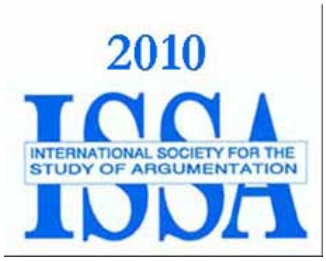
ISSA Proceedings 2010 – Vagueness Of Language And Judicial Rhetoric



1. Introduction

The purpose of this paper is to reflect on the relationships between the vagueness of language and judicial rhetoric. To this end, the discussion will be organized as follows.

1) I shall briefly analyse the vagueness of language, seeking to show its nature and characteristics. It will obviously not be possible to analyse all the various theories of vagueness. Hence the discussion will be restricted to a number of fundamental issues.

2) I shall then concentrate on legal controversy and on the logical method that regulates its conduct: that is, the rhetorical method. I shall expound the theory developed in Italy by Francesco Cavalla, according to which the rhetorical method is a rigorous logical procedure, structured in different and successive phases, and in which the rhetorician/lawyer must gradually persuade the audience to agree with his argument.

3) I shall thus analyse the various phases of the rhetorical method – which is a combination of topic, dialectic and rhetoric – to clarify how the rhetorician persuades the audience to agree with him and overcomes the objections of the adverse party. I shall pay particular attention to the relationship between rhetoric and truth.

2. The vagueness of language

The first thing that strikes one when studying vagueness is that it is not susceptible to a single definition. Various theories have sought to explain the nature of vagueness and each of them has furnished its own definition of vagueness. It is not possible here to examine these various theories (on which see Williamson 1994). However, there is a broad definition of vagueness which is presumably acceptable.

"Very roughly, vagueness is deficiency of meaning […]; there is general agreement that predicates which possess borderline cases are vague predicates" (Sorensen 1985, pp. 134-5). This can be understood very well if one considers the

classic example of vagueness: that of the sorites paradox. What is it the exact number of grains of wheat necessary to form a heap? We do not know. In fact, if I pile up grains of wheat, a heap will be gradually formed. But I cannot know or say which grain of wheat is the one that changes the non-heap into a heap.

There is consequently an indefinite series of "borderline cases" that pertain both to the heap and the non-heap. The distinction is not clear; it is, as said, vague. We are therefore in the presence of vagueness when we cannot *exactly* state the objects to which the predicate applies and those to which it does not apply. "The vagueness of a predicate 'Fz' consists in there being no sharp distinction between the objects which satisfy it and those which do not" (Heck Jr. 1993, p. 201). Hence the vagueness of language entails a lack of precision.

The vagueness of language is therefore a problem for those who wish to construct certain and precise logical systems. It was so, for instance, for Frege and Russell, the "fathers" of formal logic, who adhered to the principle that "logic only applies to non-vague predicates" (Sorensen 1985, p. 136). Formal logic, they maintained, must be precise and certain, and vagueness must be eliminated in order to formulate a non-vague language. Yet this is not possible; and today the idea that an absolutely non-vague language can be formulated has faded away. Let us see why.
The principle that "logic only applies to non-vague predicates" is untenable. In fact, it would "work" only if it were possible to distinguish sharply between vague terms (the terms to which logic may not be applied) and non-vague terms (those to which it may be applied). But distinguishing between vague and non-vague terms is impossible. It is so for the following reason.
The term "vague" means "not precise or exact in meaning". Not only, therefore, does it denote what is vague, but it is itself vague. But also the term "non-vague" is in its turn vague. In fact, according to the principle of compositionality, if a statement contains a vague term, the statement as a whole is vague. Hence, precisely because the lemma "non-vague" contains the term "vague", it is itself vague.

Frege and Russell's principle ("logic only applies to non-vague predicates") comprises the term "non-vague", which, as just said, is vague. On the basis of the rule stated by Frege and Russell, therefore, one must deduce that logic cannot be applied to their principle because it is vague. Which, however, is a problem; for this deduction would be possible if and only if logic could be applied to the

principle itself.
But this is a vicious circle. The result is that “if logic applies to the statement, the statement is incorrect. If logic does not apply to the statement, then the ‘restriction’ is without force; for it has no implication as to what is ruled in or ruled out. Since a restriction must rule something out, the ‘restriction’ would not be a genuine restriction” (Sorensen 1985, p. 137).
Hence, because it is not possible to distinguish between vague and non-vague terms, it is also not possible to state that “logic only applies to non-vague predicates”. One consequently understands why it is impossible to conceive of a non-vague language. Moreover, as shown, not only is vagueness impossible to eliminate but it is omnipresent in language. “Any type of expression capable of meaning, is also capable of being vague; names, name-operators, predicates, quantifiers, and even sentence-operators” (Fine 1975, p. 266).

My thesis in this paper, however, is that contrary to what the founders of modern formal logic believed, vagueness is not necessarily a negative characteristic of language. It is not necessary to eliminate vagueness to obtain a form of controllable and certain discourse. I maintain, in fact, that it is possible to “live with” the vagueness of language and to “work” with it. From this point of view, vagueness and precision are not mutually exclusive. One can instead attain a satisfactory exactness of language, and therefore of communication, without eliminating vagueness. This is made possible by dialogue.

2.1. Vagueness of language and controversy
As said, there is a very close connection between vagueness and dialogue – or, better, controversy. In effect, the impossibility of eliminating the vagueness of language always entails that something can be discussed and disputed. The fact that the terms which we use are semantically vague is one of reasons why disagreements arise. This may seem to be a negative factor. On the other hand, however, it is precisely because our language is vague that it is possible for people to discuss matters, seeking to achieve sufficient clarity for mutual understanding. And this is a positive factor. Hence vagueness at once causes and enables controversy and dialogue.

It might be thought that this does not apply in axiomatic-formal contexts, given that the distinctive feature of such contexts is the extreme precision and non-vagueness of the language used, and of the rules of inference applied. Nevertheless, apart from the fact that (as seen) it is never possible to eliminate

vagueness entirely, some important considerations should be borne in mind. Symbolic-formal languages are indeed very precise. But they are so because they have been established by convention. But to establish a convention there must first be dialogue: the process by which the symbolic-formal convention to adopt is agreed and stipulated.
Hence, the logical-formal certainty of axiomatic systems does not eliminate dialogue; rather, it presupposes dialogue. Put otherwise: in axiomatic-deductive systems dialogue is suspended until it is decided renegotiate the agreed-upon stipulation – for instance to falsify a particular theoretical model.

From this point of view, therefore, the connection is confirmed between the ineliminability of vagueness and the ineliminability of the dialogue which precedes and follows the stipulatory moment. The implications for the relationship between rhetoric and the exact sciences are evident: even in formalized and axiomatized contexts there is space for dialogue, and therefore for rhetoric. Perhaps, therefore, the "two cultures" are not as distant as modernity thought.

3. Vagueness of language and law: legal logic and rhetoric
We have seen what constitutes vagueness, why it cannot be eliminated, and the connection between vagueness and controversy. If, as just said, this connection is also decisive with regard to formalized contexts, one well understands the importance of vagueness in contexts where not a formal language, but a natural one is used.
The "weight" of vagueness is very apparent also in the legal domain, where a "technical" or "administered" language is used.
Of course, when discussing law and vagueness, it is first necessary to clarify the standpoint from which the law is considered. Here there is insufficient space to give thorough account of the diverse philosophical-legal theories that have dealt with the topic of vagueness (for details see Endicott 2000 and Luzzati 1990). Suffice it to point out, however, that the issue has been addressed differently by those who adopt a legal-positivism perspective, espousing an anti-realist epistemic conception of vagueness; those who adopt a natural-law perspective, espousing a realist epistemic conception of the vagueness; and those who adopt a legal-informatics perspective, espousing at times a semantic conception of vagueness.

For my part – although I cannot set out my reasons here (see Moro 2001) – I do

not agree with any of these approaches to the law, all of which essentially share the idea that the law – regardless of its source – corresponds to a set of legal norms. My position, does not identify the law with its norms; and it is therefore at odds with those mentioned above. Known in Italy as the "trial-based perspective on law", this is a tradition of thought developed by Giuseppe Capograssi, Sergio Cotta and Enrico Opocher, and whose principal representatives today are Francesco Cavalla and his pupils working at the Universities of Padua, Verona and Trento under the aegis of the CERMEG-*Research Center on Legal Methodology*.
According to this legal-philosophical perspective, the *proprium* of the law is not the norm but the trial. Norms, however, are not excluded from juridical reflection. Rather, they are framed with the trial, which is a regulated form of controversy settlement (see Cavalla 1991 and Moro 2004).

The method which regulates and controls the discourses that develop during a trial (the discourses of the judge and those of the parties) is the "rhetorical method". Here, therefore, "rhetoric" is "legal logic": the logic that studies the criteria with which to regulate and to control legal discourse and legal reasoning (see Cavalla 2006).
It is necessary to distinguish this conception from those (however authoritative) which in the twentieth century sought to reinstate rhetoric as legal logic. There are important differences between the theories of, for instance, Perelman and Viehweg, on the one hand, and the theory of Francesco Cavalla on the other. For Cavalla (and for myself):
1 rhetoric is always a tripartite logical procedure consisting of topic, dialectic, and rhetoric in the strict sense
2 rhetoric is the distinctive form assumed by legal logic;
3 rhetoric – in accordance with the teachings of classical antiquity**[i]** – is the best means with which to ascertain the truth.

For Perelman and Viehweg persuasion is solely a psychological process, and argumentation has nothing to do with the truth. They maintain that "truth" is synonymous with logical certainty and concerns only the formal sciences.
But I believe that persuasion also has a logical validity and is consequently verifiable, *mutatis mutandis*, like a mathematical proof. It therefore only makes sense to talk of argumentation in relation to the truth. But what is meant by truth?

Here, by "truth" is meant "the non-contradictable conclusion of the dialectic between the parties to a trial conducted before a third and impartial subject" (Cavalla 2007, p. 23). From this point of view – given the indissoluble structure of topic, rhetoric and dialectic – the trial debate is, "more than a procedure, the essential principle of the legal order" (Manzin 2008, p.13), the crucial means to ascertain the truth.
Truth is therefore being talked about here; but in no way is the vagueness of language eliminated, because truth and the vagueness of language are not mutually exclusive. Vagueness does not rule out the possibility of producing a clear and univocal discourse that can be verified by legal logic and therefore said to be "true". Now let us explain how it is possible.

4. The characteristics of rhetoric: Francesco Cavalla' s theory
Firstly, drawing on a recent study by Francesco Cavalla – whose arguments are set out in what follows**[ii]** – it will be useful to provide further definition of the nature of rhetoric and its purpose.
Rhetoric is a way to organize ordinary language (which is vague) using a method intended to substantiate particular conclusions. It concerns itself with persuasion.
Persuasion is a fact: the fact that the listener agrees with the arguments of the orator. As said, agreement by the listener with the orator's arguments does not have solely psychological validity. Persuasion is not coerced agreement; it is not the result of an emotional choice. In this regard, Plato and Aristotle distinguished between sophistry and rhetoric, maintaining that true persuasion is the persuasion of rhetoric.

The persuasion of rhetoric ensues from a rigorous process of rational selection which uses the tools of topic and dialectic. In fact, the rhetorician topically selects the arguments that constitute his discourse. The listener then dialectically assesses the arguments of the rhetorician, considering their merits, discarding contradictory arguments and saving the logically valid ones. Such dialectical control is very stringent because it is founded on the principle of non-contradiction, which Aristotle called "the most certain principle" (Arist., *Metaph*, IV, 3 1005 b, 23)
Rhetoric is a procedure that moves through logically sequential and consequential phases. The rhetor must progressively obtain agreement on his arguments, overcome the audience's objections, and dispel every doubt concerning the definition of a certain occurrence.

Before examining what these logically sequential phases are, I must first clarify some characteristics of rhetorical discourse. This will aid understanding of the relationship between rhetoric and truth.

4.1. Rhetoric and topic: "possible discourse"

The rhetorician speaks in a dialogic-controversial setting where it is impossible to stipulate hypotheses and axioms. The starting points of rhetorical discourses are not axioms, therefore, but *topoi* or *loci argomentorum*. These are defined by Aristotle as opinions worthy of note because they are professed by the more authoritative actors in a certain setting. As such, *topoi* are "commonplaces" in that they are encountered and recognized by the people who act in that particular setting. The *topoi* constitute the historical, cultural or linguistic factors which condition the setting and therefore every argumentation within it. In law, for example, this role is performed by precedents, in particular those established by the high courts, or by the most authoritative scholarly studies, or again by the law itself.

The discourse which starts from *topoi* – that is, the rhetorical discourse – has the initial status of a "possible discourse" (Cavalla 2007, pp. 21-44). It is in fact only "possible" that it will be accepted by the audience; it is not necessary that it will be so. Moreover, it is only "possible" because, although the *topos* signifies something, it does not rule out alternatives: normally, in fact, one rhetorical discourse is contraposed by another rhetorical discourse. An argument can always be opposed by another one, so that they contradict each other. This is controversy. Consequently, the finding of shared *topoi* is not enough for persuasion to come about. It is necessary to argue on the validity of the *topoi*, countering the criticisms of the other party, and then criticising the other party's arguments in their turn.

A "possible" discourse is therefore neither a "necessary" discourse nor an "impossible" one.

"Necessary discourse" is the type of discourse to be found, for example, in the conclusions of a mathematical proof, which, with its abstract determinateness, does not admit to alternatives. It is tautological and hence necessary: once the hypotheses have been selected and stipulated, the conclusion cannot but be the one that they implicate. In the case of a "possible discourse", by contrast, in is impossible to stipulate any initial hypothesis, and the conclusion may be different from that implicated by the *topoi* that have been chosen. The adverse party may

therefore win the argument.

But “possible discourse” is not “impossible discourse” either. “Impossible discourse” is contradictory discourse unable to refer to anything determinate, and therefore unable to stand as an alternative to any type of statement. In effect, to recall the principle of non-contradiction, we may state that someone who at the same time, in the same regard, on the same subject, affirms and denies the same predicate, may be uttering words but he is saying precisely nothing. “Possible discourse”, instead, refers to something determinate but which, by itself, in the topical phase, is still not a preferable alternative to the contrary discourses, which are just as “possible”.

In judicial controversy, therefore, a clash arises between the “possible discourses” of the parties. The purpose of each party’s discourse of to overcome the objections of the adversary and to attack the discourse. The aim is therefore to have one’s own “possible discourse” become the only one that is acceptable.
As long as a possible discourse admits to alternatives (the other “possible discourses”), it cannot lay any claim to truth. However, during the rhetorical procedure, it can be shown that the alternatives proposed by the counterpart are inconsistent. When this happens, the possible discourse ceases to be merely possible and becomes true.
This possible discourse will no longer encounter – in that moment, for that audience, for that time – any alternative. For the rhetorician will have shown that the alternative discourses are untenable. Hence, only one remains of all the initial possible discourses. And it must be accepted. The initial “possible discourse” will therefore no longer be just one discourse among others; it will be the only rationally valid discourse. Being recognized as such, it must be accepted by the parties.

4.2. Overcoming objections
Having clarified these matters, we may return to analysis of the rhetorical procedure. The rhetorician defeats his adversary through a sequence of steps in which he acquires increasing agreement with his arguments. These aspects of the discourse are its existence, its capacity to furnish a solution to the case, and its preferability to any other thesis.

As said, the first stage of the rhetorical procedure is topic: the first thing that the rhetorician must do, in fact, is determine the *topoi*. The *topos* is therefore the

premise of the rhetorical discourse; and it is from the *topos* that the rhetorician must start in gaining agreement with his discourse.

When the rhetorician begins his argumentation, therefore, he must find the most efficacious *topoi*: those are most widely accepted. These are very useful because they make the discourse more easily recognizable by the listener, and therefore more acceptable. However, contrary to the opinion of some contemporary scholars, topic is not enough in itself. Finding the most efficacious commonplace, in fact, does not suffice for the purposes of rhetorical argumentation, because every discourse must subsequently undergo the scrutiny of the dialectic and the opposition raised by the adversary. Consequently, as every lawyer knows, having identified the favourable case law is not enough to win a trial.

There are numerous *topoi*, and they are of diverse types. It is just as well that they are so, because the rhetorical discourse must be defended against the various kinds of attack that Francesco Cavalla calls "objections". According to the type of objection that the rhetorician encounters during his argumentation, he will have to choose the commonplace best suited to overcoming it.

The objections that the rhetorician may encounter can be broadly classified among the following four types:
objection by indifference
objection by ignorance
objection by generic doubt
objection by specific doubt.

As the rhetorician overcomes each of these objections, he obtains increasing agreement with his argument. These types of objections are now discussed.

4.2.1. Objection by indifference: aesthetic rhetoric

Objection by indifference is the most common type. It concerns the listener and consists in his lack of interest. It arises when the adverse party has not yet raised a specific challenge against the rhetorician's thesis but has instead simply ignored it.

Used to overcome objection by indifference and to gain the listener's attention is the variant of rhetoric which goes by the name of "aesthetic rhetoric". This consists in a series of actions intended to attract the listener's attention: a joke, a

witticism, a studied gesture, a refined tone of voice, and so on. This is what is conventionally regarded as rhetoric *tout court* and gives it a pejorative connotation. Indeed, where rhetoric to stop here, it would be no more than sophistry; for it would be mere emotional captation, and therefore used with ill-concealed psychological violence.

4.2.2. Objection by ignorance: didascalic rhetoric

Instead, once the rhetorician has gained the listener's attention, he may be faced by the second type of objection – that by ignorance

Objection by ignorance arises when the listener to the discourse does not yet know whether its content is possible. In fact, at a first level, the rhetorical discourse may be contested either because the listener does not have the resources to understand the meaning of the conclusion or because he does not have the cultural wherewithal to substantiate it.

In this case, the rhetorician overcomes the objection and makes himself understood by means of "didascalic rhetoric". This consists in the use of all the devices – such as examples or figures of speech (primarily metaphors) – able to convey the sense of the rhetorician's discourse and to explain obscure or particularly complex arguments.

During a trial, this type of rhetoric is used in the presence of a jury with insufficient legal knowledge to understand complex points of law. Or it is used when highly technical scientific evidence requires the judge to apply specialist knowledge which he does not possess. In both cases, the counsel must explain the sense of his discourse and the meaning of expressions which the audience does not understand because of its ignorance. The counsel must therefore furnish the listener(s) with the specific knowledge that they lack so that they can understand the sense and reference of the argument: obviously, if they cannot understand what is being said, they cannot agree with the counsel's argument. Making them understand is therefore crucial (Quint., *Inst.*, VIII, 2 24).

4.2.3. Objection by generic doubt: the "peroration"

However, once the rhetorician has gained attention, and once the listener has understood the sense of the discourse, objection by generic doubt may be raised.

The listener is attentive; he has identified the argument to evaluate; and he recognizes its feasibility because he is now knowledgeable about its content. Nevertheless, he still does not have sufficient reasons to approve this argument rather than a different one. The doubt is "generic" because the listener does not

have a specific alternative to oppose against the argument; yet nor does he have grounds to deem it preferable to its negation. The rhetorician overcomes this type of objection with what since Cicero has been known as “peroration”, and which consists in further justification for one’s discourse. In this phase, in fact, it is necessary further to specify the reasons why the premise proposed can resolve the case under discussion and is therefore preferable to others.

This phase is of central importance in regard to the theme of the vagueness of language with which I began. As said, it is by virtue of its vagueness that language can be clarified so that a discourse is made comprehensible. This happens at every stage of the rhetorical procedure, but it does so especially in the peroration.
The peroration stage is characterized by what has been called a “procedure by accumulation” (Cavalla 2007, p. 58), the purpose of which is exactly that of reducing the vagueness of the discourse so that a univocal meaning can be constructed.
When the rhetorician perorates his cause, he fashions an “argumentative-semantic web” – so to speak – able to “capture” the meaning best suited to framing the case in question. The tighter the mesh of this web, the more it is efficacious, and the closer its nodes, the less room for manoeuvre will be available by the adverse party, who in his turn will seek to “free” the listener from the other’s web and bring him into his own.

Metaphor aside, in this phase the orator must seek to connect the vague terms of his discourse so as to construct an association of concepts which “by intersecting with each other produce an overall message that comprises only one particular portion of the reality – i.e. the object of the communication – while everything that is extraneous is left at the margins” (Cavalla 2007, p. 37). This point is now explained in more detail.

4.2.3.1. “Generalization”
As we saw earlier, the extension of a vague term is uncertain, and vagueness can never be eliminated. Nevertheless, the vagueness of a term can be reduced by the concurrent contribution of another term, and then another one, and so on. The speaker must proceed until he has achieved the degree of clarity required to create a set of meanings worthy of approval because it unequivocally defines the specific case. This meaning construct is called “generalization” (Cavalla 2007, pp. 59-61).

A generalization is acceptable if it omits none of the properties that have been attributed to the particular case during the discussion, maintaining a relationship of inclusion with it – that is, presenting it as a sample of the series defined (Arist., *Soph. el.*, VI, 168a 22).
By way of example, consider the discussion during a criminal trial of legitimate self-defence. Like all legal notions, this derives from the criminal code, case law, and jurisprudence. Yet the notion is not precise, but vague: for were it not vague, there would be no discussion. Nevertheless, what constitutes legitimate self-defence is frequently discussed in criminal trials for the purpose of determining whether or not the defendant's behaviour was justified.

Hence, in pleading his case, the defence lawyer will seek to define what is meant by mitigating circumstance, by legitimate self-defence, by threat, by proportionality between threat and defence, and so on. These too are vague concepts, so that the lawyer must take care to construct generalizations able to "comprise" the legitimate self-defence under discussion.

Yet anyone who frequents courtrooms knows perfectly well that whenever the defence counsel pleads self-defence, a new generalization must be constructed. There does not exist, in fact, either at general or particular level, *the* definition of legitimate self-defence which can be cited. There exist, in fact, different definitions of legitimate self-defence, and in abstract all of them are worthy of consideration: initially, all of them are "possible", but none of them is "necessary". What is meant by "possible discourse" thus becomes clearer: whoever believes that a definition which states all the characteristics of the object in question is the only one possible is mistaken. There are numerous alternatives: and since there are so many of them, the rhetorical procedure must demonstrate that only one of them is worthy of consideration because it is better than the others: it applies to the case under examination. One case is different from the next, so that it cannot be claimed *a priori* that there is a definition of legitimate self-defence which holds in all cases as an indisputable generalization.

If this were the case, we would be in the domain of necessary discourse – that of science. In effect, there is also generalization in necessary discourses. But the generalization of analytical-deductive discourses has universal value. It is characterized by the fact that what can be stated of a set of objects is all and only the properties of the class in question. When this happens, the presence of a defined series entails that the objects belonging to it have always, without

exception, all and only properties of the series. Hence, in Euclidean geometry, for example, a "triangle" can be defined as a "polygon with three sides, the sum of whose internal angles is 180°". Yet any figure with these, and only these, properties is inevitably a triangle. Hence, whenever I encounter a polygon with three sides and with internal angles summing to 180°, I am certain without a shadow of doubt that it is a triangle. The matter is beyond dispute. Only to be discussed is whether it is intended to build another system: that is, another definition in which, for example, the sum of the internal angles is more or less than 180°. But in this case, I will have constructed another generalization – that of a non-Euclidean geometry – which will have universal value within that system of reference.

In rhetorical generalization, however, the rhetorician can never state all the properties of the series, because the generalization constructed, being typical of a possible discourse, comprises some properties but inevitably omits others. This, therefore, is not a universal generalization (which "holds for all cases") but a particular generalization (which "holds only in this case"). In rhetoric, in fact, vagueness cannot be reduced by any sort of initial stipulation.

Hence the rhetorician must demonstrate that the particular case being debated has *at least* the properties listed in the generalization, and not others which at the time are not relevant or not in discussion. Thus, a particular event will belong to the series if it possesses at least those properties with which the series has been defined, developed, and made knowable.

To return to our example: *if* by legitimate self-defence is meant an otherwise criminal act committed because the perpetrator has been forced to defend himself or others against the threat of injury with due proportionality; and *if* the case in question exhibits at least these characteristics of necessary defence, proportionality between defence and offence, and the actuality of the danger – each of them clarified by a particular generalization –; *then* the case in question must be regarded as belonging within the series "legitimate defence", with the result that the accused must be acquitted.
This bears out what has already been said: the vagueness of language is not the negation of clarity (as the formal logicians thought). Precisely because language is vague, the different terms of the language can collaborate with each other to construct a sufficiently clear and unambiguous meaning. That is to say, construct a sufficiently exhaustive generalization.

However, as said, there are at least two parties to a legal controversy. There is never just one rhetorical discourse, never just one generalization in a trial. There are always at least two of them: the generalization constructed by one counsel clashes with that of the other.

4.2.4. Objection by specific doubt: dialectic and confutatory rhetoric

We thus come the fourth type of opposition – opposition by specific doubt. This arise when a discourse, however well-founded, is opposed by a contrary thesis which has another premise, equally sound and apparently well-founded, which at least at first sight can also reasonably claim to efficaciously frame the case in point.

It is in this last stage of the rhetorical procedure that we find the use of what was classically known as "dialectic", and which uses "confutatory rhetoric" to demonstrate, on the basis of common knowledge, that the contrary thesis is untenable (Arist., *Soph. el.*, V, 167a 20-25).

To this end, the rhetorician may show that the adversary's discourse is based on a commonplace too vague for the case in question; or he may show that the adverse commonplace is clear but not relevant to the adversary's thesis; or again, he may demonstrate more specific fallacies or contradictions in the adversary's argument.

To return again to our example, if the defence counsel claims legitimate self-defence by the defendant, he invokes an institute whose existence requires the concurrence of several circumstances. Simultaneously present must be the necessity of self-defence, proportionality between defence and offence, and the actuality of the danger. Rhetorically, the defence counsel must construct a generalization able to show that the defendant's behaviour fulfilled all these criteria, which in their turn must be defined. But if the defence counsel forgets one of these elements (or is unable to demonstrate it), the prosecution will not find it difficult to prove the non-existence of legitimate self-defence and obtain a conviction.

In short, confutation consists in an assault on the other party's argument in order to demolish it. The rhetorician makes elenctic use of the principle of non-contradiction to demonstrate the unsustainability of the adversary's argument so that, between the two contending discourses, only his own remains. Thus the possible discourse eliminates its alternative. Hence, the alternative having been removed, the possible discourse attains the status of true discourse. If then, as

may happen, the judge nevertheless does not recognize the truth of the rhetorician's discourse, the condition is in place for the sentence to be impugned, and therefore for the sustainability of the rhetorician's argument to be asserted elsewhere.

It is evident that meeting this fourth type of objection is indispensable. Overcoming the other three types of objections leads only to the dialectical phase. Dealing with the first three objections is necessary, but not sufficient. Moreover, the rhetorician may not necessarily encounter all four of the objections described. It may happen that he is heeded immediately or that it is not necessary to explain the terms of his discourse. What is certain, however, is that the need for confutation will always arise: it will never be the case that confutation is not necessary.

During a trial, therefore, every discourse, however well constructed and appealing, will fail in its argumentative purpose if it does not overcome the dialectical opposition raised by the adversary. Just as rhetoric cannot do without the topic in order to state the premises of the discourse, so it cannot do without the dialectic to demonstrate the validity of the discourse.

In all cases, therefore – as suggested by the etymons of the Greek term *elenchos* and the Latin term *confutatio* – the rhetorician must raise obstacles against the adversary's claims while demolishing his defences. In this sense, even a mere procedural objection is authentically a rhetorical discourse: it demonstrates that the adverse party's argument is so weak that it does not even warrant discussion during a trial.

5. Rhetoric and truth

I conclude with a note on the term *"truth"*. When Francesco Cavalla discusses truth, he defines it as "instantaneous" (Cavalla 2007, pp. 80-84). As soon as a discourse is pronounced and recognized as true, it is liable to re-discussion and possible disproval.

Truth in this sense is not something that never changes, that is immovable and distant from experience. Rather, like experience, truth is always and constantly *"in motion"*.

From another point of view, we can also say that truth is a matter of quality and not quantity: there is no "partial truth" or "trial truth" that is inferior to a purported "material truth" or "factual truth". There exists only "truth": what may differ are the methods used to establish it. And the trial method cannot but be the

rhetorical method, which is not inferior to that of the exact sciences.

NOTES

[i] The term “classic” or “classical” is used here not in the chronological sense but rather in a category-specific one. Hence “classical” denotes a thought able to maintain its assumptions and conclusions valid despite the march of time. This does not imply that a classical thought is indisputable: instead, when we debate a thought, we recognize it as classical because we again confirm its validity.

[ii] I summarize Francesco Cavalla’s theory and expound his conception of rhetoric: all definitions used are taken from Cavalla (2007).

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