UNIVERSITÀ DEGLI STUDI DI TRENTO
Facoltà di Giurisprudenza

STUDIES ON ARGUMENTATION AND LEGAL PHILOSOPHY

Further Steps Towards a Pluralistic Approach

Ed. by
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FEDERICO PUPPO
SERENA TOMASI

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Università degli Studi di Trento 2015

In memory of

Enrico Nicolis Di Robilant
(1924 - 2012)

Non omnis moriar

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PREFACE

Maurizio Manzin

On 7th-8th June, 2012 the Research Center on Legal Methodology (CERMEG)[1] and the Faculty of Law organized in Trento the twelfth GTR Conference on rhetoric named "Giornate Tridentine di Retorica" (Trento Days on Rhetoric)[2], a yearly meeting in which argumentative issues are presented and discussed by scholars of legal philosophy and other legal disciplines together with authoritative lawyers and judges. GTR 12 was characterized by the participation of a number of scholars on argumentation coming from abroad (it was the first time since GTR 1 in 2000), some of them expressly invited for the keynote speeches. The specific aim of the organizers was to create the conditions for a brainstorming between Italian legal philosophers interested in legal reasoning and other scholars on argumentation from different scientific domains (logic, linguistics, philosophy, literature etc.).

At the end of the Conference most of the papers were collected and reviewed in order to be published in a miscellanea edited by a scientific committee of CERMEG. The essays selected this way were then submitted to the referees of the series of the Trento Law Faculty («Quaderni della Facoltà di Giurisprudenza») for the ultimate review.

It is now an honour for me to introduce this volume of the series, where authoritative and challenging studies on argumentation are offered to deepen issues strictly related to the work of lawyers and judges when arguing in trial and to the academic investigations in jurisprudence.

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[1] For further info on CERMEG visit the website: http://www.cermeg.it/eng/.

[2] http://www.cermeg.it/eng/2012/05/16/12th-annual-conference-on-rhetoric-%C2%ABgiornate-tridentine-di-retorica-12-%E2%80%93-gtr-2012%C2%BB-first-international-workshop-on-argumentation-rhetoric-in-public-discourse-in-language-in-law/.

In the opening essay of the volume, Frans H. van Eemeren[3], former director (and nowadays *Professor Emeritus*) in the Department of Speech Communication, Argumentation Theory and Rhetoric at the University of Amsterdam, and founder of the International Society for the Study of Argumentation (ISSA) – one of the most influential scholars on argumentation all over the world – illustrates to what extent the 'rhetorical turn' has been crucial in the development of the pragma-dialectical account on argumentation[4]. The idea of 'strategic manoeuvring' as a part of the logical procedures operated by arguers when setting up a critical discourse integrates the fundamental effort towards reasonableness with the necessity of persuading – in other words, with the effectiveness of the discourse. Van Eemeren shows in detail how on one side some important insights coming especially from Aristotle can be fully shared by scholars and applicators of the pragma-dialectical method, while on the other side some differences between the classical approach and the new one of the School of Amsterdam must be stressed.

The following essay, by Eveline T. Feteris (University of Amsterdam)[5], could be considered a perfect prosecution of van Eemeren's account, focused on the domain of legal argumentation. Eveline explains very well how 'strategic manoeuvring' can be applied in a typical judicial context dealing with the community property entitlement (a case similar under certain respects to the famous one of *Riggs vs Palmer*). The legal opinion expressed by the Dutch Supreme Court, establishing an exception in the case of murder of one's spouse, could be interpreted as largely grounded on strategically argumentative moves. Both Eveline's study and the Court's judgment are readings highly recommended to academic experts as well as practical lawyers.

Fabrizio Macagno, a very active scholar on argumentation lecturing at the Universidade Nova of Lisbon (one of the founders of ArgLab: Reasoning and Argumentation Laboratory)[6], underlines in his essay the

[3] http://home.medewerker.uva.nl/f.h.vaneemeren.

[4] See: Van Eemeren, F.H. (2010). *Strategic Manoeuvring in Argumentative Discourse*. Amsterdam: Springer.

[5] http://www.uva.nl/en/about-the-uva/organisation/staff-members/content/f/e/e.t.feteris/e.t.feteris.html.

[6] http://www.arglab.ifl.pt/.

role of argumentative schemes in legal interpretation, particularly when the meaning of a single term or sentence dealing with a legal qualification is disputed. The matter of relationship between argumentation and interpretation has always been one of the most discussed and fertile in jurisprudence, and the insights provided by Fabrizio will be surely able to help legal scholars to evaluate and choose among the various offers in the rich market of interpretivism.

The accurate essay of Silvia Zorzetto (University of Milan) and Fabrizio Esposito (University "Bocconi", Milan) put together the theoretic tools of both analytic philosophy and Law & Economics to explore the distinction between *rationality* and *reasonableness*, in order to clarify the concept of "economic agent" as a rational man – a key concept which is also a sort of commonplace in economic theory. In their opinion the idea of an individual acting as a rational being in the economic field implies a complex set of justifications in argumentative commitments either in Civil or in Common Law systems.

Giovanni Bombelli (Catholic University "Sacro Cuore", Milan) stresses the fundamental role of ancient Greek philosophy for argumentative studies, particularly in their linguistic dimension. Giovanni reminds us how the Aristotelian notion of *logos* is antithetic to that of 'linguistic code' as illustrated especially by N. Chomsky, and how different and opposite theories on argumentation arise if you choose as a starting point the former or the latter.

János Frivaldszky, director in the Department of Legal Philosophy (Catholic University "Pázmáni Péter", Budapest), makes it clear that legal argumentation is a species of the genus 'practical reasoning', which he explains in opposition to the analytic and linguistic accounts. According to János, the basic elements of argumentation applied by legal scholars and judges in Civil Law systems would come mainly from the tradition of Roman law and from the philosophical heritage of Aristotle and St. Thomas. For this reason, he points out it would be extremely important, when studying the way the lawyers argument, not to forget the 'essential' relation between justice and truth.

Last but not least, Claudio Sartea (University of Rome 2 "Tor Vergata") reflects upon the coherence of ontology, ethics and logic in legal practice. Inspired by the model of the rhetorician in the past – *vir bonus*

dicendi peritus – contemporary lawyers could be good if they were effective, and vice versa they could be effective if they were good. In other words, Claudio maintains that being a lawyer (ontology) corresponds to a moral engagement (ethics), which guarantees by itself positive outcomes in one's own practice. More precisely, such engagement consists of defending the party under judgment by means of judicial rhetoric in legal argumentation (logic).

As anyone can see, a fair number of relevant argumentative issues are discussed in this volume in the light of different perspectives of current legal philosophy: from a more "continental" approach to a clearly analytic one. The authors provide many insights, which are in part overlapping and in part not. A situation, which is typical in scientific literature and which must be regarded not as a limit, but as an opportunity.

The very purpose of the GTR 12 organizers (and editors of this volume) was in fact that of comparing a variety of answers dealing with remarkable questions on legal argumentation. It should sound strange and paradoxical to face from a unique point of view issues related to that specific form of public discourse represented by legal decisions; it should be a *monologue* on what is essentially a *dialogue*, although an institutionalized one. On the contrary, the pluralistic formula works well with argumentative studies as well as with any other, being capable of balancing freedom and reason.

I am deeply grateful to Federico Puppo and Serena Tomasi for their committed partnership in the organization of GTR 12 Conference and in the further editing of this volume. It should have been hard – not to say impossible – to arrange an international conference and to coordinate all the administrative, scientific and publishing supports without their precious help.

Part One

Theoretical Perspectives

THE INDISPENSABLE CONNECTION BETWEEN THE DIALECTICAL AND THE RHETORICAL PERSPECTIVE ON ARGUMENTATION[1]

Frans H. van Eemeren

1. Argumentation theory as a hybrid discipline

Argumentation is due when conclusive evidence cannot be provided and all the same a justification of why a certain standpoint should be accepted on reasonable grounds is called for. This is in particular the case when an evaluative or a prescriptive view is at issue. If a descriptive claim is at issue and its truth can be easily established, just giving argumentation for its acceptability generally does not suffice because definitive proof will be demanded[2]. More often than not, the propositions which are justified by means of argumentation are therefore evaluative or prescriptive rather than purely descriptive propositions.

The observation that argumentation is prototypically used when the acceptability of a standpoint on reasonable grounds is at stake and a binding verdict cannot be given, played an important role in the rebirth of argumentation theory in the twentieth century. In the motivations of their theoretical proposals for a renewed argumentation theory, put forward in 1958, both Stephen Toulmin (2003) and Chaim Perelman and Lucie Olbrechts-Tyteca (1969) strongly emphasized that argumentation is an effort to make a standpoint in a reasonable way acceptable to addressees who are in doubt rather than a logical proof of its truth. In their

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[1] An earlier version of this paper, titled "In what sense do modern argumentation theories relate to Aristotle? The case of pragma-dialectics", has appeared in 2013 in *Argumentation 27*(1) as part of a special issue on Aristotle and modern argumentation theory guest-edited by H. Jales Ribeiro.

[2] Proof that does not appear to speak for itself can, of course, be presented as argumentation.

view, to do justice to argumentation, in the theorizing the formal logical treatment of argumentation had to be replaced by a different kind of treatment. They thus returned to a theoretical tradition of dealing with argumentation which started in Antiquity, had been continued for a very long time, but had been abandoned in modern time.

2. The dialectical and the rhetorical perspective

The rebirth of argumentation theory went together with the recognition that argumentation theory had its roots in Antiquity and had reached its classical apex in Aristotle's dialectic and rhetoric. After the resurgence of argumentation theory as a field of study in the second part of the twentieth century both the dialectical and rhetorical perspective had their renaissances, albeit in ways that were in various respects different from the classical tradition and completely isolated from each other.

After dialectic and rhetoric had been redefined and separated from each other in the sixteenth century, dialectic was included in logic. When logic later took a mathematical turn, the dialectical study of regulated critical exchanges not only disappeared from sight outside logic but also inside logic. In the 1960s and 1970s, however, some developments took place which put an end to the abandonment of dialectic[3]. New dialectical approaches started to emerge which, in spite of considerable differences in their design, relate to classical dialectic in the general sense that they also deal with regulated critical exchanges aimed at systematically testing the tenability of a standpoint. Two developments are of particular importance to the evolution of these modern dialectics.

First, Paul Lorenzen instigated with other members of the Erlangen School a dialogical approach of logic. Second, Charles Hamblin (1970) developed in an epoch-making monograph proposals for critical discussion procedures which he designates as *Formal Dialectic*. In *From axiom to dialogue*, Else Barth and Erik Krabbe (1982) have exploited

[3] An earlier European pioneer of the modern dialectical treatment of argumentation is Naess (1966).

Hamblinean insights, together with Lorenzen style dialogue logic, to create their own 'formal dialectic,' a formal theory of argumentation. In the 1990s, Walton and Krabbe (1995) have given a pragmatic extension to formal dialectic by distinguishing between different 'dialogue types' in dealing with argumentation. Earlier, formal dialectic had already inspired Frans H. van Eemeren and Rob Grootendorst (1984, 2004) to develop the 'pragma-dialectical' theory of argumentation, to which I will return in more detail later on.

A general characteristic of all dialectical approaches is that the acceptability of argumentative moves is regarded to be dependent on the rational quality of the argumentative exchange, so that the *reasonableness* of argumentative discourse is always at the centre of attention. Opting for a dialectical perspective means that the point of departure is normative and requires that the argumentative moves that are made in argumentative discourse should comply with the soundness standards ensuing from the philosophical ideal of a critical discussion. The litmus proof of a dialectical procedure is generally believed to be the possibility of nailing down the various kinds of fallacies.

The alternative theoretical angle in examining argumentation is the rhetorical perspective, in which the core notion is 'effectiveness.' Although in the course of time the rhetorical perspective has been constantly redefined, the focus has always been on effective persuasion of an audience[4]. However, following Aristotle, who provided the current conceptual framework of rhetoric, it is not the actual achievement of persuasive effects that rhetoric concentrates upon, but the capability to identify the means of persuasion that may be effective in a given case. The adherence to Aristotle's views explains why in practice rhetorical research is not the same as 'persuasion research' (O'Keefe, 2002). Unlike persuasion researchers, rhetoricians do not examine empirically, let alone experimentally and quantitatively, under which conditions certain persuasive techniques are actually effective with certain people. Instead, they concentrate on laying bare the ways in which the intended

[4] According to Simons (1990), «most neutrally, perhaps, rhetoric is the study and practice of persuasion» (p. 5).

effectiveness is aimed for[5]. Rhetorical studies are in principle descriptive and explanatory rather than normative and evaluative, so that no external standards for identifying fallacies are provided[6].

A major impetus to the revival of the study of argumentation from a rhetorical perspective in the twentieth century was given by Perelman and Olbrechts-Tyteca's monograph *Traité de l'argumentation: La nouvelle rhétorique*, published in 1958 and followed by an English translation in 1969. The *New Rhetoric* is a descriptive theory of argumentative effectiveness and does not present critical standards of reasonableness to which arguers ought to adhere.

Just as in classical rhetoric, in the *New Rhetoric* the notion of 'audience' plays a pivotal role. It is postulated that argumentation is always designed to have an effect on those for whom it is intended. Argumentation is persuasive if it succeeds in securing the approval of a 'particular audience,' consisting of a particular person or group, and convincing if it may lay claim to the approval of the 'universal audience,' consisting of all reasonable people. The *New Rhetoric* is calculated to provide a systematic survey of all elements in argumentative discourse that play a part in the discursive techniques used to bring about acceptance of the claims defended in the people that are addressed.

Although most definitions in modern handbooks confirm that rhetoric is about communication as a way of influencing people effectively, this does not mean that rhetoric as it is currently practiced is always

[5] At best, the rhetoricians could be said to carry out 'preliminary theoretical work' for empirical persuasion research. In practice, however, rhetoricians are as a rule dealing with individual speech events rather than being out to develop general theory. Besides, the notions of 'effectiveness' and 'persuasiveness' are not necessarily synonymous (van Eemeren, 2010, p. 39, p. 66).

[6] However, in line with the classical view that for acting rhetorically optimally a *vir bonus* is required and the modern ideal of 'civic discourse', there is a tendency among rhetoricians to add an ethical (and sometimes downright moralistic) dimension to their rhetorical considerations. As Leff (2002) points out, there is no general agreement among rhetoricians about which normative standard needs to be taken into account in addition to effectiveness: Quintilian adds an ethical standard, the humanists in the Renaissance require eloquence, speech act theorists refer to the requirements of the discursive situation, and others require demonstrating a deep kind of rationality (p. 54). Often rhetorical normativity is summarized in the rather vague notion of 'appropriateness'.

about argumentation. In *The Sage handbook of rhetorical studies*, C. Jan Swearingen and Edward Schiappa (2009) observe that American rhetorical theories have extended their scope in the twentieth century «to the point that everything, or virtually everything, can be described as 'rhetorical'» (p. 2). Andrea A. Lunsford, Kirt H. Wilson and Rosa A. Eberly (2009) therefore describe 'Big Rhetoric' as «a plastic art that moulds itself to varying times, places and situations» (p. xix).

Even when in American rhetoric the term *argumentation* is used, its meaning is often much broader than in argumentation theory. Instead of just justifying a standpoint on reasonable grounds by giving reasons in its support, it may involve any characteristic of communication that can have a persuasive effect on the audience. This more diffuse conception of argumentation may be a consequence of the influence of the Isocratean rhetorical tradition. The inclusion, next to *logos*, of *ethos* and *pathos* in the rhetorical study of argumentation is also part of the explanation. In addition, it may play a part that in English the meaning of the words 'argument' and 'argumentation' is in pertinent respects rather undetermined compared to that of their counterparts in other European languages.

It is striking that in the United States rhetoric has survived more robustly than in Europe, albeit watered down to Big Rhetoric[7]. Kenneth Burke's adage «Wherever there is persuasion, there is rhetoric – and wherever there is 'meaning', there is 'persuasion'» instigated an unprecedented broadening of the scope of rhetoric. New concepts, such as 'identification,' were declared rhetorical phenomena. New angles of research, such as feminist rhetoric, were included. Scholars who never labeled themselves as rhetoricians, such as Jürgen Habermas and Michel Foucault, were incorporated (Foss, Foss & Trapp 1985). According to Schiappa (2002), few American scholars would nowadays object to categorizing a narrative analysis of George Bush's discourse about the Persian Gulf War, a psychoanalytic reading of the movie *Aliens*, and an analysis of visual iconography in the advertisement of

[7] My speculative explanation is that this is partly due to a combination of immigrants' tendency to hold on to cultural tradition and democratic ideology stimulating every citizen to be capable of taking part in public debate.

«Heroin chic» all under the rubric «rhetorical perspective on argumentative discourse» (p. 67).

In spite of the dilution of rhetoric, in the past decades interesting rhetorical analyses of argumentative discourse have been made, also – and even particularly – in the United States. These analyses are usually grafted onto the classical and post-classical tradition. In some cases they are accompanied by an in-depth exposition of the rhetorical framework in which the analysis takes place. A case in point in Jeanne Fahnestock's (1999) study *Rhetorical figures in science*.

Remarkably thorough and sustained 'case-based' analyses of public argumentative discourse are carried out by David Zarefsky, who supplements classical rhetorical insights with modern rhetorical insights whenever this seems functional. In *President Johnson's war on poverty*, Zarefsky (2005, 1st ed. 1986) examines how public policy can be put in a strategic perspective by discursive means, notably the use of the word 'war' in fighting poverty – later followed by Presidential 'wars' against drugs and against terrorism.

3. Connections between modern argumentation theory and Aristotle

The sources for modern theoretical thinking on argumentation in Antiquity lie in particular in Aristotle's writings[8]. In exploring the connections between modern argumentation theory and Aristotle's dialectic and rhetoric I will only bring to the fore what I take to be the accepted quintessence of Aristotle's views.

In Antiquity, the term *dialectic* also had other meanings, but Aristotle used it to refer to critical dialogues aimed at establishing whether or not a particular standpoint is acceptable[9]. Dialectic then pertains to a discussion between two parties: a 'questioner,' who is out to refute the standpoint at issue, and an 'answerer,' who tries to prevent the stand-

[8] Aristotle developed his dialectical insights in the *Topica* and the *Sophisticis elenchis* and his rhetorical insights in the *Rhetorica*.

[9] According to Slomkowski (1997) and Hasper and Krabbe (to be published), Aristotle's dialectic is based on the art of discussion described in Plato's dialogues, despite Aristotle's claim to originality.

point from being refuted[10]. In the end, only one of the parties can be successful in his endeavor. Their joint goal in the discussion is to determine whether the standpoint can be maintained in the light of generally accepted premises and other premises accepted by the answerer as 'concessions' in the discussion.

A critical dialogue in the Aristotelian sense is opened by the questioner starting the discussion by asking a question that can be answered with Yes or No. The answerer responds by taking a position on the matter. Departing from this standpoint, a methodical exchange of questions and answers develops. During the exchange both parties are committed to the things they have said and have to comply with certain rules and other normative regulations. The contributions of the questioner are aimed at refuting the answerer's standpoint and the contributions of the answerer are aimed at avoiding refutation, without putting forward argumentation in defence of the standpoint. The questioner is out to end the discussion by drawing a conclusion, which contradicts the standpoint at issue on the basis of the concessions elicited from the answerer[11].

As far as rhetoric is concerned, Aristotle's position in Antiquity is more complicated. Because in our education classical rhetoric has become standardized in the so-called 'system of antique rhetoric', it is nowadays commonly assumed – in spite of a great many indications that this is not correct – that there existed one unified classical rhetorical theory combining the two important classical divisions of the *officia oratoris* (tasks of the orator) and the *partes orationis* (components of the oration)[12]. In the 'system of antique rhetoric,' rhetoric is viewed as concentrating on persuading an audience. This definition corresponds

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[10] According to Wagemans (2009), Aristotle's dialectical discussion is organized in the same way as the 'dialectics' of the Socratic elenchus and the critical component of the method of hypotheticizing (pp. 113-131).

[11] For the organization of a dialectical discussion, see Slomkowski (1997, pp. 14-42) and Wagner and Rapp (2004, pp. 17-18).

[12] The tasks of the orator are *inventio*, *dispositio*, *elocutio*, *memoria*, and *actio*. The components of the oration include, apart from an occasional *digressio*, the *exordium*, the *narratio*, the *argumentatio* (including both *confirmatio* and *refutatio*), and the *peroratio*. See Lausberg (1998).

roughly with the definition that Plato attributes in his dialogues to Gorgias: the art of speaking well, in the sense of speaking persuasively (*Gorgias* 452e-453a). Deviating from the general definition prevailing in Antiquity, Aristotle defines rhetoric in a very pronounced way as the faculty of seeing in oratory in each particular case the possible means of persuasion (*Rhetorica* 1355b27-28)[13]. This view prefigures the later divergence of argumentation theory and persuasion research I already mentioned.

The art of rhetoric concentrates in Aristotle's approach on a systematic consideration of the means of persuasion available to an orator to persuade the audience. The means of persuasion to be taken into account include next to argumentative means consisting of the use of *logos* in enthymemes and examples also the non-argumentative means of *ethos* and *pathos* (*Rhetorica* 1356a1-21). Aristotle distinguishes between three 'genres of oratory,' classifying them in accordance with the institutional circumstances in which the discourse is conducted (*Rhetorica* 1358a39-b7). The first of these genres, which are incorporated in the system of antique rhetoric, is the *genos didanikon* (usually referred to as *genus iudiciale*) of the legal speech. The second is the *genos sumbouleutikon* (also known as *genus deliberativum*) of the political speech. The third is the ceremonial *genos epideiktikon* (or *genus demonstrativum*). Due to the rhetorical emphasis on effective persuasion, the most important factor to be taken into account in all three genres is the audience for whom the discourse is intended. In the context of a legal speech, the judges (in Antiquity a jury) are to accept a standpoint defended by one of the contesting parties, in the context of a political speech the people addressed at a public meeting (in Antiquity the citizens) are to accept a policy standpoint of one of the contestants, and in the context of an 'epidictic' speech on a ceremonial occasion the audience's acceptance of a value standpoint is to be confirmed and amplified. Although in the latter case there is no counter-standpoint, accord-

[13] In a Dutch monograph, Braet (2007) compares Aristotle's *Rhetorica*, the *Rhetorica ad Alexandrum*, and the rhetoric of Hermagoras of Temnos from the perspective of argumentation theory. He characterizes Aristotle's rhetoric as richest in theory – the *Rhetorica ad Alexandrum* is more practical, the rhetoric of Hermagoras more educational.

ing to Lausberg (1998), the audience still has to be persuaded of the acceptability of the standpoint because there may be a *dubium* (section 59-61).

Rhetoric was criticized by Plato and other philosophers because it aims for persuading people to accept views that can be disputable and may not be true. This criticism is reinforced by the fact that, next to the use of *logos*, rhetoric also allows for the use of *pathos* and *ethos*. Aristotle, however, is in the first place out to have orators aim for the optimal results in terms of truth and justice. In order to make the audience accept true and just standpoints, in particular in legal and political speeches, the orator needs in principle to make use of argumentative means of persuasion. In his rhetoric, the argumentative means of persuasion are the core and the non-argumentative means of persuasion are secondary (*Rhetorica* 1354a10-20)[14]. Making use of pathetic and ethical means of persuasion is in his view only allowed when the use of *logos* is not effective, so that other means are required to ensure that true and just standpoints prevail (Sprute, 1994).

How do modern dialectical and rhetorical approaches to argumentation relate to Aristotelian dialectic and rhetoric? Before trying to answer this question, it might be helpful to make a distinction between two different ways of dealing with the historical legacy of the field (van Eemeren, 2010, pp. 53-54). On the one side, there are scholars who put their approach to argumentation in a historical perspective and try to connect as closely as possible with their antique predecessors. They consider the identity of dialectic and the identity of rhetoric as a historical given and refer to classical sources to legitimize their approach, which has in principle a descriptive, philological basis. Because on crucial issues there is no unanimity among the classical sources, they are inevitably faced with the problem of making a justified choice. Some of them ignore this problem, in some cases even to the extent that they declare the source they favour authoritative in an almost essentialistic way (“this is what dialectic/rhetoric really is”). On the other side, there are those argumentation theorists whose definitions of dialectic and

[14] Aristotle observes that other rhetoricians resort in the first place to *pathos*. See Rapp (2002, I, p. 364).

rhetoric are in the first place guided by theoretical considerations concerning which conception is most suitable in view of the problems they are confronted with in carrying out their particular research programs. Starting from the idea that no one, not even Aristotle, can lay claim to having taken out a patent on a certain use of the terms *dialectic* and *rhetoric*, in relating with their antique predecessors they select from the competing classical approaches these outlooks and ideas to connect with that fit in with their favoured theoretical way of dealing with the problems involved in analyzing and evaluating argumentative discourse. In fact, they do not shy away from amending the classical views and adapting them to their own approach when they find this is necessary.

Generally modern dialecticians seem to be inclined to adopt a theoretically motivated attitude towards the historical legacy from Antiquity while modern rhetoricians are inclined to adopt a historically motivated attitude. In their approaches to argumentation, theorists who favour a dialectical perspective not just borrow the naming of their theories from classical dialectic but they also try to cover what they consider the gist of the dialectical enterprise. In their turn, rhetorical argumentation theorists usually see their work as an immediate continuation of the antique rhetorical tradition and tend to stay in the substance of their approaches much closer to the exact contents of their classical examples. Modern dialectical approaches to argumentation are all in particular inspired by Aristotle's work. In the case of the modern rhetorical approaches the sources from which the scholars draw are more diverse, albeit that the largely Aristotelian system of antique rhetoric takes pride of place.

4. Dealing with the relationship of dialectic and rhetoric

The next question I need to deal with is how the relationship of dialectic as a theoretical perspective on argumentative reasonableness and rhetoric as a theoretical perspective on argumentative effectiveness is to be envisaged. Aristotle, who took both perspectives seriously and reflected thoroughly upon each of them, called rhetoric an offshoot of dialectic and characterized their relationship with the term *antistrophos*.

This term, which is usually translated as ‘counterpart’, is notorious for its lack of clarity, which has sometimes led to indignant complaints (e.g. Reboul, 1991, p. 46).

At any rate, Aristotle considered dialectic and rhetoric as complementary perspectives on argumentation and appears to have envisioned a division of labour between the two. Other classical and post-classical authors however seem to have viewed dialectic and rhetoric in more competitive terms. To some of them the dialectical perspective is the preferred one, to others the rhetorical perspective. Overviewing the developments, Michael Leff (2002) provides the following summary: «the historical record is one of constant change as the identity, function, structure, and mutual relationship [of the arts of dialectic and rhetoric, FHvE] become issues of argumentative contestation» (p. 53).

In the sixteenth century the competition between dialectic and rhetoric culminated eventually in a complete separation of the two disciplines. This happened after two vital parts of rhetoric, *inventio* and *dispositio*, had been transferred to dialectic, so that rhetoric was virtually reduced to *elocutio* in the sense of style and delivery. As a result of the Ramist separation of the fields of activity, rhetoric became exclusively the domain of the humanities while dialectic was included in the exact sciences. The dialectical and rhetorical perspectives on argumentation came to be regarded as different kinds of paradigms, representing entirely different conceptions of argumentation. Since these conceptions were perceived as incompatible, the division between dialectic and rhetoric became ideological (Toulmin, 2001).

When dialectic and rhetoric experienced in the second part of the twentieth century the independent renaissances, which led to the resurgence of argumentation theory, the watershed between the two perspectives on argumentation had become absolute and the dialectical and the rhetorical argumentation theorists were almost completely isolated from each other. They were – and to a large extent still are – the intellectual territory of different academic communities, each with their own infrastructure of scholarly societies, conferences, journals and book series. As a rule, the dialecticians are formal or informal logicians stemming from departments of philosophy while the rhetoricians generally come from departments of (speech) communication. As far as they are aware

of each other's contributions to argumentation theory, they do not give any signs of being much impressed. I suspect that the prevailing view among dialecticians is that the rhetoricians' concentration on individual cases, in combination with their synthetic approach, will not lead to the systematic theorizing about argumentation that is necessary and among rhetoricians that the generic, procedural, and often formal approach of the dialecticians, abstracting from vital characteristics of actual communication, will not result in the desired understanding of argumentative practice.

As a consequence of their separate developments, the ideological division between them, and the different intellectual contexts in which they operate, there is a yawning intellectual and communicative gap between dialecticians and rhetoricians, which prevents a constructive exchange of ideas. This will not be perceived as a problem however by the "silent majority" of the dialecticians and rhetoricians concerned, because in their self-chosen isolation – and probably also due to inertia – they are happily continuing their own pursuits, thus maintaining the *status quo*. As stands to reason, the harmful consequence is that those problems of analysis and evaluation which require a contribution from both dialectic and rhetoric will not be resolved. Because argumentative discourse can only be fully analyzed and evaluated if both its reasonableness dimension and its effectiveness dimension are taken into account, it is of vital importance to the further development of argumentation theory that both rhetorical and dialectical insights are given their due and are systematically linked together. Since the late 1990s, this issue has been taken up again seriously and some important theoretical steps have been made towards a solution (van Eemeren & Houtlosser, Eds., 2002).

Key figures in the resurgence of argumentation theory such as Toulmin and Perelman recognized the importance of both rhetorical and dialectical insights, but did not go very deeply into the matter of how they can be combined. Among the argumentation scholars who have recently acknowledged that the relationship between the dialectical perspective and the rhetorical perspective deserves closer attention there are some who are in favour of operating very cautiously while others are more daring. It must be said that generally the rhetoricians

have been more forthcoming in exploring the relationship than the dialecticians. Some rhetoricians are indeed in favour of some cooperation but show themselves reluctant to allow the counterpart's approach too much space for fear of seeing their own approach being taken in. Hanns Hohmann (2002), for one, applauds a non-hierarchical collaboration on the practical level (p. 50), but displays a remarkable insecurity about the strength of his own discipline by expressing the fear that if the two disciplines were theoretically in any way combined rhetoric might become a "handmaiden" of dialectic (p. 41). Can one imagine mathematicians being worried about the position of their discipline when mathematical insights are used in physics or economics?

Michael Leff (2002) is more confident about the survival power of rhetoric. Holding on to the historical meaning of the two disciplines and to the traditional division of labour between them, he sees clear advantages to both dialectic and rhetoric in combining insights from the two disciplines. He imagines that rhetoric and dialectic can correct each other's 'vices'. As far as rhetoric is concerned, he states that «effective persuasion must be disciplined by dialectical rationality», which is in particular important when it comes to the detection of fallacies (p. 62). Leff claims that rhetoric, in its turn, could save dialectic from circularity and infinite regress[15]. In a rhetorical analysis argumentation is viewed in the specific communicative and interactional context in which it occurs. By bringing rhetorical insights to bear, the application of dialectical rules is therefore connected with a concrete point of departure, so that a point is reached where the argumentation can be concluded and the danger that the discussion cannot be brought to an end can be averted (p. 60).

5. The pragma-dialectical gambit

Let me now explain how the relationship between dialectic and rhetoric is dealt with in the pragma-dialectical approach to argumenta-

[15] The *Münchhausen trilemma* involves that in justifying standpoints definitively one either falls into circularity, or in an infinite regress of justifications, or has to break off the justification process at an arbitrary point.

tion that I have developed together with Rob Grootendorst (van Eemeren & Grootendorst, 1984, 2004). Initially this approach was exclusively dialectical, but in the 1990s I have extended it in collaboration with Peter Houtlosser with a rhetorical dimension (van Eemeren & Houtlosser, 2002b; van Eemeren, 2010).

Characteristically, argumentation is in the pragma-dialectical approach considered as being aimed at resolving a difference of opinion on the merits. By taking a procedural view, the process of argumentation and the product of argumentation resulting from it are methodically brought together. At the same time, by integrating descriptive and normative insights a commitment to empirical adequacy description is systematically linked with a critical stance towards argumentative practice[16].

In pragma-dialectics, the normative dimension of reasonableness in argumentative discourse is given shape in the model of a 'critical discussion' aimed at resolving a difference of opinion on the merits. In a critical discussion, the parties attempt to reach agreement about the acceptability of the standpoints at issue by finding out whether, given the mutually accepted starting points, these standpoints are tenable against doubt or other criticism. The stages that need to be passed through in resolving a difference of opinion on the merits, the argumentative moves that are to be made, and the procedural rules that are to be observed are in the model of a critical discussion specified in a dialectical vein for the 'confrontation,' the 'opening,' the 'argumentation,' and the 'concluding' phases. In a pragmatic vein, the argumentative moves that are instrumental in resolving a difference of opinion on the merits are in the model of a critical discussion defined in terms of specific types of speech acts performed in natural language.

The norms incorporated in the rules for critical discussion authorizing the performance of speech acts in the various stages represent the standards of reasonableness that, according to the pragma-dialectical

[16] In pragma-dialectics, argumentation is studied from a communicative perspective, inspired by pragmatic insights from speech act theory and discourse analysis, combined with a critical perspective, inspired by dialectical insights from critical rationalism and logical dialogue theory (van Eemeren & Grootendorst, 1984, 1992, 2004).

theory of argumentation, are to be maintained in argumentative discourse. Based on these standards, a 'code of conduct' for reasonable discussants has been proposed consisting of ten fundamental rules – often referred to as the "Ten Commandments" – that must be taken into account in resolving a difference of opinion on the merits (van Eemeren & Grootendorst, 2004, pp. 187-196)[17]. Any argumentative move by any of the parties at any of the four stages that goes against any of the rules of the code of conduct obstructs or hinders the resolution process and is therefore to be considered *fallacious*. A 'fallacy' is thus pragma-dialectically defined as a speech act performed in argumentative discourse which constitutes a violation of a rule for critical discussion.

At the end of the twentieth century, a crucial step was taken in the further development of pragma-dialectics when the theorizing was extended by taking together with the dimension of reasonableness also the dimension of effectiveness of argumentative discourse into account (van Eemeren & Houtlosser, 2002b)[18]. In the pragma-dialectical view, all argumentative moves that are made in the discourse are in principle aimed at being reasonable as well as effective. The tension inherent in pursuing simultaneously these two aims calls for continual 'strategic manoeuvring' in order to keep the balance. In *Strategic maneuvering in argumentative discourse* I have explained what taking account of the

[17] Rule 1 of the code of conduct, the *Freedom Rule*, is designed to ensure that standpoints and doubt regarding standpoints can be freely advanced. Rule 2, the *Obligation to Defend Rule*, ensures that standpoints that are put forward and called into question are indeed defended. Rule 3, the *Standpoint Rule*, prevents antagonists to deviate from what is actually claimed. Rule 4, the *Relevance Rule*, requires standpoints to be defended by *logos*, not merely by *ethos* or *pathos*. Rule 5, the *Unexpressed Premise Rule*, ensures that implicit elements in argumentation are treated seriously. Rule 6, the *Starting Point Rule*, ensures that the starting points agreed upon are used properly. Rule 7, the *Validity Rule*, requires checking in cases where this is due whether the conclusion follows logically from the premises. Rule 8, the *Argument Scheme Rule*, excludes improper uses of argument schemes. Rule 9, the *Concluding Rule*, ensures that the result of the discussion is ascertained in a correct manner. Rule 10, the *Language Use Rule*, is aimed at preventing misunderstandings resulting from non-transparent, vague or equivocal formulations or inaccurate, sloppy or biased interpretations.

[18] Pragma-dialecticians are interested in effectiveness consisting of intentional acceptance of commitment based on understanding and rational consideration (van Eemeren, 2010, p. 37-38).

'strategic design' of the discourse in the theorizing involves (van Eemeren, 2010).

Incorporating the aiming for effectiveness in the theorizing requires extending the dialectical framework of pragma-dialectics with a *rhetorical* dimension[19]. In this way justice can be done to the fact that at every stage of the discourse strategic manoeuvring involves trying to achieve a result that corresponds at the same time with the dialectical objective of the stage concerned and with the rhetorical analogue that is associated with it. The notion of strategic manoeuvring is the theoretical tool to point out how the simultaneous pursuit of the dialectical aim and the rhetorical aim can be reconciled. Although there is always a tension between trying to be effective and being reasonable, in our view these objectives are not really incompatible. Strategic manoeuvring derails only when an argumentative move violates a rule for critical discussion, so that the argumentative move is fallacious.

Strategic manoeuvring does not take part in an idealized critical discussion but in the institutionally motivated communicative practices that can be found in empirical reality. In the various communicative domains different kinds of 'communicative activity types' have developed to serve the institutional needs of a particular macro-context of communicative activity. Each communicative activity type has an 'institutional point' that defines its rationale, reflecting the institutional exigency in response to which the activity type has come into being. The way in which a communicative activity type has been conventionalized to serve its institutional point may vary from highly formalised and strict in the legal domain to very informal and loose in the interpersonal domain.

If in a communicative activity type argumentation plays an important part, it needs to be characterized argumentatively. In the various communicative activity types the argumentative dimension is substanti-

[19] Dialectical insights could in principle also be integrated in a rhetorical framework, as Tindale (2004) aspires to do, but the integration of rhetorical insights in a dialectical framework is in my view for methodological reasons to be preferred. The theoretical framework provided by dialectic is more general and more systematic than the rhetorical one because it abstracts further from the particularities of actual argumentative discourse.

ated in different ways, depending on the institutional point of the activity type. The theoretical model of a critical discussion can be instrumental in this endeavour[20]. The way in which the counterparts of the four stages of a critical discussion have been conventionalized in a certain communicative activity type imposes certain extrinsic restrictions on the opportunities for strategic manoeuvring in that activity type. The argumentative characterization of a particular communicative activity type therefore provides a good starting point for tracing methodically the *institutional preconditions* for strategic manoeuvring in that particular communicative activity type.

The institutional preconditions for strategic manoeuvring do not only affect the analysis but also the evaluation of argumentative discourse. In order to be able to determine when exactly a certain argumentative move made in the discourse is in agreement with the standards of reasonableness expressed in the rules for critical discussion, precise criteria are required which may also involve criteria that are specifically related to a particular kind of macro-context. The specific soundness criteria pertaining to a certain mode of strategic manoeuvring – say making an appeal to authority or launching a personal attack – may vary to some extent depending on the communicative activity type in which it occurs. It is therefore necessary to examine systematically for all general soundness criteria pertaining to a certain mode of strategic manoeuvring whether, and in what way, they need to be specified, amended or supplemented in a particular communicative activity type to do justice to macro-contextual requirements. Because the specific soundness criteria that are to be applied in evaluating argumentative moves may vary to some extent from the one communicative activity type to the other, judgments of fallaciousness are in the pragma-dialectical view in the last resort context-dependent.

[20] Taking the four stages of a critical discussion as the point of departure, their empirical counterparts in a particular communicative activity type can be identified that are to be depicted in an argumentative characterization of the activity type: the *initial situation* (confrontation stage), the *starting points* (opening stage), the *argumentative means and criticisms*, and the *outcome* (concluding stage).

6. Conclusion

In extended pragma-dialectics a *functional integration* is aimed for of dialectical and rhetorical insights concerning argumentative discourse. "Functional" means in this case incorporating all those and only those insights in the theorizing that are instrumental in improving the analysis and evaluation so that the integration plays a constructive role in pursuing the aims of argumentation theory. The notion of strategic manoeuvring is pivotal in bringing about the desired integration because it allows for a reconciliation of the simultaneous pursuit of maintaining reasonableness and being effective.

What is the meaning of the pragma-dialectical interpretation of *antistrophos* in relation to the views of dialectic and rhetoric propounded by Aristotle? A first difference is that to pragma-dialecticians the terms *dialectic* and *rhetoric* refer to theoretical perspectives on argumentative discourse on the meta level while Aristotle uses them also to refer to specific kinds of argumentative activities on the object level of argumentative discourse, so that argumentation is not only *viewed* dialectically or rhetorically but can also *be* dialectical or rhetorical. A second non-vital difference is that pragma-dialecticians put dialectic and rhetoric in the context of a historical perspective that is different from Aristotle's. While Aristotelian dialectic is in the first place associated with private Socratic exercises in the Platonic sense and Aristotelian rhetoric with soliloquized public discourse in the legal and political practices of Antiquity[21], in pragma-dialectics dialectic is not limited to conversational exchanges between two participants on particular types of issues and rhetoric pertains to all argumentative attempts at convincing that are made in the whole institutionally diversified set of communicative activity types that has come into being in modern society.

As far as the substantial differences between Aristotelian and pragma-dialectical dialectic are concerned, most striking in the confrontation stage is that with Aristotle the difference of opinion centres around a 'thesis' which consists of a general claim to acceptability while with

[21] Leff (2002) emphasizes the strong impression this origin of rhetoric has left «on almost all future developments» (p. 56). According to Kennedy (1994), Aristotelian rhetoric is «a body of knowledge, derived from observation and experience» (p. 57).

pragma-dialectics it can be any descriptive, evaluative or prescriptive standpoint. In the opening stage, with Aristotle the material starting point consists of *endoxa* and the procedural starting point of rules and other normative regulations for the exchange between the questioner and the answerer, accompanied by some strategic advice, while with pragma-dialectics the material starting point is to be agreed upon by the protagonist and the antagonist of the standpoints at issue at the start of the discussion and the procedural starting point consists of the rules for critical discussion. In the argumentation stage, with Aristotle a systematic exchange of questions and answers takes place making use of deductive and inductive dialectical syllogisms, while with pragma-dialectics a systematic exchange takes place of critical attacks by the antagonist and argumentative defences by the protagonist. In the concluding stage, with Aristotle it is established through refutation whether the claim at issue is acceptable while with pragma-dialectics it is determined whether the standpoint at issue can be maintained.

As far as the substantial differences between Aristotelian and pragma-dialectical rhetoric are concerned, most striking in the rhetorical counterpart of the confrontation stage is that with Aristotle the difference of opinion concerns the acceptability of a specific legal, political or epideictic 'hypothesis' while with pragma-dialectics any descriptive, evaluative or prescriptive standpoint can be at issue that is pertinent to the communicative activity type concerned. In the rhetorical counterpart of the opening stage, with Aristotle the material and the procedural starting points consist of the premises and the kind of persuasive moves that in the discourse genre concerned happen to be acceptable to the audience while with pragma-dialectics they depend also on the dialectical starting points. In the rhetorical counterpart of the argumentation stage, with Aristotle the persuasive means that can be used to sway the audience do not only include *logos* in the form of enthymematic argumentation and argumentation by example, but if necessary also *pathos* and *ethos*, while with pragma-dialectics only the use of argumentative means is allowed that is in agreement with the dialectical rules for critical discussion. In the rhetorical counterpart of the concluding stage, with Aristotle the *oratio* is successful if the audience is persuaded 'by rights' while with pragma-dialectics it might also be the case that the

antagonist's criticisms are effective and the result is only recognized as reasonable anyway if the rules for critical discussion have been properly observed.

In spite of the differences in historical background, format and substance, the rationales of the Aristotelian and the pragma-dialectical conceptions of dialectic and rhetoric are basically the same. The Aristotelian and the pragma-dialectical dialectic have in common that they both concentrate on the maintenance of reasonableness in resolving differences of opinion by means of argumentative discourse. The Aristotelian and the pragma-dialectical rhetoric have in common that they both concentrate on the pursuit of effectiveness in making the intended audience accept the standpoints at issue. In the first instance pragma-dialectical rhetoric may seem fundamentally different from Aristotelian rhetoric because it is built in into a dialectical framework, but in the second instance it becomes clear that this is a less crucial difference than it seems. As it happens, ultimately Aristotle too is out to make truth and justice prevail and in his rhetoric he tries to include safeguards to achieve this effect.

In fact, Aristotle does not only make an effort in his rhetoric to combine the pursuit of effectiveness with the maintenance of reasonableness, but also makes an effort in his dialectic to combine the maintenance of reasonableness with the aiming for effectiveness. To enhance the effectiveness of the critical exchanges between the questioner and the answerer he provides strategic advice to both of them concerning how to handle their respective tasks effectively (*Topica* VIII). This means that, just as Aristotle's rhetoric contains elements that pragma-dialecticians would call 'dialectical,' Aristotle's dialectic contains elements that pragma-dialecticians would call 'rhetorical.' Unlike Aristotle, pragma-dialecticians make a clear and mutually exclusive division between dialectic and rhetoric by associating the dialectical perspective only with the reasonableness of argumentative discourse and the rhetorical perspective only with the effectiveness of argumentative discourse. As a matter of fact, when in argumentative discourse aiming for the maintenance of reasonableness and the pursuit of effectiveness are combined, as is by definition the case in strategic manoeuvring, the dialectical and the rhetorical perspective are relevant at the same time.

Because both in Aristotelian dialectic and rhetoric and in the extended pragma-dialectical theory of argumentation the concerns for reasonableness and effectiveness are somehow combined, it may be concluded that Aristotle's dual approach to argumentative discourse and our integrating approach are in a certain sense related. There is, to be sure, a fundamental distinction between, on the one hand, the modeling and design of Aristotle's dialectic and rhetoric and, on the other hand, the modeling and design of the extended pragma-dialectical theory. Nevertheless, it is at the same time clear that these approaches share a fundamental interest in reconciling a basic concern for reasonableness and a basic concern for effectiveness. I think that it is therefore not too bold to claim that in pragma-dialectics by functionally integrating with the help of the notion of strategic manoeuvring a rhetorical perspective on argumentative discourse into a dialectical perspective a radical interpretation is given of the problematical notion of *antistrophos* which is not Aristotelian to the letter but may nonetheless lay claim to being Aristotelian in spirit[22].

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[22] Perhaps more importantly, the integration of rhetorical insights in a dialectical theoretical framework offers argumentation theorists new opportunities for carrying out empirical research: qualitative research to describe the preconditions for strategic manoeuvring in the various kinds of communicative types and experimental research to describe from a firmer theoretical basis than current persuasion research the interdependency between the effectiveness of argumentative moves and their reasonableness.

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STRATEGIC MANOEUVRING IN THE CASE OF THE 'UNWORTHY SPOUSE'

Eveline T. Feteris

1. Introduction

In research of legal argumentation different aspects of the process of legal justification have been the object of study. Some researchers consider legal justification as a rational activity and for this reason are interested in the rules that should be observed in rational legal discussions. Others consider legal justification as a rhetorical practice and are interested in the way in which judges operate in steering the discussion in the direction that is desirable from the perspective of certain legal goals.

That both aspects of the legal 'enterprise', rational dispute resolution and a rhetorical orientation to a particular result through strategic manoeuvring, can also be reconciled is something that has received little attention in research of legal argumentation. The aim of this contribution is to analyse the way in which courts try to reconcile the dialectical goal of resolving the difference of opinion in a rational way with the rhetorical goal of steering the discussion in a particular direction that is desirable from the perspective of a particular development of law.

To this end I shall analyse the strategic manoeuvring in the justification of the Dutch Supreme Court in the famous case of the 'Unworthy Spouse' in which a spouse who had murdered his wife claimed his share in the matrimonial community of property. In this case it had to be established whether and on what grounds an exception to article 1:100 of the Dutch Civil Code, that entitles a spouse to his share in the community of property, can be justified (for an overview of the relevant legal rules see A at the end of this contribution). The District Court, the Court of Appeal and the Supreme Court all agreed that an exception

should be made and they all justified the exception by referring to certain legal principles that can be summarized as 'crime does not pay'[1]. However, with regard to the exact argumentative role of the legal principles the Supreme Court adopts another position than the other courts but it does not express this position explicitly but presents it in an indirect way as the interpretation of the decision of the Court of Appeal, thereby giving another interpretation of the argumentative role of the legal principles than was originally intended by the Court of Appeal.

In my contribution I shall describe how the Dutch Supreme Court manoeuvres strategically in its role as court of cassation when attributing a different argumentative role to the legal principles than is intended by the Court of Appeal[2]. I shall explain how the Supreme Court operates strategically in its capacity of court of cassation to promote a particular development of law with respect to the role of legal principles to make an exception to a rule of law.

The central question in the case of the Unworthy Spouse is whether behaviour that can be considered 'unacceptable from the perspective of a sense of justice' or 'repugnant to justice' must also be considered as unacceptable from the perspective of civil law when there are no existing rules on the basis of which this behaviour can be characterized as unacceptable. In this case the question is whether a spouse (in this case L.) who has murdered his 72 year old wife (mrs. Van Wylick) after 5 weeks of marriage and who has been convicted of murder in a criminal procedure, still has a right to his legal share in the marital community property on the basis of article 1:100 clause 1 (old) of the Dutch Civil Code, and if he does not have such a right how the exception should be justified for this case.

In this case the Court of Appeal decides that L. does not have a right to his legal share in the marital community of property, making an exception to the rule of 1:00 of the Civil code for this case. The Court of Appeal justifies the exception by referring to two legal principles. The

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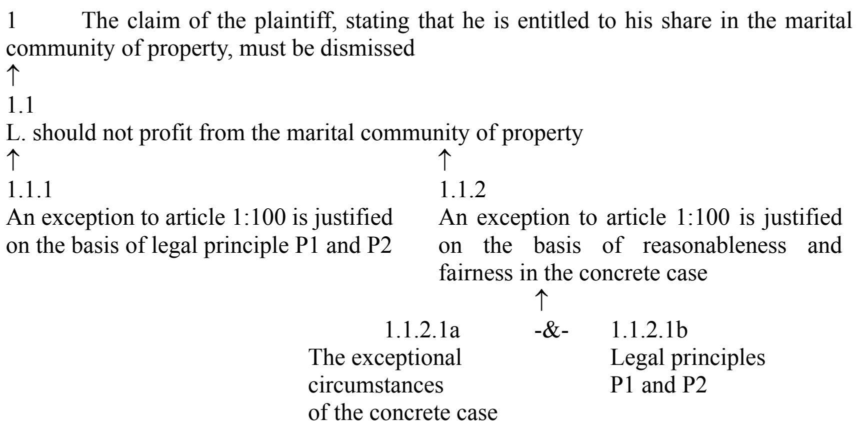
[1] See the decisions published in NJ 1988/992, 8-4-1987, NJ 1989/369, 24-11-1988, NJ 1991/593, 7-12-1990.

[2] Cf. the case of Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) mentioned by Dworkin (1986, pp. 15-20) as an example of a systematic interpretation of the law of inheritance with the aim of clarifying the underlying principles.

first principle is that he, who deliberately causes the death of someone else, who has benefited and favoured him, should not profit from this favour (P1). The second principle is that one should not profit from the deliberately caused death of someone else (P2). Furthermore the Court of Appeal argues as an 'obiter dictum' that also the requirements of reasonableness and fairness would justify making an exception in this particular case. An overview of the main structure of the argumentation of the Court of Appeal is given in scheme 1A.



Scheme (1A) Overview of the main structure of the argumentation of the Court of Appeal

The Supreme Court also answers this question positively. However, the Supreme Court gives another justification of the exception by considering the exception on the basis of reasonableness and fairness as the main argument. An overview of the main structure of the argumentation of the Supreme Court is given in scheme 1B.

1 The claim of the plaintiff, stating that he is entitled to his share in the marital community of property, must be dismissed
↑
1.1
L. should not profit from the marital community of property

1.1.1
An exception to article 1:100 is justified
on the basis of reasonableness and fairness in
the concrete case
↑

1.1.2.1a	-&-	1.1.2.1b
The exceptional circumstances of the concrete case		Legal principles P1 and P2

Scheme (1B) Overview of the main structure of the argumentation of the Supreme Court

As is indicated in scheme IB, in support of this main argument (1.1.1), the Supreme Court mentions the two legal principles in 1.1.2.1b in combination with the exceptional circumstances of this case. In doing so, the Supreme Court departs from the way in which the argument of reasonableness and fairness was presented by the Court of Appeal, i.e. as an obiter dictum (argument 1.1.2), while the two legal principles were presented by the Court of Appeal as the independent main argument 1.1.1.

As is mentioned by the annotator, from the perspective of legal certainty the Supreme Court wants to give a signal to the legal community that general legal principles cannot constitute a reason for making an exception to a legal rule that forms one of the cornerstones of Dutch family law. For this reason the Supreme Court chooses for the 'safe' option of restricting the exception to the concrete case by using the derogating function of reasonableness and fairness (which will be introduced in the new article 6:2 of the Civil Code) as the *main argumentation* (1.1.1) and the legal principles as *supporting coordinative argumentation* (1.1.2.1b) in combination with the exceptional circumstances (1.1.2.1a).

In this paper I will answer the question what the discussion strategy of the Supreme Court in rejecting the cassation grounds and in changing the argumentative role of the legal principles exactly amounts to

from the perspective of the space he has to manoeuvre strategically as a court of cassation. In my analysis of the argumentation strategy of the Supreme Court I use the concept of *strategic manoeuvring* developed by van Eemeren (2010) and van Eemeren and Houtlosser (2006, 2007). In their approach strategic manoeuvring is conceived as an attempt to reconcile the dialectical goal of resolving a difference of opinion in a reasonable way with the rhetorical goal of steering the resolution in a particular direction.

Van Eemeren and Houtlosser describe a *discussion strategy* as a methodical design of discussion moves aimed at influencing the result of a particular discussion stage, and the discussion as a whole, in the desired direction. A discussion strategy consists of a systematic, co-ordinated and simultaneous exploitation of the options available in a particular stage of the discussion.

Starting from this conception I shall show that the discussion strategy of the Supreme Court can be described as a consistent effort in the different stages of a critical discussion to steer the discussion in the desired direction[3]. I characterize the choices the Supreme Court makes in the different stages as a methodical design to steer the outcome of the discussion in the preferred direction, within the boundaries created by the institutional conventions for the discussion in cassation.

2. Analysis of the discussion strategy of the Supreme Court in the case of the 'Unworthy Spouse'

The aim of the procedure in cassation in the Netherlands is to establish what the law in a particular case should be and how the law should be applied in that case. To this end, in this case the Supreme Court must decide whether the decision of the Court of Appeal is in accordance with the law. For this case this implies that the Supreme Court must investigate whether the rules of law that are applied by the Court of Appeal have been applied correctly.

[3] For other analyses of the strategic manoeuvring in legal decisions see Feteris (2008, 2009a and 2009b).

From this perspective, the dialectical goal of the discussion is to establish whether the protagonist in the case in cassation, the Court of Appeal, has defended its decision successfully against the attacks of the antagonist, the plaintiff in cassation, in light of the common starting points, the rules of law, so that the Court of Appeal can maintain his standpoint, or whether it has been attacked successfully. In this case the Supreme Court tries to reconcile this dialectical goal with the rhetorical goal to steer the discussion in the desired direction, i.e. to convince the audience that application of the rule without making an exception for the concrete case would be unacceptable from the perspective of justice[4]. To attain this rhetorical goal, the Supreme Court gives a particular interpretation of the system of the law of inheritance by attaching a particular argumentative role to the general legal principles as a legal ground for making an exception to article 1:100 clause 1 of the Civil Code.

To be able to decide that the decision of the Court of Appeal can be maintained, the Supreme Court adopts a particular discussion strategy that consists of a combination of two 'moves'. First, the Supreme Court wants to be able to decide in the concluding stage of the discussion that the attacks of the plaintiff in cassation L have failed. To realize this aim, in the argumentation stage the Supreme Court must decide that the argumentation of the Court of Appeal is in accordance with the common starting points. To be able to decide this, in the opening stage the Supreme Court must select those starting points that make this evaluation of the argumentation of the Court of Appeal possible.

Second, the Supreme Court wants to give a decision that makes clear that an exception to the rules of family law and the law of inher-

[4] In the case of legal justification the audience of the Dutch Supreme Court is a composite audience consisting of various 'groups'. Firstly the audience consists of the parties in dispute. Secondly, in cases of appeal and cassation, the audience also consists of the judges that have taken prior decisions. Thirdly, the audience consists of members of the legal community of legal practitioners such as other judges and lawyers for whom the justification provides information about the way in which the law needs to be applied according to the Supreme Court. Although the decisions do not have the status of precedents, other judges and lawyers take into account the opinions of the Supreme Court in similar cases.

itance can only be made in very special circumstances. For this reason the Supreme Court must select those starting points that are desirable in light of this view on the development of these branches of law. For this reason, in the opening stage the Supreme Court does not only decide about the role of reasonableness and fairness and certain legal principles as starting points, but also about their argumentative role.

In my analysis I shall explain how this discussion strategy manifests itself in the justification of the decision of the Supreme Court as given in scheme 1B[5]. I shall do this on the basis of the statements of the Supreme Court in the legal considerations 3.2-3.5 (see F at the end of this contribution) that I shall analyse in terms of certain moves in a critical discussion.

The confrontation stage

In this case, the *confrontation stage* that is intended at realizing the dialectical goal of establishing the difference of opinion, is represented by the cassation grounds formulated by the plaintiff in which he formulates his objections against the decision of the Court of Appeal[6]. The plaintiff is of the opinion that the Court of Appeal has made a mistake in applying the law by deciding erroneously that certain legal principles apply and by deciding erroneously that it is justified to make an exception to article 1:100 clause 1 of the Civil Code on the basis of reasonableness and fairness. Because the plaintiff determines the content and scope of the difference of opinion, the Supreme Court has no space to manoeuvre strategically in this discussion stage.

[5] See for a more extended analysis of the decision of the Supreme Court analysis D at the end of this contribution.

[6] For the relevant parts of the decision of the Court of Appeal see E at the end of this contribution. For a more extended analysis of the argumentation of the Court of Appeal see B at the end of this contribution. For an analysis of the argumentation of the plaintiff see C at the end of this contribution.

The opening stage

In the *opening stage* the discussion strategy consists of a methodical design of discussion moves aimed at reconciling the dialectical goal of establishing the common starting points with the rhetorical goal of establishing those starting points that are advantageous in view of his final goal of dismissing the appeal in cassation so that the decision of the Court of Appeal can be maintained as well as a particular development of law. The Supreme Court exploits the space he has on the basis of his dialectical role to establish the common legal starting points in a specific way.

In civil procedure in the Netherlands the latitude to establish common legal starting points is specified in article 48 of the Code of Civil Procedure that gives the judge, in this case the Supreme Court, the authority to formulate the legal grounds. In this case it uses this latitude to formulate the legal grounds on the basis of which the exception to article 1:100 clause of the Civil Code can be justified.

The discussion strategy in the opening stage amounts to the following. The Supreme Court chooses those starting points from the topical potential that it needs to steer the result of the opening stage in the desired direction: it chooses those starting points that it needs in the argumentation stage to be able to evaluate the attack of the plaintiff as a failed attack on the argumentation of the Court of Appeal. In doing so the Supreme Court tries to adapt to the preferences of the legal community by taking into account that acknowledging the claim of the plaintiff would be 'unacceptable for the sense of justice', as is also stressed by the Advocate-General Langemeijer.

In the old matrimonial property law there was not a rule specifying when someone is unworthy to inherit. To avoid a result that would be unacceptable to the sense of justice therefore the Supreme Court must create a possibility to make an exception to article 1:100 clause 1 of the Civil Code on the basis of certain common legal starting points. The Supreme Court establishes the common starting points by acknowledging that it is possible to make an exception to article 1:100 and it establishes that this exception can be justified on the basis of reasonableness and fairness and on the basis of certain legal principles. In doing so the

Supreme Court rebuts the statement of the plaintiff that the exception can not be justified in this way.

Apart from this decision about the status of reasonableness and fairness and the legal principles as common legal starting points, the Supreme Court also decides about the *argumentative function* of these common starting points. The Supreme Court does this in an implicit way with the following statement in consideration in which it rejects the statements in the cassation grounds of the plaintiff:

> As appears from the cited formulation, in this context the legal principles only play the role that they have contributed to the decision of the court that the requirements of reasonableness and fairness make the exertion of his right to his share in the inheritance inadmissible. As far as the parts A and B read in legal consideration 5.18 that the court has used these principles as a direct legal ground for denying this right, they lack a factual basis[7].

As is shown in the analysis of the argumentation of the Court of Appeal in scheme 1A and the analysis of the argumentation of the Supreme Court in scheme 1B, the Supreme Court gives an interpretation of the argumentation of the Court of Appeal that departs from the way in which the court has intended it. The Supreme Court gives the legal principles the function of subordinate argumentation and does not consider them as independent argumentation as they were presented by the Court of Appeal.

The argumentation stage

In the *argumentation stage* the discussion strategy consists of a methodical design of discussion moves aimed at giving a positive evaluation of the argumentation of the Court of Appeal in light of the attacks by the plaintiff. In the argumentation stage the Supreme Court tries to reconcile the dialectical goal of establishing the acceptability of the argumentation of the Court of Appeal on the basis of common testing methods in light of the attacks of the plaintiff with the rhetorical goal of

[7] See for the complete text of the justification of the Supreme Court F at the end of this contribution.

evaluating the attacks of the plaintiff in such a way that these attacks fail. To attain this, the Supreme Court uses the common starting points formulated in the opening stage. In doing so, the Supreme Court exploits the space it has within his dialectical task and the authority it has on the basis of the legal rules to evaluate the argumentation in a special way.

The discussion strategy manifests itself first in the statements in the decision in which the Supreme Court decides in legal consideration 3.2 that the grounds of cassation A and B 'cannot lead to cassation' because they 'lack interest', 'lack a factual basis' and 'depart from a wrong conception of the law'. The strategy manifests itself second in the decision in legal consideration 3.3 cited above that the statement about the exception on the basis of reasonableness and fairness from part C is wrong.

These decisions imply that the attack of the plaintiff (in cassation grounds A and B) on argumentation line 1.1 of the Court of Appeal has failed because the legal principles do exist. The attack (in cassation ground C) on argumentation line 1.2 also fails because the Supreme Court decides that the possibility to make an exception is possible, but only in very special circumstances.

To be able to make the choice from the topical potential that is most suitable to reach the desired result of the argumentation stage, the Supreme Court has prepared these choices in the opening stage. The Supreme Court chooses to present part C of the cassation grounds as a failing attempt to attack the decision by using the formulation that says that C 'contests in vain' part 5.18 of the argumentation. The Supreme Court presents the attacks in the cassation grounds A and B as failing attacks and characterizes them in legal terms as attacks that cannot lead to cassation 'because of lack of interest'.

The concluding stage

Finally, in the *concluding stage*, the Supreme Court decides on the basis of this evaluation of the grounds of cassation in the argumentation stage that the appeal in cassation must be dismissed, which implies that the decision of the Court of Appeal can remain intact. The Supreme

Court uses the space he has within his dialectical tasks and the authority he has on the basis of the applicable legal rules to present the choices he has made in the previous stages as a justification of his final decision.

The discussion strategy of the Supreme Court implies that it does two things at the same time. First it decides that the attacks by the plaintiff on the argumentation of the Court of Appeal have failed so that the decision can remain intact. Second, the Supreme Court gives an implicit interpretation of the argumentation of the Court of Appeal that departs from the way in which the argumentation was intended. This discussion move is not necessary to accomplish the dialectical goal of establishing the acceptability of the argumentation of the Court of Appeal because the Supreme Court can dismiss the appeal without this interpretation. The differing interpretation can be considered as an implicit 'obiter dictum' that the Supreme Court gives as a signal to the legal community in his capacity as judge of cassation to point out how the law should be developed. By choosing an interpretation in which the Supreme Court justifies the exception to article 1.100 clause 1 of the Civil Code on the basis of reasonableness and fairness that is supported by an appeal to the legal principles instead of a direct appeal to the legal principles, the Supreme Court makes indirectly clear that it does not want to consider the legal principles as the main argument and therefore as the main reason to make an exception.

3. Conclusion

With this analysis of the discussion strategy of the Supreme Court to establish the legal and argumentative function of certain legal principles in a concrete case as a systematic effort in the various discussion stages I have clarified how the Supreme Court combines a rational resolution of legal disputes and a rhetorical choice and presentation of discussion moves. The Supreme Court uses the space it has within the boundaries of his dialectical role and the applicable institutional rules to manoeuvre strategically to resolve the difference of opinion and at the same time establish the argumentative role of the applicable legal principles.

In the opening stage the Supreme Court uses the space it has within the institutional boundaries to establish the common legal starting points. It establishes the content of the common legal starting points in such a way that it is able to give a negative evaluation of the attacks of the plaintiff in the argumentation stage. On the basis of this negative evaluation it can finally dismiss the appeal in the concluding stage. At the same time, the Supreme Court also uses the space it has within the institutional boundaries to establish the argumentative role of the common legal starting points. The Supreme Court decides that in making an exception to rule 1:100 of the law of inheritance, this exception must be restricted to the concrete case.

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5. Additional Notes

A. Legal rules applied in the case of the 'Unworty Spouse'

Article 1:100 of the Old Dutch Civil Code

1. The spouses have an equal share in this divided community of property, unless a different division is established by means of a marriage settlement (...).

Article 4.3 of the New Dutch Civil Code

1. Legally unworthy to profit from an inheritance are: He who has been condemned irrevocably because he has killed the deceased, he who has tried to kill the deceased or he who has prepared to kill the deceased or has participated in preparing to kill the deceased.

Article 6:248, 2 of the Dutch Civil Code

An arrangement that is valid between the creditor and the debtor on the basis of the law, a custom or a legal act, does not apply if this is unacceptable from the perspective of the standards of reasonableness and fairness.

Article 3:12 of the Dutch Civil Code

When establishing what reasonableness and fairness require, generally accepted legal principles, legal convictions that are generally accepted in the Netherlands, and social and personal interests in a particular case, should be taken into account.

B. Decision of the Court of appeal

1. The claim of L, stating that he is entitled to his share in the marital community of property, must be dismissed.
    1.1. L. should not profit from the marital community of property (5.17, 5.18).
        1.1.1. In the special circumstances of the concrete case an exception to the legal division on the basis of article 1:100 of the Dutch Civil Code is justified on the basis of the following two legal principles:

1.1.1.1a. He, who deliberately causes the death of someone else, who has benefited favoured him, should not profit from this favour (5.13) (*legal principle P1*).

1.1.1.1a.1. Article 3:959 of the Dutch Civil Code and article 4:1725 sub 2e of the Dutch Civil Code (5.14)

1.1.1.1b. One should not profit from the deliberately caused death of someone else (*legal principle P2*).

1.1.1.1b.1. Article 3:885 sub 1e of the Dutch Civil Code

1.1.2. In the concrete case an exception to the legal division of the marital community of property on the basis of article 1:100 of the Dutch Civil Code is justified on the basis of reasonableness and fairness as specified in article 6:2 section 2 of the New Dutch Civil Code.

1.1.2.1a. The exceptional circumstances of the concrete case

1.1.2.1b. He, who deliberately causes the death of someone else, who has favoured him, should not profit from this favour (5.13) (*legal principle P1*).

1.1.2.1b.1. Article 3:959 of the Dutch Civil Code and section 4:1725 sub 2e of the Dutch Civil Code (5.14)

1.1.2.1c. One should not profit from the deliberately caused death of someone else (*legal principle P2*).

1.1.2.1c.1. Article 3:885 sub 1e of the Dutch Civil Code

C. Argumentation of the plaintiff in cassation

1. The decision by the court in which it denies my claim that I am entitled to my share in the marital community of property must be nullified because the court has made mistakes in the application of the law.

1.1a. The court erroneously has based its decision on the two general *legal principles P1 and P2* (grounds of cassation A and B attacking argument 1.1.1).

1.1a.1a. These principles do not exist.

1.1a.1b. These principles do not apply because I am not favoured by the marriage.

1.1a.1b.1. The marital community op property is not a favour and I have not profited from the death of mrs. Van Wylick because I had already become the owner

of half of the marital community on the basis of my marriage with her.

1.1b. On the basis of article 11 AB the judge is not allowed to make an exception to a clear legal rule on the basis of reasonableness and fairness (ground of cassation C attacking argument 1.1.2).

D. Decision of the Supreme Court

1. The claim of L, stating that he is entitled to his share the marital community of property, must be dismissed.
   1.1.1. In the concrete case an exception to the legal division of the marital community of property on the basis of article 1:100 of the Dutch Civil Code is justified on the basis of reasonableness and fairness as specified in clause 6:2 section 2 of the New Dutch Civil Code.
      1.1.1.1a. The exceptional circumstances of the concrete case
      1.1.1.1b. In the concrete case an exception to the legal division on the basis of article 1:100 of the Dutch Civil Code is justified on the basis of the following two legal principles:
         1.1.1.1b.1a. He, who deliberately causes the death of someone else, who has favoured him, should not profit from this favour (5.13) (*legal principle P1*).
            1.1.1.1b.1a.1. Article 3:959 of the Dutch Civil Code and article 4:1725 sub 2e of the Dutch Civil Code (5.14)
         1.1.1.1b.1b. One should not profit from the deliberately caused death of someone else (*legal principle P2*).
            1.1.1.1b.1b.1. Article 3:885 sub 1e of the Dutch Civil Code.

E. Text of the decision of the Court of Appeal NJ 1989/369, 24-11-1988

(...)
5.13. Since the district court has assumed that Mrs. Van Wylick intended with the marriage – that also according to L was a marriage of convenience – a financial benefit for L, the district court has rightly stressed that to the factual situation described in the foregoing the general legal principle is applicable that he, who has deliberately caused the death of someone else, who has favoured him, should not profit from the this favour.
(...)

5.16. In this context it is also important to mention that the aforementioned legal principle is closely related to another legal principle, i.e. that one should not profit form the deliberately caused death of someone else, which principle has among others been expressed in article 885 under 1 book 3 CC. (...)
5.17. Application of the mentioned legal principles leads under the aforementioned facts and circumstances to the conclusion that L is not entitled to the benefit that is the consequence of the community of property created by the marriage without a marriage settlement ('huwelijkse voorwaarden') with mrs. van Wylick.
5.18. Also an examination of the claims of L in light of the requirements of reasonableness and fairness according to which he is supposed to behave in the community of property that is created by the marriage, as is stated by Brouwers c.s., leads to the conclusion that L should not profit from the marital community of property. In this case the court applies a strict standard because the appeal to reasonableness and fairness is aimed at preventing the claims of L completely. Also when applying such a strict standard the court is of the opinion that the claims of L must be considered as so unreasonable and unfair, in the aforementioned special circumstances of this case and also considered in light of the mentioned general legal principles, that the exertion of the claimed rights must be denied to him completely.

F. Text of the decision of the Supreme Court NJ 1991/593 07-12-1990

Supreme Court:
(...)
3. Evaluation of the means of cassation
3.1.1. In cassation the following must be taken as a starting point:
L who is born in 1944, has taken care of the 72-year old van Wylick from January 1983 receiving payment in compensation for the care, initially several days per week and in a later stage on a daily basis. On September 29, 1983 L has married mrs. Van Wylick without making a marriage settlement. The marriage took place in another place than where the future spouses lived and no publicity was given to the marriage.
L owned practically nothing while mrs. Van Wylick brought in a considerable fortune. Both knew that the marriage would cause a considerable shift of property.
Since 1976 L had a relation with another man, which relation has not been broken.

Five weeks after the marriage L has killed van Wylick in a sophisticated way and with a gross breach of the trust that had been put in him. L has been condemned to a long term imprisonment for murder.
3.1.2. Furthermore, on the basis of these circumstances, in particular the short time between the marriage and the murder of mrs. Van Wylick, in the absence of any offer of proof to the contrary, the court has taken as a starting point that the sole reason for L to marry mrs. van Wylick was that he intended to appropriate her property and that already during the wedding, and in any case almost immediately after, L had the intention to kill mrs. van Wylick if she would not die in a natural way.
3.1.3. The Court of Appeal has, in a similar way as the district court, ruled that the question whether L has a right to half of the property belonging to the community property in the context of the partitioning and division of the community property, as far as this is brought in by mrs. van Wylick, must be answered negatively. This decision is contested by the means of cassation.
3.2. In the legal consideration 5.10 the Court of Appeal has taken as a starting point in answering the aforementioned question that in the light of the ‘exceptional circumstances of this case’ on the one hand consideration must be given to the general legal principles and on the other hand to the requirements of reasonableness and fairness according to which L is supposed to behave in the community property.
Furthermore the court has stated in legal consideration 5.13-5.17 that in this case two general legal principles apply and that on the basis of these principles L is not entitled to the benefits that originate from the community property. Against these two considerations the parts A and B of the means of cassation are aimed in vain.
As far as these parts are based on the statement that the general legal principles formulated by the court do not exist at all, this statement, that has not been substantiated, must be rejected as incorrect.
As far as these parts A and B are intended as an argument in support of the statement that these legal principles do not apply in a case as the case at hand because, briefly stated, the nature of the acquisition resulting from the community of property impedes that this acquisition can be considered as something that is equal to a ‘favour’ or an ‘ advantage’ as mentioned in these principles, they cannot lead to cassation because of a lack of interest. For the decision of the court is supported by the independent judgement formulated in consideration 5.18 that is, as will be explained below, contested in vain.
3.3. In legal consideration 5.18 the court has ruled that in the exceptional circumstances of this case ‘and also considered in light of the mentioned general

legal principles' the claims of L are so unreasonable and unfair that he must be denied the exertion of these rights completely. *As appears from the cited formulation, in this context the legal principles play only the role that they have contributed to the decision of the court that the requirements of reasonableness and fairness make the exertion of the right to his share in the inheritance inadmissible. As far as the parts A and B read in legal consideration 5.18 that the court has used these principles as a direct legal ground for denying this right, they lack a factual basis.* As far as they express the complaint that those principles cannot contribute to the decision of the court, they depart from a wrong conception of the law.
Part C attacks legal consideration 5.18 with the statement that the judge is not allowed to make an exception to 1:100, 1 of the Civil Code on the basis of reasonableness and fairness. This statement is wrong in its generality. For an exception is not completely excluded. The court has correctly stated that such an exception can only be made in very special circumstances, where the court speaks of 'a very strict standard'. In the circumstances that the court has taken as a starting point, the court has correctly decided that the unimpaired application of the equal division of the community of property based on the rule of article 1:100 clause 1 of the Civil Code between spouses in a dissolved matrimonial community, would, in the wording of article 6:2 clause 2 of the new Civil Code, be unacceptable according to standards of reasonableness and fairness.
On this ground the court has concluded that in the division of this community L is not entitled to the share in the community of property that has been brought in by van Wylick.
(...)
3.5. Since, as has been stated above, none of the parts succeed ('treffen doel'), the appeal in cassation must be dismissed.
4. Decision
The Supreme Court:
dismisses the appeal.

ARGUMENTS OF INTERPRETATION AND ARGUMENTATION SCHEMES

Fabrizio Macagno

1. Introduction

In everyday discourse we retrieve the meaning of verbal or written utterances by means of different processes of reasoning. The most common one is the presumptive, or rather heuristic mechanism (Hamblin 1970, pp. 294-295; Macagno 2012). Our interpretation of a word or a sentence is guided by the commonly shared definition and meaning attributed to it. However, sometimes the presumptive meaning is not a viable option. If we do not have any doubts in classifying an unlawful killing as a 'homicide', we have much greater problems when we need to categorize an abortion as such. There are cases in which we cannot presume a shared meaning, or the shared meaning itself is contested. Therefore, the possible definition of a word or the interpretation of a sentence becomes a standpoint that needs to be supported by arguments. In this sense, the actual or possible conflicts of opinion on meaning become a form of argumentative practice that needs to be analyzed through the analysis of the arguments used.

Theories on legal interpretation clearly highlight this argumentative dimension of meaning. According to McCormick (1995, p. 467), interpretation 'is a particular form of practical argumentation in law, in which one argues for a particular understanding of authoritative texts or materials as a special kind of (justifying) reason for legal decisions.' A statement of law (or source statement) can be used to support a specific conclusion only by retrieving its meaning. Sometimes this meaning can be reconstructed in a presumptive way, and in this sense we 'understand' it. However, when the understanding of the source is controversial, it turns into an interpretative process grounded on arguments (Patterson 2004, p. 247).

The analysis of legal interpretation as an argumentative activity involves two different domains and two different perspectives. On the one hand, interpretation is based on the use of arguments, whose logical and semantic structure and evaluation can be analyzed from within the field of argumentation studies (Walton 2006; van Eemeren & Grootendorst 2004). On the other hand, this activity is performed in a specific context, characterized by precise rules, roles and mechanisms. Such elements are taken into consideration in the field of philosophy of law. Thus, a study of legal interpretation needs to reconcile the two theoretical dimensions and approaches, so that the structure of a specific type of reasoning used in the specific context of law can be explained, examined and evaluated from a more abstract perspective.

The purpose of this study is to translate the argument analysis carried out in philosophy of law into the theoretical structures used in argumentation theory. The starting point is provided by the list of arguments of statutory interpretation set out by Tarello (Tarello 1980; see Feteris 1999). These arguments, comparable with the ones used in common law (McCormick 1995; Summers 1991; Greeanawalt 2002), can be shown to be specific applications of more generic schemes of reasoning, characterized by the combination of a semantic principle (called «local» or «material» connection between the terms, see Stump 1988, p. 6; Abelardi *Dialectica* 264) with a more abstract formal rule of inference. These structures that represent prototypical patterns of argument, called argumentation schemes (Walton, Reed & Macagno 2008; see also van Eemeren & Grootendorst 2004), can provide a link between legal interpretation and the instruments of argumentation.

2. Interpretation and presumptive meaning

In law the concept of interpretation has been analyzed both in a broader and in a more restrictive sense. According to the first position, advocated by Tarello (Tarello 1980; Guastini 2011) interpretation is the necessary step leading from a source statement (a linguistic element) to a rule (its meaning). On this perspective, there are no rules of law (obligations, prohibitions…) without interpretation. According to the nar-

rower approach, interpretation is regarded as the argumentative process that is aimed at solving a doubt concerning the meaning of a text (Patterson 2004). These two perspectives are not mutually exclusive. Rather, the second approach distinguishes between the defaultive reasoning, which is used to attribute a presumptive meaning to a statement (the 'understanding'), and the systematic one, which intervenes when the prima-facie understanding is not possible. The nature of the two types of interpretative activity is different from the point of view of the kind of reasoning involved. However, in both cases the relationship between text and meaning is always mediated by a reasoning process that can be described in argumentative terms.

The relationship between the source-statement, set out in legal sources, and its interpretation, namely the rule resulting therefrom, corresponds to the linguistic distinction between text and meaning (Rigotti & Cigada 2004; Rigotti & Rocci 2006), or between what is said (literal meaning) and what is meant (Carston 2002; Searle 1981, Chapter 5). This passage can be mediated by two different processes. The first is the prima-facie understanding, which is the attribution by default of a rule (or meaning) to the text (the source-statement). The other process consists in a more complex reasoning that Searle called «strategy for interpretation» (1981, p. 102), namely an explanation of meaning that is supported by different grounds, such as salience, definitional traits, prototypical features, and so on.

From an argumentative perspective, interpretation can be distinguished from prima-facie understanding. In prima-facie understanding, the passage from a source statement to the rule it expresses (Tarello 1980) is grounded on unchallenged presumptive meaning (Macagno 2011, 2012). If we consider the passage from text to meaning as a mediated process, understanding can be regarded as the default explanation of the meaning of a word or sentence according to shared linguistic-cultural conventions/practices. In interpretation, the explanation of meaning of a source-statement needs to be supported by arguments. Interpretative argumentation becomes an activity aimed at supporting a challenged or potentially challengeable interpretative statement. In other words, it bears out a possibly controversial statement affirming that a source-statement has a certain meaning (expresses a certain rule), and

thereby selecting a specific meaning among other possible ones of the same source.

This twofold route to meaning explanation can be more clearly explained by means of the analysis of an example. For instance, we can consider the famous source-statement written on a sign in from of Lincoln Park (Horn 1995, p. 1146):

All vehicles are prohibited from Lincoln Park.

The presumptive meaning is based on the commonly shared definition of ‘vehicle’, resulting in the following default explanation of meaning (or prima-facie understanding): ‘entities having wheels and used for the transportation of people are prohibited from Lincoln Park.’ In a prototypical context, characterized by specific background assumptions (Searle 1981, p. 135), this default passage can be accepted or considered as acceptable. However, sometimes the prototypical context allowing a ‘literal’ understanding does not occur in all its features. For this reason, the presumptive, defaultive meaning cannot be taken into consideration as the possible meaning explanation without any burden of proof.

Sometimes in legal interpretation the passage from the source statement to the corresponding rule is not merely a process of understanding. The statement may be vague or ambiguous (so that prima-facie understanding delivers alternative clues), or it needs to be applied to a specific case with regard to which there are reasons for *not* applying the presumptive meaning. In this case, the default explanation cannot be considered presumptive anymore, as possible contrary evidence is already there. The presumptive meaning becomes one of the possible interpretative statements that need to be grounded on arguments. For example ‘vehicles’ can be interpreted as ‘unauthorized transportation means’, or as ‘transportation means with an engine’, etc. We can represent the twofold process of interpretation as follows:

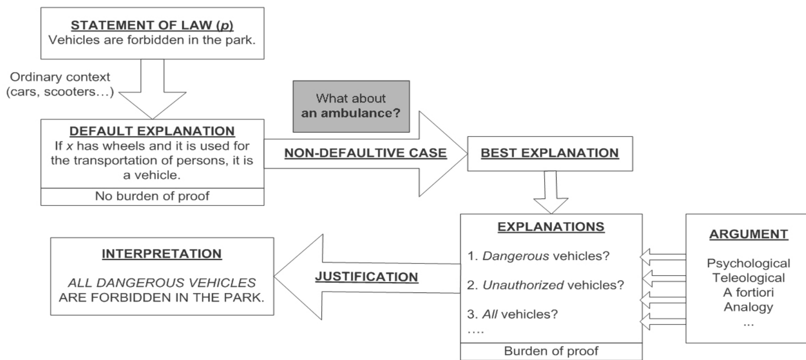

Figure 1: Interpretation and understanding

As shown in figure 1 above, understanding does not involve a burden of proof, as it is the default explanation that holds until contrary evidence (i.e. challenges or non-prototypical context) emerges. When these conditions do not apply, the default explanation ceases to be as such. It becomes one of the possible interpretations that are considered as potentially controversial and, therefore, need to be grounded on arguments. The various arguments advanced to support an interpretation need to defeat the other possible alternatives. They need to show that the advocated explanation of meaning is better (more adequate, more suitable) than the others. These interpretative arguments have been analyzed in philosophy of law and classified in general categories that will be described in the following section.

3. The categories of interpretative arguments

Tarello (1980) in his work on legal interpretation identified the structure and the uses of thirteen types of argument of interpretation. Two of these arguments (the argument from the coherence of the law and the argument from the completeness of the law) are called ‘ancillary’, as they do not support directly an interpretation, but instead act as

counter-arguments. They exclude a possible (presumptive or non-presumptive) explanation and provide a reason for the simple *need* for a different interpretation of a source statement.

Tarello's arguments can be examined from a different perspective. The picture of interpretative reasoning can be broadened, and such arguments can be considered in relation with more abstract categories of patterns of human argument. Instead of describing Tarello's arguments from a legal perspective, it is possible to show how they mirror some more abstract structures with which the human ordinary reasoning can be represented.

The patterns of natural arguments are called in argumentation theory 'argumentation schemes' or 'argument schemes'. They can be regarded as the modern re-elaboration of an ancient idea, namely the description of the principles that lead from two or more premises to a conclusion. On this perspective, the modern schemes can be considered as the continuation of the medieval theory of *loci*, or rather maxims of inference (Walton, Reed & Macagno 2008; Rigotti & Greco-Morasso 2010; Rigotti 2009). In the last fifty years different sets and classifications of schemes have been proposed (see Hastings 1963; Perelman & Olbrechts-Tyteca 1969; Kienpointner 1992a, 1992b; Walton 1996; Grennan 1997; Walton, Reed & Macagno 2008), abstracting general categories from the various arguments more commonly used. Van Eemeren and Grootendorst (2004), instead, proposed a top-down approach, where three generic types of schemes are distinguished, under which different subtypes are classified. Taking into consideration the schemes set out in (Walton, Reed & Macagno 2008) and comparing them with Tarello's arguments, it is possible to show how the first ones can be regarded as specific, contextual uses of more generic patterns.

The first type of argument of interpretation is the *a contrario*, which can be summarized by the Latin principle *Ubi lex voluit, dixit; ubi noluit, tacuit* (what the law wishes, it states, what the law does not want, it keeps silent upon). According to this argument, if a rule attributes any normative qualification (such as a power, an obligation or a status) to an individual or a category of individuals, in lack of any other explicit rules it shall be excluded that any additional rule is in force (exists, is valid) attributing the same quality to any other individual or cat-

egory of individuals. The structure of this argument can be represented as follows:

Major premise:	If x is P, then x has the right/is A.
Closed world premise:	In lack of contrary provisions, if x is not P, then x does not have the right/is not A.
Minor premise:	Individual a is not P.
Conclusion:	Therefore, individual a has not the right/is not A.

We can notice that this reasoning is effective only in a closed-world scenario. The conclusion can be drawn only in conditions of lack of contrary evidence, that is, when no other laws setting out the attribution of the same predicate to other categories is known. For this reason, the crucial logical assumption behind this type of reasoning can be represented as a form of reasoning from ignorance (Walton, Reed & Macagno 2008, p. 327):

Argumentation scheme 1: Argument from ignorance

Major premise:	If A were true, then A would be known to be true.
Minor premise:	It is not the case that A is known to be true.
Conclusion:	Therefore A is not true.

The argument from similarity and the *a fortiori* argument both proceed from a comparison between two rules (Guastini 2011, p. 282-283). In both cases, the interpreter aims at supporting an unexpressed rule and presupposes a *ratio iuris*, which is applied to the case not expressly regulated yet. In case of analogy, if a rule attributes any normative qualification (such as a power, an obligation or a status) to an individual or a category of individuals, it can be concluded that there is an additional rule that attributes the same quality to another individual or category of individuals connected with the former class by a similarity or an analogy relation. The reasoning structure of this type of argument can be represented as follows (Walton, Reed & Macagno 2008, p. 315):

Argumentation scheme 2: Argument from analogy

Major premise:	Generally, case C_1 is similar to case C_2.
Minor premise:	Proposition *A* is true (false) in case C_1.
Conclusion:	Proposition *A* is true (false) in case C_2.

This scheme is defeasible, in the sense that it provides only a presumptive reason to accept the conclusion. The following critical questions highlight the potentially critical points of an analogical argument, which can be used at the same time as an instrument of invention (finding possible rebuttals or defeaters) and a method of evaluation (does the argument satisfactorily meets such conditions or provides reasons in support thereto?).

CQ1: Is *A* true (false) in C_1?
CQ2: Are C_1 and C_2 similar, in the respects cited?
CQ3: Are there important differences (dissimilarities) between C_1 and C_2?
CQ3: Are there important?
CQ4: Is there some other case C_3 that is also similar to C_1 except that *A* is false (true) in C_3?

The *a fortiori* argument partially mirrors the aforesaid pattern. However, in this case there is an asymmetry in favor of the case not expressly regulated: if a rule attributes any normative qualification (such as a power, an obligation or a status) to an individual or a category of individuals, it can be concluded that there is a different rule (or a different rule exists, is valid) that attributes the same quality to another individual or category of individuals in a situation in which such a normative qualification shall be even more needed or justified (Tarello 1980, p. 355).

Four arguments are based on authority: the psychological, the historical, the naturalistic and the *ab exemplo* arguments. In these arguments, the acceptability of the interpretation depends on the authority of the legislator, previous interpreters or popular opinion. According to the psychological argument, to a source statement shall be attributed the meaning that corresponds to the intention of its drafter or author, that is,

the historical legislator. In the historical argument the authority is not the actual legislator but the traditional interpretation (the authority of previous interpreters) of a previous source statement that governed the same case in the same legal system. This type of argument, which can be called the *de jure* argument from authority, has the following argumentation scheme:

Argumentation scheme 3: Argument from authority (de jure)

Minor Premises:	*L* is an authority involved in (passing, drafting, amending) the source-statement *A*.
Major Premise:	*L* (passed, drafted, amended) source-statement *A* intending *M*.
Conditional Premise:	If *L* is an authority involved in (passing, drafting, amending) the source-statement *A*, and *L* intended the meaning (interpretation) *M*, then *M* may plausibly be taken to be right meaning (interpretation).
Conclusion:	*M* may plausibly be taken to be the right meaning (interpretation).

The defeasibility conditions can be specified by taking into consideration the critical questions of the argument from expert opinion and Tarello's analysis (1980, p. 366-367). They can be summarized in the following critical questions:

CQ1: *Role Question*: Whose opinion, in the case, effectively represents *L's* opinion (the majority, the most influential, the most representative)?

CQ2: *Opinion Question*: Did *L intend to* express *M* by asserting *A*?

CQ3: *Consistency Question*: Is *M* consistent with the intention of other *Ls* that passed the same law?

CQ4: *Coherence Question*: Does *M* lead to any antinomy or incoherence in the legal system?

The argument *ab exemplo* (or authoritative) is based on the authority of a previous interpretation, or rather the authority of the product of a previous interpretation. Finally, the naturalistic argument (or at least

one of its patterns) proceeds from the authority of popular opinion. As a matter of fact, it is grounded on the commonly accepted 'nature' of the things, namely the commonly shared values that characterize a specific culture.

The arguments from consequences are based on the acceptability or unacceptability of what follows from applying a rule. The judgment on the consequences of the application of a rule is transferred onto the reasonableness or unacceptability of the interpretation leading to that rule. Through the apagogic argument it is possible to reject the possible interpretations of a source statement leading to an unreasonable or 'absurd' rule. According to the teleological argument a source statement shall be given the interpretation that corresponds to the purpose which the legislator (or the law) aims to achieve through that statement. This type of reasoning can be represented with the argument from consequences (from Walton, Reed & Macagno 2008, p. 332):

Argumentation scheme 4: Argument from consequences

Major premise:	If *A* is brought about, good (bad) consequences will plausibly occur.
Minor premise:	What leads to good (bad) consequences shall be (not) brought about.
Conclusion:	Therefore *A* should be (not) brought about.

The critical questions associated with this scheme are the following ones:

CQ1: How strong is the likelihood that the cited consequences will (may, must) occur?

CQ2: What evidence supports the claim that the cited consequences will (may, must) occur, and is it sufficient to support the strength of the claim adequately?

CQ3: Are there other opposite consequences (bad as opposed to good, for example) that should be taken into account?

Finally, abductive arguments lead from a fact to its best possible explanation. According to the economic argument, an interpretation of a source statement that corresponds to the meaning of another, older or hierarchically superior, source statement shall be excluded. The reason can be found in the fact that the best explanation for the existence of two identical statements of law is that the legislator intended them as having different meanings. The systematic argument is based on the authority of the legal system (the other provisions of law) and the explanatory principle that the legislator intended a unitary and coherent system of laws. Accordingly, the best explanation for the meaning of a source statement is the meaning corresponding to the one imposed (and not excluded) by the legal system. This type of reasoning can be mirrored by the reasoning from best explanation (Walton 2002, p. 44):

Argumentation scheme 5: Reasoning from best explanation

Premise 1:	*F* is a finding or given set of facts.
Premise 2:	*E* is a satisfactory explanation of *F*.
Premise 3:	No alternative explanation *E'* given so far is as satisfactory as *E*.
Conclusion:	Therefore, *E* is plausible, as a hypothesis.

The defeasible points can be summarized in the following questions:

CQ1: How satisfactory is *E* itself as an explanation of *F*, apart from the alternative explanations available so far in the dialogue?

CQ2: How much better an explanation is *E* than the alternative explanation so far in the dialogue?

CQ3: How far has the dialogue progressed? If the dialogue is an inquiry, how thorough has the search been in the investigation of the case?

CQ4: Would it be better to continue the dialogue further, instead of drawing a conclusion at this point?

The different interpretation of a principle expressed in a different place, or redundant, is a satisfactory explanation of a fact. It is a possi-

ble way of explaining the superfluity of a source statement or a specific phrase therein.

The correlation between the arguments of interpretation and the argumentation schemes can be represented in the following scheme:

Arguments of interpretation	Argumentation schemes
1. Argumentum a contrario	**Argument in lack of evidence**
2. Argumentum a simili	**Analogical arguments**
3. Argumentum a fortiori	
4. The psychological argument	**Arguments proceeding from the authority of the source**
5. The historical argument	
6. The naturalistic argument	
7. Argumentum ab exemplo	
8. The teleological argument	**Arguments proceeding from consequences**
9. The apagogical argument	
10. Argumentum a coherentia	
11. The economic argument	**Abductive arguments**
12. The systematic argument	
13. Argumentum a completitudine	

Figure 2: Arguments and schemes of interpretation

Clearly, this correspondence is not perfect. The authority of a piece of legislation is strictly connected with the authority of its source, or the authority of the system of laws. For this reason, arguments that in the Latin and medieval tradition would have been considered as intrinsic, namely directly dependent on the subject matter, are often supported by extrinsic ones. These latter arguments correspond to the topics that support the conclusion on the basis not of the characteristics of the subject

matter thereof (see the concept of ‘reasons of substance’ in McCormick 1995; Summers 1978), but rather on the relationship that it has with other propositions or with the authority of who advances it (Boethii *De Topicis Differentiis* 1194C 1-18; Stump 1988, p. 8, p. 9). This case is particularly clear with the abductive arguments, where the best explanation is considered as such because it does not conflict, or is in accordance with, the system of existing laws.

The following sections will take into consideration the translation into the categories of argumentation schemes of two arguments of legal interpretation, the arguments from analogy and the naturalistic argument.

4. Arguments from analogy

The interpretative function of the arguments from similarity (*analogia legis*; *analogia iuris*) can be understood starting from its opposite (from an interpretative perspective), the argument *a contrario*. As mentioned above, this latter type of reasoning is aimed at excluding the attribution of a legal predicate to the entities not belonging to the category mentioned in the law. On the contrary, the arguments from analogy extend the attribution of such a predicate to entities that are different from, but somehow sharing some crucial similarities with the ones falling within the legal categories. As Tarello put it, if a rule attributes any normative qualification (such as a power, an obligation or a status) to an individual or a category of individuals, it can be concluded that there is a different rule in force (or a different rule exists, is valid) that attributes the same quality to another individual or category of individuals connected with the former class by a similarity or an analogy relation. Such a relationship shall be relevant from the perspective of the applicable law, or the qualification to be attributed (Tarello 1980, p. 351).

The reasoning structure of this type of argument mentioned above (Walton, Reed & Macagno 2008, p. 315) is grounded on the premise ‘Generally, case C_1 is similar to case C_2’, which leads from a difference to a kind of identity. However, this pattern is ambiguous. The cases

compared can be instances of the same category governed by the legal qualification *A*, or two categories of which the second (C_2) is not governed by *A*. In other words, there is a crucial difference between a similarity of two cases (*a* and *b*) that can belong to the class *P*, and a similarity of two categories (*P* and *Q*).

At common law, this difference represents a distinction between two ways in which the use of the precedent operates. In civil law, where the written laws represent the primary authority, this difference is pointed out by the concepts of *analogia legis*, or the application of a *written* law to a different, similar case (Colombo 2003, p. 96-97; Cendon 2011, p. 236), and *analogia iuris*, or the application of an abstract and unexpressed principle of law from which the stated law is drawn (Guastini 2011, p. 281). While in the first case analogy is used to *apply* the law to borderline or controversial cases, in the second case this type of reasoning is used to draw and support *a new unexpressed law* covering a legal gap. For this reason, the difference results in a crucial distinction between a mere reasoning aimed at applying a law and a process intended to justify a systematic interpretation (a rule can be drawn from the statements of law already existing in the legal system).

4.1. Redefining a predicate – analogia legis

From a reasoning perspective, analogia legis can be conceived as a form of specification of the properties of the predicate. Since the definition does not allow a classification of borderline cases, through analogy the relevant, unstated factors are pointed out. This type of reasoning can be represented as follows (Ashley 1991, p. 758):

Specific scheme from analogia legis

Premise 1 (rule)	If x is P, then x has the right/is A.
Premise 2 (borderline)	It is not clear whether a (a borderline case) is P.
Similarity premise	a is similar to b.
Premise 3 (principle of classification)	b was classified as P because of the factors $f_1, f_2, \ldots, f_n$.
Redefinition premise	If x has the factors $f_1, f_2, \ldots, f_n$, then x is P.
Premise 4 (factors)	a has $f_1, f_2, \ldots, f_n$.
Conclusion	Therefore, a is P.

The predicate is specified (or rather redefined, Sorensen 1991) by highlighting the factors that are considered as essential for the legal qualification to apply.

The argument from *analogia legis* can be illustrated in the civil law by the following case from the Italian Corte costituzionale (Judgment no. 0280 of 2010). The article no. 180, 4th paragraph of the Legislative Decree no. 285 of 1992[1] allowed public transport (vehicles for the transportation of persons) and vehicles for rental (without driver) to keep on board only the photocopy of the registration document, authenticated by the owner. The case concerns a police officer stopping the driver of a vehicle owned by a company of waste management. The driver showed him the driving license and the photocopy of the registration documents, authenticated by the company. Was the legal provision applicable in this case, even though the purpose of the vehicle was

[1] Art. 180, 4th paragraph, of the aforementioned Legislative Decree no. 285 of 1992, amended by art. 3, 17th paragraph of the Law Decree no. 151 of 27 June 2003 ("Integrations and amendments to the highway code"), converted into the law no. 214 of 1 August 2003, with amendments to the section in which it forbids its extension to all vehicles of public companies providing essential services, as defined by art. 1 of the law no. 146 of 12 June 1990 (Rules on the enforcement of the right to strike in the sector providing essential public services, and on the protection of the rights of individuals under the constitution. Institution of the Guarantee committed for the implementation of the law).

not transportation of people, but of objects? The Italian Corte costituzionale advanced the following reasoning[2]:

The law that allowed the drivers of vehicles for public transport of persons to carry the photocopy of the registration document instead of the original copy was based on the need of promptly and systematically retrieving the original documents for purpose of renewal, updating and periodical service, in order to avoid the risk of their loss and the consequent custody of the vehicle […]. These purposes concern also any other types of public services characterized by essentiality, – as specified in art. 1 of the law no. 146/1990 – and involving the management of a fleet of vehicles.

In this case, the category of 'vehicles for public transport of persons' was specified by setting out the features of 'being an essential public service' and 'managing a fleet of vehicles.' These two features bore out the extension of the category to the case considered as similar. We can represent the reasoning as follows:

Premise 1 (rule)	If x is a "*driver of vehicles for public transport of persons*" (P), then x has the right to "*carry the photocopy of the registration document instead of the original copy*" (A).
Premise 2 (borderline)	It is not clear whether a "*driver of a waste management vehicle"* is P.
Similarity premise	A "*driver of a waste management vehicle"* is similar to a "*driver of a vehicle for public transport of persons*".
Premise 3 (principle of classification)	A "*driver of a vehicle for public transport of persons*" was classified as P because of the "*essentiality of the service proivided*" (f_1) and the "*management of a fleet of vehicles*" (f_2).
Redefinition premise	If x has the factors f_1 and f_2, then x is P.
Premise 4 (factors)	A "*driver of a waste management vehicle"* has f_1 and f_2.
Conclusion	Therefore, a "*driver of a waste management vehicle"* is P.

At common law, the *analogia legis*, considered as a type of reasoning used for extending a category governed by a legal provision, can be used both in statutory interpretation and case law. *Analogia legis* can be

[2] See http://www.dircost.unito.it/SentNet1.01/srch/sn_showArgs.asp?id_sentenza=20100280#20100280_3.

used to interpret state or federal law, such as in the following case (*Dooley v. Parker-Hannifin Corp*., 817 F. Supp. 245, at 248 1993).

Under Rhode Island Law, the ‘sale’ of a product may create a variety of warranties regarding that product. Thus, a warranty of merchantability is implied in a contract for the ‘sale’ of goods if the ‘seller’ is a merchant with respect to goods of that type. […] Breach of those warranties exposes the ‘seller’ to liability for personal injury that proximately results from the breach. […] Responsibility for personal injury caused by a defective product also may be imposed on one who ‘sells’ the product on the theory of strict liability in tort as set forth in Restatement (Second) of Torts § 402A (1965):

> Are lessors of defective products liable? Are lessors of furnished apartment strictly liable for injuries suffered due to defect in furniture? In such cases the court found a similarity between leasing products and selling them, as ‘suppliers placed the products in the stream of commerce by means of transactions very similar to sales’. The category of ‘sale’ is extended, or rather redefined through new factors (‘being a supplier of a product’; ‘supplying a product placed in the stream of commerce’; ‘executing a transaction similar to sale’), so that borderline cases are included.

In case law, the concept of *analogia legis* can be seen as an implicit contradiction, as such a source of law presupposes the absence of an explicit written code. Instead, at common law the judge both applies and defines the legal rules based on previously decided cases (Friesen 1996, pp. 12-13). In this system we can consider the principle underlying the concept of *analogia legis*, and conceive it as the specification or extension of an implicit category, by pointing out the essential or fundamental characteristics (or factors), already governed by a legal provision or a precedent to include a borderline case.

One of the most famous cases involving this use of analogy is *Popov v. Hayashi* (WL 31833731, Cal. Super. Ct. 2002). In this case the plaintiff (Popov), a baseball fan, stopped with his glove the ball hit by a famous player, who set a new record with it. However, in order to reach for the ball, Popov lost his balance and was forced to the ground by the crowd, leaving the ball loose on the ground. The defendant (*Hayashi)* was involuntarily forced to the ground too, and when he saw the loose

ball, he picked it up, rose to his feet and put it in his pocket. Popov, who intended to establish and maintain possession of the ball, could not prove that he secured it. An issue for both parties was the classification of Popov's act as 'possession', which would have resulted in Hayashi's charge of conversion. However, in the California case law, the concept of possession had never been clearly and univocally defined, and for this reason this borderline cases resulted in a discussion on its definition. The specifications of the concept were supported both by the defense and the plaintiff by means of analogical arguments. For instance, the plaintiff used the following argument (*Popov v. Hayashi*, WL 31833731, at 8, Cal. Super. Ct. 2002):

> The hunting and fishing cases recognize that a mortally wounded animal may run for a distance before falling. The hunter acquires possession upon the act of wounding the animal not the eventual capture. Similarly, whalers acquire possession by landing a harpoon, not by subduing the animal.

The plaintiff compared the possession of the ball with the possession of an animal or a whale in hunting and fishing. In these latter cases, possession is established based on the criterion, or rather factor, of partial dominion and control over the possessed item, and more specifically on the following factors: 'The actor to be actively and ably engaged in efforts to establish complete control' (f_1); 'Such efforts must be significant and they must be reasonably calculated to result in unequivocal dominion and control at some point in the near future' (f_1). According to the plaintiff, the calculated efforts made to establish complete control on the ball could classify his partial possession as possession.

The problem in this case was simply shifted onto the issue of whether the nature of a ball allowed a complete control or not, and whether partial control could be classified as full or no possession. For this reason, the court used a different analogy to establish the factors that could lead to a more viable classification. The analogy used by the court was the following (*Popov v. Hayashi*, WL 31833731, at 7, Cal. Super. Ct. 2002):

> […] five boys were walking home along a railroad track in the city of Elizabeth New Jersey. The youngest of the boys came upon an old sock that was tied shut and contained something heavy. He picked it up and swung it. The oldest boy took it away from him and beat the others with it. The sock passes from boy to boy. Each controlled it for a short time. At some point in the course of play, the sock broke open and out spilled $775 as well as some rags, cloths and ribbons.
> The court noted that possession requires both physical control and the intent to reduce the property to one's possession. Control and intent must be concurrent. None of the boys intended to take possession until it became apparent that the sock contained money. Each boy had physical control of the sock at some point before that discovery was made.

In this case, the relevant factors for determining possession were physical control and intent. Since both parties had physical control and intent, they were found equally entitled to the ball.

4.2. Analogia iuris (argument from general principles)

Analogia iuris represents the application of an implicit ratio of a law governing a different case. This argument can be represented as follows (Macagno & Walton 2009, p. 173; Guastini 2011, pp. 280-281):

Specific scheme from *analogia iuris*

Premise 1 (target)	No law provides for the x's that are Q.
Premise 2 (property)	If x is P, then x has the right/is A.
Similarity premise	P and Q belong to the same functional genus G.
Species – Genus premise	If x is G, then x has the right/is A.
Conclusion	If x is Q, then x has the right/is A.

This type of reasoning is grounded on two fundamental principles, expressed by Boethius in his *De Differentiis Topicis*. The first principle is the attribution of the property A of the species P to the functional genus G. This passage is supported by the maxim connecting the species

to the genus: What is predicated of the parts (in this case essential part, the species) is predicated also of the whole (in this case essential whole, the genus)[3]. In the case of analogy, the genus *G* is abstracted based on the property *A* predicated of the species. It is considered as an essential property of the species (or rather, the category *P* has been chosen because it is essentially similar to *Q* from the point of view of *A*) and for this reason is predicated of the possible essential parts of G. The other inferential step is presupposed by the requirements of the former. From the predication of the property *A* to the genus *G*, the attribution of *A* to the other species *P* is concluded. This inferential step is supported by the maxim stating that 'What is (not essentially) said of the genus is said of its species as well'[4]. Since *P* and *Q* are the two species of *G*, and *A* is attributed to *G*, then *Q* is *G*.

The aforementioned analysis mirrors the abstract and ideal reasoning structure of the use of analogy. Clearly, depending on the legal system the grounds, the effects and the conditions of its use can greatly vary. In civil law, it can be considered as a reason provided for the use of a systematic interpretation. In lack of a source statement governing a specific case, the enforceable rule needs to be found within the legal system, by interpreting one of the provisions already in force. Analogy in this case provides the 'surface reasoning structure' which actually draws its force from the authority of the completeness of the legal system. This mechanism represents the reasoning underlying the «construction of an unexpressed rule» (Guastini 2011, p. 278), which can be illustrated by the following case (Guastini 2011, p. 280):

> According to art. 2038 of the Italian Civil code, anyone who has unduly received some goods and has transferred them in good faith, ignoring the obligation to return them, shall return the consideration thereof and not the very goods or their value. The ratio of the law is the principle of protecting good faith. On this view, the law provides only for the restitution of the consideration and not more burdensome obligations in order to protect the good faith of the individual. The undue receipt together with the transferal subsequent thereof is similar to the purchase

[3] «Quod enim singulis partibus inest, id toti inesse necesse est» (Boethii *De Differentiis Topicis*, 1189A).

[4] «[...] quae generi adsunt specie adsunt» (Boethii *De Differentiis Topicis*, 1188C).

> and sale of stolen goods when their illicit provenience is unknown. Therefore, art. 2038, 1st paragraph, shall be interpreted as applicable also to the case of purchase in good faith of stolen goods.

In this case, an unexpressed principle is abstracted from a law and applied to a case not possibly falling thereunder, so that the scope of an existent provision is broadened.

A clear example of *analogia iuris*, or rather analogy aimed at introducing a new generic functional concept under which the cases fall can be found in the opinion rendered by the court in the aforementioned case *Popov v. Hayashi. The court, with the last analogy mentioned in the subsection above, established that both parties had both possessed the ball. How to solve this issue? Who has title to the ball? The California case law had not previous cases providing a principle from which it was possible to draw a conclusion. The solution that was found was to draw a generic rule of equity implicit in previous similar cases. In particular, the following analogy was drawn (Popov v. Hayashi*, WL 31833731, at 7, Cal. Super. Ct. 2002):

> Although there is no California case directly on point, *Arnold v. Producers Fruit Company* (1900) 128 Cal. 637 provides some insight. There, a number of different rune growers contracted with Producer's Fruit Company to dry and market their product. Producers did a bad job. They mixed fruit from many different growers together in a single bin and much of the fruit rotted because it was improperly treated. When one of the plaintiffs offered proof that the fruit in general was rotten, Producers objected on the theory that the plaintiff could not prove that the prunes he contributed to the mix were the same prunes that rotted. The court concluded that it did not matter. After the mixing was done, each grower had an undivided interest in the whole, in proportion to the amount of fruit each had originally contributed. The principle at work here is that where more than one party has a valid claim to a single piece of property, the court will recognize an undivided interest in the property in proportion to the strength of the claim.

This argument can be reconstructed following the aforementioned more abstract pattern:

Premise 1 (rule)	If x is a "*driver of vehicles for public transport of persons*" (P), then x has the right to "*carry the photocopy of the registration document instead of the original copy*" (A).
Premise 2 (borderline)	It is not clear whether a "*driver of a waste management vehicle*" is P.
Similarity premise	A "*driver of a waste management vehicle*" is similar to a "*driver of a vehicle for public transport of persons*".
Premise 3 (principle of classification)	A "*driver of a vehicle for public transport of persons*" was classified as P because of the "*essentiality of the service proivided*" (f_1) and the "*management of a fleet of vehicles*" (f_2).
Redefinition premise	If x has the factors f_1 and f_2, then x is P.
Premise 4 (factors)	A "*driver of a waste management vehicle*" has f_1 and f_2.
Conclusion	Therefore, a "*driver of a waste management vehicle*" is P.

The distinction between *analogia iuris* and *analogia legis* mirrors at a more conceptual level a crucial difference between two distinct patterns of reasoning from analogy. The first one is a form of (implicit or explicit) redefinition of a concept, while the second one consists in the introduction of a new generic property.

5. Naturalistic arguments

Among the arguments from authority of the source, the naturalistic argument is the most problematic one due to the ambiguity and vagueness of its grounds. The naturalistic argument is based on the so-called 'nature' of man, social relations, or things. Therefore, who uses this argument presents the law as directly drawn or taken from the 'nature', implying that the legislator cannot force it unless he wants to provide a law that is not 'real'.

An example of this argument, which is often left implicit and underlying other arguments is the following Italian case (Corte costituzionale, Sentenza n. 138/210) concerning the constitutionality of the civil law prohibiting same-sex marriage. Such a law was allegedly conflicting with article 3 of the Italian constitution (prohibiting any discrimination) and article 29, defining family. The Court found that the same-sex marriage ban was not unconstitutional, grounding its argument on the

definition of family as a 'natural society based on marriage' (Italian Constitution, art. 29). This definition is gender-neutral; however, what shall be considered as a 'natural society'? As Damele put it (Damele 2011):

> […] the Court resorts also to a psychological argument, saying that 'with this expression, as one can deduce from the preliminary work of the constituent assembly, the constitutional legislator meant underline that the family has original rights, not derived from the authority of the State or of the legal order'. As we can see, the naturalistic argument is still implicit, but the strategy of the Court is to hide this argument, which ultimately states the unnaturalness of same-sex marriage, by resorting to the intention of the legislator. It thus shifts the burden of proof to the 'Constituent Fathers'.

Here the argument proceeds from the 'nature' of family, which amounts to what is traditionally perceived as a family.

In order to understand the argumentative structure of the naturalistic argument works, it is necessary to analyse how the concept of 'nature' is appealed to from a dialectical and rhetorical perspective. From a dialectical perspective, 'nature' can be appealed to as a scientific law (the causal 'nature of the things'), i.e. a commonly accepted principle that does not need to be further proved. For instance we can consider the following case (*People v. Collins*, 214 Ill. 2d 206, at 218, 2005):

> In a prosecution under 720 Ill. Comp. Stat. 5/24-1.5 (2002), the State is not required to introduce evidence concerning the force or velocity of bullets as they fall to the ground, or the angle or direction of the discharge. The inherent danger caused by the reckless discharge of a firearm into the air, and the obvious ricochet effect that may occur when bullets fall to the ground, are matters of common sense.

In this case the scientific law governing the velocity of bullets does not need to be proved, as it is a scientific law commonly accepted by the scientific community, and is part of the accepted opinions (Damele 2012).

The scientific naturalistic argument need to be distinguished from the ontological naturalistic ones, which are grounded on other uses of the idea of 'nature', such as the 'nature' of a concept, a value (Guastini 2011, p. 242), or a goal. These latter arguments make explicit appeal to the ontological structure of what is referred to as 'natural.' For example, in the medieval tradition the ability to laugh was regarded as an essential characteristic of human being, as part of his nature (called 'specific nature', see Thomas Aquinas *Summa Theologiae*, Q. 51 A. 1). We can consider the following argument (*Lewis v. Harris*, 875 A.2d 259 at 277, 2005):

> […] a core feature of marriage is its binary, opposite-sex nature. Interestingly, plaintiffs admittedly have no quarrel with the legal requirement that marriage be limited to a union of two people. But, the binary idea of marriage arose precisely because there are two sexes.

The problem of the fundamental shared characteristics of a concept is to establish what is actually shared, and by whom. The ontological naturalistic argument was supported in the past by the idea of a divine order of things, which *was to be* shared because of its divine nature. In this sense, the popular acceptance was based on the authority of religion. For instance we can consider the following argument (*Scott v. State*, 39 Ga. 321, at 326, 1869):

> Before the laws, the Code of Georgia makes all citizens equal, without regard to race or color. But it does not create, nor does any law of the State attempt to enforce, moral or social equality between the different races or citizens of the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest arch angel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist, and must continue to exist through all eternity.

Nowadays the concept of 'nature' of the things mirrors a commonly accepted meaning, beliefs shared because of different reasons, such as culture or tradition. In this sense, the ontological naturalistic argument can be interpreted as based on the 'common sense' (Soboleva 2007; see

also Eskridge 1997 for the evolution of the notion of 'crime against nature). The 'natural' meaning of a concept (Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 1994; *Perrin* v. *United States*, 444 U.S. 37, at 42, 1979; 322 L Ed Digest §165) constitutes a presumption of acceptance (*Lewis v. Harris*, 908 A.2d 196, at 206, 2006):

> The State rests its case on age-old traditions, beliefs, and laws, which have defined the essential nature of marriage to be the union of a man and a woman. The long-held historical view of marriage, according to the State, provides a sufficient basis to uphold the constitutionality of the marriage statutes. Any change to the bedrock principle that limits marriage to persons of the opposite sex, the State argues, must come from the democratic process.

This characteristic of what is considered to be 'natural' and the extremely vague and often undefined meaning of nature can be frequently used for implicitly redefining a concept. For instance, the definition of 'crime against nature' was implicitly modified many times throughout the years in the United States by broadening or restricting what a 'natural sexual relationship' meant (Eskridge 1997, p. 1029). Depending on the social policy goals pursued by the courts, homosexuality was first included in this concept and later excluded from it.

The presumptive effect of the 'natural' meaning can also explain the rhetorical uses of this argument, grounded on the mechanism of dissociation (see Van Rees 2009). This strategy consists in an implicit redefinition, in which the original meaning of a term is split into two concepts, a 'real' or 'true' one, and an apparent one (Perelman & Olbrechts -Tyteca 1969, p. 418). Dissociation has been used several times by the parties to trial for redefining 'marriage'. 'Real marriage' became a marriage made with serious intentions, and not in jest (*Girvan v. Griffin*, 91 N.J. Eq. 141, 1919), or in which the husband resides with the family (*Cavalry Portfolio Services, LLC v. Douilly*, Index No. 315/08, Supreme Court of New York 2008), or in which the wife 'cares about the marriage and her marital duties' (*Anton v. Anton*, 118 A.2d 605, 1955). The strategy of appealing to the 'real marriage' can also hide an operational definition, which replaces the meaning of a concept with the criteria that can be used for classifying specific cases. In this fashion, a

marriage is not 'real' if the wife does not take her husband's last name and knows the man from a short time (Damon v. Ashcroft, 360 F.3d 1084, 2004).

Two different schemes underlie the two distinct types of naturalistic argument: the argument from cause to effect and the argument from popular opinion. In the first case, a scientific law is used to draw a certain conclusion. In this sense, the reason corresponds to a law of nature that cannot be rebutted until contrary evidence is provided (Walton, Reed & Macagno 2008, p. 328).

Argumentation scheme 6: Argument from cause to effect

Major premise:	Generally, if *A* occurs, then *B* will (might) occur.
Minor premise:	In this case, *A* occurs (might occur).
Conclusion:	Therefore in this case, *B* will (might) occur.

The following defeasibility conditions are associated with this scheme, representing the possible attacks to the presumptive nature of the scheme:

CQ1: How strong is the causal generalization?

CQ2: Is the evidence cited (if there is any) strong enough to warrant the causal generalization?

CQ3: Are there other causal factors that could interfere with the production of the effect in the given case?

The second type of naturalistic argument can be represented using the argument from popular opinion. What is regarded as 'natural' depends on what is commonly accepted in a given culture at a given time. The popular acceptance is regarded as a heuristic reason for accepting the conclusion (Walton, Reed & Macagno 2008, p. 125):

Major premise:	If a large majority in a particular reference group *G* accepts *A* as true (false), then there exists a defeasible presumption in favor of (against) *A*.
Minor premise:	A large majority accepts *A* as true (false).
Conclusion:	Therefore, there exists a presumption in favor of (against) *A*.

The critical questions are the following ones:

CQ1: Does a large majority of the cited reference group accept *A* as true?

CQ2: Is there other relevant evidence available that would support the assumption that *A* is not true?

CQ3: What reason is there for thinking that the view of this large majority is likely to be right?

The difference between this type of argument and the ontological naturalistic one is the ambiguity of the concept of nature in the latter. As mentioned above, the objective structure of the real is often advanced as the commonly accepted one. However, the presumptive force of the two concepts is clearly different. While the passage from what is commonly accepted to what is objectively real (real marriage…) can be accepted, an ontological claim (the essence of marriage is…) cannot be easily rejected by appealing to popular opinion. This passage can be represented as follows:

Major premise:	If the nature of *x* is *A*, then there exists a defeasible *x* is *A*.
Minor premise:	A large majority accepts that *x* is *A*.
Conclusion:	Therefore, *x* is *A*.

The ambiguity increases the burden of rejection and the force of the argument.

6. Conclusion

Argumentation schemes are abstract representations of natural and defeasible arguments. They combine a logical or quasi-logical structure with a semantic, material relation linking the premises to the conclusion. They can be used to represent the logical and semantic relation of the interpretative arguments analyzed by Tarello, pointing out their defeasibility conditions and the different possible logical structures. The defeasible nature of the scheme is shown by means of critical questions, which identify the default conditions of the reasoning and the possible ways of rebutting or attacking them.

This 'translation' of the arguments of interpretation into the argumentation schemes framework has been applied to the analogical and naturalistic arguments, which show how the procedure can be extended to the other kinds of interpretative arguments set out by Tarello. In both cases the transformation of the arguments of interpretation into schemes shows that the arguments can be complex. The argumentative structure of analogical arguments can be described according to two distinct patterns, one aimed at redefining a category, the other at creating a new one. The naturalistic argument can be divided into two kinds, the appeal to scientific principles and the appeal to common sense. The first case can be represented by the argument from cause to effect, while the second one hides an argument from popular opinion, often mixed with other strategies.

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THE RATIONAL AND THE REASONABLE. BRIEF NOTES ABOUT A TOPOS OF THE LAW AND ECONOMICS IN JURISTIC STYLE

Silvia Zorzetto & Fabrizio Esposito

1. The homo economicus

As Thomas S. Ulen observed, «When law and economics was a new field in the legal curriculum and just becoming a regular part of academic legal discourse, the use of microeconomic theory to discuss traditional legal topics aroused interest but also suspicion and hostility. Prominent among the reasons for this suspicion and hostility was the feeling that the economist's account of human decision making – rational choice theory – was so deeply flawed that conclusions derived from that account ought to be taken with a very large grain of salt, if not rejected outright»[1].

It is quite uncontroversial that the orthodox version of the *Law and Economics* (hereinafter *L&E*) provides a model of economic agent very close to the rational agent typical of the *Rational Choice Theory* (hereinafter *RCT*)[2]. In this respect, the *RCT* has been also interpreted as a theory of decision and choice behaviour that is an evolution of the earlier economic man theory flourished at the Chicago *L&E* School[3].

Regardless of this historical background, what is significant to our purpose is that, in the light of the *L&E* – and of the *RCT* to boot –, the rational man is an ideal type, insomuch as human rationality is con-

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[1] Ulen (1999), p. 790. Retrived from http://encyclo.findlaw.com/0710book.pdf.

[2] In our discussion we will consider the rational choice issue only under conditions of certainty, as a particular case of the more general theory of rational choice even under conditions of uncertainty. On this topic see Sen (2008), p. 857; Hargraves Heap (2008), p. 700.

[3] Jacoby (2000). Retrieved from http://ssrn.com/abstract=930174 or http://dx.doi.org/10.2139/ssrn.239538.

strued every time according to certain postulates[4]. *L&E*'s and *RCT*'s models of rational man are indeed axiomatic systems that provide a benchmark to analyse alternatives of choices related to predetermined constraints[5]. Roughly speaking, every individual is seen as a utility "maximize", that is to say as an agent interested in obtaining the highest possible amount of utility, given his initial endowment. And an individual obtains a certain degree of utility by satisficing his preferences through his actions and choices of goods.

As well-known, at the 'core'[6] of the *RCT* there is the idea of *ordering of preferences*. This is a set of preferences which satisfies the following requirements[7]: *(i)* the transitivity axiom, according to which if you prefer A to B, and B to C, then you prefer A to C; *(ii)* the reflexivity axiom, according to which preferences must be reflexive (xi = xi); *(iii)* the completeness axiom, according to which the ordering is formed by all possible preferences of the agent and these preferences can be ordered so that xi ≥ xj or xi ≤ xj; *(iv)* the continuity axiom, according to which there is no option that is absolutely necessary and that cannot be substituted by another. Accordingly, «if there is a preferred alternative…, it will be the chosen element»[8].

It has to be noted that the ordering of preferences is an abstract hierarchy among preferences and it does not take into account preferences *feasibility*. In other words, in *RCT* «human action is described as the upshot of two selection procedures. First, from all possible (and relevant) action alternatives those alternatives are selected which are feasible. Second, from this set of alternatives the preferred one is chosen. The selection of the feasible set is based on the (financial, legal, social, physical and emotional) restrictions an agent faces. On the basis of his preference ordering the agent makes his choice among the alternatives»[9].

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[4] Keita (1982), pp. 22-38.

[5] Graziano (2013), pp. 3-4.

[6] On the description of *RCT* in the light of Lakatos' epistemological theory, see Gilli (2005); Guala (2006).

[7] Halpern (1998), pp. 222-223.

[8] Arrow (1987), p. 234.

[9] de Jonge (2012), p. 8.

To clarify this point, let imagine that an agent has a total budget of Euros 15 and that a pizza costs Euros 7, a hamburger Euros 5 and a beer Euros 5. He may choose to have a pizza along with a beer and to save Euros 3 (batch A), or, alternatively, to have a hamburger and two beers (batch B). The *RCT* explains agent's behaviour stating that he will choose the batch that maximizes his utility coherently with his ordering of preferences. Yet, this thesis requires four main specifications.

First, it must be explained why an agent does not employ all his resources to satisfy his first (feasible) preference, but decides to satisfy his lower ranked (feasible) preferences. The solution to this problem is related to the marginal utility of additional consumption of a good. The general assumption is that the utility obtained by the consumption of a unit of a good is minor to that of consuming the prior unity and superior to that of consuming an ulterior unit[10]. This means that, an additional unit of the higher-ranked good has a lower value to the agent respect to the first unit of the lower-ranked good. As a consequence, the agent will prefer to satisfy the second preference in his personal ordering (and so on, until he consumes all his endowment).

Let us consider the following example: Paul has a budget of Euros 2,00 and he is hungry. He can choose to have a croissant or a muffin, both at the price of Euro 1,00. He takes a croissant (because it has a higher ranking in his ordering). However, after the consumption of a croissant, Paul is still hungry and decides to have a muffin, since to him the marginal utility of a second croissant is lower than the utility of a first muffin.

Second, goods are considered as generally substitutable, *i.e.*, utility provided by consuming a good can be obtained by consuming an amount of another good. The indifference curves are grounded precisely on this assumption[11] and show all the infinite combinations of quantities of two goods (or two batches of goods) that, if consumed, would give to the agent the same amount of utility[12].

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[10] See Archibald (2008), pp. 392-400.

[11] Lewbel & Pendakur (2008), p. 26.

[12] When the limits of feasibility are taken into account, it exists only one set of goods which can be consumed and maximizes the utility of the agent and so that it is consistent with *RCT*: the so called 'consumer optimum'.

Third, perfectly rational agents are imaged as perfectly informed too[13]. This means that everyone knows his own preferences, the characteristics of goods available, the feature of the transactions, etc. Hence, there is no discrepancy between expected and effective utility[14].

Fourth, in the *RCT* «the rationality of the action is the manifestation of the rationality of the agent's choice criteria»[15]; as a result, there is no distinction between criteria of choices and actions.

Thus, it can be said that a man is rational, if he acts rationally; an action is rational, if it is the outcome of a rational choice, namely if it is consistent with the criteria of rational choice. Again, a choice is rational, if it corresponds to the highest rank of the agent's preferences.

In this view the *homo economicus* is the typical rational man[16]. His rationality is perfect, so as his reasoning is an invariable calculus, accompanied by perfect information and self-interest[17]. The rationality of the *homo economicus* is, in the common opinion, strictly instrumental. And it has in addition the specific feature that the means and the goals, the constraints and the gains are all predetermined data, correlated in a fixed manner. In this perspective, a rational man has not only the ability to make reasoning as calculation in compliance with the rules of formal logic, but he has also the capacity to succeed in maximizing his own utility in every circumstance. In short: a rational man makes unfailingly the optimal choice.

Thinking to a judge or a lawyer, we could say that they would be always right.

Of course, as Herbert A. Simon wrote, such a figure requires «powers of prescience and capacities for computation resembling those we usually attribute to God»[18].

Two aspects of this model have to be underlined. First in economics a good is «an object or service of which the consumer would choose to

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[13] Mirman (2008), pp. 367-370.

[14] Bray (2008), pp. 365-367.

[15] Montesano (2005), p. 25.

[16] For a detailed analysis see Kirchgässner (2008).

[17] Pompian (2012). E-book retrieved from www.wiley.com.

[18] Simon (1957), p. 3. See also on this topic Pitt (2004), pp. 483-500.

have more»[19]. It is «anything that, when consumed, improves the level of individual satisfaction» and so, «if you wish relax, free time is a good»[20]. Hence, 'good' is just a different name for a mean, instrumental to the realization of an end.

Second, this theory is morally neutral[21], in the sense that it does not express any positive or negative evaluation on the preferences of the agent, as it is well summarized by the Latin motto «de gustibus non est disputandum»[22]. For *homo economicus* model preferences are exogenous data.

It is well known that the model of agent proposed by the *RCT* has been exposed to many criticisms[23]. However, it is beyond question that this pattern of human rationality is still embedded in economy and in law, especially in *L&E*[24].

2. The reasonable person

It is apparent that people are systematically incapable of being perfectly rational, informed, etc., as the *homo economicus*. Thus, during the XIX century another model of man has become very popular in European law, namely, the *reasonable person*. Nowadays, this figure dominates not only the common law tradition, where it was born[25], but

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[19] For a detailed analysis see Kirchgässner (2008).

[19] Johnson (1958), p. 149; Milgate (2008), pp. 21-25.

[20] Bollino, Katz, Morgan & Rosen (2011); Knight (1960).

[21] Quartarone (2008). Mele & Moser (1994), p. 53.

[22] Stigler & Becker (1977), pp. 76-90. The Authors explain their maxim revealingly affirming that it is not "an assertion about the world" and "not a proposition in logic". The motto means that economics consider human preferences as "unchallengeable axioms of a man's behaviour" and avoid to argue "over tastes for the same reason that one does not argue over the Rocky Mountains-both are there, will be there next year, too, and are the same to all men".

[23] See, for instance, Egidi (2005). Retrieved from http://ssrn.com/abstract=758424.

[24] See, among others, Posner (1998), pp. 1551-1575.

[25] Moran says that «The reasonable person has distinguished himself as the common law's most enduring legal fiction». Moran (2010), pp. 1233-1283; see also case *Fardell v. Potts*: Herbert (1930), pp. 11-20.

also the civil law legal systems, insomuch that reasonableness plays a vital role in the upper courts adjudication[26]. In particular, the reasonable person is a pivotal tool among jurists that follows the *L&E* approach.

Who is a reasonable person is a difficult question, since the beginning of the history of philosophy[27]. In a nutshell, a person is reasonable, if he is in some respects rational, but not purely rational. Of course, it is reasonable to be consistent, but to be absolutely consistent may be irrational in some cases. Then, in normal circumstances it is of course reasonable to try to achieve those goals that are possible according to the means on hand. But, instrumental rationality traces only a path to the reasonable.

In the common opinion, reasonableness involves also fairness and a sense of justice. Moreover, a reasonable person is sensible, practical, and prudent. But he is also benevolent, sincere, and not selfish[28]. Therefore, he is able to feel sympathy and empathy towards the others.

Besides, a reasonable person is ready to explain and justify his beliefs and to reconsider them according to the circumstances.

Foremost, this ideal agent, on one hand, acts by reflexive deliberation, that is to say, balancing the pro and cons of the various options and, on the other hand, he is ready to revise his fundamental choices, if needed.

By virtue of reasonableness, persons are not just single individuals, they are related to the others. An essential feature of a reasonable person is his capacity of reciprocity.

Furthermore, while nobody seriously thinks that we are as rational as the *homo economicus*, according to common sense people are or should be reasonable creatures in the way we said above. In other words, the general idea that people are reasonable creatures is not pure-

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[26] Adinolfi (2009).

[27] In particular see Sibley (1953). It is noteworthy also the essay of Lucas (1963).

[28] For instance, «Montchrestien considered that man was reasonable to the extent that "he sometimes embraces public service with a passionate desire […] In this way, often reserving the smallest part of his life for himself, he voluntarily dedicates the greatest and best part of his life to the service of others". In other words, it is by the very exercise of his reason that man manages to reconcile his private and collective interests»: Maucourant (2012). Retrieved from www.assoeconomiepolitique.org/.

ly theoretical. We cannot say *in abstracto* who is a reasonable person or when a person is reasonable. It depends on the circumstances: in particular, it depends on both the facts and the values that exist in a certain context. In this respect there is a sharp difference with the *homo economicus* model, which is genuinely abstract.

For instance, people are of the opinion that «there is a reasonable limit to the amount that ought to be expended from the resources of the community on the equipment and encouragement of its highly gifted members, however outstanding they might be»[29]. Yet, the real problem is how this limit has to be determined.

The conception of reasonable person that is widespread among legal scholars and judges is not perfectly identical to the idea sketched above. Of course, the features above are relevant even in the legal process, but pragmatic considerations have a material impact in adjudication.

In many cases the reasonable person seems equivalent to «the neighbours' standard»: as law is a form of social plan, what is appropriate to law is «a standard of behaviour for the man in interaction with his neighbours rather than what is fair as a subjective matter to the man considered on his own»[30].

In this respect, reasonableness may be related especially to the political contest in which the litigation goes on. In other cases, what is reasonable depends at the bottom on economic, financial, and commercial considerations. This is immediately obvious in antitrust and commercial law. In other fields of law, such as immigration law or family law, where personal issues are prominent, the reasonable joints to moral values and the culture and the ethic of people.

3. The rational and the reasonable in the legal domain

The *homo economicus* (*i.e.* economic rational man) and the reasonable person are used together by legislators and courts both in Europe

[29] Corkey (1959), p. 159.
[30] See Chapman (2006).

and in the United States of America. The examples we are going to present are expressive of a broader trend.

3.1. The rational/reasonable private investor in European law

The first case is a Judgment of the European Court of Justice (Grand Chambre), held on 5 June 2012 in the case *European Commission vs. Électricité de France* (C-124/10 P)[31]. In this case it is under discussion the "prudent private investor in a market economy" test (§ 51), namely, in brief, the *private investor test*. The Court states that this test "is not an exception", but it must be applied by the European Commission to establish whether an investment made by a Member State is or is not an illegitimate aid according to the Art. 87 of the European Community Treaty (now Art. 107 of the Lisbon Treaty). In the case at hand, France did an investment in the capital of *Électricité de France*. The Court remembers that

> [a]ccording to case law, (…) the conditions which a measure must meet in order to be treated as 'aid' for the purposes of Article 87 EC are not met if the recipient public undertaking could, in circumstances which correspond to normal market conditions, obtain the same advantage as that which has been made available to it through State resources. In the case of public undertakings, that assessment is made by applying, in principle, the private investor test (…) it is clear from case law that, in order to assess whether the same measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as shareholder – to the exclusion of those linked to its situation as a public authority – are to be taken into account (…). In that regard, it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability (§ 76, 78, 79, 84).

[31] The text of the judgment is available at http://curia.europa.eu/; for a comment see Sánchez Graells (2012) and De Luca (2012).

This test requires «to ascertain the economic rationale for the investment in question», to wit «whether, in the same circumstances, a private investor would have invested a comparable amount in» the same affair (§ 33). This test clearly «presupposes (…) an economic analysis» (§ 34) and a comparison of costs (§ 41)[32].

The second case is the Judgment of the Court of Justice, held on 21 March 1991 in the case *Italian Republic vs. Commission of the European Communities* (case C-303/88). The case concerns a State aid in the textile and clothing sector[33]. In this case the European Commission and the Court apply a different test: the *reasonable investor test*. In short, it consists in this:

> As the Court held in its judgment of Case 234/84 (Belgium v Commission [1986] ECR 2263, at paragraph 15), a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganization. It must therefore be accepted that a parent company may also, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions. Such decisions may be motivated not solely by the likelihood of an indirect material profit but also by other considerations, such as a desire to protect the group's image or to redirect its activities (§ 21).

So, the difference of the reasonable investor from the rational one is that the first is not governed, as the second, only by the "prospect of profitability", but takes into account other reasons (§ 22, see also the Opinion of Advocate General Geelhoed, delivered on 27 September 2001)[34].

Also European legislation refers to the reasonable investor: in the recital 1 of the preamble of Directive 2003/124, it is said that

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[32] The Commission has identified some criteria that define the private rational investor and six situations in which "the market economy investor test prima facie not met". See Bourgeois (2001); Evans (1996).

[33] The text of the judgment is available at http://curia.europa.eu/.

[34] The text of the judgment is available at http://curia.europa.eu/.

> Reasonable investors base their investment decisions on information already available to them, that is to say, on ex ante available information. Therefore, the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information should be appraised on the basis of the ex ante available information. Such an assessment has to take into consideration the anticipated impact of the information in light of the totality of the related issuer's activity, the reliability of the source of information and any other market variables likely to affect the related financial instrument or derivative financial instrument related thereto in the given circumstances[35].

It is apparent that, according to an economic perspective, here the reasonable stands for the rational and the reasonable investor is actually depicted as an ideal full-aware agent.

3.2. Cost-effective strategies in American tort law and contract law

In American tort law, legal scholars tend to encourage the courts to identify situations in which taking precautions is a cost-effective strategy and to understand who, between the plaintiff and the defendant, might have prevented damages at a lower cost. In American contract

[35] Article 1 of that same directive, entitled 'Inside information', provides: «1. For the purposes of applying point 1 of Article 1 of Directive 2003/6/EC, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments». On this rule see Judgment Of The Court (Second Chamber) held on 28 June 2012 in case C-19/11, Markus Geltl vs. Daimler AG. In this Judgment, «the Court (Second Chamber) hereby rules: (…) 2. Article 1(1) of Directive 2003/124 must be interpreted as meaning that the notion of 'a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so' refers to future circumstances or events from which it appears, on the basis of an overall assessment of the factors existing at the relevant time, that there is a realistic prospect that they will come into existence or occur. However, that notion should not be interpreted as meaning that the magnitude of the effect of that set of circumstances or that event on the prices of the financial instruments concerned must be taken into consideration».

law, legal scholars propose to investigate who of the parties might be able to draft (more) efficient contract terms, that is to say clauses that, for instance, successfully specify *ex ante* performance obligations and remedies in response to different contingencies. In point of fact, the courts use proxies for reasonable comparative judgments that vary according to the economic circumstances. All this is done overtly. But what counts is that, in the common view, along this path courts reach the efficient response and encourage everybody to take steps in the direction of the optimal behaviour[36].

Thus, economic rationality collapses into reasonableness and, contrariwise, the reasonable person is seen as the man who thinks and acts efficiently, internalizing all the costs and the benefits of those activities that are under his control[37]. Accordingly, it has been said that in American tort law and contract law, «the reasonable person provides a well recognized arbiter that a judge may use to stamp a decision with an aura of objectivity and rationality»[38].

3.3. Reasonable sellers and buyers in the International Sale of Goods

The *United Nations Convention on Contracts for the International Sale of Goods*, dated on 1980 (hereinafter, the *CISG* or the *Convention*), represents another field of law very instructive to our analysis. In the text the word 'reasonable' and its derivatives are mentioned just 47 times. And, as we will see, they convey various senses of reasonableness that all are commonly interpreted as related with economic rationality. To show this, we will aggregate the uses of reasonableness in the *Convention* in three classes[39].

Firstly, some uses are related to *states of mind* and, in particular, to the *beliefs*, the *ability of comprehension* and the *foresight* of one party or of the reasonable person itself (viz. Articles 8, 16, and 25). In addi-

[36] Cohen (2009).

[37] Keating (1996).

[38] Di Matteo (1997).

[39] See also Troiano (2005), who observes that it is possible to classify the uses of reasonableness with regard, for instance, to states of mind, temporal indications, facts, the probability of future events, etc.

tion, in many uses, reasonableness is directly referred to the *reliance* of one party to the other or to the *expectations* of a reasonable person (see Articles 16, 75, 77 and 79).

For instance, according to Art. 8 of the *CISG*, the “understanding of a reasonable person” must be measured along with the understanding of “a specialist who is aware of the practice in his trade sector”[40]; and, this is a criterion to interpret the statements and the conduct of the parties and so, at the end, the content of the contract. Moreover, according to Art. 25 of the *CISG*, the liability in case of breach of contract is circumscribed to what a reasonable person can foresee. Legal scholars comment that, in these cases, reasonableness is a tool to take into account social parameters, instead of idiosyncratic factors, in the application of legal rules and hence it is a device in order to achieve a certain degree of objectivity in ruling each case[41].

Secondly, in the *CISG* reasonableness is associated to the parties *behaviour* and their actions. The *Convention* explicitly requires to the parties to act reasonably, for instance, to mitigate damages or to preserve goods in case of disputes about the validity or the execution of the contract (viz. Articles 75, 77, 85 and 86; see also Art. 72, § 2). According to the case law on *CISG*, in this regard the reasonable is but what an ordinary businessman would have done[42].

Also many uses of reasonableness related with a period or a length of time, delay, etc. are, in point of fact, referred to parties’ behaviour, and not to time in the proper sense of a chronological matter[43]. In truth, none term or period of time whatever is reasonable in itself. To say that it is reasonable is an ellipsis. Even in this uses reasonableness is a tool to measure a concrete behaviour in compliance with a more general standard of a seller or a buyer. And, as it has been observed, at the end, «we go back to the standard of the reasonable man»[44].

Thirdly, reasonableness is also related to the *consequences of the behaviour* of one party with regard to the other, especially taking into

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[40] See Junge (1998).

[41] Troiano (2005), p. 203.

[42] On Articles 75 and 77, see Fountoulakis (2007).

[43] See e.g. Articles 18, 39, 47 and 88.

[44] Berlingieri (1981).

account his expenses, costs or inconveniences. The rights to remedy of the parties depend on their reasonable behaviour just the same. So, seller's remedies are subordinated to the fact that they do not determine an unreasonable inconvenience or expense for the buyer (viz. Articles 34, 37, 46; but also Articles 87 and 88). In this respect, the commentators to the *Convention* significantly suggest that (*i*) it should be taken into account if it is more convenient that the seller or instead the buyer repairs goods[45] and (*ii*) that "a strong indication of unreasonableness" amounts to the disproportion between the costs of repair and those of substitution or between the costs (of the seller) and the benefits (of the buyer) related to repair[46].

These latter examples, as the former ones about American and European law, show that, often, the ideas about economic rationality and reasonableness applied in the legal domain are a simplified shadow of those models elaborated by economists and philosophers. All the same, it would be uncharitable to consider the legal uses of the reasonable and the economic rational as a bunch of platitudes. To the contrary, in the law and especially in case law, these concepts are used in several sophisticated ways, that is very useful to distinguish.

4. A map of the reasonable from an economic perspective

In this essay we do not attempt to draw a dividing line between the reasonable and the economic rationality in law. As the analysis above reveals, every proposal in this direction would result in newfangled definitions, incapable to grasp the unity of the reasonable and the rational in legal uses.

From an economic perspective it would be preferable to attempt to individuate some senses and shades of the reasonable that involve economic rationality in law.

The list here proposed is just a preliminary sketch of some very general and abstract conceptual distinctions.

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[45] See Huber (1998).

[46] Mullis & Huber (2007), p. 205.

1. Reasonableness as efficacy

In this sense, a person or an activity is reasonable if it is capable to produce the desired or intended result or to achieve certain predetermined aims.

Taxation is rational/reasonable if it succeeds in the levying of the tax.

2. Reasonableness as adequacy 2

According to the instrumental rationality, it is reasonable to choose a line of conduct and act in a manner that, *ex ante*, appears satisfactory or acceptable with regard to the aims or goals.

In the sale and purchase agreement, in order to guarantee the payment of the price at the closing and the subsequent price adjustments, it is reasonable to stipulate holding funds in escrow.

3. Reasonableness as effectiveness

Also in this sense the reasonableness is related to the results, but what is relevant here is not the capability to achieve a result, but the fact that the result achieved is effectual: looking *ex post* it is produced in a definite manner.

A procedure of election is reasonable/rational if someone results elected.

4. Reasonableness as possibility/necessity

In this respect, reasonableness is related to beliefs and empirical and logical constraints. It is unreasonable to pretend to forecast the future in situations of complete uncertainty and ignorance and it is unreasonable to pretend to walk through a wall. Here reasonableness involves a sense of reality. This sense of reasonableness is an implicit basis for the understanding, the reliance and the foresight of the reasonable person (*viz* Articles 8, 16, 25 and 35 of the *Convention*).

5. Reasonableness as positive outcome in terms of costs-benefits

In this sense the reasonable is what economists consider as the rational, when to the benefits obtained by acting are greater than the costs incurred for completing the action[47]. A corollary of this general defini-

[47] The branch of economics focused on this matter is called ‘cost-benefit analysis’. For an introduction on the matter, see Brent (2006); Adler & Posner (2001).

tion of rationality is the Kaldor-Hicks efficiency principle, according to which an action is efficient if its benefits are superior to its costs[48].

6. Reasonableness as the minimum costs

According to the principle of minimization, it is reasonable to achieve the result by acting at the lowest cost. In this view the adequacy of means to aims and to succeed are not enough, but in addition it is relevant the comparative cost of the alternatives.

This sense of reasonableness is strictly related to the precedent. In fact, in both cases what is important is the relation between the benefits and the costs of acting.

For example, costs and benefits have to be considered in the choice of the remedy in case of breach of contract, according to Article 46 of the *CISG.* Equally, in a negotiation a reasonable purchaser does his best to bargain the lowest price for the same goods that are offered in the market.

7. Reasonableness as proportionality

A reasonable measure is proportional, insofar as it corresponds in quality or in amount to something else, that has already been ordered and measured along a (real or ideal) scale.

A penal system is typically reasonable/rational if the punishments should be/are proportional to the crimes.

8. Reasonableness as limitation of unfair effects or wrong responses

In this regard reasonableness depends on further criteria: it relies on what is right or wrong, what is fair or unfair, what is just or good, etc. See, for example, Articles 34 and 37 of the *CISG*, where causing unreasonable inconvenience or unreasonable expenses to the buyer excludes the right of the seller to cure any lack of conformity of goods or of the documents related to goods.

9. Reasonableness as equilibrium between opposite or contrasting interests

From an economic perspective here the frame of reference is represented by the economic concept of equilibrium. As well known, equilibrium can be defined as a stable situation in which internal forces are

[48] See, among others, Mathis (2009); Chiassoni (1992); Dworkin (1980).

able to recreate the original situation if some external events change it[49].

For instance, when according to the *Convention* above mentioned a party has the duty or the burden to act within a "reasonable time", in economic terms it can be affirmed that the rule requires to find an equilibrium between the opposite interest of the buyer and of the seller.

5. The rule of reason

«Rhetoric and law and economics do not often share the same paragraph in academic legal writing»[50]. In fact, the few analyses that merge classical and contemporary rhetoric and *L&E* present these disciplines as two main realms of persuasion. As a result they analyse chiefly the force of persuasion of the *L&E* with regards to everybody and not just legal economists and whether and how the *L&E* is able to improve the persuasiveness of legal discourses[51]. This approach seems biased towards both rhetoric and *L&E.* On one hand, it disregards that rhetoric is much more than the art of persuasion[52]. On the other, it neglects to inquiry into the discursive structure, the tropes, and the argumentative strategies typical of the *L&E*. Even the most accurate analyses do not include among the *topoi* or *loci* of the *L&E* the overview of the rational and the reasonable specific to this approach.

The thesis that «Law and Economics pursues the happy middle ground incorporating into 'the reasonable person' principles of rational choice»[53] is of course controversial, but, as we have seen, contains a grain of truth. The distinctive line between the rational and the reasona-

[49] Pareto (2006); Cooter (1996); Hendry (2008); Salvatore (2010).

[50] Murray (2011). Murray is of the opinion, that we deny, that L&E "shares a common goal of rhetoric, the study of communication and persuasion".

[51] Two exceptions are the study of Murray above quoted and the noted essay of McCloskey (1983). See also Panetta & Hasian (1994).

[52] In the viewpoint here endorsed rhetoric is rather a form of argumentation that something is truth (where truth has to be interpreted according to the Greek *aletheia*); this status of rhetoric is guaranteed above all by the principle of non-contradiction and by the dialectic: see Cavalla (1998); Manzin (2010).

[53] Feldman (1998).

ble is never clear cut. But, this is apparent especially in those legal doctrines acquainted with *L&E* where the distinction definitely collapses.

At this point it can be noted that in the light of the *L&E* the unity of the rational and the reasonable turns out into a particular argumentative strategy.

Perhaps, the most emblematic example is the *Rule of Reason* legal doctrine. To our purpose we can ignore the original American doctrine[54] and consider its elaboration in the European law. According to the European Court of Justice, in the name of the *Rule of Reason*, courts have to provide protection to public interests, such as public health and safety, even against the free market rules of the European Treaty, as long as it is *reasonable*. Here the reasonable is a flexible criterion that allows a full assessment of the situation (including the non economic circumstances)[55].

Contrary to appearances, according to such a definition, the *Rule of Reason* does not stand for a principle of economic rationality. Rather it involves the classic idea of *equity,* as expressed by Aristotle in the *Nicomachean Ethics*[56] (or by Plato in the *Statesman*[57]): in virtue of the *Rule of Reason*, any general rule about free trade may be contingently corrected whenever its application to a certain case would produce unsatisfactory outcomes[58]. Its implementation by judges requires indeed the Aristotelian *phronesis*.

In fact, in the case law of the European Court of Justice, the *Rule of Reason* is systematically used to introduce implicit exceptions to the general rules and principles of free trade, to make rules defeasible and at the end to give additional grounds of derogation in the legal process[59].

Two decades ago Stefano Rodotà[60] observed that in the American as well as in the Italian contract laws there were the implicit conviction

[54] See the classical essays of Wilgus (1911); Grosvenor (1917); Loevinger (1962).

[55] Schrauwen (2005), pp. 3-20, pp. 3-4.

[56] Aristotle (1977), §1137a-b.

[57] In particular, see the dialogue with the Eleatic Stranger. Plato (1952), 294a-b.

[58] See Solum (1994).

[59] Tesauro (2013). See also Leffler (1985); Rossi & Curzon (2009).

[60] Rodotà (1991).

that general clauses – such as good faith, but the same can be said with regard to reasonableness – could be used to make law rational from the economic point of view. European courts – in the eyes of Rodotà – believed that by means of general clauses they could improve economic efficiency and promote economic plans; all this would indeed contribute to a rational allocation of risks and private and public costs.

In fact, it seems that this opinion is still commonly encountered in current legal thinking.

Nowadays, both in America and Europe, legal institutions generally put individual preferences at the bottom of private and public policies[61]. In these contexts, economic theories and models, such as the theory of revealed preferences, the theory of merit goods, etc., can well be considered useful analytical tool both for the legislators and the courts, providing that such authorities and judges be aware of the postulates and the premises of these theories. Obviously, economic theories of human behaviour are mathematical models, consisting of algebraic variables, functions, equations whose results are logically deduced from their premises (postulates or axioms)[62]. Accordingly, they shape an idealized rational agent, who chooses among a fixed set of alternative choices in compliance with a certain order of preferences, which are *in thesis* complete and transitive[63].

From a philosophical point of view the application in law of these theories raises many difficult issues, first of all methodological and epistemological ones. Moreover, of course preferences involve beliefs and predictions and express actual *emotions* (feelings or tastes). As Richard M. Hare wrote – "to have a preference is to accept a prescription"[64]. As a consequence, preference are closely related to rules (reasons for action) and the *universalizability* and *rationality* of ethics.

From this point of view, then, it is not surprising that the *RCT* and, accordingly, the *L&E* are interpreted also as providing normative models, that "can help convince decision makers, ourselves included,

[61] Sunstein (1986).
[62] Foldvary (2010).
[63] Hausman (1998).
[64] Hare (1981).

that we would actually like to behave in accordance with a particular decision model"[65].

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Part Two

Philosophical Perspectives

ARGUMENTATION AND ‘ADVENTURES’ OF *LEGHEIN*: CLASSICAL HERITAGE, LINGUISTICS AND PHILOSOPHY OF LANGUAGE

Giovanni Bombelli

1. Preambula. *On the triangle “communication-argumentation-meaning” (according to the classical tradition)*

First, I want to explain briefly, what my main thesis is.

The philosophical model of language, as a “global linguistic dimension” different from the “(artificial-formalized) language”, implies a corresponding model of reality, rationality and argumentation as well as involving symmetrical political-institutional models.

From this point of view, it is possible to observe two parallel processes.

On one side, in the twentieth century we had the crisis of the classical-Hellenic linguistic model. It was grounded on the idea of language as *logos*, that is to say with a substantial/referential character and rooted on the practical (or *melius* ethical-political-communitarian) dimension. Hence a gradual achievement of a very different model of language, code-rooted and essentially characterized by a logical-interlinguistic (or also: without reference and semiotic) dimension.

This is the transition from what I name “language-*logos*” to the “code-language”, including a consequent formalization of language and, gradually, its interpretation as a pragmatic dimension, which subtends an intersubjective model of rationality.

On the other side, you can recently notice a partial rethinking of the central role assigned to the “code-language” and the “rediscovery” of the complexity of the linguistic dimension (at least in two main directions: textual linguistics and pragmatic linguistics), with the contemporary emergence, above all in the public debate and at a *cognitive* level, of instances of “meaning” (or “sense”).

1.1. Some remarks starting from Aristotle

I will start from Aristotle.

His perspective about the communicative dimension, expressed in *Rhetoric* (especially I, 1 e I, 5), *Poetics*[1] (but also in *Politics* and, obviously, in *On Interpretation*), is well known and has recently been reproposed in different directions: communitarianism[2], hermeneutics[3], Habermas' theory[4] (although only in part) and in linguistics (for instance the "deep cases theory" elaborated by Charles J. Fillmore)[5].

But we have to put these references in the wider Aristotelian perspective or, better, within the framework traced by Aristotle of the *koinonia-leghein* as a "practical (pragmatical) universal".

More precisely, according to the Greek philosopher the nexus (link) "community-language", or better still *koinonia-logos*, represents an inseparable plexus with multiple levels, as it appears clearly from *Politics*, I, 2, 1253a 7-18:

> Now, that man is more of a political (πολιτικόν) animal than bees or any other gregarious animals is evident. Nature, as we often say, makes nothing in vain, and man is the only animal whom she has endowed with the gift of speech. And whereas mere voice (λόγος) is but an indication of pleasure or pain, and is therefore found in other animals (for their nature attains to the perception of pleasure and pain and the intimation of them to one another, and no further), the power of speech(λόγος) is intended to set forth the expedient and inexpedient, and therefore likewise the just and the unjust (δίκαιον καί τό άδικον). And it is a characteristic of man that he alone has any sense of good and evil (ἀγαθός καί κακός), of just and unjust (δίκαιον καί τό άδικον), and the like, and the association of living beings who have this sense makes a family and a state (πόλις).

This passage is very important at least for two reasons.

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[1] Aristotle (1996), (2004), (2008). In a wider framework, see Ryan (1984).

[2] About this point let me refer to Bombelli (2010).

[3] Gadamer (1983).

[4] Cortella (1995), pp. 143-162, especially p. 146.

[5] Fillmore (1968), pp. 1-88.

The first one regards the *relation* between the “language-*logos*” and the practical/political dimension represented by *polis-koinonia*. In other words, the linguistic dimension is a structural profile of the political/legal relationship: hence we have to read the Aristotelian perspective within the global horizon proposed in *Politics* and *Ethics* (as just remarked by Hannah Arendt)[6].

The second reason concerns the *circularity* between the “language-*logos*” and the “political dimension”, both rooted into the horizon of nature. For Aristotle the political nature of human beings is also, and at the same time, a linguistic nature: *consequently*, man is a “juridical (legal)animal” because he can *linguistically* define the “right and wrong” (or: the “just and unjust”). In other words, the ability or skill to talk (or: to speak and to argue) is also a *condition* to live (politically, socially) together.

Reduced to its fundamental schema, the Aristotelian model is based on three structural elements (a sort of conceptual triangle): “language-*logos*”, “reality” and “argumentation”. Regarding this point, we can formulate two remarks.

Firstly, you should note the crucial role assigned to the couple “language-*logos*/ontology” (*logos-ontos*, *sema*-truth), where argumentation becomes a sort of “bridge” between these two levels (there’s no argumentation without the horizon of *leghein*) with its many possible outcomes, for instance the eristic one[7]. Furthermore, this conceptual triangle, strongly structured, presents also a symbolic dimension of the “language-*logos*”: that is to say, it is an anthropological *proprium* and the articulation of the human being as a member of a community.

Therefore, we can perhaps reconsider the conventional interpretation of the Aristotelian linguistic theory above all exposed in *De Interpretatione*

[6] Arendt (1958).

[7] Aristotle *Topics* 1, 100b24-101a4; for this point see also Aristotle, *Sophistical Refutations*, 165b7-8 and *Topics* 171b3-172b9. See also Aristotle, *Poetics* particularly I, 2 and II, 24. In a wider perspective: Aristotle, *Topics*, I, 11, 104b ff; 108, 108a18ff; 160b22-VIII, 14, 164b21. To complete, Aristotle, *Sophistical Refutations*, particularly paragraphs V, VI, VII, VIII.

(for this point I particularly share the new proposal of Franco Lo Piparo)[8].

In other words, we have to underline its ontological-semantic, and not only syntactical, relevance. Generally, the conceptual framework drawn in the classical world is based on three elements: the natural "language-*logos*", the communitarian dimension (without distinction between endolinguistic/extralinguistic sphere), and, consequently, the central role assigned to the extralinguistic (ontological) reference of argumentation (hence the room for rhetoric and topics).

To sum up, the Aristotelian linguistic theory, globally reviewed, is to be considered an *ontology of argumentation (or an ontological argumentation)*. For Aristotle "communication" is a sort of "rationality linguistically articulated", oriented to a *logos* (with presocratic echoes?) and grounded in an ontological *kòinon* as its basis.

Consequently, the close relation "politics (law)-linguistic dimension" is not extrinsic, but it is placed on a deep dimension: it is the "common space" which allows reciprocal communication and comprehension. In this direction, the "language-*logos*" is not only the *medium* (a sort of linguistic apparatus) for dialectics, but also the "place" (*melius* the "common place", the "horizon") which implies a model of substantive rationality: finally, the "sense", the "meaning" or the "truth".

1.2. Three hypotheses

These remarks allow proposing three hypotheses, which I will try to develop in the following pages.

Firstly, from the interpretation of the relation "theory of language-model of argumentation" (and, therefore, legal argumentation) emerges a double possible conceptualization of argumentation. It can be understood as an articulation of "meaning" or, in a very different way, as a mere logical-intralinguistic-semiotic circularity, in which prevails the intersubjective aspect as you can observe in some contemporary perspectives.

[8] Lo Piparo (2003).

Subsequently, this confirms the decisive interlacing (second hypothesis) between "philosophy of language" and "linguistics": here I will try to concentrate briefly on the second element (or level: the linguistic one).

Finally, I would like to underline two more aspects. The first one consists in a brief review of some linguistic paradigms ("code", "history", "text" and "pragmatics") and, from this point of view, I propose the third hypothesis, about the progressive transition (in linguistics) from a substantive or classical linguistic model to its gradual "de-substantialitation" as a "code-language" and, consequently, the break of the conceptual circle "*leghein*-argumentation".

Afterwards I will propose some remarks about the necessary reproposal of the extra-linguistic meaning, or sense, by a brief analysis of the perspectives related to Apel, Habermas and Alexy.

2. Theoretical frameworks: brief survey about some linguistic paradigms

Originally "philosophy of language" and "linguistics" were strictly connected. As I have pointed out, in Aristotle there is no proper distinction between, using a contemporary lexicon, "science of language" and "philosophy of language".

Maybe we can find the crisis of this model in the seventeenth century, when you can also observe the premises of the transition (also at a level of legal theory) from the relation "language-*logos*/communitarian horizon" to a "code-based language".

In fact, it is in this passage that we can observe, so to say, the "warning signs" of the division "philosophy of language"-"linguistics", with particular reference to Hobbes (see, for instance, his notion of "mark" proposed in *The Elements of Law Natural and Politic*)[9], to Leibniz, in a

[9] «A mark therefore is a sensible object which a man erechteth voluntarily to himself, to the end to remember thereby somewhat past, when the same is objected to his sense again. As men that have passed by a rock at sea, set up some mark, whereby to remember their former danger, and avoid it. In the number of these marks, are those human voices (which we call the names or appellations of things) sensible to the ear, by

explicit legal perspective (especially in his *Nova Methodus Discendae Docendaeque Jurisprudentiae*)[10] and, in some way, to the linguistics of Port Royal based on the theory of *modus*[11].

2.1. Historical paradigm

The second passage is represented by the "historical paradigm" and, then, by the romanticist linguistics with particular reference to authors as J. G. Herder, w. von Humboldt, F. D. E. Schleiermacher[12]. In some way, this perspective, along different directions, re-proposes many topics of the classical model. In this view, here we can briefly draw attention only on some of its theoretical aspects.

Firstly, romanticist linguistics presents a *philosophical* concept of "language": in other words, we can understand the linguistic dimension *only within* a philosophical model of reality and history (hence, the crucial role assigned to interpretation by Schleiermacher)[13].

Secondly, and similarly to the Aristotelian "language-*logos*" conceived as a natural dimension, the *naturality* of "language" becomes crucial: more precisely, language is to be understood primarily and fundamentally as a historical and practical dimension (with particular reference to the couple "natural idiom-*Volk*" developed, within a preromantic *Zeitgeist*, by Herder)[14].

Hence the *referentiality* of "language": according to the romanticist authors, language has always an extra-linguistic meaning or sense. But in this direction we can also understand the central role assigned to the *socio-historical dimension* of "language" as a complex *Weltanschau-*

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which we recall into our mind some conceptions of the things to which we give those names or appellations. As the appellation white bringeth to remembrance the quality of such objects as produce that colour or conception in us. A NAME or APPELLATIONS therefore is the voice of a man, arbitrarily imposed, for a mark to bring to his mind some conception concerning the thing on which it is imposed»: Hobbes (1928), p. 14.

[10] Leibniz (2012).

[11] With regard to this point see, for instance, Reguig-Naya (2007); Schmitter (1996).

[12] Esterhammer (2000). See also Formigari (1977).

[13] Schleiermacher (1996).

[14] Herder (1954).

ung, once again in analogy with the ancient Aristotelian idea of the communitarian horizon, which implies ultimately the superimposition or overlapping "thought-being" (well synthesized in the polarity "(language as) *energheia* vs. (language as) *ergon*" proposed by Humboldt)[15].

The *linguistic turn* of the twentieth century outlines the progressive centrality of language (although in opposite directions), drawing a new, but radically different, strong interlacing between philosophy of language and linguistics. With a quick outlook, we can identify the roots of this passage in two strictly connected dynamics: the linguistic structuralism and the neo-positivist philosophy[16].

Defining language substantially as a "physical object", in principle decomposable, these theoretical perspectives reduce linguistic dimension (although along different theoretical directions) to a "model" or to a "code" and, then, to what you can define as a "code-language".

Hence two corollaries. On one hand, at a conceptual level there's the space for a *theory* of language code-based and, on the other, a gradual process of de-substantialization or, otherwise, of division "things (reality)-language" takes place, with the consequent central role assigned to syntax also in legal theory.

The result is a model of language essentially as an enunciatively/propositional system, with obvious and relevant consequences also in the philosophy of law.

2.2. Code-paradigm: Saussure and Chomsky

At the level of linguistic theory, or *melius* linguistics, the passage from the historical paradigm to the code-paradigm (i.e.: from the natural idiom to the "language") is carried out by Ferdinand de Saussure.

In Saussure[17], as you know, we can observe a series of operations about the language.

Firstly we have to note a process of *de-historicization*. Code-language is to be considered essentially not in a historical-diachronic per-

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[15] Humboldt (1989).

[16] As regards the linguistic structuralism see, for instance: Lepschy (1966). About the neopositivism Stöltzner & Uebel (2006). Furthermore: Pasquinelli (1979).

[17] Saussure (1982).

spective, but as a synchronic logical-intralinguistic process with the central role to the idea of "code": hence the famous distinction *langue /parole* proposed by the Swiss linguist.

Secondly, Saussure provides to elaborate a sort of *autonomization* of language. In other words, language should be studied scientifically (i.e. functionally), and hence as an autonomous ambit or conceptual dimension, that is to say apart from a historical or sociological approach (is there an analogy with the later Kelsenian perspective about law?).

Thirdly, the approach to language is *functional*. Language is relevant not for its meaning or its extra-linguistic reference, but in relation to the function implemented by it (again: are there analogies with Niklas Luhmann and, generally, with the later "theories of law"?).

Finally, and consequently, in the theory of language developed by the Swiss linguist a clear *formalism* emerges. In other words, here the transition from the romanticist-olistic notion of "natural idiom" to its *possible* decomposition (or fragmentation) in "language" is completed: that is to say, in a framework composed by formal unities. This represents, in some way, the conceptual premise for the later notion of "meta-language": see also, for instance, the linguistic perspectives (although sometimes developed in a semantic direction) offered by authors as Prieto, Hjemslev and Šaumjan[18].

In this direction we can also consider briefly Chomsky's "transformational generativism" (in its double version: 1957 and 1965)[19]. In particular, you have to note a triple process.

The *formalization* of language (Chomsky's perspective is, notoriously, a formalized theory) represents the logical condition for its *rigorization* from a syntactic point of view. That is to say, in the American linguist the idea of language as a sort of *calculus* to brought to the surface emerges: what he calls the "original intuition" or, also, the "deep

[18] Prieto (1964), Hjelmslev (1975), Šaumjan (1974). But see also, for the so called 'Prague School', above all Jakobson (1966); for a general survey, Vachek (1967) and Raynaud (1990). As regards the American structuralism (F. Boas, E. Sapir, L. Bloomfield), particularly in comparison with the European structuralism, see Haugen (1951), pp. 211-222.

[19] Chomsky (1969), (1975), (1970), (2005) (2008-2009). In addition, Lenneberg (1971).

structure". In other words, according to Chomsky's view the aim is represented by constructing or building correct claims and, ultimately, a "universal grammar".

Consequently, Chomsky provides for the *elimination of the semantic dimension*. This one, in fact, is inessential to the study of language, although the American linguist revalues the semantic level at a later stage[20]. So, synthetically in Chomsky's position you can appreciate two profiles of the linguistic turn typical of the twentieth century: logicism and the syntactic generativism.

To sum up, linguistic structuralism (Saussure, Chomsky and *alii*) implies a process of *formalization* of language as disambiguation of the natural idioms.

The priority bestowed to the *syntactic profile* is the conceptual condition to construct a model of language as a *systemic* (or code-based) *equilibrium* and, ultimately, to elaborate the idea of "language" (no more a natural idiom) as a "model". Hence the possibility to reshape language as "meta-language", with its possible extension to the sociological-legal models and systems (from Kelsen to Luhmann).

2.2. Pragmatics and texts

During the twentieth century, the structuralist perspective showed many limits with particular regard to its inability to grasp out the complexity of linguistic dimension (*leghein*).

Hence, the attention paid progressively to pragmatics, both starting from a strict philosophical approach (i.e. Searle and Austin)[21] and from a close linguistic perspective focusing on the textual analysis (for instance: E. Coseriu, M. E. Conte)[22].

These two approaches are to be understood as attempts, so it seems to me, to underline along different perspectives not only the complexity of communication but, ultimately, its dimension of "sense".

The first one (pragmatics) emphasizes the nature of language as a "communicative (practical) act": a conceptual profile which, as well

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[20] Chomsky (1972), pp. 170-210.

[21] Searle (1969) and Austin (1962).

[22] Conte (1977); furthermore (1971).

known, is central in authors as Jürgen Habermas and Robert Alexy (for this point see the next paragraph).

The attention to the textual dimension underlines the multiple levels of communication: “text”, “context”, and *cetera*. This perspective is a decisive profile of the analytical approach to the philosophy of law and, for instance, has recently been re-proposed by some Italian constructivist philosophers of law[23].

3. Questions: linguistic model, public discourse and “sense”

The problems implied by a formalist model of “language” justify, along this line, the attention for a more complex model of “language”.

In particular, it is necessary to reconsider the question about the *extra-linguistic* meaning (or sense) of communication as regards public discourse and, hence, the possibility to elaborate a different model of argumentation.

So, from this point of view, I propose a very short survey on some pragmatic-discursive models of language or, also, what you can call philosophical-argumentative-linguistic models (Apel, Habermas, Alexy).

They can also be considered, in some way, the “result” or the “product” of the linguistic transition previously described and, above all, as proof of the ever-increasing relevance assigned to the “rules of argumentation” (particularly by Habermas and Alexy).

3.1. On Apel

With regard to Apel’s perspective, I will make only two brief observations.

The first concerns the notion of “truth”.

In spite of his transcendental model, in *Transformation der Philosophie*[24], Apel theorizes a sort of “linguistic truth” or, better, the existence of a “objective (although ideal, formal, *a priori* and transcendental)

[23] Villa (2012).

[24] Apel (1977).

truth" of communication: it coincides with the community of communication[25]. So, it seems to me that Apel still presents, at least to some extent, a "semantic model" of language, obviously deeply reconsidered along a transcendental (*melius* Kantian) model.

The second observation concerns the model of "rationality" implemented by Apel's perspective. Apel, in fact, still starts from a sort of *pure* model of "rationality", that is to say, we have to point it out, a *western* model of "rationality". In the same way, and consequently, in Apel's theory the idea of "subject" only as a rational "speaker" (or a mere linguistic actor) emerges: this is another theoretical profile which associates his perspective with the illuminist heritage.

But, apart from other theoretical questions concerning the notion of "community"[26], these aspects make clear, above all, how Apel's perspective is unable to interpret the complexity of contemporary societies, characterized by the presence of cultural models radically heterogeneous if compared to our western tradition (especially the modern and rationalist philosophical model).

3.2. On Habermas

Both Jürgen Habermas and Robert Alexy propose a linguistic-argumentative model based on a pragmatic structure: in few words, both models reduce semantics into pragmatics. This implies, moreover, a transition to a discursive theory of law: note, please, "theory" and not "philosophy", "discourse" (or "meta-discourse") and not "language-*logos*".

In other words, in both perspectives the "sense" (the "meaning" and, maybe, the "truth") of language becomes essentially a form of "discoursivity". This common point presents, however, a different development in the two authors.

As regards Habermas, here it will be enough to formulate some remarks about four key-aspects of his linguistic-argumentative perspective: the universal pragmatics, the "grounded consent", the relation lan-

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[25] Apel (1977), p. 168 ff.

[26] For this point Botturi (1995), pp. 55-92, especially pp. 81-87.

guage/shared rationality and, finally, the model of consensual theory of truth related to democratic systems[27].

Firstly, Habermas borrows from Apel a transcendental (Kantian) perspective, although it has been declined, or reconsidered, as universal pragmatics (i.e.: as a meta-language). In other words, Habermas elaborates a communicative theory strongly marked by a (neo)illuminist influence and, therefore, by the subtended and implied acceptance of the consequent institutional frameworks (democratic systems, notion of subjective-individual right, and so on), what maybe can be understood as a *cognitive* presupposition[28].

Therefore, for the German philosopher pragmatics becomes a universalist meta-language or, better, a sort of review and reinterpretation of the Apelian "ideal and transcendental community". Then, for Habermas semantics is substantially absorbed by pragmatics or, at the same way, semantic contents are *produced* only within a contextual dimension. From this point of view, the notion of "grounded consent" elaborated by the German philosopher[29], and rationally based on a discursive "argument" within a dialectical tension with the *Lebenswelte*, has a double function. It is crucial both to guarantee in some way the "truth" of the descriptive statements (claims, propositions) and for the logical consistency, or correctness, of the normative propositions and, ultimately, of the social system.

In other words, at the center of Habermas' pragmatic logic of discourse, which tends to be a *universal* pragmatics, there is the decisive role of the "(rational) argument" as a *justification* for the validity of a claim, imperative or judge of value. In brief: no rational justification, no argumentation[30].

Hence, at a conceptual level, there is room for the relation between language and shared (or also: consensual-interactionist) rationality. In simple words, Habermas' conceptual model implies the identification of "language" with *a* peculiar model of "rationality" and, more precise-

[27] Habermas (1997) (1992).

[28] Habermas (1997), especially pp. 1046-1088. See also Habermas (1985).

[29] Habermas (1997), pp. 221-227. But this point is generally implied in many aspects of Habermas' theory.

[30] Habermas (1997), pp. 1078-1088.

ly, with a model in some ways consensual-interactionist. For the German philosopher, then, language is not primarily a dialogue, but a form of interaction: see, for this peculiar aspect, the critical attention paid by Habermas to Mead and Parsons in his *Theorie des kommunikativen Handelns*[31].

Now you can better understand the relation drawn by Habermas between "theory of truth" and democratic systems. In fact, at a level of public discourse, the outcome of the consensual theory of rationality (and truth?) proposed by the German philosopher is represented by the central role assigned to the democratic system as a "model" of public argumentation[32].

But in this way Habermas, similarly to Apel, does not put in question the *western* character and nature of democracy. This one is based on a peculiar typology of rationality and, hence, presents structural limits related both to its specific cultural origin and to its real capacity to interpret contemporary sceneries[33].

3.2. On Alexy

Similarly to Habermas, Robert Alexy proposes a linguistic model, always based on a "code/formal language", in terms of logical procedure or, better, as a sort of pragmatic universalism[34].

Consequently, at the methodological and juridical level, for Alexy legal discourse is a "part" or articulation of the practical discourse (once again similarly to Habermas).

The crucial point is the following one.

Alexy establishes a *continuity*, at a logical level, among "linguistics", "philosophy of language" and "theory of Law". For him, we can elaborate a "theory" about the "general and rational-practical dis-

[31] See Habermas (1997), pp. 547-696 for the critical observations formulated by the German philosopher.

[32] For this aspect Habermas (1992). But see also Habermas (1962).

[33] The reference is once again to the just quoted *Faktizität und Geltung.* See also Habermas (1998).

[34] The fundamental reference is Alexy (1998).

course", with great attention paid by the German author to the logical formalization.

I will consider only two aspects: the universal character of moral (and also practical) claims or statements and the nature of legal propositions.

The first one is a classical Kantian argument discussed by Alexy along Habermas" theory: it implies that ideas and concepts are to be considered "linguistic acts" with universal value. In this direction, the respect of pragmatic rules should guarantee the "rationality", but not the "certainty" of results: with relation to this aspect see, for instance, the types of justification studied by Alexy (especially the pragmatic-universal one) and the subsequent argumentative rules and forms[35].

The second point is more closely related to the legal propositions (for instance: the "legal decisions"). The passage from the general practical discourse to law, or to the "legal discourse", is due to the "limits" imposed by the latter, which is based on the legal system in force: in other words, the rules of general practical discourse are somehow *detailed* and *specified* in the legal discourse (for instance: the trial). So, in Alexy the legal discourse, or argumentation, is to be considered only a system of discursive restrictions or limits[36].

Hence, the distinction between "dogmatic" and "pragmatic" and, above all, the priority assigned by Alexy to the second one (or, at least, their strict interlacing: what the German author calls *Integrationsthese*). From a conceptual point of view, this implies that the traditional couple composed by legal (and presupposed) norms and empirical propositions, or proofs, is insufficient: in other words, we need general and *practical* "arguments" (i.e.: extra linguistic, referential) to improve the level and the quality of argumentation.

I will formulate only two considerations on Alexy's theory.

If compared to Habermas' perspective, Alexy, in some way, better underlines the "evaluative" moment of argumentation. That is to say that argumentation *necessarily* implies an extra linguistic reference or,

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[35] Alexy (1998), pp. 225-227, pp. 35-242.

[36] Alexy (1998), especially pp. 169-170.

also, a "practical-evaluative" and maybe axiological dimension: the decisive role of the pragmatic dimension takes his root from here[37].

But, similarly to Habermas, Alexy's perspective presents some limits with regard to the notion of "public argumentation". Contemporary social sceneries require a more articulated, maybe sophisticated, model of language and, then, of argumentation: in other words, we need a "language-*logos*" more than a "code-language" (as substantially still affirmed by Alexy).

This necessarily implies giving space to the meaning and to the sense or, in a wider perspective, to a real "philosophy of language": so, the distinction between "validity", as a set or combination of rules, and "certainty" drawn by Alexy in his theory seems to me very relevant[38].

4. Conclusion

At a theoretical level, the pragmatic-discursive models of language raise many questions.

Firstly the question about the problematic couple "intersubjective language/discursive rationality", which would request to discuss radically the polarity "reasonableness" *vs*. "rationality"[39], furthermore scarcely discussed for instance in Habermas and Alexy.

Secondly, we should outline the debate about the problems which afflict contemporary democratic systems as forms of "discourse" and "public argumentation", with the necessary recourse to new forms of participation as the so called "participative democracy" and "deliberative democracy" or, as well as, the "new constitutionalism"[40].

Thirdly, and in a wider perspective, we should place the pragmatical-discoursive models of language in the philosophical background of

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[37] About this crucial point see Alexy (1998), pp.VIII-XI with the fundamental remarks proposed by Luigi Mengoni in his *Presentation*, and the *Appendix* to the Italian translation by Massimo La Torre, pp. 357-384.

[38] Alexy (1998), especially p. 232; see also Alexy (1994).

[39] The reference is obviously to Rawls (1971).

[40] About these themes see for instance: De Martin & Bolognino (Eds.) (2010); Sunstein (2009); Aars & Offerdal (2000); Barberis (2012).

the last century. If you look more closely, we note the presence in the twentieth century of what could be defined "tracks of sense", that is the presence (*lato sensu* from Heidegger to the "second" Wittgenstein and up to Walter Benjamin) of some symbolic models of language, in many ways totally different and irreducible to the structural-formalistic scheme formerly described.

However, to conclude, I would like to express briefly some more specific remarks about the analysis proposed in the previous pages, trying to sketch the conceptual circle semantics-syntax-pragmatics.

First, the analysis has put in light the in eliminable relation between "philosophy of language" (also in its close linguistic profile), "models of reality" and "legal/argumentative level". In other words, *every* philosophy of language not only implies globally a conceptual representation of reality, but it always constitutes the theoretical background of legal argumentation since, and this is the decisive point, law is to be regarded in turn as a "herméneutique officielle du monde"[41].

In this direction we have observed a gradual transition from the classical linguistic model, semantic and referential, to another one, which can be defined as logical-formal-semiotic, rooted in the central role of syntax and peculiar to the first half of the twentieth century. The later re-discussion of this perspective, from a linguistic point of view as well as in a strict perspective of philosophy of language, has progressively brought the attention to the pragmatic dimension of language (or pragmatic semantics) up to the more sophisticated forms of pragmatics.

Along this line, even law is conceived as a pragmatic discourse. Nevertheless, it is in doubt that a practical sphere, as law, is reducible to the universal-pragmatic "discourse" (or also "meta-discourse") and,

[41] Grzegorczyk (1990) p. 34: «Le droit n'est rien d'autre qu'une série d'opérations interprétatives portant sur des choses et états de choses de la réalité. […] [L]e droit est une interprétation autoritaire de la réalité, attribuant à ses éléments des statuts ou propriétés appelés tautologiquement juridiques, et opérée par des personnes ayant elles-mêmes la qualité d'organes du droit». But see also Grzegorczyk (1979) p. 259: «Le langage du droit n'est donc pas entièrement neutre, il ne se limite pas à sa fonction de description, et sa spécificité par rapport au langage des sciences réside […] dans sa puissance d'attribution d'existence juridique, dans son aspect dit "performatif"».

similarly, that "language" is reducible to the "code-language" or to the "linguistic usage".

More precisely, we have to underline the *cognitive* profile of "language" and communication and, therefore, of argumentation.

In other words, the "discourse", as an attempt to *mis en forme* at the rational level of the evaluative dimension (as paradigmatically emerges for instance in Alexy), is not the same as "dialogue": in fact, "dialogue" implies necessarily a comparison with other cultural models. So, beyond the intersubjective justification, although implemented by the performativity offered by the discursive rationality (Habermas), there is another level: a *cognitive* level, which originally represents the common space where we can understand each other (what the Greeks named, significantly, *kóinon*).

Along this line, there is also an anthropological level.

From this point of view the crucial question is: human beings are to be considered only "speakers" or "linguistic actors"? This implies that a pure linguistic-pragmatic approach, that is an interaction, risks to disregard the anthropological *substratum* of argumentation and communication: we risk, hence, to forget that communication is an *anthropological relationship* (as just showed by Aristotle: but for this point see also some interesting clues in Alexy about the general rules of practical discourse or argumentation)[42].

In other words, contemporary societies need more and more (so to say, in a pragma-dialectical perspective)[43] a radical rethinking about the couple "linguistic sphere (pragmatic sphere)-rational models". While the theories of argumentation proposed by Habermas and Alexy presuppose socio-political models and juridical institutes (i.e. democratic systems and legal systems), nowadays many factors (the multicultural question, globalization, the new relation "science-law", the diffusion of reticular models of law *et cetera*) put in question this conceptual and institutional framework.

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[42] See Alexy (1998) about the freedom of speech and expression within argumentation.

[43] Eemeren & Grootendorst (2004). See also: Eemeren (Ed.) (2002) and Eemeren & Grootendorst (1992).

More precisely, public discourse and argumentation developed within the complex societies necessarily need the reference to an extra linguistic or semantic dimension. Starting from this perspective, we could consider the "levels of sense (meaning)" as a sort of *condition* and "presupposition" for argumentation and public debate: in some way, the "sense" can be considered a meta-theoretical, or also meta-pragmatical and pragma-dialectical, rule. Is it a rediscovery of the "truth"?

In conclusion: we have to pass from a theory of argumentation grounded on the central role of the "discourse" and in a interlinguistic/ semiotic framework, with secondary reference to the extra linguistic "meaning" and "sense"[44], towards another theory of communication and argumentation.

In this new model, *leghein* is not only a intersubjective and interlinguistic "exchange", but engages and binds totally the subjects. Only in this way we will have an *epistemology of the "complex (ontological) argumentation"* or, in other words, a theory of argumentation suited to the contemporary complex societies.

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[44] See, only for instance, the contemporary philosophical-legal debate about the notion of *endoxa*: Zanuso (2009).

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LEGAL DISCOURSE: THE PROMISE OF CLASSICAL PRACTICAL PHILOSOPHY

János Frivaldszky

1. Legal discourse: the promise of classical practical philosophy

The knowledge of classical Roman jurists was, due to its practical character, both juristic and 'practical' in the philosophical sense. This way of thinking, however, was abandoned after Renaissance humanism[1] by the modernists, who tried to construct closed, axiomatic and deductive scientific systems. The modern image of law, conceived as a legal or rational order closed into a scientific system, has lost its practical philosophical nature characterised by classical natural law and dialectic argumentation. In the second half of the 20th century, practical philosophy was rehabilitated (it is the case of the well-known debate on the *Rehabilitierung der praktischen Philosophie*) in Germany (and in continental Europe) as well as in English-speaking countries. This brought with it some concepts of justice and practical philosophy (prudence, political friendship, dialectic argumentation, topics, etc.) back into mainstream philosophical discourse. The Aristotelian, and partly Thomistic, concepts of practical philosophy have played a key role in this process and the subsequent debates alike. Aristotelian influence, in the form of 'classical natural law' (Michel Villey), first appeared in the thought of (classical) Roman jurists, and was, after a long gap, received by today's legal philosophers. The major part of philosophical debates about law is now conducted along Aristotelian, and partly Thomistic, lines. In the last three decades, Aquinas has been rehabilitated by advocates of 'neo-classical' natural law within a peculiar framework of moral and political (i.e. practical) philosophy. Certain exponents of this current also draw inspiration from the thought of the analytic philoso-

[1] See Manzin (1994), (2007), (2008).

pher Herbert L.A. Hart, who describes law as a social practice, thus opening the way for a philosophy of law that concentrates on practical reasons and justification.

We can agree with Ulpian, and the greatest authorities of ancient Roman law in general[2], that *lawyers* are the 'experts' of justice and fairness. We may also add that by virtue of their practical approach, they follow legal *principles* (as for instance the principle of 'giving everyone his or her due') rather than applying rigid statutory provisions unjustifiable by justice. Yet the application of principles needs the *juristic* (i.e. *legal* skill), of pursuing justice in a *practical* (prudential) sense – hence the expression *iuris prudentia*. Ulpian was convinced that law, justice and fairness are organically connected within natural law, which is made to work by the practical 'philosophy' of lawyers, through their art aimed at what is good and equitable, that is to say, through their actual legal knowledge.

Roman juristic thinking was linked to Greek dialectical argument rather than rhetoric with open arguments, and so the Greek tradition did not appear among Roman jurists in the form of rhetorical argumentation before the courts but through the use of Aristotelian dialectical arguments. The material of arguments included legal-philosophical categories which were regarded from the perspective of practice.

Today, when the practice and epistemic form of rhetoric is regaining popularity, it is important that a deeper reflection on justice and law should not be replaced. One way of saving this kind of reflection may be to rediscover the *philosophical* importance of classical (ancient and medieval) dialectical argument for legal discourses[3]. As Michel Villey emphasised, ancient rhetoric, which was the source of the jurists' logic as well, was not a mere technique of persuasion, but 'controversy was a much worthier and more fruitful art leading to probable truth; it ensured the "places" and the selection of questions for a meaningful debate; it

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[2] See Hervada (1990).

[3] On ancient dialectic as the heritage of European culture, see Berti (2003). On the relationship between dialectic on the one hand and practical philosophy and Gadamer's hermeneutics on the other, see Berti (2002).

was also a rich source of other useful advice; and, finally, it led to good legal solutions'[4].

Of the best known scholars who contributed to the rehabilitation of ancient Greek dialectical or topical thinking, one may mention Chaim Perelman whose 'new' rhetoric actually returns to Aristotelian rhetoric and the modes of ancient dialectical argument, but also Theodor Viehweg in Germany[5], and Michel Villey in France[6]. The active interest in the exploration of ancient dialectic, that manifested itself in the second half of the 20th century[7], has brought particularly valuable results through the work of Enrico Berti in Italy, whose findings in the field of ancient Greek dialectic have much to offer contemporary legal philosophy[8]. Speaking of philosophers, also the dialogical dialectic of Hans-Georg Gadamer should be mentioned. Gadamer's intersubjective and situational approach still throws new light[9] on the whole process of legal hermeneutical understanding and the reality of law itself, being at the same time faithful to its Aristotelian roots and up-to-date. The link between Gadamerian hermeneutic and Greek dialectic is highlighted also by the title of a volume dedicated to Gadamer[10]. Finally, it should

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[4] Villey (1967).

[5] Viehweg (1953).

[6] See Villey (2003).

[7] On the beginnings of the renewed interest in ancient Greek dialectic see Sichirollo (1961).

[8] Enrico Berti regularly published in journals and volumes devoted to the philosophy of law. It is partly due to his work that Italian legal philosophers started to explore the legal dimension of dialectic argument and its promises for our age. He also contributed to the rehabilitation of practical philosophy: see Berti (2004).

[9] «The art of dialectic is not the art of being able to win every argument. On the contrary, it is possible that someone practicing the art of dialectic – i.e., the art of questioning and of seeking truth – comes off worse in the argument in the eyes of those listening to it. As the art of asking questions, dialectic proves its value because only the person who knows how to ask questions is able to persist in his questioning, which involves being able to preserve his orientation toward openness. The art of questioning is the art of questioning ever further – i.e., the art of thinking. It is called dialectic because it is the art of conducting a real dialogue», Gadamer (2006), p. 360.

[10] Bubner & Cramer & Wiehl (1970).

not be forgotten that ancient Greek dialectical thinking has found some resonance among English-speaking analytic philosophers as well[11].

Underlying the deconstructionist conception of law there is an anthropological view that is not only strongly individualistic but also conflictual. Its exponents claim that (human) rights work through continuous and regular conflicts of power, much like the sophists' idea of debate[12]. In the final analysis, such a view transposes, legal problems into the practical social policies related to the power dimensions of discursive and oppressing hierarchical oppositions, which can then be emancipated and/or 'deconstructed' or subverted. Human rights that – rightly – dominate legal thinking thus become the main point of reference for substantive law and legal decisions in an age where a philosophical concept of human nature is not only abandoned, but seems 'politically incorrect'. How, then, could one *justify* an argument or choice between mutually limiting rights in concrete cases of collision between human rights, if human nature, or its 'true' philosophy (i.e. one that is sound in a juristic sense), or objective and substantive elements of interpersonal justice, can hardly be addressed any more?

The practical and theoretical impact as well as the consequences of anti-essentialist, anti-dualist[13] and anti-metaphysical (neo-)pragmatism which opposes theoretical philosophy cannot yet be fully assessed. We still think that the postmodernist practice of critical politics cannot serve as the basis for a sound philosophy of law, nor, for that matter, for any kind of legal philosophy whatsoever. Thus, the emancipatory practice of postmodernist neo-pragmatism or deconstructivism, or any form of radical criticism, cannot show the way for right practical philosophy that aims at achieving justice.

It is, in our opinion, not the analytic but the continental tradition of practical philosophy that should be followed. It is the one that reaches

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[11] See Berti (2003) p. 14, pp. 16 f.

[12] «Ah, là-dessus je suis radicalement du côté des sophistes» – Michel Foucault writes, one of the most important exponents of post-modernism. Foucault, Michel, *La vérité et les formes juridiques*, http://1libertaire.free.fr/MFoucault194.html. The topic of Michel Foucault's first course in the Collège de France was the sophists, a movement he had always considered important.

[13] See Rorty's claim that he is 'anti-dualist': Rorty (1999), p. xix.

back to classical (ancient and medieval) roots in a way that allows for the reconstruction of the spirit of that tradition, both in terms of the form of dialectical thinking and the substance of classical natural-law thought. In light of that, we may state that the questions of practical philosophy, hermeneutical understanding, and dialectical argumentative logic have to be directed to truth in the sense of natural law (i.e. the *nature* of things and relationships). This also applies to an open, argumentative and rhetorically-oriented discourse based on opinions and appearances, the outcome of which is therefore always uncertain. In its Aristotelian and Ciceronian sense, dialectical thinking (to be used by lawyers) seeks to distinguish between *true and false* by way of clarifying the question in a debate between opposed views, through highlighting the contradictions in the arguments of the opponent[14]. (The use of dialectical syllogisms that are true in the sense of formal logic does not, however, exclude the *probable truth* of premises, which are determined on the basis of 'considerable opinions' [*endoxa*] regarded as true. Thus, in a late medieval context we may speak of a *debate of dialectical syllogisms*, which is aimed at determining which of the syllogisms leads to the most plausible and most probable, i.e. most persuasive, truth)[15]. Finally, we may add that according to Cicero, only those in possession of the dialectical method can become lawyers[16]. A dialectically coherent juristic opinion, being either true or false, follows the *nature of things*, as the devices of dialectic follow and exhibit the internal structure and nature of things. It is not so much the middle Platonist dichotomous logic of Porphyry, but the nature of the *field of practical philosophy* that suggests that the determination of the *due* [*iustum*] of the respective Other is possible only on the basis of an assessment of arguments con-

[14] Elemér (1988): Logical coherence, which dialectical argumentation allows for, leads not only to *logical rightness*, but is capable of expressing *substantial truth* (i.e. *the right order of things*). Cicero discusses the virtue and capacity to recognise the natural order of the whole world, and describes human community within that world as something that is based on nature, which still requires the recognition of one another as fellow humans. He then describes the science of rational debate, i.e. dialectic, which is the art of distinguishing between true and false, as something that aims at protecting these recognitions. Cicero, Marcus Tullius, *De legibus.* XXIII (60)-XXIV(62).

[15] Errera (2006).

[16] Pólay (1988), p. 98.

sidered in the *interpersonal dimension* (i.e. a *dia-logos*, and discussed in a dialectical argumentative debate)[17].

The pragmatism of classical Roman lawyers does not show the characteristics of Platonic essentialism but rather Aristotelian natural law and dialectical thinking. This latter could follow the nature of things, thus being *pragmatically essentialist* and *pragmatically philosophic* in a dialectical-controversial (i.e. *discursive*, way at the same time)[18]. The same applies to the glossators, too. Thus, anti-Platonic arguments of postmodernist criticism do not concern the validity and acceptability of classical practical philosophy.

The way of exerting justice has always been the central question of practical philosophy. The question of right (i.e. just and fair) action has been, since the classical age, part of the more general philosophical problem of *the right way of life*. Juristic arguments concerning human rights can, however, be said – in very general terms – to be problem-avoiding technical and pragmatist, and – in certain matters – politically and ideologically charged in favour of the fashionable intellectual currents already mentioned. Both ways depart from the right (classical) way of practical philosophy. Still, the conception of 'juristic knowledge as true philosophy' advocated by Ulpian seems to show a way that avoids both errors, even for today's lawyers, and even if the great jurist only summarised the fundamental principles. The work and thought of the glossators, in turn, has shown a way that can and ought to be followed even nowadays.

The classical natural-law way of practical philosophy, whose Aristotelian version we regard as desirable[19], was characteristic of both the classical Roman jurists and the glossators. This way of thinking took the nature of interpersonal relations, considered to be *real*, as its starting point. It thereby aimed at giving everyone his or her *legal* due, ra-

[17] See the preface by Francesco D'Agostino (2007).

[18] Villey (2003), pp. 104-106, pp. 429-430.

[19] Here, the cleavage is not within English-speaking theories, but between the analytical post-metaphysical and traditional currents or natural law. Aristotle, the most important figure of practical philosophy, represents a link between the two, his pragmatism allowing only for a minimal metaphysical content in his categories of analysis, method and approach.

ther than fighting for some kind of a presumed 'due' in the sense of whatever political or moral philosophy, which is often the case nowadays. As the above discussion has made clear, the legal epistemology of the classical jurists is intimately linked to the anatomy of human relations they described. This epistemology was characterised by dialectical argumentation, a way of controversy determining the legal nature of interpersonal relations in a constructive way, unlike the (often implicit) conflictual anthropology of postmodernism and the related power-oriented epistemology.

In terms of the sources of law, classical Roman lawyers did not rely on the exclusiveness of rigid rules, not least because their quest for law and justice was oriented in practice by broad legal *principles* of action in today's sense. Thus, the way to overcome the *exclusiveness of rules*, which captured modernist legal thinking, does not lead through a *political and ideological dogmatism* of conceptions of justice formulated in a doctrinaire way, nor through a subjective nihilism of occasional references to these conceptions, but is rather the well-known path of classical Roman lawyers. It is therefore a welcome development that ancient and medieval dialectical debate and argumentation is an increasingly popular field of research, which indirectly contributes to our knowledge of classical legal thinking. 'At the heart of the logic of law there is the study of dialectic' – as Michel Villey suggestively puts it[20]. The method of controversy, he adds, could be the method of right legal thinking and practice, if applied in a well-grounded and self-reflective way. Since, as already mentioned, the classical Roman jurists' way of thinking was shaped by the dialectic of Aristotle, and was preserved by the glossators[21], the study of *Aristotelian dialectic* seems inevitable. This, we should emphasise, opens the way to the exploration of the inter-subjective argumentative dimension of the practical rationality of classical natural law. Dialectic thus transposes the traditional questions of practical philosophy into the *interpretive hermeneutics of inter-personality.* This calls us to explore and re-think the classical sense of the action-guiding function of *legal principles*, and a number of other traditional

[20] Villey (1967), pp. 81-82.

[21] Villey (2003), pp. 105-106, pp. 429-430, pp. 466-467. See also Giuliani (1966); Frivaldszky (2009).

questions of legal philosophy, for example, fairness, observance of law, or the determination of the due share of the Other.

Among the glossators, due to the influence of the greatest thinkers, the view spread that the science of law (*legalis scientia*) did not merely depend on philosophy but that *iurisprudentia* actually *was* philosophy[22]. Apparently, this idea found support in a relevant passage of Ulpian[23]. At the same time, the definition of wisdom, understood in the Middle Ages as philosophy, said that it was the knowledge of things human and divine, the science of just and unjust. This definition was passed down through the tradition of Roman law, where it was understood as jurisprudence, and it was after this development and with this content that in the Middle Ages jurisprudence and philosophy were identified on the basis of the heritage of Roman law. If the classics generally assert this, then the profession of the lawyer is not to create human relations as some kind of 'god' through arguments or legal acts and according to various fashionable conceptions of justice, but to *explore* the *order* of things, the nature of human relations, as a quasi-philosopher in the classical sense. The same applies to the sphere of validity of one's arguments as well. We therefore accept doubt that stems from opinion in the Socratic sense. This method of continuous questioning, we hope, guides us towards truth through probabilities, by way of carefully constructed questions and answers that are open to reality and the arguments of the Other. This non-sophistic tradition of dialectic warns us that logically sound argumentative justification can never depart from truth, which it seeks to approximate. In this respect, it seems worthwhile to compare the figures of the orator, the sophist, the dialectician, and the philosopher, in their Aristotelian senses. We cannot now discuss the relationship of the orator, who uses methods of

[22] Padovani (1997).

[23] «Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitia appellatum: nam, ut eleganter celsus definit, ius est ars boni et aequi. Dig. 1.1.1.1Ulpianus 1 inst. Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes», Dig. 1.1.0. *De iustitia et iure*. Dig. 1.1.1pr. Ulpianus 1 inst.

persuasion over an audience, to legal argumentation. The complexity and problems of that kind of relationship are well illustrated in the works of Cicero. Rather, we should have a look at the argumentative and intellectual patterns of the sophist, the dialectician, and the philosopher[24]. In terms of method, the sophist could be a dialectician, whereas the difference is in their intentions: the arguments of the dialectician are directed at the thing itself, while the sophist merely 'utilises' the appearance of justice. Dialectic, on the other hand, takes a middle path between sophistic and philosophy, being a relative of the former in method but not in intention, and of the latter in the intention directed at the thing itself but not in the theoretical deductive (scientific) method (used by the philosopher). The dialectician, rightly understood, looks for the nature of things in an open argumentative debate, starting from the generally shared opinions. If, however, we understand philosophy of law not in the modernist sense of an abstract science that aims at building a theoretical system from axioms by way of deduction, but – as it was suggested earlier on – use dialectic in the field of law in accordance with the scope of practical philosophy, then the deductive element is limited to the internal structure of individual syllogisms (i.e. the logical way to the conclusion). We have already mentioned that the premises of syllogisms are still determined on the basis of probabilities, and dialectical debate aims exactly to determine which selection of premises leads, by way of syllogism, to more plausible conclusions. Thus, the debates of the glossators represent *debates of syllogisms*. In their method of argumentation aimed at a just and lawful solution but oriented by probabilities, they remained faithful to Aristotle, as it can hardly be overlooked how rarely the Stagirite used formal syllogisms in his scientific writings[25]. Nor, therefore, can the science of law follow another method. Classical Roman jurists and the glossators did not choose to deductively construct a system, but followed the way of classical Aristotelian natural law and dialectical arguments[26].

According to the classics, dialectical logic substituted for inter-personal argumentation in the field of questions of practical philosophy

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[24] See Sichirollo (1961), p. 113.

[25] Sichirollo (1961), p. 116 f.

[26] Villey (2003), pp. 429-430, pp. 466-467.

dominated by the logic of 'probable truth'. Their exploration of reality thus did not use the scientific means of *proof* by deductive inferences, but wanted to explore truth through dialectical debates, remaining always in the field of probabilities. St. Thomas Aquinas, in turn, made human nature the basis of practical philosophy (i.e. arguments based on the law of nature). Thus, the truths of this nature, i.e. the few fundamental rights (like the right to life) and institutions (such as marriage, family) that stem from those truths by way of apodictic syllogisms, delimit the 'probably true' domain of dialectic argumentation. This completes the heritage of classical natural lawyers.

Finding the widely shared starting points of thinking [*endoxa*] necessary for practising classical dialectic today seems easy, as these can hardly be anything other than human rights. Still, they do not make a totally secure starting point for argumentation. Libertarian 'human rights' that have been traditionally considered as going against human nature, yet nowadays appearing – and finding radical advocates – in public discourse (e.g. same-sex couples' 'right to marriage'), are shaped by 'public opinion' organised by mainstream media and often ruled by politics. The question, then, is how far, in what sense, and why these 'considerable' views are widely shared. We deny, on the one hand, that all opinions should be held 'true' as the sophists thought, and assert, on the other hand, that public opinion is strongly shaped by powerful actors, with the consequence that most often it is only one opinion that seems 'true'. Given the lack of freely and widely shared opinions necessary for dialectical debate, it is difficult to be sure that the play of opposed arguments is going to lead to probable truth. We therefore think that we should be even more consistently faithful to the moral truths of Aquinas' philosophical anthropology in terms of the basic human-related moral questions – which are truths accessible to every human being through his or her own nature – and it is only within the limits of these that dialectical debate can and should take place. Thus, if our dialectical argument leads to a conclusion that is contrary to human nature as determined by philosophical anthropology or – if you like – the theory of moral philosophy, then however logical or persuasive the argument may seem and however widely shared it is among lawyers, it is substantially incorrect. In such cases, we started from

endoxa or apparent *endoxa* and oriented ourselves towards what was or seemed 'probable', yet we did not come to truth but to falsehood. In order that dialectical argumentation (probably) comes to true conclusions, it has to be based on generally shared wise opinions having in themselves 'arguments containing the seeds of truth' (*argumenta veritatis*) rather than apparent truths distorted by the media. Moreover, argumentation constantly has to be aimed at truth[27], otherwise the truth is lost.

It is therefore an extremely important question, both theoretically and in practice, that what we exactly regard as the content of human rights functions nowadays as *endoxa*. The sophist Protagoras argued that 'man is the measure of everything'[28], yet the question remains what nature and what corresponding rights can be attributed to human beings. We can by no means accept here another one of Protagoras' sayings, according to which 'all opinions are true'[29], nor do we think with Protagoras that an unjust cause should be considered as true just because it is shown in a positive light by effective rhetorical[30] and other means of media. In a final analysis, it seems that the *Universal Decree of Human Rights*, composed in the time of and (partly) by Jacques Maritain, was based on a *de facto* consensus in terms of human rights, which came about spontaneously as a recognition, and found a greater degree of natural agreement than it would nowadays. The factual validity of human rights that is due to an overlapping consensus does not in practice indicate an identity of philosophical or substantive opinions but perhaps only a *coincidence* of formulations on the level of actual normative texts. This is not something to be downplayed, yet the fragility of consensus, which results from its lack of grounds, is shown by the

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[27] de La Porrée (1992).

[28] «Man is the measure of all things […]»: Laertius, Diogenes, *Lives of the Eminent Philosophers*, IX. 8. 51.

[29] Here we have to agree with Berti (2003), p. 23.

[30] Aristotle remarks that people rightly found the conception of Protagoras outrageous, according to which a weaker (i.e. false) case can be made to appear as stronger, since this way the argumentation that uses effective rhetorical devices does not proceed from what is generally accepted to what is probably true by way of persuasive arguments, but advocates a lie by way of sophistic argumentation. See Aristotle: *Rhetoric,* 1402a.

fact that it does not give a reliable theoretical or argumentative basis for the philosophical determination of rights whose content is debated or for the application of eventually conflicting rights. Thus, forums of the application of law often merely echo the 'public opinion' oriented by mainstream media in terms of the content of certain questionable human 'rights'[31].

Postmodernist conceptions of truth and justice, which reject any kind of grounding, already show some signs of decay. It seems somewhat aimless to demonise essentialism in the field of legal philosophy, as classical natural-law doctrines have been widely rehabilitated, opening a wide space for practical wisdom, prudence[32], or leading up to these, fruitful professional and open dialectical debates. Today, many scholars follow the path of natural-law practical philosophy, which does not ignore practical truth, while seeking to achieve justice through dialectical argumentation. The question is, then, whether arguments of practical philosophy can be linked to a philosophically determined human nature and its truths. We think that justice is inherently and inseparably linked to truth, of which human nature is also a part. There are a few cogent norms and institutions of fundamental importance stemming from the latter, and these are the marginal criteria of valid legal argumentation. It is *within* these margins that other legal questions can be addressed in dialectical debate, following the internal logic of things (i.e. legal relations).

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[31] Berti does not see this danger as he does not approach the question from a juristic perspective. He is thus justified in thinking that a practical consensus in terms of the content of human rights may be a sufficient basis for arguments and refutations based on human rights. Berti (2003), p. 20 ff.

[32] See Nelson (1992); see also the conception of 'practical syllogism' developed by Fulvio Di Blasi, which is intended to reconcile natural law and virtue ethics: Di Blasi (2006).

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FALSE IS THE SAME AS UNJUST, CAPABLE IS THE SAME AS GOOD. SOME CONSIDERATIONS UPON THE IDEA OF AN ETHICS INTRINSIC TO THE PROFESSION

Claudio Sartea

1. Ontology, deontology, and teleology of the profession

A few years ago, Maurizio Manzin put forth a synthetic formula for a deontology firmly rooted in ontology. This formula had also the fascination of the ancient times, since it sounds like the English word would: O.L.D., i.e. Ontology, Logic, Deontology[1]. The claim implied in the formula was essential and incisive. Deontology is not a set of rules or norms superimposed to the professional practice, more or less elegantly, and more or less sanctimoniously. Rather, deontology is the internal structure of the professional practice. Deontology is the ontology itself of the profession, viewed from the viewpoint of human behavior. Since the professional behavior of a jurist (lawyer, judges, notary, etc.) consists in "doing things with words"[2], logic – being the truth of rhetoric[3] – belongs to it necessarily.

In order to enrich the debate, and maybe giving the impression of making a play on words, I would also add that this ontologized *deontology* is ultimately a *teleology*. It is a reflection upon ends, a discovery

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[1] Manzin (2010).

[2] See Austin (1987).

[3] Cavalla has maintained for a long time that the "ethical" problem of the judiciary rhetoric relies on this: «Is there a criterion – and if yes, how can we determine it – that guarantees that the verdict is not arbitrary so that its conclusions can be considered acceptable by everybody (and by the parts implied in the trial) on the basis of a rigorous control process? To ask this questions amounts to wonder whether the verdict is grounded (or can be grounded) upon a logical reasoning, capable of evidence, or if on the other hand it simply expresses an imperative resulting from persuasive speeches, aimed to convince the auditory about its own validity» [Cavalla (1983), p. 6].

or at least a redefinition of the meaning of the forensic profession. It is clear that I am following here a classic idea of ontology, for which every entity has an essential teleology. Now, if it is evident that artificial entities do not have, properly speaking, an essence or a natural way of being (and we have to acknowledge that this is the condition of the professions), it is also true that their origin within the civil society has always a "natural" motivation (similarly, some people think that many social facts are natural; some other believe that all social facts are natural. However, this point would require a broader discussion than the present one). So, medical doctors have existed for millennia because health is a universal human need, which has been always perceived as socially relevant and in need of attention by the community. As far as jurists are concerned, I believe that the deontological code for the European lawyers gets this point exactly right when it states in the preamble that the goal (i.e. the teleology, the essence) of the forensic professions is the realization of justice[4].

Therefore, the honor and dignity of the profession depends upon a *honos*, which is not the excuse for unmentionable personal and corporative interests (money, social control, power, privileges) but constitutes their limit and justification. As Cicero explains in *De Officiis* following Panaetius's stoic doctrine of *περὶ τοῦ καθήκοντος*[5], there is *honestas*

[4] «1. Preamble. 1.1. The Function of the Lawyer in Society. In a society founded on respect for the rule of law the lawyer fulfills a special role. His duties do not begin and end with the faithful performance of what he is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he is trusted to assert and defend and it is his duty not only to plead his client's cause but to be his adviser. A lawyer's function therefore lays on him a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards: the client; the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf; the legal profession in general and each fellow member of it in particular; the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society» (Code of Conduct for European Lawyers, approved in 1998 and modified in 1998 and 2002).

[5] The choice of the Latin word for the translation from the Greek is also interesting in a philosophical perspective. Cicero and Atticus debated on this, as it is proved by the correspondence between the two intellectuals. See on this Fiori (2011).

when there is conformity to the *honos*; on this conformity also depend the respect and the order which, while necessary within the world of natural facts, are constantly jeopardized and challenged in the world of social facts[6]. It is for this reason that the realization of the *télos* of justice is a virtue, that is, a voluntary, hard, and praiseworthy promotion of the social order: it transforms the *caos* into *cosmos*, it brings about peace and harmony among intersubjective conflicts. The *bonus vir dicendi peritus* is therefore a virtuous man in his own capacity. And deontology strengthens his *honestas* and the social order at once.

2. In search for a télos *for the forensic profession*

Going back to Manzin's formula we mentioned at the outset, we can talk of a teleological ontology as the source of a deontology: "Become what you are!", as Pindar would have said. In a less poetical way: we should accept rules and normative patterns to regulate the professional behavior, but only because grounded in the essence of the profession, that is, its constitutive ends; without the explicit reference to these essential ends, the profession is delegitimized and the professional group becomes identified with a socially acceptable lobby. The entire problem relies therefore on this: that we can single out the finalities that regulate the forensic profession beyond its continuous social and legislative transformations.

I fully agree with the idea that the specific *télos* of the lawyer is "the function of defending"[7]: his partiality[8] – which could be seen provoca-

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[6] Also on this point see Fiori (2011).

[7] Sarra (2008). This view allows to see in the same light also the forensic activity of advising and mediating, even for the simple reason that in this case the goal is to defend the client from a trial that could jeopardize his situation. It is worthwhile reminding here Opocher's lesson, in Opocher (1993), according to which «the 'possibility' of the trial and of the judgment logically determines both the position of the norm and the juridical action of the subject, even independently from their effective realization».

[8] Massimo La Torre has examined in depth this "constitutive ambiguity" of the lawyer acting on trial in his essay La Torre (2003). For a broader treatment of this point, see also La Torre (2002).

tively as partisanship[9] – is essential to the social role played by him and therefore to his profession. He is not supposed to judge, but to defend: according to justice, for sure, but also realizing fully his role, which has a specific and binding function within the trial mechanism. So that if he let his conduct be conditioned or governed by concerns which are foreign to his essential duty (e.g. investigating on the integrity of the client, assessing the reliability of his declarations and information, taking the role of the vigilante), he would violate the deontology of his profession and would not be as a consequence a good professional. He would become something different from what he is or should be. A lawyer who behaves as an accuser or a judge is not "becoming who he is". If this happens, the trial ends up lacking one of its essential factors, so that the entire mechanism and meaning of the trial are left unsatisfied.

A professional deontology might look not only as a set of rules on the professional's duties, but also as a reasonable source of *exemption from responsibility* (the paradox is only illusory)[10]: the medical doctor who intervenes on a dangerous criminal ought not kill him, not even when the criminal has already been convicted to the capital punishment. The doctor should aim to save the criminal's life, even though the executioner will take that life away only a few days later. Everyone has the duty to perform his professional function scrupulously (for the sake of the argument, we admit here that also that of the executioner is a profession; however, this point constitutes a problem that cannot be addressed here). Only compliance with a professional code of conduct will allow the medical doctor to perform his duties properly. As a matter of fact, he has made his appearance in the hypothetical case we are considering only because he is a surgeon and can use his expertise in this specific case. The prosecutors and judges, and maybe the executioners, will make their appearance only later on.

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[9] Amato Mangiameli (2010). For the operative consequences of this problem, see Gianaria & Mittone (2007).

[10] This seemingly paradoxical inversion of the obligations related to the professional responsibility is suggested by Faro (2006). The article often refers to the moral philosophy of Robert Spaemann.

3. Deontology and methodology: duties, means, and results

As some authors have stressed quite rightly[11], the professional duties that stem from a deontology concern the means to be used, not the results to be obtained. It would be unacceptable to put the burden of the results on the professional when these results do not depend *entirely* upon his conduct. That jurisprudence has the tendency to tone down this dichotomy when the medical responsibility is concerned (while however the distinction is sharp in the context of the forensic practice)[12] should not make us overlook the fact that medical and surgical activity has always an element of imponderability. However, there are tragic and extreme exceptions to this account, such as when the surgeon acts without respecting the informed consent[13], or when he oversteps the limits of a reasonable therapeutic action. Let simply remind us[14] the

[11] Manzin (2010), p. 9.

[12] See the important meeting in Pisa, 17 December 2010 Zana (2010). Available on line at http://www.altalex.com/index.php?idnot=12597.

[13] The jurisprudence is not univocal in matter of informed consent and medical and surgical practice. Even though treating at length this subject would lead us astray, we can briefly mention that starting from what the judges ruled over the Massimo case in 1992 we have witnessed a worrisome variation of decisions in the rulings of the Supreme Court too. The Sentence no. 2437 del 2009, issued by the by Italian Supreme Court, Joined Sections, has seen again a certain priority in the “self-legitimation principle” of the medical practice (which therefore does not need a specific discharging condition in order not to be considered *ex se* unlawful). In fact, according to the Sentence a medical treatment can or cannot be qualified as a criminal offence depending on the positive or non-positive outcome of the treatment itself. See Monaca, Sartea & Anzilotti (2010).

[14] According to the sentence of the Supreme Court, Criminal Section no. IV, no. 13746 of the 7 April 2011, «The Court of Appeal has identified the main fault of the accused in the violation of the laws of caution and of the scientific and conscientious rules that should govern the practitioner’s deeds. In the case under examination, given the indisputable conditions of the patient (“inoperable” because afflicted by a diffused pancreatic neoplasm), it was not possible to expect from the surgical treatment of the woman any improvement to her health. (Even though the treatment was supported by the informed consent of the woman, who was a forty-years-old mother of two girls and therefore ready to do whatever could be done to prolong her life). The surgeons therefore failed to comply with the code of conduct, which prohibits any form of therapeutic and diagnostic futile care even in presence of an informed consent». Moreover, art. 16

tragic case of the surgeon in Rome whose action was considered completely contrary to any professional criterion, either scientific or of conscience; in that situation, the presence of an informed consent, rather than protecting the doctor, made clear the impossibility of exonerating him from his responsibilities.

As we have already mentioned, the juridical relationship between lawyer and client entails the obligation for the lawyer to the use of certain means. We could also call this principle a *methodological* bind: the normative power of the deontological law concerns therefore also the relationship with the client, not only the professional category from which it emerges (not only as a written code of conduct, but also simply as intra-corporate rights and duties), even though its disciplinary and applicative actions only concern the latter.

Given that deontology is the substance of the professional method, it is clear that it implies the obligation to use certain means. It seems also clear that what the Italian Supreme Court has deliberated in the past ten years[15] about the legal subsumption of the deontological norms is absolutely legitimate. Indeed, it represents a way to detail the general standards of diligence and fair conduct as it is institutionally legitimized by the Italian National Solicitor Association[16].

4. The rhetorical means, or how the form is wedded to the content

If the *ontology* of the lawyer consists in his act of defending, and if the forensic activity is always more or less *doing things with words*, it follows that rhetoric plays a fundamental role both in the education and

of the Medical Code of Conduct of 2006 not only confirms that the codified rules of deontology for medical doctors complement the legal provisions on the same matter [see Sartea (2009)], but also restates the teleological and normative meaning of deontology.

[15] At least starting from the sentence of the Supreme Court, Joined Sections, 6 June 2002, no. 8225 (also in *Rassegna forense*, 2003, 130, with a comment by R. Danovi), confirmed by Supreme Court, Joined Sections, 20 December 2007, no. 26810.

[16] See Danovi (2003) and the interesting review of cases in Danovi (2007).

training of the defender and in the actual exercise of his function, viz. in the process[17].

Even Aristotle's statement that "unjust is the same as false"[18] could be enough for starting a process of moralization (or re-moralization) of rhetoric. In the *Rhetoric* Aristotle has also pointed out the reason why praise and blame are attached to the forensic practice: "Rhetoric is useful because things that are true and things that are just have a natural tendency to prevail over their opposites, so that if the decisions of judges are not what they ought to be, the defeat must be due to the speakers themselves, and they must be blamed accordingly"[19].

Before Aristotle, Plato had highlighted the inner connection of ethics and technique in the practice of rhetoric. Compelled by Socrates's arguments, Gorgias first and then Callicles and Polus end up acknowledging the impossibility of defining rhetoric without appealing to a moral goal, to what is just and what is unjust. Mere persuasion – viz. the *télos* of rhetoric considered simply from an utilitarian standpoint – is not able to frame this art in depth. The mere pursuit of persuasion reduces rhetoric to eristic and deprives it of its most authentic dignity: as Socrates claims, such a deformation of rhetoric is to justice "what cookery is to medicine"[20].

If this is the case, then, there are no boundaries between the cognitive and the ethical, and every agent has the responsibility to take side in the moral challenges with which he is faced. If "false is the same as unjust", rhetoric becomes deontology. Or, similarly, deontology takes the shape of rhetoric, in the sense that it becomes the cultivation of what is true, art and science of what is veridical and not of mere persuasion. Calamandrei, by adapting the opinion of the ancient Greek think-

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[17] A comprehensive overview of the functions of rhetoric within the forensic practice is in Cavalla (2007). From the view point of the formation of the jurist, see Paolo Moro's works, e.g. Moro (2004).

[18] The expression is in *Politics* 1276a. It occurs in relation to the question whether the label of "citizen" should be attributed to everyone who is a citizen according to the law or if there should be a difference between a justly and an unjustly (and therefore, falsely) owned citizenship. An extension of this principle to ethical questions can be found in D'Agostino (2006).

[19] Aristotle, *Rhetoric*, I, 1355a.

[20] Plato, *Gorgias* 465C.

ers to the modern forensic practice, writes in his famous *Elogio dei giudici scritto da un avvocato*: "Now I have faith in the court practice and I trust the judges. By addressing them as one of them I am sure that I can convince them of the truth, because knowing what is true is stronger than any rhetorical strategy or formal subtlety"[21]. These words should be taken seriously since they come not from an anarchic revolutionary, but from the reflections of an eminent jurist and incomparable defense lawyer.

5. Juridical rhetoric: essentiality of the trial and adversarial process

What I have said so far becomes concrete life and juridical experience[22] in the context of the trial[23] and in particular in the adversarial process. It is also from this perspective that the professional deontology finds a strong confirmation of its indispensability. Since the trial is like a drama[24] in which each actor has to play creatively a definite part, the professional deontology is like the ethics of the role in a drama[25]. Otherwise its internal logic is betrayed and its finalization (to the realization of justice in a concrete case) is irremediably frustrated[26].

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[21] See Calamandrei (1999). For a reflection on this original writing see Amato Mangiameli (2010).

[22] This expression was dear to Capograssi, who wrote on this subject in 1959: the essay was published for the first time in *Rivista di diritto processuale* and now it is also available in *Opere*, vol. V, Milano: Giuffrè, 54 ff.

[23] Opocher notoriously defends this position in Opocher (1993). For a study on this view, see Cavalla (1991).

[24] Carnelutti (1950).

[25] See the fundamental principle of the private law according to which "iuxta alligata et probata iudex iudicare debet". Consider also the serious consequences and problems that follow every time that the defense lawyers do not do what they are supposed to do in order to provide the judge with all the necessary cognitive elements.

[26] To what defense is the party entitled? To the best possible one, we shall say. However, in order to avoid any partiality in answering this question it is necessary to reflect on the relationship between the situation of the individual client and the broader context in which he is immersed. Deontology has the function of prohibiting the conduct that hinders the normal development of the trial while trying to act in the interest of the client. The paradoxical consequence of this approach is that the lawyer's duty of

The Italian theory of the judicial proceedings of the first half of the last century has made clear, thanks to a dense dialogue between practitioners and philosophers, that the contrasting individual claims result somehow in a process of harmonization and unification within the trial. Let us remember what Capograssi says in his commemoration of Chiovenda, which also echoes Carnelutti's and Satta's views. In the trial "everybody agrees: the judicial order has to become actualized and realized in a concrete relationship"; "while striving for something different, everybody ends up aiming at the same goal on the basis of his diversity; that is, each and all simply want that the judicial order is actualized in the concrete case, that the *iussum* of the law becomes *ordo*"[27]. Also the most radical among our old-fashioned experts in proceedings, who push themselves to speak of a "mystery" of the trial[28], believe nevertheless that our society cannot do without this mysterious institutional presence.

The adversarial process, i.e. the public and rational discussion of the parties before the judge and "absent" at the moment of the facts, whose truth needs to be reconstructed (and rationally argued *a posteriori* in the section of the sentence discussing the legal grounds of the decision, which represents therefore the rhetorical bind of the third character of the trial)[29] represents in the end the essence of the concrete life of the law[30]. It also represents the fundamental ethical moment of the forensic practice. It is, in other words, the moment in which the deontological nature of rhetoric manifests itself in the clearest and unmistakable way. This is an old acquisition of jurisprudence, since it sounds as what gov-

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fairness might end up impairing the client himself. The art. 14 of the Code of Forensic Conduct on the duty of respecting the truth is written with this paradoxical situation in mind. See Randazzo (2003).

[27] Capograssi (1959), pp. 252-287, also in *Opere*, IV, p. 136.

[28] In addition to Satta (1994), it is worth mentioning at least Carnelutti (1950), p. 39, in which we read that «the mission of the master of proceedings law is not limited to single out the problem nor to admit that the problem is a mystery; rather it goes further and teach how to celebrate this mystery».

[29] See Moro (2008).

[30] On this subject, see the important collection of materials in Manzin & Puppo (Eds.) (2008), in particular the essays by Manzin, Sommaggio and Moro.

ernor Festus reminds to king Agrippa[31] and what Plato announces in the *Laws* when he presents his ideal model of trial for the punishment of the blasphemous in the city[32].

As some commentators have noticed, the adversarial process explicates the dialogical nature of jurisprudence. Therefore, including it as a crucial aspect of the trial and protecting it with the law[33] and with a deontological code[34] represents the awareness of its centrality in our society. It also means that jurisprudence is a social resource to settle disagreements which is radically opposed and alternative to the use of violence and force. It could be considered as a form of "western" nonviolence, as someone has maintained[35], destined to a universal diffusion, even more effective and broad than the ethical doctrines of Gandhi.

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[31] See Acts of the Apostles, XXV, 13 ff.: «When a few days had passed, King Agrippa and Bernice arrived in Caesarea on a visit to Festus. Since they spent several days there, Festus referred Paul's case to the king, saying, 'There is a man here left in custody by Felix. When I was in Jerusalem the chief priests and the elders of the Jews brought charges against him and demanded his condemnation. I answered them that it was not Roman practice to hand over an accused person before he has faced his accusers and had the opportunity to defend himself against their charge'».

[32] Plato, *Laws*, IX, 855 d: «Let the vote be given openly; but before they come to vote let the judges sit in order of seniority over against plaintiff and defendant, and let all the citizens who can spare time hear and take a serious interest in listening to such causes. First of all the plaintiff shall make one speech, and then the defendant shall make another; and after the speeches have been made the eldest judge shall begin to examine the parties, and proceed to make an adequate inquiry into what has been said; and after the oldest has spoken, the rest shall proceed in order to examine either party as to what may be found defective in the evidence, whether of statement or omission; and he who has nothing to ask shall hand over the examination to another».

[33] An overview of these norms is found in Moro (2010), p. 29. For a detailed philosophical analysis of art. 88 of civil proceedings code ("Dovere di lealtà e di probità") see Macioce (2005).

[34] In the Preamble of the Italian Code of Forensic Conduct we read that «The lawyer watches over the conformity of the laws to the principles of the Constitution, in obedience to the Convention for the Protection of Human Rights and EU Law; guarantees the undeniable right to liberty, security and defense; ensures the normal development of the adversarial process and the judgment. The deontological norms play an essential function in protecting and realizing such values».

[35] D'Agostino (2006), p. 116.

Similarly, in *Gorgias* Socrates concludes after convincing his rivals that their opinions are groundless that “to do injustice is more to be avoided than to suffer injustice, and that the reality and not the appearance of virtue is to be followed above all things, as well in public as in private life […] and rhetoric should be used by him [by man], and all his actions should be done always, with a view to justice”[36].

6. Crisis of truth, crisis of the profession

What I have maintained in this article naturally echoes Plato’s remarks about the connection of ontology, logic, and deontology. This stance might sound to us somehow rhetorical and even moralistic today. This depends probably on the fact that deontology does not enjoy good health in times like ours of relativism or even “juridical nihilism”[37]. As I have maintained, the deep meaning of jurisprudence mainly relies on the processes related to the trial, and the pursuit of judicial or legal truth, as Capograssi says, always presupposes the existence of truth and the possibility of grasping it. As a consequence, the crisis of truth in which we are immersed deeply undermine the sense of the forensic profession in its ontology and teleology-deontology.

As Capograssi says, “the judicial truth is the human truth, that is, the truth that all the human beings eventually find when they inquire in a human way, i.e. with the possibilities, the methods, and the modalities which are integral to the human condition”[38]. For this reason we are today “at the last stage of the crisis”, since “the objective truth of all things (for instance, that the human being is a human being!) is openly denied; it is openly denied that what there is has a value and deserves an acknowledgment; the goal or the interest of the dominating historical power becomes the ‘truth’, if you will: everything that pleases this goal

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[36] Plato, *Gorgias*, 527 b-c.

[37] From the title of Natalino Irti’s famous essay, Irti (2004). See also Possenti (2012).

[38] Capograssi (1959), p. 66.

is ‘true,’ while what constitutes an obstacle to it is ‘false.’ In other words, ‘truth’ is ultimately reduced to power”[39].

Here, I do not intend to answer the question whether this situation is a product of secularism, as Satta clearly states[40], or if it results (totally or in part) from other cultural and social factors. However, it seems to me that this is the reason of today’s widespread cynicism and unscrupulousness in the forensic practice, to the point that normality is perceived as heroism and is today more necessary than ever.

I would like to conclude providing a summary of the different topics touched in this article. The “partial impartiality” of the defense lawyer (remember that it is the “function of defending” that characterizes the ontology, the methodology, and deontology of the lawyer) does not rely simply on the ideal or mystic strive of a lawyer who behaves like an old-fashioned Don Quixote. Rather, it depends upon the lawyer’s reasonable connection to the logic of his rhetoric, understood as a connection with truth and therefore as a moral norm. The lawyer is bound to the client through the ethical (and juridical) link of the mandate: he should be respectful of the truth in its totality because of the specific functions of his profession, which cannot be changed at will by the professional nor can be negotiated with the client. If “false is the same as unjust”, justice depends therefore from the truth of someone’s statements. The medical practice is an analogous case, in which the “logic of health” should be respected if a genuine therapeutic relation has to

[39] Capograssi (1959), p. 75. Amato Mangiameli renews these statements when he says: «The *good* conception of rhetoric, so to speak, undergoes a crisis because modern jurisprudence has been reduced to a set of *technical rules*. In such a system, *alethic arguments* find no room. As a consequence, both jurisprudence and rhetoric are deprived of their genuine soul: for the former, the *pursuit* of justice and equality; for the latter, the *pursuit* of truth. *Jurisprudence* and *rhetoric* need for their own meaning and function that human beings try to solve their controversies striving for justice and that they open themselves to the (probable) truth»: Amato Mangiameli (2007), p. 137.

[40] According to Satta, «the crisis of the judgment, the crisis of the trial is only an aspect of the broader spiritual crisis that can be found in every field of the moral life, in the arts, in philosophy, in politics, because it is the crisis of the human being, of each one of us. Humanity has lost his faith, which is the august sense of one’s destiny. Since the judgment is the obligatory way to such a destiny, humanity has lost the sense of judgment»: Satta (2003), p. 79.

be established, in such a way that this logic is not subject to the negotiation among the parts and is not suitable of radical subjective interpretations.

The justice to which the forensic practice is oriented does not coincide with the victory, nor with the triumph of an abstract truth. Rather, it is the real application of the best prudential rule to the concrete case. Such a justice is found in the content of the decision of an expert judge. But all the people involved in the trial are positively responsible in different measure for such a justice when they perform their own duty according to their respective deontology. As a consequence, the capacity that a single professional has to defend someone else cannot be evaluated only on the basis of the results that he achieves, but above all on the basis of the method he follows: the coherence with the professional truth that makes him good, also leads him to *become* what he has chosen to *be*.

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