



**THE ETHIC GROUND OF JURIDICAL PRACTICE
UNDER AN ARISTOTELIAN PRISM:
A STUDY ON ARGUMENTATIVE RATIONALITY AND ITS USES IN LAW
PRACTICE**

**O TERCEIRO ÉTICO DA PRÁTICA JURÍDICA
SOB UM PRISMA ARISTOTELIANO:
UM ESTUDO SOBRE A RACIONALIDADE ARGUMENTATIVA E SEUS USOS NA
PRÁTICA LEGAIS**

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ABSTRACT

The purpose of the present text is to analyze the juridical phenomenon through the perspective of its rhetorical practice and to discuss whether such posture is by itself censorable from the ethical point of view. In order to achieve our purpose in this text, we have chosen to study, within the broad oeuvre of Aristotle, parts of the *Organon* collection, namely: *Analytics*, *Topics*, *Sophistical Refutations*, and also *Rhetoric* and *Poetics*, with an emphasis on the *Art of Rhetoric*. The aim that governs this entire demarche is to understand the Aristotelian proposals to a theory of rationality, which is to be investigated through the discursive practices applied to the juridical phenomenon. The utility of rhetoric is thus emphasized to what concerns it as a technique of discourse analysis, not its power to dominate minds. The function of rhetoric is not only to persuade, but also to find the persuasion means that fit better each case, to recognize what seems to convince and what convinces indeed. Even though it may be dishonestly used, that does not diminish its value. Aristotle has freed rhetoric from the burden of moral. It is necessary to be capable of defending the pro as well as the contra, not to make them equivalent, but in order to understand the adversary mechanism of argumentation and, thus, refute it. Aristotle believes that the true and the just are by nature stronger than their contraries. This is also how juridical praxis works.

RESUMO

O propósito do presente texto é analisar o fenômeno jurídico através da perspectiva de sua prática retórica e discutir se tal postura é por si só censurável do ponto de vista ético. Para alcançar nosso propósito neste texto, optamos por estudar, dentro da ampla obra de Aristóteles, partes da coleção de *Organon*, a saber: *Analítica*, *Temas*, *Refutações Sofisticadas*, e também *Retórica* e *Poética*, com ênfase na *Arte Da Retórica*. O objetivo que governa toda essa demarche é entender as propostas aristotélicas a uma teoria da racionalidade, que deve ser investigada através das práticas discursivas aplicadas ao fenômeno jurídico. A utilidade da retórica é assim enfatizada para o que interessa como uma técnica de análise do discurso, e não seu poder de dominar as mentes. A função da retórica não é apenas persuadir, mas também encontrar os meios de persuasão que se encaixam melhor em cada caso, para reconhecer o que parece convencer e o que realmente convence. Mesmo que possa ser usado desonestamente, isso não diminui seu valor. Aristóteles liberou a retórica do fardo da moral. É necessário ser capaz de defender tanto o pro quanto o contra, não os fazer equivalentes, mas sim entender o mecanismo adversário da argumentação e, portanto, refutá-lo. Aristóteles acredita que o verdadeiro e o justo são por natureza mais fortes do que seus contrários. É assim que funciona a práxis jurídica.

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1. Formulation of our problem

The purpose of this text is to present and discuss the argumentative and rhetorical mechanisms present in juridical praxis, on the basis provided by Aristotelian Ethics. When we mention argumentative and rhetorical mechanisms, we intend to be in accordance with the perspective proposed by Aristotle while we approach and evaluate these possible forms of rationality, but we also focus on something the Macedonian philosopher did not develop, which is: to discuss the ethical condition of possibility of using rhetoric when the issue is law. We state that the meanders of dialectics, according to this thinker, have a lot in common with the life of courts, which use those discursive practices without being properly critical about the content of their own attitudes. We mean that law professionals even believe that their positions are a result of formal syllogisms, when it is not like that. What, in fact, they do is to use enthymematic syllogism, even when they are not aware that their actions are always rhetorical.¹

Juridical practice, due to reasons we shall expose, is essentially rhetorical. The purpose of rhetoric is to achieve persuasion within a factual case, whether criticizing or defending something, starting from specific circumstances and even taking profit of specific characteristics of the audience it addresses. For these reasons, persuasion, which is a fundamental quality of rhetoric, has been somehow stigmatized, although through a shallow kind of critics. Nevertheless, we will demonstrate that the function of rhetoric, according to Aristotle, is not only to persuade, but also to find the persuasion means that fit better each case, to recognize what seems to convince (*Art of Rhetoric*, 1355b, 10-15). Even though rhetoric may be dishonestly used, it tends to unveil its performative contradictions and, for that reason, it is an applicable mechanism of knowledge. Contrarily to Plato, Aristotle freed rhetoric from the burden of moral. Once it is an “art”, rhetoric seems to be amoral to the Macedonian. Aristotle gives a more solid basis to rhetoric, by privileging not its power to dominate, but its capacity to explain, expose and demonstrate the fundamentals underlying this or that thesis. According to the Aristotelian view, what must be done is to understand the mechanism of the adversary’s argumentation, in order to refute it. Aristotle believes, after all, that truth and justice are by nature stronger than its contraries (*Art of Rhetoric*, 1355a, 37-38).

Aristotle believes in that because, according to him, *logos* is fourfold, comprising science, intelligence, wisdom and art, being rhetoric and dialectics the means by which all forms of rationality are constructed. However, there are a number of possible deformations within the unfolding of rationality, such as sophistic, eristic, lack of art and bad rhetoric. These rationality defects, as to say, might occur due to lack of preciseness and rigor, or even due to unfaithful intentions, but all of these vices can only be overcome by means of the same mechanism that creates them: argumentation itself. In other words, just as in

¹ There is, hence, a desired ignorance within juridical operators, whom are rhetorical but deny such attitude because of prejudice about rhetoric or fear of the stigma of sophistic. Similarly, we can consider that formalism is something strategic or, at least, highly functional, as suggested by Katarina SOBOTA in *Não mencione a norma*.

biological science, the antidote has the same nature as poison: against bad argumentation, argumentation itself must be used. This is precisely the conclusion achieved by Enrico Berti, chiefly because “this is the typical attitude of he who is ready to give reason to what he affirms, thus establishing a communication with others and, therefore, submitting himself to evaluation and critical inspection made by others”².

Indeed, we understand juridical rhetoric is the only mechanism that effectively vivifies the rationality of law, once it is connected to human subjectivity with its amount of wrong steps, incongruence and peculiarity. The “beings of sublunary world”, in Aristotle’s words, in order to construct their justice, possess tools which are merely probable, approximate, verisimilar and imperfect. Thus, only argumentation is capable of putting fragments back together, giving them form and usage. Certainly, there is no such thing as true premise when the law is at stake, but, after all, as Rohden affirms, “there are many ways of being rational or making rational speeches, but not all of them can be reduced to logical formulas or scientific and precise methods. Not all speeches are given the same level of rigor, conclusiveness and constringency, but all of them are valid, universalizable and communicable.”³

In order to achieve the proposals of the present text, we have chosen to study, within the broad oeuvre of Aristotle, parts of the *Organon* collection, namely: *Analytics*, *Topics*, *Sophistical Refutations*, and also *Rhetoric* and *Poetics*, with an emphasis on the *Art of Rhetoric*. The aim that governs this entire demarche is to understand the Aristotelian proposals to a theory of rationality, which is to be investigated through the discursive practices applied to the juridical phenomenon.

2. Introduction to the Aristotelian theory of rationality and what type of rationality corresponds to the law.

It is quite known that Aristotle does not deny the existence of a complete “truth”, conceived as a knowledge derived from the rigor of science (*episteme*). However, science is not always a possibility. Then, wherever there is doubt (*doxa*), the argumentation upon what is preferable must be used. According to the philosopher, there are two worlds: the divine ethereal world, with necessary and therefore predictable and calculable movements; and the sublunary world, which is Earth, place of chance, contingency, unpredictability, open to human action, a place where a perfect science is impossible and only verisimilar and probable judgments are possible. While the first world is knowable by means of demonstrative reason, the second corresponds to the field of argumentation.

After having accepted Parmenides’ thesis of dividing the areas of human knowledge into *episteme* and *doxa*, Aristotle claims that is a characteristic of man to search for precision, which is only possible, in each gender of thing, to the proportion admitted by the nature of the issue (*Nicomachean Ethics*, I 3, 1094b 24 and on; *Metaphysics*, II, 3, 995a 15). This is the reason why the art of

² BERTI, Enrico. *As razões de Aristóteles*. Tradução de Dion Davi Macedo. São Paulo: Loyola, 1998. p.186-187.

³ ROHDEN, Luiz. *O Poder da Linguagem: a arte retórica de Aristóteles*. Porto Alegre: Edipucrs, 1997. p.224.

defending oneself with argumentation is so important in situations in which demonstration is not possible. Aristotle finds rationality beyond analytical and demonstrative logics, and believes to be possible a logic of discussion and dialogue, a dialectic syllogistic ratiocination in order to satisfy the condition of confrontability, always obliged to communicate with the other person. This posture separates him from the convincement proposed by stoic philosophy, which believed that only *episteme* could be a source of knowledge; for the same reason, it isolates him from the cynic posture and places him contrarily to Platonism. Nonetheless, it does not align him with the sophists, because, in Aristotle's view, argumentation and rhetoric aim at the true knowledge, even though it takes their limitation into account. According to Ricoeur:

The great merit of Aristotle was in developing this link between the rhetorical concept of persuasion and the logical concept of the probable, and in constructing the whole edifice of a philosophy of rhetoric on this relationship. Thus, what we now read under the title of *Rhetoric* is a treatise containing the equilibrium between two opposed movements, one that inclines rhetoric to break away from philosophy, if not to replace it, and one that disposes philosophy to reinvent rhetoric as a system of second-order proofs.⁴

In order to better understand Aristotle's plan we must recognize that his purpose distinguishes, in the field of dialectics, the good argumentation which leads to philosophical knowledge, from the bad argumentation which leads to eristic (vicious argumentation) or to sophism. Thus, sophism is like an apparent wisdom, without ballast, leading to an apparent persuasion; leading, in a word, to deceit. The law is configured the same manner; it may also be a victim of bad argumentation or eristic, but these vices are not necessarily part of it.

Dialectics and rhetoric are modes of rationality that deal with what is merely acceptable, producing, therefore, a valid knowledge, once they use premises acceptable by common sense and reasonability. On the other hand, demonstrative logic, differently to argumentative and rhetoric, works with evidence in the field of certainty and produces answers through deduction from apodictic syllogism, because it departs from premises which are indemonstrable and counterfactually true. Among the forms of argumentative rationality, there are dialectics, which deal with what is acceptable in order to construct a thesis (*thesis*), and rhetoric, that functions in the field of contingency, influenced by the mood of the audience, and searches for persuasion. Let us check the scheme proposed by Eemeren, Grootendorst & Kruijer⁵, as follows:

<i>arguments</i>	demonstrative	Dialectical	rhetorical
<i>Objective</i>	certainty	Acceptability	cogency

⁴ RICOEUR, Paul. Between rhetoric and poetics. In: RORTY, Amélie Oksenberg. *Aristotle's Rhetoric*. University of California Press, 1996. pp.324-384. p.326.

⁵ EEMEREN, Frans H. Van; GROOTENDORST, Rob; KRUIGER, Tjark. *Handbook of Argumentation Theory: a critical survey of classical backgrounds and modern studies*. Dordrecht-Holland / Providence-USA: Foris Publications, 1987. p.59: Fig.2.1. Aristotle's three sorts of argument.

<i>status of premises</i>	evidently true	Acceptable	cogent for audience
<i>Deduction</i>	valid	Valid	cogent for audience
<i>Theory</i>	logic	Dialectic	rhetoric

Such scheme is very useful to our purposes. We can perceive that the aim of demonstration is certainty, while in dialectics and rhetoric, what matters is, respectively, acceptability and cogency. Furthermore, demonstrative logic, as well as dialectics and rhetoric, are based upon premises. In formal logic, premises need to be evident (indemonstrable); in dialectics and rhetoric, premises can be acceptable or cogent for the audience, respectively.

The main discussion developed by Aristotle concerns methodology and is dedicated to comprehending the forms through which rationality is established. The different rationalities studied by Aristotle can be divided into demonstrative logic (I), dialectic rationality (II), rhetoric (III), eristic or sophistic (IV) and poetic (V). Law, in our view, is immersed in dialectic and rhetorical rationalities, but it uses poetic frequently.

3.1. Juridical praxis and its incompatibility with demonstrative rationality

The Aristotelian formal logic is exposed in the first books of *Organon*, called *Analytics*. These are the books in which Aristotle exposes his general conception of ratiocination through syllogism and sets the basis of formal logic. In these two books, *Prior* and *Posterior Analytics*, Aristotle does not directly approach an issue which would raise a great polemic in his works: the defense of argumentative thought as a manner of obtaining valid knowledge. This is a very original posture taken by Aristotle, because it is different from sophistic, it is not the acceptance of eristic: it is the admission of the limits of human rationality to what concerns knowing the truth in certain areas and, in spite of this admission, it sustains that human rationality is able to lead to valid knowledge.

Demonstrative rationality is the one in which there are no doubts (*doxa*), and its results are safe and true. The premises of scientific thought do not demand justification; they are evident; they come *a priori* and, therefore, are also indemonstrable. Let us see how Margutti describes the Aristotelian theory of demonstration:

Aristotle equalizes “knowledge” with “knowing by demonstration” and defines demonstration as being scientific syllogism (Post. An. I, 2, 71b, 16-18). Thus, science is equivalent to certain knowledge by the cause, a knowledge that is expressed in the syllogistic form. Therefore, previous knowledge is needed to function as departure points for syllogistic deduction. Such previous knowledge constitute the principles of science and are characterized for being absolutely true, prior and indemonstrable. Through the principles of science, we

are capable of obtaining a knowledge of true enchainments based upon necessity.⁶

In the field of formal science (*episteme*), principles or premises are considered to be indemonstrable or absolute, being, thus, unnecessary to question them. They would be captured by intuition, a faculty which belongs to the intellect (*noûs*)⁷. The whole structure of demonstration is based upon the model provided by geometry and arithmetic, and its axioms are taken as indubitable principles inside the very system it founds. This epistemological restriction is similar to the one made by Plato concerning *dianoia*. The field in which demonstration is applied is, to Aristotle, a relatively restricted one, because it must only be taken as valid.

As broadly exposed by the historiography of law, the arithmetic posture has been defended by the so-called “formalists of law” since the beginning of Modern Age, when we observe the ever-growing formalism of juridical practice, making it counterfactually deductible and unquestionable. This posture had been denounced with precocity by Vico, whom foresaw its dominant growth, once the Italian thinker was an enthusiast of rhetoric⁸. But juridical formalism grew indistinctly during the 17th and 18th centuries and achieved its utmost peak when the Exegetic School was expressive, confirming its methodological and systematic effects in the School of the Jurisprudence of Concepts (Thibaut and Puchta), arriving, already in the 20th century, at the conception of purification of law, as verified in Kelsen and Hart.

However, this posture does not seem suitable to juridical thought because it departs from a lack of attention to the juridical phenomenon as a fact of culture. Or, still in Aristotelian words, law as a “sublunary” fact. The juridical world may even translate its results into syllogisms, but never into a formal syllogism, because there is no way of establishing unquestionable premises.

In order to better demonstrate our hypothesis, let us analyze the functioning of a formal logic problem, and then compare it to a juridical problem and its development. Once this is done, we take back theory and present our conclusion.

Still according to Aristotle, science is the field of knowledge in which apodictic, formal logic operates. This is so, because this world has indemonstrable premises which can be captured by intuition. And exactly because formal logic is able to depart from these *a priori* data and to make its premises from such data, it is capable of producing knowledge. Let us suppose, then, that we could understand this prior knowledge as non-discussible or simply valid rules.

⁶ MARGUTTI PINTO, Paulo Roberto. *A contribuição das Segundas Analíticas de Aristóteles para uma análise da argumentação*. Síntese Nova Fase. Belo Horizonte, v.21, n.65, p.159-181, 1994. p.169.

⁷ Aristotle calls this knowledge *noûs*, a word impossible to translate, which has been substituted in Latin, since Boetius, by *intellectus*. It was taken to German as *Vernunft* and, after Kant, the Latin term *ratio* was used, and afterwards translated normally as *reason*. Berti prefers to translate the Greek word *noûs* as *intelligence*, in spite of all mistakes this term may also lead to.

⁸ This is Vico's theoretical viewpoint, according to Th. Viehweg in his *Topik und Jurisprudenz*.

We have chosen, from the public domain, a formal logic problem, in order to use its merely *valid* premises.

The agent we decided to name as Sophia, must cross a river carrying her wolf, her chicken and a handful of corn grains. These are the rules: each one has to be carried at a time, that is to say, the wolf, the chicken and the grain separately. The wolf will eat the chicken if Sophia is not around; the chicken will eat the corn, if Sofia is not there to prevent. No other action is allowed, such as tying the wolf, hiding the grains etc. Sofia must carry one by one across the river: this is the only dogma. This is the problem we propose to the reader.

Well, the solution (if you have it, dear reader) can be obtained deductively, but there is no value involved. Once all premises are indemonstrably given *a priori*, they are only accepted without questioning. The whole demonstration structure is based upon the geometric or arithmetic model; its axioms are considered to be non-discussible and necessarily true principles, within the system it founds. They are, as to say, dogmas. When a system involving norms and dogmas is formed within law, we call it juridical dogmatic. Law has intensively proposed itself as dogmatic, bringing to itself an apologetic discourse of truth. Such an understanding has almost always revealed itself through the discourse of natural or rational law. It is not by chance that the world of science (*episteme*) is the one defined as natural (*physis*), and is characterized as ethereal and perfect. But there is something important to be observed about Aristotle when we analyze the prior and posterior analytics. It is necessary to recognize that, to Aristotle, the world of *episteme* is not necessarily metaphysical. It is in fact regulated by *a priori* commands, originated from indemonstrable causes. Science is the world of infallible rules, not necessarily metaphysical. But infallible does not necessarily means universal or supernatural, in Aristotle's perspective. Infallible is only indemonstrable and, thus, constitutes unconditional premises which demand a plan of apodictic rationality.

Well, human beings live in the Earth, in the sublunary world. This is the world of things that are left over, approximate, verisimilar, the world of enthymematic logic. This is the field of philosophy, where rationality derives from the dialectic of probability and contingency, thus constituting two fields: argumentative and rhetoric. In this matter, operations are made from *topoi*. A *topos* is an *opinion accepted by all, or almost all, or at least by the wise ones* (*Topics*, V). Dialectic is thus the art of arguing for and against.

Now, we have a juridical problem. The circumstances and their interpretation are as follows:

Alcebiades was in a terrible financial situation. His creditors were ready to demand his bankruptcy. Pressed by circumstances, he who only had one real estate, went to his friend Procolus and proposed him to make a mortgage, in order to obtain money enough to avoid bankruptcy. The loaned money corresponded exactly to the real estate value.

Procolus, noticing Alcebiades affliction, proposes to him a simulated selling of the real estate, instead of simply receiving it in mortgage,

claiming that guarantee provided by mortgage might be ineffective before some of the creditors, because there were special creditors, such as those related to taxes and labor debts.

Anxious and frightened, Alcebiades signs a contract selling the real estate to Procolus, for the same value of the loan, which is also the market value of the real estate.

After having received the money, Alcebiades is free from bankruptcy and quickly restores his financial capacity, in order to pay Procolus the money he owed to him.

Having been offered payment plus interests, Procolus says he no longer wants the money, because he prefers to keep the real estate, which had greatly increased its market value. Procolus claimed he had no money to receive, and was the full owner of the real estate.

Facing this situation, Alcebiades consults us about the possibilities of a juridical procedure against Procolus, if there is any. We ask the reader to try to solve the question.

In the juridical field, there are some specific characteristics which can only be understood with dialectics. From now on, the effort of this text will be directed to demonstrate how dialectic-rhetoric thought translates itself into juridical thought. In law, we must, first of all, try to construct arguments from a short catalogue of previously disposed hypothesis. Each hypothesis – which may be understood here as a *topos* – may be, only maybe, used as a major premise. In the foreseen case, Alcebiades intends to annul the sale contract he made with Procolus. He will only succeed in that if he claims that there have been contractual defects which are previously mentioned in the juridical system [in that case, the Brazilian juridical system]. Therefore, the juridical actions can be annulled if one of the following situations is configured: (a) *error*, (b) *deceit*, (c) *coercion*, (d) *simulation*, (e) *fraud against creditors*, (f) *damage* and (g) *theory of mental reserve*. In other words, the juridical system offers a limited series of *a priori* data, but all of them are not derived from nature and, thus, in order to be used, all need to be readily chosen and defended, that is to say, they are not demonstrable.

We believe that claiming *error* is a fragile strategy, because Alcebiades demonstrates, in the deal, the satisfaction of all three qualities that might damage the contract with *error*, if missing: *ability* (Procolus and Alcebiades are able), *licit object* (the owner of the real estate is Alcebiades) and *form ruled or not prohibited by law* (sales contract is legal). *Deceit*, *simulation* and *fraud against creditors* do not match the case, because Alcebiades could not claim *his own turpitude* to benefit himself, because this is prohibited by the juridical system. Neither can *damage* be configured, because it would require that the object of deal were negotiated by a third or less of its market value, besides urgency. Indeed, Alcebiades had urgency, but the value of the loan corresponded to the market value of the real estate. The options left over are *coercion* and *theory of mental reserve* which are not ideal hypothesis, but the “least worse” ones. Alcebiades must, then, demonstrate by argumentation that his will was disturbed (something that harms the principle of autonomy of will), under irresistible coercion. Still, if the sale contract was not annulled by coercion, he might claim the right to a “recondite” clause of reverse sale, which

might be in the field of contractors' mental reserve, although not explicit in the text of the sale contract.

We may, thus, recognize some specific characteristics of juridical thought: A) There is almost never an ideal premise which is perfect for the case. The usage of premises in law is always temerarious, and they can match the case in various possible levels. This also means that each chosen premise depends on a discourse to justify it (rhetorical capacity of persuasion); B) The conduct of Alcebiades will also be defended with rhetoric; it will be necessary to convince the judge (audience) and touch his sensibility in order to demonstrate that Alcebiades has effectively been victim of *coercion* or *mental reserve*. The case solution will be moved by the reasonability of parts in debate, by the usage of common sense; C) There will be a confrontation of arguments between Proculus and Alcebiades, because the first will try to resist in property of the real estate. Therefore, the process will be dialectical, because of the discussion involved. It would be, thus, the art of offering and receiving reasons. Let us see how each of the characteristics just mentioned appears in comparison with Aristotelian thought.

A – There is almost never an ideal, apodictic, premise which is perfect for the case. The usage of premises in law is always temerarious, and they can match the case in a higher or lower level, but always in approximate ways. This also means that each chosen premise depends on a discourse to justify its choice. It functions through a type of ratiocination applicable to those areas in which we cannot count on immediately evident principles (this is a specificity of practical reasoning). As affirmed by Eemeren, Grootendorst & Kruiger: "In Aristotle's *Topics* the term dialectic has a broader meaning. Here, dialectics is the art of reasoning using premises which are not evidently true".⁹

In law, as well as in all dialectical thought, solutions do not emerge from the posing of premises, but from the posing of the problem. Solution turns around a specific case; it does not appear in a system of previously given arguments. This is precisely the most relevant question in Viehweg's view of Aristotle's *Topics*. There is certainly a question of choice among the alternatives of solution to the problem-case. Alternatives must be evaluated according to the reasonability of their usage in case, which is their primary orientation.

B – The conduct of Alcebiades will also be defended with rhetoric; it will be necessary to convince the judge (audience) and touch his sensibility in order to demonstrate that Alcebiades has effectively been victim of *coercion*. The main characteristic of dialectic is to use the art of rationality. Once premises are not an evident truth, its adjustment to the case is the mission of the arguer. It is thus the art of reasoning highlighted by Aristotle's interpreters.¹⁰

⁹ EEMEREN, Frans H. Van; GROOTENDORST, Rob; KRUIGER, Tjark. *Handbook of Argumentation Theory: a critical survey of classical backgrounds and modern studies*. Dordrecht-Holland / Providence-USA: Foris Publications, 1987. p.64.

¹⁰ EEMEREN, Frans H. Van; GROOTENDORST, Rob; KRUIGER, Tjark. *Handbook of Argumentation Theory: a critical survey of classical backgrounds and modern studies*. Dordrecht-Holland / Providence-USA: Foris Publications, 1987. p.64.

Reasonability and common sense. Let us explore this idea, taking advantage of what is said by Brunschwig: When Aristotle refers to dialectic, in fact, he always has in mind the practice of reasonable dialogue, the art or argumentation by means of questions and answers, based upon the Socratic model”¹¹ And also what is said by Eemeren & Grootendorst & Kruiger: “Dialectic was originally the term used to denote a particular argumentative technique in a discussion or debate.”¹² We can see that, when it comes to enthymemes and their degree of certainty, we refer to *probability* instead of *evidence*. Nevertheless, it is necessary to have in mind that what is at stake here is not a calculable and statistic probability, but a probability in the qualitative sense. And this is the central idea of dialectics, which also applies to law. Note that Perelman affirms that “what is accepted is what is verisimilar, but we should not confound this verisimilitude with a calculable probability: contrarily, the meaning of the term *eulógos*, translated as ‘generally accepted’ or ‘acceptable’ has a qualitative aspect and is more connected to the term ‘reasonable’ than too the term ‘probable’.”¹³

C) There will be a confrontation of arguments between Proculus and Alcebiades, because the first will try to resist in property of the real estate. Thus, the process will be dialectical, because of the discussion involved. On dialectics, a previous definition is suitable here. According to Berti, “dialectic derives from *dialégesthai*, to dialogue, not in the sense of *conversation* for mutual entertainment, for instance, but in the sense of *discussing*, with intervention from both sides, contrasting one another. This is a first fundamental difference between apodictic and dialectic: while the former refers to a monologue, the latter is referred to a dialogue”.¹⁴

What characterizes juridical thought is exactly the dialectical effort which consists of discussion to choose the arguments that will decide the case. However, there is certainly a confrontation. Concerning this specific point, Eemeren, Grootendrost & Kruiger, while commenting Aristotle’s dialectic, state that “In philosophical questions the truth will be revealed more expeditiously if we can find arguments both for and against a certain philosophical point of view. Dialectic is thus the art of arguing for and against.”¹⁵

This usage of dialectic, related to “philosophical sciences”, is called *diaporésai*. Berti describes it as follows:

¹¹ BRUNSCHWIG, Jacques. Introduction. In: ARISTÓTELES. *Topiques*. Tme I. Livres I-IV. Tradução e introdução de Jacques Brunschwig. Paris: Les Belles Lettres, 1967. p.x. In the French original text : *Lorsque Aristote parle de dialectique, en effet, il se réfère toujours à la pratique du dialogue raisonné, à l’art d’argumenter par questions et réponses, sur le modèle socratique.*

¹² EEMEREN, Frans H. Van; GROOTENDORST, Rob; KRUIGER, Tjark. *Handbook of Argumentation Theory: a critical survey of classical backgrounds and modern studies*. Dordrecht-Holland / Providence-USA: Foris Publications, 1987. p.63.

¹³ PERELMAN, Chaïm. *L’Empire rhétorique: rhétorique et argumentation*. Paris: J.Vrin, 1977. p.16.

¹⁴ BERTI, Enrico. *As razões de Aristóteles*. Tradução de Dion Davi Macedo. São Paulo: Loyola, 1998. p. 19.

¹⁵ EEMEREN, Frans H. Van; GROOTENDORST, Rob; KRUIGER, Tjark. *Handbook of Argumentation Theory: a critical survey of classical backgrounds and modern studies*. Dordrecht-Holland / Providence-USA: Foris Publications, 1987. p.64.

Remaining in the atmosphere of crossroads, we may say that developing an *aporia* consists in trying to foresee whereto lead both the directions that appear before us, for instance, looking from a higher viewpoint in order to distinguish whether one of them leads us to inaccessible places or to a dead end. This is exactly the operation which, concerning *Topics*, we characterize as deduction of the extreme consequences of each one of the opposed hypothesis, leading us to the purpose of seeing which one of them leads to a contradiction and which, contrarily, does not. Thus, the method Aristotle proposes here to metaphysics coincides with the third usage of dialectics, the 'scientific' one, that is to say, again, a dialectic method which we shall denominate, for comfort, 'diaphoretic' procedure.¹⁶

In order to guarantee safe results in this diaphoretic method, it is necessary to examine all objections, all opposite argumentations. Comparison with court debates is evident here. To a great extent, dialectic argumentative technique is based upon indirect proofs, like *reductio ad impossibile*, because argumentation consists in leading the adversary to contradiction. The defense made by Aristotle of the principle of non-contradiction is a paradigmatic example of how a dialectic refutation can achieve the condition of a true demonstration. Aristotle does even mention here a true and proper 'demonstration' (*apodéixai*), although it is made 'trough refutation' (*elenktikôs*).

3.1.1 – Comparison of the mentioned cases, *Sophia's problem* and *Alcebiades' law-case*:

In the problem Sophia faces, the solution is deductible because it must necessarily depart from premises found *a priori* within the system. Therefore, it contains an alternative that derives from a merely formal reasoning, in which there is no need to criticize the content of premises. The solution will be solely demonstrated and not grounded in fundamentals¹⁷. Diversely, in Alcebiades' law-case, it is necessary to discuss the proposals that are to be taken as premises; it is necessary to characterize Alcebiades' and Procolus' conducts as adequate to the content of the chosen premise. Even though, everything happens in the field of probability, of approximation, and the considered hypothesis is always temerarious. For that reason, the effort of the arguer is needed, his capacity of persuasion. All these elements will depend on the demonstration of reasonability and common sense, in order to convince the audience, and will also involve the poetical art, because this is something that helps in persuasion.

Law is inside the field of rhetoric, for its main goal is to produce consensus, via adhesion of the audience. In Aristotle, rhetoric occupies an intermediate place between poetics and philosophy, in a scale which is ascendant, in the

¹⁶ BERTI, Enrico. *As razões de Aristóteles*. Tradução de Dion Davi Macedo. São Paulo: Loyola, 1998. p.79.

¹⁷ Sophia must carry the chicken to the other side and return to fetch the wolf; after passing the wolf, she must return with the chicken, leave it there and bring the corn. Finally, she must return to fetch the chicken. The wolf and the corn are thus compatible. Sophia must always isolate the chicken from contact with any other element of the problem.

intellectualist sense. Rhetoric is defined as the “faculty of seeing theoretically what, in each case, is capable of generating persuasion” (*Art of Rhetoric*, book I, chapter 2, I, 1355b). True rhetoric must be a rigorous technique of argumentation. Aristotle’s rhetoric is, above all, a rhetoric of proof, or ratiocination, of approximate syllogism.¹⁸

Aristotle praises the utility of rhetoric as a technique to dissect a discourse, not rhetoric’s power to dominate minds. The function of rhetoric consists, thus, not only in persuasion, but also in seeing the means of persuasion which are pertinent to each case, in recognizing what is and what seems to be convincing (*Art of Rhetoric*, 1355b, 10-15). Even though it may be dishonestly used, that does not diminish its value. Aristotle has freed rhetoric from the burden of moral. It is necessary to be capable of defending the pro as well as the contra, not to make them equivalent, but in order to understand the adversary mechanism of argumentation and, thus, refute it. Aristotle believes that the true and the just are by nature stronger than their contraries (*Art of Rhetoric*, 1355a, 37-38). This is also how juridical praxis works.

Ricoeur stresses the broadness of Aristotelian rhetoric, which is related to poetics and to philosophy at the same time. This distinction, which is present inside the art of rhetoric, evokes the distinction between, on one side, the point of view of literature, of oratory, that is to say, of all of those who are worried about the form of discourse, its style and beauty and, on the other side, the strictly argumentative point of view, of all of those worried with the structure and the persuasive or conclusive force of arguments. Ancient rhetoric experts, when they became worried with the phenomenon of adhesion, they only thought of the emotive effect that discourse could generate. In other words, they only cared about style, expression and reception by the listeners. This school tended to concentrate on ornaments, contributing thus to make style more artificial, flowery or bombastic. The approximation to oratory is evident, being those studies included in the old treatises on the theory of *elocutio*, or theory of style – which concentrated mainly on developing stylistic skills to make a speech more beautiful – and on the theory of composition of discourse, or *compositio*. Together, these two theories formed what Ricoeur called *restricted rhetoric*. Ricoeur observes that once it distanced itself from its philosophical basis and came closer to poetics (as a stylistic study), rhetoric was a victim of the disregard of occidental tradition:

¹⁸ To what concerns this question, it must be taken into account that Aristotle did not exactly oppose emotions to reason. Practical knowledge and the ethic notion of virtue, in Aristotle’s view, involve emotions, which need to be educated in order to be rational. Educated emotion would be in harmony with good life and would be essential, as a motivating force of virtue. Without emotions, virtuous actions would be impossible. As synthesized by Nussbaum: “All of this is part of the equipment of the person practical wisdom, part of what practical rationality is. Rationality recognizes truth; the recognition of some ethical truths is impossible without emotion; indeed, certain emotions centrally involve such recognitions.” (cf. NUSSBAUM, Martha Craven. *Aristotle on Emotions and Rational Persuasion*. In: RORTY, Amélie Oksenberg. *Aristotle’s Rhetoric*. University of California Press, 1996. pp.303-323, p.316-317). According to Nussbaum’s interpretation, Aristotle believes that philosophy, alone, would be incapable of molding souls, being thus necessary, in the beginning, a sort of entrainment of emotions, as a part of the process of education (*paideia*), which would provide emotions stable and able to philosophize.

For Aristotle, rhetoric covers three areas. A theory of argumentation (*inventio*, the 'invention' of arguments and proofs) constitutes the principal axis of rhetoric and at the same time provides the decisive link between rhetoric and demonstrative logic and therefore with philosophy (this theory of argumentation by itself takes up two-thirds of the treatise). Rhetoric also encompasses a theory of style (*elocutio*) and, finally, a theory of composition (*compositio*). Compared to this, what the latest treatises on rhetoric offer us is a 'restricted rhetoric', restricted first to a theory of style and then to the theory of tropes. The history of rhetoric is an ironic tale of diminishing returns. This is one of the causes of the death of rhetoric: in reducing itself thus to one of its parts, rhetoric simultaneously lost the nexus that bound it through dialectic to philosophy; and once this link was lost, rhetoric became an erratic and futile discipline.¹⁹

In Ricoeur's interpretation on the relationship between Aristotelian rhetoric and dialectics, the author stresses on point of contact, which is: the two of them are related to popular truth, to opinions accepted by the majority of people or by the wisest ones. To what concerns differences, first, rhetoric appears in concrete situations – deliberations of political assemblies (deliberative gender), judgments in court (judicial gender) and in public speeches of praise or censure (epidictic gender); second difference, derived from the first one: the art of rhetoric is related only to judgments in individual situations. This is precisely the case of law, in which an abstract norm is to be concretized via judicial decision. Furthermore, rhetoric could not be absorbed into a purely logical and argumentative discipline, because it addresses itself to the listener (*Art of Rhetoric*, 1404a, 4). Rhetoric cannot put aside the skill of the speaker and the mood of the audience, including thus, although complementarily, emotions, passions, habits and beliefs (*pathos* and *ethos*). Ricoeur affirms, in conclusion, that rhetoric is not dissolved into dialectics.

4 – The ethic question of the law: critics to eristic and sophistic

The main proposal of this text is to demonstrate that rhetoric and argumentation, by themselves, do not represent a danger to the law. Contrarily, they are useful as methods of ratiocination which may diminish the risk of mistakes. Argumentative dialectics and rhetoric are, therefore, methods which aid the effectiveness of justice. The common vices of law do not derive from its techniques of ratiocination, but from external factors, such as dishonesty of arguers. That does not mean rhetoric is a problem itself, because the same would happen in any usage of *logos*.

The reasoning that does not fit to the law is exactly the formal one, for this kind of ratiocination is typical of natural sciences, of the ethereal and perfect world. Law belongs to "sublunary" world, which is imperfect. The use of apodictic logics in law would require unconditional and indemonstrable premises. This vice of understanding came to us from the time when the law would rely upon juridical naturalism and rationalism, which were beliefs in transcendental truth. If

¹⁹ RICOEUR, Paul. Between rhetoric and poetics. In: RORTY, Amélie Oksenberg. Aristotle's Rhetoric. University of California Press, 1996. pp.324-384. p. 324.

juridical conflicts were like Sophia's problem, formal logics would be useful. But juridical confrontations usually are like those of Proculus and Alcebiades: their actions are not captured within a single abstract and general dimension. There is simulation, there is some guilt shared, there is mistreat and greed. There is, above all, values like one's desire of maintaining the property of his house. In this field, only reasonability emerged from dialectics is useful.

When ethics becomes absent from juridical praxis, this happens in the field of dialectics and is called eristic, which is the corruption of dialectics. Dialectic and eristic syllogisms differ in that dialectic syllogism is based upon probable premises, defined by Aristotle as "opinions sheltered by all, or by the majority or by the wise ones and, among these, by the most notable and illustrated" (*Topics*, I, 1, 100b), while eristic syllogism is a form of falsification of dialectics, once it is based upon opinions which appear to be probable but, in fact, are not. Eristic leads to mistake. Dialectics lead to explication (from Latin radicals *ex* plus *plica*: fold outwards, unfold) of the problem.

Dialectic ratiocination, as formulated by Aristotle, has been treated with great injustice when equalized to eristic, which is merely a technique at the service of evil interests. According to Berti:

Eristic syllogism is therefore only a bad imitation, a counterfeit of dialectic syllogism and, in general, eristic, that is to say, the practice of mere contestation (*eris*, contestation, litigation), is not a true form of rationality, but much more a deformation of the authentic form of rationality, which is dialectics. Effectively, eristic does not has the critical analysis of a thesis for its goal, but only wishes to succeed in a discussion, even though using the least loyal means, such as deceit (once it is the attempt to make appearance and falseness be taken for the truth).²⁰

In the *Topics*, Aristotle shows how the dialectic method provides verisimilar conclusions on any proposed subject. It seems to us adequate to compare this posture with the one adopted by law operators. In topics as well as in the law, there is the construction of a *techné*, which is structured with rational and discursive abilities, searching for persuasion. Dialectics is the practice of a discussion oriented towards proving the force of a thesis; juridical praxis is a discussion oriented towards the defense of a law-case. Nonetheless, the lack of ethics in any of the fields just mentioned occurs through the corruption of *logos* (read here in the sense of a system which produces the premises). And corruption of *logos* is a question placed outside dialectics, because it is no longer a matter of ratiocination, but of prevarication of arguments.

Logics operate an irrefutable demonstration, using the method of evidences, that is to say, there must be an enchainment of actions to make Sofia reach the other side of the river with her protected beings. On the other hand, *enthymemes* or dialectic syllogisms, with premises that may be refuted, would

²⁰ BERTI, Enrico. As razões de Aristóteles. Tradução de Dion Davi Macedo. São Paulo:Loyola, 1998. p.26-27.

be capable of producing the defense of Alcebiades.

Aristotle classifies the premises of dialectic ratiocination into four groups: proofs, examples, verisimilitudes and signs. None of these premises is as rigorous as logical premises, and their degrees of certitude are various. A different type of *enthymeme* derives from each of these classes of premises: apodictic²¹, inductive²², anapodictic²³ and apparent²⁴ *enthymemes*. The vices of the system must be accidental, mere mistakes, never proposed by force. The logic of the system tends by itself to solve the imperfections of such system. But if the vice is external, an evil intent is at stake, and not even the logical system would be immune to it.

Berti finds four utilities of rhetoric²⁵. It allows to avoid a reproachable thing, which is to lose a cause due to inferiority, once the true and the just are by nature stronger than its opposites, according to Aristotle. Rhetoric allows arguing where a more rigorous science is not possible. It teaches how to start from common-places to create arguments. It has scientific and philosophical utilities. All in all, it allows one to persuade others about opposite things, thus developing aporiai on both directions. It may be beneficial to what concerns an equitable use of the ability of making discourses. Well, if juridical practice succeeds in benefiting from these four gains, we believe it will be confidently heading towards justice. And we mean not a transcendental justice, but a juridical and practical one.

²¹ The apodictic *enthymeme* is the certain indicium, the one which cannot be diversely. It is approximate to scientific syllogism, although it is based upon a universality of experience, only (cf. BARTHES, Roland. *A retórica antiga*. In: COHEN, J., et. al. *Pesquisas de retórica*. Petrópolis: Vozes, 1975. p.147-221.p.191-192).

²² Sometimes, induction is opposed to *enthymeme*. In other occasions, it is taken as one of its subspecies (cf. PLEBE, Armando. *Breve história da retórica antiga*. São Paulo: EPU: EDUSP, 1978. p.45).

²³ The certainty of this *enthymeme* is based upon the general idea that, contrarily to the universal, it is non-necessary and determined by the opinion of the larger number (cf. BARTHES, Roland. *A retórica antiga*. In: COHEN, J., et. al. *Pesquisas de retórica*. Petrópolis: Vozes, 1975. p.147-221.p.192-193).

²⁴ The sign is a more ambiguous and very uncertain indicium. It is so uncertain that Quintilian excluded it from the technique of oratory (cf. BARTHES, Roland. *A retórica antiga*. In: COHEN, J., et. al. *Pesquisas de retórica*. Petrópolis: Vozes, 1975. p.147-221.p.193).

²⁵ BERTI, Enrico. *As razões de Aristóteles*. Tradução de Dion Davi Macedo. São Paulo: Loyola, 1998. p.173-174.