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Sources of Law*

Giorgio Pino

1. An Oddly Neglected Topic

The sources of law are a neglected topic in contemporary jurisprudence. While all the major, classical works of mid twentieth-century jurisprudence, and particularly those in the province of legal positivism, incorporated some theoretical treatment of the sources of law,[1] very scant reference—if any—is made to this subject in mainstream contemporary legal philosophy. True, a fair amount of jurisprudential attention has been recently directed to *some* types of sources of law, such as constitutions, legislation, precedents, custom, and even legal scholarship.[2] However, by comparison, very little theoretical attention is paid to the concept of sources of law *as such*.[3]

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[1] See Kelsen 1945, 131–2, 152–3, and Kelsen 1960, 232–3; Ross 1953, ch. 3 (Ross also authored, some 20 years before his masterpiece, a conspicuous and nowadays mostly ignored *Theorie der Rechtsquellen*: Ross 1929); Hart 1994, 95, 97, 101, 106; Bobbio 1961, 163–83.

[2] For an outstanding example of this line of inquiry, see Gardner 2012, ch. 3.

[3] The few exceptions will be duly referenced in the remainder of the essay. The concept of source of law figures prominently in the jurisprudence of Joseph Raz (the 'sources thesis'), but Raz admittedly uses 'it in 'a somewhat technical sense' (Raz 1979, 47).

Arguably, several reasons may account for this lack of interest. On the one hand, an overwhelming amount of intellectual energy in contemporary analytical jurisprudence has been devoted to exploring not just 'ordinary' sources of law, but rather only the 'ultimate' sources, that is, the ultimate foundations of a legal system and of legality. On the other hand, the topic of 'ordinary' sources of law—as opposed to 'ultimate' sources—may appear to many jurisprudents as too parochial, doctrinal, and empirical, while a 'genuine' jurisprudential inquiry is supposed to be entirely general or even universal in scope, and purely conceptual in character. According to this view (or tacit assumption), sources of law would in fact belong to the domain of 'particular jurisprudence', i.e. to the doctrinal study of particular legal systems, rather than to general jurisprudence.

Yet, it is difficult to understate the importance of the topic of the sources of law—and not only of ultimate or foundational sources—for a theoretical inquiry on the law. Sources of law, after all, are what makes of something 'a law'—a law is what is produced by, or derives from, a source of law. Sources epitomize the very 'positivity' of positive law, an aspect of law which is central to legal positivism of course,[4] but whose importance not even a natural lawyer or an anti-positivist in his right mind would ever dare deny. The identification of the law is, in fact, the identification of its sources in the first place. Legal reasoning is

[4] Leiter 2018, 7: legal positivism holds that 'norms are *legally valid* only in virtue of having certain sources (e.g., judicial pronouncement or legislative enactment) and without regard for their *merits*' (emphasis in the original). Some paradigmatic positivistic statements: Kelsen 1945, 114: 'Law is always positive law, and its positivity lies in the fact that it is created and annulled by acts of human beings'; Gardner 2012, 86: 'there is no such thing as non-positive law'.

constrained by the very existence of the sources to be interpreted.[5] And an argument qualifies as a *legal* argument only insofar as it may ultimately be traced to a source of law.

If these sketchy observations are correct, then the sources of law represent not just one legitimate subject of jurisprudential reflection, but a crucial one.[6] This is exactly the point of this essay: to give a jurisprudential account of the notion—to clarify what a source of law is, and what is involved in the existence and in the operation of a source of law. As a consequence, in this essay you will not find a sustained philosophical argument in favour of One Big Idea. Rather, the aim of the essay is to draw attention towards *a subject-matter*, and the several important jurisprudential insights that it may reveal.

Indeed, as soon as one zooms in on the sources of law, and on their operations, many conundrums and conceptual intricacies are bound to appear—starting from the definition itself of 'source of law', which is far less obvious than it may appear at first sight. Moreover, a careful reflection on the topic of the sources of law can help shed light on many long-debated jurisprudential topics, such as the concept of legal validity, the notion (and the conditions of existence) of a legal system, the problem of legal change, and the scope of legal disagreements.[7]

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[5] Raz 2009, 223 ('legal interpretation is primarily […] the interpretation not of the law, but of its sources').

[6] See Raz 2009, 109 ('the authoritative laying down of standards is the decisive moment in the legal process'), and 223 ('legal sources are central to the law'); Schauer 2009, 66.

[7] While this essay will be an exercise in analytical legal theory, it should be noted that the topic of the sources of law has considerable relevance also in the perspective of moral and political philosophy. Indeed, the operations of the sources of law are crucial to some Rule of Law requirements and to questions of political legitimacy, namely those relating to the publicity and accountability of the law-making process—some sources enhance the democratic credentials of a

The essay proceeds as follows. First, a few ambiguities will be unravelled, and a few distinctions will be introduced, in order to clear the path for a working definition of 'source of law' (2). Then, I will focus on 'formal' sources and their varieties (3), and I will clarify the role of sources in the interpretive process (4). Finally, I will conclude with some more general remarks regarding the importance of the topic of the sources of law for a positivistic inquiry (5).

2. Focusing the Sources of Law

The first step in a tentative theory of the sources of law is, of course, to provide a definition. This is crucial, since the phrase 'source of law', as it is currently used in the jurisprudential marketplace of ideas, is obscure and ambiguous under several respects. The very notion of 'source of law' is controversial, and jurisprudents and jurists alike tend to use it in a rather casual way.

In part, the obscurity of the phrase 'source of law' derives from the fact that 'source' is, of course, a metaphorical, figurative term—it evokes the idea that there are 'places' from whence the law springs, so to speak. In addition, the metaphor also conveys the notion that the sources of law do not just provide for an isolated act of law-creation, but for a continuous supply of legal norms—just as water springs continuously from an actual source.[8] But, as is

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legal system, while others do not; some sources promote publicity and accessibility of legal standards, other sources do so to a lesser extent. On these aspects of the sources of law, which will not be explored here, see Atiyah, Summers 1987, 23–8; Waldron 2009, 684–91; Celano 2013; Besson 2010, 172.

[8] This last point captures *part* of the idea of law as a 'dynamic' normative system (i.e., it is open to continuous change). But on the 'dynamic' character of the law see also infra, fn. 10.

the case with metaphors, the cognitive shortcut provided by figurative speech, beneficial as it may be, often results in a lack of conceptual precision.

2.1 The Standard Picture

Let's start from the predominant account of what is a source of law. The sources of law, it is often said, are acts or facts that create, modify, and annul legal standards ('laws, 'legal norms', and the like).[9] What could a source of law possibly be other than that?

Well, on closer inspection, such a definition starts looking somewhat precarious. To begin with, it is incomplete: it does not clarify *by virtue of what* some acts or events are able to create, modify or annul, legal standards. The usual answer, here, is that some acts or facts are sources of law because they are authorized to produce legal standards by the legal system itself.[10] But the nature of this 'authorization' is not always clear. Indeed, a familiar idea is that something counts as a source by virtue of a power-conferring norm (a rule of change, a norm that confer competence) of the legal system—a norm, that is, which specifies who is empowered, and how, to create etc., the law in that legal system. This seems all well and good—a good many sources of law actually work like this, through an empowerment bestowed by other norms of the relevant legal system. But then, what about a constitution? Usually, a constitution is not the product of a formally attributed law-making power. There are no power-conferring norms, in the legal system, granting the competence to *create* a

[9] See, along these lines, Kelsen 1945, 131; Guastini 1996, 370; Marmor 2015, § 1.1; Besson 2010, 163, 169, 170.

[10] Kelsen 1945, 124: 'law regulates its own creation insasmuch as one legal norm determines the way in which another norm is created' (this is another, and more technical, sense of 'dynamic': see ibid., 112–14). Guastini 1996, 372.

constitution.[11] Ordinarily, constitutions are the upshot of a revolution, a civil war, or the like. Indeed, prior to the enactment of the constitution, the relevant legal system did not actually exist: the constitution is supposed to do exactly this job, to create—i.e. to constitute—a brand new legal system. So the 'new' legal system cannot have formally authorized the production of its own constitution. Should one conclude, then, that constitutions are not really sources of law, since their production has not been—and arguably, cannot be—duly authorized by the relevant legal system?

Moreover, if one considers the reality of many legal systems, one will usually find some things that are treated as sources of law, but that nevertheless do not enjoy a formal authorization to this effect by the meta-norms of that legal system. For instance, judge-made law does not formally qualify as a source of law in civil law countries, since these countries do not explicitly include any rule of change to this effect. Still, there is ample evidence that even in these countries judge-made law is often treated as a source of law.[12]

Lastly, the idea that something is a source if it is authorized by the legal system makes the standard definition somewhat circular: on the one hand, the sources of law are identified by the relevant legal system; but on the other hand, the legal system itself is identified by its sources—the description of a legal system usually begins with a list of its sources, as any law textbook readily shows.

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[11] I assume here that—barring some convolute unclear cases—there is a sharp difference between amending an existing constitution and enacting a brand new one. And the difference lies exactly in the fact that the enactment of a new constitution happens outside the channels of constitutional amendment. This point will be taken up again later, fn 42 and accompanying text.

[12] MacCormick, Summers (eds.) 1997; Bell 1997.

A possible, and promising, way out of such difficulties would be Hartian in character: something counts as a source of law if it is directly or indirectly so defined by the Rule of recognition of the relevant legal system.[13] Accordingly, at least some sources do not owe their status to explicitly stated power-conferring norms, but rather to the very practice of recognition endorsed by the officials. And indeed, in this essay I will develop and defend one version of this line of argument. But, for now, let's just take due note of one essential point: the Hartian approach calls for a revision of the standard definition of the sources of law—actually, a sheer inversion of perspective. While the standard definition looks at the sources of law from the perspective of law-making, this different, broadly Hartian approach adopts the standpoint of law-applying institutions. In the following of this essay we'll see in more detail how this reflects in the identification and existence of the sources of law.

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[13] Post-Hartian jurisprudence has produced a bewildering array of interpretations of the nature and functions of the rule of recognition (for a recapitulation of the debate, and for my own take on the issue, see Pino 2011). But it can hardly be doubted that Hart conceived of the rule of recognition as a device for the identification of the sources of law in the first place (see Hart 1994, 97, 99, 101, 106, 266, 269, 294; Hart 1982, 156). This point is clearly seen by Ross 1962, 1186; Raz 1986, 1107 ('All it [*viz*., the rule of recognition] does, and all it is meant to do, is to identify which acts are acts of legislation and which are the rendering of binding judicial decisions, or more generally, which acts create law. The Rule of Recognition does not help one to understand what is the law thus created, whether it is stated or implied.'); Green 1996, 1697, and Green 2003, § 2 ('the source-determining rule of recognition'); Allan 2004, 686–7; Lamond 2014, 29; Kramer 2018, ch. 3. Of course this interpretation is far from being unanimously accepted, not least because of some ambiguities in Hart's own treatment of this topic (Hart occasionally refers to the rule of recognition as a tool for the identification of valid *rules*. On the conceptual distinction between sources and rules, or norms, see below, 2.3).

2.2 First Steps Towards a Different Account of the Sources of Law

So, let's take a step back, and explore how such an alternative account of the sources of law might look.

I propose a two-pronged definition of 'source of law', which comprises a 'what' and a 'how'. The 'what' is a metaphysical question, if you like, and it may be phrased as 'what sort of thing is a source of law?'. The 'how' is a question about what actually makes that thing a source of law—a question about what can turn a putative candidate into an actual source of law. Later on (4), I will deal with the further question of what is supposed to follow from the fact that something is a source of law.

As to the 'what', a source of law is a fact. In principle, any kind of fact—even natural, meteorological, or theological facts—may count as a source of law, provided that such a fact is recognized as a source of law by the relevant community. Legal positivism, of course, imposes a restriction, a sort of threshold test, on the kind of facts that can count as sources of law—they must be 'human' or 'social' facts, and more precisely facts pertaining to human actions and decisions (as opposed to, say, facts about human nature), and assisted by some kind of social pressure.

The facts that can qualify as sources of law may be quite simple and involve just one act by just one person (an Austinian 'command' in its simplest form), or may involve complex procedures and multiple organs (the enactment of a statute), or may consist in the behaviour of an unspecified number of people for an unspecified amount of time (custom)—and so on. In any case, these facts are not just brute facts, but 'institutional facts'. In so far as they are

recognized as sources of law, such facts acquire a 'social meaning' that is different from, and supervenes upon, the meaning that they enjoy in a purely naturalistic sense.[14]

As to the 'how', what is required in order to transform any such fact into a source of law is that that fact is regularly treated as a point of reference by the officials of the relevant legal system (predominantly, but not exclusively, law-applying officials) in the course of their law-ascertaining activities.[15] In other words, for some fact F to count as a source of law, a practice of recognition must be in place among the law-applying officials to the effect that F is to be consulted in order to know what counts as law. So, while the concept of sources of law is usually taken to belong to the province of law-making, the practices that endow something with the status of a source of law in fact belong to the domain of law-application at least as much as they do to the domain of law-making—and arguably even more so. But here we need to clarify the notion of 'regularity' included in our definition, lest it drag us into a rather unpalatable form of extreme legal realism (the law as the game of the scorer's discretion, to quote Hart once again).

The circumstance that something counts as a source of law if it is 'regularly used by the officials of the legal system', of course, does not amount to just a factual regularity, to a convergence by mere happenstance. Rather, the relevant regularity is of a normative kind—the convergence of behaviour must be associated with a normative attitude, evidenced by a social pressure for conformity. Social pressure for conformity will manifest itself in criticism

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[14] On sources as institutional facts, Guastini 1996, 373–4; Carpentier 2018, 77.

[15] Shecaira 2013, ch. 3. For some hints in this direction: Green 2003, § 2 ('binding reasons for decision, i.e. as sources of law'); Leiter 2018, 7, fn. 12 ('the sources are those that officials accept and which they take themselves to have an obligation to consult in deciding questions of legal validity. What Hart calls the 'rule of recognition' just is this official practice.'); Bell 2018, 47.

and praise, by public opinion generally and by the legal community in particular (legal scholars, fellow judges…). In such cases, of course, both criticism and praise are relevant in so far as they are levelled on *legal* bases, not just on moral, political, or opportunistic considerations. Most notably, since the law is an institutionalized normative practice, the relevant social pressure will be expressed through institutional channels: legal decisions that comport with the relevant sources of law will be deemed to be legally correct (i.e. valid, enforceable, etc.), while decisions that fails to do so will face reactions such as annulment, or even enforcement of sanctions on its author (tort or criminal liability, disciplinary measures, removal from office, etc.). In short, when such a normative attitude is in place, we will say that the law-applying institutions are 'legally required' to use a given source of law— i.e., to treat a certain kind of fact as a source of law. A source of law, then, is not just anything that a court happens to use in its law-ascertaining activity, but rather is what a court is legally supposed to use, because failure to do so will generate reactions (criticism, annulment, disciplinary sanctions, etc.) that are grounded on legal bases.

An obvious question is how the relevant normative attitude is to be ascertained. There is no denying that such an ascertainment may prove difficult, and at times may yield only approximate results. Here, useful guidance may be provided by some familiar features of the law—namely, the argumentative and the institutionalized character of the law.

The *argumentative* nature of the law refers to the fact that a good deal of the practice of the law takes place in the form of publicly available arguments. And normally, the law-applying institutions have a duty to give public reasons for their rulings. So, in the decisions rendered by law-applying officials we can normally expect to find explicit references to the relevant sources of law—i.e., to the kind of facts that they have consulted in order to ascertain the law. We could call these 'source-statements', statements to the effect that some fact is to be taken into account in order to ascertain the law. Such source-statements are

usually two-fold. On the one hand, they state that a particular fact F_1 is a source of law. On the other hand, they state—or at least imply—that F_1 is a source because it is an instantiation of an abstract model F.[16]

Of course, it is not only what officials explicitly *say* that matters, it is also important to look at what they actually *do*. Commitment to some sources—or the lack thereof—may very well be evidenced by the actual outcomes of judicial decision-making, rather than by explicitly avowed statements.[17]

The *institutionalized* character of the law, on the other hand, usually yields a hierarchical ranking of law-applying institutions. Normally, the sundry officials of the legal system are not on a par regarding their law-ascertaining authority. Normally, the law-ascertainment pronouncements of higher courts have a precedential authority—be it binding or just 'persuasive'—upon lower courts. Accordingly, in the 'physiological' state of a legal system (as opposed to its 'pathology'), the existence and scope of the relevant recognitional attitude will be mostly compounded by the practice of higher-ranking law-applying institutions. The existence of a recognitional practice entertained by higher-ranking law-applying institutions supports a strong presumption that the other law-applying institutions of the legal system just

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[16] Schauer 2009, 81: 'A citation to a particular source is not only a statement by the one citing it that this is a good source, but is also a statement by the citer (especially if a court) that sources *of this type* are legitimate.' (emphasis in the original).

[17] Consider the following scenarios. In a given jurisdiction, judges may explicitly state that the constitution is a source of law. But in fact they never resort to the constitution in order to decide cases, and consistently refrain from challenging unconstitutional legislation. Or, in a given jurisdiction judges may explicitly claim that precedent constitutes a source of law. But at the same time, they routinely refrain from quashing judicial decisions that fail to comport with what has been ruled by the relevant precedents.

follow suit. Of course, such a presumption is always a defeasible one, as new recognitional practices may arise anywhere within the legal system, even amongst lower-ranking law-applying institutions, and may subsequently influence the practice of the other actors within the system. To be sure, there is no exact formula to tell us when the threshold level of convergence has been attained, in order to establish that something actually counts as a source of law within a legal system. Still, through some mix of both quantitative (i.e., the sheer amount of convergence among the officials) and qualitative elements (i.e., the officials' hierarchical standing), we are usually able to formulate reliable descriptions of the sources of law in a given legal system at a given time.

2.3 Sources of Law vs Legal Norms

Sources of law are facts—facts that a law-applying institution is legally required to take into account in order to identify the law. In this sense, it is true that the law 'derives' from a source of law, or that sources of law 'produce' the law. It is true, but still quite metaphorical in character. Indeed, what *exactly* is produced by a source of law?

The usual answer goes, 'a legal norm'—i.e. the legal qualification, usually in deontic terms, of some state of affairs. And indeed there *is* a sense in which this answer is correct—a norm is a legal norm in so far as it is traceable to a source of law. But on closer inspection, the idea that sources produce norms is mistaken—indeed, categorially mistaken. Let's see why.

A source of law, I have said, is a fact, or a complex set of facts. In the most paradigmatic cases, such facts are procedurally organized in order to produce a text.[18] In these cases, 'source' denotes both some facts (a procedure), and the product of these facts (a text). In less

[18] Gardner 2012, 54 ('legislated law is paradigmatic law').

paradigmatic cases, such as in the case of customary law, on the other hand, there is no real separation between the process and the product—the source itself is an ongoing process, which is somehow arbitrarily crystallized in one moment in time in order to extract a legal requirement from it.[19]

Now, the important point here is that both in paradigmatic and in peripheral cases, a source of law does not *directly* produce legal norms. Rather, a source produces a *norm-formulation*,[20] either in canonical language (in the most paradigmatic cases), or in non-verbal communication (in less paradigmatic cases).[21] A legal norm, on the other hand, is *the content of meaning* of whatever is produced by a source. A legal norm, in other words, is the meaning of a legal text, or the normative standard which may be inferred from the convergent behaviours that compound a custom. (For simplicity's sake, hereinafter I will set peripheral cases aside, and refer only to the paradigmatic case of canonical, textual sources.) Sources do not produce, and even less are, legal norms. Sources produce—or, rather, are—texts, and only through the interpretation of these texts may we know what legal norms they convey.

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[19] But also customs may have a textual dimension - they can happen to be incorporated in texts, as is usually the case with judicial customs.

[20] On the distinction between norm and norm-formulation, see von Wright 1963, 93–5; Guastini 2011, 147. This distinction, which has wide currency in European Continental jurisprudence, is frequently overlooked in anglophone jurisprudential circles (on this point, see Shecaira 2015). For some exceptions, see Priel 2006; Gardner 2012, 58; but see Schauer 1991, 62–4 (acknowledging the distinction, but adding that 'the implications of that lesson are limited, and likely to be exaggerated', 64).

[21] A typical case of a norm-formulation conveyed through non-verbal communication is when a certain behaviour is interpreted as an 'example' of what is required by a norm. See Hart 1994, 124–36.

Stricly speaking, then, a legal norm is not itself produced by a source, but rather by the *interpretation* of a source.

As a matter of course, there are several important interactions between legal norms and their sources. For instance, a legal norm is 'named' after the source from which it derives ('statutory norms', 'constitutional norms', 'customary norms', etc.). And this, in turn, affects the legal status, the hierarchical position, and the force of the relevant norms—normally only by reference to the relevant sources can we claim that a legal norm is 'superior' to other legal norms, or 'more recent' than other legal norms. Even more basically, a norm counts as a *legal* norm only if it can be traced back, directly or indirectly, to a source of law.

Still, the two concepts must not be confused nor conflated into one single entity. For one thing, the identification of a source of law, and the identification (through interpretation) of the legal norms that it can express, are two different and distinct intellectual activities.[22] Moreover, sources of law and legal norms have different *conditions of validity*: the validity of a source of law normally depends upon the correct execution of a procedure ('formal' validity: see *infra*, 3.3), while the validity of a legal norm depends upon the fact that that norm is not incompatible with another, hierarchically superior, norm ('material' validity).[23] Accordingly, a (formally) valid source of law could convey (materially) invalid legal norms; or, one and the same source of law could be open to two rival interpretations, one yielding a valid norm and another yielding an invalid norm—exactly this possibility is behind the

[22] See along these lines also Waluchow 1994, 76 (on the need to supplement the rule of recognition with further secondary 'rules of interpretation'); Guastini 2019.

[23] For a more elaborate treatment of the distinction between formal validity and material validity, see Guastini 1996, 377–8; Pino 2014, 207–9. The need to distinguish different senses or dimensions of legal validity is explored, on partly different grounds, also by Waluchow 2009.

doctrine of ‘constitutional avoidance’. Lastly, it can very well be the case that the normative content of a source of law (the norms that a source can express) changes over time, as different interpretations of that source replace one another, while the source itself remains formally the same—legal change may occur not only through the enactment of new laws, but also through new interpretations of the existing sources.[24]

3. Exploring the Realm of Formal Sources

I have claimed that a normative regularity is required for something to constitute a source of law. This opens the possibility for introducing a first, important distinction in the general domain of the sources of law, the distinction between ‘formal’ and ‘material’ sources of law.[25]

Material sources are all the factors that, *as a matter of fact*, influence the decision-making activities of law-applying institutions, or possibly even the creation of the law by law-making institutions. Any number of things may act as material sources—including sense of justice, equity, cultural and political orientation, and policy arguments. As soon as any such consideration affects the decisional process of a law-applying institution, or even of a law-making institution, it can qualify as a material source of law.[26]

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[24] Gardner 2012, 58–9.

[25] Hart 1994, 246–7; Green 2009; Shecaira 2013, 17. The distinction, but not the terminology, is also acknowledged by Kelsen 1945, 132.

[26] Ross 1953, 77; Sacco 1991, 345 (‘whatever influences interpretation is a source of law’). Generally speaking, this is the notion of source of law used by legal scholars within the tradition of legal realism.

Formal sources are the facts that a law-applying institution, or any official for that matter, *is legally required* to take into account in discharging her institutional task (in the sense that has already been clarified: above, 2.2). Such sources are 'formal' in the sense that a law-applying institution is required to use them for reasons that do not pertain to their merits (soundness, wisdom, efficiency…).

In the remainder of this chapter, I shall be concerned with sources of law only in the formal sense. The following subsections will introduce a set of partly related notions in order to explain how formal sources may acquire their status as sources of law (3.1), how they may be brought into existence (3.2), and how they are related to the concept of legal validity (3.3).

3.1 Codified vs Practice-Based Sources

Under our working definition, something is a source of law in a given legal system if the officials (predominantly, but not exclusively, law-applying officials) in that legal system are legally required to use it in discharging their law-ascertaining activities. As I have already made clear, 'legally required' here means that the relevant officials not only do regularly consult some facts in the course of their law-ascertaining activities, but also take themselves to be required to do so, and that failure to do so engenders legal consequences—as opposed to reactions levelled on sheer moral, political, or even prudential grounds. This means that the status of something as a source of law is ultimately grounded on a practice of recognition shared by the relevant officials.

Of course, the claim that the sources of law are ultimately grounded on a practice of recognition entertained by the officials needs to be squared with the obvious fact that in many legal systems we find enacted provisions, usually of constitutional or legislative kind, that either explicitly state or imply that something is to count as a source of law. Some legal

systems even provide, in some constitutional or legislative provision, a detailed list of their various sources of law.

This fact prompts a distinction between codified sources of law, on the one hand, and practice-based sources of law, on the other. The meaning of this distinction is quite straightforward. While a codified source owes its status as a source of law, prima facie, to its being explicitly so qualified by another source of law, a practice-based source will be grounded directly and exclusively on the recognitional practice of the law-applying officials.

A few quick clarifications are in order. First, the distinction between codified and practice-based sources operates at the level of 'type-sources', i.e. it refers to classes of sources ('constitutions', 'statutory law', 'precedents', 'customary law', etc.), not to specific instances of some kind of source (the statute enacted on a specific occasion, a judicial decision issued by a certain court, etc.—'token-sources). In this sense, the distinction between codified and practice-based sources highlights the different ways in which a *kind* of source (a type-source) may enter the list of the sources of law of a given legal system—namely, either through explicit mention by another source of law (codified sources), or through a recognitional practice entertained by law applying officials (practice-based sources).

Second, I have said that something is a codified source if its status as a source is either 'explicitly stated' or 'implied' by another source of the relevant legal system. Now, that something is 'impliedly' referenced to as a source simply means that a certain source S_1 requires the law-applying officials to use something, S_2, in their law-ascertaining activities—and thus requires them to treat S_2 as a source of law. This is what happens, for instance, when an explicitly regulated mechanism of judicial review of legislation is in place: in these cases, the constitution acquires the status of a codified source exactly in virtue of the provisions on

judicial review, since such provisions require that the constitution is used by the courts in order to assess the validity of legislation.

Third, 'codified' source is not tantamount to 'written' source. A source S_2 is codified, under the present definition, if it is explicitly or impliedly referenced to by another source S_1. But S_2 may very well be an unwritten source. This is exactly what happens, for instance, when customary law is explicitly or impliedly recognized as a source of law in a legal system: customary law then becomes a codified source, in the specified sense, but it still will be an unwritten source of law. And the reverse also holds, of course: a 'practice-based' source need not be an 'unwritten' source: enough, a practice-based source—i.e., a non-codified source—may very well have a textual dimension.

Lastly, and more importantly, even a set of codified sources ultimately owes its status to an ongoing recognitional practice among the law-applying officials. This follows from the definition itself of source of law, understood as a fact that a law-applying institution is legally required to use in the course of its law-applying activities—whereby that something is legally required *ultimately* consists in the presence of a normative pressure exerted by the law-applying institutions at large. That is, even codified sources are *ultimately* practice-based.

Still, between the codified level of sources of law and the underlying recognitional practice there is a complex dialectic. The relation is bidirectional rather than unidirectional.[27] In fact, once a codified set of sources is in place, it tends to become the normal point of reference for the law-ascertaining activities of the law-applying institutions. That is, while even a codified set of sources must ultimately be backed by a practice of recognition, the codified set of sources tends in turn to give shape to, and to strengthen, the recognitional practice itself. And even more so when one or more sources (type-sources) are codified (i.e.,

[27] Kramer 2018, 92–7. See also Hart 1994, 111.

referenced to) at the most apical level of the legal system: if a set of sources is explicitly codified by a written constitution, this will most likely produce a starkly constraining effect on the recognitional practice of the law-applying institutions.[28]

In short, while even codified sources need to be backed by a recognitional practice in order to really count as sources, at the same time the very existence of codified sources significantly constrains the scope of the relevant recognitional practices of the officials. Still, the constraining role of a set of codified sources is always far from absolute. There always is the standing possibility that new (non-codified) sources emerge from the sheer practice of the law-applying officials, as well as the possibility that the recognitional practice ceases to sustain some codified source. The recognitional practice always has the last word.

3.2 Derivative vs Autonomous Sources

While the distinction between codified and practice-based sources captures the ways in which a class of sources (type-sources) can be recognized in a legal system, a different distinction focuses on the ways in which specific instances of type-sources (a single statute, a single custom, the constitution—token-sources) can come into existence in a legal system. This is the distinction between derivative and autonomous sources. A derivative source is something that counts as a source of law because it has been produced in accordance with the requirements prescribed by another source of law of the same legal system. Indeed, the notion that a source 'derives' from another source requires some elaboration. What 'derives', here, is of course legal validity: source S_1 establishes the conditions pursuant to which source S_2 is to be produced—conversely, S_2 is valid if it has been produced in conformity with the

[28] Moreover, the codification of sources often includes also a hierarchy among the explicitly referenced sources, and also this plays a constraining role on the recognitional practice.

requirements established by S_1. To be sure, the derivation of validity is not a direct relationship between S_1 and S_2. The conditions of validity for S_2 are not established by the source S_1 *as such*, but by the rules of change embodied in S_1,[29] which confer the Hohfeldian power (the competence) to create other sources of law, and which regulate the conditions for the correct exercise of this power. The correct exercise of the Hohfeldian power at stake, i.e. the exercise of the power by the appropriate agent through the appropriate procedure, yields a valid (derivative) source of law.[30] More precisely, the relevant rules of change usually determine the 'who' (i.e., which agent is in charge of producing, modifying, etc., a given source—quite often, in actual fact, the operation of a source will require the concerted efforts of multiple agents), and the 'how' (the procedures to be followed by the empowered agent in order to create, modify, etc., a given source).[31]

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[29] See 2.3 above, on the distinction between sources of law and legal norms. Rules of change are, of course, a variety of legal norms.

[30] Raz 1979, 95: 'all the laws conferring legislative powers […] determine criteria of validity'.

[31] The point made in the text highlights the error in identifying the sources of law with the institutions and groups of persons that have the power to create, modify, and annul, law (for instance, 'legislatures'). See for instance Allen 1964, 1 ('The term "sources" is here used to connote those agencies by which rules of conduct acquire the character of law by becoming objectively definite, uniform, and, above all, compulsory'); Waldron 2009, 687–91; Gardner 2012, 69. To better see this, consider the following: *a*) not everything that an institution does is a source of law—only what it does pursuant to certain procedures may count as a source of law (think of the sundry acts of a purely political nature that a Parliament may perform, in addition to the enactment of statutes); *b*) a single institution may potentially issue sources of law of different types, resorting to different procedures; *c*) some sources are produced by the joint efforts of several distinct institutions; and *d*) some sources of law do not flow from institutions, as it is the case with many autonomous sources.

The very idea of rules of change expresses the notion that a given source (namely, a derivative source), is controlled by the legal system: it is the relevant legal system that decides whether to create that source, whether to amend it or to destroy it—either by way of derogation or annulment.[32] From this point of view, derivative sources are the paradigm case of source of law in contemporary legal systems *qua* institutionalized normative systems, whereby the production of the law is almost entirely regulated by the legal system itself.[33]

But it is not the case that the legal system always displays full or almost full control on its sources. In the case of autonomous sources, such control is lacking.

An autonomous source is a source whose production is not regulated by the rules of change of the legal system. It is a source that is constitutively 'picked out' by the legal system, either as a codified source or as a practice-based source (3.1), and whose production is not regulated by the relevant legal system. In the case of an autonomous source, the legal system incorporates a source whose production it does not directly control. The only control that the legal system displays over an autonomous source is just in the decision whether to use such a source or not—the legal system normally lacks the power to create an autonomous

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[32] As suggested in the text, the notion of rule of change could be usefully broadened to include the rules that empower some agent to strike down a source in case of alleged irregularities in its production. After all, according to Hans Kelsen judicial review of legislation represents an exercise in 'negative legislation' (Kelsen 1929).

[33] See Kelsen 1945, 124 ('Law regulates its own creation'). In the text, I say 'almost entirely'. This qualification depends on the one hand on the fact that, as we shall see shortly, besides derivative sources a legal system usually also hosts autonomous sources; and, on the other, on the fact that even in the case of derivative sources the relevant rules of change may be incomplete and indeterminate, leaving law-applying institutions with the task of completing and determining the full extent of the conditions of validity for these sources.

source, to modify it, or to annul it (we'll see one limited exception shortly).[34] An autonomous source comes into existence somewhat spontaneously, stemming from the actions of a non-official body, or from the actions of an official body acting outside the scope of its competence. The paradigm case of an autonomous source is customary law.[35] Most legal systems do recognize customary law as a source of law, but at the same time they do not regulate its conditions of existence—in fact, most legal systems do not even *define* what customary law is.

But the example of customary law should not mislead us into thinking that autonomous sources are only marginally present in contemporary legal systems. Indeed, the constitution

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[34] According to Leslie Green, it would seem, being subject to the rules of change of a legal system is determinant of legality (Green 2003, § 3): 'neither courts nor legislators can repeal or amend the law of commutativity. The same holds of other social norms, including the norms of foreign legal systems. […] although Canadian officials can decide whether or not to apply [Mexican law], they can neither change it nor repeal it […]. In like manner, moral standards, logic, mathematics, principles of statistical inference, or English grammar, though all properly applied in cases, are not themselves the law, for legal organs have applicative but not creative power over them.' But if the argument outlined in the text is correct, it is not the case that every source of law is subject to rules of change. This requirement holds only for derivative sources, not for autonomous sources. Think of custom, of course—including judicial customs. And some written constitutions are not legally amendable, not even through special procedures.

[35] Other good examples of autonomous sources are legal scholarship, where it is spontaneously used as a formal source of law by the relevant law-applying institutions (Sacco 1991; Shecaira 2013); foreign law, when it is used by a domestic court (Waldron 2012, ch. 3, applying a Hartian conceptual apparatus in order to prove the legal relevance, for municipal systems, of foreign laws and judicial decisions); and soft law (Mackor 2018).

itself is the most conspicuous case of autonomous source in many contemporary legal systems. As it happens, a constitution is established by an unregulated power (namely, constituent power), a power that is not formally attributed—and cannot, for logical reasons, be attributed—be the legal system itself. As I have already remarked, here are no power-conferring norms, in the legal system, granting the competence to *create* a constitution. If it is a source of law, the constitution cannot be but an autonomous source.[36]

3.3 Sources and Validity

Earlier, I have introduced a connection between derivative sources of law and legal validity, and I have anticipated that the validity of the sources of law may be called 'formal validity', as opposed to the 'material validity' of legal norms.[37] It is high time now to give a closer look at the (formal) validity of sources.

A source of law is formally valid if it has been produced in accordance with the relevant rules of change established by another source (and has not subsequently been repealed). This dimension of validity is appropriately called 'formal', because it usually coincides with a successful 'enactment', or with a 'pedigree' test, i.e. with requirements that do not pertain to

[36] The example of constitutions shows that it is at least possible that for some source there can be no rules of change in order to *create* it, while there are such rules in order to *modify* it. Indeed, many contemporary written constitutions, while created by an unregulated power (constituent power), do in fact include rules that regulate the procedures for their amendment. Interestingly, cases like these still show that the relevant autonomous source does not entirely fall under the control of the legal system. After all, the power of constitutional amendment usually does not include the possibility of *erasing completely* the old constitution.

[37] Guastini 1996, 377; Pino 2014, 207–8; Mackor 2018, 127; Sandro 2018.

the content or the merits of the source but rather to the way in which that source has been produced. Now, the discussion so far shows that legal validity (understood as formal validity) pertains only to a subset of the sources that can operate in a given legal system—namely, to derivative sources, the sources whose production is regulated by the legal system itself through its rules of change. Autonomous sources, by contrast, are not legally valid (or, more exactly, they are neither valid nor invalid), precisely because the legal system does not afford rules and procedures for their creation—it just picks them out, so to speak.[38] The existence of autonomous sources entirely rests on their efficacy.

A derivative source is formally valid insofar as it comports with the formal and procedural requirements (the rules of change) established by another source. Validity is a *relational* concept—it entails a relation between a source, S_1, and the rules of change established by another source, S_2; when such a relation occurs, S_2 qualifies as 'superior' to S_1. Of course, a question of validity may also be raised with respect to S_2. That is, one may question whether the (relatively) superior source, in turn, comports with the formal and procedural requirements established by yet another source—and so on. Accordingly, the various derivative sources of law operating within a given legal system interlock to form a sort of chain—a chain of validity.[39] Since a chain of validity is plainly connected to the idea of validity and of rules of change, a derivative source will necessarily be part of a chain of validity (however small), and conversely a chain of validity will be composed only by derivative sources. But there is an obvious, and inevitable, exception. For reasons of logical necessity, at the top link of any chain of validity can only sit an autonomous source—a

[38] For quite similar lines of analysis, but with a slightly different conceptual apparatus, see Kramer 2009, 46–7; Mackor 2018, 126–7.

[39] See some examples of chains of validity in Hart 1994, 107; Lamond 2014, 31.

source whose production is not itself regulated by the legal system, otherwise the chain of validity would fall in an infinite regress. Therefore, any given chain of validity cannot fail to include at its apex an autonomous source, a source which is neither valid nor invalid. In other words, and assuming that the most common kind of source that can be expected to be found at the apex of a chain of validity is the constitution, the constitution itself cannot qualify as either valid or invalid.

The idea of a chain of validity could suggest that the legal system always has a neatly and linear hierarchical structure—that, in other words, ultimately only one chain of validity, however long, is to be found in a given legal system.[40] However, this need not be the case. For one thing, there is no reason to suppose that a legal system includes only *one* chain of validity—several distinct chains of validity may be in place in a legal system, each departing from one and the same apical point; or, there may be many chains of validity that are totally independent from one another, each with a distinct autonomous source at its higher end.[41] Moreover, in a legal system we may also find sources (of course, autonomous sources) which remain completely outside the chains of validity that are in place in that legal system: such sources are purely self-standing, as it were, and are directly grounded on the practice of recognition entertained by the officials.[42]

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[40] This is exactly Kelsen's idea of the *Stufenbau* (Kelsen 1945, ch. 5), sometimes also rendered as a pyramidal image of the legal system. A similar idea is present also inHart 1994, 107, but it should be noted that Hart's conceptual apparatus (the rule of recognition)does not necessarily lead to the conclusion that the legal system is ultimately reducible to one single chain of validity.

[41] For different accounts of this possibility, see Raz 1979, 95–6; Kramer 2018, 86–8.

[42] According to Kent Greenawalt, for instance, the ultimate rule of recognition in the United States most certainly recognizes sources of law which are not traceable to the Constitution (Greenawalt 1987). See also Kramer 2009, for the idea that some laws can be 'free-floating'.

3.4 Food for Thought (I)

Before concluding this section, some quick remarks are in order.

(1) I have introduced two separate couples of concepts pertaining to the sources of law: codified vs practice-based sources, and autonomous vs derivative sources. These two couples can be combined in some interesting ways.

An autonomous source can be either a codified source, or a practiced-based source. The idea of an autonomous *and* codified source of law may sound strange at first, but it is actually quite familiar in a good many legal systems. Indeed, a given legal system may explicitly bestow on something the status of a source of law (hence the source is codified), and may even regulate the conditions of applicability of that source vis-à-vis the other sources of the legal system, while at the same time refraining from regulating the production of that source (hence the source is autonomous).[43] (In such cases, it should be noted, the autonomous source that happens to be expressly picked out as a codified source of the legal system does not thereby acquire formal validity: the relevant source may be explicitly listed as a source of law by some norm of the legal system, but its production is still not regulated by apposite rules of change of the system.)

A derivative source, on the other hand, is necessarily a codified source. The very fact that the relevant legal system includes rules of change in order to produce a given source,

[43] Once again, customary law is a good case in point. As we have already noted, most legal systems do not even define what customary law is, while at the same time positively allowing its use by the law-applying institutions (see supra, 3.2).

makes that source not only a derivative source, but also a codified one. Nonetheless, the derivative status of a codified source may over time become blurred. Indeed, it is entirely possible that a source, which has originally come into existence as a derivative source, may subsequently be picked out by a practice of recognition which grants that source a new kind of legal existence, as it were. In such cases, that source will owe its current legal status not to the original enactment, i.e. to its 'derivativeness', but directly to its official recognition. It will still be a codified source, but its derivative character will fade away, and it will work more like a practice-based source.

Far from being an extravagant hypothesis, this is exactly what happens with most contemporary constitutions: a constitution, of course, may very well be enacted pursuant to some procedure of sorts, but it would be strange indeed to claim that the constitution owes its legal status to that very act of enactment—as opposed to the continued existence of a practice of official recognition.[44] To be sure, constituent power need not be an *entirely* unregulated power—it can certainly make its own rules of change. A constituent assembly can certainly establish its own rules of procedure in order to proceed towards the enactment of the text of the constitution. But the important point, here, is that the legal existence of the constitution as a source of law is not premised in the least on the fact that it has been enacted in conformity with these rules of change. Constituent power is successful (it succeeds in establishing a new constitution) if the constitution it produces is effective, i.e. if it is sustained by a practice of recognition of the law-applying officials, and of the polity at large.

[44] See Greenawalt 1987, 19. Arguably, it is the need to grapple with this peculiarity that leads J. Raz to say that constitutions 'are self-validating. They are valid just because they are there, enshrined in the practices of their countries' (Raz 2009, 348).

(2) ‘‘Validity’ is not tantamount to the ‘existence’ of a source of law (or to the ‘membership’ of a source to a legal system).[45] Validity applies only to derivative sources, i.e. to sources that are within a chain of validity. But a legal system cannot comprise *only* derivative sources. Since a chain of validity is bound to terminate with an apical, autonomous source, which itself is neither valid nor invalid, for logical necessity any legal system is bound to include at least one source that is neither valid nor invalid.

In actual fact, in addition to apical (and hence necessarily autonomous) sources, legal systems usually happen to harbour many other sorts of autonomous sources—again, sources that ‘exist’ or ‘belong’ to the legal system not in virtue of their validity (they are neither valid nor invalid), but in virtue of their efficacy. A source of law, then, may *exist in* a legal system, and may *belong to* a legal system, without being formally valid. (Indeed, as we shall see shortly, a source may exist in a legal system even if it is *invalid*.)

(3) A derivative source is valid if it has been produced in accordance with the relevant rules of change. Accordingly, a purported source that, in actual fact, has not been produced in accordance with the relevant rules of change is formally invalid—actually, it is not a source at all.[46] It cannot count as a source of the legal system.

This much seems correct. But unfortunately, the reality of actual legal systems is a bit more complicated. Indeed, officials do sometimes treat a source of law ‘as valid’, even if it fails to meet all the requirements imposed by the relevant rules of change—that is to say, officials sometimes happen to treat as valid a source which is in actual fact *invalid*. In other

[45] Guastini 2000, 267–8.

[46] Waluchow 2009, 137: ‘failure to observe a condition for the valid exercise of a Hohfeldian power of law creation must, as a sheer conceptual matter, be a nullity’.

words, there is a standing possibility that officials treat the legal system's rules of change as *defeasible* rules.

Earlier, I have distinguished the 'formal validity' of derivative sources, grounded on conformity with the rules of change, from the ''efficacy' of autonomous sources (3.2). As it turns out, we now have a further possibility, somewhere in between the two. The relevant practice of recognition may also bestow legal existence upon a derivative source that is in fact invalid—and by the same token, of course, the official practice of recognition can deprive a formally valid source of its legal existence.[47]

Of course, when rules of change are in place, they normally exercise a constraining role on the law-ascertaining activities of the officials—they tend to represent the 'normality' of the ascertainment of derivative sources. And this constraining role gets stronger as the relevant procedures are embodied in high-ranking sources, such as a constitution. Still, absolutely nothing, apart from contingent cultural factors, prevents officials from treating *as valid* purported acts of law-making that actually fail to comport with the relevant rules of change.[48]

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[47] For various accounts of this possibility, Munzer 1972, 42–3; Celano 2002; Schauer 1995, 156, 160–1 (with exclusive reference to constitutional amendment); Guastini 2000, 267–8; Waluchow 2009, 139–41; Grellette 2010; Lamond 2014, 41.

[48] The practical consequences, here, may be paradoxical indeed. Consider the following case. A purported statute, PS, has in fact been enacted in violation of the relevant rules of change. It is thus affected by formal invalidity. On the face of it, it should not even count as a statute of the relevant legal system—it should be a 'nullity' (supra, fn. 48). But, as it turns out, the officials of that legal system accept PS; they regularly use it in the course of their institutional activities. PS thus 'exists', in the specified sense. Suppose now that the legislature wants to further intervene in the subject-matter that is regulated by PS. Even if PS is, at least in theory, a nullity, it will be necessary to

4. Sources and/as Reasons

Thus far, I have consistently stressed the direct or indirect role of official practices of recognition in order for something to constitute a source of law. But we still have to consider a bit more closely the content of such practices of recognition—what *kind* of recognition is required for something to count as a source of law? In other words, what does it mean to treat something as a source of law? Moreover, one must consider how sources of law work in legal reasoning. Sources, we are told, are reasons for action.[49] But reasons *for what kind of action* exactly—and *what kind of reasons* are they?

The matter may become complicated, not only due to the potential complexity of the notion of a reason, but also in light of the fact—which I have already accounted for (2.3)—that, in juristic parlance, there is a frequent and pervasive confusion between 'sources' and 'norms'. The first issue that needs to be disentangled here, then, is what it means to 'use' a source—what is the 'action' for which a source of law provides a reason. The panoply of conceptions outlined throughout this chapter will be of some help.

I have said that sources of law are facts that are used by the officials of a legal systemin their law-ascertaining activities (2.2). And I have also stressed that sources of law are not tantamount to legal norms—a norm being the normative content of a source, as ascertained through interpretation (2.3). Since cases are adjudicated by applying legal norms to the relevant facts of the matter, it follows that a source of law, by itself, cannot qualify as a reason for adjudicating a case. Sources of law do not provide *directly* for the solution of a

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formally amend or repeal PS—formally amend or repeal, that is, a source that at least in theory does not exist.

[49] Raz 1979, 65–6; see also Raz 2009, 108 ('the law provides a reason for action for its subjects through being a decree laid down or endorsed by a legitimate authority').

case. Sources of law need to be interpreted, in order to 'find' the legal norm that may be dispositive of the case at hand.[50]

Accordingly, the fact that something is a source of law is a reason *for using it in the interpretive process*, in order to extract from it the legal norm to be applied in a case. To use a source means to interpret it. This, and only this, is the 'action' for which a source of law provides a reason.[51]

Let's now see what kind of reasons may be provided by a source of law.

The first thing to note, here, is that a source of law is an authoritative reason. In other words, if a certain fact constitutes a source of law, it provides reasons (in the sense specified above) regardless of the merits of its contents—i.e. regardless of the wisdom, rightness, reasonableness, etc., of the norms that it conveys. Insofar as a source provides reasons, these reasons do not flow from its merits, or even from the merits of the manner in which the source comes into existence (e.g., the wisdom of the legislature, the fairness of a court).[52]

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[50] The 'may' in the text refers to the all-too-obvious fact that, even after interpretation, a source may still not be able to provide for the solution to the case at hand.

[51] This point is very clearly stated by Hart 1994, 294: 'In systems where a statute is a formal or legal source of law, a court in deciding a case *is bound to attend to a relevant statute* though no doubt it is left considerable freedom in interpreting the meaning of the statutory language' (emphasis added).

[52] Gardner 2012, 20–1; Shecaira 2013, 23–6. This is an appropriate refinement of Hart's original idea of sources of law as 'content-independent reasons' (Hart 1982, 259–61). Indeed, content-based considerations, as opposed to merits-based considerations, may very well affect the status and the operation of a source of law. For instance, sources of law may be organized on a subject-matter basis. It is very often the case that a given subject-matter may be regulated only, or primarily, by a

(This dimension of the sources of law explains in part the usual label, 'formal sources'.) Moreover, the authoritative character of the sources of law entails that the sources of law play an exclusionary role: when facing a source-based norm, i.e. a legal norm, the law-applying institution has a reason to set aside other norms that do not have such a provenance, and also has a reason to set aside legal norms that have their provenance in lower-ranking sources. (It should be noted, however, that the fact that sources are exclusionary reasons does not mean that they bear absolute weight. Indeed, they may be defeated by other reasons—by other sources of law, or even by reasons of a different sort.)

So, a source can provide a reason of a certain kind (i.e., an authoritative reason), to take certain actions (i.e., to interpret the source in order to extract norms). But what strength can these reasons have? How do they affect the legal reasoning of law-applying institutions? Throughout this essay, I have used the rather neutral—indeed, almost tautological—expression 'legally required to', in order to describe the position of a law-applying institution towards a source of law. The most obvious way to instantiate this 'requirement' situation would be in terms of a duty: a source of law is something that *must* be consulted by a law-applying institution, in its law-ascertaining activity. And certainly this makes sense of the most paradigmatic cases of sources of law. But on closer inspection, it turns out that this is not always the case. There are indeed sources the use of which does not seem to be so categorically required.

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certain kind of source. Think of the legality principle in criminal law, or the distribution of competence among several sources in federal states.

A first useful refinement of the above picture, then, is a distinction between 'mandatory' (or binding) and 'permissive' (or optional) sources.[53]

Mandatory sources are sources that a law-applying institution is bound to apply. Disregarding a mandatory source results in a legally flawed decision: the relevant decision is invalid, or it is regarded as a reason to impose some kind of fine or liability on the relevant law-applying institution, and the like.

Permissive sources, on the other hand, are sources the use of which is not required, and which have less, and variable, weight. More precisely, permissive sources can enter the decision-making process of a law-applying institution in different ways. First, they may act as contributory reasons along with other, mandatory sources: they may improve the persuasiveness, acceptability, even elegance, of a legal decision that would have been reached in any event on the grounds of the available mandatory sources alone. In these cases, a permissive source may be disregarded without affecting the validity of the relevant legal decision—it is used by a law-applying institution only insofar as it is thought to lend additional argumentative support to a legal decision. Second, a permissive source may be used insofar as the relevant mandatory sources prove indeterminate, or support conflicting conclusions. In these cases, permissive sources will typically be used to tip the scales towards a particular decisional outcome within the framework of the sundry possibilities that appear to be equally permitted by the available mandatory sources. Third, permissive sources may enter the scene in the absence of mandatory sources.

But it would seem that the 'mandatory'/'permissive' alternative does not yet cover the whole range of available possibilities. Indeed, there are sources, the use of which is not fully

[53] Various ways of presenting this distinction are provided by Hart 1994, 294; Gardner 1988; Green 2009, § 3; Waldron 2012, 21, 61–2; Schauer 2009, ch. 4.

mandatory, but is not merely permitted either. Call them ‘defeasible sources’. A defeasible source is a source that *should* be considered by a law-applying institution, and failure to do so would result in an invalid or otherwise legally wrong decision, *unless strong reasons are provided to this effect*.[54]

The difference between mandatory, permissive, and defeasible sources emerges nicely in the perspective of legal argumentation. From this point of view, the use of a mandatory source does not require to be appositely justified by the law-applying institution (its use is just business as usual). The use of a permissive source, by contrast, usually requires to be appositely justified by the law-applying institution, by making reference to the need to strengthen the acceptability of the overall decision, or to the fact that mandatory sources are indeterminate or incomplete, etc. Lastly, the use of a defeasible source does not require justification, but an apposite argumentative burden falls upon the law-applying institution in order to set that source aside.

4.1 Food for Thought (II)

A few quick observations are required in order to conclude the argument outlined in this section.

(1) The variable strength of a source is not tantamount to, and is not even related to, the ability of a source to determine the outcome of a case. As is made clear by the source/norm distinction, a mandatory source may not be dispositive of a case at all, in so far as its normative content proves to be vague, indeterminate, under-inclusive, or conflicting with

[54] Accordingly, it is possible to distinguish between ‘must-sources’ (mandatory sources), ‘should-sources’ (defeasible, less-than-mandatory), and ‘may-sources’ (permissive sources): Peczenik 1989, 261–4; Shecaira 2013, 29–33; Bell 2018, 47–8.

other legal norms. By the same token, a permissive source may very well be dispositive of a case, insofar as it conveys a precise norm, and no other normative considerations (such as norms conveyed by mandatory sources) are applicable to the case at hand.

(2) The distinction between mandatory, defeasible, and permissive sources is entirely contingent, that is, it depends upon the prevalent practices of recognition as they are in place in the relevant community. Which source may play which role is, of course, contingent, as is the specific mixture of these kinds of sources which one may find in a given legal context. For instance, it is entirely possible that, in a given legal system, only mandatory sources are allowed, or only permissive sources for that matter. Moreover, the distinction between mandatory, defeasible, and permissive sources may shift over time. For instance, it is possible that a given source may first appear as a permissive source and, over time, its use may become more and more regular, to the point that it is eventually perceived as mandatory or at least defeasible. Once again, it all depends on the relevant practices of recognition entertained by the officials of the relevant legal system. It is official practice of recognition that ultimately establishes the degree of normativity of a source.

(3) So far, I have been referring to sources of law as reasons, and I have rather apodictically assumed that sources of law *are* reasons. But this, of course, is disputable, and at least calls for some explanation. As a matter of fact, I do not mean to claim that sources of law *as such* are reasons for action, that sources of law carry with them a built-in reason-giving power, and that a law-applying institution has an inherent duty to use the sources of law—not even mandatory sources. As a legal positivist, I actually think the opposite—I think that the law *does not* carry with it an inherent normativity, and that there is no inherent duty to obey or to apply the law. The discussion in the present subsection about sources as reasons, then, is to be understood as conditional or perspectival in character, i.e. a discussion from the point of

view of the officials who already assume a normative point of view—the point of view of those who accept the legal system as a whole.[55]

5. The Scope of Official Convergence and the Existence of a Legal System

A final point. I have said not only that some sources are directly grounded upon a practice of recognition entertained by the law-applying institutions (practice-based sources), but also that such a practice is what ultimately sustains all the sources of law. In short, then, the very existence of a legal system—as well as its shape and size—ultimately depends on the recognitional practices of law-applying officials. It only seems appropriate, then, to close this essay with some quick suggestion regarding the relationship between the official practice of recognition and the existence of a legal system, and in particular, the kind of official convergence that is required in order to maintain a viable legal system.

There is no denying that we face some serious challenge here. On the one hand, official practice is ultimately constitutive of the components of a legal system—and of the legal system as such. And this—i.e., the idea that law is ultimately grounded in a set of social facts, such as an official practice—is a basic tenet of legal positivism. But, on the other hand, there is no guarantee that the sundry officials who operate in a legal system perfectly converge in

[55] Leiter 2004, 176: 'The sources thesis entails that, *to the extent that a judge has a duty to decide according to law*, then the judge must apply the source-based norms' (emphasis in the original). And see also Gardner 2012, 36; Green 2003: 'No legal positivist argues that the *systemic validity* of law establishes its *moral validity*, i.e., that it should be obeyed by subjects or applied by judges' (emphasis in the original); Pino 2021.

their law-ascertaining activities. Indeed, officials seem to disagree as to the manner in which they identify the law: any legal system is filled with rival interpretive canons; jurists fiercely disagree on the legally correct outcome of controversies—not always, of course, but enough to say that disagreement in law is business as usual. The law seems to be inhabited by official convergence as much as by official disagreement. Is there a way of reconciling the undisputable fact of legal disagreement with the idea that official convergence is the ultimate foundation of a legal system?

The argument advanced in this chapter may be of some assistance here. The beginning of wisdom is to note is that, in a legal system, different types of legal disagreements may be at stake. Officials may disagree over many different things. They may disagree, at least, on:

a) the sources of law, both in the type- sense (what should or should not count as a source of law in a given legal system), and in the token- sense (is this really an instance of a statute? Is this precedent still in force?);

b) the interpretive canons to be deployed in order to derive legal norms from the sources of law;

c) specific interpretations of the sources of law, i.e. the identification of the legal norms that can be derived from a source of law;

d) the specific outcome of a dispute (how to apply a legal norm to a given case, or type of case); and

e) the fundamental values of the legal system.[56]

Now, we should expect neither complete agreement, nor complete disagreement, in respect to any of these matters. A situation of complete agreement would be fantastic, whereas a situation of rampant disagreement would amount to the sheer collapse of the legal

[56] A similar articulation of legal disagreement is developed by Dolcetti and Ratti 2013.

system. In actual legal systems we should expect a mix of agreements and disagreements among the officials. Moreover, the dialectic between agreement and disagreement can work in different ways in regard to the the different points highlighted above. In fact, we can imagine that the several points listed above form a sort of progressive scale, with some points where legal disagreements can be expected, perhaps even in an intense degree, without endangering the viability of the legal system, and some other points where a legal system can flourish only if agreement, or even a vast agreement, obtains. Let's see.

To begin with, in all likelihood a legal system is not particularly affected by the presence of disagreements at the level of interpretive canons and of the fundamental values of the legal system—points b) and e) above, respectively. It is indeed quite normal that the officials in the legal system embrace different values and—at least in contemporary pluralist democracies—this is exactly what one should expect. Pretty much on the same footing, it is normal that law-applying institutions resort to different interpretive methodologies in order to ascertain the law. The fact that a variety of interpretive methodologies is available does not necessarily affect the unity of the legal system, since it is entirely possible—indeed, it is an observable fact—that different interpretive methodologies can often lead to the same decisional outcome.[57] In turn, it is probably fair to expect any viable legal system to host a decent amount of agreement on the specific outcomes of many, or even most, legal controversies,[58] and probably also on the norms that can be derived from the relevant sources—points d) and c) above, respectively. In fact, in most viable legal systems exists a vast agreement on these

[57] On this phenomenon, see Farber 1999; Leiter 2009.

[58] Kramer 1999, 130–45; Leiter 2009.

points—indeed, it is difficult to imagine how a legal system could survive were law-applying institutions engaged in a fierce disagreement over these points.[59]

Lastly, even more wide agreement is supposed to be found at the level of the identification *of the sources of law*—point a) above. A wide convergence on the sources of law is necessary in order to maintain a legal system in good shape—indeed, in order to have a legal system at all.[60] It is wide agreement on sources that makes it possible to accommodate the other kinds of disagreements. Specifically, it is convergence on the sources of law that makes it possible to conceive of the different officials as being engaged in playing the same game—albeit with different interpretive moves. If the several officials are using different sources in order to adjudicate cases, it is difficult to say that they are actually operating in one and the same legal system. As long as the recognitional practices of the officials converge, or overlap, on a set of sources of law, we can say that the minimal condition for the existence of a legal system has been met. We have hit the bedrock of the legal system.

Of course, there is no reason to suppose that the list of agreed-upon sources of law is static. The practice of recognition is constantly open to change,[61] not least because of the fact that such a practice is the field of power struggles among different officials whose participation in the legal system can be driven by different fundamental values. Nor should

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[59] For a more extended argument to this effect, see Kramer 2007, ch 2.

[60] Leiter 2018, 7: 'the relevant sources of law in each society are fixed by a contingent practice of officials of the legal system (call this the "Conventionality Thesis")'.

[61] Raz 1979, 94. And see Schauer 2009, 81: 'what counts as a legitimate source of law […] is the product of an evolving practice in which lawyers, judges, commentators, and other legal actors gradually and in diffuse and nonlinear fashion determine what will count as a legitimate source and what will not, and thus will, in the same fashion, determine what will count as law and what will not'.

we expect any legal system to be endowed with a clear-cut list of sources of law. The practice of recognition may give rise to indeterminacy and uncertainties in the identification of the sources of law. No exact formula is to be expected here.[62]

Still, as long as there is a convergent—or overlapping—official practice of recognition of the sources of law, that is, a convergence that enables officials to look in the same direction in order to find the law, we can say that those officials are operating in the same legal system—actually, we can say that a legal system is in place.

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[62] Hart 1994, 147–54, on uncertainty and open texture in the rule of recognition. See also Vogenauer 2006, 885.

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