Do the "critical questions" have only *dialectic relevance?*

Some remarks on the rhetorical value of CQ in legal argumentation

Abstract

The purpose of this paper is to provide some critical theoretical insights for the study of legal reasoning, judicial reasoning and lawyering skills. The Italian Supreme Court has recently set *logical* standards for evaluating expert opinions. The Court's guideline appears quite generic and doesn't avoid the most practical difficulty of providing a reasonable justification. I will take into account the tools endorsed by a representative approach to argumentation, the New – Dialectic. This theory furnishes a list of options available to users in the current context of everyday language. Moreover, in this contribution, discussing about the risk of a systematic approach, the development of my arguments has been influenced, more particularly, by the works of Enrico Berti and Francesca Piazza on rhetoric in the Nineties and by the studies of forensic rhetoric of Cermeg (Centre of Research on Legal Methodology) to which I belong. In this view, I will present the Aristotelian predicable classification as a topical scheme applicable to the critical questions. According to this approach, topics, dialectic and rhetoric may be considered, of necessity, joint together in a rational procedure: the CQ would play a *rhetorical* function too.

This analysis comes in relevance for putting forth a broader framework, the one of contemporary studies on argumentation, for the judicial evaluation of scientific evidence.

1. Introduction

The purpose of this paper is to provide some critical theoretical insights for the study of legal reasoning, judicial reasoning and lawyering skills.

The starting point will be a recent clamorous case in Italian law of crimes in which the decision was based on an expert solution: the attribution of legal responsibility was determined by an innovative legal report which measured the very possibility of a person of doing actions intentionally on neurosciences researches and new techniques for mapping the brain.

By this example, I want to explore what are the means of justifying a legal decision grounded on an expert opinion according to argumentation studies. In the current debate of argumentation, there has been a development of researches on legal reasoning which provide a strict methodology. I argue that the judicial choice, in most cases, however, is not a purely technical one, but a matter of *logos*, *pathos* and *ethos.* It is rarely preferable to use fixed structured for reasoning (as argumentation schemes) without making use of persuasive elements.

I will take into account the tools endorsed in the legal context by a representative approach to argumentation: New – Dialectics, the Walton's theory of reasoning. Moreover, in this contribution, I turn the centre of attention to a more general topic: rhetoric and the role (it is expected) to play in arguing. Discussing whether an argumentation scheme has rhetorical relevance, the development of my arguments has been influenced, more particularly, by the works of Enrico Berti and Francesca Piazza on rhetoric in the Nineties and by the studies of forensic rhetoric of Cermeg (Centre of Research on legal methodology) to which I belong.

Finally, this analysis comes in relevance for putting forth a broader framework, the one of contemporary studies on argumentation, for the judicial evaluation of scientific evidence.

2. *The case*

In 2011 the Court of Appeal of Trieste reversed a decision made by an earlier Court,

influenced by neuroscience researches. The case introduces a new scenario in Italian Legal System with respect to the role of neuroscience in law.

This is the case: a man was stabbed to death at the railroad station in Udine, a city in the North of Italy. An Algerian man was arrested in connection with this death and then convicted of murder and sentenced to imprisonment. The defendant appealed the decision to the Court for requesting a formal change of it. During the appeal process, a neuroscientist was called as an expert witness. He testified, showing a map of the brain, that the man suffered severe brain impairment: a genetic vulnerability affected his mental capacity and changed his personality into violent behaviours in response to specific social adverse stimulus. The court declared him partially mentally incompetent and reduced the level of punishment (*Corte d'Assise d'Appello* of Trieste, 1.10.2009, n. 5). The Court upheld that the first decision was unjust because scientific criteria were misapplied in determining the degree of culpability of the accused: neuroscience, in practice, assessed the legal measure of mental competence, which is relevant for criminal responsibility.

The decision of the Court of Appeal to accept the "brain scan" as evidence towards a fuller comprehension of behaviour rests upon a case-to-case basis. The Supreme Court has not so far ratified it.

3. *Legal premises*

In this case the Court, in forming the decision, drew almost exclusively from the neurosciences.

It definitely involves the legal debate on the standard for admissibility of expert testimony: many works have argued on those leading decisions which, valuing the scientific support for judge in trial, identify specific factors by which reliability of such knowledge is to be determined (see, in a wider context, the works on Frye v.

United States, 293 F. 1013 -D.C. Cir. 1923, Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 - U.S. June 28, 1993; (Puppo, 2004; Godden & Walton, 2006; Fuselli, 2008).

The background of this presentation consists in Italian legal system: there is an extensive reference to Italian experience. So it is necessary to clarify some legal aspects.

First, it is possible for the judge or the court, both in civil and in criminal law, to come to judgment founding his opinion on an expert opinion. Broadly speaking about the legal order, Italy is a civil law country. Materially, civil law holds case law to be secondary and subordinate to statutory law and the court system is usually unbound by precedent. In Italian jurisdictions the decisions of the Courts are not necessarily binding beyond the immediate case before but, in practice, the decision of higher courts provide a very strong precedent, for both itself and all lower courts. More properly expressed, the Italian Supreme Court decisions represent *grands arrêts* which give a direction to judicial practice and doctrinal studies, setting certain rules in a chaotic network formed by rules, lower court decisions and regulations. They play an argumentative role as *topoi* suited to orienting the interpretation but also a practical legal role, representing the "living law", the rules that judges apply and create when legal gaps occur (Mengoni, 1996).

In Italian jurisdiction, the Italian Supreme Court has recently set the outcome of a Daubert-like standard to expert opinion testimony. It focuses attention not upon the requirements for acceptability of expert testimony but upon the criteria that would lead judges in grounding their discretional decision.

«Within the legal order in force, based on the principle of the free belief of the Judge, the Judge can found his decision upon an expert survey, although it has been opposed by the opposing party, as long as he will provide appropriate grounds for his

decision" (Supreme Court, Civil Law, section VI, 12.12.11, n. 26550, Agenzia delle Entrate vs. Ericson Telecomunicazioni S.p.A).

«According to the principle of the free belief of the Judge and lacking legal evidence, the Judge can choose among different theories propounded by different experts, nominated by the Judge or by the parties, the one which is the most sharable, as long as he will explain carefully and deeply the reasons of his disapproval or the reasons of his choice and he will specifically confute the opposing deductions of the parties. The Supreme Court will not interject about major or minor plausibility of scientific theories; it will not decide whether the thesis which has been approved by the lower court is true or not, but it will examine the grounds of the decision which needs to be *reasonable* and *logical*. The Supreme Court is not the judge of the science because it does not have scientific knowledge: it will assess the methodological correctness of the lower court approach with regard to the expert opinion and it will critically verify its trustworthiness» (Supreme Court, Criminal Law, section IV, 13.5.12, n. 24573). The guidelines of the Supreme Court recalls the gatekeeping role of the judge as defined by *Daubert*: the judge has not a passive role limiting himself to attributing weight to the expert opinion; he plays an active role focused on the methodological check. Especially: 1) the judge provides appropriate grounds for decision; 2) he explains carefully and deeply the reason of his choice (approval / disapproval); 3) he confutes the opposing deduction; 4) he assesses the logical correctness of the procedure; 5) he cannot judge science in the merits.

In short, the Italian Supreme Court's decisions highlight, first, that the judicial decision is governed by the principle of free belief. The judge is partially free in the sense that, despite his personal conviction, the verdict needs to be grounded, looking at the evidence of the trial. The judicial discretion is not unlimited. It doesn't consist in a

personal conviction but in the rational determination based on critical discussion of the parties (see Manzin and Puppo, 2008).

Secondly, the core of the judicial experience is the dialectical and reciprocal *exchange* of the parties, which is going to be an effective *interchange* (for the concept of *trilogue*, see Plantin, 1999, 2001, 2011).

Third, the judge can disregard the arguments propounded by the parties as long as he will *justify* it. The duty of justification plays an important role for the public determination of the decision making process. This duty is established at the highest level of Italian legal order (see art. 111 co. 6 of Constitutional Act) and confirmed by the Code of Civil Procedure (art. 132 c.p.c.) and by the Code of Criminal Procedure too (art. 546, 192 c.p.p.). Legal justification consists in explaining the *logical* and the *legal* procedure that lead to conclusion.

According to the common experience of the courts, *logically*, the better way of justification is formed by a syllogism in which the major premise (the s.c. judgment in law) is the rule to apply to the case; the minor premise (the s.c. judgement in fact) is determined by the reconstruction of the fact as an historical event; the conclusion is the final decision. The s.c. *judicial syllogism* is made of two operations: one is duty-bound to law; the other one is based on the judicial discretional power over choosing and evaluating evidence (see Manzin, 2011, 2012a, 2012b). For instance:

P.M. A person who kills a man commits a murder

p.m. An Algerian citizen killed a man

Dec. An Algerian citizen committed a murder

In logical terms, the judicial syllogism is an argument: the first two statements are the premises; the third statement is the conclusion. If an argument is offered as a

justification of its conclusion, two questions arise. First, are the premises true? Second, are the premises properly related to the conclusion? The logical correctness or incorrectness of the argument depends upon the relation between premises and conclusion: it is independent of the truth of the premises. But a logically correct argument may have one or more false premises; a logical incorrect argument may have true premises; indeed, it may have a true conclusion too.

Respecting this, a key tool for legal practitioners is offered by contemporary argumentation theories: they provide a baseline to recognize arguments, to identify premises and conclusions, to supply the missing premises of an incomplete argument. They can serve a theoretical framework for implementing the Italian Supreme Court's logical standards for evaluating expert opinions.

4. Evaluating the expert opinion: the New – Dialectics standard of proof

In this paper I adopt the theoretical framework for the analysis and evaluation of arguments propounded by Douglas Walton (Walton, 1995, 1996, 1998). The challenge is twofold: 1) presenting a normative model to *logically* check the grounds for judicial decision; 2) evaluating the process-view presented.

According to a (simplified) account of this new method in use in argumentation theory and informal logic, there are two main basic concepts to be presented: dialogue types and argumentation schemes.

A dialogue (or conversation) "is a sequence of exchanges message or speech acts between two or more participants" (Walton, 1989: 3). It is a necessary condition for an argument, identified by five characteristics: the issue, the viewpoints of participants, the politeness, the opposition of viewpoints and the use of arguments. According to this definition, an argument always involves a claim, advanced by a party, and a question put forward by the other party.

A dialogue type is “a context or setting in which argumentation occurs in everyday argumentation” (Walton, 1995: 98). It can be used as a normative model for evaluating arguments in different types of cases, even legal cases. According to this approach to fallacies, to evaluate an argument as correct or incorrect, it is necessary to examine the argumentative moves by the participants in the context in which the dialogue occurs. A fallacy occurs as an illicit dialectical shift from one type of dialogue to another; some contexts support moves which can be considered fallacious in other contexts.

The dialogue-type of legal case is viewed, in the model of the new dialectic, as a kind of persuasion dialogue in which there is a central thesis to be proved by a party. Inferences are chained together to aim at proving an ultimate conclusion of the dialogue.

Another basic concept is identified by argumentation scheme which are, in a broad sense, general and abstract patterns used to create, classify and evaluate arguments. In a conventionalized way, argumentation schemes show the internal organization of each single argument and the way by which the argument can be employed.

Depending on the argument scheme used, various types of argumentation can be distinguished and each type of argumentation requires specific critical questions to be answered. They include deductive, inductive and defeasible forms of argument (see Walton & Reed & Macagno, 2008: 1-2). In this recent book, the authors provide a menu of argumentation schemes, a complete taxonomy, bringing together a large number of schemes that occur in everyday argumentation. They develop a method of classifying schemes in a formalized way based on logic and artificial intelligence. Their project of classifying argument schemes is prior to classifying informal fallacies.

In new dialectics, fallacies are closely related to argument schemes: most of informal fallacies are associated with misuses of schemes. Specifically, argument schemes are

classified under three broad headings: reasoning, source-based arguments, applying rules to cases (Walton, 1998; 2006).

Legal reasoning requires a variety of argumentation schemes to be used together. The legal case I have presented in the beginning can be modelled in an argument from expert opinion. This kind of argument is dependent to the source: an agent is in a position to know something; so the argument depends on the characteristics of the source (its credibility, its expertise). Walton has indicated the constitutive elements of such argumentation scheme as follows.

Appeal to expert opinion is an argument found on (see Walton, 2002: 49-50):

Major Premise: *Source* E *is an expert in subject domain* S *containing proposition* A

Minor Premise*:* E *asserts that a proposition* A *(in domain* S*) is true (false).*

Conclusion: A *may plausibly be taken to be true (false).*

There are six basic critical questions matching the appeal to expert opinion; they indicate the way by which an argument can be criticized, by analysing the relation between premises and conclusion.

1. Expertise Question: *How credible is* E *as an expert source?*
2. Field Question: *Is* E *an expert in the fields that* A *is in?*
3. Opinion Question: *What did* E *assert that implies* A*?*
4. Trustworthiness Question: *Is* E *personally reliable as a source?*
5. Consistency Question: *Is* A *consistent with what other experts assert?*
6. Backup Evidence Question: *Is* E*'s assertion based on evidence?*

In a practical view, adopting a scheme-based approach can be useful.

The argumentation scheme and the CQ associated with it can be used as inputs into the judgement. The list of CQ may be a tool for judges and lawyers (participants at the legal dialogue) to represent premises and conclusion and the link between the premises and the conclusion: they are simple, accessible and selective. They indicate the key assumptions on which the correct argumentation depends.

Walton and Gordon have recently implemented a software library for building argumentation tools. To give an example, CARNEADES, which is free available on line, provide a computational model for representing, diagramming and evaluation arguments. Within the European Estrella Project, it has been used in legal domain as a device to help lawyers and judges to build a wide variety of arguments, improving their ability to argue the issue of a case.

In closing, in the new dialectic model, argumentation schemes and the appropriate CQ related may be used as a *logical tool* to check the application of an argument in conversational contexts and to evaluate the strengths or weakness of an argument. *Logical* means *dialectical*: applying argumentation scheme, an argument can be analysed as a *process* in which different types of rules are used (from deductive logic, inductive and abductive form of reasoning) in a dialogical sequence of acts.

This process view is well illustrated by informal logic approach: «to say that argumentation is dialectical, then, is to identify it as a human practice, an exchange between two or more individuals in which the process of interaction shapes the product» (Blair and Johnson, 1987: 46). In order to identify the dialectical conception of argumentation, four elements come to relevance: a) argumentation is a product / process link; b) argumentation is originated by a conflict between at least two arguers; c) the starting point of argumentation consists in a question or a doubt; d) the argumentation is a purposive activity in the peculiar sense that the parties have a goal towards which their moves turn.

5. *A rhetorical conception of argumentation schemes*

If New Dialectic theory is right and practically useful, then it offers a topic to discuss: does it imply rhetoric? Do the "critical questions" have only dialectic relevance? New Dialectic provides a pragmatic framework for identification, description and evaluation of arguments: does rhetoric make its contribution?

The solution I argue in this paper is supported by Enrico Berti's work on rhetoric. For what his solution implies, rhetoric is the one identified by Aristotle. Referring to Aristotle involves assuming rhetoric as the ability «not to simply succeed in persuading, but rather to discover the means of coming as near such success as the circumstances of each particular case allow» (*Rh*. 1355b 27). Discussing this definition, Berti emphasizes that rhetoric is not the art of persuasion but the (fallible) attempt of choosing a way (*methodon*) to persuade. Nothing is persuasive *per se* but it is always *to* someone. This is the real challenge for rhetoric: to find out something, which can be persuasive in each argument *to* someone.

There are three means of effecting persuasion: «The man who is to be in command of them must, it is clear, be able (1) to reason logically, (2) to understand human character and goodness in their various forms, and (3) to understand the emotions-that is, to name them and describe them, to know their causes and the way in which they are excited» (Rh. 1356a).

From the perspective of philosophy of language, Berti argues, all the participants in a dialogue are *within* the discourse: they are constitutive elements of it and not just external users.

Logos is made of three parts: the speaker, the topic, the man towards a speech is directed (see. *Rh*. 1358a 37-b1). The outcome of such this statement is that argumentation develops within the *logos.* The *logos* is not just a component of the

model: it may simply be a part of it if argumentation is figured as a communicational system. But *Logos* cannot be reduced to the "message" because it is not neither external to the participants, nor neutral to them. *Logos*, *pathos* and *ethos* cannot be represented as devices for emotional persuasion: they consist in essential components of the persuasive process.

In order to fully understand the traditional concept of rhetoric, it is necessary to collect the pieces into which it has been fragmented. Francesca Piazza, an Italian philosopher of language, discussing on the revival of rhetoric in the Nineties, recognizes that rhetoric has been performed in two directions: valuing the rules of *inventio* (s.c. rhetoric of proof) or valuing the rules of *elocutio* (s.c. rhetoric of trope). For the rhetoric of proof, rhetoric is assimilated to the art of dialectic and reduced to a general theory of argumentation. For the rhetoric of the trope, rhetoric is assimilated to poetics.

A united conception of rhetoric has been expanded by Cermeg (Centre of Research on Legal Methodology) in various work on forensic rhetoric.

The most peculiar aspect of the studies of Cermeg on legal argumentation is the bottom-up approach, moving from a legal case study to the metaphysical foundation of the argumentative procedure (see Manzin, 2010, 2012; Tomasi, 2011). The aim of the Cermeg research on legal argumentation is not limited to the practical aspect of providing for legal practitioners an easy-to-use handbook for being successful in circumstantial cases. The idea is to recover classical studies on rhetorical procedure, getting rid of the neo-platonic influence, in order to understand the principle by which each party may argue and check it.

In this view, the critical questions of the new dialectical theory may be interpreted as a *topical* scheme functional to the argumentative procedure.

To evaluate the plausibility of the expert argument, it is necessary to use criteria based on *endoxa*, opinions generally accepted (Luzzati, 1990). In a critical discussion, the opposing party does not confine himself/herself to acknowledge what the expert says but criticizes tit. The CQ assign to the party an active role: the party is considered not to be a passive user of the expertise of someone else, but an active judge who has to evaluate what the expert source communicates.

In *Topics,* Aristotle presented a method «whereby we shall be able to reason from opinions that are generally accepted about every problem propounded to us, and also shall ourselves, when standing up to an argument, avoid saying anything that will obstruct us» (ARIST., *Topici,* I, 100a 18-21). This method moves from statements. Each statement in which there is a predication reveals a definition, a genus, a property, an accident. The Aristotelian classification may be briefly explained.

The *definition* of anything is the statement of its essence, i.e. that which makes it what it is. *Genus* is that part of the essence which is also predicable of other things different from them in kind. A *property* is an attribute, which is common to all the members of a class, but is not part of its essence (i.e. need not be given in its definition). An *accident* is an attribute, which may or may not belong to a subject.

The predicable classification provides a topical scheme, which emerges from the set of the critical question too. The topical scheme may be considered a way to read and interpret the Critical Questions.

For example, the E*xpertise* Q*uestion* is functional to establish whether the expert assertion can be drawn into the genre of "expert discourses". So the expertise question plays a role that is on a par with the one of the genus. It provides a necessary element for evaluating the argument.

Once established that E is an expert source, the *Field Question* confines the field of expertise. E's assertion is relevant only if he is competent in the specific field

within the subject is included. It corresponds to the property's role: it allows identifying the subject in an unambiguous way.

The O*pinion* Q*uestion* allows to clarify E's theory in relation to the argument A: the question plays the role of the definition, because it specifies the essence of the discourse.

Through the *Trustworthiness Question* can be checked a relation similar to the one of the accident: the personal reliability cannot be considered as a decisive standard to evaluate an assertion. So trustworthiness is a possible element, not an essential one. Too many variables can affect the judgment of trustworthy.

The C*onsistency* Q*uestion* aims to put E's opinion in relation to what other experts have argued in the same field and to check its compatibility. The idea is to make a comparative judgment: this function is the one served by the property because the kind of compatibility does not describe the essence of the object but a relation.

Through the *Backup Evidence Question*, it is possible to assess the limits of E's assertion beyond which the theory is neither informative nor grounded. It corresponds to the definition's role.

By reading the CQ into a topical classification, it becomes clear that the kind of critical control carried out by questioning is *doxastic*: it regards the relation between the expert opinion and the topic at issue. Moreover, argumentation schemes provide not only a dialectical guidance for conducting the discussion, but assume topical and rhetorical functions.

Topics are functional to the use of *dialectics,* which correspond to the praxis of confutation (*elenchos*): having recovered the premises, it becomes necessary to verify that a certain proposition lacks opposition because the parties share it or because its opposition is contradictory. The proposition defended by confutation of the opposite

thesis within the controversial context is true: this conclusion is rationally guaranteed by the logical principle of non-contradiction.

Lastly, *rhetoric* is an indispensable part of the argumentative procedure*:* it does neither replace nor coincide with dialectics but it pursues a purpose complementary to it, which is to support persuasively the dialectic conclusion. Though without excluding but rather underlining the importance of a careful study of words, voice, gestures, rhetoric must not be reduced to the mere practice of techniques to move the inspiration of the audience. The employment of rhetorical means leads to cogent conclusions as the objections are overcome.

In short, see the following table

New Dialectic	Forensic Rhetoric
Argumentation schemes are forms of argument (structure of inferences) that represent structures of common types of arguments used in everyday discourse	CQ represent a topical scheme: the kind of critical control carried out by questioning is doxastic; it regards the relation between the expert opinion and the topic at issue
Classification of informal fallacies	*Predicables*
DIALECTICAL RELEVANCE	RHETORICAL RELEVANCE

I argue that the two perspectives are compatible.

According to the Aristotelian conception, dialectic may not be considered as an analytical procedure geared to an ordered composition of arguments.

«The more we try to make either dialectic rhetoric not, what they really are, practical faculties, but sciences, the more we shall inadvertently be destroying their true nature; for we shall be re-fashioning them and shall be passing into the region of sciences dealing with definite subjects rather than simply with words and forms of reasoning» (*Rh.* 1359b).

The border between dialectics and analytics has been discussed since medieval time and, namely, as Petrarca reported it, it emerges in the epistemological conflict between *dyalectici* and *scholae dyalectici* (see Manzin, 1994). The former apply the Aristotelian methodology based on confutation (*elenchos*); the latter apply a method affected by scholasticism, more inclined to classification[1]. A misconception of dialectics would be determined by scholastic epistemology, which tended to simplification, to reduction to unity by splitting into identical parts, classifying and reordering.

The scholasticism mixed up dialectic with eloquence, granting a privilege to the procedure able to persuade the audience. But the cogency of dialectic may not be measured upon the effects on the audience: it implies non-contradiction in premises and coherence with the conclusion. In modern thought, scholasticism would be responsible for favouring analytical procedure, by adopting deductive procedure, aiming at persuasion, forgetting the truth.

[1] I am referring to Manzin'work on the interpretation of the concept of order in a legal philosophical perspective (Manzin 2008). Neo-platonism has influenced the modern and static order: Plotinus and his scholars were first responsible for denying the ontological dimension of difference, by reducing the difference into unity. This idea derives from Anassagora and Zenone and their conception of principle: qualifying the principle of everything always just alike itself, they removed difference from the horizon.

So here is a passage in which Aristotle warns against people, like sophists, think and act thinking of dialectics as a practical science:

> "Still we ought not to be ignorant of that which occurs in this treatise… For the beginning of every thing is perhaps, as it is said, the greatest thing, and on this account the most difficult; for that is the hardest to be perceived, which, as it is the most powerful in faculty, is by so much the smallest in size; yet when this is discovered, it is more easy to add and co-increase what mains, which also occurs in rhetorical arguments, and in almost all the other arts" (Arist. *El. Sof.* 183b 15-30).

Dialectics is described as an art, not a mere matter of skills: if it were a technique, it would be automatically applied. Qualifying it as an art implies practising it, caring about not its effects but the reason why certain effects are produced. Learning what comes from art is easier, faster and effortless: it helps if necessity but it doesn't increase knowledge.

The Aristotelian example is also very forceful:

> "As if a person professing to deliver the science of keeping feet from injury, should afterwards not teach shoemaking, nor whence such things (as safe-guards for the feet) may be procured, but should exhibit many kinds of shoes of every form; for he would indeed afford assistance as to use, yet not discover the art" (Arist. *El. Sof.* 184a).

Dialectic is an *ars logica*, founded on principle of non contradiction and implying confutation. Dialectis involves the search for the truth (*inquisitio very*)*;* true is what appears as undeniable in a context. Pseudo-dialectic abstracts from this element

(*telos*): truth is out of consideration; what is required is audience's persuasion. We could say that persuasion is the condition of efficiency in pseudo-dialectic view.

Using a pseudo-dialectic procedure could take many advantages: practically speaking, it helps cutting the difference by providing a ready–made scheme of order; the scheme of order is functional to a concrete goal pursued by a party; the goal is automatically achieved following the instructions given; the scheme of order is rational, based on the principle of coherence. But what is missing? The theoretical component of the theory, the research of the principle by which it is possible to increase or decrease the knowledge.

«The sophist does not differ from the good rhetorician for a matter of knowledge or a matter of skills, but for choosing a different way of life: the sophist makes a bad choice which consists in ignoring or hiding the truth and bending the other party to his will. In this context, persuasion is apparent: not in the sense that it doesn't exist, but in the sense that it is not grounded because it turns to be a mere subjection to a power» (Cavalla, 1992: 725).

The consequent issue would be: how is possible to pass on a true discourse? The starting point of argumentation is, in its basic form, an option formed by *possible* opposite discourses of the parties. But how can be declared the truth?

The solution is represented by that methodology composed by topic, dialectic and rhetoric. Rhetoric cannot be excepted: rhetoric and dialectic are complementary. Both regards controversial situation: dialectic plays a preliminary role checking the opposition; rhetoric makes the discourse effective by persuasion. The rhetorical procedure is a complex procedure, which is addressed to a pragmatic goal (arousing audience's attention) and to the more general goal (winning the opposition by confutation of the opposing argument). A party prevails against the other by following acquisition of approval about controversial *topoi*. The first act for the rhetorician is

finding out the most effective *topoi*: they will represent the starting point of discussion for getting the other party's approval. A reference book regarding the topical potential to consult would be useful: but it would not be enough. The discourse needs to be assessed by a logical check, rationally guaranteed by principle of non-contradiction.

6. Conclusion

In this final section, from the points made in the essay, I will finally draw the conclusion discussing the practical legal side of it.

As I have stated in the beginning, in 2011 the Italian Supreme Court has ruled the judging in those cases where an expert witness, voluntarily or under compulsion, provides testimonial evidence. Both in private law and in criminal law, the expert survey is required for providing scientific or technical information to the solution of the legal issue.

What is the role of the judge? The guidelines of the Supreme Court recall the gatekeeping role as defined by *Daubert*: without spotting criteria of admissibility of evidence, both the decisions emphasize the duty of justification. It is supposed to be a distinction between scientific/technical or other specialized knowledge and rhetorical skills: the judge, and so the parties in trial, are not required to have scientific knowledge but they need to apply argumentative skills.

However, the Court's guidance appears quite generic and doesn't avoid the most practical difficulty of a reasonable justification. How do judges operate when they evaluate the admissibility of scientific evidence and come to judgment?

The argumentation schemes are fruitful tools to this purpose. A careful reading of the Court's decisions shows the applicability of argumentation schemes in Italian legal experience.

What does it mean to provide appropriate grounds for decisions? The decision could not be unjustified and unreasonable. The duty of justification obliges the judge to make public and susceptible to be controlled his decision-making process. Unreasonable is the decision that has no valid connection to the case.

What are the conditions at which an argumentation is reasonable or logical? Argumentation schemes capture common patterns of reasoning and perform a practical function: to check the logical consistency of argumentation. If there is an expert witness, the scheme is the one from expert opinion as defined by Walton (Walton, 2002: 49-50). This argument is defeasible: it is subject to defeat in light of new information, which can come out in the argumentative dialogue (Walton and Godden, 2006: 277). This is why the critical questions are so important to verify the validity of the argument. Following the list of six critical questions sketched in the pattern, many doubts / oppositions can feed the discussion. For instance, the judge (and the parties too, in force of due process principle) may ask: how credible is the expert source? What qualifications does he/she hold? What are his/her publications? Is the field of expertise the one of his/her knowledge? Is he/she up-to-date in relation with the developments of the area? Is his/her assertion clear? Is he/she personally reliable as a source? Is his/her assertion consistent with what other expert assert? Can the expert provide good reasons in opposing other experts conclusions? Does his/her assertion belong the major opinion in the scientific community (general acceptance)? Is his/her assertion based on evidence?

All these critical questions «codify some of the background information that is assumed by (or implicit in) the argument from expert opinion. As questions, they function to request the background information on which the success of the argument depends. As objection, they challenge the acceptability of the original argument until

the additional information is found to be favourable (to the initial argument)» (Walton and Godden 2006: 279).

As maintained by Cermeg'work and by the reported studies on rhetoric, the relevance of argumentation scheme is not only dialectical but also rhetorical: the content of the critical questions can be reconstructed by the predicable theory. The answers to the questions represent possible discourses, which need to be checked by confutation in order to be true.

How can be checked the methodological correctness of the decision? After having selected the *topoi,* the controversial arguments are subject to the dialectical assessment. The conclusion, which stands to opposition, is true. Therefore, rhetoric is a fundamental part of the process: it regards the way to express a true discourse. In legal context, for instance, the ritual formulas (for instance, "in name of the Italian people", "*salvis iuribus*",…) have a rhetorical meaning because they convey a message in a shared linguistic form. The use of specific legal expressions corresponds to a rhetorical choice.

Is it exhaustive to make a legal syllogism? The deductive inference of the practical judicial syllogism doesn't use up legal argumentation: after having sketched the premises, major premise and minor premise need to be linked to conclusion in a coherent way. The final deduction implies a more complex process in which the participants move in a strategic way.

In concluding, I want to add a critical remark on the use of argumentative schemes. Argumentation theories may not be reduced to provide a list of options available to users in the current context of everyday language.

It is theoretically possible to distinguish two lines of developments: on the one hand, providing more and more complete schemes which sum up the logical and conversational operations; on the other hand, recalling the classical tradition, acquiring

skills without forgetting but researching the principle by which the truth emerges (*aletheia*). According to the former, argumentation theory is thought to be a system: the risk is to confuse dialectic with the analytical procedure and consider it not only a tool for practical utilities but also a guarantee for a rational procedure. According to the latter, the theoretical framework is different: the check's demand cannot avoid a foundational investigation of the argumentative structure. In other words, arguing reasonably and effectively cannot be reduce to the use of practical skills, without knowing the principle by which the techniques applied are valid.

The risk of adopting a systematic approach to argumentation produces methodological consequences: the discourse is split into units and organized by schemes relating to a static and totalizing concept of order; if the system of rules is violated, a fallacy occurs and the argumentation cannot come to its reasonable outcome.

Indeed, the second way of thinking of argumentation is characterized by putting in relevance the difference, which is the real source of the controversial situation: the difference is not resolved through fixed standards but discussed and checked through the principle of non contradiction.

So, here are two possible attitudes towards the use of argumentation schemes: an automatic application *vs.* a critical use; a systematic procedure *vs*. a rhetorical one. Such this second way is the way, I argue, in accordance to which parties in trial must act using topics, dialectics and rhetoric.

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