mgr Barbara Tecław
Wydział Prawa i Administracji
Uniwersytet Gdański

Summary of the doctoral dissertation entitled

***Fallacia* in legal argumentation – a study in legal theory**

Every theory of argumentation formulated over the centuries aimed to create a perfect argumentative model, the main component of which is a specific way of adjudicating the correctness of arguments. The occurrence of sophisms, or fallacies (Latin: *fallaciae*) in argumentative discourse is inevitable, so the degree to which a given theory of argumentation makes it possible to adequately assess fallacies should be considered a benchmark of the quality of that theory if it is to properly perform its two main functions: identifying-analytical and evaluative. The author of the present dissertation, taking the theories of fallacy inherent in non-specialised discourse as the basis for consideration, attempts to present and redefine the concept of sophism used in legal argumentation from the perspective of Polish theory of law. The purpose of the dissertation so defined influenced the identification of three main theses of the dissertation, correlated with each other through a cause-effect relationship:

1. The fundamental statement of the thesis is the following: the problem whether a given argument raised in legal discourse (and especially in judicial discourse) is correct (in the sense: right, rational or reasonable) is determined by the context of a given argumentative statement, and not by the argumentative usus, functioning in the discourse with the use of legal instrumentalities. Thus, there are "non-sophistic sophisms" here or "non-fallacies fallacies". Some of the arguments described so far as sophisms or *fallaciae* are therefore arguments that are not fallacious, so-called "fallacies not fallacious" (FNF), or are in fact other types of errors. The dissertation presents a proposal to introduce a method of differentiation between these instances, based on the established definition of the term *fallacia*, which has been defined as: an error in reasoning committed consciously with a deceptive intent.

2. Legal sciences have not developed a unified understanding of sophism; instead, legal scholars tend to adapt solutions and patterns existing in other sciences (first of all, in communication theory). In other words, the methodological approach to fallacies, called the standard treatment of the fallacies, is reproduced in legal discourse and manifests itself in the creation of catalogues of arguments defined *a priori* as sophisms. In consequence, there is a noteworthy tendency to dismiss certain arguments as incorrect solely on the basis of their formal structure. It is

necessary to break with past practice and attempt to define "legal *fallacia*" and determine in what contexts an argument that has been so far considered sophistic will find legitimacy of application in legal discourse – which directly leads to the thesis of the existence of "fallacies not fallacious".

3. The assumption of the existence of "fallacies not fallacious" was the starting point of the search for a theory of legal argumentation that would most comprehensively implement and justify this assumption. Of the modern theories of argumentation applicable to legal discourse, Chaim Perelman's "new rhetoric" deserves special attention. The approach to fallacies, which is derived from the "new rhetoric," supplemented by cases of "fallacies not fallacious", makes it possible to propose a simple procedure to determine whether a given argument raised in legal discourse constitutes a case of the fallacy discussed in the dissertation.

The realisation of the above assumptions is served by six specific theses, determining the structure of the dissertation, which consists of four chapters, each of which is preceded by an introduction and followed by a conclusion.

The content of the first chapter is intended to outline the background to the main considerations – it defines the place of legal argumentation in the theory of law; defines the basic concepts related to argumentation, pointing out, among other aspects, the semantic relations between justification and proof; describes the object of research of contemporary theories of legal argumentation and the leading approaches to the problems cited. The last part of the chapter is devoted to the analysis of the issue of legal discourse against the background of the so-called general discourse, since the discursive environment is the prerequisite for argumentation.

In view of the need to redefine the concept of sophism in legal discourse, the first specific goal of the dissertation is to construct a definition of the concept of *fallacia* that can serve as a reference point for assessing the correctness of arguments in legal discourse, and to formulate conclusions *de doctrina ferenda*. Referring, among other sources, to the research on the sophism by Ch.L. Hamblin, who criticised the standard account of sophism and the typologies of sophisms found in the theory of argumentation, the dissertation makes an attempt to define and, at least partially, fill the research gap in legal theory. The problem of sophism has not been sufficiently developed in literature on the subject so far, which is not without influence on the arguments used by legal professionals today.

Accordingly, the second chapter of the dissertation includes a consideration of the etymology of the term fallacia and an extensive historical analysis. The presentation of the

history of the study of sophisms is also of considerable importance for the postulate of rehabilitation of the sophistry, which is wrongly identified with eristic. The realisation of the postulate to reinstate sophistry to its rightful place is possible only on the basis of a thorough study of the views of Aristotle and particular sophists. Moreover, it was the eristic treatment of sophistic argumentation that formed the genesis of the creation of the so-called standard treatment of sophisms in the study of fallacies.

The third part of the chapter presents an analysis and comparison of key concepts by selected scholars who developed the theory of fallacies, combined with a presentation of the typology of fallacies in the form of diagrams outlined by the author – which is, by the way, the first study of its kind in the Polish-language literature on the subject – and is related to the inclusion of the theory of fallacies in the curricula for teaching legal argumentation in legal studies, as proposed in the dissertation. As familiarity with past achievements of any scientific discipline is beneficial, so it is believed that exposure to historical typologies of fallacies, other than eristic tricks and "typical" fallacies discussed in the literature for lawyers, is likely to benefit law practitioners in their evaluation of arguments, while encouraging *ad hoc* evaluation of arguments by taking into account the argumentative context.

The last part of chapter two is devoted to the presentation of views which criticise the described standard treatment of sophisms. The content presented in the second chapter makes it possible to point out the difference in the advancement of research on sophism (fallacy) between the research conducted in Poland and the numerous and advanced results of the deliberations of researchers, operating in academic centres outside Poland, especially in the countries of the common law system.

The third chapter describes further determinants of entropy of sophism theory, i.e. the issue of eristic correlated with the issue of persuasion and manipulation together with the problem of logical error. This is followed by an attempt to outline the line of demarcation between the concepts of eristic, rhetoric and sophistry and in consequence examine the status of eristic in legal discourse. On the basis of the considerations presented it becomes possible to define the framework for the functioning (acceptability) of eristic in legal discourse and to formulate the directions of development of this discipline. The analysis of eristic is closely connected with the attempt to locate the concept of fallacia in legal discourse, which leads to the inclusion of some of Arthur Schopenhauer's "eristic methods" in the circle of FNF cases. These findings allow the author to present a proposal for a typology of fallaciarum with the inclusion of "non-

fallacious fallacies", which can serve an auxiliary function in evaluating arguments raised in judicial discourse according to the evaluation scheme proposed in the dissertation.

The third chapter also gives grounds for another specific thesis, according to which the resources of knowledge about the fallacy in legal discourse need to be systematised, and the lack of a unified theory of fallacy within the (general) science of argumentation implies a diverse way of evaluating individual rhetorical strategies both by researchers of legal discourse and by its participants. Thus, the last part of chapter three serves to illustrate the state of the judges' knowledge regarding sophisms, as has been shown on the basis of an analysis of the concept of fallacia and related terms in the justifications of court decisions.

The fourth chapter of the dissertation is entirely devoted to the phenomenon of "non-fallacious fallacies". It has first presented the prospects for the development of the theory of fallacies applicable to legal discourse, as well as possible interpretations of the FNF thesis. Then the proposed treatment of FNF in legal discourse is demonstrated, based on the definition of fallacia and the five cases of FNF distinguished by the author.

Consequently, an attempt was made to formulate the concept of fallacy, which will allow one to assess the "correctness" of arguments in legal discourse. This approach is based on the following components: 1) the rejection of the standard treatment of the fallacies, 2) acceptance of the FNF thesis with the distinction of 5 categories of fallacy types, 3) redefinition of the concept of fallacy and introduction of the concept of fallacia into the Polish legal language, 4) re-introduction of the concept of sophism by way of disassociating it with eristic, resulting in its recognition as a pragmatic argumentation, distinguished from rhetoric and eristic, 5) an auxiliary typology of falaciae, 6) the proposal of a method of evaluating arguments according to a scheme consisting of: humanistic interpretation of the argument in accordance with the principle of benevolence, identification of FNF cases, application of the universal audience as a criterion of rationality understood in accordance with the "new rhetoric", adapted to the argumentative situations occurring in legal discourse; 7) allowance for the peculiarities of legal discourse, manifested in the form of a framework limiting the argumentative possibilities of the subjects of this discourse.

The seventh component correlates with the final specific thesis of the dissertation. In order to study the functioning of the fallacies in judicial discourse, it is necessary to analyse the verbal manifestations of interaction between the participants in this discourse. Thus, the thesis attempts to present the possibility of using selected argumentative constructions by chosen participants of the judicial process, taking the situation of interrogation as a model

argumentative context, which allows the author to prove that the argumentative possibilities of these participants of the trial – in terms of reaching for certain types of fallacies and "non-fallacious fallacies" – in their statements, are limited. The second part of Chapter Four is therefore an application of the FNF thesis directly to selected argumentative situations occurring in legal discourse in the form of witness, party and expert hearings, using the example of ad hominem argument and correlated arguments.

In conclusions the author proves the implementation of each of the presented theses, and also revisits the ancient art of sophistry, noting its similarities with the "new rhetoric" as well as the implications of the rehabilitation of the concept. Indeed, the didactic and philosophical views of the sophists are represented more accurately by the word *sophistication* than by *sophistry*. The sophists believed, as many modern philosophers do, that it is not always possible to arrive at or identify the truth, and yet people have to make decisions every day, such as adjudicating cases in legal discourse on the basis of evidence that is only probable, while relying on formal logic, the use of which, especially in hard cases, is limited. Thus, sophistry is a philosophical position according to which truth is "created" in the process of use of language by its speakers, and its presence in culture testifies to the transformation of ways of thinking and values that modern society is experiencing – we are therefore living in an era of "third sophistry."