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THE RHETORICAL SYLLOGISM (ENTHYMEME) IN JUDICIAL ARGUMENTATION*

ABSTRACT. The thesis here expounded can be divided in three parts: in the first place, it is supposed that the syllogism is not the rhetorical way, and less still the logical way, indeed used to reach the decision in the legal proceedings monopolized by the modern State. At the most, it can be seen as a form of presenting a decision that has already been reached by other means. It sure constitutes a highly functional procedure, effective and legitimating. It is generally not a conscious strategy on the part of the so called official legal agents (judges, prosecutors, state attorneys, lawyers, plaintiffs), which seem to believe that the decision before the concrete case is in fact produced by the previous general norm enunciated by the system. If there would be a chronological order, the general norm comes afterwards. In the second place, the judicial discursive structure seems to be rather enthymematic than syllogistic, because not all the effectively used norms are revealed, many of them staying not only out of question but also hidden. Finally, it is suggested that, in the atmosphere of faking dogmatic law in which acts the underdeveloped State, those implicit norms are not just presupposed as evident, but they are also uncertain, being rendered to manipulation.

INTRODUCTION

The distinctive trade marks of the practice and the theory of law, at the dawn of contemporary western civilization, have been the great express State codifications (statutory and jurisprudential) and positivist thinking. At first, legal interpretation of the codes as exemplified in the French *École d'Éxegese* was naive, but normative theories became broader and better adapted to the new law. There were the *Historische Rechtschule*, *Begriffsjurisprudenz*, *Interessenjurisprudenz*, *Libre Récherche du Droit*, *Wienerkreis*, different forms of legal realism and so on. In spite of those more abstract and sophisticated trends of normative legal theory, it seems even today to remain the conviction, linked to a syllogistic mentality, that every particular legal decision derives from a previous system of general norms.

The thesis here expounded can be divided into three parts: in the first place, it is supposed that the syllogism is not the rhetorical way, and less

still the logical way, in fact used to reach the decision in the legal proceedings monopolized by the modern State. At the most, it can be seen as a form of presenting a decision that has already been reached by other means.[1] It surely constitutes a highly functional procedure, effective and legitimating. It is generally not a conscious strategy on the part of the so called official legal agents (judges, prosecutors, state attorneys, lawyers, plaintiffs), who seem to believe that the decision of the concrete case is in fact produced by the previous general norm pronounced by the system. But the "...general legal norms (reflected in the major premise) do not 'refer' at all to the facts of cases brought under them (reflected in the minor premise)".[2] If there would be a chronological order, the general norm comes last. In the second place, the judicial discursive structure seems to be much more enthymematic than syllogistic, among other aspects, because not all the used norms are revealed, many of them staying not only out of question but also hidden. Finally, it is suggested that, in the atmosphere of a pretence of dogmatic law in which the underdeveloped State acts, those implicit norms are not just presupposed as evident, but they are also uncertain, being susceptible to manipulation.[3]

This presentation is part of a wider work which tries to study the rhetorical syllogism (enthymeme) as a starting point for a theory better adapted to understanding modern judicial procedures. The work is far from complete, for it does not contain the empirical part, which is just getting started. Departing from concrete judicial decisions in Recife's local Hall of Justice, it tries to show the actual, real sources of the decisions and to what extent they correspond to the arguments in which the decisions allegedly are founded, that is, the explicit state norms.

The Enthymeme as Rhetorical Concept

Besides those that accompany any philosophical investigation, some additional difficulties appear when antique authors and themes are studied, such as changes in the sense of the words throughout history and tradition, inaccuracies in the passage of the original to the modern vocabulary and

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[1] Katharina Sobota, *Sachlichkeit – Rhetorische Kunst der Juristen* (Frankfurt a. M.: Peter Lang, 1990), 13 f.

[2] Bernard Jackson, "Logic and Semiotics: Ontology or Linguistic Structure?", *International Journal for the Semiotics of Law* (vol. XI, n. 33, 1999), 323.

[3] That is not a privilege of the legal discourse in underdeveloped countries. See J. A. Harris, "Recognizing Legal Tropes: Metonymy as Manipulative Mode", *The American University Law Review* (vol. 34, Number 4, Summer 1985), 1215–1229.

even controversies on the trustworthy character of the actually available copies, not to speak of the work's authorship itself.[4]

The first aspect of our central theme to be fleshed out is the relationship between the enthymeme and rhetoric. Perhaps because of the astonishment before this human ability to speak, rhetoric appears associated with myth.[5] The oldest references on the study of rhetoric come from Sicily, with Corax and Teisias (V century B.C.), whose attention is mainly directed to forensic eloquence, where one may also find the roots of the concept of enthymeme. Later on the sophists, among them Gorgias, brought more refinement to rhetoric and, "...in spite of the overall effect, with its heavy and sometimes naive tone, producing an impression of something archaic ...",[6] there is already a tradition behind that Gorgianic oratory, gathering thinkers like Thrasymachus, Isocrates, Euenus of Paros, Antiphon, Pamphilus, Callippus, Theodore of Byzantium, Licymnius, Theramenes, Polycrates, Alcidamas and others. And a "rhetorical turn" in our days,[7] taking rhetoric as a system of analysis, has a lot to do with its practical results, specially concerning law and the study of judicial decisions.[8]

Aristotle begins his intellectual life in the context of a conflict between Plato's ontology and the sophists' rhetoric. Despite being a disciple of Plato, admitting that the aim of philosophy is truth and that its method focuses on necessary demonstration, Aristotle recognizes the importance of the reflections about the opinionative ambit of human experience, the *doxa*, for which Plato did not seem to care much.[9] Aristotle pays atten-

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[4] Concerning Aristotle's writings the quotes refer to the following versions: *The Works of Aristotle*, translated by A. J. Jenkinson (*Prior Analytics*) and W. Rhys Roberts (*Rhetoric*), Great Books of the Western World, vols. 7–8 (Chicago: Encyclopaedia Britannica, 1990). And *The Work of Aristotle*, translated by W. A. Pickard (*Topics*) (Cambridge: Cambridge University Press, 1966). Concerning Plato's works, *The Dialogues of Plato*, translated by Benjamin Jowett, Great Books of the Western World, vol. 6 (Chicago: Encyclopaedia Britannica, 1990). The numbers after the title of the work indicate the subdivisions: book; chapter; number and letter of the page and the column from the standard Berlin Greek text; finally, the number of the line in the official Greek version (once pointed out).

[5] Friedrich Nietzsche, *Rhetorik* (Darstellung der antiken Rhetorik; Vorlesung Sommer 1874), *Gesammelte Werke*, fünfter Band (München: Musarion Verlag, 1922), 290.

[6] Antonio Tovar, "Introducción a la Retorica de Aristoteles", Aristoteles, *Retorica* (Madrid: Institutos de Estudios Politicos, 1971), XI, refering to Gorgias' texts which have reached our times, like *Helen's Eulogy* and *Palamedes' Defense*.

[7] Richard Sherwin, "A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling", *Michigan Law Review* (vol. 87, 1988), 545.

[8] Peter Goodrich, "Rhetoric as Jurisprudence: an Introduction to the Politics of Legal Language". *Oxford Journal of Legal Studies*, vol. 4 (Oxford: Oxford University Press, 1984), 88–122.

[9] Renato Barilli, *Retórica* (Lisboa: Editorial Presença, 1985), 21 f.

tion to the democratic relevance of opinion, ways of thinking which are accepted by all, by the majority, by the wise, and he is less averse to rhetoric. One should not think of him as a democrat in the modern sense of the term, though: after all, the *zoon politikon*, with his vital necessities already taken care of, does not have to labor and therefore he holds citizenship, while those who labor cannot act politically and be considered citizens.[10]

Aristotle tries to give a more systematic treatment to rhetoric and, consequently, to the concept of enthymeme. Aristotle's rhetoric is underestimated and the same happens to his enthymeme theory, which is part of it and will be examined below.

For Aristotle rhetoric is a *techne*. He classifies knowledge into theoretical, practical and poetical. As theoretical sciences he places philosophy, the natural sciences and mathematics; as practical sciences, politics and ethics, the goals of which are good deeds. Aristotle says explicitly that rhetoric is not the science of poetics, which is understood as the one that produces its own object, there thwarting the sophistic.

The enthymeme is a technic which comes from dialectics and is transposed to rhetoric. Aristotle's dialectics is seen more as an argumentative technique than as a theoretical science about argumentative structures. Rhetoric resembles dialectics, on one side, and the sophistic arguments, on the other. In other words, rhetoric takes care not only of what is persuasive, but also of what seems to be persuasive, for "what makes a man a 'sophist' is not his faculty but his moral purpose".[11]

In a definition which can not be accused of being tautological, Aristotle presents the syllogism as "an argument in which, if certain statements are presupposed, something different from those presuppositions necessarily comes out of them".[12] Syllogisms are classified as apodictic, dialectical, eristical and the enthymeme is called a *rhetorical syllogism*.

In spite of its being the core of persuasive speech, the enthymeme is not the only technic. Rhetoric is not exclusively composed of enthymemes, which work for the technical and emotionally more neutral parts of the argument. Rhetoric still depends on the speaker's credibility and on the relationship of affection between speaker and listener, the other two more important ways of persuasion, separate from the logical perspective of the enthymeme theory. The enthymemes are rhetorical syllogisms because they are formally or logically imperfect, their conclusions do not neces-

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[10] Hannah Arendt, *The Human Condition* (Chicago-London: The University of Chicago Press, 1958), 79 f.

[11] Aristotle, *Rhetoric*, I, 1, 1355b, 15–17.

[12] Aristotle, *Topic*, 110a, 25–27.

sarily follow from their premises, unlike the apodictic syllogisms; but they are pragmatically useful if the objective is to persuade without the demands of rigid logical coherence, in case this is not possible, opportune or desirable. The main task of rhetoric is to investigate them. Thus, many of the ethical and political subjects come to be part of rhetoric.

The ethical problem is in the root of the debate and Aristotle takes the platonic distinction between rhetoric and philosophy as a point of departure. They both, Plato[13] and Aristotle, considered the sophistic impure exactly for bringing rhetoric into philosophy, confusing them. Isocrates, the rhetor, for example, presents himself as philosopher. Plato warns against the bad use of rhetoric, the danger that an eloquent quibbler represents, when he concentrates his work on persuasion while understanding truth to be impossible.[14] And Aristotle, as already said, is educated under the influence of Plato, depreciating rhetoric in comparison to philosophy. This opinion, however, does not seem to have been unanimous in Greece, where some took rhetoric as the citizen's "highest spiritual occupation".[15] "Rhetoric, as the study of contingency, was ... opposed to any elaboration of knowledge which was dependent upon the use of absolutized categories of reason or necessity".[16] It is in polemicizing with the pupils of Isocrates that Aristotle begins to study rhetoric and his rhetoric course attracts Athens' youth to the point of causing Isocrates concern.[17]

The political problem is also important in the process of truth and philosophy prevailing over rhetoric, which does not start with Quintilian and his emphasis on ornament. Already under the influence of Aristotle one can notice a "implicit restriction of the choices available to the rhetoricians who were later faced with the decline of all forms of democracy and the extreme contraction of the public domain of politically significant speech".[18] (p. 105) Goodrich, Jurisprudence.

Etymologically, the word enthymeme comes from *enthymeísthai* (to consider, to ponder, to contemplate) and Isocrates seems to have been the first to introduce the expression in the rhetorical jargon, as an ornament for speech. The work *Rhetoric to Alexander*, whose authorship is doubted and attributed by many to Anaximenes of Lampsakos, already tries to define

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[13] Plato, *Laws*, XII, 949b.

[14] Plato, *Gorgias*, 452 f.

[15] Friedrich Nietzsche (*supra*, n. 5), 288.

[16] Peter Goodrich (n. 8), 99.

[17] Antonio Tovar (n. 6), XXIX.

[18] Peter Goodrich (n. 8), 105.

the enthymeme technically, specifically linking it to forensics and relating it to the investigation of contradictions in argumentative speech.[19]

Loyal to his careful style and with a propensity for a way of thinking that today could be called scientific, distinct from the passionate and sometimes poetical argumentation of Plato, Aristotle aims to place rhetoric in the group of human studies which should compose the citizen's formation. He synthesizes platonism in his *Rhetoric*, once he seeks to provide ethical dignity to science and dialectics, and even to sophistic, somehow making concessions to the latter through studying the enthymeme.[20] Investigating rhetoric, although affirming that it is not possible to elevate it to the level of philosophy, Aristotle tries, through internal distinctions, to separate good and bad rhetoric, allowing the former.

And his example of bad rhetoric is precisely the forensic, destined to move the spectator's emotions, based in factual proofs, flagrantly fragile. It is to be noticed that, in spite of his many critics, Aristotle maintains the relationship between judicial rhetoric and rhetoric, so to speak, as science, in a way legitimating even judicial rhetoric. At least he studies it.

The most evident characteristic of the enthymeme is the shortened formulation. What could appear as a deficiency, from the logical patterns, becomes efficiency from the point of view of the "material" rhetoric (pragmatic role) and of the "formal" rhetoric (strategic role). Rhetoric is driven to obtain immediate effects. Arguments presented with "scientific form", exhaustively demonstrative, may frequently appear unpleasant and innocuous, intending universal and (relatively) permanent validity.

Nevertheless, perhaps for its logical rigorism, the syllogism seems to have had larger weight in the western tradition, having been studied by Anaximenes, Aristotle, Cicero, Quintilian, Augustine and many others. Quintilian is one of those who refer to the enthymeme as an incomplete syllogism.[21] With that preponderance of the formal sense, the enthymeme comes to be seen less as an argument form, that persuades in spite of its absence of necessity and logical certainty, and more as an abbreviated syllogism. The material and formal senses, however, remain perfectly compatible.

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[19] Joachim Ritter and Karl Gründer (hrsg.), *Historisches Wörterbuch der Philosophie*, vol. 2 (Basel-Stuttgart: Schwabe & Co., 1972), 759 f.

[20] Antonio Tovar (n. 6), XVII–XXXI.

[21] Marcus Fabius Quintilianus, *Institutionis Oratoriae*, Liber XII, 5–10,1 f., 5–14-1 and 5–14-24, among other texts. The citations refer to the bilingual edition from H. Rahn (hrsg.), *Ausbildung des Redners*, vol. I (Darmstadt: Wissenschaftliche Buchgesellschaft, 1988), 547, 651 and 661.

To contemporary eyes, the term "rhetoric" is employed in three basic senses:[22]

1. **Material** rhetoric consists of language itself, the environment of contextual significances in which human societies live; the material rhetoric is the "linguistic fact", the experience and the comprehensible description of events, the human condition of meaning through speech. This material rhetoric is reality itself, the "realities in which we live",[23] constituting the field of study of the practical and analytic rhetoric.
2. **Practical** rhetoric teaches how to behave before the material rhetoric, the techniques and the efficient experiences to act, that is, to understand, to argue, to persuade, to decide, in one sentence: to live in the world –, including, for example, rhetoric as oratory.[24]
3. **Analytic** rhetoric is the study of the other two levels, in a double abstraction, trying to systematize and understand the relationships between the material and practical rhetoric, under an epistemological perspective.

ARISTOTLE'S CONCEPT OF ENTHYMEME

As mentioned, the concept of enthymeme is not clearly defined, having many variations around a common nucleus. Aristotle is the first to investigate it in more detail and to build his own concept. Knowing the definition of the enthymeme as a kind of syllogism, in which one of the premises or even the conclusion is taken as evident, staying implicit, he doesn't adopt it under argument that it has a merely formal character and does not supply the specific material difference he wishes.[25]

Thus Aristotle considers insufficient the classification of enthymemes into first, second or third order, according respectively to the lack of the major premise, of the minor premise or of the conclusion, a more common definition until today. But the advice of maintaining in silence one of the premises or the conclusion as a persuasive strategy is also mentioned by him; so the idea of the formal structuring of the enthymeme is maintained,

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[22] Ottmar Ballweg, "Rhetorik und Vertrauen", *Kritik und Vertrauen – Festschrift für Peter Schneider zum 70. Geburtstag* (Frankfurt a.M.: Anton Hain Verlag, 1990), 34–45.

[23] Hans Blumenberg, *Wirklichkeiten, in denen wir leben – Aufsätze und eine Rede* (Stuttgart: Philipp Reclam, 1986).

[24] Katharina Sobota, "Rhetorik: Form ohne Inhalt?", *Archiv für Rechts- und Sozialphilosophie*, vol. LXXV, Heft 4., 4. Quartal (Stuttgart: Steiner, 1989), 525–533.

[25] Jürgen Sprute, *Die Enthymemtheorie der aristotelischen Rhetorik* (Göttingen: Vandenhoeck & Ruprecht, 1982), 68 f.

which does not express the syllogism in its entirety, but suppresses what is obvious or very well-known to the listener. The enthymeme presupposes that the listener knows and agrees with the silenced premise or conclusion, be this in fact or not. For instance: Dorieus won the Olympic games, Dorieus won a crown. It lacks the major premise, because everyone knows that the prize of the games is a crown.[26] What will be formulated and what will be silenced depends on the concrete situation. In fact, the Aristotelian concept is not incompatible with this formal one, he just tries to go beyond and understand how is it possible to leave implicit essential parts of the thinking process, and how it works so well.

Aristotle lists some of the *topoi* which are good to base the enthymemes, be they real or apparent: the employment of oppositions and equivalences of terms (antonyms and synonyms), the comparison, differences in degree, previous experiences, polysemy, ambiguities, generalizing judgments of value. He enumerates 28 of those points of view.[27] Examples of *topoi* building enthymemes are: conclusion starting from the opposite: "courage is good, because cowardice is bad"; conclusion coming from the implication between complementary concepts: "if it is good to learn rhetoric, then also it is good to teach rhetoric"; conclusion from a judgment about the stronger or larger, extended to the weaker or smaller: "if not even the gods know everything, less still do men" (variants of this enthymeme are "the one who can the plus, he can the minus", "the one who cannot the minus, he cannot the plus"); starting from an authority argument: "the soul is immortal because the great philosophers have affirmed so".

The topics consists of that group of rules which are good to demonstrate something (*topoi*), rules that are not deductive or demonstrative, but nevertheless are axiomatic, based on recognized points of view. The topics are of service to rhetoric but also to science, politics, law, literary theory and so on.

Aristotle says expressly that the enthymeme is the nucleus of the art of persuasion and the central object of rhetoric. The enthymeme shows that rhetoric is a counterpart of dialectics: as well as the dialectical conclusions, which also come from the *endoxa*, the enthymeme takes care of that which does not necessarily follow from the invoked premises.

To facilitate the recognition and the construction of enthymemes, Aristotle builds a topic of the enthymeme, a topic inside the *Rhetoric*, besides the one included in his *Topic* itself. To find and to build enthymemes is one of the most important functions of *inventio*. The **invention** ("to discover thoughts which would be more adapted to the aim intended by

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[26] Aristotle, *Rhetoric*, I, 2, 1357a, 15–20.

[27] Aristotle, *Rhetoric*, II, 23, 1397a, 10–30.

the speaker") is one of the six parts of **eloquence** ("to mean or intend to convince and persuade, provoking delight").[28] For such, one of the oldest methods is the topics.

In his *Topic*, Aristotle had already placed the concept of dialectic syllogism, based on universally accepted premises (*endoxa*), different from the **apodictic** syllogism, based on evident, unquestionable premises and conclusion. The **dialectical** syllogism (*epiquirem*), although less inexorable than the apodictic syllogism, is demonstrable, contrary to the enthymeme, which is persuasive. He also clearly separates the enthymeme from the **eristical** syllogism of the sophists, which is based on false premises or arrives at false conclusions. So the enthymeme, studied later, does not get mixed up with those other syllogism forms.

The discursive ways of persuasion are separated into technical and rhetorical. The technical concern the *Ethos* (presentation of the speaker's character, giving credibility to his words), *Pathos* (that consists in waking up emotions in the listeners) and *Logos* (the objective argumentation). Concerning the **rhetorical** discursive ways of persuasion, Aristotle makes an analogy with the methods employed by science and dialectics, also finding the induction (*epagogé*) and the deduction (*syllogismós*). Thus, the corresponding rhetorical ways are the **paradigm** (inductive, called "rhetorical induction") and the enthymeme (deductive, called "rhetorical syllogism").

With Aristotle's contribution, a topical or material classification of the enthymemes may be tried.

First Group: enthymemes that have for a base the probable, that which could and can happen in a different way from what has indeed been verified, that is, events which are neither necessary nor impossible. It is the domain of the contingent. But it is not contingency in its absolute sense: the rare and the merely casual, which are contingent, they do not come up here. The probable happens in most of the cases and almost always, it is relatively stable, in a certain way permanent and not arbitrary. The argument seems verisimilar to all, to most of the people or to the wiser ones.

Example of Euripides' Medea: the reflective man does not teach the children more wisdom than necessary, because they become indolent and envied by their fellow citizens. But there is always the possibility of

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[28] Frei Joaquim do Amor Divino Caneca, *Tratado de Eloqüência*, *Obras Políticas e Literárias*, vol. I, collected by the Comendador Antonio Joaquim de Mello (Recife: Typographia Mercantil, 1875), 65.

another enthymeme in a contrary sense: it is good to teach more wisdom than is necessary, because the more wisdom the better. That type of enthymeme allows a contradictory argument which, not rarely, comes from the application of the same *topos*. On one side, "one who waits will despair" (in Brazil, *quem espera, desespera*), on the other, "one who waits will always get" (*quem espera sempre alcança*). Or, in an example extracted from the juridical adages, *dura lex sed lex* can be contrasted with *summum jus, summa injuria*.

Those enthymemes are based on verisimilitude, they are arguments on, most of the time, what happens or does not happen, what is or is not, what is or is not worth, always in the context of the *praxis*: two sentences – antecedent and consequent – they get united in a whole through a third element – the *topos* – which gives foundation and sense to the whole. The result is formulated by the structure "if . . . then . . . ", just as the syllogism is.

Second group: the paradigmatic enthymeme receives its persuasive force from examples. Those examples are added to other ones by likeness and then, through induction, to the conclusive general norm. Here the generalized consequent is less sure for the receiver of the message than the already known and accepted antecedent – the paradigmatic example. An example from Aristotle: Dionysius aims at tyranny because he is asking for a bodyguard, for Peisistratus became a tyrant as soon as he got his bodyguard and this was also the case with Theagenes at Megara.[29] It is concluded that, when he forms a bodyguard, the king intends to be a tyrant.

This enthymeme type relates an historical fact, which is as such undisputably accepted, to a future fact which is only probable. The justification of the whole argument is the generalization. Besides the characteristically enthymematic relationship if . . . then . . . , the exemplificative enthymeme also establishes a paradigmatic epagogical (inductive) relationship, whose structure may be expressed like this: "if a and b; then c".

Aristotle advises that the initial example should be a real fact, because people in general are inclined to accept that events from the past will again take place in the future; but real examples may be difficult to find and this is not a necessary condition anyway. Thus are parables and fables rhetorically very useful.[30] Of course it is not enough, to contradict a paradigmatic

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[29] Aristotle, *Rhetoric*, I, 2, 1357b, 30–35.
[30] Aristotle, *Rhetoric*, II, 20, 1393a, 25.

enthymeme, to point out a contrary concrete case, it is necessary to show that this opposite happens in most of the cases, although not in all cases, for necessary validity is not intended.

Third group: enthymemes that rest upon signs or indications. They can be classified according to two basic criteria: 1. Considering if the sign does or does not constitute a definitive and irrefutable indication of what it seems to attest; for instance: this woman is lactating, therefore, she gave birth to a child. 2. Considering if the sign constitutes a particular indication that leads to a general object or a general indication that reveals a particularized object. The combination of those classificatory criteria leads to four types of enthymeme by signs or indications: 1a. There are enough particular indications to reveal a general object, as in the relationship between lactating and maternity. 1b. There are general indications to suggest a particular object (this kind of enthymeme is not so argumentatively useful, because a general indication can signal several different objects – paleness could be a sign of fatigue, stress, fright, pregnancy – and an effective indication should lead to one single object). 2a. The particular signs are insufficient to a general object; for example: Socrates is wise and Socrates is fair, therefore wise persons are just. 2b. The general indications are not enough to lead to a particular object; example: pregnant women become pale, this woman is pale, therefore she is pregnant.

Well, if the enthymeme is formally defined as a syllogistic structure which lacks one of the three elements, it is logically possible to build three enthymemes starting from a complete syllogism, such as: (Premise 1) all men are mortal; (Premise 2) Socrates is a man; (Conclusion) therefore, Socrates is mortal. Enthymeme 1 (missing P1): (P2) Socrates is a man, therefore (C) Socrates is mortal. Enthymeme 2 (missing P2): (P1) All men are mortal, therefore (C) Socrates is mortal. Enthymeme 3 (lacking the conclusion): (P1) all men are mortal; (C) and Socrates is a man. If two components of the syllogism are not expressed, the remaining element is called a sentence. When the sentence is placed at the end of an argument or speech, expressing a climax, according to Quintilian it shall be called an **epiphonema**.[31]

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[31] M. F. Quintilianus (n. 21), Liber VIII, 5–11. In the edition quoted here, vol. II, 207.

Already in the Middle Ages the technical meaning of the term "enthymeme" can be so summarized:[32]

1. The **topical** enthymeme (from *topos-topoi*, commonplace) deduces probable conclusions starting from generally accepted points of view. Formally, as already mentioned, such enthymemes appear as immediate conclusions of a premise: if P, then C (this boy is fat, therefore he is well-tempered). This topical enthymeme can be expressed formally as protasis and vice-versa.

2. The **protasis** enthymeme (from *protaseis*, premise) deduces syllogistic conclusions which are formally rigorous, but these conclusions happen to be only probable:

    2.1. Because the premises are simply (2.1.1.) probable or (2.1.2.) verisimilar, constituting the enthymemes *ex eikóton*. An example of *eikos* enthymeme: premise 1 (P 1): this first characteristic (a) is generally or in the widespread opinion accompanied by this other one (b); premise 2 (P2): this object (o) is endowed with this first characteristic (a); conclusion (C): this object (o) is very probably endowed with that other characteristic (b).

    2.2. In the case of the enthymeme by indications (*paradeigma*), the point of departure consists of deducing premises from an actual characteristic that, as it usually appears signaling the presence of the other, allows one to verify the presence of a and induce the presence of b, constituting the enthymeme *ex signis*. 2.2.1. The enthymemes whose signs are necessary, called *tekmeria*, which do not admit reply, already mentioned. 2.2.2. The contingent enthymemes, the indications properly said, *semeia*, *semeion*. In another opportunity, following a different approach, as already seen, Aristotle classifies the enthymemes by indications in: 2.2.1., those that go from the general to the particular; and 2.2.2., the ones that go from the particular to the general.[33]

    In the *Prior Analytics*, Aristotle classifies the enthymemes by indications according to the three formal figures. First figure: (a – b, o – a, therefore o – b): having milk is indication of maternity, this woman is lactating, therefore, this woman gave birth to a child. Second figure (b – a, o – b, therefore o – a): this woman is pale, whoever is pregnant turns pale, therefore this woman is pregnant. Third figure (o – a, o – b, therefore a – b): Socrates is good, Socrates is wise, therefore whoever is good is also wise.

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[32] Gert Ueding (hrsg.), *Historisches Wörterbuch der Rhetorik*, Band 2 (Darmstadt: Wissenschaftliche Buchgesellschaft, 1994), 1197–1222.

[33] Aristotle, *Rhetoric* I, 2, 1357b, 1–10.

The *tekmeria* is the only incontestable enthymeme, but the other two may also be used with success in a speech.

3. The **formal** sense: enthymeme as a syllogism which lack one of the premises or even the conclusion.
4. A sentence with justification, a **based statement** (*gnome*).

There surely are confusing aspects in some of these definitions, for instance: 1. Paradigm and enthymeme are different concepts, but there is the paradigmatic enthymeme; 2. The topic enthymeme may be presented as *protasis* and vice-versa. 3. The *tekmeria* enthymeme seems to be as irrefutable as the dialectical syllogism (demonstrative), which Aristotle opposes to the rhetorical syllogism (the enthymeme).

Having quickly summarized these theories on the enthymeme, concentrated on Aristotle's thought, let us see how they could be useful to a contemporary theory of law.

THE RENEWED RELEVANCE OF THE ENTHYMEME FOR A THEORY OF JUDICIAL ARGUMENTATION

The law systems in some more complex societies, which may be called "dogmatic", are characterized by only considering arguments allegedly based in a legal norm which preexists in the State legal order. The interpretation and application of this law comes as syllogistic: the alleged state norm, generally expressed by statutes and repertories of judicial decisions, represents the major premise; the concrete case, through a subsumptive process, constitutes the minor premise; and the individual norm, the decision applied to the concrete case, corresponds to the conclusion.

This dogmatic form of organizing the state law still leans on three other basic postulates, among several others, which are the constraint to decide or the prohibition of *non liquet*; the constraint to interpret, supplying the concrete meaning and the actual reach of the general norms; and the need of justifying the decisions, the problem of legitimacy.[34]

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[34] *Normsetzungszwang*, *Entscheidungszwang*, *Deutungszwang* and *Begründungszwang*. See Ottmar Ballweg, "Entwurf einer analytischen Rhetorik", H. Schanze (hrsg.), *Rhetorik und Philosophie* (München: Alber, 1989), 229 f.; Theodor Viehweg, "Notizen zu einer rhetorischen Argumentationstheorie der Rechtsdisziplin", Theodor Viehweg, *Rechtsphilosophie oder Rechtstheorie?* (Darmstadt: Wissenschaftliche Buchgesellschaft), 315–326; João Maurício Adeodato, "Inconsistency Strategies in Peripheral Judicial Systems: A Form of Alternative Law", Elspeth Attwooll and Paolo Comanducci (editors), *Sources of Law and Legislation – Special Issue ARSP*, Beiheft N. 69, vol. III (Stuttgart: Franz Steiner Verlag, 1997), 122–131; and João Maurício Adeodato, *Filosofia do Direito. Uma Crítica à Verdade na Ética e na Ciência* (São Paulo: Saraiva, 1996), 11–16.

Once "les grand récits" do not seem to function properly in post-modern society, the legitimation of science and government becomes a problem. On one hand, the criteria based on operational features and efficiency are technological and cannot help defining truth or justice; on the other hand, the belief in a consens generated by discussion and directed by reason ignores the heterogeneity of the "jeux de langage".[35]

The dogmatic juridical form is the preponderant model of law organization in the modern State. Of course the dogmatic ways of organizing and distributing law have not always existed, configuring a historical phenomenon without precedents. Although this process of dogmatization is not at all fully achieved in most contemporary societies, and perhaps will never be, trying to develop it seems to be a worldwide tendency of State governments in our times. But the process demands a relatively stable and complex society, with an efficient bureaucratic apparatus and other specific characteristics that will not be treated here. Among them are the pretence of monopoly in the production of law, on the part of the modern State, and the relative emancipation of law in relation to the other normative orders, the *autopoiesis*.[36]

Such a historical and ideological development of law seems to be guided by that syllogistic mentality, the form of thinking and applying law which seems more appropriate to dogmatic law, the law that inevitably decides, always referring to a norm *a priori* fastened to the autopoietic rules of the own system. It seems that, as affirmed in the beginning of this work, in spite of the larger abstraction and sophistication conducted by new trends of positivism, it remains the conviction or the prejudice that all concrete rulings are based on a previous general norm. Even though they are in the minority, however, there have been critics of these dominant conceptions.

The current legal hermeneutics has departed from an already classical debate which may be didactically summarized in the dichotomy subsumption *versus* casuistry. The subsumptive conception is intended to arrive at a safe, sure and correct conclusion, the objective of the interpretation, that is, the decision. The casuistic, more skeptical perspective, understands that the general norm does not produce the decision or even build the frame inside of which the interpreter acts. The norm just serves as a

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[35] Jean-François Lyotard, *La Condition Postmoderne. Rapport sur le Savoir* (Paris: Minuit, 1979), 8.

[36] To the concepts of *autopoiesis* and *allopoiesis*, see, among many, Humberto R. Maturana e Francisco J. Varela, *Autopoiesis and Cognition. The Realization of the Living* (Dordrecht: D. Reidel, 1972); and Niklas Luhmann, *Soziale Systeme. Grundriß einer allgemeinen Theorie* (Frankfurt a. M.: Suhrkamp, 1984), *passim*.

posterior justification for a choice already made before the end of the official proceedings and produced by different means that do not arise from the mentioned norm although the interpreter may naively think, or strategically allege, to take it as a point of departure. Although the objectivity of truth is taken as self-evident, a pragmatic approach may make truth "...relative to the perspective of different users" and "...relative to the discourse in which it is constructed".[37]

In contemporary legal theory this non-subsumptive approach is already present in the so called American legal realism, whose precursor, Oliver Wendell Holmes, emphasizes the empirical, variable character of judicial decisions and their inarticulated, unspoken major premises. To Karl Llewellyn, who studied in Germany, it is clear that the general legal norms neither express what law really is, what courts decide from case to case, nor produce its possibilities.[38]

What is in fact verified is the incompleteness of the alleged norm: its text, metonymically confused with the norm itself, simply works as a starting point, although important, for the juridical operators. Only when indeed accomplished in the concrete case does the norm constitute itself in reality. This does not represent any deficiency but seems to be hermeneutically necessary and aprioristic.[39] More still, it is not only the concrete norm which is built from the case, but also the apparently generic and abstract norm. In other words, the general norm is not previous, only its text; the previously given general norm does not even exist, it is just a fiction. What the legislator does, including the original constitutional power, is to produce the legal or constitutional **text**, not the norm properly said. The traditional syllogistic interpretation, which separates the creation and application of law, is just one of the more general aspects of the normative concretization.[40]

It should be recognized that many of the critical studies and jurists, more linked to the hermeneutic schools, emphasize a larger changeability of the norm before the concrete case. Even so, the doctrine is almost unanimous that the starting point is the text of the norm, general and *a priori*. That is to admit that the self-referential structure through which legal dogmatics are presented by the modern constitutional State effec-

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[37] Bernard Jackson, "Truth or Proof?: The Criminal Verdict", *International Journal for the Semiotics of Law* (vol. XI, n. 33, 1998), 259 and 261.

[38] Oliver Wendell Holmes Jr., *The Common Law* (Boston: Little Brown, 1938), 1. And Karl Llewellyn, "Some Realism about Realism", *Harvard Law Review* (vol. 44, 1931), 1222.

[39] Arthur Kaufmann, "Problemgeschichte der Rechtsphilosophie", Arthur Kaufmann and Winfried Hassemer (Heidelberg: C.F. Müller, 1994), 163.

[40] Friedrich Müller, *Strukturierende Rechtslehre* (Berlin: Duncker & Humblot, 1994).

tively corresponds to reality. This enables a universal rationalization that hides the irrational character of reality, casual and unrepeatable,[41] but it has been very effective in the treatment of the conflicts.

It seems more appropriate to think that the foundation of the juridical decisions are *topoi*, more or less indefinite opinions to which, nevertheless, the great majority lends its adhesion, at the same time in which each one or each social group fills the inevitably obscure and ambiguous points with their own personal opinion, based on presuppositions that remain implicit as if they were evident. Exactly those vague and indefinite *topoi*, present in the State laws, enable the social control by the State and its legal dogmatics in a highly complex society. Examples are the so called "undetermined legal concepts", like common good, honest woman, good faith, administrative probity, property, credit, indecent exposure and so on.

It is a fact that when one deconstructs the legal speech, especially in what concerns judicial decisions, the allopoietic basis of the decisions turns up very clearly. In this way the economic, gender, national subsystems, or friendship relations, they all interfere in the legal subsystem. For example: the proportion of people living below the poverty level in prison is much higher than the same proportion in the universe of the whole Brazilian society, regardless of the parameters to define poverty. This confirms the influence of money in the judicial system and may represent a menace to the legitimating effect of the concrete decision.

Only more primitive systems, in terms of social complexity, are able to maintain this allopoietic character and to permit themselves the luxury of clearly expressing the effectively applied rules in judicial decisions and social control.[42] But even in more simple societies, not all norms are allowed to come to light; in the normative speech of a primitive tribe like Aisat-naf, in the South Pacific islands, there are terms that, "in spite of their lack of meaning, have a function to carry out in the daily language of the people", every community has its *tû-tû*.[43] Those societies do not develop a dogmatic procedure of control and legitimation because the legitimacy is already guaranteed by a previous pact, a power agreement about normative contents or other extra-dogmatic forms of reduction of complexity.[44] It

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[41] According to Nicolai Hartmann, every real being is unique, individualized, nothing is equal in the real world, constituting one of the insurmountable forms of irrationality. See Nicolai Hartmann, *Zur Grundlegung der Ontologie* (Berlin: Walter de Gruyter, 1965), 81 f. and João Maurício Adeodato (n. 34), 108.

[42] Katharina Sobota, "Don't Mention the Norm!", *International Journal for the Semiotics of Law* (vol. 4, n. 10, 1991), 45–60.

[43] Alf Ross, *Tû-Tû* (Buenos Aires: Abeledo Perrot, 1976), 9.

[44] Niklas Luhmann, *Legitimation durch Verfahren* (Frankfurt a.M.: Suhrkamp, 1983), 155 f., specially notes 5 and 11.

can be concluded that, the less self-referring the social systems are, the more interconnected will be the society's several normative orders, the more interdependent will be the spheres of religion, moral, economics, etc. Whether this necessarily implies less complexity shall not be discussed here.[45]

Surely there seems to be an intimate relationship between the development of rhetoric and political freedom, a freedom directly proportional to the number of people who may take part in discourse and speak out, reducing the capacity of single individuals or groups to concentrate political power and force their points of view.

CONCLUSION

The objective here is simply to point out the misunderstanding of starting from the idea of the demonstrative, explicit and rationally cogent syllogism, that would be a logical instrument for the study of positive law, as is attempted by traditional legal dogmatics. The argumentative structure expressed by the enthymeme theory seems more capable of enabling understanding contemporary law, revealing, for example, that "scientific" pillars like the unit of the state legal order, the judge's neutrality or the objectivity of the law constitute, in the long run, mere discursive strategies.

Besides the epistemological part, another important problem is to know whether the rhetorical perspective necessarily implies an anti-ethical posture. In the first place, law constitutes one of the species of the genus "ethic" and so it necessarily assumes ethical contents, whatever they may be, and there is no such a thing as an "unethical law"; positive law may be against (*anti-*) **this or that** ethical principle but it will never be without (*a-un*) ethic. In this non-ontological sense, without definitive ethical contents, rhetoric only refuses the postulate according to which those contents would be stablished by a "natural", "rational" or any other external parameter, sufficient to gauge or rate the epistemological or ethical correctness of law, whose legitimacy would lie beyond the juridical discourse itself.

In the second place, besides serving to immunize against presumed true or assumed irrefutable discourses, which aim at universal recognition, a more defensive, deconstructive or skeptical ethic may render possible a constructive ethic, derived from the rhetorical point of view, which could be called an **ethic of tolerance**.

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[45] João Maurício Adeodato, "Brasilien. Vorstudien zu einer emanzipatorischen Legitimationstheorie für unterentwickelte Länder", *Rechtstheorie*, N. 22, Heft 1 (Berlin: Duncker und Humblot, 1991), 108–128.

In effect, inside the many internal quarrels which divide the several trends here called rhetorical (sophists, skeptics, cynics, nominalists, nihilists, several struturalists and functionalists, deconstructivists), the ones which put the rhetorical approach simply as the ideology of the victorious faction in the struggle for power[46] are argumentatively viable but in no way unquestionable. It seems that the ethic of the rhetorical philosophies are not necessarily the ones which, by seeing as doubtful any kind of content, are useful to justify the imposition of compulsory homogeneous behavior patterns on the whole society at large. This is anti-rhetorical. By refusing behavior patterns which would be legitimate "in themselves" (*an sich*), rhetoric gets along more easily with a generically comprehensive ethic, more ready to tolerate different positions toward the world, as long as they are not intended to be imposed on everyone at any price.

Facing the choice between a "terrorist" conception of autopoietical legal dogmatics and some sort of universal consens as an optimistic goal of discourse, the recognition of the enthymematic character of legal discourse could help deal better with generalized dissens and lead to that "...local consens, ...eventually subject to resiliation ...and limited within time-space".[47]

As some art of conclusion one may suggest that: 1. The **syllogistic fiction** fits the dogmatization of contemporary law like a glove according to which the decision comes from a previous general norm, a very functional and effective argumentation; 2. In this sense, the fiction of autopoiesis would be harmed by the explicit recognition of the enthymematic structure of judicial reasoning, as long as the decision needs to be presented **as if it came from a functionally differentiated legal system**; 3. Finally, the idea of a **correct and legitimate decision** also seems to be highly functional, satisfying atavistic human demands for safety, supported by an ethic which is presented as true and cogent in the handling of conflicts.

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[46] As suggested by Franz Wieacker, "Zur Topikdiscussion in der zeitgenössischen deutschen Rechtswissenschaft", *Xenion. Festschrift für Pan J. Zepos*, vol. I (Athen – Freiburg i.B. – Köln: 1973), 401.

[47] Jean-François Lyotard (n. 35), 104–107.