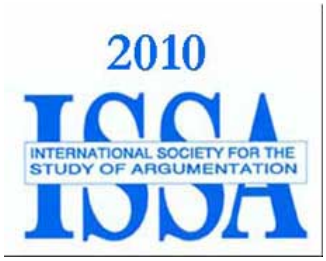
ISSA Proceedings 2010 – Adversarial Principle And Argumentation: An Outline Of Italian Criminal Trial



1. Introduction

The object of this paper is to develop some critical considerations on the implementation of the principle of the judicial due process, restricting the survey to the Italian criminal trial. This will lead to further observations on the nature and structure of judicial argumentation.

This study is divided into three parts:

1. Firstly, I will define the scope of my research, proposing an examination of the principle of due process as principle of the trial;
2. Secondly, I will focus on the Italian judicial experience, examining the implementation of the principle of due process in criminal law. Clearly, it is by no means possible to analyse it in detail as we should examine the entire structure of today's Italian criminal trial system. To contextualize the principle, it will suffice to recall its clearest legal application (and therefore judicial praxis): i.e. the institution of the cross-examination of witnesses;
3. Finally, it will be possible to represent a model that allows to accomplish the judicial due process, drawing upon the classical thought of Plato, Aristotle and Cicero.

2. Trial – due process of law – principle

In this section I will confine myself to defining the scope of my research.

The task of this study is the principle of due process, authentic foundation of western juridical civilization, the centrality of which appears juridically undisputable. So much so that many believe there cannot be trial without due process of law.

Jurists often express this principle through the Latin brocard "*audiatur et altera pars*". Seneca's *Medea* addressed the tyrant Creon with these words to call for an equitable decision, claiming that the fairness of a judgment depended on giving

each party the opportunity to give reasons for their conduct and be listened to**[i]** .
To fully understand the extent of this principle in the trial, we will ponder its constitutive structure. It is worth, therefore, analysing the concepts involved: trial, due process of law, principle.

2.1. Trial

In the modern juridical thought, dominated by the scientific – rationalistic and empiricist – model, a common aspect to the different juridical perspectives (particularly that of *civil law*) is the centrality of norms, which serve the function of regulating controversy.
A *norm*, product of the will of the State, would represent a hypothesis escaping whatever argument (prohibition of interpretation), able to settle contrast and to preserve social order. Founding themselves upon this assumption, the main branches of modern and contemporary legal philosophy (legal positivism, legal naturalism and legal realism) conceived law as a set of norms issued by the State for the purpose of coactively regulating the intersubjectively meaningful behaviours. A judgment, in this perspective, becomes synonymous of a sentence which is guaranteed by a syllogistic logical procedure consisting in the subsumption of a fact in a norm.
Clearly, this norm-centred point of view leads to the abandonment of law to the power and its reduction to a mere tool of social control (*Auctoritas non veritas facit legem*, according to the well-known Hobbesian formula). But, above all, this type of juridical conception is animated by the claim to suppress or to ignore the conflict, distorting and neglecting a constitutive datum of social experience, i.e. controversy.
Controversy among opposite positions is not an avoidable circumstance of human life, but it is one structural aspect of it**[ii]**.
Then, if we acknowledge experience as a diversity of intersubjective positions, we will not be able to suppress or ignore the opposition of a different claim without incurring logical and practical contradictions.

In fact, on one hand, he who aims to suppress the opposition ends by holding true only his own position. This is the dogmatist's position: his reasoning leads, however, to an unprovable judgment.
On the other hand, he who ignores the opposition, considering indifferently his own claim and any others', denies the existence of any truth. This position is that of the sceptic, who implicitly assumes a dogmatic position: he, in fact, recognizes

his own affirmation (i.e. that there is no truth at all) as an indisputable premise, according to a contradictory reasoning.
Since it is not possible to suppress neither to ignore the oppositions, the controversy escapes any determination of willing and it has to be accepted as an indelible aspect of social experience and – therefore – *unavailable*.

Starting from these considerations, and regarding controversy as the root of experience, it is possible to appraise the importance of the trial. Moving beyond the rationalistic hypotheses of the normative conception, we can thus see that the foundation of the juridical experience is not the norm but the trial.
As far as Italy is concerned, at this point it is worth remembering that a juridical-philosophical tradition – strongly connected to the judicial experience – could be traced in the studies of Capograssi, Cotta and Opocher. Their work represented an alternative to the tradition based on the formal analysis of the legislator's discourse authoritatively led by Bobbio and Scarpelli**[iii]** .

In its essence, that can be considered as acquired in most legal systems, a *trial* is a series of legal acts to which the parties are summoned to participate (the parties being those who support opposite positions and mean to achieve a resolution to their dispute upon execution of a conclusive provision accounting for their claims) before a third judging party. In this view, a judgment is a complex act, since each party and the third judging party necessarily take part to it. It is not just the sentence, a static aspect of the judicial experience, but it includes all the dynamic phases of discussion of the controversy.
Drawing upon Paolo Moro's valuable research**[iv]**, we can state that the concept of trial comprises four constitutive elements undeniably representing its principles. These principles are: confrontation, due process of law, evidence and jurisdiction. *Confrontation*: the questioning and answering during the trial. The questions and the exceptions of the parties qualify the trial opposition and they define the scope of the controversy and the judgment.

Due process of law: it is the core of every trial because it enables each party to participate in the judicial activity and to affect it, under fair conditions.
Evidence: it is the logical control procedure of the basis of confrontation.
Jurisdiction: it is the synthesis of these elements, the neutral activity developed by a third party to settle the controversy through a judgment acknowledging a balance among the opposite claims to be proved by the parties.

Although each of these elements may require better insight, together they allow us to observe a further datum: the *juridical reasoning* par excellence is the judicial reasoning, i.e. that which unravels during trial. Since the trial is the place and time where different positions meet, "the reasoning of the jurist always develops according to due process: from the very beginning it performs before an opposite thesis and succeeds as long as it removes the opposition"**[v]**(Cavalla 2004, p. 32). Unlike geometric demonstrations, dialogicity is an original feature of juridical discourse. Moreover, it expresses itself within a language that is not as symbolic and formalized as that of mathematical sciences. Therefore, because of these peculiarities, the juridical reasoning is not a demonstration, neither can it exclusively apply, as a form of order, the scientific syllogism – habitually employed by formal sciences – but the dialectical syllogism. In different passages, Aristotle refers to this form of reasoning that moves from the premise of someone else's reasoning not to remove it but to question it.

The juridical reasoning is also not a mere empirical verification. We tend to believe that the construction of a fact is an objective description of the historical truth of what happened. But it is not: a trial cannot be reduced to a laboratory because what happens during it is not what happens in a laboratory, as the equipment and the conditions are different. As Cavalla clarifies, judicial truth is not a truth as correspondence**[vi]**. The data collected during the trial, also by means of scientific evidence, are not self-explained but can lead to different conclusions depending on how they are connected and interpreted.
The juridical reasoning is, therefore, an *argumentation*. However, the meaning of this term here is different from that proposed by Perelman. According to Perelman, an argumentation is an organization of the speech aimed at persuading, and to which the truth is precluded. In fact, only demonstrations can generate truth. According to Cavalla and other researchers at CERMEG (Centro di Ricerche sulla Metodologia Giuridica, i.e. Research Center on Legal Methodology), anchored to the classical thought of Plato, Aristotle and Cicero, an argumentation is an organization of the discourse that can persuade if it succeeds in showing the contextual truth (the so-called instantaneous truth) of what it states. It implicates therefore an articulated series of logical operations of topical, dialectical and rhetorical kind.
These observations are enough to show that only a critical notion of the characteristic aspects of the juridical-judicial discourse allows to consider the principle of due process.

2.2. Due process of law

As we have already stated, due process of law is the core of the trial – allowing every party to take part in the judicial activity and to influence its final result under fair conditions.

At international level, the judicial due process is enshrined in many sources (Universal Declaration in the rights of the man, Convention for the safeguard of the rights of the man and the fundamental liberties, International Pact related to the civil rights and political). As far as the Italian legal system is concerned, due process can be found in the Constitution and in a series of technical judicial rules.

Under what conditions can we positively say due process will have been fulfilled? Is the staging of the debating parties enough for the dialogic structure of the trial to be shown? Is it enough for the judge to make sure the defendant and his defending counsel are physically present? Can the judging body's supplementary activity along with the party's activities jeopardize the principle? Can compliance with technical judicial rules guarantee *per se* abidance of due process?

If the answer to all these questions is yes, then we conform to a modern rationalistic-type of law. For the juridical discourse to be genuinely dialogic, the judicial reasoning has to assume its characteristic feature, that is not the scientific syllogism but, following the Aristotelian distinction, the dialectical syllogism. Supported by the principle of non-contradiction, it moves from the premise of someone else's reasoning to question it and validate it through denial of its opposite alternatives. It is due process of law that necessarily influences the evolving of the juridical discourse in its confutative form.

2.3. Principle

Moving beyond the normative datum, it is necessary to explain what is meant by qualifying due process as principle.

First of all, it is worth noticing that due process is inscribed within an axiological horizon representing the juridical community. This means that the principle of due process dwells, sooner than in the legal system, in a pre-juridical common sense. It is common sense that makes us deem preferable to depend on adversary hearings rather than a judge's monological decision.

Let us dwell upon this key point a little longer. We have already mentioned the commonplace, recurrent in the juridical community, that a matter discussed among the parties is better settled than one settled by the decision-maker on his own.

However, qualifying due process as a principle does not allude only to this. In fact, in our search for the reason why due process is approvable and hardly disputable, the nature of due process as a principle appears very clear. Through due process, we see the intrinsic structure of the trial, requiring that either party and the judge co-operate in the debate of the controversy and acknowledge dialogue as a common, undeniable aspect in the dispute of the conflicting theses.

It might be worthy of note, at this point, the qualification of due process that Manzin proposes in a recent contribution on the matter. He identifies three levels at which due process reveals itself: ontological, logical and deontological. Due process is, in fact, an ontological principle, representing the very essence of the trial; it performs, at a logical level, as a method characterized by specific sequences; finally, it is a prescriptive rule for legal experts (Manzin 2008b, p. 15).

3. Implementation of the principle of due process in the Italian criminal trial

This section analyses the Italian judicial praxis to assess the state of implementation of due process, especially as a criminal trial principle.

The Italian experience of application of this principle, strengthened by a plethora of technical judicial rules in the last twenty years, will trigger a series of jus-philosophical reflections.

I chose to restrict this research to the criminal field because it is in this very context that we can find an asymmetry between parties which serves us as a better way of testing due process as a principle.

As far as the evolution of the principle of due process in ordinary law (code of criminal procedure) is concerned, in 1988 Italy switched from an inquisitional to a "tendentially" accusatorial system. The new criminal procedure sought to convert the judicial system into adversary proceedings following the example of *common law***[vii]** .

Let us very briefly characterize the accusatorial and inquisitorial models. On one hand, the accusatorial model states the perfect equality between prosecution and defence before a third judging party, the centrality of the trial phase and the dialectical search for truth. On the other hand, the inquisitorial model asserts the disparity between parties (with a prevalence of the prosecution over the defence), the centrality of the phase of the preliminary investigations and the search of an objective truth, seen as factual or material truth. At present, according to the finest criminal trial doctrine, although within a generally accusatory context,

many inquisitorial norms – especially those regulating the preliminary investigations phase – cause the system to be only "tendentially" accusatorial.
Note that in the code of criminal procedure there is not an explicit statuition contemplating due process of law. However, its subsistence can be drawn by the set of norms that regulate participation and intervention of the accused in the trial as well as from the dispositions on formation of evidence.

Yet the presence of due process in the trial is explicitly formulated in the Constitution in article 111. The term has been included at the highest normative level only recently, i.e. when the Constitutional Law – introducing the principles of fair trial – became effective (law n. 2/1999). In particular, Paragraph 2 of article 111 provides that "All court trials are conducted according to due process and the parties are entitled to equal conditions before an impartial judge in third party position". Paragraphs 4 and 5 of the same article, regarding criminal trials, state that "The formation of evidence is based on the principle of due process" and that "Law regulates the cases in which the formation of evidence does not occur according to due process with the consent of the defendant or owing to reasons of ascertained objective impossibility or proven illicit conduct".

With these premises, let us now consider the operational reality of the principle of due process in criminal trials inferring it from the Italian experience. In order to do this, we will refer to the judicial praxis of cross-examination, a criminal trial institution clearly inspired by due process**[viii]** .
Cross-examination is a means of acquisition and formation of (oral) evidence through direct examination (conducted by the party who introduces the evidence supporting his own thesis), cross-examination (conducted by the adverse party, to adduce proof supporting his own antithesis) and re-examination of witnesses upon adversary hearings of the parties.

Each of these moments is of a particular strategic interest for the party. More precisely, in the direct examination the party seeks confirmation of his own claim. With integrative cross-examination the adversary party seeks to obtain evidence from a witness on points on which he has not been questioned in chief and that he is thought to be acquainted with. Dubitative cross-examination aims at hurting the credibility of the witness or what he has said. Finally, destructive cross-examination seeks to disprove the opposite argument showing its contradiction.
This method of examination of the witnesses determines the reaffirmation of what is the ineludible basis of the classical judicial model: the dialectical confrontation

of the parties. Let us consider, with an example as contemporary as ever, the dialogue between Socrates and Meletus, reported in the Plato's *Apology of Socrates*, when the philosopher was forced to defend himself from the charge of corrupting the young.
Many publications have been dedicated to this institution: much literature consists of lists of commandments or practical enunciations of skills of the good lawyer.

Nevertheless, one work among the others is noteworthy thanks to the perpetuity of its teachings: we are reporting there to the work of Francis Wellman, famous New Yorker trial lawyer of the XIX century**[ix]**. In 1903 he wrote The Art of Cross-examination: neither a manual nor a collection of precepts on how to carry out cross-examination, but a lively account of the experience of an extremely well-qualified professional man gathered as a result of many years' court practice.
The effectiveness of this book is that it provides the tools for an authentic "rhetoric of argument"**[x]**.

Rhetoric is generally defined as the study of the criterions and models to communicate effectively, with as a means to please or persuade the audience. Distinction needs to be made between two different kinds of rhetoric: "there is a rhetoric of persuasion which is exclusively aimed at conferring the maximum effectiveness to the discourse; there is a rhetoric of argument, i.e. of using reasonable arguments, which is the one that aims at linking different propositions in the discourse through valid and controllable inferences"**[xi]**.

Since, as we have previously remarked, juridical reasoning cannot be a mathematical demonstration: we can at best detect its ability to persuade. Thus it has been demonstrated that, statistically speaking, certain ways of organize and introduce the discourse are more effective than others. Yet judicial reasoning cannot depend on such means only: each grid of precepts will ineluctably reveal its own limits when applied to different cases. It is necessary to apply rhetoric to judicial reasoning – rhetoric meant as an authentic way of cogently (i.e. in rational and controllable form) establishing the premises and the inferences between premises and conclusions. The classicism of Wellman's work originates here: he does not only point out that an argument can be more persuasive than another one but also gathers confutative experience.

Although cross-examination is minutely regulated in the Italian procedural system

(technical rules are stated in articles nn. 498, 499 and 500 of the Code of Criminal Procedure), nevertheless experience recorded from 1988 up to now shows a scarce awareness of this institution and its overall method. The result is that trial examination of witnesses is often restricted to mere faculty of the parties to directly ask questions with no need for the judge to act as an intermediary; questions are censored or admitted upon authoritarian judicial choice; confrontation develops in a disordered way. "It has not been understood that examination is a tool finalistically aimed at arising persuasion elements that are to be measured not only by the answers to the questions but also by the probative outcome to be progressively acquired"**[xii]**.

In Italy, this happens for a series of reasons that can be summarized as follows.

Defective trial structure. The main reason for the system to resist submission to the order of adversary proceedings is that there is no equality between parties in that the prosecutor (*Pubblico Ministero*) is a magistrate just as the judging party is. The pretence of the impartial prosecutor alters the equilibrium of the triadic parties-judge diagram.

Atomization of collection of evidence activities. Practically speaking, examination of witnesses is reduced to just asking question. Which is quite different from really conducting an examination. Lawyers often prepare a list of questions to read to the witness who, this way, escapes the examiner's control. The *cross examiner* should, instead, constantly self-limit himself, according to what is required by the contextuality of the deposition of the witness and by the whole probative picture. This way, it may sometimes become necessary to leave out a witness or a question: silent adversary hearings can be an interesting facet to the dialectical structure of confrontation and not a way to escape it.

Professional specialization. In his book, Wellman refers to the "art of advocacy." As we know, systems of common law distinguish between barrister and solicitor. In Italy there used to be a distinction between lawyer and attorney but there is not anymore. Only the barrister is qualified as competent to represent people in trial by jury, whereas the solicitor institutes proceedings, gathers probative elements and is responsible for liaison with clients. In the adversary systems, cross-examination is therefore a specialty,that of the barrister. On the contrary, in Italy, a lawyer who is exclusively devote to criminal cases is rare – but for in large cities. Neither can such a distinction of roles be found: the acquisition of the art

of advocacy would be jeopardized by little court practice.

Powers of the court. In our legal system, cross-examination is completed by a fourth phase (often indistinguishable as mingled with direct and cross-examination), i.e. the examination of the witness carried out by the judge. It is worth pointing out that also the tradition of common law admits questions to the witnesses by the judge, different from those asked by the parties. However, courts are carefully controlled as to suppress any abuse which may occur every time a judge abandons his impartial role and assumes that of a lawyer. It is also true that article 506 of the Code of Criminal Procedure forbids the judge to ask questions during the examination. Even so, in general, it the judge common for the judge to make remarks**,** frequent they are the observations, the interventions and the applications of the judge.

4. Topics-dialectic-rhetoric

All we have stated so far can be summarized as follows:

a. reflecting on law means considering the trial in its dynamic structure of opposition and composition;

b. due process reveals itself as the essence of the trial: it is an ontological, therefore unavailable principle; it is the logical method of composition of the conflict; it is a deontological rule of conduct;

c. the juridical reasoning par excellence is the judicial reasoning: it can neither be represented as a demonstration nor as a mere empirical verification because the context in which it develops is dialogic and the language that employs is vague;

d. the juridical reasoning is an argumentation: it must be intended as the organization of the discourse that can persuade if it succeeds in showing the contextual truth of what it states.

The search of a method of composition of the controversy brings us back to the origins of the trial, and, more precisely, to the classical configuration of rhetoric. The rhetorical procedure implicates an articulated series of logical operations of topical, dialectical and rhetorical kind**[xiii]**.

Where there is a controversy, opposite claims expect to be valid. Therefore, at the beginning it is necessary to choose the proposition that should be discussed first. So the rhetorician learns the art of *topics*: he finds the common places familiar to the audience and builds the premise of his own reasoning.

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 it is shared by the parties 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*: it does neither replace nor coincide with dialectics but it pursues a purpose complementary to it, that is to support persuasively the dialectic's conclusions. 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 which can move the inspiration of the audience. The employment of rhetorical means leads to cogent conclusions as the objections are overcome. The distracted or indifferent audience can be won either through a formally impressive discourse (*aesthetic rhetoric*) or through a discourse made clear thanks to the use of metaphors and periphrasis (*didactic rhetoric*). Having overcome these resistances, the rhetorician will then have to motivate his thesis (*peroration*). He will develop his reasoning adding on the – generally given – object of the main definition a series of more and more detailed attributes, thus bringing a certain juridical institution closer to that particular case. This is the reason why it is important not to "atomize" the collection of evidence activities. In ancient Greek, probative elements were called *semeia* (signs): they were divided into *techmeria* and *eichota*, depending on whether they were necessary or not necessary, so that they could be added to other evidence and become stronger. In other words, in order for evidence – be it even scientific or technical – to be effective, it has to be incorporated into a wider reasoning based on the argumentative logic. Finally, the thesis defended by the rhetorician may be opposite to a specific and distinct alternative which he will have to disprove developing a confutative rhetoric.

As far as the truth orientation is concerned, it is better to make clear the methodological position of the text. One of the basics of the Aristotelian concept of truth is the principle that true is something which is not deniable, otherwise there is a contradiction. Aristotle denotes the topical premises as *eikos*. This concept is mainly discussed in *Rhetoric: eikos* is what is true not in all of the cases but only in the concrete experience. In fact, it is possible to qualify a proposition as true at any time, only by making an abstract and generalizing hypothesis. So, the Aristotelian concept of truth has nothing to do with the notion addressed to Legal Naturalism according to which truth is dogmatic, evident by

itself and prior to verification. It is also completely different from the notion of coherence or empirical verification developed by Perelman.
Abandoning the classical canons of argumentation to follow the suggestions of forensic psychology or to seek aid in lists of rules may be dangerous because we could forget the practice of the dialectical method. Be all of this restated in order to continuously ponder the principle of due process as the foundation of the trial and decision.

NOTES

[i] For a reconstruction of the usage of this latin expression in a legal context, see Manzin (2008b).

[ii] On controversy, see Moro (2001) and Cavalla (1992) (2007).

[iii] For a more detailed description, see Cavalla (1991).

[iv] I will confine myself to discussing the concept of trial in accordance to the perspective of Paolo Moro, a pupil of Francesco Cavalla (2001). He provides an ideal model of trial in which the judicial reasoning develops through four sequential stages.

[v] Cfr. Cavalla (2004).

[vi] See Cavalla (2007); on this issue, see also Fuselli (2008).

[vii] I will confine myself to pointing out the most authoritative readings concerning the Italian criminal procedure: Amdio (2009), Ferrua (2005) (2007); for a philosophical approach, see Fuselli (2008).

[viii] For a closer examination of this institute and its application in italian judicial praxis, see Schittar (1989) (1998) (2001) (2010), Randazzo (2008), Frigo (2009).

[ix] The book has been recently published in Italy: it is particularly noteworthy the introduction written by Ennio Amodio in which he points out the anomalies of the so called “Italian style”. Besides, most of my remarks refer to the endnotes edited by Giuseppe Frigo, a famous judge of the Italian Constitutional Court.

[x] See Cavalla (2004).

[xi] Loc.ul.cit.

[xii] See Frigo (2009).

[xiii] In this paragraph I am using the terms “topics”, “dialectic” and “rhetoric” in the specific sense developed by Francesco Cavalla in his essays. Every definition given is gathered from Cavalla (2007), passim. Especially, see Cavalla (2006) (2007). For further information on this theory of argumentation and its metaphisical foundation, see Cavalla (1996), Manzin (2004) (2005a) (2005b)

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