

# **Sense and Sensibility – Classic Rhetoric as a Model for Modern Legal Thinking**

Hans Petter Graver

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## 1 From Law to Legal Rhetoric

It is easy to convince oneself that one is right. Persuading others of the correctness of one's views is a much more ambitious prospect. Even judges, who can decide what the prevailing law is, must have support for their standpoint: from the courts of appeal in the case of judges in lower instances or, in the case of a Supreme Court judge, from colleagues with whom a case is to be decided on together or who will subsequently decide on whether and how much the judgment is to be followed as precedent.

Many associate the law with something in force. Pronouncements as to what is correct or incorrect are perceived in relation to how close they come to what the prevailing law is at a given point in time. 'The prevailing law' is perhaps not perceived as being something fixed on all points, and we perhaps do not know all the details of its content. The decision must therefore be supplemented with appraisals and suppositions. The core of the work of legal professionals is nevertheless a description of the law, even though the description must be supplemented with appraisals, when the state of the law is uncertain or when it is thought to be unsatisfactory.

An alternative approach is to view the law as something which is constantly being created and recreated in a context of social interaction.<sup>1</sup> Law is not just something lawyers may take for granted, but something for which they bear a collective responsibility to produce and reproduce on a continuous basis. The advancement of legal knowledge is also a collective project. This it has in common with all organised knowledge development but, unlike knowledge development in many other fields, it is not cumulative. This is because the practical application of the law takes place through the courts and the administration thereof does not resolve practical challenges in the field in the same manner as engineers who resolve a technical challenge or physicians who break a genetic code. Lawyers resolve problems by ending discussions. The results are not knowledge which can then become incorporated into the specialised knowledge of the field, but rather examples which may influence the references next time a discussion takes place. This is even more true of legislation, which also does not resolve legal problems in the same manner as problem-solving in more purely technical fields.

In the following I will examine in detail the consequences this has for theoretical descriptions of the law and for legal method to view the law as a social process rather than as a system of norms used to resolve legal issues. In such a context, the task of lawyers does not consist of finding legal solutions, but in persuading others and each other of what the best solutions are at a given point in time. In that regard there is no difference between the work of lawyers, judges and legal researchers.<sup>2</sup> The perspective shifts from being an individual-oriented one to a social one, from law as a method to gain insight and arrive at positions to law as rhetoric.

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1 See Katharina Sobota, *The Rhetorical Construction of Law*, *International Journal for the Semiotics of Law* V/13 [1992] s. 39-54.

2 Alain Lempereur, *Logic or Rhetoric in Law?*, *Argumentation* 5: 283-297, 1991.

## 2 Knowledge, Norms and Appraisals

It is well known in Norwegian law that arriving at a decision on a legal issue requires an appraisal on the part of the party applying the law, and that many of these appraisals cannot be viewed as being significantly and ultimately norm-driven.<sup>3</sup> It is nevertheless rather unusual to adopt the point of view that such appraisals take place in an interaction between a number of parties: the appraisals tend to be viewed more as an individual matter, as a matter of the thorough deliberations and weighing-up by the party applying the law in the light of the legal material at hand and of the rules governing how those deliberations are to take place. Such an individualistic approach is in fact rather strange, considering that it is generally accepted that the conclusion of the party applying the law has little worth if it does not have the support of others. This is true even of the Supreme Court (Høyesterett), where individual judges must win over endorsement for their viewpoints from the other judges in order to side with the majority.<sup>4</sup> If a Supreme Court judge regularly fails to obtain endorsement from others, be they those who work with the legislation or those who will give judgment in subsequent cases, the authority of the Court will quickly be undermined.

Current legal method shows that the law is often open in the sense that in many cases it is possible to give correct grounds for different results. However, the law is also open in another sense which is less recognized: in many cases a number of different yet correct sets of grounds may be given for the same result.<sup>5</sup> This has been obvious in a number of judgments from the Supreme Court, where the Court has given a number of sets of reasons, each of which is in itself sufficient for the purposes of giving judgment, or where the judges disagree on the grounds but agree on the result. It is not possible to conclude from such cases that in all cases where a court or legal author only gives one set of reasons it would not have been possible to give grounds for the result in a different manner. On the contrary, it is reasonable to assume that, in many cases, another set of reasons would have done just as well. The question which may be posed in any event is why a party applying the law chooses one set of reasons over another when alternatives are available. This shows that different people can appreciate different sets of reasons. It is also possible to choose sets of reasons based on considerations such as whom it is important to consult and from whom it is important to obtain endorsement. For a judge it may be the

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3 See Torstein Eckhoff, *Rettskildelære*, 5th ed., by Jan E. Helgesen, Oslo, 2001, pp. 27-28. Sverre Blandhol, *Retorikk og juss*, in Øivind Andersen and Kjell Lars Berge (eds.) *Retorikkens relevans*, Norsk sakprosa, Oslo, 2003 (also in *TJR* 2003 pp. 499-518), takes the view that there are structural similarities between Eckhoff's sources of law doctrine and rhetoric's line of argument doctrine. Apart from the fact that Eckhoff refers to the indeterminate in lawyers' appraisals, these similarities are difficult to detect. Eckhoff's analysis does, however, open up the possibility of analysing applications of law using rhetoric's approach and terms.

4 See Henrik Zahle's description of the dynamic between judges in the Danish Supreme Court (Højesteret) in *Praktisk retsfilosofi*, Copenhagen, 2005, pp. 119-133.

5 See Wolfgang Gast, *Juristische Rhetorik*, 4th ed., Heidelberg, 2006, p. 10.

parties to a case or the general development of the law; for a jurisprudence author it may be that what makes the most persuasive set of reasons may depend on whether inspiration is drawn from practical applications of the law, colleagues in jurisprudence circles or decision-makers in the public administration or political bodies.

### 3 Legal Argument and Rhetoric

Lawyers present argument. This is so when a judge gives reasons for judgment, when a lawyer pleads a case and when a legal researcher writes an article or a book. Putting together a line of argument is significant for the party doing it in that it contributes to developing a viewpoint on how an issue can and should be resolved. That viewpoint is usually developed based on an examination of arguments which have been presented by others in relation to a given case, in a set of reasons for judgment or in a legal opinion. The arguments one chooses to present are not merely chosen to persuade oneself, but also in order to make the result one wishes to obtain seem persuasive for others. Case-law is thus applied rhetoric, if rhetoric is understood as being the manner in which to obtain endorsement for a viewpoint through argument.

There is little doubt that, in olden times, law was understood to be a topic of rhetoric. Legal discourse is one of the three forms of discourse described by Aristotle as being in the field of rhetoric. For Cicero and Quintilian, legal discourse is the most central means of their presentation of rhetoric. In the European tradition, rhetoric had a natural place in the study of law until the emergence of the rationalist natural law in the 1600s.<sup>6</sup> From that time onwards, however, the rhetorical traditional in the application of the law and jurisprudence was broken. The rationalist school was, by its very nature, anti-rhetorical. Moreover, the emphasis on discussion of controversial issues and uncertainty in legal viewpoints and the application of law was in conflict with the increasing concentration of power in the hands of States where control by judicial discretion was an important factor.<sup>7</sup> The German historical school also led to rhetoric being excluded from the study of Roman law.<sup>8</sup> The subsequent modernist school, which focused on a more scholarly approach to applying the law, and which in Norway reached its height with Alf Ross, had no place for rhetoric.

As mentioned earlier, there are good reasons for reintroducing rhetoric as a framework for description and analysis of the work of legal professionals, both in theoretical and practical contexts. Rhetoric, understood as the ability, in each particular case, to see the available means of persuasion, is an approach which can be used to train lawyers and to analyse their work. For training purposes this

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6 See Theodor Viehweg, *Topic und Jurisprudenz*, Munich, 1974, § 5.

7 Hanns Hohmann, *Rhetoric and Dialectic: Some Historical and Legal Perspectives*, *Argumentation* 14: 223–234, 2000, p. 230.

8 See Olga Tellegen-Couperus, *Introduction* in Tellegen-Couperus (ed.), *Quintilian and the Law*, Leuven 2003.

means going more directly to the heart of the matter than is done under the current approach, which proceeds via a fiction that there is prevailing law which is a means of reaching a decision by using a specific, and not particularly well-defined, method. For theoretical purposes this gives an approach which can remain at the descriptive level without going into descriptions of conduct and lawfulness or a 'judges' ideology' which is difficult to grasp.

At the same time, it offers possibilities for drawing on experience which has been built up through several thousand years of systematic work. What makes people appear to be credible and allow themselves to be persuaded is, as a rule, a purely empirical issue. It also involves a number of complex, inter-related matters for which we have not yet developed theories and methods for elucidating in a manner which satisfies modern scholarly requirements. At a basic level, inter-personal relations have not changed. In other words, we have not come very much further in these fields than in ancient times.<sup>9</sup> This means that the knowledge which has been built up through earlier systematic observations and thinking is still of value to us in current scholarly work. It may be old-fashioned, but it is far from obsolete.

#### 4 Rhetoric as a Description of the Work of Legal Professionals

As in all fields, the work of legal professionals may be understood at three levels: at the practical level, as a body of knowledge on how to succeed in practice and as theoretical knowledge about what the work is.<sup>10</sup> A rhetorical analysis of the law can also be conducted at these three levels: as an analysis of the rhetorical means used in a specific legal action, such as a legislative text, judgment or article; as a doctrine on the principles for good, persuasive legal presentation in various contexts; and as an analysis of the possible means of persuasion in each case.

At the practical level, rhetoric provides a method for obtaining endorsement for viewpoints in issues where secure points of reference in logic and experience are lacking. Rhetoric does not replace logic and empirical knowledge where the latter give certain answers. As a rule, however, neither logic nor empirical knowledge provides answers to the questions lawyers pose regarding what occurred in a specific case, how different situations should be classified and judged according to the legal rules and how endorsement for a viewpoint on such circumstances can best be obtained. Rhetoric makes it possible to gather support for assertions the correctness of which may not be demonstrated through logical conclusions or reliable evidence. This is generally the case for assertions

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9 Empirical studies concentrate on the basic ethos, logos and pathos of Aristotle, and mostly confirm the points of the classics and the complexity of factors which together make it difficult to attach more than fairly general and obvious hypotheses with empirical methods, see William J. McGuire, *Input and Output Variables Currently Promising for Constructing Persuasive Communications*, in Rice and Atkin (eds.) *Public Communication Campaigns*, 3rd ed., Thousand Oaks, 2001.

10 Or, if one wishes, in a classic context such as *ars, prudentia and scientia*. See Katharina Sobota, *Sachlichkeit, Rhetorische Kunst der Juristen*, Frankfurt am Main, 1990, p. 4.

about values and norms.<sup>11</sup> Even those values and norms which are considered to be fairly solid, such as the inviolability of the individual or the right to cross-examination, are nonetheless so broad that everyday requirements for legal answers in the various contexts often cannot unequivocally be inferred from them.

Whether a line of argument is capable of persuasion depends on how credible the person presenting it is, how it is supported with evidence and arguments, and how that evidence and those arguments influence the recipient. Thus the three central questions for anyone wishing to become involved in how legal questions are to be resolved are the three classic ones: what is the most persuasive line of argument, how to appear credible, and what is necessary to reach precisely those people sought to be addressed in the specific case, or *logos, ethos and pathos*.

There is a connection between the credibility of the person conveying a message, the message itself and the issue of whether the recipients put their trust in the message. Even in academic circles, the speaker's credibility affects whether or not the argument is accepted. The manner in which the line of argument is developed also helps to strengthen or weaken the credibility of the party presenting it. A line of argument which is disorganised and paralogical will undermine not only the argument itself, but also the credibility of the party presenting it. Credibility is ultimately a feeling or attitude on the part of the recipient. As hermeneutics teach us, the recipient's prejudices influence the manner in which the message is perceived. Influencing those prejudices helps to strengthen or weaken credibility. This is why there is a clear connection between what in rhetorical circles are referred to as *ethos* and *pathos*. Despite the connections between credibility, line of argument and the manner in which the recipient perceives the credibility of the party conveying the message, a distinction should be drawn between them. Accordingly, in the following, I will comment briefly on each of these three aspects of legal argument separately.

## 5 Logos: Evidence and Argument<sup>12</sup>

Beginning with the question of what means of persuasion there are in relation to a question is a good starting point for finding a legal solution to the problem. The ability to see what means of persuasion there are depends, first, on the ability to see where there is common ground and where there is uncertainty. Points of common agreement will often resolve an issue. In many cases they will highlight what is worth discussing, whilst in other cases they will provide a basis for presenting argument. The second key skill is the ability to see what means of persuasion are to be found in the points of uncertainty. This includes finding out

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11 See Chaim Perelman, *Justice, Law and Argument*, Dordrecht, 1980 pp. 55-65.

12 In the following I will use the term 'evidence' in a broader sense than is usual in a legal context and allow it to cover also the basis for a standpoint on legal issues. A validly-enacted legislative text is thus evidence for the existence of a legal rule, and widespread conduct, combined with an interpretation of the law, is evidence of a rule of common law.

what rules or general practices there might be, how they can be interpreted and what could weigh in favour of following them or disregarding them. The third skill is the ability to see what means there are to call supposedly certain factors into question. A supposedly certain rule need not always be followed. The circumstances may be extraordinary or the situation may have changed. This requires the ability to think of all possible arguments, analyse them and ascertain their merit, which in turn requires the ability to be able to argue the opposite point of view from one's own or the view advocated by others, and the ability to be able to structure lines of argument and develop them into a persuasive whole.

The classic rhetorical approach starts with the premise that the issues in any dispute relate to three basic questions: conjecture, definition and quality, i.e. Does it exist? What is it? What kind of thing is it?<sup>13</sup> Both the factual and legal issues of the case relate to these three questions. The first question relates to facts and appraisal of evidence. The second relates to which legal rules are to be applied to the issue, the conditions of application of those rules and the actual subsumption thereunder. The third question relates to the legal consequences: does the breach give rise to compensation, does the failure to handle the matter correctly lead to invalidity, what sentence is to be imposed, etc.?

With the legal questions it is possible to consider questions as to which rules are to be found in a given legal order, the content of those rules and how they should be harmonised. Quintilian says that it can all be reduced to four questions. In addition to conjecture, definition and quality he adds a fourth aspect: the justification for applying the rules in question to the case. This can be seen as a purely procedural question relating to conditions for bringing an action and a court's jurisdiction, but it can also be construed as a question as to whether there is justification for disregarding the rules in a specific case. Aristotle deals with this explicitly and gives arguments for not following a law where, for example, it is a bad law or the result is unreasonable or unfair.<sup>14</sup>

In rhetoric a distinction is drawn between evidence taken from outside the field of rhetoric (non-technical), and evidence which the party pleading the case takes from the case itself (technical) and therefore, after a fashion, puts together.<sup>15</sup> Evidence taken from external sources includes texts, earlier judgments, generally-held views, witness statements and fair evidence. In the Norwegian context in relation to legal questions, it may be said that the list of sources of law, apart from the concept of considerations of consequences and fairness (known in Norwegian law as 'reelle hensyn', which relates to the substantive considerations of the case, whilst taking into account the practical consequences of the decision), is a list of such external evidence or places from where arguments may be drawn. Some of them carry the weight of authority in the sense that the mere fact that they exist is proof of a legal point or a legal rule. This is particularly true of legislation, precedent, international obligations and, to a certain extent, a situation which has become established through practice or

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13 See, for example, Quintilian, *Institutio Oratoria*, Loeb Classical Library, Cambridge, Mass. 2001, book 3.6.

14 Aristotle, *Rhetoric*, 1375b.

15 Quintilian, *Institutio Oratoria*, Loeb Classical Library, Cambridge, Mass. 2001, book 5.1.

custom. This does not mean that this evidence cannot be rebutted, but simply that no further support is required in the form of, say, argument in order for it to be persuasive. Other forms of evidence, such as legal literature, are no more persuasive than the arguments they contain. Preparatory documents (often referred to by the French term ‘travaux préparatoires’) are in a somewhat unique position. Because of the strong traditional link in Norway between the legislature and the application of the law, some of the statements in the preparatory documents carry authoritative weight. Traditionally in Norway, the legislature has been permitted a certain amount of normative activity through preparatory documents. Other statements in the preparatory documents must be construed as a background for the legislative text ultimately enacted, and provide arguments in so far as they can serve as an indication of aspects such as the legislature’s purpose, the meaning to be attached to words or expressions chosen for the legislative text, and what the drafters of the legislation have expressly taken a position on and what they have not. Yet other statements in the preparatory documents must be seen as a description and line of argument on an equal footing with sources such as legal theory.

The other type of evidence is that which is drawn from the specific case or question which is being dealt with. This type of evidence is particularly crucial for the arguments on legal points.<sup>16</sup> Quintilian defines ‘argument’ as a ‘process of reasoning which provides proof and enables one thing to be inferred from another and confirms facts which are uncertain by reference to facts which are certain’.<sup>17</sup>

Rhetoric also has a list of ‘commonplaces’ from where arguments may be derived: ‘*topoi*’ or ‘*argumentorum locos (locus communis)*’. Many of these commonplaces relate to arguments for facts such as general characteristics of persons, places and the passage of time. Some are more general and also significant for claims about theoretical points such as the existence, interpretation and application of legal rules. They comprise general requirements of logic and also more loosely formulated empirical statements. Quintilian mentions, *inter alia*, that definitions can provide arguments for determining in which group something belongs based on its nature, class and properties. He adds that arguments may be based on similarities, differences, opposites, conflict, consequences, causes and reasoning of greater to lesser. Consequences fall into two categories: factual and normative, that is, the consequences a decision will have for how other, similar cases are to be decided.

With these starting points in classical rhetoric, it is possible to draw up a table or list of questions to be answered in relation to a point of legal reasoning and state which arguments are relevant in answering those questions. This exercise will provide general guidance as to how legal reasoning should be structured so as to be persuasive or, in the terms of classical rhetoric, the requirements of the *logos* of legal discourse.<sup>18</sup>

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16 The others are signs, that is, indications and examples; see Quintilian, *Institutio Oratoria*, Loeb Classical Library, Cambridge, Mass. 2001, book 5.9. These are of particular importance for the appraisal of the facts.

17 Op.cit bok 5.10.

18 I have provided guidance on this in my book *Rettsretorikk – en metodelære*, Bergen, 2007.



When legal rules are to be applied to the facts of a case, it must be established whether a given rule can be said to form part of the relevant legal order. All types of evidence and arguments may be used to establish this. It is, however, useful to distinguish between written and unwritten rules. For written rules, a text enacted by a competent body is virtually irrefutable proof that the rule exists. For unwritten rules, the situation is more complex. Certain types of evidence can provide fairly solid indications. This is particularly true of judgments of the Supreme Court in Norwegian law and decisions from international courts which have jurisdiction to give binding judgments on the interpretation of international rules. The case-law of other courts, administrative practice and private-sector practice can give indications of the existence of a rule, although these carry less weight than judgments of the Supreme Court. One decision is rarely sufficient; usually there must be a regular, widespread pattern. In addition, it is common to require that practice be a reflection of an interpretation of the law. Interpretations of the law can also be an indication that a rule exists. Lastly, rules may be 'proven' with arguments derived from a specific case, using the classic commonplaces of rhetoric.

When a given rule has been found, two further issues arise. The first is what conditions of application the rule contains and whether those conditions are met in the specific case. The second is what consequences or results follow from the application of the rule. These two issues are well known in the distinction between a rule's legal factual facet (conditional facet) and legal consequence facet. These issues must be resolved primarily through an interpretation of the rule. This takes place through the use of arguments for different interpretation outcomes, where both authoritative arguments and other external evidence, as well as arguments derived from the specific question or case, may be considered. In the case of written rules, aspects such as the wording, legislative background and legislature's purpose will play a central role in this process. For rules established on the basis of practice, in addition to an examination of relevant actual decisions and the reasoning behind them, arguments as to which group something belongs based on its nature, class and properties, as well as arguments relating to similarities, differences, opposites or conflict, play a central role.

The fourth question which arises once a rule has been established and interpreted is whether there are reasons not to apply it to a specific or hypothetical case. A number of key questions are again central here, and again it is helpful to draw a distinction between written and unwritten rules. In the case of written rules, questions arise as to whether the law is a good one from a technical point of view or whether it is inconsistent, self-contradictory or lacks proper reasons. It may also conflict with other written rules, or with unwritten rules or principles. It may be that it is inappropriate for the specific case, either because the situation has changed since the rule was enacted or because the case falls outside the sphere the legislature examined or intended to regulate. In the case of unwritten rules, the doctrine of precedent and the techniques for distinguishing precedents are helpful. In addition to arguments to the effect that a written rule is not appropriate and for distinguishing earlier, authoritative decisions or judgments, it is possible to put forward arguments that it would be reasonable, fair and appropriate not to apply a rule. If the rule does not have a basis in an authoritative text or judgment, but only, say, in a generally-held view,

there is more latitude to use such arguments. They are not, however, entirely excluded in relation to laws or the case-law of the Supreme Court, especially when they can be combined with other arguments not to follow the law.

## 6 Ethos: Authority and Credibility

A party presenting arguments and wishing to gain acceptance for them must have credibility. Credibility is not something which can be gained through argument. According to Aristotle, there are three factors outside the production of evidence which make us believe something: a person's good sense, good moral character, and goodwill. A person who gives the impression of having all three of these characteristics will inevitably win the confidence of listeners.<sup>19</sup> Credibility or trust is thus shaped by our ideas about the person who is presenting the arguments and what he or she represents as a person and as a representative of an institution. These ideas may be derived from our direct knowledge of the person and institution and through symbols, actions and development of the arguments through factors such as language and style.

Lawyers develop trust for their views by building up trust for the law in general, by 'borrowing from' that trust when they present argument and by building up personal authority or ethos. This is wise, as studies show that people consistently have greater trust in institutions than in the people who occupy positions in those institutions.<sup>20</sup> Likewise, people's trust in the law as such is greater than their trust in the actual legal institutions with formal authority.<sup>21</sup>

The law's ethos has partly a formal basis – what is held to be the prevailing law by an administrative body or court must be abided by when the appeal possibilities have been exhausted. A final decision or legally binding judgment is a virtually unbeatable argument in the sense that there is not much scope to have it challenged or changed. Legal jurisdiction or authority, such as that possessed by the legislature, courts, prosecuting authorities and public administration, confers formal authority.

The choice of terms can be used to foster authority and credibility in legal argument. For example, when a lawyer uses terms such as 'section' and 'subsection' in referring to a specific part of a piece of legislation, it is to emphasise that a legislative text is not like any other text. Other aspects of the language used by lawyers are indicative of a higher register of discourse: the use of Latin (*ratio decidendi*, *obiter dictum*, *stare decisis*, *locus standi*, *nemo dat quod non habet*, *res judicata*), the use of set legal expressions, each with its specific content 'behind' the expression (material breach, vital defect, gross negligence, force majeure), the tendency to use several words to designate the same thing,

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19 Aristotle, *Rhetoric*, translated by W. Rhys Roberts, Book II, Chapter 1 (1378a).

20 See Tom Christensen and Per Læg Reid, *Trust in Government – the Relative Importance of Service Satisfaction, Political Factors and Demography*, Rokkansenteret Working Paper 18-2002, Bergen, p. 17.

21 According to Leif Petter Olaussen in the Norwegian lawyers' association publication *Advokatbladet*, No 5, 2003, 80% of people have trust in 'the legal system as such'.

when one might have sufficed in a non-legal setting (aid and abet, cease and desist, null and void). Such use of language creates a distance in that the text usually becomes difficult for ordinary people to understand. This can create the impression that the author of the text is noble and learned.

Other aspects of the chosen use of language reinforce this impression. The tendency by judges to speak in the third person rather than the first person ('the Court finds'), unless a judge is writing a dissenting opinion, is one example. Moreover, the court does not simply express its views, it 'finds', 'holds' and 'rules', thereby indicating authority. Even in referring to its own earlier judgments, the Supreme Court does not use the term 'we', as in 'we held'; rather, it states that 'in Case X, the Court held'. This manner of appearing directly under the credibility of the institution is used mostly by judges and public administrative bodies. Sometimes, lawyers, too, have clients who lend credibility to their argument, as when, for example, a lawyer can state 'the Government takes the view that ...'.

Another manner in which to shift the focus away from the speaker is to use logical constructions of thought in the argument, using expressions such as 'it follows that', 'this indicates that' or 'the conclusion is that', etc. Expressions such as these give the impression that the conclusion is the result of a logical syllogism or calculation, which in most cases is incorrect, since the speaker chooses how he or she will formulate the major premise (the norm) and the minor premise (facts) and weigh up the interests.<sup>22</sup> Yet another approach is the use of references, which is often done more to confer greater authority on the arguments than to give the source of them.

Legal language also uses a number of metaphors which emphasise the objective aspect and play down the subjective element in legal reasoning.<sup>23</sup> Suffice it to recall the expression 'sources of law', which conveys the idea that has a source which must be found, or that the law is something that flows out of the party applying the law and that the outcome is to be found in what springs from that person. The expressions 'weighing-up' and 'weighing', used to describe the process leading up to persuasion and appraisal of the arguments, convey objective properties on those arguments. Even though expressions such as 'the weight of an argument' are also used in everyday speech, it is not an expression often used in argumentation theory.<sup>24</sup> Another widespread use of metaphor is the employment of verbs which ascribe properties of animate beings to abstract or social phenomena, as in 'considerations of fairness call for', 'the law has as its purpose', 'this judgment leads us to conclude', etc.

For judges, in addition to language and style, there is also the matter that they abide by an unwritten rule not to comment on a case pending before them

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22 See Katharina Sobota, *Sachlichkeit, Rhetorische Kunst der Juristen*, Frankfurt am Main, 1990 p. 47 et seq.

23 See Ånde Somby, *Juss som retorikk*, Oslo, 1999 p. 33.

24 Regarding differences in terminology between lawyers' training in legal argument and argumentation theory, see Eivind Kolflaath, *Språk og argumentasjon – med eksempler fra juss*, Bergen, 2004, pp. 110-111.

or in which judgment has been delivered.<sup>25</sup> Leif Petter Olaussen says that ‘...judges’ anonymity helps to maintain the impression that judges are *independent* and, to a large extent, “like most people”, as judges must be if they are to enjoy the trust of Norwegian society’.<sup>26</sup>

Even though lawyers often use the case, the law and language in order to foster credibility, they are also, to varying degrees, also dependent on purely personal ethos.<sup>27</sup> For parties who write legal literature in the form of articles and treatises, personal credibility clearly has a role to play. Lawyers act in a less anonymous manner than judges and are therefore more dependent on their personal ability to persuade. Even judges, however, cannot disregard completely their personal authority. Rank, power and success are meaningful for the personal credibility of a person trained in the law, including inside legal circles. If a person holds a high position in the legal hierarchy, it is usually a sign that that person’s formal qualifications are in order, since it is not usually possible to attain the highest positions in the profession without impeccable academic and professional credentials. One good illustration of this is the manner in which a Supreme Court judge has, by dint of his or her position, sufficient credibility in academic circles to be on panels for doctoral disputations and decisions on academic posts. Moreover, persons in positions of authority generally carry the weight of their position.

What is necessary to establish personal credibility depends to a certain extent on the role the person plays, and will be different for a judge, a lawyer and a legal researcher, to name a few key examples. A good judge ‘must be fairly objective, fairly knowledgeable in the law, fairly efficient and have a fairly good human and social perspective’.<sup>28</sup> It is, first and foremost, a question of integrity: judges must not intentionally break the law, and they must pursue their vices behind closed doors. Judges must not only be loyal, but also modest and not imagine that it is the courts which are the driving force behind the country’s development. Judges must also have the gift of doubt, but not so much that it makes them incapable of acting. Other important factors for a judge’s ethos include political participation and public statements. Judges may be politically active without losing credibility, but they should avoid taking extreme positions on issues.

The primary ethical requirements for research are integrity, impartiality and openness to one’s own fallibility.<sup>29</sup> Kai Krüger refers in an article to the following aspects which can be significant for legal researchers’ credibility: a mixture of legislative and drafting work, on the one hand, and the author and teacher role, on the other; a mixture of a role as an objective researcher with legal practice and opinion writing, which implies a university researcher

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25 Jan-Fredrik Wilhelmsen and Geir Woxholth, *Juristetikk*, Oslo, 2003, p. 101.

26 Leif Petter Olaussen, *Folks tillit til og medvirkning i domstolene*, Tidsskrift for strafferett, 2005 pp. 119-143, p. 124.

27 See Ånde Somby, *Juss som retorikk*, Oslo, 1999, pp. 153-155.

28 Knut Blom, *Juristrollen og yrkesetikk*. Dommeren i Institutt for privatretts stensilserie, No 115, Oslo, 1987, p. 38.

29 Ethical guidelines for research in social studies, humanities, law and theology.

carrying out a major research and writing project which benefits only one case or party assigning the task.<sup>30</sup>

In addition to factors such as rank, power and success, moral authority also plays a role in credibility. Based on Cicero's doctrine of virtue, Ánde Somby has analysed how lawyers' ethos is influenced by how they achieve the ideals of wisdom, justice, courage and moderation.<sup>31</sup> This author believes that, construed as aspects which can influence an individual speaker's credibility in a positive or negative manner, they can still be of relevance today. There can be little doubt that a person who appears to be stupid, arbitrary, cowardly and extreme will have little credibility, even though the person may hold a lofty and powerful position. Likewise, a person who appears to be insightful, impartial, moderate and with the courage of his or her convictions will enjoy a high degree of credibility, without having a high position or power on which to lean.

## 7 Pathos: the Tear in the Judge's Eye

Arguments and credibility are not always sufficient. Someone who wishes to believe often begins to do so. It is easier to persuade someone who wants to be persuaded; it is more difficult with someone who is unwilling. A listener might accept the opposite party's arguments and solutions because he or she fears the consequences for 'the system' or himself or herself, has an interest in the outcome, cannot be bothered to become involved, does not see the consequences, does not believe that other solutions are possible, does not like the person affected by the decision, or for many other reasons.

Sometimes the evidence and arguments are so overwhelming that even a reluctant party must admit that he or she is persuaded. Most often this is not the case, however. A number of different conclusions may be possible within the parameters, and parameters are elastic. The attitude the recipient has towards the case can become decisive. If that party's attitude can be influenced, it will also be possible to influence the position ultimately adopted by that person. This is obvious when only a small number of people are to be persuaded, such as in legal proceedings or in a matter involving the public administration. It also holds true when the recipients are a wider circle of people, as in the case of legal theory. In that situation, an attempt is made to gain acceptance for a position in general legal opinion, be it in theory or legal practice. It is not possible to disregard the attitude of the recipients here, either. By way of example: what may be persuasive for people in favour of Norway joining the EU may not be persuasive for people holding the opposite view.

This leads to an analysis of the pathos of legal rhetoric. How can the listener be led to believe the speaker, listen to the speaker and allow himself or herself to be persuaded by the speaker's arguments? It is important here not to base the argument on all types of views, but only on those views shared by a select group

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30 Kai Krüger, *Etikk i rettsvitenskapen - noen synspunkter og standpunkter - og fire praktiske oppgaver*, Det juridiske fakultets skriftserie, No 65, Bergen, 1996.

31 See Ánde Somby, *Juss som retorikk*, Oslo, 1999, pp. 156-219.

of people. 'People love to hear stated in general terms what they already believe in some particular connection'.<sup>32</sup> Thus, in order to speak in a persuasive manner, it is necessary to have knowledge of the views of the people being addressed and on what those views are based. In order to persuade it is therefore necessary to play on the views and attitudes the recipients have on legal and other issues. It is indeed possible to succeed in changing some of them, but it is not possible to change all of them simultaneously. Obviously, it will be more of a challenge to gain acceptance for something which goes against more fundamental beliefs than for something which runs counter to more peripheral attitudes and views.<sup>33</sup>

In rhetoric a distinction is drawn between a controlled and sober style close to everyday language, a vigorous style with more grandiloquent sentences and rich use of words, and a 'medium' style falling somewhere between the two. Cicero distinguishes between his discourse using a more 'vigorous' style and his philosophical works with a more unimpassioned, restrained style.<sup>34</sup> An oral presentation for legal purposes falls more into the theoretical category, but nonetheless is aimed at a specific group, such as judges, public administrative bodies or academic legal circles. Cicero emphasises that it is not appropriate to treat every 'social status, rank or authority' in the same manner, but rather it is necessary to adapt one's style and presentation to the subject-matter of the case and who is involved both as a speaker and a listener.<sup>35</sup> In the presentation of legal argument as well, there are differences in lawyers' roles. The lawyer must be 'lawyerly' in presenting his or her case, which entails his or her playing a much broader role than, say, a legal researcher or judge.

The ideal for legal discourse today is close to Antiquity's philosophical discourse aimed at the learned and is more aimed at instilling calm than stirring up anger. This does not mean, however, that one can ignore the influence of argument. Aristotle says that even though one should debate the facts and that anything that goes beyond establishing them should be regarded as redundant, the arts of language cannot help having 'a small but real importance, whatever it is we have to expound to others: the way in which a thing is said does affect its intelligibility'.<sup>36</sup> Quintilian recommends that legal discourse appeal to emotions if there are no other means for securing the victory of truth, justice and the public interest, for instance, when both parties have presented their argument and the outcome of the case is still uncertain.<sup>37</sup>

The margin for playing on the recipients' emotions is traditionally not very large in most legal settings. The modern view is that emotions are something which impedes a decision and rational decision-making on the basis of evidence

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32 Aristotle, *Rhetoric*, translated by W. Rhys Roberts, Book II, Chapter 21 (1395b).

33 This aspect of rhetoric and the importance attached by hermeneutics to the significance of the listener's understanding and bias are related; see, for example, Jan Fridtjof Bernt, *Normativisme og pragmatisme i rettsvitenskapen*, Jussens Venner, 2004, pp. 61-73.

34 *De Officiis*, book 1.3, translated by Walter Miller, Harvard University Press, Cambridge, 1913.

35 In *Orator*, paragraph 71-73.

36 Aristotle, *Rhetoric*, translated by W. Rhys Roberts, Book III, Chapter 1 (1404a).

37 Quintilian, *Institutio Oratoria*, Loeb Classical Library, Cambridge, Mass. 2001, book 6.1.7.

and arguments. Emotions create bias, lead to loss of control and are often a sign of weakness. They should therefore be hidden, controlled and, if at all possible, avoided.

A detailed study of Norwegian lawyers' argument shows that it is not as free of emotion-influencing elements as one might believe. Svein Eng shows how, inter alia, words which are designed to appeal to the emotions and definitions designed to persuade are part and parcel of legal language, that is, words which tend to call forth emotions and thereby provide a basis for influencing other people. 'One chooses words one presumes will arouse negative feelings in the recipients; if one wants to work against what the area covers, and one chooses words one presumes will arouse positive feelings, if one wants to promote what falls within the area'.<sup>38</sup> Another means of persuasion he refers to is principle-terminology, which makes it possible 'for personal evaluations and choices to be clothed in the language attire of discovery and description'.<sup>39</sup>

Words with strong emotional appeal are to be found in all areas of the law. The following are the most key terms: freedom, equal treatment, common interest, justice, legal certainty, democracy, sovereignty, foreseeability, personal integrity, right and proportionality, force, abuse, unlawful and encroachment. In addition to their appeal to emotions, all of these words are vague and ambiguous and can therefore represent many diverse claims. The common interest and democracy, for example, may entail claims for strong State government on behalf of a given collectivity in order effectively to implement decisions reached by elected bodies or bodies with legitimacy from those bodies, whilst it can also encompass claims for joint schemes established by or in close collaboration with the parties directly affected by them.

The use of words which appeal to the emotions appears to be on the rise in legal argument. There can be many reasons for this. Many of these words were held in low esteem in the glory days of legal realism, when many leading theoreticians wished to abolish words such as 'right' and 'justice' or at least attach a purely technical meaning to them.<sup>40</sup> Words which appeal to the emotions are used, inter alia, in connection with the internationalisation of law. The discussion surrounding Norwegian membership in the EU has been marked by the use of words such as 'sovereignty', 'self-determination', 'solidarity', and 'market liberalism', which has also influenced the legal debate on the relationship between national law and international rules. A number of the international legal rules Norway has incorporated into its domestic law contain words which appeal to the emotions and which are an important part of the formulation of those rules. This is particularly true of the European Convention on Human Rights, and also the Agreement on the European Economic Area (EEA Agreement). The increasing use of principle-related argument also opens up more possibilities for playing on the recipients' emotions in legal argument.

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38 Svein Eng, *Analysis of Dis/agreement – with particular reference to Law and Legal Theory*, Dordrecht, 2003, p. 415.

39 *Op. cit.*, p.483.

40 See, for example, Hans Petter Graver, *Keiserens garderobe: Eckhoffs rettskildelære og utfordringene fremover*, TfR, 2000, pp. 429-476.

Another feature in legal problem-solving which can influence the recipient's emotional reaction is the manner in which lawyers distinguish between the relevant and irrelevant aspects of a case. Distinguishing, particularly when it involves filtering out considerable quantities of human and inter-human material from cases and problems in dealing with them legally, is a striking feature of the legal approach to problem-solving. By separating what is legally relevant from what is irrelevant, some of the emotional aspects of a case are removed, whilst others are allowed in. A number of years ago, in the legal proceedings that followed the youth street protests against the WTO in Gothenburg, issues relating to international solidarity and poverty resulting from the liberalisation of world trade were played down, whilst outrage at street violence and the lack of respect for law and order was given greater prominence.

How the sorting and redefinition of a dispute influences the emotional register on which the argument can play is well illustrated by Nils Christie, albeit in relation to the appraisal of the facts:

“My favourite example took place just after the war. One of my country's absolutely top defenders told with pride how he had just rescued a poor client. The client had collaborated with the Germans. The prosecutor claimed that the client had been one of the key people in the organisation of the Nazi movement. He had been one of the master-minds behind it all. The defender, however, saved his client. He saved him by pointing out to the jury how weak, how lacking in ability, how obviously deficient his client was, socially as well as organisationally. His client could simply not have been one of the organisers among the collaborators; he was without talents. And he won his case. His client got a very minor sentence as a very minor figure. The defender ended his story by telling me-with some indignation-that neither the accused, nor his wife, had ever thanked him, they had not even talked to him afterwards.”<sup>41</sup>

This example provides a good illustration of well how the choice of aspects one chooses to emphasise or play down influences the listener's attitude to the evidence in a case and how the person's actions should be judged. Irrespective of whether these redefinitions and distinguishing exercises between relevant and irrelevant aspects are done deliberately in order to foster sympathy or antipathy, or is a necessary consequence of a case having to be defined and resolved in relation to legal rules, the result is unavoidably that they influence which of the emotions are appealed to in the recipient.

Legal decision-makers are, like other experts, trained to ignore their emotional reactions and decide cases based on 'rational' deliberation. It is highly unlikely, however, that they manage completely to avoid being influenced by their emotional reactions to cases, words and arguments. Psychological research shows that emotions are present in all human activity, and that our cognition and rational activity are filtered through our emotions. Even though there is little empirical research on the place of emotions in legal problem-solving and judicial activity, it is reasonable to assume that in this regard the situation is no different

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41 Nils Christie, *Conflict as Property*, *The British Journal of Criminology* Vol. 17. 1977 pp 1-15 at p. 4.



from any other social interaction, such as a workplace or the public arena.<sup>42</sup> Moreover, as mentioned earlier, in many cases the arguments do not lead to unambiguous conclusions. Where argument and rationality ends, there is room for other factors to come into play, when a person allows himself or herself to be persuaded of a given view.

## 8 Objections to Rhetoric

Rhetoric has long had a dubious reputation, and some might hesitate to characterise the work of legal professionals as a form of rhetoric. Rhetoric can mean many things and often has an odious ring to it. Many associate it with pompous and bombastic forms of discourse, sophistic argument and linguistic manipulation.

Rhetoric is often defined more neutrally as the power of persuading.<sup>43</sup> Rhetoric is this, too, but the power of persuasion requires knowledge of the means available in a situation, from where arguments may be drawn, what will work particularly persuasively on the person one seeks to influence, etc. This author therefore believes that the definition given by Aristotle, that is, the ability in each particular case to see the available means of persuasion, is a more productive starting point for the analysis of legal method and practice. The main emphasis is on which positions can be persuasively argued for and with which arguments, not the actual presentation. The latter can be left for reports on the drafting of judgments and procedural techniques. Many will nonetheless assert that the use of a rhetorical approach can threaten core values in the law, such as its normativity, scholarly approach, rationality and foreseeability. Those objections will be examined in the following.

### 8.1 *Rhetoric Fails to Recognise the Normativity of the Law*

One objection can be to state that to view the work of legal professionals as rhetoric fails to recognise that the application of the law is about finding out what the prevailing law is and applying it, and that the issue is whether a decision is in accordance with or contrary to the legal rules, not whether or not someone can be persuaded by it. In beginning by considering what available means there are to persuade and not what the rules require, the method becomes blind to prevailing rules and values. It is possible to state, in the tradition of Socrates, that in order to do what is right, it is necessary to have knowledge of what is right. It is therefore knowledge of what is right which must be sought out; legal method must be developed so as to be able to give that.

The problem with this approach is that, irrespective of what is right or not, there is no generally-recognised method for recognising what is right when we see it, even less determining what it is in any reliable manner, apart from a reference to the vague notions of ‘the gift of legal sagacity’ or ‘legal discretion’.

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42 See Richard A. Katula, *Emotion in the Courtroom*, in Tellegen-Couperus (ed.), *Quintilian and the Law*, Leuven, 2003.

43 See, for example, Laurent Pernot, *Rhetoric in Antiquity*, Washington, D.C. 2005 p. ix.

When grounds are to be given for a decision or point of view on a legal issue, we tend to do it without solid criteria to distinguish right from wrong. This does not mean that everything is right or wrong, but merely that there are degrees of ‘probability’ for a point of view being right or wrong, based on what we perceive at a given point in time. The duty of rhetoric is, according to Aristotle, “to deal with such matters as we deliberate upon without arts or systems to guide us, in the hearing of persons who cannot take in at a glance a complicated argument, or follow a long chain of reasoning”.<sup>44</sup> The fact that we do not always have knowledge means that the premises for argument are few and uncertain, and must be based on probabilities and indications, not on truths and solid evidence. It is precisely the fact that we do not always have the necessary knowledge to distinguish between right and wrong points of view which makes argument – and therefore rhetoric – important. Today as in Antiquity, this description covers the notion of decision-making in legal disputes. The fact that we cannot establish which is the best or correct solution makes it all the more important to have argument for the purpose of reaching agreement on what the best solution is. Otherwise, we would simply have to leave the case with those who know best, which can be hazardous if we have to rely on mere trust or authority.

Legal problem-solving nevertheless shares a number of common features with the method used to derive knowledge from a systematic body of knowledge. Beginning with a reliable starting point, such as a general rule, it is possible, using a syllogism, to infer (deduce) a condition or conditions which must be satisfied for the rule to apply. It is possible to establish from observation whether or not those conditions are satisfied in a specific case (subsumption). From the general norm (major premise) and the specific observation (minor premise) it is possible to infer the conclusion. This does not mean that the law, with a particular claim on realism, can be described as a coherent system where specific rules can always be inferred from the system for the facts on which a finding is being made. There are a number of reasons for this.

For a system to be able to give firm answers, some fundamental points must be present or assumed on which the specific reasoning can be based. Law does not work like that. The fundamental assumptions are there, but they shift. So long as we can say that we have fundamental assumptions, there will always be room for divided opinions on what they are and what their content is. In a case involving inciting racial hatred, for example, we cannot begin with the assumption that freedom of expression is a more fundamental right than the right not to be discriminated against on the basis of race. That is precisely one of the issues on which a decision will have to be made, at least for the specific case.

Of course, not all issues begin with conflicting fundamental values. Many issues can be reasoned through on the basis of fairly solid premises. For example, there cannot be much doubt about the rule that the vendor is responsible for vital defects and that the purchaser may annul the contract if the conditions for doing so are satisfied. It is rare, however, for it to be impossible to find something or other which can be debated either in the major premise or in

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44 Aristotle, *Rhetoric*, translated by W. Rhys Roberts, Book I, Chapter 2 (1357a).

the minor premise, which brings us out of the sphere of logic and into the sphere of rhetoric.<sup>45</sup> It is, in any event, not possible to state with certainty that that rule is related systematically to all other rules in a given legal order, such as the Norwegian legal order. Thus we are not faced with a system of rules, but rather a plurality of systems of rules which vary in scope and are interconnected in various ways.<sup>46</sup>

Even within such small subsystems of rules, there are issues which are not capable of being resolved in any certain manner. Firstly, there is the vagueness of language. Many concepts are intrinsically vague or indeterminate. Others are clear enough at their core, but somewhat hazy around the edges. Secondly, there may be conflicting rules. Freedom of expression will square off against the right to privacy when the media covers a false step by a prominent personality; legal certainty will be contrasted with legal effectiveness when a suspect's access to the case-file is hampered for investigative reasons. Thirdly, questions may arise for which there are no rules but for which rules are needed. It may be that the legislature deliberately left a point for decision by the party applying the law, such as when contracts may be set aside when they have unreasonable effects. Questions may arise which the legislature simply did not contemplate. Or the situation may have changed, such as when the rules on exchanges of correspondence must be applied to a situation where the communication has taken place electronically. Lastly, there is the possibility of a special case which may justify a departure from the general rules, such as when the consequences would be particularly harsh or it would run counter to the purpose of the rule to apply it. In any event, legal disagreement rarely concerns logical conclusions and certain scientific evidence; it usually relates to possible connections, probabilities and what is acceptable and approvable.

Argument takes place before 'persons who cannot take in at a glance a complicated argument, or follow a long chain of reasoning' because the task of rhetoric is practical and relates to situations where decisions are to be made on legal or political questions. Legal reasoning may form part of the premises for such decisions, but the decision will not necessarily be made by legal professionals. The parties who will make decisions, *inter alia*, on the basis of arguments from various professions, are not familiar with the basis for them and therefore cannot follow a purely technical presentation of evidence. Thus Aristotle distinguishes between the method we can use when we can reason on the basis of a cogent system of knowledge and the one we can use to reason on the basis of uncertain and incomplete premises.

Rhetoric is therefore the method we must use to reach as certain a conclusion as possible when we do not have firm starting assumptions and cannot base our points of view on systematic inferences from them. If we had methods for distinguishing between true and untrue assertions, we would not need rhetoric. Since we do not have them, and we must reach decisions on matters which have occurred in the past or on how we will act in future, rhetoric is the best tool we have. Rhetoric gives us a method for advancing from varying degrees of

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45 See Alain Lempereur, *Logic or Rhetoric in Law?* *Argumentation* 5: 283-297, 1991, p. 286.

46 See Theodor Viehweg, *Topic und Jurisprudenz*, pp. 41-45.

uncertainty to definitive decisions. That is precisely what the work of legal professionals consists of today, just as in Aristotle's day.<sup>47</sup>

Rhetoric involves persuasion through argument and discussion. The fact that our points of view are not definitive but must constantly be tested through discussion and fresh persuasion is particularly important in the field of law, where decisions are made without a firm basis but which nevertheless are implemented by force of law. It is through discussion that we can improve the solutions we choose and avoid injustices from being committed in the name of the law.

Legal rhetoric is thus ontologically neutral, but is based on the recognition that there are or are not valid norms or a 'prevailing law', so that there is no generally-accepted method for proving or disproving assertions as to its content. The rhetorical approach, however, does not assume that the assertion is that there is no prevailing law or that it is merely a construct, only that our assertions about it cannot be proved or disproved. Aristotle was of the clear view that there was truth to be found in issues involving values and stated, inter alia, that 'things that are true and things that are just have a natural tendency to prevail over their opposites, so that if the decisions of judges are not what they ought to be, the defeat must be due to the speakers themselves'.<sup>48</sup> A generally accepted knowledge of rhetoric is, in Aristotle's view, a way in which to further the cause of justice.

## 8.2 *Rhetoric Fails to Recognise the Scholarly Approach of the Law*

A second objection can be that the rhetorical approach does not take account of the scholarly aspect of law. Legal method is above all a scholarly method, whereas rhetoric involves applying techniques in order to gain acceptance. In so far as those techniques contain non-rational elements such as appeals to authority, credibility and emotions, the goal must be to clear them out of lawyers' practice, not to cultivate and fortify them. Stig Strömholm concurs when he writes that '*topika*' is a step backwards, and that 'it is of interest to note that Aristotle, who is hailed as the father of topics, considered the topical argument method to be a *last resort*, a solution for the rational arguer which was available when a lack of specific knowledge and sufficiently defined concepts made apodictic, that is, logical and strictly scholarly, argument impossible'.<sup>49</sup>

In addition to what has been put forward in relation to the first objection, it must be observed that the decision-making that takes place in the courts and the public administration can hardly be characterised as 'scholarly' in any commonly-understood meaning of the term. There are few people today who would claim that practising lawyers' work consists of applying scholarly concepts and that judges and decision-makers in the public administration must present 'strictly scholarly argument'.

What, then, is to become of jurisprudence? The difference between jurisprudence and the application of law is more a difference of degree than

47 See Theodor Viehweg, *Topic und Jurisprudenz*, pp. 118-119.

48 Aristotle, *Rhetoric*, translated by W. Rhys Roberts, Book I, Chapter 1 (1355a).

49 Stig Strömholm, *Rätt, rättskällor och rättslämpning*, 4th ed., Stockholm, 1992, p. 136.

method. In both contexts, legal argument takes place within the same parameters and according to the same basic rules of method. The difference between legal argument in these two arenas lies first and foremost in the different expectations as to how the party applying the law is to deal with the value-related premises which ultimately are decisive for the use of the rules of argument which apply to legal argument. Both argument in legal doctrine and specific legal argument presuppose an insight into the fundamental values underlying the area of the law on which the argument is focused, although for legal doctrine there is the expectation that the area underlying the value-related premises will be clarified in a manner which is more holistic, in-depth and complete than is the case for specific legal argument. Since argument in legal doctrine takes place against the background of a broader, more nuanced and more accurate view of the underlying values, a more comprehensive balancing approach is called for. Legal doctrine, with its responsibility to contribute holistic, in-depth and complete portrayals of underlying values in the law, is in a unique position to question the tenability of given value-related premises.<sup>50</sup>

Jurisprudence becomes no less scholarly when the rhetorical approach is applied. Finding, developing and presenting argument for a decision is rhetoric in practice. Someone interested in learning or practising law should therefore take an interest in the study of rhetoric. Aristotle says that ‘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 inquire as to the *reason* why some speakers succeed through practice and others spontaneously; and every one will at once agree that such an inquiry is the function of an *art*’.<sup>51</sup> Aristotle’s classic justification for studying and analysing rhetoric also holds true as justification for why modern-day lawyers should acquire this skill for both practical and scholarly use, and why an analysis of the work of legal professionals which begins with rhetoric is no less a scholarly activity than other systematic studies of conduct and institutions.

The objection may perhaps be understood as being directed against rhetoric drawing irrational aspects into the legal decision-making process by pointing out that it is not only rational argument which is decisive, but also unfounded trust, and irrational emotions and attitudes. In response, it may be said that it is not rhetoric which brings such aspects in to the legal opinion-forming process. Rhetoric claims that they are there already. Since that is so, it must be the task of jurisprudence to describe them and the task of the party applying the law to put them into practice.

### 8.3 *Rhetoric Fails to Recognise the Rationality of the Law*

Rhetoric’s open highlighting and use of the irrational aspects which lead to people allowing themselves to be persuaded brings us to a third objection of a more normative nature: that the ideal would be for legal decisions and points of

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50 Synne Sæther Mæhle, *Gjelder det andre regler for rettslig argumentasjon i rettsdogmatikken enn for domstolene?*, Jussens Venner, 2004, pp. 329-342.

51 Aristotle, *Rhetoric*, translated by W. Rhys Roberts, Book I, Chapter 1 (1354a).

view to be taken from objective argument, not from misunderstood faith in authority and emotional influence.

The ideal of rationality is firmly rooted in our culture and must be regarded as being an important part of conceptions of democracy and a State governed by law. Legal practice and descriptions of legal practice must therefore seek to strengthen the rational elements of the law. Legal rhetoric does not necessarily run counter to such a wish. Under a rhetorical approach, the key tool for seeing and utilising the available means of persuasion are good arguments. Rhetoric relates largely to how one develops a good line of argument. In this respect it is not very different from the approach used in traditional legal method. There is a pedagogical difference in the choice of approach, however. Whilst in the traditional method the focus is on the solution and finding the party who has the best arguments on his or her side, the focus of legal rhetoric is on persuasion, that is, how one will bring others round to one's own point of view. The evidence and arguments must thus be adapted to the relevant situation, depending on whether one wishes to persuade a party applying the law or one is seeking endorsement in the broader legal community.

The biggest difference lies in the fact that legal rhetoric continues beyond the evidence and arguments, and is aware that the language, sequence and formulation of arguments, the use of appeals and metaphors can affect whether or not the message is accepted. Rather than lessening the rationality in law, this can contribute to augmenting it. Attention to such matters can help them to become the focus for more detailed, systematic investigation, thereby increasing knowledge of them.

The party who actually manages to persuade wins the case. In this respect, it is democratising to investigate what is necessary to have the skill to persuade, under which conditions persuasion takes place and which means there are to debate the prevailing view on different issues. This can help to foster debate on views which have a weak basis, thereby preventing them from prevailing for too long. In a context where the party who is capable of gaining endorsement succeeds, it is also important to spread knowledge on how to see through techniques of persuasion which are not based on tenable arguments and values on which there is agreement.

Does not then the rhetorical approach imply that a party who presents legal argument appears to be an opportunist taking advantage of strategic tricks to promote something other than what can obviously be used to argue? In contrast, it may be asserted that a judge or legal author, in any event, should argue based on his or her convictions. Rhetoric, however, does not make people or arguments better or worse than they are. Rhetoric can be used for both manipulation and dialogue. Even the wish to gain acceptance for one's point of view cannot be decisive for whether one is labelled as being strategically manipulative or genuinely communicative, no more than the fact that a person learns and trains in how to see and utilise the available means of persuading others on a matter. As Cicero observed: Why has it always been well viewed to teach civil law, and why have well-known lawyers always had an abundance of pupils, whilst it is seen as reprehensible to train youth in the art of speaking or assist them in that discipline? If it is wrong to speak artfully, then the art of speaking must be banished from the State. But if it is not just an ornament for the party in

possession of it, but also for the benefit of the common good, why is it wrong to learn something which brings glory to know, and not well regarded to teach something which brings esteem to the party who is capable of it?<sup>52</sup>

#### 8.4 *Rhetoric Undermines the Foreseeability of the Law*

A fourth objection can be that the emphasis placed by rhetoric on seeing the available means of persuasion, inter alia by debating what is ostensibly non-debatable, by finding arguments not to apply a written or unwritten rule or by refusing to accept genuine knowledge in the relevant area of the law, helps to undermine the law and legal certainty. It can be argued that rhetoric thus clears the way for a totally free legal method where the party applying the law is not bound by the law, precedent or legal method.

When it is not possible to know whether an assertion about the law is correct or incorrect, it is a simple matter to claim that the assertion cannot be correct or incorrect, or that all assertions are equally correct or incorrect. This is a consequence for which few wish, as it runs counter to basic intuition about the law and legal assertions. It can equally well be an indication that the question was incorrectly put or that rhetoric is not the right answer, and that the acceptability of a legal assertion does not depend on whether it expresses a correct or incorrect description of a state of the law which is present and ready to be recognised and described.

Rather, the question which should be put is whether the assertion is meritorious of our endorsement as an assertion about the law, that is, whether it is likely to persuade us. The correctness of assertions about the law is not to be found in whether it is in accordance with a norm or method, but rather in the social aspect, that is, whether it is likely to convince us or others. And that is precisely the point: legal professionals turn to each other and others to give the law its underpinning. What has been laid down repeatedly by all appears to be fixed, undisputed and self-evident. Premises may be assessed on this basis as being relevant or irrelevant, permissible or not permissible, acceptable or unacceptable, reasonable or unreasonable, etc.<sup>53</sup> In adopting rhetoric as a method, we see the law as something which can be created and recreated in social interaction. The objectivity of assertions about the law is not to be found in whether it is in accordance with a norm or method, but precisely in the social aspect.<sup>54</sup>

Is the law then reduced to that on which there is agreement, and is the majority always right? The answer is no – a majority is a majority, but the opinion of the majority is not necessarily right other than as a starting point for argument when one wishes to debate the prevailing opinion, and an end point when a majority has jurisdiction to end the discussion, such as a collegial court. In other cases it will be for the party wishing to attain a given solution to gain acceptance through argument. Rhetoric shows precisely the means of persuasion available in each case and how they can be used. On other hand, Aristotle is

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52 *Orator*, paragraph 142.

53 See Theodor Viehweg, *Topic und Jurisprudenz*, pp. 41-42.

54 See Richard D. Rieke, *The Judicial Dialogue*, Argumentation 5: 39-55, 1991.

right in stating that ‘about things that could not have been, and cannot now or in the future be, other than they are, nobody who takes them to be of this nature wastes his time in deliberation’.<sup>55</sup> Points on which no one’s interests are served by debating will therefore continue to be ‘right’ in the view of the majority. However, the majority is not an absolute criterion for what is ‘right’. If there were to be such a criterion in the social interaction on the law, it would have to be the absence of someone who sees possibilities for debating and obtaining acceptance for something other than that which is taken for granted. If one is to operate with a concept of ‘prevailing law’ in a rhetorical approach, it cannot be linked to prevailing thought but to the lack of serious opposition to the prevailing thought.

The objection can also be made that the emphasis placed on systematic presentation of the means of persuasion neglects what must be a principal task, at least for jurisprudence, namely a systematic presentation and analysis of the rules which are deemed to apply in a given area. This criticism is misplaced, however. The ability to see which arguments can be persuasive and set up a persuasive line of argument requires thorough knowledge of the relevant area.<sup>56</sup> Accordingly, a line of argument on what are allegedly the best views on points of law in a legal order such as the Norwegian one calls for thorough knowledge of the Norwegian legal order in general and the relevant area of the law in particular. That knowledge is best obtained by conducting a systematic study of the relevant laws, judgments and arguments. It is thus an important task for jurisprudence to chart and present that knowledge and for the party applying the law to familiarise himself or herself with it. Legal rhetoric thus does not neglect a systematic presentation of the legal rules, it presupposes it.

Legal certainty is not dependent on seeing the law as something in force which can be made the subject of the decision. Nor does such an approach offer a guarantee for certainty and foreseeability in legal decisions. The legal material used as a basis can itself counteract foreseeability and foster a free approach to legal decision-making if, for example, the legislative text contains a large number of generally-formulated provisions, or if the legal material is unclear or has loopholes. A rhetorical approach can be used to argue for or against solutions which are closely linked to the material or far removed from it. The rhetorical approach does in itself not advocate a free approach towards the law.

If there is margin left for appraisal, it is a sign of the relevant law and not a consequence of the method. The legislature openly uses standards as part of legislative texts, the rules must be adapted to suit new situations in a changing society and rules must be harmonised in a situation with different, competing legal orders. In such a context, the use of rhetoric as a method can enhance foreseeability rather than diminish it. Firstly, the emphasis placed on drawing up descriptions and classifications of arguments as part of the requirements of the content of the arguments leads to a detailed description of methods of

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55 Aristotle, *Rhetoric*, translated by W. Rhys Roberts, Book I, Chapter 2 (1375a).

56 See Hans Petter Graver, *Rettsretorikk – en metodebok*, Bergen, 2007, pp. 19-28.



assessment.<sup>57</sup> Secondly, an open recognition and description of what fosters credibility and the inclination to be persuaded by arguments makes it easier to foresee in which direction parties applying the law may allow themselves to be persuaded in different situations.

### 8.5 *Rhetoric Offers Nothing New*

Suppose one accepts rhetoric as an agenda, but nevertheless guards against rewriting legal method based on the rhetorical approach. Such a rewriting has its costs, in that many will have to change their customary ideas about how the law and the application of the law function. As Sverre Blandhol observes, there can be many disadvantages associated with introducing major changes in a vocabulary which works well and has a long tradition, like many of the sets of concepts used in current works on legal method.<sup>58</sup> This is particularly true if it brings nothing new in relation to the existing manner in which the work of legal professionals is presented. The question then becomes: does rhetoric offer fresh and valuable insights which make it worth the trouble to introduce them into the description of legal method?

This author hopes that the present article provides a basis for several affirmative answers to that question. Rhetoric gives insight into what makes it possible to gain acceptance for a legal point of view, that is, the available means of persuasion in each case. It gives greater insight than traditional legal method, which merely examines how legal questions may be resolved based on the legal material available. This is of theoretical significance, but also of practical interest for some wishing to attain a specific result or for someone wishing to debate legal issues in the public forum.

Since rhetoric offers only supplementary insight, it could be introduced as a subject alongside traditional legal method, for people who are interested in precisely those additional aspects. Rhetoric is understood in this manner in those few places where it is offered at all as part of legal studies. Rhetoric offers more than merely supplementary insight, however. It also offers an alternative insight into the core of legal method, namely how to argue a legal point of view.

Firstly, rhetoric's change in approach shifts the focus from the 'prevailing law' to gaining endorsement from others. 'Prevailing law' is an abstract and diffuse concept, whereas gaining endorsement from a judge, a person grading an examination or in legal circles is a specific, practical goal which anyone can set for themselves and analyse. For many, the idea of a 'prevailing law', when they are not sure they know what it is, which they are not sure they are able to recognise and which they do not completely understand how others can definitely see, is an obstacle to gaining insight into a legal question and confidence in their own abilities. Seen from this angle, there are pedagogical advantages, both for people who are to study law and for the general public, to present the work of legal professionals using the rhetorical approach. Assertions

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57 See Maarten Henket, 'Status and Loci for the Modern Judge', in Tellegen-Couperus (ed.), *Quintilian and the Law*, Leuven, 2003.

58 See Sverre Blandhol, *Retorikk og juss.*, in Øivind Andersen and Kjell Lars Berge (eds.), *Retorikkens relevans*, Norsk sakprosa, Oslo, 2003 (also in *TfR*, 2003, pp. 499-518), p. 126.

about ‘prevailing law’ can then be revealed for what they often are, namely rhetorical tricks aimed at playing on the listeners’ emotional trust in authorities and respect for what is in force.

Secondly, the rhetorical approach is based on argument to the effect that it is possible to concentrate on what is essential, that is, which conclusions are true or false in a logical sequence, which evidence and indications may be used to advantage and which arguments are persuasive and non-persuasive. Conversely, it will be possible to manage without notions which are currently core concepts in legal method: ‘source of law’, ‘conclusion’ and ‘weight’. These are concepts which give the impression that the application of the law is a mechanical process in which weights are placed on a scale and the outcome is decided according to which set of arguments weighs heaviest. This is an unrealistic description of how viewpoints on legal issues are formed. Moreover, the concepts give the impression that argument and opinion-shaping can be described with a much greater degree of accuracy than is actually possible. These concepts make the presentation of legal method unnecessarily difficult to understand, because it calls for the learning of a number of unnecessary concepts and ways to approach a problem, whilst at the same time leading the thought process in the wrong direction.<sup>59</sup>

A third advantage of legal rhetoric over traditional legal method is that it provides a much better grasp of the analysis of the appraisal done by the party applying the law than the vague concept ‘considerations of fairness’. As mentioned earlier in the part on logos, like Quintilian it is possible to draw a distinction between evidence taken from outside the field of rhetoric, and evidence which the party pleading the case takes from the case itself and therefore, after a fashion, puts together. Of the evidence taken from the specific case or question which is the subject-matter of the case, it is particularly the arguments which draw attention. By using the rhetorical doctrine on ‘*topoi*’, we can structure arguments which can be particularly useful, including general requirements of logic and also more loosely formulated empirical statements. Arguments can thus be developed from definitions to the effect that something belongs to a given group based on its nature, class and properties or may be based on similarities, differences, opposites, conflict, consequences, causes and reasoning of greater to lesser.

The doctrine of considerations of fairness can be supplemented with the topics doctrine of rhetoric, within the parameters of the prevailing method doctrine. This would be a step forward and give better guidance to parties applying the law on how to structure develop argument and make assessments.<sup>60</sup> It would also make it clearer that ‘considerations of fairness’ cannot be compared with the other ‘sources of law’, but that more or less standardised arguments are being used to strengthen or weaken the persuasive power of the

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59 In my book *Rettsretorikk – en metodelære*, Bergen, 2007, I have sought to take the consequences of this criticism and demonstrate that legal method can be described as rhetoric in a simpler and more realistic manner than with the traditional approach.

60 See J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in P. Brooks and P. Gewirth, eds., *Law’s Stories: Narrative and Rhetoric in the Law*, 211-224 Yale Univ. Press, 1996.

other evidence or indices leaning in favour of or against a legal outcome. Considerations of fairness do not 'weigh in favour' or 'point in the direction of' anything. They are simply arguments which the party applying the law draws from general experience and from which a given legal culture says arguments may be drawn. That experience is not binding, however; it merely serves as a guide, the goal being to choose the arguments which appear to be most persuasive for the party one wishes to persuade. Often one does not know, and must simply make do with the arguments one finds to be most persuasive. In a homogenous legal culture with a strong social factor present in the profession, it will in many cases also give a good indication as to what will have a persuasive influence on others.

Rhetoric can, in this way, improve on the traditional teaching of legal method. If one is to use rhetoric to improve the grasp on considerations of fairness, however, why not make the leap and view legal method generally in the light of rhetoric?

## **9 Insight into the Law**

In this article we have considered the law as a social process rather than as a system of norms used to resolve legal problems, and what consequences this has for theoretical descriptions of the law and legal method. To that end we have applied the same approach as that used daily by people who put together legal argument, be they lawyers, judges or legal researchers, namely, how can an argument be developed that will be persuasive. The requirements differ in different contexts, depending on the role of the party presenting argument and who the audience is. The common point, however, is that it is all legal argument and an attempt to gain acceptance for a point of view on a legal issue.

Approaching the law from a rhetorical perspective offers a view which is simpler and, at the same time, more complex than the traditional approach to law as a normative order which offers guidance as to a solution. It is simpler in that the criteria for what is successful is simpler. It is easier to ascertain whether one has succeeded in persuading someone than to ascertain what the 'prevailing law' is. Descriptions of method are also simpler and more practice-oriented. Instead of beginning with abstract metaphors such as 'source of law', 'weight', and 'weighing-up process', one begins with the problem and the available means of persuasion as to how the problem should be solved. This appraisal must take place on the basis of knowledge of which arguments are perceived as good and persuasive by the people one is seeking to reach – in a Norwegian legal context this would be Norwegian legal professionals in, for example, the courts or in legal circles. The audience is not an abstract group of people 'somewhere out there', it is actual people in an actual place.

The picture becomes somewhat more complicated when we see that, in addition to argument, we must also consider what makes a person credible and that, in many cases, persuasion is a matter of emotions on the part of the party to be persuaded. This brings a number of elements into the description and appraisal of how the law develops. It also makes it more realistic, however, and

opens for greater possibilities for countering viewpoints which are not based on or defended with good arguments.

The 'prevailing law' thus disappears as a criterion for appraising arguments and assertions about legal solutions. Opinions differ as to what the prevailing law is and what is unfair. Through the methods we have seen we can gain insight into the law, although not the truth about it.