations of failures in practice.

In what follows we provide our first articulation of a new ideal model of integrated practical reasoning and argumentation. It is ideal in two senses. First, its method is prescriptive, although it may never be executed perfectly in practice. Second, as an ideal standard, applying it to an instance of real life reasoning or argumentation will provide evaluative insights (see Baumtrog 2015). However, although an ideal model, we have tried to keep its ideal and prescriptive aspects relevant, pertinent, and realistically representative of intuitions regarding what we actually do when we practically reason and argue.

As alluded to above, we are not the first to put forward an ideal model for practical reasoning or argumentation. Philosophers have long

focused on practical reasoning, with recent models/schemata coming from Broome (2002) and Audi (2006), to name but a few. Argumentation scholars such as Walton (1990, 2007, 2013a, b), van Eemeren, Grootendorst, & Snoeck Henkemans (2002 pp.101–102),[1] and Fairclough & Fairclough (2012) have provided recent models of practical argumentation. As such, if we are to be responsible academics, we must then justify the need for our current contribution; we must answer the question 'What is on offer here that cannot be found elsewhere?'

The answer will become clearer below, but here we would like to offer one brief answer explained through three supporting points. The main answer is that the new model is an *integrated* model of practical reasoning and argumentation. Philosopher's working on practical reasoning and ethics have thus far paid little attention to argumentation theory. Similarly, argumentation scholars have paid little attention to the work of those in practical reasoning and ethical decision-making. In short, there is a gap between the two areas. This could be in part due to the explanation Walton (2007: 212) gives that there is a contrast between his 'commitment' model and the 'Belief, Desire, Intention' (BDI) models. As integrative, then, we consider our model a novel contribution.

The three supporting points indicate the main ways the model is integrated. The first is that it can be used by both commitment and BDI proponents. For those viewing the model with a mind to argumentation, we invite the reader to feel welcome to think in terms of commitments interlocutors have and can be held accountable for. Viewing the model as an instance of reasoning, we invite the reader to view the model in terms of attitudes that connect to reasons in an inferential process. In both cases, however, we side with the view that practical reasoning and argumentation conclude in an intention to act rather than, as many in argumentation have it, a *belief* that one should act. For argumentation, this means maintaining a discursive commitment that one intends to perform some act.

The second way the model is integrative is that we reconceptualise and reposition what have come to be known as 'argumentation schemes' as producing *pro tanto* reasons. In this way, we use one concept from argumentation – argumentation schemes with critical questions – while

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1   They refer to their scheme as 'pragmatic argumentation' rather than 'practical'.

using them as providing support for reasons used on a BDI conception of the role of reasons. The importance of this move will be made clearer below.

The third point of integration is that we attempt to integrate explicit moral considerations into the production and evaluation of practical reasoning and argumentation. While moral components have been a focal point for philosophers of practical reasoning, many in argumentation have stayed away from including them on the basis that procedural accounts of argumentation ought to remain silent on content. As will be shown below, our account takes moral considerations into account, without, however, dictating or advocating for an authoritative moral theory or threshold.

Without further ado then, the next section will introduce our starting points: what we take as background and assumptions from which to proceed. Section 3 provides an overview of the model, looking at its functioning on a macro scale. Section 4 zooms in on each of the model's component parts, detailing and justifying the selection of the schemes so as to provide a picture of the scaffolding of practical reasoning. In section 5 we provide a summary and some concluding remarks.

1. Background and Assumptions

1.1 Background

We take up Broome's characterization of reasoning as 'a process whereby some of your attitudes cause you to have a new attitude' (Broome 2013: 221) and agree that for practical reasoning the new attitude is an intention. Accordingly, in designing this model we have conceived of practical reasoning as an activity of the human mind aiming at forming an intention to complete the actions required for some alteration in the state of the world.

Theoretically, we separate reasoning and argumentation – though recognize the two are intertwined in practice. We consider argumentation to turn on the notion of conflict, and thus conceive of it as a dialectical

situation, which can be individual, dialogical, or polylogical. It is the practice, through which human agents support or criticise a given line of reasoning, or a step of that reasoning (Baumtrog 2017). Reasoning and argumentation are differentiated by the nature of the activity that each one carries out. Reasoning is a mental and usually individual process leading to a conclusion. It is an activity of the mind through which an individual, starting from certain mental states and following a rational process according to rules, leads his mind into a new mental state that concludes the process (Broome: 2004). Argumentation begins when one or more parts of the process of reasoning come into conflict – it is the contestation of reasoning or its conclusion.

In terms of practical argumentation, if the argumentation from an opponent is successful, the proponent can interiorize that recommendation and make it his own intention. Only when someone reasons or argues by himself, does the argumentation immediately result in an intention to perform the action (or not).[2] Practical reasoning and argumentation have the following purpose in common: to produce and serve as rational support for an intention to realize an action and/or a sequence of actions consisting of the means chosen to achieve that action.

1.2 Assumptions

In order to philosophically frame the model, it is first necessary to explain the main assumptions from which we start.

A) Practical reasoning and argumentation:

(A1) *Objectives are intentions*. Objectives are nothing other than intentions linguistically expressed and sufficiently stable to serve as the base for practical reasoning and practical argumentation. Since objectives can be more general or more specific, so too can intentions. In some cases, it is helpful to distinguish more precisely between an objective and an aim. Whereas an objective can be achieved through a traceable

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2   Thanks to Dima Mohammed for this suggestion.

causal sequence, an aim is a broader objective such as 'being a good person', which may not be as easily traceable. Since both are intentions we consider them both objectives. However, for clarity, we try to use the word 'aim' where it applies and is helpful to clarify.[3] In what follows, and for formal simplicity, we shall use 'G' (or variants) to refer to the common content of the intention or the objective.

(A2) *Complex objectives give rise to plans*. When a certain objective assumed by x is sufficiently complex and for that reason *involves a progressive execution over time*, it gives rise to a *plan*. Plans, among other things, influence our actions beyond the present (Bratman, 1987). In what follows, we shall use 'M' (or variants) to refer to the content of any means or sequence of means, whether they belong to a plan over time or to simpler practical reasoning.

(A3) *The relation between Objective and Mean is contextual*. The first objective of a plan can be a means for another, more inclusive, plan. It should also be noted that, for example, x can have as an objective 'to be in a place of power' and use the sub-plan 'to be Prime-Minister' as a means (and that other means/sub-plans would eventually also be needed). Hence, it becomes apparent that being a means and an objective (end) often depends on context and can be conceived of differently depending on the level of zoom with which the reasoning or argumentation is viewed.

B) Human Agents

(B1) *The relation 'is a reason for' is considered primitive and pro tanto*. To justify their objectives and the means they choose for realizing them, human agents reason and argue in *terms of reasons*. At this point we will not go beyond the intuitive notion of 'a reason' that Thomas Scanlon articulates: 'a consideration that counts in favour' (Scanlon, 1998, p. 17). For example, that 'x is thirsty' is a reason (a consideration that counts in favour) for x to (intend to) drink water. Along with Dancy (2004) we recognize that reasons may count in favour of and/or against

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3   Many thanks to David Hitchcock for bringing the difference between goals and aims to our attention. We acknowledge that further work is needed regarding how this might impact our view of practical reasoning and argumentation overall.

the assumption of an objective and we are therefore talking about *contributing* reasons or reasons *pro tanto*.[4] In what follows, if we wish to distinguish between reasons, we will number them as R1, R2, and so on. To qualify reasons, we will write R+ or R-, depending on whether these contribute in a positive or negative way, respectively, for the assumption of an objective, G (or for the adoption of a mean, M). Taking this notation a little further, we will accept that $(R\pm1, \ldots, R\pm n)G^*$ represents the set of reasons, positive or negative, associated to the assumption of an objective G^* where the asterisk identifies that the goal has yet to be assumed and that $(R\pm1, \ldots, R\pm n)M^*$ represents the set of reasons, positive or negative, associated to the adoption of a mean or set of means which have yet to be assumed. Accordingly, and in short, G^* is used to stand for 'proposed goal' and M^* is used to stand for 'proposed means.'

(B2) *Situation, Circumstance, and Context.* We can describe practical reasoning and argumentation in relation to the baseline situation, S', and to a situation of arrival, S*, also called a future state of affairs (Hitchcock, 2011; Fairclough and Fairclough, 2012): x is in situation S', S' has some aspect that leaves x unsatisfied, let us call that aspect 'the absence of G^*', and x assumes G^* as an objective, whose realization will turn S' into S*. x thinks that to realize G^*, he should mobilize the means M^*. The beliefs and evaluations the agent(s) hold about a given situation determine what is relevant for a given occurrence of practical reasoning or argumentation. Accordingly, we call the context of practical reasoning and argumentation the set of relevant circumstances.

(B3) *Plausible Justifications and Defeasible Rules*. Given that incompatibilities exist between objectives, means for objectives, and the means for one objective impacting a different objective, etc., combined with the ever evolving (perceived) knowledge of the agent, it follows that the rules the agents can use to infer a certain conclusion from certain premises are rules of plausible inference and, therefore, remain defeasible and sensitive to context.[5] Although they are never deductive or inductive (or statistical) inferences (even if these enter as components

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4   The literature on reasons is vast and very complex. Some of our favourite texts are (in alphabetical order) Broome (2001, 2004), Dancy (2004), and Scanlon (1998).
5   As convincingly argued by Walton, Reed, & Macagno (2008). Along the same lines, though more moral, see Dancy (2004: 111–117, 184–187).

of plausible inferences), plausible justifications and defeasible rules should not be seen as a defect or limitation, but rather the condition of the exercise of practical reasoning and argumentation.

With this background and these assumptions in mind, we now move to our view of practical reasoning and argumentation illustrated through a flowchart and accompanying explanation.

Overview of the New Model

Figure 1: Integrated Model for Practical Reasoning and Argumentation.[6]\

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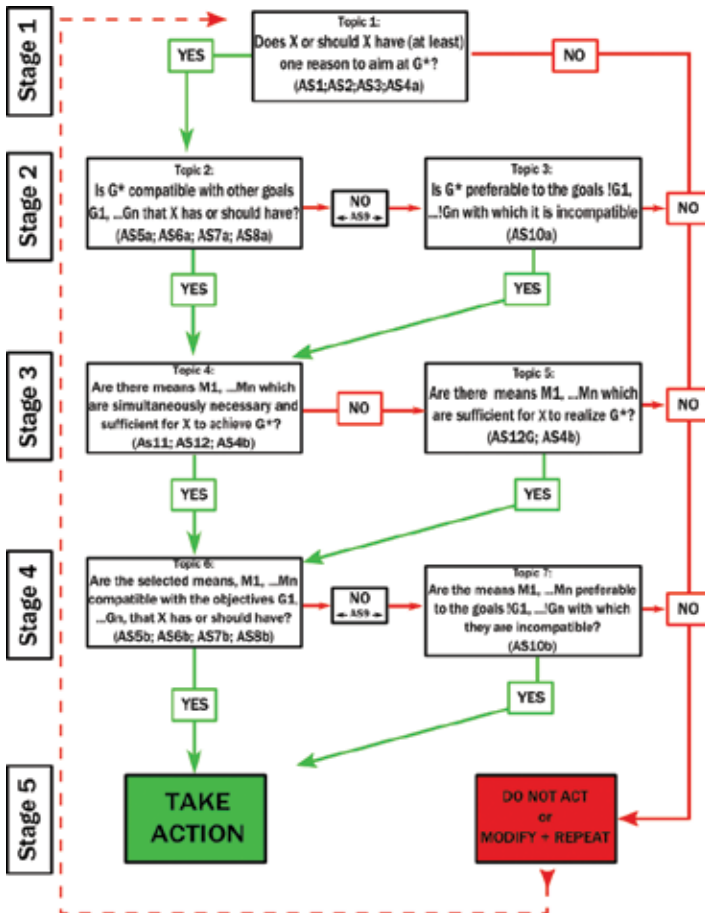
6   Thanks to Jacky Visser for suggestions on improving the visual layout of the model.

Our model is an *integrative, realistic,*[7] *and normative model*. In a single representation, our model integrates the structure of both practical reasoning and practical argumentation, including the variants usually differentiated in both – i.e., instrumental, normative, and value based. It is realistic in the sense that following the model generally corresponds to the real practice of reasoners and arguers. It is normative in the sense that it prescribes a chain of inferences (for reasoning) or a chain of primitive argumentative schemes (for argumentation) that should occur, and in a certain order, for both to provide maximally plausible formulations, conclusions, and decisions.

3.1 Stages and Topics

The model has *5 Stages*. Stage one addresses the agent's motivation for action; Stage two is concerned with the proposed goal and other goals; Stage three concerns the available means for achieving the proposed goal; Stage four deals with the relation between the means and between the means and other goals; and Stage five is the decision to act, not act, or make a modification to the reasoning or argumentation and start the process over. Given that our model is integrative and that, simultaneously, we think that the assumption of the objectives themselves should be an object of reasoning and argumentation – and not only the choice of means – our model includes two initial stages about objectives, two about means, and one for the decision.

   In order to license moving from one Stage to the next, the reasoner must answer one or two 'Yes' or 'No' *Topic* questions. In any case, an affirmative answer results in a 'green light' to move to the next Stage. In some cases, a negative answer or 'red light' will lead to another Topic question and thus a second chance to move to the next Stage. In other cases, a negative answer leads straight to a conclusion not to act.

   Each Topic questions an aspect of the general theme of the Stage and conditions the specific practical reasoning and argumentation associated with it. Ideally, the answer should be properly justified through

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7   Thanks to Eugen Poppa for this term.

an instantiation of one or more primitive argumentation schemes (AS), together with responses to their respective critical questions (CQ). These together determine the basic argumentation structure of the Topic. Discussing (arguing about) those primitive argumentative schemes may require (several) other argumentation schemes.[8] It is not possible to anticipate which schemes those might be, given that they can vary from case to case. We can thus only provide a complete string of what we believe to be primitive schemes.

3.2 Tracks

Given the possibility of providing differing answers to the Topic questions, there are different paths or tracks one can take through the model. The 'fast track' (shortest path)[9] most readily resembles routine reasoning and involves only 'Yes' answers to the Topic questions. In such a case the arguer only addresses Topics 1, 2, 4, and 6. In the most involved cases, the arguer has to address all of the Topics – weighing the reasons for and against the acceptance of both the goal and the means.

3.3 Schemes and Critical Questions

Many of the schemes we include in our primitive list are based on schemes already articulated by others, especially Walton, Reed, and Macagno (2008). We have, however, made efforts to systematize the schemes by including only one term with inferential power per premise. For example, the first argumentation scheme for the argument from teleology includes as the first premise: x has G+ as its finality. In this case 'finality' is the sole term with inferential power.

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8   The distinction between primitive and derived schemes is contextual and was a suggestion made by Fabrizio Macagno.

9   Nothing guarantees a reasoner or arguer will be able to address the 'short' track Topics quickly or quicker than perhaps all of the long track Topics. We are making a quantitative observation here only that fewer Topics and schemes need be addressed when taking this route.

We have also adjusted the schemes and critical questions to strengthen them for individual use. If you have a separate, critical Other asking the critical questions, then the wording of the questions can be less stringent in light of the opportunity for the Other to 'press harder' – so to speak – if the answerer does not provide a satisfactory answer. In the case where you are the only one responsible for asking and answering the critical questions, a more carefully worded question will make it harder to provide an unsatisfactory answer. As such, we find the wording of the questions is of great importance and have avoided using critical questions with only 'Yes' or 'No' answers.

Accordingly, we asked ourselves 'what makes a critical question, critical?' If you envisage the question being asked by a critical Other, then part of the answer would be 'The disposition with which the question is being asked'. When you are alone and conducting individual dialectical or quasi-dialogical argumentation, however, that critical attitude may be nearly absent. Thus, another part of the motivation for the way we have formulated the critical questions was in an effort to make the questions themselves as critical as possible, while relying less on the person asking them.

Taking the above two considerations into account – avoiding Yes/No questions and making the questions critical – we have designed the questions as a pair of questions, the first of which asks for an explanation of the inferential term's use and the second of which challenges it. Both parts are necessary, in our view, for the critical questioning of the inferential term to be adequate. Thus, in our model, the second (part of the) question ensures the question contains a critical component in every case and regardless of the questioner or their disposition.

Finally, it should also be noted that schemes may be used more than once to answer any given Topic question. For example, when answering the question in Topic one, the reasoner or arguer may put forward two differing reasons from positive values. In addition, they may avoid one of our identified schemes altogether. For example, they might not use any reasons from teleology. Our only contention is that at least one of the argumentation schemes should be used in answering any given Topic. As contributory, how the reasons resulting from the use of the schemes interact is a separate question from which and how many schemes are used.

3.4 Closure

Following a track and using the schemes ensures that the use of our model always ends in a traceably justified decision to act or not act. Whereas other models have left the decision to an unarticulated procedure of weighting, our model provides a way to rationally justify the selection of one of the alternatives. This is especially important for the evaluation or challenging of the process. On our account, the choice of which schemes to employ (or not), as well as the quality with which they were employed, can both be identified and evaluated as precise areas of challenge or critique against which an alternate possibility can be clearly projected.

2. The Structure of Practical Reasoning and Practical Argumentation

Let us now identify the problem each Topic addresses, how this problem can motivate practical reasoning, and the primitive argumentative schemes (and respective critical questions) that should be used to justify a response.

Stage 1. Topic 1

Stage 1, containing only Topic 1, consists in answering the problem: 'Does X or should X have (at least) one reason to aim at goal G*?' It should be noted that a reason here does not have to be a pro-attitude. I can suppose that I should assume G* for another type of reason: maybe G* involves some sacrifice that I have to make (hence, my not having a pro-attitude towards G*), but, if I assume G*, perhaps I feel that I am contributing to realize a certain value ('social equity') that I cherish. We can also include here reasons deriving from 'institutional facts' (Searle, 1995; 2001, p. 56–7).

The rational justification of the answer to the question of Topic 1 seems to depend on three main considerations, articulated through four argumentation schemes.[10]

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10   For reasoning, consider only the pattern of reasoning without the critical questions.

Teleological Considerations. Practical reasoning and argumentation are teleological in that goals are instantiations or manifestations of a general purpose or aim. If, for example, x is an institution created with the mission G+, we consider that G* can be a manifestation of G+. By arguing that G* results from that objective, one attributes to x a reason for assuming G*. To illustrate:

Major Premise: NATO's mission is to actively contribute to world peace and security (G+)

Minor Premise: Helping Ukraine increase its defensive power (G*) will actively contribute to world peace and security

        Therefore, it is plausible to suppose that,

Conclusion: NATO has a reason to help Ukraine increase its defensive power.

More formalized we arrive at:

Argumentation Scheme 1. Assumption of Objectives by Teleology[11]
(AS1)
Premise 1:   x has G+ as its finality
Premise 2:   G* belongs to G+
              Therefore, plausibly
Conclusion: There is a reason for x to assume G*

By definition, answering CQs in plausible argumentation is essentially contextual: it depends on the circumstances (in the sense of 'circumstance' explained above).

    Satisfactorily answering the following critical questions provides a plausible justification:

Critical Questions for Argumentation Scheme 1
CQ1:   How does G+ really correspond to the finality of x?
        How can G+ not correspond to the finality of x?[12]

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11   We agree with Fabrizio Macagno, who suggested that AS1 can be considered a variant of 'Argument from Commitment' (Cf. Walton, Reed, & Macagno 2008: 335).

12   For this and all critical questions we assume there can be more than one response/reason. We use the singular wording only for the sake of simplicity of presentation.

CQ2:   How is G* really a particular case of G+?
         How could G* not be a particular case of G+?

Value Considerations. These are considerations involving moral or so-cial values, *sensu lato*, regarding both individual and collective behaviour (e.g. 'Individual Well-Being', 'Collective Well-Being', 'Keeping a Promise', 'Honesty', etc.)

For this consideration, we have two types of cases in mind. The first regards the assumption of your value as positive (V+). For example, if you are a political leader who values fairness (V+), you may consider it to be positively promoted by taxing the rich to help fund a free national public health system (G*). In the second type, G* may not directly promote any obvious value. It may, however have consequences positively valued by x, for instance, to quench thirst, thus giving x another kind of reason to assume G*.

In the first case, the argumentative scheme from positive values (Walton, Reed, & Macagno, 2008, p. 321) generally applies, but with two caveats. First, there are no critical questions associated with the scheme in the literature so, using the method described above, we have taken the liberty of formulating them ourselves. Second, since we formulated these questions to focus on the correct application, in a given context, of the essential term with inferential power, we will propose a slightly modified, simplified version of the scheme that clearly isolates the (only) expressions we consider essential.

Argumentation Scheme 2. Argument from Positive Values
AS2)
Premise 1:   value V is positive (= V+)
Premise 2:   V+ positively values G*
         Therefore, plausibly
Conclusion: There is a reason for x to assume G*

Critical Questions for Argumentation Scheme 2
CQ1:   What reasons are there for attributing a positive value to V?
         What reasons could count against attributing a positive value to V?

CQ2:   What reasons are there for the positive evaluation of G* by V+?
         What reasons are there for G* not to be positively evaluated by V+?

The answer to CQ1 will likely involve the participants in *a substantial* discussion regarding *values*. The answer to CQ2 most likely consists in the demonstration of the *relevant relation between V+ and G**, which may require sub-argumentation. For instance, if V+ is 'to promote peace' and G* is 'to reinforce military power in Ukraine' there is definitely room for sub-argumentation.

Argumentation Scheme 3. Argument from Positive Consequences
(AS3)

Premise 1:   If G* is realized by x, then the consequences K1, …, Kn will occur.

Premise 2:   K1, …, Kn are to be valued positively.

Therefore, plausibly

Conclusion: There is a reason for x to assume G*

We have 'unfolded' the single premise put forward by Walton, Reed & Macagno (2008, pp. 332–3; cf. Walton, 2013a, p. 102) into two premises to permit a critical question to specifically focus on two issues in two premises. This is because in the actual argumentative process it is possible to accept one of the premises and deny the other, deny both, or accept both. The use of the infinitive in the second premise is deliberate, for it allows a discussion (CQ2) on the positive evaluation: x, the proponent, can positively value K1, …, Kn, but in argumentation, y, the opponent, can value them negatively or be neutral. If we indexed the evaluation to x, the second premise would become undisputable (it would consist in the truism, stated by x, that x values K1, …, Kn positively) and we think that it should be able to be discussed. We have also suppressed the original version's CQ3, because we think that it should be carried out in Topic 3 (where pro and con reasons are pondered), as we shall show below.

Critical Questions for Argumentation Scheme 3

CQ1:   What makes it plausible that G* has K1, …, Kn as consequences? How could G* not have K1, …, Kn as consequences?

CQ2:   Why should K1, …, Kn be positively valued? How could K1, …, Kn not be positively valued?

Operational Consideration. One last basic aspect that could enable x with a reason to assume G* is to know if x has the ability to (contribute to) realize G* and, also, if his assumption of G* is or is not idle regarding the realization of that objective. At this point, it is important to note that we are not here addressing the ability of x to carry out the means. This argument scheme will appear again later in the model where it can be appropriately used for that purpose. For its use in providing a reason to aim at the goal, 'ability' here is to be understood more broadly as 'in a position'. For example, consider a husband who needs to pick his wife up from the train station. His having a driver's licence that his children do not have could be an ability reason that enables him to realize the goal of picking her up. This ability, however, says nothing about the car being functional or otherwise available for him to perform the means of driving to get there. We recognize that if hard pressed, the ability reason does indeed boil down to an ability to perform the means, but think an important part of early practical reasoning rests on a preliminary consideration of an agent's being in a position – having the ability – to achieve the goal. Since this scheme is used again later while addressing the means, it is not crucial to follow the ability chain all the way to the end of the performance of the means here. Its second instantiation functions as an appropriate check on the means at that point.[13] The argumentation at this stage should instantiate the following scheme:

Argumentation Scheme 4. Argument from Ability[14]
(AS4a)

Premise 1:   G* should be positively valued

Premise 2:   x has the ability to realize G*

Premise 3:   x's ability to realize G* is a necessary/enabling condition for the realization of G*

Therefore, plausibly,

Conclusion: There is a reason for x to assume G*

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13   Changing AS4 to appear in two places is new in this articulation as compared to the forthcoming publication, but has been added in consultation with João Sàágua who maintains reservations about such a decision.

14   Given that we have not found a similar scheme in the literature, we hope this constitutes a modest contribution to the field.

In this scheme, the agent goes from the existence of a reason to carry out G* (Premise 1) to the existence of a reason for *x, and not any other agent*, to carry out G* (Premises 2 and 3). If x were not in a position to realize G*, or if the assumption of G* by x was unnecessary, in the sense that G* would occur anyway even if x would not assume it, then there would not be this reason for x assuming G*. The two reasons are not the same. Going back to the NATO example, the reason to carry out G* (NATO helping Ukraine increase its defensive power) can be, for example, because it 'Promotes Peace', which is considered to be a positive value (V+), while the reason for x assuming G* (and not any other agent) can be, for example, because NATO is in a better position to negotiate with the quarrelling parties, an *operational* reason.

Critical Questions for Argumentation Scheme 4a

CQ1:   How does x have the ability to realize G*?
         What could prevent x from realizing G*?

CQ2:   To what extent is the assumption of G* by x a necessary/enabling condition for the realization of G*?
         Which y exists (such that y≠x) whose ability to realize G* is a necessary/enabling condition for the realization of G*

Since we think that, normatively, it only makes sense to argue through the instantiation of AS4 if its Premise 1 has already been proven by *another type* of argumentation (AS1-AS3), we consider Premise 1 as assumed. For that reason, it does not need the association of a CQ. Further, this illustrates the importance of following the argumentation schemes in order since if AS4 were used first, it would be unsupported.

Let us imagine that all four schemes were employed on real argumentation and that all of the CQs were answered successfully. While it may mean there are reasons to assume G*, it does not yet mean that x should assume G*. This is because the reasons x has for assuming G* are *pro tanto* and not *pro toto*. We thus have now to consider 'the other side of the scale'.

Stage 2. Topic 2

Topic 2 involves argumentation aimed at founding an answer (positive or negative) to the problem: 'Is G* compatible with other goals, G1, ….Gn, that x has or should have?' As stated, the problem seems to lead to the idea that x has to consider the compatibility of G* with virtually *every* objective (including aims) that x *has*, as well as with *all* those that x *should have*. To complicate the situation further, we assume that there is no safe and sound method for the calculation of (in)compatibilities! Although seemingly extremely complex, this is not an intractable situation. It will be sufficient *to use the Principle of Charity* and, in a sense, *to reverse the burden of proof*. Given that we are speaking of human reasoning, using the principle of charity we shall assume from the outset that x is 1) usually not (knowingly) self-contradictory and 2) is not an inherently evil person. Obviously, there is place for a margin of error: x can overlook conflicting goals, or accidentally contradict himself and x can have instances of evil. Generally, however, we take x to be consistent and morally neutral or good by default, thus reversing the burden of proof and leaving it to the opponent to build an argument to challenge a positive answer to Topic 2.

With these qualifications in mind, we consider the argumentation supporting an answer to the Topic to rest on the four following argumentation schemes: the first argues against the assumption of G* because this objective promotes a negative value; the second argues against the assumption of G* because this objective contradicts or inhibits a positive value; the third argues against the assumption of G* because the enactment of this objective has negative consequences; the fourth is neutral regarding values and evaluations and simply argues that there is an operational incompatibility between G*, if assumed by x, and other objectives x has *already assumed*. The first three schemes thus concern objectives that x *should have*, while the fourth concerns the objectives x *has*. Since these schemes occur in the overall model twice – here as applied to the goal and later as applied to the means – on the flowchart they have been labelled 'a' and 'b' respectively, as was done with AS4 above. This double applicability is represented in each scheme with G*/M*. Assumptions A2 and A3 above address our view on the flux between means and goals.

Argumentation Scheme 5. Argument from Negative Values[15]
(AS5)
Premise 1:   the value V is negative (= V-)
Premise 2:   V- negatively values G*/M*
Therefore, plausibly,
Conclusion: There is a reason for x not to assume G*/M

Critical Questions for Argument Scheme 5
CQ1:   What reasons are there for attributing a negative value to V?
            How could V not have a negative value?

CQ2:   What reasons are there for the negative evaluation of G*/M*
            by V-?
            How could G*/M* not be negatively valued by V-?

Argumentation Scheme 6. Argument Contradicting Positive Values[16]
(AS6)
Premise 1:   Value V is positive (V+)
Premise 2:   G*/M* contradicts (or inhibits) V+
Therefore, plausibly
Conclusion: There is a reason for x not to assume G*/M*

Critical Questions for Argument Scheme 6
CQ1:   What reasons are there for attributing a positive value to V?
            How could V not be valued positively?

CQ2:   What reasons are there to indicate G*/M* contradicting (inhib-
            iting) V+?
            How could G*/M* be congruent with V+?

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15   See, Argument from Negative Value (Walton, Reed, & Macagno 2008: 321; Walton 2013a: 103). The two remarks made above regarding the argumentative scheme on positive values apply, *mutatis mutandis*, also here, hence, we will not repeat them.

16   Although this scheme cannot be found as such in Walton, Reed, & Macagno (2008), or in Walton (2013a), it is considered a variant of the 'Argument from Values', easily manageable out of the two schemes that are 'traditionally' included in it.

Argumentation Scheme 7. Argument from Negative Consequences

(AS7)

Premise 1:   If G*/M* is realized by x, the consequences K1, …, Kn will occur

Premise 2:   K1,…, Kn are to be negatively valued

Therefore, plausibly

Conclusion: There is a reason for x not to assume G*/M*

Similar remarks to those made for AS3 are applicable, *mutatis mutandis*, here – with the exception of the ones regarding the existence of a second premise, which, in this case, already appear in the original formulation of the scheme (see Walton, Reed, & Macagno 2008: 332–333; Walton, 2013a: 102).

Critical Questions for Argument Scheme 7

CQ1:   What makes it plausible that G*/M* has K1, …, Kn as consequences?
How could G*/M* not have K1, …, Kn as consequences?

CQ2:   Why should K1, …, Kn be negatively valued?
How could K1, …, Kn not be negatively valued?

Other schemes related to AS7 are rightly described by Walton, Reed & Macagno (2008, pp. 318–344) as in the realm of practical reasoning, but are not primitive. A discussion of how they relate to the primitive scheme would be an excellent topic for a further paper.

Argumentation Scheme 8. Argument from Operational Incompatibility[17]

(AS8)

Premise 1:   G is an objective already assumed by x

Premise 2:   G and G*/M* are operationally incompatible

Therefore, plausibly

Conclusion: There is a reason for x not to assume G*/M*

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17   Given that we have not found a similar scheme in the literature, we hope this constitutes a modest contribution to the field.

It is noteworthy that in premise 1, the objectives of x are restricted to *those already assumed by x* and *do not* include those that the opponent considers x should assume. If the latter were included, the reference to values and evaluations would be unavoidable (and, for that, we already have AS5, AS6, and AS7). This scheme aims at situations in which the existence of a contradiction between the realization of certain objectives already assumed by x and the new objective x is considering to assume, G*, is 'pointed out'. In this way it remains focused on operational incompatibility rather than ideological incompatibility.

Critical Questions for Argumentation Scheme 8

CQ1:   What reasons are there for taking G as an objective already assumed by x?
       What reasons are there for doubting x already assumed G?

CQ2:   What makes G and G*/M* operationally incompatible?
       How could G and G*/M* not be operationally incompatible?

Let us imagine that AS5, AS6, AS7, and AS8 were actually instantiated in a concrete argumentation and that they passed their respective CQs; or that at least one of them did. In that case, the practical argumentation that took place guaranteed that x has up to four, but at least one reason, for *not* assuming G*. Does this mean that x should not assume G*? Not yet. The reasons x has for not assuming G* are *pro tanto*, and not *pro toto,* so we have to decide between the two sides – we have to weigh the pros and cons. That is the purpose of Topic 3.

Excursus. Negotiation of Objectives
Before analysing the argumentation belonging to Topic 3, it is appropriate to consider a situation in which a contradiction has arisen between an objective to be assumed, G*, and another objective !G. Instead of arguing about which objective is preferable (Topic 3), one can argue for a modification to one of those objectives, or both. This is arguing through negotiation. It is important to emphasize precisely this *argumentative aspect of the negotiation,* because negotiation writ large does not have to be rational as in the case of pure threat, blackmail, or bribery.

A simple[18] example. Let us imagine that x already had as an objective, G, 'To act in an environmentally-friendly way'. Now, x wins the lottery and can buy the car he always dreamt of. x is considering a new objective, G*, 'To buy a Ferrari Testarossa'. Knowing the Testarossa's high fuel consumption, it is obvious that the second objective is incompatible with G – his aim to be environmentally friendly. To mark the incompatibility of G with G*, we will represent G as !G – in which '!' is used to point out that contradiction with G*. Now, in a certain sense, x can choose between determining which of the two objectives, G* or !G, is preferable, thus going to Topic 3. Or x can try to modify one of the two objectives, or both, in order to make them compatible. Let us imagine that x enters into a process of *argumentative negotiation* in which he will have to determine *how far he can go in the modification of his objectives*, G* and !G, *in order to make them compatible, but also to think that he is still assuming that part of those objectives that x considers essential*. Let us imagine, for instance, that at the end of the negotiation (either with y or with himself) x modifies G*, 'To buy a Ferrari Testarossa' into, 'To buy a Citröen DS5'. There is a clear sense in which the objective, G*, was preserved and modified: x now has the objective of buying a more environmentally-friendly car that, although not a Ferrari, is still a fancy car. This is now, so to speak, the 'car of his dreams' insofar as it achieves the assumption of both goals rather than requiring the sacrifice of one.

We consider that the argumentative process just illustrated consists in an instantiation of the following Argument Scheme.

Argumentation Scheme 9. Argument Based on Reasonable Negotiation[19]
(AS9)
AS9.1. Variation on !G
Premise 1:   !G and G*/M* are contradictory
Premise 2:   Modifying !G into Gi preserves the essential in !G

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18 But it is obvious that this kind of situation can be enormously complex. For example, consider the negotiation between social stakeholders: employers, unions, and government.

19 Given that we have not found a similar scheme in the literature, we hope this constitutes a modest contribution to the field.

Premise 3:   Gi is compatible with G*/M*
Therefore, plausibly
Conclusion: x should assume Gi (instead of !G)

AS9.2. Variation on G*
Premise 1:   !G and G*/M* are contradictory
Premise 2:   Modifying G*/M* into G' preserves the essential
              in G*/M*
Premise 3:   G' is compatible with !G
Therefore, plausibly
Conclusion: x should assume G' (instead of G*/M*)

AS9.3. Variation on G* and !G
Premise 1:   !G and G*/M* are contradictory
Premise 2:   Modifying !G into Gi preserves the essential in !G
Premise 3:   Modifying G*/M* into G' preserves the essential
              in G*/M*
Premise 4:   Gi and G' are compatible
Therefore, plausibly
Conclusion: x should assume Gi and G' (instead of !G and
              G*/M*, respectively)

Since premise 1 works as an assumption imported from the previous Topic we do no need to question the incompatibility. Accordingly, these are the remaining Critical Questions associated to this scheme (in any of its variations).

Critical Questions for Argumentation Scheme 9
CQ1:   How do the modifications of !Gi into Gi or of G*/M* into G',
        respectively, preserve the essential aspect(s) of each of the ini-
        tial objectives?
        How might the modifications of !Gi into Gi or of G*/M* into
        G', respectively, diminish/jeopardize the essential aspect(s) of
        each of the initial objectives?

CQ2:   What makes the schemes resulting from the proposed modifi-
        cations (Gi/!Gi and G'/G*/M*) compatible?
        How might the schemes resulting from the proposed modifica-
        tions (Gi/!Gi and G'/G*/M*) be incompatible?

CQ3:   What incompatibilities with other objectives x has or should have result from the proposed modifications (Gi/!Gi or G'/ G*/M*)?

How could one resolve these resulting incompatibilities?

We consider the burden of proof of CQ1 to be on the side of the proponent and the burden of proof in the case of CQ2 and CQ3 to be on the side of the opponent (in line with what was stated about that matter in Topic 2).

Stage 2. Topic 3.
Topic 3 receives a situation of incompatibility (insurmountable, or overlooked, by negotiation) between G* and one or more objectives/aims that x has or should have as input and has to provide a founded answer to the question: 'Is G* preferable to the goals, !G1, …!Gn, with which it is incompatible?'. Intuitively, and simplifying slightly, if G* is preferable to another objective, !G, with which it is incompatible, then that other objective should be abandoned and the reasoning should progress to Topic 4. If !G is preferable, then !G should (continue to) be assumed by x and the practical reasoning on G* ends here. To found the answer to the question, *an argumentative process in favour of the preference* for G* or for !G should be carried out. In addition, that argumentative process should take into account the specific results obtained in Topics 1 and 2. Let us see this in greater detail.

Topic 1 allowed for four types of reasons in favour of the assumption of G*, of which at least one would have been positively associated to G*. Obviously, we are talking about several types of reasons. As mentioned above, this means that there can be several particular reasons in favour of the assumption of G* by x that are specimens of each one of those types. Topic 2 allowed for four types of reasons against the assumption of G*, of which at least one would have been negatively associated to G*. Here, we are again talking about *types of* reasons and so there can be *several particular reasons* against the assumption of G* by x that are specimens of each one of those types. This time, the *particular* reasons positively associated to G* in Topic 1 are the ones that must be weighed *against* the *particular* reasons negatively associated to G* in Topic 2. Resolving Topic 3 rationally articulates this process of 'weighing' the reasons in favour/against the assumption G* by x.

Argumentation Scheme 10. Argument Based on Rational Preference[20]
(AS10)

10.1 Variation in favour of G*/M

Premise 1:   !G and G*/M* are contradictory

Premise 2:   (R*±1, …, R*±n)G*/M*

Premise 3:   (!R±1, …, !R±n)!G

Premise 4:   (R*±1, …, R*±n)G*/M* are preferable to (!R±1, …, !R±n)!G

Therefore, plausibly

Conclusion: x should assume G*/M* (and abandon !G)

10.2 Variation in favour of !G

Premise 1:   !G and G*/M are contradictory

Premise 2:   (R*±1, …, R*±n)G*/M*

Premise 3:   (!R±1, …, !R±n)!G

Premise 4:   (!R±1, …, !R±n)!G are preferable to (R*±1, …, R*±n)G*/M*

Therefore, plausibly

Conclusion: x should assume !G (and abandon G*/M*)

In theory, the R*± of premise 2 were all identified in Topics 1 and 2. In concrete argumentative practice, if the matter is very serious, one can submit G* to a 'second round' of those very same Topics. It is almost certain that the !R± of premise 3 were not all identified when having G* and not !G in sight. Hence, one should now go through those two Topics *having !G in sight*. For that we do not need additional Topics or schemes. Thus, the individual reasons (R*±1, …, R*±n) and in (!R±1, …, !R±n) are just those reasons identified positively in Topic 1 or negatively in Topic 2 for G* or !G.

What is being weighed ({R*±} vs. {!R±}) in premise 4, when the *relation of preference* is applied?

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20   Given that we have not found a similar scheme in the literature, we hope this constitutes a modest contribution to the field.

1) All evaluations of reasons considered positive vs. all evaluations of reasons considered negative. For example, 'In this situation S1, it is preferable to slightly sacrifice the value V1+, in order to greatly implement the value V2+'; or another example, 'In the situation S2, it is preferable to slightly sacrifice K1+, to be able (in the future) to enjoy the positive consequence, K2+, that will increase the well-being of x in a more sustained way'.

2) Ideally, the subjective probabilities (possibly conditional) that x and y believe to be associated to both: (a) the success in realizing G* or, alternatively, !G; and (b) the 'coming to existence' of the reasons {R*±} and {!R±} as a result of the realization of that G*, or !G, respectively. For example: G* has a 0.9 probability of being realized, its R+I has a 0.7 probability to be implemented if G* is realized (repeated for each R+i) and its R-I has a 0.2 probability of occurring if G* is realized (repeated for each R-i); and a similar reasoning for !G and its associated reasons.

3) Most of the time and in alternative to 2), the *subjective 'plausibilities'* which are equal to 2, but replacing the probabilistic quantification, between 0 and 1, by qualifiers such as 'very', 'few', and so on. We are not often capable of specifying a probability, even a subjective one, for the success of G* or of reasons that we believe to be associated to G*.[21]

4) The *beliefs* regarding the *circumstances* of the situation.

Importing the critical questions from above for the input premises (1–3), let us now see the CQs for premise 4. As noted above, the critical questions for this scheme depart slightly from the usual 1:1 ratio of critical question per term with inferential power. This is because, we believe, the term 'preference' entails both aspects of goodness and probability. Thus, the questions here, while focused only on the single term 'preference', address both of its component parts.

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21   How people pick and assign probability and weight to reasons is an interesting and important question, but one which is ultimately a matter for psychologists. Further work could, however, address how one ought to assign probability and weight to reasons (See Lord & Maguire 2016).

Critical Questions for Argumentation Scheme 10

CQ1: What makes the standard(s) used for the evaluation of the reasons associated with the goals/means the best for this situation? Why might the standard(s) used for the evaluation of the reason associated with the goals/means not be the best for this situation?

CQ2: What makes the standard(s) used to assess the probability or plausibility of the reasons used to justify the assumption of the goal/means and of the goal/means being assumed the best for this situation? Why might the standard(s) used to assess the probability or plausibility of the reasons used to justify the assumption of the goal/means and of the goal/means being assumed not be the best for this situation?

In short, these questions are challenging the goodness in the reasons and the accuracy of the probability of success, respectively. These questions are notoriously difficult to formulate because it is at this point where argumentation theory meets choice theory, and both meet moral theory.

Stage 3. Topic 4

This Stage begins when the objective G* has been rationally founded. We then need to associate one or more means to it. Here is where what has been called instrumental practical reasoning (Wallace 2014; Hitchcock 2011), or 'means-ends reasoning' begins. The first question each agent will ask about the means can be vague, of the kind: 'Is there any way to realize G*?' As an answer to this question, the agent expects that representations of actions he can carry out and whose implementation will bring him closer to the realization of G* until G* is realized will 'pop into mind' by a process that he usually does not control well. The agent might use his experience from similar cases along with other tools to marshal every means offered to him in any more or less fortuitous, more or less contextual, way. There are also studies pointing out the importance of automated or innate heuristics to 'the finding of means'.[22] Though the creation of reasons is a matter generally investigated within psychology, it also has philosophical implications (Smith 2010; Mizrahi 2014).

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22   See, e.g., Tversky & Kahneman (1974).

From a philosophical point of view, one part of the important work consists in classifying the means into necessary or possible options. Accordingly, the problem of interest to us at Stage 3, Topic 4 is, 'Are there means, M1, …, Mn (M*), to realize G* which are simultaneously necessary and sufficient for x to achieve G*?'. As a matter of fact, this problem includes two questions: 1) 'are there means that *have* to be used if one intends to realize G*?' and 2) 'are those *all* the means needed to realize G*?'

A 'Yes' to the first question means that, without the use of those means by x, x is not able to realize G*. In that case, those means *have to* be used. Imagine a situation where the only way to beat a competitor is to kill him. While perhaps necessary (and say, sufficient) it is not usually something that *should* be done. Here we deal only with what has to be done, with the foresight of knowing that the 'should' is addressed shortly (Topics 6 and 7).

However, a 'No' to the first question *does not* necessarily imply that there are no means available to realize G*. It can also imply that there are several alternative means that x *can choose between*. In that case, there is the problem of knowing if those means are *sufficient*. That is the problem of Topic 5. If they are, and given that x can choose, then the discussion about the 'best means' will be opened. That problem will be dealt with in Topic 6 and eventually 7. At present, a 'No' to the first question is simply tantamount to going to Topic 5, where we will deal with the problem of the existence, or not, of sufficient means to realize G*.

Let us now imagine that we answer 'Yes' to the question regarding the necessary means (NM). Now we need to know if the set {NM1, …, NMn} is sufficient to realize G*; or if, *some other means besides* {NM1, …, NMn} will still be needed. This is the *raison d'être* for our second question in Topic 5: 'are the means necessary to realize G* sufficient in conjunction?' If the answer is 'Yes', we go to Topic 6. If we answer 'No', it means that the set {NM1, …, NMn} has to be *supplemented with more means from which a choice will have to be made*. 'Supplemented', because {NM1, …, NMn} is not sufficient to realize G* and 'a choice will have to be made,' because if there were no choice, the added means would actually be necessary and would belong to {NM1, …, NMn}. Schematically: to realize G*, x has to use {NM1, …, NMn} and then still use

M1, or M2, or Mn (which do not belong to {NM1, …, NMn}), because without at least one of these means, x cannot realize G*.

Schematized, we arrive at:

> **Argumentation Scheme 11. Necessary Condition Argument**[23]
> (AS11)
> Premise 1:   x has the objective of realizing G*
> Premise 2: ....{NM1, …, NMn} are necessary means for x realizing G*
> Therefore, plausibly
> Conclusion: x has a reason to carry out {NM1, …, NMn}

There is no CQ for premise 1 because it works as an assumption, in the sense already explained.

> **Critical Questions for Argumentation Scheme 11**

CQ1:   What makes it plausible that {NM1, …, NMn} are necessary means for x realizing G*?
How could any of these means be suppressed while still allowing for the realization of G*?

Obviously, the argumentation aimed at showing the (defeasible) necessity of any of the means has an extremely high sensitivity to context. Think of the necessary means for becoming President – a detailed discussion of what those means are will involve differing argumentative schemes derived from AS11, in the sense already explained. For that reason, the 'course' the argumentation will take in each case is difficult to predict. It also seems reasonable to accept that it is the proponent of the argument instantiating AS11 who has the initial burden of proof regarding the necessity of {NM1, …, NMn}, given that it requires the

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23   We have distanced ourselves from the 'Necessary Condition Schema' (Walton, Reed, & Macagno 2008: 323–324) for two reasons. The formulation of the 'Alternatives Premise' removes the necessity of each of the means by using the expression 'at least one of', making them optional amongst themselves. Also, the formulation of the 'Selection Premise' and of the conclusion clearly shows that the scheme's objective is to select 'the best mean' (referred as 'Bi'), which will only be dealt with by us in Topics 6 and 7. These are not meant as criticism of the scheme, but as justification for not considering it primitive and thus not using it here.

use of those means or the waiving of the realization of G* on reasonable grounds.

Despite this highly contextual character, it is known that an argument in favour of a *necessary* condition (in the present case, a mean) ends with a conclusion in the form. 'If not {NM1, …, NMn}, then not G*', in which the conditional is material, and which is, thus, logically equivalent (by contraposition) to 'If G*, then {NM1, …, MNn}'. Any of those forms of the conclusion can be used to build a *plausible* argument in favour of the necessity of each one of the NMi, an argument whose premises will be, as already stated, strongly dependent on context. To determine if the means are sufficient, we can use the following scheme:

> **Argumentation Scheme 12. Sufficient Condition Argument**[24]
> (AS12)
> Premise 1:   x has the objective of realizing G*
> Premise 2:   If x carries out {NM1, …, NMn}, then x realizes G*
> Therefore, plausibly
> Conclusion: x has a reason to carry out {NM1, …, NMn}

There is no CQ for Premise 1 because it works as an assumption in the sense already explained.

> **Critical Questions for Argumentation Scheme 12**

CQ1:   How does carrying out all of the necessary means guarantee the realization of G*?
How might G* remain unrealized despite carrying out the necessary means?

The same observations we made regarding the sensitivity to context of AS11 and its CQ are applicable to AS12 and its CQ, therefore we will not repeat them. The same can be said regarding the matter of the burden of proof.

Likewise, and despite this highly contextual character, it is known that an argument in favour of a *sufficient* condition (in the present case,

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24   See the previous footnote. Similar considerations can be applied here in regard to '22.3. Sufficient Condition Schema' (Walton, Reed, & Macagno 2008: 323–324).

a mean) ends with a conclusion of the form: 'If {NM1, …, NMn}, then G*', in which the conditional is material, and which is, thus, logically equivalent (by contraposition) to 'If not G*, then not {NM1, …, NMn}'. Any of these forms of conclusion can be used to build a *plausible* argument in favour of the sufficiency of each mean, taken in conjunction – an argument whose premises will be, as already stated, strongly dependent on context.

Finally, it is one thing to recognize necessary and sufficient means, and another to ensure that x has the ability to carry them out. Further, in our view, being the *only* one able to carry out the means can provide an *additional* reason for x to pursue M*. Accordingly, we re-use the scheme for ability from Topic 1 and include it in Topic 4 (and Topic 5 if it should be necessary), in a similar but slightly modified way. The similarity is that, as before, it still only becomes necessary after the other schemes in the Topic have been addressed. In other words, for this Topic, if there are no means then there is no need to consider the agent's ability to carry out the non-existent means. The modification is that, in this instantiation, ability does not refer to 'being in a position' but rather, more directly, to 'being able to perform'.

Argumentation Scheme 4b. Argument from Ability
(AS4b)

Premise 1:   M* are necessary and sufficient (or at least sufficient) for G*

Premise 2:   x has the ability to realize M*

Premise 3:   x's ability to realize M* is a necessary/enabling condition for the realization of G*

Therefore, plausibly,

Conclusion: There is a reason for x assuming M*

In this scheme, we go from the existence of a reason to carry out G* (Premise 1) to the existence of a reason for *x* to carry out M* (Premises 2 and 3). For the same reasons as presented in Topic 1, if x did not have the ability to realize M*, or if the assumption of G* by x was unnecessary, in the sense that G* would occur anyway even if x would not assume it, then there would not be a reason for x assuming M*.

Also for the same reasons as mentioned with this scheme in Topic 1, there are only two Critical Questions needed for this scheme.

Critical Questions for Argumentation Scheme 4b

CQ1: How does x have the ability to realize M*?
      What could prevent x from realizing M*?

CQ2: To what extent is the assumption of M* by x a necessary/enabling condition for the realization of M*?
      Is there any y (such that y≠x) whose ability to realize M* is a necessary/enabling condition for the realization of M*

Stage 3. Topic 5

An agent only arrives at this Topic if the prior argumentation leads to a negative answer to the question 'Are there means M1, …Mn which are simultaneously necessary and sufficient for x to achieve G*?' (Topic 4). If the Topic reveals that there are necessary but not sufficient conditions, then we are then directed to Topic 5 while bringing with us a set of necessary means (if they were also sufficient we would have gone to Topic 6, without going through Topic 5). However, this difference between having or not having means does not substantially affect the formulation of the scheme, which, in reality, is nothing more than our well-known AS12, now formulated in a more general way: AS12G (here, 'G' means 'General').

Argumentation Scheme 12. Sufficient Condition Argument[25]
(AS12G)
Premise 1:   x has the objective of realizing G*
Premise 2:   If x carries out {NM1, …, NMn} and {SM1 or, …, or SMn}, then x realizes G*
Therefore, plausibly
Conclusion: x has a reason to carry out {SM1 or, …, or SMn} (in addition to the reasons x may have to carry out {NM1, …, NMn})

Since the question 'Are there necessary means to realize G*?' would have been positively answered in Topic 4 and since a negative answer would be inconsequential and leave us only to consider the sufficient means, no specific CQ on them is provided here.

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25   See the previous footnote.

The critical question associated to this scheme, then, addresses the sufficient means.

Critical Questions for Argumentation Scheme 12G

CQ1:   How does carrying out at least one of SMi, where SMi belongs to {SM1, …, SMn} (in addition to {NM1, …, NMn}, if there are such) guarantee the realization of G*?
        How might G* remain unrealized in spite of carrying out all of these means?

All of the remarks made in Topic 4 about that version of AS12 are naturally applicable to AS12G and so we will not repeat them.

Further, because any number of new sufficient conditions may have been introduced in this Topic, AS4b applies here as well.

If the concrete argumentation that instantiates AS12G is negatively concluded, that means that there are no sufficient means to realize G* and the reasoning/argumentation stops here.

If the concrete argumentation instantiating AS12G is positively concluded, that means that there is more than one means M1, …, Mn (that is sufficient) for x realizing G*, i.e. there several possible means for x realizing G*.[26] In this case x may choose the one that he considers *the best means*. As expected, the choice of the best means is a process subjected to argumentation. This takes us to Topics 6 and 7.

Stage 4. Topic 6

Topic 6 involves an argumentative process aimed at founding an answer (positive or negative) to the question: 'Are the selected means, M1, …, Mn, compatible with the objectives G1, …, Gn, that x has or should have?' In this sense, the Argumentation Schemes and respective Critical Questions to be used *are exactly the same as* the ones proposed for Topic 2, as is immediately perceivable if we replace, in the formulation of the problem, 'the selected means, M1, …, Mn' by 'the objective G*?' (as formulated in Topic 2). In line with what was stated above, we consider

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26   Of course, if there are also necessary (but not sufficient) means, it will be necessary to combine them through a distribution of conjunction over disjunction. Thus: {NM1, …, NMn} and SM1, or {NM1, …, NMn} and …, or {NM1, …, NMn} and SMn.

that the burden of proof is on the side of the opponent here as well (even if this is x with 'second thoughts', before going into action, on whether he should or should not use the means M1, …, Mn, to realize G*).

We thus consider the schemes AS5 to AS9 to be reproduced here, along with their respective CQs and what we stated in their regard in Topic 2. The only difference is that the schemes and critical questions here employ the M* side of the G*/M* option where M* indicates 'set of selected means'. We now simply need to add an illustration and an explanation.

It suffices to recall our presidential 'murderer example' (mentioned in Topic 4): there may not be any incompatibility between the objective 'To be President of the Portuguese Republic' and *all the other* objectives that x has or should have. But if, at a given time, the means chosen by x to realize this objective is 'To get his most direct rival candidate killed', then this means will surely clash, no matter how efficient it is, with *several other* objectives or aims x has or *should* have.

Explanation: Three cases to be considered.
Case 1. If, among M1, …, Mn, only necessary means are to be found, then the conclusion that one of those means is incompatible with G1, …, Gn, immediately leads us to the argumentative process taking place in Topic 7.

Case 2. If, among M1, …, Mn, several sufficient means are to be found (thus resulting from a list of alternative means corresponding to the affirmative answer to the question of Topic 5), then if *some* of those alternative means, *but not all*, are considered incompatible with G1, …, Gn, through the argumentative process taking place in Topic 6, that may permit us to select only the compatible ones (given that, hypothetically, any one of them is sufficient to realize G*) which immediately leads us to Stage 5 and a decision to act.

Case 3. In the case of the sufficient means, only if all of them (that is, all possible means) are considered incompatible with G1, …, Gn, will we be directed to the argumentative process of Topic 7.

Also in regard to Topic 6, it will be possible to try a procedure of negotiation like the one described in the Excursus and associated with AS9. With this supplementary proviso: the potential modifications to be introduced into M1, …, Mn, cannot remove the effectiveness of any of these means making them *no longer sufficient* to realize G*.

Stage 4. Topic 7

Topic 7 involves an argumentative process aiming at founding a (positive or negative) answer to the question: 'Are the means M1….Mm, preferable to the goals !G1, ….!Gn, with which they are incompatible?'. AS10 (and variants) with their respective Critical Questions can also be used here, as can be immediately perceived if we replace the occurrences of 'M1, …, Mn' by 'G*' in the formulation of the problem. Likewise, the comments we associated to the presentation of AS10 and its CQ in Topic 3 are applicable here with the same caveat that the M* option is to be used in this Stage. Hence, nothing else needs to be added at this time.

Stage 5. Decision

In Stage 5, the final stage, there is not exactly a problem to be dealt with and to be answered, so this stage does not contain a Topic. It is only the matter of capitalizing on the reasoning process and on the argumentative course realized in the previous Topics, whether one has gone through all the Topics or just some of them. Obviously, the process may be stopped at any time, simply by answering 'No' to Topic 1, or from then on answering 'No' two consecutive times. If that happens, the agent may decide either not to act, or to make an appropriate modification to the goal or means (depending on where the process was stopped) and begin again with the modification in place. If the process is not stopped, however, and we have arrived at Stage 5, then it is now just the matter of making a decision (practical reasoning) or recommending the action (practical argumentation) founded on all the process, or courses, which started at Topic 1. Therefore, if we consider Γ as the best formulation of the argumentative thread that started at Topic 1 and ended in Stage 5, we can propose:

–   For practical reasoning: 'Given that I accept Γ, I justifiably (do not) intend to carry out M1, …, Mn, to realize G*'.
–   For practical argumentation: 'Γ being given, the recommendation that x carries out M1, …, Mn to realize G* is (not) justified'.

Conclusion

To conclude, given the detail in the explanations above, we will start by risking a limited amount of repetition for the sake of clarity. The above presentation constitutes our efforts to contribute a new integrated model of practical reasoning and argumentation to the field. Imagining a human agent in any given circumstance, the model begins by asking if the agent has a reason to alter the current state of the world. With the aim of providing a model extending beyond mere instrumental reasoning, we have included consideration of the motivations for aiming at a goal as the first step in explicit practical reasoning and argumentation.

The complete model is composed of five stages: Stage one addresses the agent's motivation for action; Stage two is concerned with the proposed goal and other goals; Stage three concerns available means for achieving the proposed goal; Stage four deals with the relation between the means and other goals; and Stage five is simply the decision to act or not. If the agent progresses through all five Stages, they will have reasonable grounds for deciding to act. If they are stopped at any stage, they will then have reasonable grounds for not acting.

In order to license moving from one Stage to the next, the agent must answer one or two 'Yes' or 'No' Topic questions. In any case, an affirmative answer results in a 'green light' to move to the next Stage. In some cases, a negative answer or 'red light' will lead to another Topic and thus a second chance to move to the next Stage. In other cases, a negative answer leads straight to a conclusion not to act.

Each Topic questions an aspect of the general theme of the Stage. Answering 'Yes' or 'No' to the Topics is not, however, based merely on the free thinking or intuitions of the agent. In order to reasonably answer the Topic questions, the agent must have reasons supporting their answer. Those reasons can be specified using an appropriate argument scheme. The model indicates what we consider to be the basic, necessary schemes to justify an answer to each one of the Topics, though in practice an agent may of course use schemes over and above the provided list.

Importantly, the reasons which emerge from the schemes are to be considered *pro tanto*, or contributory reasons, in the way that Jonathan

Dancy (2004) has characterized them. This consideration is important because of two major implications it carries through the reasoning. First, it means a reason on one side is not, by itself, enough to license moving to a conclusion to act or not act. The questions and schemes are set up in oppositional fashion so that contributing reasons from both sides can be weighed. For example, an agent using the schemes associated with Topic 1 could come up with four reasons to pursue the goal. Rather than jumping straight to a conclusion to pursue it, however, Topic 2 is aimed at finding reasons not to pursue it. Only after both reasons for and reasons against have been addressed is the agent free to look for means.

Second, reasons being contributory also means that one reason may outweigh all opposing reasons. In other words, the number of reasons and weight provided to one side of the 'Yes' or 'No' answer are not in a strict relationship. Thus, even though there may be four reasons for accepting the proposed means and one reason against, that one reason may outweigh the other four.

We have also aimed to improve the way moral considerations are included in the model in a few important ways. First, we have provided a way to include consequentialist and other moral considerations. While consequences are addressed during the selection of both the goal and the means, any given moral principle can be used in our Argumentation Scheme 10, which performs an overall weighing between a proposed goal or means and incompatible alternatives an agent has or should have. Rather than stipulate a moral authority for these decisions, a Critical Question for the Scheme asks the user to justify why the moral standard they have chosen is best, and to account for the exclusion of others. In the absence of a universally agreed authoritative moral theory, we think that the best that can be done at present is to argue for the selection of the chosen standard in rational use at any given time.

Second, we have included moral evaluation of the means and not just the goal. Such an inclusion may have a much bigger impact than at first appears as was partially demonstrated through our example of wanting to become president but killing to do so. While there may be nothing wrong with having a goal to become president, if one overlooks the moral component of killing to get there, an important check on the decision-making process has been overlooked.

Finally, when filled out, the use of such a model provides many opportunities for the evaluation of the reasoning or argumentation. While a full theory of evaluation is better suited for another paper, at this point it suffices to point out that evaluation can take the form of pointing to Argumentation Schemes that were not used when they could have been, pointing to poor usage of the Argumentation Schemes that we employed, assessing the quality of the answers to the Critical Questions, and acknowledging the inclusion or lack thereof of goals an agent should have. In all of these cases, an evaluator can pinpoint an exact component in the process and recommend a systematic solution for improvement.

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Arguing, bargaining and persuading in constituent processes[1]

Giovanni Damele
Francesco Pallante

1. Introduction

In this essay we will outline the constituent process that took place in Italy between 25 July 1943 (the fall of Fascism) and 1 January 1948 (the effective promulgation date of the Republican Constitution), paying special attention to the debate that arose during the sessions of the Constituent Assembly between 2 June 1946 and 27 December 1947.

This essay is based on Jon Elster's paper, *Arguing and bargaining in two constituent assemblies*[2], which focuses on the study of constituent processes and, above all, constituent debates. The theoretical issues raised by the concept of constituent power[3] will remain in the background for reasons of space.

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1   Giovanni Damele is the author of section 8; Francesco Pallante is the author of sections 3–7 and 9. Sections 1, 2 and 10 are the fruit of a shared reflection.

2   ELSTER 2000 (the paper was based on a conference held at Yale University in 1991).

3   In Italian constitutionalist doctrine, see at least: BARILE 1966, DOGLIANI 1986 and 1990, MORTATI 1972, GRASSO 1985, PACE 1997, RESCIGNO 1996. In international literature, the following writers have recently worked on standardizing constituent processes with regulatory intents: GINSBURG-ELKINS-BLOUNT 2009, ELKINS-GINSBURG-MELTON 2009; GINSBURG 2012.

2. The Elster diagram

The summary indications in Elster's essay can be broken down into seven main steps of constituent processes:

1) convocation of the constituent assembly
2) choice of the delegate selection procedure
3) definition of the mandate of the assembly and of the delegates
4) verification of the delegates' credentials
5) choice of the decision-making procedure to be adopted during the assembly
6) discussion and approval of the constitution by the assembly
7) ratification of the constitution

The Norwegian scholar first distinguishes between the first two steps and the following ones, claiming that the convocation of the constituent assembly and the choice of the delegate selection procedure are performed by independent authorities who are not part of the assembly, while all of the other steps refer to assembly decisions (under penalty of establishing a puppet-body that simply enacts the will of others)[4].

This point is pivotal: only a process that is possibly "self-founded" can truly be considered as "constituent", whereas a process which follows from a decision by a pre-existing body[5] should be considered as being "constituted".

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4   ELSTER 2000: 358–59 (in addition to 361–62, 364 and 366).
5   RESCIGNO 1996: 34 *et seq*.

3. The convocation of the constituent assembly

A) Starting from the first step, according to Elster, the authority convening the constituent assembly may be[6]:

– the constitution itself, if it provides for periodic constituent assemblies (Thomas Jefferson's idea). The idea that the constitution provides for its total review is similar (see Article 193 of the Constitution of the Helvetic Confederation; something similar happened in Spain in 1978)[7].

– an authority different from that of the State to which the constitution will apply: for example, an occupying power (as in Western Germany and Japan after the Second World War). Today, the hypothesis that a non-State authority has an international character prevails (consider Kosovo and Afghanistan).

– a provisional government resulting from a revolution (as in France with the 1789 and 1848 revolutions) or a coup (the case of the Ghana Constitution of 1992). Naturally, a revolution or coup does not always involve the use of violence (since the constituent assemblies convened by bodies belonging to the previous constitutional organization – like the French National Convention which approved the 1793 Constitution – would allegedly fall under this hypothesis).

– a mixed government or a seat of concertation between the old regime and the opposition (which is what happened in Poland in 1989 with the so-called Round Table Agreement).

B) In the Italian case, the convocation of the Constituent Assembly may be formally traced back to two documents:

– Law Decree no. 151/1944, which provides for the election of a Constituent Assembly to pass resolutions on all aspects (including the institutional form: monarchy and republic?) of the "new State Constitution" (the so-called first provisional Constitution).

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6   ELSTER 2000: 358, note 64.
7   *Contra* PACE 1997: 8 *et seq*., in his opinion these hypotheses amount to the practice of a constituted power.

–   Delegated Decree no. 98/1946, which redefines the powers of the
    Constituent Assembly establishing that the institutional issue must
    be solved by popular *referendum* to be held at the same time as the
    election of the assembly itself (so-called second provisional Con-
    stitution).

Both documents were adopted by provisional governments of national
unity, hence by external authorities according to the Elster diagram: the
former was enacted by the Bonomi government, the latter by the first
De Gasperi government. In both cases, there were also influences from
the monarchy and the Allies.

Elster notes that, since it is not clear whether the new or old rules
apply at the time of constituent processes, the relationships between
the old and new regimes often give rise to a logic paradox by virtue of
the framers' attempt to give their actions formal legitimacy based on
pre-existing legal arrangements[8].

In the Italian case, a clear symptom of these problems is the dif-
ferent format taken by the two decrees: one is a law decree, the other
is a delegated decree. The difference is explained by the fact that the
document dated 1944 – adopted under Article 3 of Law no. 100/1926 –
establishes the delegation of legislative powers to the government; con-
sequently, only subsequent documents may be delegated documents.
However, since law decrees are temporary, there is the problem of the
conversion of Law Decree no. 151/1944 into law: the fifteenth transito-
ry and final disposition of the Constitution did so, however, terming it a
… "delegated decree".

4. The delegate selection procedure

A) As concerns the selection method of assembly members, Elster
stresses that the deciding authority should be different from the one con-
vening the assembly; however this would create a "puppet assembly"

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8   ELSTER 2000: 360.

since the delegates would allegedly be selected based on their loyalty to the convening authority[9]. The Norwegian political scientist does not, however, linger on subjects regarding the selection of the delegates[10].

B) In the Italian case, the document establishing the methods of formation of the Constituent Assembly is Delegated Decree no. 74/1946, which introduced a strictly proportional electoral law. The selection of the assembly members was referred to the people, convened on 2 June 1946 to vote by universal suffrage for the first time. It is clear, however, that the definition of the electoral system was extremely important and was largely affected by the fact that the parties were not familiar with their electoral "weight" (since they opted, Rawls-style, for the choice that would have secured them in case of defeat).

In the Italian case, two independent authorities were involved: the provisional government, which established the electoral system, and the Italian people, who elected the assembly delegates. This partly proves the Elster diagram wrong since the provisional government intervened in both phases – convocation and selection of the members – which preceded the formation of the Assembly.

5. The definition of the mandate

A) As concerns the definition of the mandate, the question is whether there is a constraint. On the practical side, it is easy – as Elster writes – for the authority convening the constituent assembly (or, more rarely, the one selecting its members) to try to influence the outcome of the work by constraining the mandate of the delegates. It is, however, equally easy for the constituent process to get away from its "creator" (which is what happened to Louis XVI)[11].

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9   ELSTER 2000: 359, in particular note 65, which gives the example of "the body of 66 men convened in China by Yuan Shikai in 1914 to give his rule a semblance of legality through a 'constitutional compact'".
10   ELSTER 2000: 359.
11   ELSTER 2000: 361–62.

Aside from its practical infeasibility, the Norwegian scholar does not give a completely negative opinion of putting constraints on the mandate because it can be useful in order to strengthen the threats made during the bargaining[12].

B) In the Italian case, it could be believed that a type of constraint was applied to the mandate of the Constituent Assembly members by not allowing them to decide on the institutional question.

As already mentioned, Law Decree no. 151/1944 initially stated that the selection was the responsibility of the Assembly, then Delegated Decree no. 98/1946 re-examined the issue, referring the decision to the people by referendum. This is one of the key steps of the entire Italian constituent process. Despite the fact that the 1944 decree resulted from a comprehensive agreement involving the Allies, CLN (National Liberation Committee) parties and the monarchy, Lieutenant Umberto broke the understanding, asking the people to decide on the institutional question. Along the same lines, the (mainly monarchist) Italian Liberal Party and the Christian Democracy (DC) were concerned about the gap between the Party's positions and those of its electorate (considered more inclined to institutional continuity). De Gasperi also convinced the Allies to support the referendum as a solution. On the contrary, the left-wing parties and the Actionists favoured abiding by the original provisions of Law Decree no. 151/1944[13].

The issue was first raised by De Gasperi on 10 October 1945 under the Parri government. A complex debate arose which became intertwined with the two additional issues of whether or not the Constituent Assembly should also act as a law-making body and whether the Constituent Assembly should pass resolutions by a simple or a qualified majority. The Council of Ministers (and the so-called Cabinet, a selected committee made up of the ministries representing the CLN parties) was involved in these debates during the sessions held between 19 February and 2 March 1946 until the secretaries of the DC, PSI and PCI agreed to approve Delegated Decree no. 98/1946 under the De Gasperi government.

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12   ELSTER 2000: 363.
13   The event is carefully re-enacted in RICCI 1996: 449–459.

6. The verification of credentials

A) Elster considers the verification of the credentials of the constituent assembly delegates a logic paradox (in addition to the paradox on the legal origin of the constituent assembly): the assembly cannot verify the credentials of the delegates without taking office, but – at the same time – it cannot take office without having first verified the credentials of its member[14]. An independent audit would be necessary, but this would undermine the independence of the assembly. In France, the issue was hotly debated during the Estates General convened by Louis XVI, and a solution was found on the basis of the following consideration: "It is impossible to believe that the majority of those who present themselves as delegates should not have valid credentials"[15].

B) In the Italian case, the Constituent Assembly established a Committee responsible for verifying the credentials of elected members, which it did, making some replacements.

The issue raised no specific debates because the Assembly worked on the basis of the parliamentary procedures of the pre-Fascist Lower House (*Camera dei Deputati*), which had already provided that the Council was competent for the election.

7. The choice of the decision-making procedure

A) Elster mentions the following problems regarding the choice of the procedures to be adopted during the assembly to discuss and approve the constitution[16]:

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14   ELSTER 2000: 366.
15   ELSTER 2000: 366.
16   ELSTER 2000: 367 and 404–405.

1) the duration of the sessions
2) whether the constituent assembly should also act as a law-making body
3) how to decide on the allocation of the time between law-making and constitution-making
4) the possibility to establish constitution-drafting or problem-solving committees
5) whether to proceed in closed sessions or open the debates to the public. (Elster believes that closed sessions encourage bargaining and arguing because it is easier to change opinion.)[17]
6) the quorum and the voting method (by "person" or by group[18]? And, if by "person", by roll call, show of hands, division of the assembly etc.?)
7) the procedure of transforming votes into decisions

B) In the Italian case, we must refer to Article 4 of Delegated Decree no. 98/1946 that applied to the Assembly the procedures promulgated for the Lower House in July 1900, as repeatedly amended until 1922. The Constituent Assembly itself made some "additions". In short, the decision on the procedures was made by an independent authority (the provisional government, although with the Assembly's tacit consent) in lieu, as the Elster diagram provides, of the Constituent Assembly.

Let us now look more closely at the individual profiles identified by Elster. Starting with the duration, Delegated Decree no. 98/1946 established an eight-month deadline from the first session (held on 25 June 1946). This deadline could be extended by no more than four months. After using such an extension, the Assembly applied for an additional six-month extension (plus a few days, to set the deadline at 31 December 1947) since the duration was decided partly by an independent authority (the provisional government), and partly by the Constituent Assembly itself.

As concerns law-making powers, the CLN was internally divided between the DC and PLI, which wanted, with the support of the Allies,

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17   ELSTER 2000: 410–411 (on the usefulness that the involved parties may change their ideas, also see p. 385).
18   The question was hotly debated during the French Constitutional Assembly (ELSTER 2000: 367–368).

to limit the competences of the Assembly to constitution-making topics (leaving ordinary law-making powers to the government) and left-wing parties, which thought it preferable to refer the decision to the Constituent Assembly. The question had to do with the fear that the left-wing parties, if they won the election, might have exploited the Assembly's powers in order to establish "revolutionary" legislation. The problem was addressed together with those of the subject in charge of making the institutional choice and the quorum of the Constituent Assembly. In this case, the solution is also found in Delegated Decree no. 98/1946 (Art. 3). Although the provision ratified the victory of moderate parties, the Assembly was permitted to indicate bills that, though not part of its law-making competence, were to be submitted for its resolution[19].

Moving on to the time of the sessions, the division between constitution-making and "ordinary" activity[20] was decided with the planning of the sessions by the Constituent Assembly itself: 375 public sessions were held, 173 of which focused on the discussion and approval of the new Constitution.

Concerning the establishment of constitution-drafting committees, a Constitutional Committee was appointed under the presidency of Meuccio Ruini in order to prepare the Constitution draft. The 75-member Committee was split into three sub-committees: (1) citizens' rights and duties; (2) constitutional organization of the State, (which was then split into two branches: one on executive power, one on judicial power and the Constitutional Court; a selected committee was also established for the regional system); and (3) economic and social relationships. The topics of the first and the third sub-committees partially overlapped, so a Coordinating Committee was established to unify their work. Eventually, a Drafting Committee (with 18 members) prepared the text of the final draft, coordinating and harmonizing the work of the three sub-committees.

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19   For a re-enactment of the event, see RICCI 1996: 449–459.
20   In addition to the opinions on the draft legislative decrees, the Assembly's main non-constituent activities were the vote of confidence for the De Gasperi Governments II, III and IV; the approval of the budget laws for 1947 and 1948; and the ratification of the peace treaties signed in Paris on 10 February 1947.

As concerns whether the sessions were public or closed, the Constituent Assembly's activity was public, but that of the Committee and its various sub-committees was not since the Italian people were not permitted to directly attend the entire constitution-making process[21]. The debate was covered by the press[22] and the Ministry for the Constituent Assembly also provided extensive information.

The quorum and voting method were governed by the pre-fascist procedures of the Lower House[23]. Voting (by "person") was by ballot for the final approval of the bills and by sitting and standing in all other cases (unless ten members asked for voting by division, fifteen by roll call, and twenty by ballot). The quorum was the majority of participants. Under these rules, the Constitution was approved on 22 December 1947 with voting by ballot by roll call (out of 515 participants, 453 votes in favour, 62 against).

As concerns the "procedure for transforming votes into decisions"[24], once approved, the Italian Constitution was enacted by the provisional Head of State, Enrico De Nicola, on 27 December 1947 and published immediately in an extraordinary edition of the Official Gazette no. 298 of the same day. It came into effect on 1 January 1948.

8. The discussion

A) Elster believes that constitution-making projects represent a "paradigmatic case" useful to highlight two types of dialogue: *arguing and bargaining*. Those "types" are exhibited in "their most striking forms"[25] in constituent assemblies, which are more polarized than ordinary law-making bodies and oscillate between "higher law-making"

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21   PALDIN 2004: 46 (and 48–49) writes, on the other hand, that the sessions were
     often "quite confidential".
22   POMBENI 1995: 93–96.
23   RICCI 1996: 449–459.
24   ELSTER 2000: 367.
25   ELSTER 2000: 347.

and "sheer appeal to force". Elster also introduces a third type of (in Elster's words) "speech act": "*rhetorical* statements aiming at *persuasion*", though he is uncertain about its proper analytical characterization. However, it seems that the distinction between the three types is a question of "motives". Not those of the speakers, which Elster distinguishes as "reason", "passion" and "interest", but the motives that the speakers ascribe to their audience. Rhetoric may perhaps be defined "by the feature that its practitioners appeal to the passions of their audience rather than to their reason or self-interest" since "in some debates reason speaks to reason; in others, interest to interest; in still others, passion to passion"[26]. Somehow, Elster's triadic model seems to reflect Aristotle's three-part division of persuasion modes, where *logos* can easily be matched with arguing, *ethos* can refer to bargaining (where the criterion of credibility is key) and *pathos* could match "rhetoric" within the meaning given by Elster, i.e. an appeal to the passions of the audience. However, Elster does not develop this parallelism, nor does he develop the analysis of the more genuinely pathetic components of assembly discussions.

A.1. (*Arguing and bargaining*). For Elster, rational arguing is subject to criteria of *validity*, and promises or threats to criteria of *credibility*[27]. The former recalls Habermas's theory of communicative action, binding a speaker aiming at *understanding* and not sheer *success* to "three validity claims: propositional truth, normative rightness, and truthfulness". Even speakers who are not "genuinely moved by impartial considerations of the common good", but whose concerns are "purely self-interested", may still be forced or induced "to substitute the language of impartial argument for the language of self-interest"[28]. This substitution would be the fruit of the *civilizing force of hypocrisy*, thanks to which "a speaker who wants to *appear* as aiming at understanding must also appear to be committed to these claims"[29]. Consequently, "one need not always oppose impartiality and self-interest" since "one may offer an argument *from* self-interest *for* impartiality". Such a typical argument is the

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26   ELSTER 2000: 371, no. 116.
27   ELSTER 2000: 372.
28   ELSTER 2000: 349.
29   ELSTER 2000: 373.

so-called "veil of ignorance"[30], or, in general, represents all those cases in which "apparently self-interested behaviour" may actually be guided "by impartial concerns"[31]. Authenticity, or sincerity, on the other hand may be traced back – at least in one of its versions – to consistency, which is not incompatible with what could be defined as *argumentative hypocrisy*[32]. It would be important to distinguish between authentic changes of opinion, which *per se* would not reveal an inconsistent argument, and actual opportunism[33].

As concerns arguing, Elster distinguishes arguments as "tending to be" either consequentialist or deontological. Roughly speaking: appealing "to overall efficiency" or "to individual rights". The latter, as well as those "based on the public good" and those "which rely on some version of utilitarianism", are considered impartial because of their generalizability[34]. Starting from these arguments, the framers would somehow prove that they are motivated by impartial *reason*, despite being permeable to self-interested considerations, as we have noted. Elster qualifies framers as *imperfectly rational*[35].

While rational discussion is supposed to be based only on the "power of the better argument", constitutional bargaining, by contrast, rests on "resources that can be used to make threats (and promises) credible". Such resources may be extra-political or intra-political. The latter include the exchange of concessions[36]. The use of these resources is strictly dependent on the framers' ability to make them credible: the framers' credibility affects the credibility of their threats and/or their promises.

A.2. (*Pure and impure types*). In the analysis of the actual arguments of the two assemblies, the two types seem to translate in a sequence of "mixed" or "impure" cases. On the one hand, a strategic use of (apparently) non-strategic arguments is not only possible but common, and in some cases desirable: in these cases, "self-interested actors often try",

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30   ELSTER 2000: 374.
31   ELSTER 2000: 388.
32   ELSTER 2000: 413.
33   ELSTER 2000: 377.
34   ELSTER 2000: 378–379.
35   ELSTER 2000: 380.
36   ELSTER 2000: 392.

in their own self-interest, "to ground their claims in principle". On the other hand "bargainers often try to present their threats as warnings"[37]. The difference between threats and warnings would lie in the fact that the former "are statements about what the speaker *will do*", whereas the latter are "statements about what *will* (*or may*) *happen*, independently of any actions taken by the speaker"[38]. In the former case, "self-interested actors" appeal to an *impartial equivalent*. In the latter case, bargainers substitute a *factual equivalent* of a threat.

From the point of view of arguing, what happens in reality is not actually a "*perfect fit* between partial interest and impartial arguments" but a "*maximal* fit"[39]. The reasons for this substitution between partisan arguments and impartial arguments may vary. First, "if others believe that one is truly arguing from principle, they may be more willing to back down". Second, "legislative coalitions tend to use public-regarding language as a 'subterfuge' for what is in reality a deal among special interests"[40]. Third, "by citing a general reason one might actually be able to persuade others"[41].

In any case, thanks to the *civilizing force of hypocrisy*, arguing "tends to yield more equitable outcomes than bargaining", even when it is purely strategic and based on self-interest, because it will prevent "the strong from using their bargaining power to the hilt". In this case, "the optimal impartial equivalent", able to "yield more equitable outcomes", will be the one that "dilutes" the self-interest of the strong by "taking some account of the interest of the weak"[42].

B) Elster believes that "the most important requirement" of a bargaining theory should be "that we are able to specify what will happen during a temporary breakdown of cooperation"[43]. In short, how the constituents can get out of an impasse caused by a non-cooperative – even

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37   ELSTER 2000: 405–406.
38   ELSTER 2000: 415.
39   ELSTER 2000: 406.
40   ELSTER 2000: 408.
41   ELSTER 2000: 408.
42   ELSTER 2000: 413.
43   ELSTER 2000: 398.

if temporary – situation. An example is the debate which led to the final version of Article 29 of the Constitution[44].

It is known that this article was the result of a difficult writing process that significantly affected its text (and its subsequent interpretations). This is due, on the one hand, to the relevance of the topics (family and marriage) for the members of the DC Party and, in general more for Catholics, and on the other, to the difficult position of the Communist Party, which was not willing to be confined to markedly secular positions in view of the future political election (in which Catholic votes would have been critical) and could not ignore that a significant portion of its electorate (and PCI members) held positions very similar to DC Party members on some aspects of the matter, and divorce in particular.

The drafting of Article 29 was marked by a series of "temporary breakdowns of cooperation" that were overcome through exchanges of concessions, recourse to "intra-political" resources (for example a strategic placement of available votes of a certain parliamentary group) and the strategic use of procedures. A first impasse caused by the opposing positions of the sub-committee on the indissolubility of marriage and the definition of family as a "natural and fundamental unit of society" was overcome by Moro and Togliatti through an exchange of concessions which translated into a new version that divided the theme into two articles, included a (more ambiguous) definition of "natural society" in the article on the family and a (more vague) reference to "unity" (in lieu of indissolubility) in the article on marriage. The second breakdown of cooperation occurred because of Togliatti and the PCI members' failure to take strategic recourse to the "intra-political" resource of voting. In the Constitutional Committee, in keeping with the compromise reached with Moro, Togliatti led his group to approve the formula "family as natural society". However, when the vote was cast for the second article, the amendments against the clause of "indissolubility of marriage" were

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44   CAPORRELLA 2010. The documents of the Constituent Assembly are available online in the "Previous legislatures" section of the website of the Lower House ("Constituent Assembly" section) or on the "Birth of the Constitution" website, by Fabrizio Calzaretti: www.nascitacostituzione.it. The debates leading to the final drafting of Article 29 were held on 26 July, 13 September, 30 October, 5–7, 12–13 and 15 November 1946 and 15 January 1947, as concerns the I Sub-committee; 4–8, 10–11 and 17 March, 15, 17–19, 21–24 April 1947, as concerns the Assembly.

not approved. Therefore, the result could be re-balanced only in the last voting session through the strategic use of the Assembly's procedures. The request for secret voting by twenty Assembly members allowed the compromise to be re-established, leading to the approval by three votes of an amendment by Socialist Party member Grilli to remove the reference to "indissolubility". As for bargaining and the recourse to warnings, it is interesting to consider the speech by Lelio Basso in the 7 November 1946 session of the I Sub-committee, during which the Socialist Party member warned that the "categorical request for the indissolubility of marriage" might have "led to a break-up of the Sub-committee".

As concerns the arguments used, the trend was not so much to argue on principles, but to present consequentialist arguments. In both cases, the objective was to present a general and impartial point of view. This is especially clear in the speeches by DC Party framers, whose main concern was to prove that the need for inclusion of "indissolubility" in the constitutional text went beyond compliance with certain religious principles. Corsanego declared that "the authentic Italian population, even in its humbler classes, has clear, well-defined and tangible arguments" on the family, recalling the authority of "common sense". He also resorted to a consequentialist argument, noting that "divorce represents the dissolution of the family and a poisonous germ for its establishment, as is proved in all the countries where it is accepted". La Pira also claimed to insist on permanence because he had been persuaded by "an increasingly determined confirmation in the scientific field of the indissolubility of marriage considered as a structural element of the family". He then stressed that the DC Party members wanted to include indissolubility in the Constitution because it should concern marriage as such, and not as a sacrament (hence, also civil marriage). Thus, he considered important "to overcome the question of the parties, so that the claim made is not the claim of the DC Party, but of the entire Italian population".

The intention of the DC Party members to present a theme from an impartial point of view is clear. Such a theme, they admitted, was essential for their political and religious position. The position of those opposing inclusion of the phrase "natural society" with respect to the family in the Constitution, and those opposing the introduction of the indissolubility of marriage appeared more delicate. Following the

compromise between Moro and Togliatti, the PCI Party members opposed the latter but not the former. On the other hand, the Socialists and some Liberals opposed both. However, neither the Socialists nor Togliatti posed the question of divorce. In a way, because of the necessary tactic in view of the future election, the position of the left-wing parties appeared more "defensive" and ambiguous, which exposed them to the accusation of inconsistency and opportunism.

Concerning the "exchange of concessions" between Moro and Togliatti, we should note the recourse to the strategic use of ambiguity, which allowed for an agreement on a formulation sufficiently ambiguous to provide different interpretations that were more or less directly consistent with the actors' different points of view. For Moro, keeping the expression "natural society" in the article allowed him to overcome a merely confessional position and affirm the "natural rights" of the family, while the definition of "natural society" had no legal effect for Togliatti and did not imply *per se* the conclusions that La Pira wanted to draw (i.e. "the indissolubility of the bond").

9. Modes of ratification

A) The modes of ratification – Elster states – are necessary to confer "downstream" legitimacy on the constitutional document approved by the constituent assembly.

The following possible modes can be identified[45]:

– right of veto of the independent convening authority (but how can a constituted power influence the constituent power?)
– ratification by the people through *referendum* or an *ad hoc* convention
– no additional ratification to the final vote of the constituent assembly.

B) In the Italian case, the approval by the Constituent Assembly was sufficient. However, it should be considered that there had already been

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45   ELSTER 2000: 371.

popular involvement because of the institutional *referendum* in whose wake the Constituent Assembly operated.

10. Conclusion

As concerns the execution of the constituent proceedings, we can say that the Elster diagram shows actual endurance capacity as applied to the Italian constituent process. Some steps may be overestimated (such as the verification of delegates' credentials), others underestimated (like the definition of the assembly's powers). However, as a whole, the steps appear to match and the most critical profiles identified by the Norwegian scholar are present in the Italian case.

The conclusion from the arguing theory perspective appears more critical. The analysis of the debate on Article 29 highlights some weaknesses of Elster's model. The first is the role played by rhetoric and more generally the concept of rhetoric he refers to. The second problem is the articulation of the debates according to the arguing/bargaining opposition and the analytical utility of such an opposition. A third problem could be the strategic use of ambiguity. As concerns the latter two, we can supplement Elster's model with analytical instruments from arguing theory and bargaining theory.

Qualifying bargaining and arguing as "types of dialogue" appears to provide a better description of their characteristics and especially their co-presence within the same dialectic interactions through the concept introduced by Walton of the "*dialectical shift*". In this case, it is not just a "combination" of types of dialogue but a more-or-less gradual transition from one type of dialogue to the next. It may be a legal or illegal transition, and in the first case, the second type of dialogue is included in the first, thereby further developing, constructively, a dialectical shift[46]. Thus, bargaining can be transformed (more or less accidentally) into a persuasive dialogue. These transitions then make it

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46   WALTON 1992: 138 and MACAGNO 2011: 106.

possible to assess the context within which a certain argument may be fallacious or not, replacing a rigid concept of fallacy with a dynamic one linked to the use of an argument in a set type of dialogue. Considering the Elster concept of bargaining, for example, and the central role played by threats or warnings within it, it may be interesting to recall Walton's analysis of the argument *ad baculum*, according to which the criterion distinguishing between a fallacious and a non-fallacious use of the threat is exactly the type of dialogue since it may be legitimate in bargaining but not in a persuasive dialogue[47].

Strategic use of ambiguity plays a key role in overcoming "temporary breakdowns of cooperation". As Eric M. Eisenberg noted, strategic ambiguity favours agreement on an abstraction without committing the bargainers on their potential future interpretations[48]. This is even more important when considering that arguers (or bargainers) in a deliberative setting may have multiple objectives, some of which may even be (partly) contrasting. One can see that this is very similar to what Cass Sunstein defined as "*incompletely theorised agreements*"[49] in a juridical setting, i.e. a communicative strategy that does not minimize but manages ambiguity[50].

The role of rhetoric remains to be defined. Elster's dyadic model appears to be a triadic model, which is missing a component: "*rhetorical* statements aiming at *persuasion*". This is because Elster considers the term "rhetoric" to essentially have a negative meaning, i.e. the common meaning of manipulation, appeal to passions (and not to reason) and demagogy. However, it is reductive to confine rhetoric to a sheer appeal to passions because it is actually the reference theoretical framework of any persuasive discourse. In a deliberative setting, the persuasive purpose combines both arguing and bargaining and eventually the appeal to emotions. As a technique of persuasive discourse, rhetoric expands its scope well beyond a mere appeal to the audience's passions. The point is not even the strategic use of arguments but, more generally, strategic arguing as a discourse technique whose purpose is to persuade

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47   WALTON, MACAGNO 2007: 75. More in general on the topic, see WALTON 2002.
48   EISENBERG 1984: 231.
49   SUNSTEIN 2007.
50   EISENBERG 1984: 238.

the audience. Therefore, Elster's hierarchy should be overturned since both strategic arguments and bargaining could develop in a deliberative framework and resort to persuasive (rhetorical) discourses.

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