Iustum Aequum Salutare
XVI. 2020. 1. • 79–90.

LEGAL ARGUMENTATION AND FORENSIC RHETORIC: A CHALLENGE TO UNCERTAINTY OF LAW

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1. Introduction

The contemporary debate on the concept of law appears to be characterized by a common core claim: the law is uncertain. Scholars, of any discipline and particular field, agree in detecting that the legal rules are not sufficient, the legislative production is alluvial, judicial decisions are unpredictable and the law has become uncertain for everyone, both for officials and for citizens. Within this framework, a new challenge arises for legal theorists.

The theory of legal argumentation addresses the question of why a certain type of interpretative or applicative result has been achieved and aims to suggest, on a prescriptive level, the best models of rational justification to be used. The purpose of this contribution is to present the theory of forensic rhetoric as an approach to law that emerges from the crisis of legalism and that seeks a tool to react to uncertainty and to the consequent and generalized feeling of distrust for the law.

2. The uses of the term uncertainty

The term uncertainty is used to describe different situations.[1]

It is mostly connected to the prominent role assumed by the jurisdiction: the legal rules are not sufficient and the legal system, even in countries with a civil-law legal tradition, cannot ignore the the precedent. The uncertainty of the law is associated

[1] About the topic of uncertainty see: G. Alpa: *La certezza del diritto nell'età dell'incertezza*. Napoli, Università degli Studi Suor Orsola Benincasa – Lezioni Magistrali, 2006.; M. Barberis: *L'evoluzione nel diritto*. Torino, Giappichelli, 1998.; L. Ferrajoli: *La cultura giuridica nell'Italia del Novecento.* Roma–Bari, Laterza, 1999.; C. Luzzati: *La vaghezza delle norme*. Milano, Giuffrè, 1990.

with the anavoidable judicial interpretation which, in the constitutional states of law, is not limited to ascertaining the validity of the legislative provisions but participates in the judgment of conformity to constitutional principles. The judge, interpreting the legislative messages, carries out the work of specification and concretization of the norms in concrete cases. This work is charged, in the civil law countries, with new interpretative tasks until it determines the conditions for the insertion of the judicial precedent into the source system.

From a euro-unitary perspective, the interpretative freedom of the judge is balanced by the obligation of interpretation in conformity with European Union law, which requires research and preference of the internal provisions that best implement it. The parameter also consists of the interpretative jurisprudence of the Court of Justice, which "holds the reins" of the process of implementation of the primacy of EU law.

The system of the sources of the "living" law cannot avoid to take into account European jurisprudence, which stands on the rulings of national courts, so much so as to constitute a binding precedent for them.

The judgment of the European Court of human rights in the well-known case of Contrada v. Italy Contrada,[2] for example, has addressed the problem of knowing the law and the predictability of decisions, questioning the semantic definition of "established judicial orientation". What is meant by "established judicial orientation"? How many compliant sentences must be counted so that it is possible to speak of an established judicial orientation? The judgment of the Court equates the legislative source and the jurisprudential source and leads to reflect on the need for a new diagram of the sources of law, in favor of a jurisprudential source law.

Precisely on the basis of European jurisprudence, in Italy, the jurisprudence of the Cassation has come to recognize a creative role of the courts for the interpretative activity put in place by the judges.[3]

3. Certainty: the challenge to uncertainty

The first remark is that talking about legal uncertainty means talking about a fact: with a disenchanted approach, it is recognized as a fact that the law is uncertain, without affecting the value of certainty.

If the law is uncertain, it does not mean that it must be. On the one hand, uncertainty is attested as a fact, on the other, certainty is affirmed as a value, intrinsic to law.

In this sense, it is possible to detect the reccurrence of an ideological use of the concept of (un) certainty including the new challenge of law. This use is explained in the constant association of uncertainty with the presentation of tools that can be used as a remedy. Beyond the different ways in which the term is used, it is sharable that it is

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[2] The European Court of Human Rights' judgment dated 14 April 2015, case Contrada v. Italy, appl.n. 66655/13.

[3] G. Giacobbe: La giurisprudenza come fonte del diritto? *Iustitia*, 2015. 313.; see also Cass., Sez. Un., n. 15144/2011.

not possible only to attest the uncertainty in the legal system but that it is also necessary to propose instruments of reaction to this state of affairs.

The use of the term legal uncertainty implies, necessarily, the development of theories that elaborate reaction models.

In the background, the project of modernity re-emerges and, with it, the myth of a rational order, constructed more geometrically, capable of guaranteeing the predictability of behaviors.[4] The need to rely, even in law, on an apparently neutral objectivity, like that of science, is expressed in the search for a conception of law based on certainty and limits to discretion. The sense of law is absorbed by the certainty of the system: from this point of view, the modern project of the rule of law in which the law coincides with the order and with its certainty re-emerges as a lost dream. So much so that the widespread feeling is that the condition of uncertainty is an evil, a condition of disfavor to which a remedy must be found.

The transition from the modern to the postmodern paradigm has already been accomplished and the disintegration of the order hinders the search for new tools.[5] The awareness that legal modernity has gone is strongly associated with the awareness of its mystifying effect. A reality that coincides with the one represented by modernity never existed: uncertainty is inevitable and the way of seeking law as a pure system is not obtainable. The perspective of postmodern legal theorists is focused on the challenge of seeking new models and new configurations of legal experience, intercepting trends and new arrangements that fit in legal practice.

4. The definitions of (un)certainty

If it is acceptable that legal uncertainty is a fact, defining uncertainty is complicated. First of all because the contexts of law are different, from which different forms of legal uncertainty derive; secondly because the definition of uncertainty implies the recognition of the content of the value of certainty, which can be otherwise declined in the absence of a single reference model. The definition of certainty is the result of a theoretical option and a choice of value that has to do with the configuration of legal values.

The Italian legal philosopher Claudio Luzzati presents a scheme of definition of uncertainty based on the history of legal thought and on the various ideas representing

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[4] On the model of legal modernity and its crisis, see in particular: P. Barcellona: *Il declino dello Stato. Riflessioni di fine secolo sulla crisi del progetto moderno.* Bari, Dedalo, 1998.; M. Cossutta: *Interpretazione ed esperienza giuridica. Sulla società pluralista ed interpretazione creativa*. Trieste, EUT, 2012.; M. Manzin: *Ordo Iuris. La nascita del pensiero sistematico.* Milano, Franco Angeli, 2008.; B. Montanari: *Luoghi della filosofia del diritto. Idee strutture mutamenti*. Torino, Giappichelli, 2012.; M. Vogliotti: *Tra fatto e diritto. Oltre la modernità giuridica*. Torino, Giappichelli, 2007.; M. Vogliotti: *Il tramonto della modernità giuridica. Un percorso interdisciplinare*. Torino, Giappichelli, 2008.

[5] On the trends of legal science, A. Calbucci: *La complessità del diritto. Nuovi itinerari del pensiero giuridico contemporaneo.* Napoli, Guida, 2009.; F. Puppo: *Metodo, pluralismo, diritto. La scienza giuridica tra tendenze «conservatrici» e «innovatrici».* Roma, Aracne, 2013.

certainty over time.[6] He describes the content of the value of certainty in relation to the conception of the legal system, distinguishing the wisdom model of Roman jurisprudence and the old-positivist one from the contemporary post-positivist view.

According to the model of Roman jurisprudence, the jurist-interpreter played a role of guaranteeing the systematic nature of law, harmonizing the rules with concrete cases. The *iuris-prudentes* played the role of custodians of legal certainty: since the Roman legal system was based on casuistry, jurisprudential interpretation became a real activity of creating the law, case by case.

The legal positivism expresses, instead, a conception of law valorizing the position of superiority of the Parliament and for the effect, among the sources, the relevance of the legislation. According to this model, the decision maker – thanks to the codification – disposed of the elements suitable to constitute the normative discourse to subsume the fact. The reduction of procedural reasoning to syllogism represented the possibility of excluding the arbitrariness of the judges, transforming them into automatons. Based on this way of understanding the law, the legal system is complete (or easily completed): the legal regulation safeguards certainty because it allows, for citizens, the predictability of the decision-making intervention and, for the officials themselves, the predictability of their own decision, in a system in which legal relationships are stable and consistent.

The crisis of legal positivism has generated the progressive loss of certainty and attempts to understand the legal phenomenon: in contemporary legal systems there are, sometimes in the codified form of principles, different values, whose compatibility is not obvious. Whoever studies or interprets the law must put the system in a coherence that was missing at the start. The interpreter, expressing evaluations on his own, is not limited to a reconnaissance activity of certain legal contents but exercises a creative activity in a strong sense, of an almost legislative nature.[7] The context is complicated because plural: on the one hand, the content of the constitutional provisions implies a greater fluidity of the relations between law and morality, on the other hand, the coexistence of national and supranational systems requires an activity of harmonization of the relations between regulations and among the Courts. In opposition to normocentrism, the structure of post-modern law is polycentric, marked by the multiplicity of legal orders in national and international communities, with the consequent effect of "hypertextuality" and instability of the law.

Nowadays there is a gap between the uncertainty of the application of the law and its certainty: a clear sign is represented by the spread of publications that highlight aspects of the legal phenomenon as soluble, fluid, non-existent, liquid.[8]

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6 C. Luzzati: *L'interprete e il legislatore. Saggio sulla certezza del diritto*. Milano, Giuffrè, 1999.

7 About the role of the interpreter see M. Cossutta: *Interpretazione ed esperienza giuridica. Sulla critica della concezione meccanicistica dell'attività interpretativa*. Trieste, EUT, 2011.

8 N. Irti: *Un diritto incalcolabile.* Torino, Giappichelli, 2016.; M. Jori: *Del diritto inesistente*. Milano, ETS, 2010.; F. Ost: Dalla piramide alla rete: un nuovo paradigma per la scienza giuridica? In: M. Vogliotti (ed.): *Il tramonto della modernità giuridica*. Torino, Giappichelli, 2008. 29–48.; M. Quiroz Vitale: *Il diritto liquido. Decisioni giuridiche tra regole e discrezionalità.* Milano, Giuffrè, 2012.; G. Zagrebelski: *Il diritto mite. Legge, diritto, giustizia*. Torino, Einaudi, 1992.

5. The argumentative perspective

Within this state of "liquidity" of law, faced with the growing asymmetries between "the law of codes" and "living law", there is a need for certainty. Terms such as "certainty" (of punishment, of the law) or references in a broad sense to "reasonableness" are very repeated.

In this direction, confidence in the argumentative practice increases: the argument is, in some ways, today, an "existential and cultural challenge",[9] which affects not only the law but different spheres and contexts of social life. To be "rational" means (to know) to argue. Roughly speaking, it means asking for a justification or providing such justification. And this is exactly what we do in the multiple contexts of everyday life. Surely, one argues in a different way since the contexts in question are substantially dissimilar, but argumentation essentially characterizes all domains of knowledge and action; and that the theory about it (argumentation theory) can legitimately, at least ideally, claim to play a fundamental part in these domains as a unifying paradigm.

Conventionally, the argumemative turn is dated back to the year 1958:[10] reconstructing the research of Perelman and Lucie Olbrechts Tyteca, Letizia Gianformaggio[11] observed that at the basis of the approach of the new rhetoric there is dissatisfaction with the vision of logical-mathematical formalism and the need to oppose hypothetical-deductive rationality and subjective arbitrariness, reasonableness, which has its model in jurisprudence and in the idea of justice. At the base of the studies that pushed Perelman to rediscover the sense of classical rhetoric there is precisely the need to give a foundation of truth to legal and legal culture: the effort is to make that even the human sciences possess a degree of technicality.

One of the consequences of argumentation theory is that formal logic has ceased to come forward as the only possible theoretical framework for the study of argumentation. But under the label 'argumentation theory' there are different school of thoughts and the concepts of logic and argumentation theory and their respective scopes are not the same for all.

In general term, argumentation theory includes logic but it is not reducible only to logic: studying argumentation means conducting the interdisciplinary work that is supposed to be argumentation theory itself, although logic is an essential part of this theory.[12]

The problematic status of logic and its connection with argumentation studies already characterized Perelman and Toulmin's theories of rhetoric and argumentation. Although these authors generally use the term "rhetoric" to describe their work, sometimes they

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9 P. Nanni: Introduzione. In: P. Nanni – E. Rigotti – C. Wolfsgruber (eds.): *Argomentare per un ragionevole rapporto con la realtà.* Milano, Fondazione Sussidiarietà, 2017. 14.

10 P. Cantù – I. Testa: *Teorie dell'Argomentazione. Un'introduzione alle logiche del dialogo.* Milano, Mondandori, 2006.

11 L. Gianformaggio: La Nuova Retorica di Perelman. In: C. Pontecorso (ed.): *Discorso e Retorica.* Torino, Loescher, 1981. 112.

12 F. D'Agostini: *Le ali del pensiero. Corso di logica elementare.* Roma, Carocci, 2003.; F. D'Agostini: *Logica in pratica. Esercizi per la filosofia e il ragionamento comune.* Roma, Carocci, 2013.

also speak of an enlarged, amplified view of logic – beyond that of formal logic itself – which would include precisely the approaches they were developing.

On one side, the rhetorical and argumentation model of Perelman and Olbrechts-Tyteca, in *Traité de l'argumentation: La nouvelle rhétorique*,[13] does not seem to give rise to the formal study of arguments (which still remains one of the essential characteristics of logic in general), while Toulmin, in *Knowing and Acting*,[14] seems to favour a theory that would incorporate both formal logic and his own study of argumentation.

On one hand, it becomes evident that some argumentation theorists (including informal logicians)[15] significantly incorporated in their research the results of formal logic's input. From this perspective, there is no divorce or conflict between formal logic and argumentation theory.

But, from another viewpoint, concerning the theoretical framework of the research carried out by each of the two approaches (formal logic, argumentation theory), they do not always seem to be talking about the same thing when speaking of logic.

When discussing today the link between formal logic and argumentation theory, must be taken into consideration a shift and, to some extent, a recast of the role that guided the development of logic during a large part of the 20th century. Meaning, and not argumentation, was the essential problem for some of the most important philosophy of language and philosophy of logic produced in that context. The issues that philosophers (as the late Wittgenstein) or logicians properly called (as the late Quine) generally focused on the following topic question: what is the relation between language and the world?

For argumentation theory there is only meaning in everyday language *through* argumentation, not independently of it or in its absence. Therefore, the challenge of contemporary argumentation theories is providing the framework for integrating the inputs coming from several different disciplines: these inputs are obviously particular, contextualized and partial and they need to be re-thought and re-equated within a neutral and interdisciplinary field. Argumentation theory itself is expected to promote a better understanding of the work developed in each of the disciplines that contribute to it.[16] The problem of definition of what is meant by logic and/or argumentation theory concerns the very foundations of argumentation, i.e. the way it is supposed to integrate logic and unify the different interdisciplinary contributions which are at its core.

Despite the different ways of understanding the logic of argumentation, argumentation theorists share this assumption: their approach is something new. Studying argumentation theory is not simply making logic, linguistics or sociology,

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13 C. Perelman – L. Olbrechts-Tyteca: *Trattato dell'argomentazione. La nuova retorica*. Torino, Einaudi, 2013.

14 S. E. Toulmin: *The uses of argument*. Cambridge, Cambridge University Press, 1958.

15 F. Puppo (ed.): *Informal Logic: A 'Canadian' Approach to Argument*. Windsor, Windsor Studies in Argumentation, 2019.

16 F. H. van Eemeren: *Handbook Argumentation Theory*. Heidelberg, Springer-Verlag, 2014.

neither making philosophy in the classical sense. Theoretically, it is making something else, new and original, which is precisely argumentation theory.

In this sense, argumentation at large, and argumentation theory in particular, can play nowadays as a unifying paradigm of human knowledge in general.

The argumentative turn led to a re-discovery of the heuristic value of the tools of argumentation: knowing the argumentative patterns is not just a matter of mastering a technique for sophistical exercises of style, nor a pure logical calculation. The idea of a pure and general logical form applicable to any content is replaced by the idea that there are different reference criteria and different degrees of probability or certainty.

Reasonableness does not depend on the logical structure of the reasoning but on the procedure for explaining the various elements that support the conclusion.[17] In other words: the truth of a deductive reasoning is something quite different from the persuasive evidence since rhetorical persuasiveness and logical rigor may not converge. There are cases of reasoning that seem convincing but are not logically meaningful or reasoning that is perfect but not convincing. The contemporary theories of argumentation come in handy where, by focusing on this space of mismatch between logic and rhetoric, they study and classify argumentative fallacies, giving detailed reviews of the misuse of the rules of logic, the misapplication in context and the cognitive tendencies.

The rebirth of argumentative studies is accompanied by a proliferation of logical systems that tends to free rationality from the meshes of formal logic in favor of different logics suitable for accounting for the complexity and dynamism of ordinary discourses.

6. Argumentation in legal context

The application to the legal context of the methods of analysis and evaluation elaborated by the theories of argumentation has stimulated new approaches to the crisis of legal certainty.

The dominant idea is that the soundness of reasoning can be measured with respect to standards that it is up to the theory to clarify and to elaborate. From this point of view, studies of legal argumentation deepen, on a theoretical level, how true and valid discourses are formed and, from a practical point of view, how effective choices are developed.

Based on argumentative research, the distance between uncertainty and certainty in the judgment can be reduced.

In this direction, in the contemporary Italian debate, there are the contributions of Giovanni Tuzet and Maurizio Manzin.[18] Both philosophers of law deny the model of mechanical jurisprudence and, on the assumption of the liquid law, claim the possibility of correct and acceptable decisions.

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[17] M. Manzin – S. Tomasi: Sulla ragionevolezza. *L'analisi linguistica e letteraria*, 2015/1. 13–33.

[18] G. Tuzet: *Dover decidere. Diritto, incertezza e ragionamento.* Roma, Carocci, 2010.; M. Manzin: *Argomentazione giuridica e retorica forense. Dieci riletture sul ragionamento processuale.* Torino, Giappichelli, 2014.

Giovanni Tuzet's approach focuses on inference, considering it as one of the fundamental dimensions of reasonableness and the way to reduce the gap between judgment as it is and what it should be. The perspective is pragmatist and analytical: on the one hand, he takes into account how in the world facts, values, knowledge and errors are intertwined, on the other he prefers analysis as a method of approaching law. Looking at the practice and the experience of judging, Tuzet recognizes that inference plays a fundamental role: moving from this awareness, it proposes to offer an analytical and evaluative hypothesis of inference as a center of judicial reasoning. In fact, non-syllogistic forms of reasoning exist, such as abduction: Pierce called abduction a 'retrodeduction', explaining it as a sort of backward reasoning that takes us back to Sherlock Holmes's investigations and Conan Doyle's stories, to the ability to know to formulate working hypotheses and to examine their accuracy. Also, the judge uses abduction in the decision-making domain: although it is a highly intuitive conjecture and is an uncertain inference, it can be tested. It is possible to verify its correspondence to reality, exactly like a mathematical conjecture. The logic of the judgment can be, that is, passed to the scrutiny of stringent tests and criteria capable of evaluating the justification given by the judge.

The studies in forensic rhetoric, developed by Maurizio Manzin, focus on the connection between inference and persuasion through the concept of enthymeme. The model of Maurizio Manzin stands on the rhetorical entimema as a logical and communicative fulcrum of judicial reasoning and aims to represent in a scheme, of only five steps, the maneuvers planned for the judge to justify in a reasonable and acceptable way. The perspective is that of reasonable argumentation which broadens the logical and epistemic procedures of reason with respect to mere deductive reason and prescribes a series of criteria for presenting legal reasonig it according to reason. The rhetorical procedure does not involve the loss of rationality but rather enriches the criteria in a movement that tends to include more rational, ethical and emotional factors. How should the judge decide in a reasonable way? The judge, according to the model developed by Manzin, should tke into account the speeches of the parties, analyze them and evaluate them according to different criteria: topical adequacy, relevance, logical coherence, dialectical correctness and persuasive commitment. Persuasion belongs to every stage of the judizial reasoning: it is what makes the inferences effective for the audience.

Manzin's model proposes a modern theory of the entimema that aims to grasp not only the inference, but also the dialogic-cooperative component of the decision-making process. The attention to the rhetorical dimension translates into a care for the human dimension of the decision and to the factors that can affect the judgment.

7. Forensic rhetoric: a valuable theory

The models of analysis, evaluation and presentation of the discourses, introduced by the argumentation studies and presented in the previous paragraph, mark a solution in the legal sphere to the crisis of certainty. That is to say: if there is an alternative to the loss in the era of the liquid law, it depends on a different way of relating to the law that focues on the positive conception of persuasion and that uses the means of rhetorical art

The recovery of argumentative reasonableness, and in particular, of rhetoric, represents, in the current panorama of human and social sciences, a demanding commitment: it implies a choice of field and a different look at reality and also at law.

In comparison with other theories of argumentation, forensic rhetoric is distinguished by attributing value to the metaphysical foundation of the dispute.

All the theories recognize that human reason is essentially argumentative. But no theory deals with the philosophical profile of the dispute. They mostly offer a methodological tool to identify the common knowledge, beliefs, values and preferences – more synthetically, the cultural or contextual premises – on which these arguments are constructed. The investigation of the ontology of conflict is lacking.

Conflict emerges as an interpersonal hostility between two or more human subjects and, therefore, as a propositional incompatibility. It serves to sketch the ontology of the conflictual situation, and to come to the central question of Aristotelian metaphysics. This question arises in the form of a finding of Aristotle: *Leghetai men Pollachós.*[19] For Aristotle the being is inherently ambiguous and polysemic. Whether you say it in one or in many ways, being is something you say. The polyivocity of being, due to the language that says it, brings us back to language as a condition of what we know.

In his model called C.A.L.S *(Cooperative Argumentative Legal Syllogism)*, Manzin,[20] with a normative purpose, develops the criteria for distinguishing good and bad arguments and, finally, he presents a tool for analysis, evaluation and presentation of the legal judgment. According to Manzin, the decision -making process is governed by a procedure consisting of topical, dialetic and rhetoric.

The model is of the trimuviral type[21], for which three perspectives – the logical, the dialectical, and the rhetorical – have something equally important to contribute to the study of argumentation. Since human judgment depends on argumentation, argumentation depends equally upon the resources of rhetoric, dialectic and logic. Logic helps us to understand and evaluate arguments as products that people create when they argue. Rhetoric helps us to understand and evaluate arguing as a natural process of persuasive communications. Dialectic helps us to understand an evaluation argumentation as a cooperative method for making critical decision. The problem of the Triumvirate View Theory is that there are a number of senses of "dialectical", logical and rhetorical.

According to Manzin, the *logic* used in argumentation is not that of deduction alone. The formal logical reconstruction of an argument could involve a reduction of the argument to an abstract logical standard form. For Manzin reducing argumentation to a deductive reasoning in legal argumentation depends on the common use of the form of deduction among legal practiotioners. But he puts in evidence that argumentation

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[19] Aristotle: *Metaphysics*. IV, 2, 1003a 33.

[20] Manzin (2014) op. cit. 160–164.

[21] J. Wenzel: Three Perspectives on Argument. In: R. Trapp – J. Schutz (eds.): *Perspectives on Argumentation: Essays in Honour of Wayne Brockreide.* Prospect Heights, IL., Waveland Press, 1991. 9–16.; R. H. Johnson: Revisiting the Logical/Dialectical/Rhetorical Triumvirate. In: J. Ritola (ed.): *Argument Cultures*. [Proceedings of OSSA 09.] CD-ROM (pp. 1–13.), Windsor, ON., OSSA, 2009.

happens in a communicative and dialogical context and that communication requires a coherence between the speaker's construction and the listens reconstruction.

He takes dialectical to mean *dialogical*, that is pertaining to dialogue in which the parties may cooperate rather then struggle. His view resembles the norms of pragma-dialectics which are not logical norms and are not put forth as such. As Pragma-dialectics,[22] foresic rhetoric falls outside the scope of dialogue logic as it was conceived by Barth and Krabbe.[23] He presents a dialogue, governed by rules, aimed at resolving a dispute.

About the idea of the *rhetorical* perspective, rhetoric is intended in an Aristotelian sense and it turns to be the pivotal component to the philosophy of argumentation. As Francesca Piazza explains in her Aristotelian reinterpretation,[24] rhetoric is not only a way of speaking but also a way of thinking; it is not only the art of persuading, but also a style of knowledge. As it is known, Aristotle shares the idea of language as a code used by an addresser to send a message to an addressee. Francesca Piazza, reading this passage, emphasizes that Aristotle is talking about the speech (*logos*) and, specifically, the person speaking, the person spoken to and the topic spoken about. Logos is not only "what is said" but it is made up of all of the three elements – the speaker, the listener and the topic. Each of these plays a crucial role in building the speech that gains its real consistency only thanks to the relationship between these three elements. In this way, speakers and listeners can be considered as internal components and not only as external users.

Indeed, Aristotle stresses that the aim *(telos)* of the speech relates to the listener. The Aristotelian specification clearly means that one of the three components of logos, the listener, occupies a key position in the discursive relationship. It is a clear reversal of the most usual order that considers the speaker as the starting point of a process that is assumed to be linear. This is not a trivial difference, but a fruitful shift in the way we see our talk exchanges, exspecially in case of judgment. The listener is always a judge, because he/she must pass through judgment the speaker's speech.[25]

Following Aristotle, in the reading given by Francesca Piazza,[26] he also paints a rich picture of human emotions from which emerges the complex relation between language and emotional sphere. Its richness is a further sign of the philosophical potentiality of rhetoric. The idea according to which the more a speech can hold together pleasure and knowledge the more persuasive it will be, implies that, in order to be persuasive, we should not separate the emotional component from the cognitive one. A speech is persuasive not because it produces knowledge and, in addition, pleasure, but because it is able to produce pleasant knowledge and pleasure that produces knowledge simultaneously.

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22 F. H. van Eemeren: *Argumentation Theory: A Pragma-Dialectical Perspective*. Springer-Verlag, 2018.

23 E. M. Barth – E. C. Krabbe: *From Axiom to Dialogue*. New York, De Gruyter, 1982.

24 F. Piazza: *La Retorica di Aristotele. Introduzione alla lettura*. Carocci, Roma, 2015.

25 Aristotle: Rhetoric. 1391b, 8–23. In: Aristotele: *Opere*. Roma–Bari, Laterza, 1989.

26 See also F. Piazza: *Linguaggio, persuasione e verità. La retorica del Novecento.* Roma, Carocci, 2004.

The richness of the rehorical approach is also entailed in its ethical component. *Ethos* is not the pre-existing reputation of the speaker, but a character constructed through *logos*. Indeed, Aristotle is not saying that the speaker's credibility makes the speech credible but the inverse; he is stating that the way in which the speech is spoken makes the speaker trustworthy. Therefore, the ethos is an effect that the speacker must achieve thanks to the speech.

This crucial role of *ethos* makes clear that in practice the distinction between who speaks and what is said is not a starting point but the result of a coomunicative process.

8. Legacy of forensic rhetoric

Forensic rhetoric is a particular and fruitful point of view on argumentation since it turns to be a way of practicing philosophy. The main value of this approach is its attention to the metaphysical components or, more exactly, to the intertwining between linguistic and non-linguistic aspects of social practices. The rhetorical point of view, in an Aristotelian sense, involves some theoretical consequences: it assigns a key position to the listeners and considers talk exchanges from the point of view of listening and not only from that of speaking. Moreover, the rhetorical perspective requires the inclusion of the emotional sphere in the field of reflection on language, paying attention to the intertwining between speech and desire.

This model fits in with practice and it is profoundly affecting legal education and lawyering.

In the research strand called argumentation in education,[27] scholars distinguish between learning to argue and arguing to learn: the former process involves the acquisition of skills of reasoning and argumentation, while in the latter students use argumentation to "achieve a specific goal", which often means "to understand or to construct specific knowledge".[28]

Specifically, the model of forensic rhetoric has been used in the training of students and professionals. The enhancement of the rhetorical component involves not reducing the judicial dispute to a battle, rather than reconstructing it as a complex rhetorical exercise of the parties cooperating for the same purpose of conflict resolution.

The forensic-rethoric model has been introduced and thaught at multiple levels of learning.

At infant level: even without having carried out experimental activities directly at this educational level, the theorists of forensic rhetoric were involved in the discussion of the researches devlepoed in years 2015–2018, on children's argumentation, by a team of scholars (Anne-Nelly Perret Clermont and Antonio Iannaccoe – University of Neuchatel –,

[27] C. Rapanta – M. Garcia-Mila – S. Gilabert: What is meant by argumentative competence? An integrative review of methods of analysis and assessment in education. *Review of Educational Research*, vol. 83., 2013. 483–520.

[28] B. B. Schwarz: Argumentation and Learning. In: A. N. Perret-Clermont (ed.): *Argumentation and Education*. New York, Sprinnger, 2009. 91–126.

Sara Greco and Andrea Rocci – USI).[29] The interest in the s.c. ArgImp project was mainly determined by the interdisciplinary perspective of argumentation, psychology and education, looking at children's argumentation in natural conversation, with no specific focus on learning or classroom contexts. As result, this project reconstructs children's inferences and their implicit premises as "spontaneous" conversations. Focusing on situations in which very small children (under 6 years) participate in the discussion, the researchers conclude that the child is basically an "arguer". Therefore, children must be considered as rational partners in argumentative discussions, since they naturally argue in a rational way.

At school level: since argumentation is one of the mostly discussed competences in the educational field, the school programs are focused on the individual reasoning skills and on how to improve them. In 2015, the model of forensic rhetoric has been used in middle-schools to educate students in solving conflicts of intercultural origin.[30] The judicial procedure was reproduced in the classrooms and the student-teacher or student-student interactions were reformulated according to the rules of judgment.

At University level: the model of forensic rhetoric is explained in university courses in philosophy of law, legal theory, logic and argumentation.

At a professional level: theorists of forensic rhetoric are part of the scientific committee of some Italian forensic schools that deal with the training of students or graduates in the professional forensic training.[31]

Within Italian law and legal education, the forensic rhetoric has a significant. By emaphasizing the importance of rhetoric in arguing, this model is going to clear the way for judges and lawyers to present, reasonably and effectively, their opinion in the judicial process. The paradigm of scholarship established by forensic rhetoric illuminates the various non-legal factors relevant to understanding what the courts do in evaluating the legal decision.

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[29] A. N. Perret-Clermont – R. Schär – S. Greco – J. Convertini – A. Iannaccone – A. Rocci: Shifting from a monological to a dialogical perspective on children's argumentation. Lessons learned. In: Frans H. van Eemeren – Bart Garssen (eds.): *Argumentation in actual practice. Topical studies about argumentative discourse in context*. John Benjamins Publishing Company, 2019. 211–236.

[30] S. Tomasi: Cultural Disagreements and Legal Argumentation: An Educational Program in Middle SchoolsOswald. In: S. Maillat – D. Maillat. (eds.): *Argumentation and Inference: Proceedings of the 2nd European Conference on Argumentation.* Fribourg–London, College Publications, 2017. 805–820.

[31] M. Manzin: La svolta argomentativa in Italia e il contributo della metodologia alla formazione del giurista. *Cultura e diritti*, vol. 1., no. 2. (2012) 21–28.