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Editors

LOGIC, EPISTEMOLOGY, AND THE UNITY OF SCIENCE 20

Approaches to Legal Rationality



Springer

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ISBN 978-90-481-9587-9

e-ISBN 978-90-481-9588-6

DOI 10.1007/978-90-481-9588-6

Springer Dordrecht Heidelberg London New York

Library of Congress Control Number: 2010936290

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Printed on acid-free paper

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Introduction

At the origin of the present volume there is a team of researchers coming from three different French institutions: the UMR-CNRS 8163 “Savoirs, Textes, Langage”, and especially the group “Dialogical Pragmatism” at the Department of Philosophy of the University of Lille, the former Center Eric Weil at the University of Lille, and the Center René Demogue at the Law Faculty of the University of Lille.

An international workshop “Argumentation, Logic and Law”, held in November 2005 at the Maison de la Recherche of the University of Lille, closed a first sequence of that interdisciplinary work. With the help of the Institut d’Histoire et de Philosophie des Sciences et des Techniques (IHPST) in Paris, and also with the logistic assistance of the Maison des Sciences de l’Homme du Nord et du Pas-de-Calais, researchers from different horizons, both geographical (England, France, Germany, Israel, Netherlands, Poland, Republic of Macedonia, United States) and intellectual, joined together to cross the lines of disciplines. During three days, logicians, legal theorists, moral philosophers, computer scientists and AI researchers, each of them usually working either in his own field in the ignorance of the other fields, or in the very same field but in one tradition in the ignorance of the others, tried to give new insights in the ways and means of legal reasoning.

Although the present volume flows from that conference and its methodological point of view, it should not be reduced to proceedings. The papers of this volume consist of a select subset of revised and newly refereed versions of the papers accepted for presentation at the workshop “Argumentation, Logic and Law”. It also includes papers from leading researchers in logic, legal theory, moral philosophy and computer science, who did not attend the workshop but share our strong interdisciplinary perspective and have something new to propose about legal reasoning.

The result is a collection of papers that has a natural place in the series “Logic, Epistemology and the Unity of Science”. From the beginning, the founders of that series were convinced of the necessity to provide it with a volume about legal reasoning.¹ The editors hope that the present volume meets the challenge.

¹Cf. Rahman S and Symons J (2004). *Logic, Epistemology and the Unity of Science: an Encyclopedic Project in the Spirit of Neurath and Diderot*. In Rahman S, Symons J, Gabbay D, and van Bendegem JP (eds) *Logic, Epistemology and the Unity of Science*. Volume 1, Springer, 2004, pp. 3–16.

The theme of the present volume is legal reasoning. All the papers are concerned with the question of making the structure of legal reasoning explicit. Despite of the fact that they operate in very different fields (legal theory, political sciences, sociology, philosophy of either “analytical” or “continental” traditions, logic, computer science, AI & Law), they all share a strong adherence to the intuitive structure of legal reasoning. More than other features, such an attention to legal reasoning as actually practiced by legal institutions makes our volume special in the normal production in this expanding area. The result is a set of new insights in major topics such as (to pick up just a few examples) the analysis and evaluation of legal arguments, the respective advantages and disadvantages of both logical and (dialectical) argumentative approaches to legal reasoning, rule-based reasoning *versus* reason-based reasoning, the relevance of logic to the law (and conversely).

The volume is divided into five parts.

The first part is concerned with the question of the “specificity” of legal reasoning. Tracking back to Aristotle and Cicero, four philosophers (Michel Crubellier, Fosca Mariani Zini, Pol Boucher and Jan Wolenski) give new insights and rediscover forgotten traditions in the received history of approaches to legal reasoning. The result is a critical discussion of some mainstream logical approaches to the law in the contemporary conceptual landscape.

The second part collects papers in which legal arguments are considered within the context of public reasoning. Indeed, the study of legal reasoning, of its structure and of its evaluation, often forgets, or fails, to take into account the fact that the notion of legal reason is directly linked to the notion of public reason in numerous and complex ways. Coming from different areas (legal theory, political sciences, sociology, and philosophy), four researchers (David M. Rasmussen, Patrice Canivez, Mathilde Cohen and Sandrine Chassagnard-Pinet) make some of those ways explicit.

The third part is devoted to the interface between logic and the law. Combining general and special investigations (the latter centered about the notions of condition, reasonable doubt and relevance in the law), three philosophers and logicians (Dov M. Gabbay, John Woods and Alexandre Thiercelin) propose new conceptual paths “to cross the lines of discipline”.

The fourth part deals with formal approaches to legal reasoning. The relevance of logical models of defeasible legal argumentation is especially considered from a legal theory point of view (Ana Dimiskovska Trajanoska, Otto Pfersmann). New logical tools for modeling legal arguments are proposed in the framework of Labelled Deductive Systems (Dov M. Gabbay and John Woods).

Last but not least, the fifth part of the volume consists in a unique, ambitious paper by Maximilian Herberger, who strives to describe in a thorough way the different uses of the words “logic”, “logical” and “logically” in a preeminent legal institution. Based upon a very rich set of textual data, his contribution opens a new direction for pragmatic investigations in the area.

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Part I
The Specificity of Legal Reasoning

Chapter 1

Aristotle on the Ways and Means of Rhetoric

Michel Crubellier

Plato hated rhetoric and the orators. In his main dialogue on that subject, the *Gorgias*,¹ Socrates – departing from his accustomed claim of ignorance, an unique occurrence in the whole corpus of the *Dialogues* – sets out a complete and refined classification of the various professions dealing with human goods, with the result that rhetoric is an irregular sort of practice, regardless of any notion of order or standards, and with no other specific skill than the ability to flatter men's immediate egoist emotions and their desire for pleasure. Although in later works² Plato did consider the possibility, and even the necessity, for rational politics to make use of some rhetoric in order to rule more easily irrational humans, he seems to have maintained to the end³ this contemptuous and distrustful attitude towards rhetoric considered in itself. Rhetoric is not and will never be a science, not even a real “art” (*techne*), since it does not take its principles from the firm realm of being, but gets involved in the moving interplay of men's emotions and passions, and gives more importance to their opinions and impressions than to reality and truth. Still worse, the orator claims that his own skill does extend to the whole sphere of human affairs, and thus it seems to compete with the ideal science that in Plato's view is distinctive of the philosopher, i.e. dialectic.⁴ At the ethical and political level, on the other

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I borrowed my citations of Aristotelian texts from the “Revised Oxford Translation”, into which I made such changes as were required to match the interpretations that I want to defend. To avoid making my footnotes too cumbersome, I did not attempt to indicate and justify these changes. I hope that readers who would like to compare my citations with the ROT will easily understand what I have changed and why.

¹Significantly enough, the *Gorgias* begins with the words “war” and “fight”. That this opening is not fortuitous may be confirmed by a reference in the *Philebus* (58b), many years later.

²*Laws* IV, 722b ff.

³For instance in *Philebus* 58b–59d.

⁴*Philebus*, 57c–58d; *Sophistes*, 230b–231b (although the “Sophistes” in question remains unnamed, many details suggest that Plato had mainly Gorgias in mind).

hand, it lets the irrational part of the soul prevail against the rational one, and lets justice or the common good give way to egoistic motives.

Yet through this hard confrontation with rhetoric, he came to formulate accurately some important questions raised by the relations between theory and practice in social contexts: how to reach a decision through weighing different motives, how to apply universal principles or norms to particular and casual states of affairs; and on top of all that, how to perform these activities by means of discussions with other people, in a context characterized by a certain amount of opacity – i.e., one cannot know with certainty what the others know and believe, to what extent they may pursue the same ends or different, even quite opposite ones, so that it is always possible to lie in different ways.

Aristotle inherited these concerns and concepts from his master, but he took a quite different stand. He thought there was a case for rhetoric, which he sets out in the first chapters of his *Art of Rhetoric*. Although he never mentions Plato, while many of his arguments are levelled at the earlier authors who wrote such *Arts*, claiming (in complete agreement with Plato) that there is nothing technical or rational in their writings, his main thesis is that rhetoric can be made into an art, and this is clearly anti-Platonic. Look at Socrates' assessment of rhetoric in the *Gorgias*:

To tell you the truth, Polos, I think that [rhetoric] is in no wise an art.⁵

I say that this no art, but a skill, because it does not know any reason why the things it brings about are such as they are, so that it could not tell the cause of any one of them.⁶

Now you have heard what I say rhetoric is: the counterpart of cookery, which is to the soul what cookery is to the body.⁷

And now Aristotle:

Rhetoric is the *counterpart* of dialectic. Both alike are concerned with such things as come, more or less, within the general ken of all men and belong to no definite science. Accordingly all men make use, more or less, of both; for to a certain extent all men attempt to discuss statements and to maintain them, to defend themselves and to attack others. Ordinary people do this either at random or through practice and from acquired habit. Both ways being possible, the subject can plainly be handled systematically, for it is possible to *consider the cause* why some speakers succeed through practice and others spontaneously; and everyone will at once agree that such a consideration belongs to an art.⁸

If orators prove to have some efficiency, either by some habit or by mere chance, and even if they do not always succeed, then there must be a causal explanation of their successes; and whoever will take this cause or causes into consideration (*theôrei*), will have a *technê*, an “art”, i.e. a rationally grounded way of doing. But

⁵*Gorgias*, 462b.

⁶*Gorgias*, 465a.

⁷*Gorgias*, 465d–e.

⁸*Art of Rhetoric* I 1, 1354a 1–11; many characteristic phrases borrowed from the *Gorgias* passage occur in this chapter. The fact that rhetoric, which Plato paired with cookery, is matched here with dialectic, is particularly striking. But this is also due to the fact that Aristotle, for quite different reasons, downgraded dialectic from the most eminent position where Plato had put it.

the exact basis on which this claim of technicity may rest, remains to be seen; and at that point Aristotle wants to blame the former authors of books under the title *Art of Rhetoric*:

Now, the framers of the current treatises on rhetoric have constructed but a small portion of that art. The *pisteis* are the only true constituents of the art: everything else is merely accessory. These writers, however, say nothing about enthymemes, which are the body of *pistis*, but deal only with the aspects [of rhetorical discourse] which are irrelevant. The arousing of prejudice, pity, anger and similar emotions has nothing to do with the subject matter, but is merely a personal appeal to the judge. Consequently if the rules for trials which are now laid down in some states – especially in well-governed states – were applied everywhere, such people would have nothing to say. All men, no doubt, think that the laws should prescribe such rules, but some, as in the court of Areopagus, give practical effect to their thoughts and forbid irrelevant talk. This is a sound law and custom. It is not right to pervert the judge by moving him to anger or envy or pity – one might as well warp a carpenter's rule before using it.⁹

So the distinct technicity of rhetoric consists in the art of producing the appropriate *pisteis* in an appropriate way. What is a *pistis*? The word may mean a belief, or the fact of being persuaded by someone to believe this or that. Rhys Roberts translates it as “modes of persuasion”; but I think “modes” is a little too abstract, and “persuasion” is too subjective. As can be seen from the above-quoted passage, Aristotle seems to put outside the range of *pisteis* the arousing of emotions (at least of some of them), or the efforts to “move the judge” “to anger or envy or pity”, though these efforts could be described as “a mode of persuasion”. In the second chapter of Book I, he sketches a typology of the different kinds of *pisteis*. Some of them are “non-technical”, i.e. they are not the result of the speaker's activity, but “are there at the outset”, such as “witnesses, < evidence given under > torture, written contracts, and so on”.¹⁰ These seem to be characteristic of forensic rhetoric. Here the orator's job is only to find the best way to use them, or cope with them if they are definitely against his case.¹¹ In the second chapter of the *Rhetoric*, Aristotle divides technical *pisteis* – those which are produced by the orator himself according to certain rules – into three classes, on the basis of a schematic analysis of the act of communication¹² which to the modern reader will perhaps evoke a rudimentary version of Jakobson's table of linguistic functions¹³

• speaker	<i>personal character of the speaker</i>
• speech (and its subject)	<i>demonstrations (real or apparent)</i>
• hearer	<i>emotions suscited in the judge</i>

⁹*Art of Rhetoric* I 1, 1354a 11–26.

¹⁰*Art of Rhetoric* I 2, 1355b 35–37.

¹¹See *Art of Rhetoric* I, Chapter 15.

¹²*Art of Rhetoric* I 2, 1356a 1–4; I 3, 1358 a 37–b1.

¹³Jakobson (1960), p. 352–357.

(Notice that in Aristotle's idiom the word *logos*, literally: "what is said", refers quite naturally to the contents as well as to the style and arrangement of the speech itself, with the result that he does not seem, at least in the first stage of his analysis, to isolate Jakobson's poetical function. In fact, he draws the distinction at the beginning of Book III,¹⁴ which is entirely devoted to this aspect of oratory. But he does not consider it a specific element of the *pisteis*, and so it does not contribute to the technical character of rhetoric.)

Now, the examples of *pisteis* that emerge from this classification are likely to puzzle many a reader: what can there be in common between the report of a tough questioning session, a syllogism, or the moral virtues exhibited in somebody's speech? The answer I would suggest is: all these are things that a good orator may "give" his audience in order to vouch for the fact that what he says is true, or just, or is the right thing to do now. Dictionaries do mention that the word was used in a concrete sense, to indicate a thing, or a sum of money, which was handed over to someone as a token of good faith or a security deposit.

(At this point, one might raise an objection, or at least mention a demarcation problem. In Chapter 1, as we have seen, Aristotle excluded from the *pisteis* the attempts to arouse anger or pity, as being more or less irregular moves directed towards the person of the judge, while here – i.e. in Chapter 2 – he counts the affects felt by the judge among the *pisteis*. Is this a mere inconsistency, or is it possible to fix at least a conceptual limit, even if we have to admit that there are some ambiguous or indecidable borderline cases? – More on this topic at the end of my paper).

In any case, the *pisteis*, taken as a whole, are said to be "the only true constituents of the art". Aristotle justifies this claim in the following way:

It is clear, then, that the technical study of rhetoric is concerned with the *pisteis*. Now *pistis* is a sort of demonstration (since we believe, most of all, when we consider that something has been demonstrated); the orator's demonstration is an enthymeme, and this is, in itself, the most effective of the *pisteis*; the enthymeme is a kind of deduction, and the consideration of deductions of all kinds, without distinction, is the business of dialectic (either of dialectic as a whole or of one of its branches); clearly, then, he who is best able to see how and from what elements a deduction is produced will also be best skilled in the enthymeme, when he has further learnt what its subject-matter is and in what respect it differs from dialectical deductions.¹⁵

Thus, Aristotle's claim that rhetoric can be turned into an art rests on analytics, i.e. a specific ability to find out the logical structure of an argument, and on syllogistic, which do provide a set of models for causal explanation of arguments in general. This might provide a plausible explanation for Aristotle's reversal of his master's judgment, since analytics is something that Plato did not know nor could foresee. Still, it may seem quite unrealistic to reduce rhetoric to a chapter of formal logic. In fact, having said that, Aristotle has very little to say about logic in the rest of his *Rhetoric* – at least in the strict sense of the word: for there are dialectical considerations in the last four chapters (20–23) of Book II, and hints about dialectic

¹⁴ *Art of Rhetoric* III 1, 1403b 6–15.

¹⁵ *Art of Rhetoric* I 1, 1355a 3–14.

scattered all along Books I-II; but he seems to develop openly and at length the very aspects that he has dismissed as irrelevant in his introductory chapters. Here again, shall we conclude that the *Rhetoric* is not consistent, maybe composed of stretches from different periods of Aristotle's career, or even that its very project was not consistent? Barnes describes rhetoric as "a magpie, thieving a piece of one art and a piece of another, and then botching a nest of its own".¹⁶ But it is not necessarily so. It may be the case that Aristotle did not include a systematic exposition of analytics in his *Art*, not even in the form of a summary, just because he supposed that his reader had to know that,¹⁷ so that the *Rhetoric* should contain only new stuff, peculiar to the treatment of public debate. It would be a supplement to the logical treatises, which presupposes them and transforms the logical and topical equipment into a specialized set of abilities.

It seems to me also that he probably meant that this reference to analytics supplies rhetoric with a rational core (cf. the claim that enthymemes, which are the rhetorical counterpart of deductions, are "the body of the *pistis*"), and that this fact in turn confers some rationality even to the other parts of rhetorical activity. Such a progress of thought is not unfrequent in Aristotle: he allows inferences from the most perfect and complete type in a given class – which he considers to reveal the true essence of that class – to unfinished, or mixed and confused, cases.

Another important issue, for this discussion about the rationality of rhetoric, is the attitude that Aristotle recommends to adopt towards the judge (by the name "judge" we will indicate the person to whom arguments are proposed in view of some determined decision that this "judge" has to make, be it an individual or a collective person,¹⁸ and independently of the relevant kind of decision: political, judiciary, or whatever).

The orator should not attempt to "pervert" the judge by arousing or increasing his most irrational passions.¹⁹ Some minimal qualities of rationality and impartiality are expected from the judge, and – Aristotle insists – must be preserved or encouraged by the speaker, inasmuch as it depends on him. What does that mean? One would perhaps ascribe this declaration to some motives that have nothing to do with the status of rhetoric. For instance, it could be just the expression of some naive faith in the goodness of human nature, or a rhetorical move made by Aristotle himself in order to defend rhetoric against "Platonist" accusators pointing at its immorality. Or it might be a merely conventional commonplace, something like the "I trust the laws and courts of my country" that every honourable defendant has to declare to

¹⁶Barnes (1995), p. 264.

¹⁷That analytics must have been considered by Aristotle himself as a (compulsory) first stage of philosophical training, as it was later on in the late Antiquity and Middle Ages, is attested by several mentions in the *Corpus*.

¹⁸In Athens, as well as in many other cities of ancient Greece, penal courts were relatively large assemblies (for instance the 500 Heliasts who sentenced Socrates to death); Aristotle seems to feel that it is in some way inappropriate to call "judge" a single person: cf *Art of Rhetoric* II 18, 1391b 10–12.

¹⁹*Art of Rhetoric* I 1, 1354a 24–26, quoted above.

his judges. It is certainly true that Aristotle was not so pessimistic a moralist as Plato seems to have been. He did not see all men (even civilized men, citizens of a refined city like Athens) as constantly threatened by the tumult and disorder of savage desires and unrestricted selfishness; he would not have claimed that truth and science (the science of the Good) were the only forces able to preserve order and peace among men. For him, there existed something like a *Sittlichkeit*, a set of practical and unreflected principles of order embodied in the effective conditions of their common life. But there must be more than that in this contention. For here in the *Rhetoric*, he says that such an appeal to the judge's passions is "irrelevant" and that the very fact that former authors concentrated on things like that shows that they were incompetent.²⁰ This may be better explained by the following remark:

Again, a litigant has clearly nothing to do but to show that the alleged fact is so or is not so, that it has or has not happened. As to whether a thing is important or unimportant, just or unjust (insofar as it has not been determined by the lawgiver), the judge must decide that for himself; he must surely refuse to take his instructions from the litigants.²¹

That does not mean that the orator must confine himself to factual points; in fact, Book I deals at some length with notions of good and harm, beautiful and shameful, just and unjust, and gives advice on how to assess the value of particular facts or ends or actions and how to compare them with one another.²² Again, is this sheer inconsistency from Aristotle? I think it is not. Of course, the final decision is the prerogative of the judge. But the act of deciding is not a process, but the instantaneous limit of the process of deliberation, and the orator is allowed to get along as close to that point as he likes (and is able to), so long as he leaves the last word to the judge. In a sense, Aristotle's insistence on the sovereignty of the judge²³ is the symbolic expression of a methodological principle. For even in the case of individual ethical deliberation, the same distinction between the stage of the statement and assessment of arguments and the stage of decision holds:

We deliberate not about ends but about what contributes to ends. For a doctor does not deliberate whether he shall heal, nor an orator whether he shall convince, nor a statesman whether he shall produce law and order, nor does any one else deliberate about his end, but having set the end, they deliberate on how and by what means it is to be attained.²⁴

We do not deliberate about ends, but we do not deliberate either on our actions considered in themselves. A sportsman training, a musician practising, may have

²⁰"The only question with which these writers here deal is how to put the judge into a given frame of mind, while about technical *pisteis* they have nothing to tell us". *Art of Rhetoric* I 1, 1354b 19–21.

²¹*Art of Rhetoric* I 1, 1354a 26–31.

²²On the good and the ends of human life, see Chapters 5 and 6; on the relative values of goods, see Chapter 7; and also Chapters 13 and 14 for similar points about guilt and injustice.

²³"This [= the ruling part of man] is what chooses. This is plain also from the ancient constitutions, which Homer represented: for the kings announced their choices to the people". *Nicomachean Ethics* III 3, 1113a 7–9.

²⁴*Nicomachean Ethics* III 3, 1112b 11–16.

to reflect on how to perform some particular sequence of actions, but this is not deliberation²⁵: we deliberate on our actions as means to some end. The distinctive kind of rationality which we call practical rationality can be attained only through this separation between means and ends. In fact, this is what Aristotle means in the celebrated passage of the *Politics* in which man is defined as a “political animal”:

Whereas mere voice is but an indication of pleasure and pain, and is therefore found in other animals (for their nature attains to the perception of pleasure and pain and the intimation of them to one another, and no further), the power of speech (*logos*) is intended to set forth the useful and the harmful, and therefore likewise the just and the unjust.²⁶

The possession of an articulated language makes man able to go beyond the mere solicitation of immediate desires, because he is able to conceive means-to-ends relations. His reflections lean on the conception of some given end, and deliberation may be described as an analytic process,²⁷ regressing from the goal to the conditions that are required to make it accessible:

Since *this* is health, if the subject is to be healthy, *this* must first be present, e.g. a uniform state of body, and if this is to be present, there must be heat; and the physician goes on thinking thus until he brings the matter to final step, which he himself can take.²⁸

With such considerations, it seems that Aristotle has found firm grounds for sustaining that rhetoric is a sound and rational occupation. It is all the more significant that he seems anxious not to push that claim of rationality too far, and to remind that rhetoric cannot be as exact and complete nor, in sum, as true, as many other arts:

Now to enumerate and classify accurately the usual subjects of public business, and further to frame, as far as possible, true definitions of them, is a task which we must not attempt on the present occasion. For it does not belong to the art of rhetoric, but to a more instructive art and a more real branch of knowledge; and, as it is, rhetoric has been given a far wider subject matter than strictly belongs to it. The truth is, as indeed we have said already, that rhetoric is a combination of the sciences of analytics and of < the part of > politics which deals with moral behaviour; and it is partly like dialectic, partly like sophistical reasoning. But the more we try to make either rhetoric or dialectic not what they really are, practical faculties, but sciences, the more we shall inadvertently be destroying their true nature; for we shall be re-fashioning them and shall be passing into the region of sciences dealing with definite subjects rather than simply with language.²⁹

²⁵ Maybe someone would wish to call that deliberation too – but then it is of a different kind : not about winning this match or contest, but about becoming a better sportsman.

²⁶ *Politics* I 2, 1252b 10–15.

²⁷ Notice that this “hypothetical” analysis, which Aristotle sometimes compares with the hypothetical mode of resolution of a mathematical problem, is entirely distinct from the kind of analysis displayed in the *Analytics*.

²⁸ *Metaphysics* Z 7, 1032b 6–9; similar views in *Physics* II 9, 200a 15–24, and *Nicomachean Ethics* III 3, 1112b 11–27.

²⁹ *Art of Rhetoric* I 4, 1359b 2–16 (context : an introduction to the section of Chapter I 4 in which Aristotle lists the main topics about which a political orator must know at least some basic facts, which he will be able to use as premises).