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Justice for Ageing: Rhetoric as a Tool for Legal Guidelines

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ABSTRACT: This article deals with the issue of social justice, starting from a case study of the Italian Constitutional Court, which denounces the regulatory gap and the need for concerted public action to promote intergenerational integration and active ageing in an era characterised by a rapidly ageing population. The article proposes a study of the issue through a rhetorical argumentative approach and finally proposes some strategies to challenge the stereotype of ageing and promote intergenerational integration.

KEYWORDS: ageing justice, legal argumentation, legal ethics, legal language, rhetoric, stereotypes

1. INTRODUCTION

The research topic of this paper addresses the problem of social inclusion of the elderly as a legal challenge and the promotion of active ageing policies, the strengthening of legal institutions for the elderly and the development of new effective legal solutions of intergenerational justice.

The case study is based on the argumentation of the Italian Constitutional Court in its recent decision no. 202/2022. The ruling concerns a case of domestic accident: the Court, in declaring that the accident, which occurred outside the family home, was not compensable, states that it cannot intervene in the protection of 'domestic accidents' because it operates in the insurance system and not in the state welfare system. This prompted the Court to point out the urgent need for reform, in particular to protect all "caregivers" in order to strengthen the social network.

While confirming the correctness of previous court rulings, the judgment concludes with a clear warning to the legislator: reform is urgently needed.

The first section of this paper will focus on the analysis of the argumentation of the Italian Constitutional Court, which will allow us to understand the reason underlying the call for legislative intervention, that is, the principle of ageing justice as intergenerational justice. In the absence of legislation guaranteeing forms of active justice in the context of an ageing population, what is the justification for an equal right to justice in old age? Since the final recipient of legislative intervention is the citizen, we will focus the study on the legal communication aspects by proposing a rhetorical analysis of legal discourses on ageing justice as a type of intergenerational justice.

2. CASE STUDY

The constitutional issue arose from a complaint by a husband, the widower of a housewife registered with Inail, a public body that administers compulsory insurance against accidents at work and occupational diseases.

The housewife had been the victim of a serious domestic accident at her parents' home, where she was caring for her elderly parents. The widower asked the court to order Inail to pay him, as his heir, the accident pension and funeral allowance due after his wife's death. Inail had refused on the grounds that the accident had occurred in a different room from the insured housewife's home. The Court dismissed the appeal on the grounds that the accident had occurred in the house of the housewife's parents and not in the marital home, i.e. the place of habitual residence, which is a fundamental condition of Inail's insurance. The question of legitimacy was raised and various grounds were put forward for questioning the constitutionality of the protection rules: the inappropriate differentiation between situations which are essentially the same; the violation of the duties of solidarity on which the relationship between parents and children within the family is based; the violation of the protection reserved by the Constitution to work in all its forms and applications and the right of workers to enjoy social security and insurance instruments appropriate to their needs in life.

The Constitutional Court ruled that the question of legitimacy raised was inadmissible, stating that it was not possible to include in insurance cover events occurring outside the family home, in the homes of "close family members who do not live together, insofar as they require domestic help". This is not possible because the level at which the protection operates is that of an insurance instrument and not that of a public welfare policy aimed at protecting the well-being of the population.

The Court's reasoning, in the concluding state, expressly refers to the need for legislative intervention on grounds of social justice in order to promote "solidarity between generations" in response to "the challenges of an ageing society", highlighting in this context the role of women who, at some point in their lives, have to take care of grandchildren and/or elderly parents.

The arguments developed by the Court to support this legal principle are twofold, as reproduced and translated verbatim below¹:

Arg. A)

With the progressive ageing of the population within the European States and the increased need for long-term care, the model of the 'carer' has become established, supplemented by family members and friends who provide free and continuous care to an elderly person who is not self-sufficient and/or disabled.

Arg. B)

Reference is also made to the European Parliament Resolution of 13 September 2016, in relation to paragraphs 34 and 37, in which "Member States were called upon to recognise the value of the work of carers (not only cohabiting family members) "for society as a

¹ The full text of the decision is available at:
<https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2022&numero=202>

whole" and of "people who devote their time and skills to caring for elderly and dependent persons, without any limitation to caring only for cohabiting family members".

Both arguments recall the key aspects and issues of equity in ageing: the declining birth rate is reflected in the increasing ageing of the population. The fact that people are living longer is in itself a positive element, but it is clear that a rapidly ageing population requires concerted public action to promote intergenerational integration and active ageing in order to counteract potentially negative consequences for living standards, welfare, employment, the social security system and public finances.

Talking about the justice of ageing means addressing intergenerational equity issues such as: welfare sustainability, financial sustainability, the right to fair access to social and health services, the fair distribution of social and health resources, health risk management, the definition and updating of essential levels of care, labour market policies.

The Court points out that, in the current legal framework, Italian legislation does not provide a general definition of an elderly person/population or even of active ageing or mature workers, leaving it to the national or regional legislator to define the relevant age thresholds sector by sector, if necessary in compliance with EU regulations.

In Italy, therefore, there is a lack of legislation enshrining a right to active ageing, a right to equal opportunities for healthy ageing and defining specific obligations and guarantees for carers in a social network vision.

What is justice in old age? In the absence of an organic national law on non-self-sufficiency and active ageing, the legal answers to this question require a reflection on intergenerational justice and the way in which it is communicated.

3. NARRATIVES FOR INTERGENERATIONAL JUSTICE

Let us try to reflect on the narrative pattern of intergenerational justice and the present- future transition. Hypothetically, several elaborations of the transition from the present to the future are theoretically possible:

- a) Future as an imaginary narration, produced by the present subject, of a time remote and other than the living one;
- b) Future as an imaginary narration, produced by the present subject, of a not distant time that reaps the fruits of decisions elaborated in the present;
- c) Future as a narration of the present, produced by the present subject, which grasps "the otherness that bursts and rushes already into the present, contaminating it in its most intimate texture".

Of these possible narratives, according to the interpretation of the Italian legal philosopher Menga, to which we refer when reconstructing, only the last narrative option would allow us to "create justice", as the only one capable of grasping a vision of community, which rediscovers itself in the present challenged by transgenerational needs. The other narrative forms (sub a and b), which are typically represented by contractualist and utilitarian theories, would have the defect of pushing the critical features of this relationship between temporalities, or rather, between men of different times, to excess. In fact, as Menga observes: (the situation in which a genuinely questioned subject encounters is that of finding himself invariably invested by a request that comes to him from another time with respect to his present (diachrony), from another place with respect to his place

(atopy) and from an inevitable solicitation, prior to any possibility of prediction, avoidance or even propitiation (asymmetry)" (Menga, 2021, p. 28). This reconstruction of the narrative reveals that intergenerational justice has a paradoxical form: it concerns cases that come from a time other than the present (diachronic), from a place other than the present proper (atopic), and from subjects that do not exist (asymmetrical).

In particular, narrative sub a) exasperates the asymmetry of the relationship by opposing two forms of temporality, the present and the future, as uncommunicating entities, to the point that the only possible elaboration on the future is an imaginary representation of it. This line of argument is typical of contractualism (Rawls, 1971) which, marked by the primacy of the present, excludes future generations in the regulatory contract for the future because they do not exist and, as such, are unable to participate in the negotiation of rights and responsibilities. In this view, care for future generations, since it cannot be derived from a contract, would only be possible as a moral intuition.

Narrative sub b) attenuates the configuration of temporal otherness by reconstructing the future as a form of projection of the present or as a present that stretches into the future: this perspective, from an argumentative point of view, is also vitiated by the primacy of the present. Given, in fact, that the future is not determined, what it is or what may be useful/harmful for the future could only be determined in the present and from the present. Moreover, this type of narrative accommodates a concept of posterity limited to the next generation, restricting its extension to a narrower composition, to that which can be known from and in the present.

Narrative sub c) generates a reconfiguration of the intergenerational relation as interpersonal: the subject, who lives here and now, and who is engaged in facing the challenges of ageing population, is not called upon to transcend his era and orient himself in the future, but to concretely live his present by grasping the call that comes from the future.

In order to root an authentically intergenerational relationship and overcome divisive logics, the narration towards a social network and intergenerational justice in an ageing society should not, therefore, be centred on the us/them dialectic, since this would inevitably lead to emphasising the hiatus between temporalities and amplify the difference between generations, attributing to the present generation the task of making hyperbolic leaps towards the generations of the future. In a way, the result may seem a truism: whatever we say about future generations is for us.

4. RHETORICAL ANALYSIS OF FORMS OF INTERGENERATIONAL JUSTICE

The reasoning on intergenerational ethics, which we have reconstructed by mainly referring to the work of Menga, has led us to elaborate the legal relationship between present-future generations in its simplest form: a relationship between us, which obliges us today, here and now, to address issues that concern us, for the future.

This issue of inter-generational justice, is, in our opinion, clearer when reviewed in the light of the rhetorical triangle.

The reference is to the scheme taken from the well-known passage in the third chapter of the first book of Aristotle's *Rhetoric* (*Rhet.* 1358a 37-b1): the speaker, the thing spoken of and the one spoken to, are all elements of the discourse, insofar as each of them

contributes to the constitution of the discourse. The metaphor of the triangle expresses the necessity of this relationship which, without the competition of all three elements, would have no real existence. From the rhetorical point of view, in the reinterpretation proposed by Lo Piparo (2014) and Piazza (2017), which is here taken as the foundation of the rhetorical perspective as philosophy, the process of discourse is not linear and does not consider the speaker as a point of departure, and the listener as a point of arrival. The listener is not a passive recipient but, on the contrary, the real protagonist actor: rhetoric makes clear that speaking is always (and not only, therefore, in courtrooms or assemblies) speaking to someone, even when this someone coincides with the speaker (Piazza, 2017, p. 7).

Thinking rhetorically leads to emphasising the audience as that which is at the beginning of every process of signification.

Therefore, rhetorically resuming the reasoning developed in the previous paragraph, the constituent elements of the intergenerational narrative can be reconstructed as follows:

- Speaker: it is us, in our present, here and now;
- Listener-interlocutor: it is always us, here and now; whatever we say about future generations, it is we who say it, and we do not say it to others and to ourselves, here and now. We will also say it to others - to the generations following ours, for example, who will have to face the same problem - if, and to the extent that, we have said it to ourselves in our present (Greco, 2018, p. 261).
- Object: a future "which is not added to the present, as something that follows the now, but which is implemented together with the now and in the now"; an anterior future, as Menga defines it, since it reaches us in the present as a "form of injunction" (Menga, 2016, p. 107).

Rhetorical analysis allows us to emphasise that the question of intergenerational justice is topical and concerns ourselves, today, as men of the present. Therefore, in order for the legal narrative not to degenerate into hyperbolic/irrealistic or even divisive discourses between generations, it should focus on the 'we'-recipients, recovering the relationship 'between us'.

5. RHETORICAL STRATEGIES FOR LEGAL AND REGULATORY GUIDELINES

The rhetorical scheme of intergenerational justice allows us to find possible solutions to the research question: why recognize the right to active ageing if it is not imposed by law? How can an equal right to healthy ageing be justified?

A rhetorical response to the question can be developed on the three levels of the rhetoric of the *pistis*: *logos*, *ethos*, *pathos* (Piazza, 2017). At the level of ethical proof, when we make an appeal to active ageing, we are making an appeal to responsibility for the future, and thus we are addressing ourselves first and foremost, it is an appeal addressed to us. This is to say, the rhetorical analysis of the appeal to the justice of active ageing makes explicit an implicit implication for us: we must reject the argument for the present.

At the level of pathetic proof, assuming the addressee of the discourse as we-community of today, the strictly generative argument could be discriminatory: the effective

argument cannot focus on generation alone, but on the more general fact that we are in relation to the other.

On the level of logic, the argument should not focus on rights or duties as alternatives. The risk of focusing, for example, on the right of the elderly to grow old well leads to an exaggeration of the duty of the young as an alternative to the right. Focusing the narrative on one generation's right creates the divisive risk inherent in dialectics: if right and duty are understood in an alternative sense, the result of legal communication will be to consolidate two communities, us/them. What is needed is a rhetoric of 'between us' that emphasises the inextricable link between rights and duties. Instead, we need to see our present duties as something we owe to others, and which we must therefore fulfil, not just because our present political-legal order imposes them on us, but because there is a relationship that obliges us and that arises from the call that comes from the future (Greco, 2021). A narrative based on the right-duty paradigm is fundamental to avoid in-group and out-group communication logics (Bianchi, 2014, Capone, 2013, Conely, 2010): the rhetoric of law would start from the common "we".

The use of the rhetoric of 'we' in legal terms brings about a transformation: a transition from the logic of 'I have no right' because 'they have the right' to the logic of 'our right to have rights' as accompanied by 'our duty to have duties'. This different way of thinking, and the use of the first person plural instead of the first person singular (Moss, 2001), makes it clear that duties do not exist simply because our current political legal system imposes them on us, but because there is first of all an interpersonal relationship that obliges us.

6. LAW FOR RHETORIC AND RHETORIC FOR LAW

The way forward that emerges from the rhetorical study of the intergenerational issue is to impose certain duties on the members of the present generations, as our duties that go hand in hand with our rights, in order to preserve certain goods and values that will only be passed on to future generations if they are discussed in the present.

In this rhetorical perspective, words are not just means of communication, but complex linguistic practices that have a concrete impact on the world around us and on relationships between people (Dascal & Gross, 1999). When we speak, we actually create or shape reality through words (Austin, 1962).

Words can produce forms of discursive injustice, participating in a complex communicative phenomenon whereby individuals or groups of individuals are placed on an unjust social scale and their behaviour is stigmatised or even dehumanised. In her recent study on the dark side of words, the Italian linguist Bianchi identifies two typical forms of discursive injustice, which are such because they affect the ability of subjects to act on the world with words: illocutionary distortion and silencing (Bianchi, 2021). The former refers to cases in which members of one group are attributed things other than what they intended, or in which the credibility of the other group is enhanced; silencing, on the other hand, occurs strategically when the words of the other group are not distorted or weakened, but rather annulled. These discursive strategies have the effect of drawing or reinforcing the boundary between in-group and out-group, between those inside and those outside the

group, of constructing an 'us' and a 'them', and of marking the gap between 'us' and 'the other us'.

The Aristotelian strand of rhetoric is, as mentioned above, profoundly pragmatic (Piazza, 2013), shifting the focus to the essentiality of discourse itself, to the relationship between self and other.

From this perspective, the argumentative line of Aristotelian rhetoric, as implemented by Perelman in the *Treatise on Argumentation* (1958), already assumes that argumentation, as opposed to demonstration, is personal and that it always moves a prior agreement between listener and audience, without which no confrontation would be possible, but there would only be room for conflict or silence. For neo-rhetoric, in fact, a sharing of opinions and values between the speaker and the interlocutor is necessary to guide the possibility of arguing and listening: this part of the Belgian logician's argumentative work focuses on the I-you relationship.

The rhetorical model and its practice (Tindale, 2004) should therefore be a valuable tool for this challenge posed by the transitions we are currently experiencing, including the demands of justice for an ageing population: in order to build an authentic intergenerational narrative, in the idea that narratives can be a means of crisis control, rhetoric serves to renew the focus on language to describe the bonds between groups.

6. CONCLUSION

Society, including the legal profession, is confronted with new demands arising from the changing transitions that are taking place. For the citizen, and even more so for the lawyer who regulates, there is an urgent need to exercise a rhetorical reasoning aimed at understanding the ethical time of transition, that is to say, in concrete terms, to define the limits of the relationship between the present and the future, to humanize it.

This demand of humanization, which concerns society and law as a human science, can be explained in various ways which, without claiming to be exhaustive, but in order to summarize the arguments put forward, we list them below.

i. Questioning the polarisation between the present and the future, enhancing the intersubjective dimension of temporality and the relations between present and future generations, starting from the observation, as obvious as it may seem, that any discourse on the transformations of society and the challenges they pose is rhetorically made for us, here and now.

ii. Overcoming divisive 'us/them' discursive logics that feed radicalizing oppositional arguments and affect reality by generating in-group/out-group dynamics: attention to language leads us to monitor argumentative strategies, especially with regard to phenomena of discursive injustice and forms of hatred triggered by distortions or silences (regarding legal linguistics, we refer to Gozdz Roszkowski, Pontrandolfo 2021, Visconti, 2009, Visconti 2018).

iii. Valuing the relational dimension of "we", with actions based on trust that allow the construction of alliances. "Trust as a plural noun" is the title of the recent publication by Sorgi and Bertè (2022), who, questioning trust in the future, observe that communications about the future envisaged in the age of transitions are often peppered with formulas such as "let's save the planet", in fact rejecting the future as an "extra we", a

"stranger, a stranger asking for favours" (p. 131). According to the political scientist and sociologist, the key to reconnecting with the future is to give substance to an otherwise intangible future, by focusing on rebuilding trust in the future (Uslaner, 2001), in one's own ability to face it, and with trustworthy people.

iv. In the field of law, too, there are many contributions from scholars and jurists who advocate the need to "réhumanise le droit" (Coudrais, 2023), to restore trust in the foundations of law (Greco, 2021, 2023), to re-organize personal, political and legal relationships in terms of "care" (Menga, 2023). According to Puppo (2023), rhetoric is also inescapable for law because it is able to hold together its different dimensions: anthropological, social and normative. In the Aristotelian doctrine of man living and speaking in the polis, it is clear that the original existential condition is that of concrete speaking, which is always at the same time speaking to others and with others, and therefore at the same time listening. For Puppo, rhetoric is at the foundation of legal relations because it takes care of the relationship that instantiates their existence (2023, p. xvii). The fundamental requirement of law, already expressed in the Homeric poems or in the judgement of the Eumenides, is that we speak and listen to each other; this typically rhetorical activity is indispensable for the formation of law, be it judicial decision or political deliberation.

We believe that, as a result of these reflections, the theme of the jurist's rhetorical commitment has been more precisely defined: as well as argumentative logic (Feteris, 1999), we have shown how, in the relationship with otherness (in the various forms of a person, a culture, the future), rhetoric actually comes to act on mistrust and to introduce the care of words for the other as a protective device against uncertainties.

REFERENCES

- Austin, J.L. (1962) *How to Do Things with Words*. Cambridge: Harvard University Press. Bianchi, C. (2014). Slurs and appropriation: An echoic account. *Journal of Pragmatics*, 66, 35-44. Bianchi, C. (2021). *Hate speech. Il lato oscuro del linguaggio*. Roma: Laterza.
- Capone, A. (2013). The pragmatics of indirect reports and slurring. In A. Capone, F. Lo Piparo, M. Carapezza (Eds.), *Perspectives on linguistic pragmatics* (131-152). Cham: Springer.
- Conely, T. (2010). *Towards a Rhetoric of Insult*. Chicago: The University of Chicago Press. Coudrais, M. (2023). *Réhumaniser le droit*. Paris: LGDJ, Forum.
- Dascal, M., & Gross, A. G. (1999). The marriage of Pragmatics and Rhetoric. *Philosophy and Rhetoric*, 32, 107-30.
- Feteris, E.T. (1999). *Fundamentals of legal argumentation*. Dordrecht: Kluwer.
- Gozdz Roszkowski, S., G. Pontrandolfo (Eds.) (2021). *Law, Language and the Courtroom. Legal Linguistics and the Discourse of Judges*. London Routledge 2021.
- Greco, T. (2018). Da dove vengono i diritti delle generazioni future? *Etica&Politica*, XX, 249-264. Greco, T. (2021). *La legge della fiducia. Alle radici del diritto*. Roma: Laterza. Greco, T. (2023). *Curare il mondo con Simone Weil*. Roma: Laterza.
- Lo Piparo, F. (2014). Sur la "grammaire publique" du sujet parlant. In S. Archaimbault, J.M. Fournier, V. Raby (Eds.), *Penser l'histoire des savoirs linguistiques. Hommage à Sylvain Auroux (155-161)*. Lyon: ENS Éditions.
- Menga, F.G. (2016). *Lo scandalo del futuro. Per una giustizia intergenerazionale*. Roma: Edizioni di Storia e Letteratura.
- Menga, F.G. (2021). *Etica intergenerazionale*. Brescia: Morcelliana. Menga, F.G. (2023) *Cura. Le parole della filosofia*. Milano: RCS MediaGroup.
- Moss, D. (2001). On Hating in the First Person Plural. *Journal of the American Psychoanalytic Association*, 49, 1315-1334.

Boogaart, R., Garssen, B. Jansen, H., Leeuwen, M. van, Pilgram, R. & Reuneker, A. (2024).
Proceedings of the Tenth Conference of the International Society for the Study of Argumentation.
Sic Sat: Amsterdam.

- Perelman, C., Olbrechts-Tyteca L. (1958). *Traité de l'argumentation. La nouvelle rhétorique*. Paris: Presses Universitaires de France.
- Piazza, F. (2013). Rhetoric and pragmatics: suggestions for a fruitful dialogue. In A. Capone, F. Lo Piparo, M. Carapezza (Eds.), *Perspectives on Pragmatics and Philosophy* (537-556). Cham: Springer. Piazza, F. (2017). Rhetoric as Philosophy of Language: an Aristotelian Perspective. *Res Rhetorica*, 1, 3-16. Puppo, F. (2023). *Diritto e retorica*. Torino: Giappichelli.
- Rawls, J. (1971). *A Theory of Justice*. Cambridge: Harvard University Press.
- Sorgi, S., Bertè, F. (2022). *Fiducia sostantivo plurale. Meritarla, curarla, conservarla*. Milano: Egea. Tindale, C.W. (2004). *Rhetorical argumentation: Principles of theory and practice*. Thousand Oaks, CA: Sage.
- Uslaner, E.M. (2001). Producing and Consuming Trust. *Politic Science Quarterly*, 115, 4, 569-590. Visconti, J. (Ed.) (2018). *Handbook of Communication in the Legal Sphere*. Boston: De Gruyter Mouton. Visconti, J. (Ed.). (2009). Speech Acts in Legal Language. *Special Issue of the Journal of Pragmatics*, 41/3.