The Italian Approach to Legal Interpretation and Argumentation

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The Legal Syllogism

Cesare Beccaria (1738-1794)

Dei delitti e delle pene (1764)
The Legal Syllogism

- “In every criminal cause the judge should reason syllogistically. The **major** should be the general law; the **minor** the conformity of the action, or its opposition to the laws; the **conclusion**, liberty or punishment. If the judge be obliged by the imperfection of the laws, or chooses to make any other, or more syllogisms than this, it will be an introduction to uncertainty.” (*Of Crimes & Punishments*, IV)

- “Judges, in criminal cases, have no right to interpret the penal laws, because they are not legislators.” (*ibid.*)
Against the “spirit of the laws”

“There is nothing more dangerous than the common axiom: the spirit of the laws is to be considered. To adopt it is to give way to the torrent of opinions. [...] The spirit of the laws will [...] be the result of the good or bad logic of the judge; and this will depend on his good or bad digestion; on the violence of his passions; on the rank and condition of the abused, or on his connections with the judge; and on all those circumstances which change the appearance of objects in the fluctuating mind of man.” (ibid.)
(1) Whoever does A shall be punished with S
(2) Caesar did A
(3) Caesar shall be punished with S

- **Deductive logical structure**: if (1) and (2) are true, (3) cannot be false
- But we need reasons to assume (1) and (2)
- Need to give arguments in favor of the premises
The Legal Syllogism: Civil

(1) Whoever causes unjust harm to another person shall compensate the victim /
(2) Caesar caused unjust harm to Anthony //
(3) Caesar shall compensate Anthony

- **Deductive logical structure:** if (1) and (2) are true, (3) cannot be false
- But we need reasons to assume (1) and (2)
- Need to give arguments in favor of the premises
The Legal Syllogism: Criticism

- Judges do not syllogize (but this objection misses the normative point of the model)
- Legal and factual issues are intertwined (Legal Hermeneutics)

- The model is too simple
- Need to give arguments for the premises
- Controversies concern such supporting arguments
The Double Justification Model

Internal Justification (IJ)
- Justification of the conclusion of the judicial syllogism

External Justification (EJ)
- Justification of the premises of the judicial syllogism

- IJ is typically deductive
- EJ is usually non-deductive
The Double Justification Model

Kinds of EJ

- EJ of the major premise: normative EJ
- EJ of the minor premise: factual EJ

- Normative EJ by interpretive or integrative arguments
- Factual EJ by probatory arguments
Factual EJ

- Justification of the **minor premise** of the judicial syllogism
- Reasons for the **truth** (or correctness at least) of the representation of the legally relevant fact (also called “operative fact”)

**Be careful:**

1. **Cognitively** speaking, facts are the starting point (including procedural facts)
2. **Logically** speaking, the order of the premises does not change the value of the conclusion
Evidence and Proof

- Collecting evidence aims to justify the factual premises of the parties and the fact-finders’ beliefs about them (or their acceptance of a hypothesis about the facts).
- But it also aims to criticize the other party’s factual claims, or to support an alternative reconstruction of the relevant facts (adversary trial).
- Dialectical dimension of the “fair trial” (art. 111 Constitution).
- Fact-finders assess the evidence and decide according to standards of proof.
Standards of probatory justification (or of acceptability of a factual claim)


2. **Civil** standard: ? “more likely than not”, “preponderance of the evidence” …

Note: they are different from assessment criteria (such as the judge’s “prudent assessment”, art. 116 c.p.c.)
Probatory Argumentation

- Typical structure (abductive): SF / BR // PF

- **Secondary Facts (SF):** probatory facts (ex. testimony) that justify the inference of the primary facts, via some “bridge rule”

- **Bridge Rules (BR):** empirical generalizations, scientific laws and legal rules concerning the evidence, as major premises of probatory inferences (ex. rules on testimony)

- **Primary Facts (PF):** the facts to be proven, namely the legally relevant facts (ex. guilt)
When Abduction is Justified

- When it satisfies the **standard of proof**, civil or criminal

- Even if it lacks deductive justification, abduction in **civil trials** is justified when it provides the hypothesis which is more likely than not, or the “best explanation” of the known facts

- Even if it lacks deductive justification, abduction in **criminal trials** is justified when it provides the hypothesis which is proven beyond a reasonable doubt, or the only reasonable explanation of the known facts
Normative EJ

- Justification of the **normative premise** of the judicial syllogism
- To give reasons for the **validity** and **applicability** of a certain norm to the given case
- **Norms** are the result of the interpretation of provisions
- Interpretation proceeds with **interpretive arguments**
Interpretive Argumentation

- Typical Structure: P / IA // N

- **Provisions (P):** normative texts to be interpreted in order to determine valid and applicable norms

- **Interpretive Arguments (IA):** canons of interpretation of normative texts

- **Norms (N):** result of the interpretation of normative texts through interpretive arguments
Interpretive Arguments

Non-exhaustive list

- Argument from literal meaning
- A contrario argument
- Argument from intention
- Argument from purpose
- Systematic arguments
- Argument from principle
- A simili argument (integrative)
- ...
Interpretive Arguments

- **Decision context**: arguments as means of interpretation
- **Justification context**: arguments as reasons of interpretation
- Interpretive maxims, directives, canons, methods...
- Interpretive conflicts and conflicts between arguments
- Meta-directives?
Interpretive Arguments

Art. 12 “Preleggi” to the Italian Civil Code (1942):
Statutory law interpretation

- “In statutory law application one can not attribute to it any other meaning than that made clear by the proper meaning of the words according to the connection of them, and by the intention of the legislator. If a dispute can not be decided by a specific provision, one has to do with the provisions governing similar cases or similar matters; if the case still remains doubtful, it is decided according to the general principles of the legal order of the State.”
Interpretive Arguments

A little of comparative law:
art. 3 c. 1 Spanish Civil Code (1889)

- “The norms will be interpreted according to the proper sense of their words, in relation to the context, the historical and legislative precedents and the social reality of the time in which they have to be applied, attending fundamentally to the spirit and purpose of those.”

- **Plurality** of interpretive arguments
The Role of Principles

- The “constitutionalization” of the Italian legal order (Guastini)
- Increasing importance of legal principles
- Constitutional principles, EU law principles, international principles, etc.

Consequences
- Moore room from non-literal interpretation
- Additional question of the identification of the relevant sources and provisions
Argument from Literal Meaning

Italian Constitutional Court, n. 1/2013

“The merely literal interpretation of normative provisions, always primitive method, it is even more so if the object of the hermeneutical reconstruction are the constitutional provisions, which contain norms based on fundamental principles indispensable for the regular functioning of the institutions of the democratic republic. The derogatory nature of the principle of equality, typical of the norms that enshrine the prerogatives of the constitutional bodies, imposes a [...] strict interpretation of the relative provisions. Therefore, both the extensive and the analogical interpretation are excluded, but systematic interpretation, which allows a coherent reconstruction of the constitutional order, remains possible and even necessary.”
Literal Meaning and Purpose

Italian Constitutional Court, n. 16/2018

“[...] the literal interpretation is only the first moment of the interpretive activity, which is completed with the search and the verification of the reasons and purpose for which the provision was enacted (Art. 12, first paragraph, of the preliminary provisions to the Civil Code).”

Some data: occurrences in the Court’s decisions (1956-2018)

- Literal interpretation: 757 (W), 116 (P)
- Teleological interpretation: 39 (W), 10 (P)
- Ratio legis: 209 (W), 152 (P)
- Legislative intention: 302 (W), 145 (P)
- Constitutionally-oriented interpretation: 263 (W), 230 (P)
The Vatican Radio Case

- Criminal case
- Background problem: dividing line between argument from analogy and extensive interpretation
- Principle of strict interpretation in criminal law
- But need of addressing new crimes and risks
- Was the emission of electromagnetic waves a “dangerous throwing of things” within the meaning of Art. 674 of the Italian Criminal Code?

- Plurality of arguments used to decide the case