Approaches to Legal Rationality

LOGIC, EPISTEMOLOGY, AND THE UNITY OF SCIENCE

VOLUME 20

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Approaches to Legal Rationality

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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.

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[1] Cf. 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 works[2] 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 end[3] 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.

[1] Significantly 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.

[3] For instance in *Philebus* 58b–59d.

[4] *Philebus*, 57e–58d; *Sophistes*, 230b—231b (although the "Sophistes" in question remains unnamed, many details suggest that Plato had mainly Gorgias in mind).

D.M. Gabbay et al. (eds.), *Approaches to Legal Rationality*, Logic, Epistemology, and the Unity of Science 20, DOI 10.1007/978-90-481-9588-6_1,

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 trough 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 *techne*, an "art", i.e. a rationally grounded way of doing. But

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[5] *Gorgias,* 462b.

[6] *Gorgias,* 465a.

[7] *Gorgias,* 465d–e.

[8] *Art of Rhetoric* I 1, 1354a 1–11; many characteristical 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 communication[12] which to the modern reader will perhaps evoke a rudimentary version of Jakobson's table of linguistic functions[13]

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

[9] *Art of Rhetoric* I 1, 1354a 11–26.

[10] *Art of Rhetoric* I 2, 1355b 35–37.

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

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

[13] Jakobson (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

[16] Barnes (1995), p. 264.

[17] That 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.

[18] In 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 cvilized 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 judge[23] 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

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[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.

[22] On 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 deliberation[25]: 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 sollicitation 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]

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[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 *Nicmoachean 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).

The idea that one cannot expect all the provinces of the realm of knowledge to conform to the same epistemological standards is a well-known Aristotelian tenet: for instance, Aristotle remarks that ethics, or physics, cannot attain to the exactness and rigour of mathematics.[30] But here, he places rhetoric even below ethics in that epistemological scale. Further, he is not merely stating the fact that rhetoric, as it is now, is imperfect (which could be due to a temporary state of affairs), nor making the poor truism that, were it to become more accurate and strict, it would then be a science and would not be any more the sort of thing it is by now. Clearly, he appears to consider that there is (and there will ever be) a place for a "practical faculty" of that kind beside a scientific knowledge of ethics and politics. Still more, its particular character makes it able to respond correctly to some situations in which an exact and universal science would prove to be inadequate.[31] Prudence (*phronesis*), the distinctive virtue of the statesman, is entirely distinct from science, though it is an intellectual virtue. In fact, Aristotle describes it as the ability to see at once what would be the outcome of an aptly conducted deliberation.[32]

The reason for that is that rhetoric is rooted in human condition: we all have to make important choices in situations of partial or inadequate knowledge, under constraints of time (most frequently the necessity to decide within a short time, but sometimes also the impossibility to act immediately, the necessity to wait for new information, etc.), and we have to come to a decision with, or against, other people. For lack of the relevant scientific knowledge, we must rest on our natural understanding of the meaning of words and our spontaneous capacity to handle the formal relations embodied in the structure of our language. That is why Aristotle says that rhetoric and dialectic deal not with the things themselves (*pragmata*, "definite subjects") but with language (*logoi*). *Logoi,* in the last sentence of the passage, is generally translated by "discourses", probably because that seems appropriate to the context of the *Rhetoric*, but it seems to me that this translation underestimates the fact that rhetoric is not concerned merely with the production of likely discourses (this would be its sophistical side), but, just like dialectic, may use language as a keen instrument for analyzing problems and situations. – By the way, the notion that the philosopher may withdraw to language for lack of the exact and complete knowledge he would have wished to possess is already present in Plato's *Phaedo*,[33] without any pejorative suggestion.

These considerations may also explain the strange sentence of lines 1359b 7–8, which seems to say that rhetoric is "broader than itself". One might also translate[34]: "rhetoric is allowed to assume much more than its own truths", i.e. while it has something like a definite field of its own (human actions and political affairs), it makes use of the general faculties of dialectic. This ambiguous status of rhetoric

[30] *Nicomachean Ethics* I 3, 1094b 11–27; *Metaphysics* ∝ 3.

[31] *Metaphysics* A 1, 981a 12–24.

[32] *Nicomachean Ethics* VI 9, 1142a 34 -b 9; cf. VI 5, 1140a 30 - b 10.

[33] *Phaedo* 99d – 100a.

[34] Giving the verb *dedosthai* its technical meaning of "to be granted" (said of a proposition).

was already present in the *Gorgias*, since the old orator claimed at the same time that rhetoric is concerned with discourses (in general),[35] while, on the other hand, the capacity of speaking before courts and assemblies about the just belongs exclusively to it.[36]

Clearly, Aristotle thinks that rhetoric is closely akin to dialectic. In what sense exactly ? He uses different phrases to express this proximity: rhetoric is "the counterpart" of dialectic[37] (or "corresponds" to it); it is "a branch of dialectic and similar to it".[38] Similarity is due to the fact that neither dialectic nor rhetoric has a special field of its own: as "faculties" concerned with discourse, their scope extends virtually to every problem or notion someone may meet, in unspecified circumstances.[39] Thus they have a sort of universality, although it must be pointed out that it is not a well-defined or grounded universality, but rather a sort of illimitation. The word *dunamis* ("faculty"), as opposed to "science" (*episteme*), was certainly meant to indicate this virtual character.[40] In the case of dialectic, such a faculty claims to deal with every possible object of discourse, be it real or fictitious, object of speculation or decision or production. Dialectic goes as far as man's natural curiosity[41]: it would be hard to conceive of a larger extension. Thus rhetoric, although it is unlimited in its kind too, may be called "a branch" (or "a part", *morion ti*) "of dialectic", i.e. its scope is necessarily restricted in comparison to dialectic. In what way ? One answer is that it deals only with the possible objects of deliberation. It may seem that it holds only for one of the genres of rhetoric, namely deliberative oratory, but this subclass is probably the most important one in Aristotle's opinion,[42] and the proper objects of the other two may be aptly described as variants of the object of the deliberative. Forensic rhetoric is confronted with past events, which as such are no more open to our present action, but the practice of justice rests on the notions that (1) the court has to make up a decision which is supposed to correct or compensate (were it only symbolically) the outcome of that past action, and (2) in order to assess the responsability of the author, the court will guide by a reconstruction of how he could or should have deliberated about it. The same kind of assessment is central to the last division of rhetoric, the epideictic, although in this case no sanction has to be taken. Thus deliberation is the "focal" centre of the field of rhetoric.[43]

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[35] *Gorgias* 449 d–e.

[36] *Gorgias* 454b.

[37] *Art of Rhetoric* 1354a 1.

[38] *Art of Rhetoric* I 2, 1356a 30–31.

[39] *Art of Rhetoric* I 1, 1355b 8–9.

[40] Before Aristotle, it had been used by Plato, to express that very same character of dialectic (for instance *Philebus* 57e), even if Plato did hope that dialectic woud lead to a real science.

[41] See the celebrated prologue of the *Metaphysics*, A 1, 980a 21–22.

[42] He does not say that in so many words, but he claims that it is "nobler" and "more political" and blames his forerunners for having taught quasi-exclusively forensic oratory (I 1, 1354b 22–1355a 1).

[43] On this notion of a "focal meaning", see *Metaphysics* Γ 2, 1003a 33–b 4, and its commentary in Owen (1960).

Objects of deliberation are characterized by the following specifications: (1) they are contingent facts (facts which could be otherwise), (2) they are open to our power of action (i.e. either they depend immediately of a choice that we can make now, or they are included in a process, an earlier stage of which lies within our power), and (3), as we have seen, they must be considered as means to attain to some end.[44] From the first two conditions, it results that the real scope of rhetorical practice is always related to a here and now. It is a thin, narrow and ever-changing net of possibilities that extends ahead of me; it is (in ordinary conditions) open-ended, but many of us will soon loose its ramifications from sight. Of course, the "art of rhetoric" does not deal directly with the particular configuration that I am facing just now, but with models that have some degree of empirical generality.[45] Other important features of rhetorical ability derive from conditions (2) and (3): the deictic reference to an "us" implies the consideration of some relevant facts about the present situation of a community, including its beliefs and values; and, as I have already mentioned before, we may have to cope with conflictual situation (which is regularly the case with forensic).

On the basis of these remarks, we are now in a position to draw a chart or map showing the situation of rhetoric among the neighbouring kinds of knowledge:

	analytics	
	dialectic	*wisdom* (= ontology)[46]
poetics	**RHETORIC**	
	political science	= ethics + politics

This unusual look at a region of the Aristotelian encyclopedy brings out a special class of learning that might be called "transverse" or perhaps "organic", since the *Organon* is an essential part of it (and it is worth remembering that while in the West the canonic order of Aristotle's works places the rhetorical treatises between the *Politics* and the *Poetics*, that is, on the borderline between "practical" and "productive" sciences, the Oriental considered it to be a part of the *Organon*). The existence of such "sciences" is due to the fact that while Aristotle rejected the Platonic project of an entirely unified science, he would not have been content with the mere addition of separate pieces of knowledge.[47] The role of these "transverse sciences" is to reflect upon the rules and conditions that are common to all sciences, as well as to some salient common features of their results. But they are not endowed with a metadiscursive or transcendental character; rather, Aristotle distinguishes them

[44] These conditions are specified in *Nicomachean Ethics* III 3, 1112a 18–1113a 2; a similar but shorter list in *Art of Rhetoric* I 2, 1357a 4–7.

[45] *Art of Rhetoric* I 2, 1356b 28–1357a 1.

[46] "Ontology" and "poetics" appear here only as reminders. They are not mentioned in the above-quoted text from Bk I Chapter 4, and the questions of the relationships between poetics and rhetoric, and of course of dialectic with first philosophy, exceed by far the scope of this paper.

[47] Cf Crubellier and Pellegrin (2002), pp. 111–113 and p. 149.

from those only by ascribing them less precision and necessity. Otherwise, he seems prone to put rhetoric on a same level as ethics and politics, inasmuch as the knowledge of some basic facts about the city and its constitution, or about emotions, virtues and vices, is an essential part of an orator's competence.

The relationship of rhetoric with dialectic and analytics is closer, but also more complicated. Rhetorical training is acquired through a regressive or backwards movement from conclusion to premises, just like analytics and dialectic[48]: "Rhetoric we look upon as the power of observing the *pisteis* on almost any given subject presented to us"[49]: phrases like "any given subject" recur in the definitions of the aims of both analytics[50] and dialectic.[51] The situation, or at least the language of the *Rhetoric*, is not exactly the same as what we read in the logical treatises. The *Analytics* (*Posterior* as well as *Prior*) present a general theory of inference based on the purely formal patterns of "syllogisms", while in the *Topics* dialectic makes use of more complex schemes, combining formal and semantical features, the so-called *topoi*.[52] Although the *Rhetoric* mentions both modes of constructing arguments, and seems to make a clear-cut distinction between them, Aristotle appears to be very lax in his use of the words, as we can see from some above-quoted passages:

> The consideration of deductions of all kinds, without distinction, is the business of *dialectic* (one would have expected "analytics") either of dialectic as a whole or of one of its branches (1355a 8–10), or:
>
> 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 (1359b 9–12).

So when he wrote the *Rhetoric* he seems to have considered that there was a theory of reasoning in general, including *topoi* as well as syllogisms, which he called (most of the time) dialectic, and into which he probably still distinguished analytics as a special part.[53] Thus analytics is relevant for rhetoric through dialectic, i.e. in his search for the best *pisteis*, the orator may use analytics and dialectic; rather, he must use dialectic, which in turn contains some analytical elements as an essential part.

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[48] On the regressive course of analytics, see Crubellier (2008).

[49] *Art of Rhetoric* I 2, 1355b 31–32.

[50] ". . .how we may ourselves always have a supply of deductions in reference to *the problem* proposed", Prior *Analytics* I 27, 43a 20–21.

[51] ". . .find a line of inquiry whereby we shall be able to reason from reputable opinions about *any subject presented* to us", *Topics* I 1, 100a 18–20.

[52] The Greek word means "place" and in dialectical contexts it is generally rendered in English by "commonplace". There is no real objection to this translation, except that in the course of this discussion I will have to mention a distinction between more and less common "commonplaces", so I chose to keep the Greek word.

[53] *Topoi* are never mentioned in the *Analytics*; in the *Topics* the word *sullogismos* appears with the general meaning of "deduction", and the characteristical form of the "syllogism" with its two premises and its middle term, never occur. That might suggest a later date for the *Rhetoric*; but it may also be the case that, for the purposes of a theory of public argument, he found it more convenient to treat the logical disciplines as one body of knowledge.

Then, in a way, since dialectic bears upon whatever can be said, it might seem that rhetoric is but a chapter of dialectic (some texts seem to go in that direction, as we shall see). But I think that one important nuance must be introduced here. A case is a matter for rhetoric when at least one of the persons who take part to the discussion is committed to taking a decision as an outcome; it is a matter for dialectic when it is investigated with no other motive than curiosity (for instance in the course of training a judge or a casuist). Thus rhetoric, although it may be very much like dialectic, cannot be reduced to it. Aristotle expresses that by saying that the specific aim of the art of rhetoric is "to invest speeches with a moral character" – literally, "to make discourses ethical", a phrase which is developed into: "there is a moral character in every speech in which the choice in conspicuous".[54] This is done:

(1) through the use of non-argumentative *pisteis*, i.e. those which rest more or less on some impressions felt by the judge, regarding either the trustworthiness of the speaker (the *ethos*) or the ethical character of the acts or facts in question (the *pathe*);
(2) through the possession of a body of specific knowledge, which provides premises for the inferential *pisteis*;
(3) but the very patterns of inferences which are characteristic of rhetoric differ significantly from their dialectical models: they are "counterparts" rather than instances of these.

Let us begin with this last point:

> Just as in dialectic there is induction on the one hand and deduction or apparent deduction on the other, so it is in rhetoric. The example is an induction, the enthymeme is a deduction, and the apparent enthymeme an apparent deduction: for I call a rhetorical deduction an enthymeme, and a rhetorical induction an example. Everyone who effects persuasion (*pisteis*) through proof does in fact use either enthymemes or examples: there is no other way. And since everyone who proves anything at all is bound to use either deductions or inductions (this is clear to us from the *Analytics*), it must follow that each of the latter is the same as one of the former[55].

From this text, it might seem that between analytics and rhetoric, as far as inferences are concerned, there is but a difference in terminology. Then an enthymeme would be any deduction, provided that it is used in a rhetorical context, and an example any induction occurring in a rhetorical context. But the situation is a bit more complicated. First, the rhetorical context imposes some characteristical qualifications on the arguments that are brought into play; second, even inside the *Prior Analytics*, Aristotle, as we will see, carefully distinguishes examples from induction, and enthymemes from deduction.

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[54] *Art of Rhetoric* II 21, 1395b 12–14; cf. also II 18, 1391b 20–21, b 25–26.
[55] *Art of Rhetoric* I 2, 1356a 36–b 11.

The constraints imposed by the situation will be easily understood. Every argument must be within the reach of the audience in the particular circumstances of the speaker's address. So it must be such as to be grasped even by people "who cannot take in at a glance a complicated argument, or follow a long chain of reasoning",[56] and thus:

- it must be short enough – a condition which amounts to beginning with premises which are not too far away from the conclusion, and so does not allow to reach always necessary premises; one will have to content with premises which will be only probable or likely[57];
- an argument must have a (comparatively) small number of premises, which leads sometimes to the suppression of some obvious premises[58];
- besides, the very nature of the objects of rhetoric implies that most of the premises will not be necessary;
- and that some of them at least must refer to concrete singular facts.

Other important characteristics of rhetorical arguments derive from the fact that they occur in socially determined situations, usually situations of confrontation. Hence, for instance, the fact that a dialectical premise must be shaped into a question, ad most often a closed question: "Do you think that P, or that not-P ?" More generally, the argumentative procedure may be described as the appropriate means for a bypassing strategy, in order to avoid a head-on collision with the opponent's convictions, which would block the discussion, as well as to bypass his prejudice or prevent him from discovering the orator's tactics (all these motives are already present in Socrates' use of questioning in Plato's dialogues).

The condition of reference to particular facts is probably the most important from a logical and epistemological point of view. For instance, in the *Prior Analytics*, it is used to mark off examples from induction:

> Clearly then an example is neither < an inference > from part to whole, nor from whole to part, but rather from part to part, which both are subordinated to the same term, and one of them is familiar. It differs from induction, because induction starting from all the particular cases proves that the extreme belongs to the middle, and does not bring its conclusion about the < particular > extreme, whereas argument by example does conclude about it and does not draw its proof from all the particular cases.[59]

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[56] *Art of Rhetoric* I 2, 1357a 3–4.

[57] *Art of Rhetoric* I 2? 1357a 22-b 1.

[58] Hence the later definition of enthymeme as an incomplete (or rather partly implicit) syllogism, with the remade etymology : "contained inside the mind". But in fact the verb *enthumeisthai* just means "to reflect", so that the name *enthumema* may apply to any moment provided by the speaker for the reflection of the judge or audience.

[59] *Prior Analytics* II 24, 69a 13–19.

Some clarification may be welcome. The paradigm case of Aristotelian induction is:

Man, horse, mule are bileless
Man, horse, mule are long-lived

Therefore bileless animals are long-lived

Aristotle says that it establishes that one of the extremes ("long-lived") belongs to the middle ("bileless")[60] by means of the other extreme (the list: "man, horse, mule"). It is an inference "from part to whole" because the subject of the conclusion has a wider extension than the subject of both premises (thus, to say that examples go neither from part to whole nor from whole to part, amounts to saying that they are neither inductive nor deductive inferences). An example is a four-term structure:

B belongs to C and to D as well
A belongs to C

Therefore A belongs to D

– in which C and D are particulars,[61] C is more familiar than D and D is very much like C. For instance: "Since when Callias was ill of this disease that did him good, that will (probably) do good to Socrates suffering from similar symptoms".[62]

One might be tempted to construe the example as the combination of an inductive move (concluding from particular cases that a person suffering of disease B will benefit from treatment A) plus a deductive move (concluding from that general rule that if D suffers of disease B, he will benefit from A), but that would miss the essential point, which is that the example is a shortcut, which is based only on singular facts and does not require awareness of one definite nosological entity (and hence belongs to empirical insight[63]), at the cost of a lesser certainty of the conclusion.

It is crucial for rhetoric to be able to draw conclusions about particular subjects, since the outcome of deliberation is the qualification of a particular action (as something to do or to avoid) or a particular person (as guilty or innocent or worthy of admiration). This can be done either by means of analogy with another particular term, as in the cases of examples, or – more effectively – through reference to a universal proposition, and then we have an enthymeme. An example of enthymeme (taken from the *Prior Analytics*) is:

A woman who has milk is with child
This woman has milk

Therefore this woman is with child[64]

[60] Here he calls "middle" the term that has an intermediate extension, and not (as he usually does) the one which bridges between the terms of the conclusion.

[61] While Aristotelian induction is always based on class attributions, such as "man is long-lived".

[62] Cf. *Metaphysics* A 1, 980a 8–9 ff.

[63] *Metaphysics* A 1, 980a 10–12, where empirical thought is opposed to art. Does that mean that Aristotle changed his mind between the *Metaphysics* and the *Art of Rhetoric* ? Not necessarily. The orator may possess an art, which enables him to devise proofs accessible even to laymen.

[64] *Prior Analytics* II 27, 70a 13–16

This looks very much like a syllogism of the first figure. But once again there is the same difference, namely that in an Aristotelian deduction (despite the famous school example "Socrates is a man – therefore Socrates is mortal", which is not Aristotle's) there is no place for particular terms such as "this woman". An enthymeme might be defined as "a syllogism in which there is one particular term" even though Aristotle does not use that criterium; but he says that an enthymeme is a deduction from signs,[65] which amounts to the same thing. For the sign, in the previous example, is the fact that this woman has milk. This is a particular information about a particular subject; but this is a sign insofar as it evokes immediately some universal proposition, with which it gives rise to an inference: in our case, the fact that this woman has milk evokes the general fact that women have milk when they are with child. The fact that this one has milk does not mean anything by itself. The trigger of the inference is the mental act by which a singular fact is recognized as a sign, i.e. referred to the universal proposition that gives it its meaning.

So examples and enthymemes are characterized by the fact that reasoning leans on some particular facts, which either are used as one would use general terms, as in the example, where the subject of the conclusion, D, is somehow subsumed under C, the familiar and undisputed comparison term, as if we had:

All Cs are A
D is a C ["of a kind"]

Therefore D is A

– or alternatively, as in enthymemes, they suggest or recall general rules that support the inference. The mental capacity to recognize forms, meanings and classes in our perceptive experience (as in the case of reading, one of Aristotle's favourite examples[66]) is crucial in Aristotle's epistemology, for it makes possible the conformity of our thoughts with external reality. He calls it *nous* or "actual comprehension", and he is always very careful to distinguish it from "logical" attribution of one general term to another.

(Another example of such an act of recognition or comprehension, and very akin to rhetoric, is the special perception that we have of a *prakton,* literally "a thing to do", which works as a trigger in the so called "practical syllogism", which is an analytic description of the formation of our intentional acts,[67] for instance:

I need drinking (or: I am thirsty)
This is a drink

He drinks at once[68]

[65] *Prior Analytics* II 27, 70a 10.

[66] See *Metaphysics* M 10, 1087a 8–21; *On the Soul* II 5, 417a 24–29.

[67] Including the activities of most animals, cf. *The Movement of Animals* and *On the Soul* III, 9–10.

[68] I put the "conclusion" in italics (and without a "Therefore. . .") to stress the fact that it is not a piece of knowledge, nor a proposition (even in the form of an order or a summon), but simply an action.

I may suffer an atrocious thirst, or be rationally convinced that I have to drink in order to keep healthy, that will not make me move an inch as long as I will not recognize something as "a drink" in the surroundings. As in the case of examples and enthymemes, the perception of a particular object actuates a general maxime, which otherwise would remain abstract or potential. The difference is that enthymemes or examples are used in the course of an argumentative process, which prefigures the action that should be done, but remains purely intellectual.)

In order to devise inferential *pisteis*, it is necessary to have premises that will be freely accepted by the judge and will allow easy and effective inferences. In this search for premises, it is essential to keep together considerations about the form of arguments and about the subject matter in itself. So the orator must possess a basic stock of truths, which he will try to link up in a convenient way to the conclusion he wants to prove.[69] These are the "proper" premises of rhetoric, which mark it off from dialectic, but are in fact common with ethics or politics. Most of them are facts about the geography, economy, sociology and history of the city[70]; others are general psychological facts about the emotions and characters of men.[71]

But there is another category of materials that can provide premises, namely truths about those "goods" or ends that all men (or at least the great majority of men in the great majority of circumstances) do share, because there is a human nature; and this is still the more true if we have to consider educated citizens of a Greek *polis*. Such ends are (1) happiness and its components,[72] (2) the good and the useful, i.e. what may lead to happiness or help us to attain to it,[73] (3) what is acknowledged by as commendable or admirable, thus strengthening the moral unity of the community: the beautiful, the just, and virtues,[74] and (4) the particular values implemented by the constitution of the state.[75] The orator must have a particularly developed, precise and methodical awareness of all these goods, which constitutes an important part of his own specialized expertise, although it is not really specific (since it develops the common beliefs of all the citizens) and it is no scientific knowledge. But this awareness becomes an art once it is worked up by dialectic and analytic capacities, which help the orator to see better what is implied in those common beliefs. For once such ends are assumed, rhetorical analysis is able to extract order and rules out of them. For instance: what do we mean by "happiness", "justice" or "virtues", and what events or properties are constitutive parts of them or conditions of their realization ?

Maybe Aristotle did not consider such truths to be as different from empirical evidence as they may appear to a modern reader of Kant, for instance: maybe he

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[69] *Art of Rhetoric* II 22, 1396a 4–7 ff.

[70] *Art of Rhetoric* I 4, 1359b 19 ff.; see also I 8, about constitutions.

[71] *Art of Rhetoric* II, 1–17.

[72] *Art of Rhetoric* I 5.

[73] *Art of Rhetoric* I 6.

[74] *Art of Rhetoric* I 9.

[75] *Art of Rhetoric* I 8.

saw them as just another kind of facts. But he must have felt some difference, since he acknowledged that while many ends are generally agreed on (*homologoumena*), many others are "disputed" (*amphisbetesima*).[76] There is a difficulty here, for since deliberation presupposes the assumption of some end, the practice of rhetoric (delivering a speech before a judge or an assembly in order to reach a decision) seems to require that the orator and the judge agree about the end. Does that mean that common deliberation is impossible whenever one of these disputed ends comes at stake, and the orator and the judge do not agree ?

In fact, it does not preclude deliberation in common, because there is still a possibility to produce and compare arguments for and against such ends by referring to some (agreed on) formal or generic features which are supposed to belong to any good as such, or to a great majority of them, so that they can be used as criteria without regard to the content. Is bad, for instance, "what our enemies desire, or at which they rejoice", "what is in excess"; is good "that of which the contrary is bad", and "that which most people seek after", "that which is praised", "what has been distinguished by the favour of a discerning or virtuous man or woman", and so on.[77] Another case of "disputable" ends is when different ends compete. Then it is possible to compare their relative values by means of different tests,[78] such as: "a thing productive of a greater good is itself a greater good"; "a thing which is desirable in itself is a greater good than a thing which is not desirable in itself"; "what is rare is a greater good than what is plentiful"; and so on.

With such patterns of argument as these, we are reaching the third element (beside inferential models and ethical premises) of rhetorical ability, the one which is properly dialectical: for they are *topoi*. What is a *topos* ? Jacques Brunschwig very aptly describes it as a "premise-making-machine",[79] i.e. a device which, from a given conclusion (or alternatively from the opponent's thesis that one has to refute), enables to generate another proposition which, once it is granted (either willingly, if our audience or the opponent feel that it is sound or true, or under constraint, if we are able to show that this is an undisputable fact or the necessary consequence of some assumptions they have made), entails the conclusion. More precisely, a *topos* gives the pattern (including some variables) of a premise that may be used to reach a conclusion modelled on a given pattern including the same variables. The method of *topoi*, as it is developed in the *Topics*, may be seen as resting on a kind of analysis of the meaning of terms. While syllogistic is definitely formal, the patterns of *topoi* are not really formal. Some of them may be extremely abstract or general, but they

[76] *Art of Rhetoric* I 6, 1362b 30. Although at 1362 b 29–30 Aristotle opposes "the things admittedly good" and "things whose goodness is disputed", and enumerates in great detail the "admittedly good", he gives no list of the disputed ones; from his examples, he appears to consider that controversies concern the application of the generally admitted notions of good to some particular object or action.

[77] *Art of Rhetoric* I 6, 1362b 30–1363a 4.

[78] Which are listed in Book I Chapter 7, with parallel passages in Chapter 9, 1367a 17–32 (for he epideictic genre) and in Chapter 14 (forensic).

[79] Brunschwig (1967), p. xxxix.

are never entirely free of reference to determined contents. The project of dialectic (already in Plato's dialogues) seems to have been the decomposition of meaning into elements which should be as simple as possible, more or less in the fashion of Leibniz's *Characteristica Universalis*; in fact, it seems (if one may try a guess on the basis of the scattered and often cryptic indications of the dialogues[80]) that Plato did hope to find absolutely simple components of meaning, from which every concept or notion could be reconstructed *a priori*, and thus made entirely clear (and become the principles of a universal science). Aristotle gave up this grand prospect, but his own contribution to dialectic was to make use of such semantic analyses in order to find premises and arguments.

The bulk of the *Topics* (from Book II to Book VII) is made up of lists of *topoi*, following a systematic division of premises and problems into four types according to the relation between the predicate and its subject – the so-called "predicables": definition, property, genus and accident.[81] Since this division of predicables is exhaustive, one might be tempted to think, here again, that the *Topics* contain a complete exposition of all the *topoi* there are, so that the *Rhetoric* would be only a collection of precepts for the application of dialectical rules to public deliberation. Once again, that would be an underestimate of the specificity of rhetoric. Some of the *topoi* I have just mentioned appear in the *Topics*: for instance, the notion that "things whose destruction is more objectionable are themselves more desirable", and "a thing whose loss or whose contrary is more objectionable is itself more desirable",[82] corresponds well enough to the rule: "is good that of which the contrary is bad".[83] But there is nothing like: "is bad what would greatly benefit our enemies": for it requires empirical knowledge, as well as a specific insight (which in fact is a form of prudence) to determine with certainty who are my enemies, and still more to foresee which actions of mine will benefit them. The same is true of the *topoi* that are used to assess the possibility or likeliness of some events – especially in the case of forensic oratory, in order to discuss about "things already done".[84] Christof Rapp suggests[85] (rightly, I think) that the word *topos* had a broader meaning than the models described in the *Topics*, which seem to have been selected by Aristotle, he says, according to some "specific formal and functional criteria". I wish to add that even within the range of these specifications, the *topoi* of rhetoric are marked by their pragmatic context, and that they implement some specific knowledge.

To conclude, I will return to non-argumentative *pisteis*, namely the ethical character of the speaker and the emotions that he is able to arouse, or at least (and more

[80] It would take a long journey through Plato's works to substantiate that conjecture (which could not be demonstrated with certainty anyway). The passage that lends the best support to it is *Phaedo* 99e – 100b ff.

[81] *Topics* I 6–8.

[82] *Topics* III 2, 117b 3–7.

[83] *Art of Rhetoric* I 6, 1362b 30–31.

[84] *Art of Rhetoric* II 19; cf. also I 3, 1358b 16–17.

[85] In an unpublished paper read at Villejuif in June, 2006.

plausibly) to inflect or regulate, in his audience. There are three questions about them that I want to tackle briefly here. (1) Is it really possible to describe them as *pisteis* in the sense I suggested above, i.e. something that the orator can "give" his audience as an aid to decision-making ? The second and third questions derive from this one, and are closely related to each other: (2) Are not they open to moral criticism, as being more or less dishonest tricks intended to manipulate an audience ? (3) Is Aristotle really consistent, if he allows himself a kind of behaviour for which he had sternly blamed the former authors ?

First, although the orator may, and probably must consciously intend to make such impressions on his audience, and to develop a battery of specific means to that effect, it seems less plausible that the hearers should become distinctly aware of these impressions and of the elements or aspects of the discourse that have created them. Indeed, it seems that it will work even better if the psychological processes remain unconscious. It is not completely implausible that the hearer would register with satisfaction the signs of competence and honesty that he discovers in his interlocutor's speech, but he will immediately become more suspicious if it comes to his mind that these signs may have been prepared on purpose. The case of emotions is perhaps a little more defensible: an orator may draw his hearers' attention on the particular emotion they are feeling just now, and suggest that they should take it as a guide to make the best choice. But even so, that will work only insofar as they can believe that their feelings are natural and not tampered by the orator's cunning. Moreover, Aristotle does not attempt to account for the psychological processes through which such *pisteis* produce their effects. So there may be some rationality in the use of them, but it seems to be objective rationality, so to say, which does not call on the rational faculties of the hearer. They do not contribute to the rational organization of a public space for discussion; rather, they presuppose opacity.

Thus we have to decide whether Aristotle proves to be inconsistent on an essential aspect of his project, or whether he is cynically cheating and speaking a double language. Another way out would be to conceive that he is ready to admit that, at its margins, the art of rhetoric shades off into its opposite, i.e. the kind of lawless practice that Plato censured. There must be something true in this supposition, since he happens to bring forward such justifications as:

> Again, it is absurd to hold that a man ought to be ashamed of being unable to defend himself with his limbs, but not of being unable to defend himself with rational speech, when the use of rational speech is more distinctive of a human being than the use of his limbs.[86]

The notion that one should not be ashamed of being unable to defend oneself before courts and assemblies is a hallmark of the Platonic Socrates,[87] while the description of rhetoric as a martial art, absolutely necessary in a world in which one is constantly assaulted, is a commonplace of his sophistic opponents

[86] *Art of Rhetoric* I 1, 1355a 38–b 2.

[87] *Theaetetus* 174a -175b; *Gorgias* 485c–486c.

in the *Gorgias*.[88] Even Aristotle's immediate reflection on this argument is strongly reminiscent of the Platonic Gorgias:

> And if it is objected that one which uses such power of speech unjustly might do great harm, that is a charge which may be made in common against all good things except virtue, and above all against the things that are most useful, as strength, health, wealth, generalship. A man can confer the greatest of benefits by a right use of these, and inflict the greatest of injuries by using them wrongly.[89]

This claim that rhetoric, as well as any other technique, is in itself ethically neutral, is Gorgias'.[90] But it must also be remembered that the idea that any good can be turned into its opposite as long as it is not regulated by the absolute Good, is often developed by Socrates himself, for instance in *Meno* 87e–89a, *Euthydemus* 288d–290d, *Phaedo* 68d–69c.

In order to appreciate more accurately Aristotle's position, another interesting indication may be taken from the following passage:

> Although the same systematic principles apply to political and to forensic oratory, and although the former is a nobler business, and fitter for a citizen, than that which concerns the relations of private individuals, these authors say nothing about public oratory, but try, one and all, to write treatises on the way to plead in court. The reason for this is that in political oratory there is less inducement to talk about non-essentials. Political oratory is less given to unscrupulous practices, because it treats of common affairs. In a political debate the man who is forming a judgment is making a decision about his own vital interests. There is no need, therefore, to prove anything except that he facts are what the supporter of a measure maintains they are. In forensic oratory this is not enough; to conciliate the listener is what pays here. It is other people's affairs that are to be decided, so that the judges, intent on their own satisfaction and listening with partiality, surrender themselves to the disputants instead of judging between them.[91]

Appealing to emotions in order to muddle and influence the judge is presented here as a characteristical feature (and a more or less pathological one) of forensic oratory, which is itself belittled in comparison to the political use of rhetoric. Aristotle does not seem to consider the possibility that the judge, who is a citizen, be interested in maintaining justice and order in the city; indeed he keeps that role for law: "well-drawn laws should themselves define all the points they possibly can and leave as few as may be to the decision of the judges"[92]: for these might be Philocleons.[93] While public deliberation about common affairs has its own norms, this is not the case with forensic oratory. On this point, Aristotle is not so far from his old master. For the main issue of the *Gorgias* is to know what is the end at which rhetoric aims and, above all, to establish the necessity for rhetoric to be ruled by

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[88] *Gorgias* 456c–457c, 486b–c, etc.

[89] *Art of Rhetoric* I 1, 1355b 2–7.

[90] *Gorgias* 456c ff.

[91] *Art of Rhetoric* I 1, 1354b 22–1355a 1.

[92] *Art of Rhetoric* I 1, 1354a 31–33.

[93] Aristophanes, *Wasps*, especially lines 545–630.