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Law, Truth, and Reason

A Treatise on Legal Argumentation

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Chapter 4
"Between the Evident and the Irrational": The New Rhetoric and Legal Argumentation Theory

4.1 The Varieties of Pragmatism and the Law

Philosophical pragmatism consists of a set of overlapping philosophical positions that all, to a greater or lesser degree, share a belief in: (a) the *instrumentalist* character of all human knowledge in the service of human action, (b) the role of the scientific or other human *community* in judging the validity of any would-be knowledge, and (c) the importance given to the *consequences* brought into effect if some belief or assertion in fact turns out to be true. Philosophical pragmatism is intertwined with the *consensus* theory of truth and knowledge. It defines the truth of a scientific theory or individual belief as being approved, accepted, or acknowledged as *warranted* in the community.

The prominent role given to the scientific community under the consensus theory of truth is neatly illustrated by Thomas S. Kuhn's sociology of science and the idea of scientific change in it. According to Kuhn's claim, it is the scientific community that has the final say on what will count as scientific knowledge and what will fail in such a test.[1] Science evolves in the sequential and, to some extent, quite unpredictable interplay of the two distinct phases of scientific progress: the usually longer periods of *normal science* are occasionally disrupted by abrupt *scientific revolutions* whereby the prevailing scientific paradigm is discarded and switched to another one. Such occasions are usually induced by some recalcitrant empirical findings, or *anomalies*, that the prevailing scientific paradigm cannot satisfactorily explain. In all this, the *scientific community* has a seminal role, since it is the scientific community that defines the notions of truth and knowledge.

[1] Kuhn's conception of science deals mostly or exclusively with knowledge in the natural sciences, and the status of the human and social sciences is left out of consideration by him. On Kuhn's conception of the theory of science and its applicability in the science of law or, in more general terms, in the human and social sciences, Siltala, *Oikeustieteen tieteenteoria*, pp. 387–460. The French philosopher Michel Foucault defended a similar kind of conception of the societal character of human knowledge in his archaeology of knowledge under the auspices of a certain *épistémè*. Foucault, *Les Mots et les choses. Une Archéologie des sciences humaines*; Foucault, *L'Archéologie du savoir*; Siltala, *Oikeustieteen tieteenteoria*, p. 1 et seq.

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Still, as Kuhn openly admits, the scientific community may be collectively in error as to the scientific laws and facts of the world, which however may be discovered only much later on. The violent clash between the scholastic premises sustained by the Catholic Church and the novel, scientific, and empiricist worldview at the beginning of the seventeenth century provides a good example thereof. As is well known, Galileo Galilei was forced to publicly repudiate in front of the Italian Inquisition the validity of the scientific discoveries he had made of celestial mechanics, to the effect that the earth revolves around the sun, and not the other way round as the doctrine of the Catholic Church had it. Not even the foundations of scientific reasoning, like the laws of logic and mathematics, are totally immune to or safeguarded against such scientific revolutions or cracks in the edifice of science. In fact, several a priori conceptions of logic have been proven false, or true with respect to some specific system of logic only.

Any pragmatic account of law comprises a set of criteria that downgrade the significance of any isomorphic, picture relation that might or might not prevail between language and the world. Equally, pragmatism denies the relevance of textual coherence among the institutional and societal premises of law, as defended by the coherence theory. Under pragmatic premises, principled legal decision-making has to recede, giving room for a more down-to-earth conception of how to construct and read law.[2]

Thus, a pragmatic approach to legal argumentation underscores the kind of criteria that are based on: (a) an approval or disapproval of the methods and outcome of legal reasoning at the intended, universal audience, defined as a subjective thought construct of the speaker, according to the *new rhetoric*; (b) well-settled practices and usages in the community, defined as the presence of common acceptance or recognition of certain social phenomena as having legal significance, or a set of mutual expectations and cooperative dispositions to the said effect, among the members of the community, according to *philosophical conventionalism*; or (c) desirability of the economic or other external effects of law in society, according to *social consequentialism*. In all three types of legal pragmatism, the concept of law is closely intertwined with the linguistic and community-aligned tenets of law, at the cost of any sky-soaringly idealistic metaphysics. In addition, (d) *radical decisionism* may be taken as a fourth instance of pragmatism in law, widely defined.

Social consequentialism and ad hoc based decisionism have the most obvious connections to philosophical pragmatism pure and simple. For the new rhetoric and legal conventionalism the link to pragmatism is provided by the role that is given to the legal community in legal argumentation. – In this chapter, I will concentrate on the new rhetoric. The other variants of legal reasoning affected by philosophical pragmatism will be considered later.

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[2] On the *principled* and *pragmatic* theories of legal reasoning, cf. Spaak, *Guidance and Constraint*, pp. 83–92. Spaak would seem to resuscitate H. L. A. Hart's famous dichotomy of the *nightmare* and the *noble dream* in jurisprudence. Cf. Hart, "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream", passim.

4.2 The Universal Audience as a Subjective Thought Construct of the Speaker by Chaïm Perelman

The philosophical *corpus* of Aristotle's topics and rhetoric were rediscovered in the 1950s, when the German scholar Theodor Viehweg (1907–1988) and the Belgian philosopher Chaïm Perelman (1912–1984) both came to realize, quite independently from each other, the impact of Aristotle's writings for the analysis of legal and moral argumentation. For the subsequent evolvement of legal argumentation, the influence by Perelman (and by Lucie Olbrecht-Tyteca, the relatively unknown co-author of *Traité de l'Argumentation. La nouvelle Rhétorique*) has proven greater than Viehweg's similarly Aristotelian ideas on *topics* in practical argumentation. The theory of legal argumentation has been subsequently advanced by, for instance, Jerzy Wróblewski,[3] Neil MacCormick,[4] Aleksander Peczenik,[5] Robert Alexy,[6] Robert S. Summers,[7] and Aulis Aarnio.[8] They all belonged to the international research group *Bielefelder Kreis* that analysed the interpretation of statutory law and precedents from the point of view of comparative legal analysis and legal argumentation theory.[9]

The new rhetoric is based on Aristotle's philosophical writings on the laws of reasoning, the constitutive premises of which are not, unlike those of deductive reasoning, known to be necessarily true or necessarily untrue but are, at the most, more or less *reasonable*, *adequate*, *justified*, or *credible*, being no more than weakly "reminiscent of truth". Unlike deductive logic, rhetorical reasoning is not *truth preserving*, in the sense that the postulated truth of the premises of an inference would guarantee the truth of the outcome of the inference. Any assertions on how to construct and read the law, as derived from a combination of certain fact premises and certain norm premises, cannot claim having access to the (absolute) truth of the propositions on the content of law. Rather, they only make the more modest claim of being (no more than) *adequate*, *reasonable*, *pertinent*, or *justified* for the case at hand under the institutional and societal preconditions acknowledged in the legal community.

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[3] Wróblewski, *The Judicial Application of Law*.

[4] MacCormick, *Legal Reasoning and Legal Theory*.

[5] Peczenik, *The Basis of Legal Justification*; Peczenik, *On Law and Reason*; Peczenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation*.

[6] Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Argumentation*.

[7] Summers, *Essays on the Nature of Law and Legal Reasoning*; Summers, *Essays in Legal Theory*; Summers, *The Jurisprudence of Law's Form and Substance*.

[8] Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification*; Aarnio, *Laintulkinnan teoria*; Aarnio, *Reason and Authority. A Treatise on the Dynamic Paradigm of Legal Dogmatics*.

[9] MacCormick and Summers, eds., *Interpreting Statutes. A Comparative Study*; MacCormick and Summers, eds., *Interpreting Precedents. A Comparative Study*. On precedent-based law, Siltala, *A Theory of Precedent. From Analytical Positivism to A Post-Analytical Philosophy of Law.*

> What is the audience around which argumentation is centered?" Perelman (rhetorically) asks in his *The Realm of Rhetoric*, and answers the question himself by reference to "*the gathering of those whom the speaker wants to influence by his arguments*".[10] "What is this gathering?" he then asks, and replies by saying, "It can be the speaker himself, reflecting privately about how to respond to a delicate situation. Or it may be all of humanity, or at least all those who are competent and reasonable – those whom I would call the "universal audience"...[11]

Any set of sentences that make up a scientific theory, a philosophical argument, an evaluative standpoint in ethics or in aesthetics, or a set of assertions on how to construct and read the law is always addressed at some specific *audience*. In the context of law, the *legal community* or some part of it counts as the audience for legal argumentation. The concept of a legal community can be defined in more than one way, though. It may refer to a *normative* ideal or to some community that *actually* exists. In addition, the legal community may be defined in a wide sense, with reference to all the individuals who are subject to the same legal order, or in a more restricted sense, with reference to those individuals whose legal position is somehow affected by the judicial decision made by the court of justice or the legal official in question.

The frame of argumentation on legal, social, moral, or the like issues should be defined in *general* and *universal* terms, if possible, since a dialogical, face-to-face speech situation easily turns into an irrational, persuasive stance towards the addressee of argumentation, due to the impact of contingent factors that have to do with the particular speech situation in question. Similarly, an inner monologue of the speaker with himself, as the silent debate with the inner voice of the consciousness or some other outspoken inner reflection, as exemplified by Hamlet's famous monologue in Shakespeare's play with the same title, are more likely to yield to benign *ex post facto* rationalizations of the speaker's motives than any argument presented to the universal audience.[12]

According to Perelman, the *universal audience* (*l'auditoire universel*) is a subjective *thought construct of the speaker* by means of which he seeks to align and adjust the arguments presented by him so as to convince the audience, while at the same time observing the general prerequisites of rationality.[13] Perelman's idea of

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[10] "Quel est cet auditoire autour duquel est centrée l'argumentation? (...) Si l'on veut définir l'auditoire d'une façon utile pour le développement d'une théorie de l'argumentation, il faut le concevoir comme *l'ensemble de ceux sur lesquels l'orateur veut influer par son argumentation*." Perelman, *L'Empire rhétorique*, p. 27. (Italics in original.) Cf. Perelman, *The Realm of Rhetoric*, pp. 13–14.

[11] "Quel est cet ensemble? Il est fort variable, et peut aller de l'orateur lui-même, dans le cas d'une deliberation intime, quand il s'agit de prendre une decision dans une situation délicate, jusqu'à l'humanité tout entière, du moins à ceux de ses members qui sont compétents et raisonnables, et que je qualifie d'auditoire universel, en passant par une infinie variété d'auditoires particuliers." Perelman, *L'Empire rhétorique*, pp. 27–28; cf. Perelman, *The Realm of Rhetoric*, p. 14.

[12] Cf. Perelman and Olbrechts-Tyteca, *Traité de l'Argumentation*, pp. 40, 46–59.

[13] "L'auditoire présumé est toujours, pour celui qui argumente, une construction plus ou moins systématisée." Perelman and Olbrechts-Tyteca, *Traité de l'Argumentation*, p. 25 (et seq.), where the two authors reflect upon the issue under the heading, *L'auditoire comme construction de l'orateur.*

the universal audience is reminiscent of Jürgen Habermas' idea of an *ideal speech situation* (*ideale Sprechsituation*), as the both seek to rule out all kind of manipulation or other distortion from the field of rational discourse. As a consequence, Perelman made the distinction between *convincing* a universal audience by means of rational arguments and *persuading* a concrete audience in a situation where the influence of different kinds of irrational arguments is not ruled out.[14] As Perelman put it[15]:

> La distinction entre les discours qui s'adressent à quelques-uns et ceux qui seraient valable pour tous, permet de mieux faire comprendre ce qui oppose le discourse persuasive à celui qui se veut convaincant. Au lieu de considérer que la persuasion s'adresse à l'imagination, au sentiment, bref à l'automate, alors que le discours convaincant fait appel à la raison,[16] au lieu de les opposer l'une à l'autre, comme le subjectif à le objectif,[17] on peut les caractériser, d'une façon plus technique, et aussi plus exacte, en disant que le discours adressé à un auditoire particulier vise à persuader, alors que celui qui s'adresse à l'auditoire universel vise à convaincre. – Comme la distinction ainsi établie ne dépend pas du nombre de personnes que écoutent un orateur, mais des intentions de ce dernier (veut-it obtenir l'adhésion de quelques-uns ou de tout être de raison?), il se peut que l'orateur n'envisage ceux auxquels il s'adresse – meme s'il s'agit d'une délibération intime – que comme une incarnation de l'auditoire universel. Un discours convaincant est celui dont les premises et les arguments sont universalisables, c'est-à-dire acceptables, en principe, par tous les membres de l'auditoire universel. On voit immédiatement comment, dans cette perspective, l'originalité même de la philosophie, associée traditionnellement aux notions de vérité et de raison, sera le mieux comprise par sa relation avec l'auditoire universel, et la manière dont celui-ci est conçu par le philosophe.

Perelman's notion of universal audience consists of *enlightened* persons whom the speaker tries to win on his side with rational arguments. Thus, the universal audience (*l'auditoire universel*) is not an empirical phenomenon but a *subjective thought*

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[14] Perelman and Olbrechts-Tyteca, *Traité de l'Argumentation*, pp. 34–40.

[15] Perelman, *L'Empire rhétorique*, p. 31. – "The distinction between discourses that are addressed to some individual persons and those intended to be valid for everyone allows us to better understand how persuasive discourse differs from one that aims at being convincing. Instead of thinking that persuasive discourse is addressed to the imagination, sentiments, or unthinking reactions of a person, whereas a discourse that aims at convincing someone appeals to his reason, and instead of opposing the one as essentially subjective to the other as essentially objective, we can characterize them in a more technical, and also more exact, manner by stating that the discourse addressed to a specific audience aims at persuading [its addressees], while the discourse addressed to the universal audience aims at convincing [its addressees]. – Like the distinction now established does not depend on the number of individuals who listen to a speaker but on the speaker's intentions (i.e. does he aim at the adherence of someones or of every reasonable being), it may well be that the speaker conceives of those to whom he speaks – even in the context of a private deliberation in his own mind – as a manifestation of the universal audience. A convincing discourse is one in which the premises and the arguments presented can be universalized, that is, being in principle acceptable to all the members of the universal audience. We immediately realize how in this way of looking into the issue the originality of philosophy, as traditionally associated with the notions of truth and reason, will best be understood in terms of its relation to the universal audience, and the manner in which this audience is conceived of by the philosopher." (Translation by the present author.) – Cf. Perelman and Olbrechts-Tyteca, *Traité de l'Argumentation*, p. 34 et seq.

[16] Perelman refers to Pascal's *Pensées* here.

[17] Perelman refers to Kant's *Kritik der reinen Vernunft* here.

construct of the speaker by means of which he is claimed to be able to align his line of arguments for the case at hand. In an essay where he compared Aarnio's and Perelman's notions of the intended audience of a legal sentence, Antti-Juhani Wihuri has rightly underscored the *constructive* character of Perelman's notion of universal audience[18]:

> What is essential in Perelman's concept of a universal audience is that it, too, is *a construction of the speaker who presents the arguments*. It is the speaker's own idea of what the universal audience is like. (...) According to my interpretation, the most consistent (i.e. coherent) way of conceiving the universal audience, as presented by Perelman, is to see it, indeed, as a construction of the speaker. The idea of a fictitious universal audience is simply based on the speaker's wish to argue in a universally valid manner, in the sense of giving both the arguments and the outcome reached by them a *universalized* quality.

I fully agree with Wihuri's reading of Perelman's conception of the universal audience. As a consequence, the universal audience is a subject-bound *thought construct of the speaker* by means of which he aligns and adjusts the inner rationality and argumentative force of the arguments presented by him, so as to convince his addressees of the validity of his arguments, no matter whether we are dealing with a scientific theory, a philosophical stance, an ethical point of view, a stance on aesthetics, or an assertion on how to construct and read the law.[19]

There is no *view from nowhere* to the law or to any other essentially contested object matter of human inquiry that would be totally free from the epistemic, logico-conceptual, methodological, and other commitments that constitute the prevailing "order of things", or *épistémè* in Michel Foucault's terminology.[20] The concept of rationality entailed in Perelman's notion of universal audience is, like the concept of law, a *deliberative practice* that is intertwined with the societal, linguistic, and cultural background premises of the common world-view.[21] As a consequence, there is no universally valid concept of human rationality that could be cut off from the societal and cultural frame of human knowledge and value commitments. Rather, the type of rationality ascribed to the universal audience, taken as a subjective thought construct of the speaker, is expressive of a *bounded rationality*, modified by the diverse "scenes", frames, settings, contextures, or approaches to the realm of reason and argumentation. Moreover, since the universal audience is ultimately a subject-related thought construct only, there is no universally valid audience that would be

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[18] Wihuri, "Auditorion käsitteestä ja auditoriosidonnaisesta argumentaatiosta", p. 363, 364–365. (Italics by Wihuri; translation by the present author.) – Cf. Perelman and Olbrechts-Tyteca, *Traité de l'Argumentation*, pp. 25–30, with the subtitle: *L'auditoire comme construction de l'orateur*.

[19] Cf.: "... *l'accord de l'auditoire universel*. Il s'agit évidemment, dans ce cas, non pas d'un fait expérimentalement éprouvé, mais d'une universalité et d'une unanimité que se représente l'oratuer (...) *L'accord d'un auditoire universel n'est donc pas une question de fait, mais du droit*." Perelman and Olbrechts-Tyteca, *Traité de l'Argumentation*, p. 41. (Italics in original.)

[20] The apt phase *view from nowhere* is borrowed from Thomas Nagel's book with the same title. Nagel, *The View from Nowhere*; Foucault, *Les Mots et les choses*; Siltala, *Oikeustieteen tieteenteoria*, pp. 30–32, 731–732.

[21] On the notion of a *deliberative practice*, cf. Morawetz, "Epistemology of Judging. Wittgenstein and Deliberative Practices", pp. 19–23.

common to all such diverse "scenes", frames, settings, contextures, or approaches to argumentation as conceived by the speaker.

There is an inherent, ever-present, and unresolvable tension in Perelman's notion of the universal audience, since it is stretched between the two constitutive elements of sky-soaring, subject-free *universality*, as pursued by the speaker under universal rationality, and a far more down-to-earth, speaker-bound *subjectivity*, since such rationality is in the last resort determined by the speaker's own cognitive faculties and the linguistic, cultural, and societal constraints as he conceives them.[22] As a consequence, the *solipsistic* elements of a purely subject-bound rationality and the more *universal* ones of objectivity-seeking rationality are placed in a constant, unresolvable tension in Perelman's notion of rational, convincing argumentation.

What is more, the universal audience for different types of discourse situations would seem to be potentially very different. The intended universal audience of a particular philosophical stance may be quite different from the one adopted for the evaluation of an ethical or aesthetical argument, the literary analysis of Jorge Luis Borges' imaginative short stories or other items of literature, or an assertion on how to construct and read the law in light of the prevalent sources of law. It seems that Perelman did not take this inherent, built-in tension within the concept of universal audience fully into account, when he wrote that a speaker who addresses a universal audience should be constrained only by the pertinent atemporal and absolute arguments that are quite independent of the local and historical contingencies.[23]

The prevailing *concept* of rationality will make room for a variety of different *conceptions* of rationality,[24] depending on the other constitutive ingredients of the societal, linguistic, and cultural world-view internalized by the speaker, and also on the specific interest of knowledge in the field of life concerned. The intended ideal, or universal, audience of philosophical argumentation usually implies a rather sophisticated "sense for ontology" and acquaintance with the philosophical tradition, while such knowledge often cannot be expected from an audience consisting of lawyers, theologians, physicians, or politologists.[25]

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[22] Cf. Perelman: "L'auditoire universel est constitué par chacun à partir de ce qu'il sait de ses semblambles, de manière à transcender les quelques oppositions dont il a conscience. Ainsi chaque culture, chaque individu a sa propre conception de l'auditoire universel, et l'étude de ces variations serait fort instructive, car elle nous ferait connaître ce que les hommes ont consideré, au cours de l'histoire, comme *réel*, *vrai* et *objectivement valable*." Perelman and Olbrechts-Tyteca, *Traité de l'Argumentation*, p. 43.

[23] Perelman and Olbrechts-Tyteca, *Traité de l'Argumentation*, p. 41 *in fine*: "Une argumentation qui s'addresse à une auditoire universel doit convaincre le lecteur du caractère contraignant des raisons fournies, de leur evidence, de leur validité intemporelle et absolue, indépendante de contingences locales ou historiques."

[24] Cf.: ". . . one must distinguish between justifying a practice as a system of rules to be applied and enforced, and justifying a particular action which falls under these rules; utilitarian arguments are appropriate with regard to question about practices, while retributive arguments fit the application of particular rules to particular case." Rawls, "Two Concepts of Rules" (1955), in *Collected Papers*, pp. 20–46.

[25] Cf. Siltala, *Oikeustieteen tieteenteoria*, pp. 628–632.

The intended universal audience of the outcome of legal argumentation, in turn, may legitimately be expected to have gained a profound acquaintance with the institutional and societal sources of law and the models of legal argumentation adopted in the legal community. Moreover, relatively detailed knowledge of the very subject matter of legal regulation and decision-making can be required from the intended ideal, universal audience of such legal argumentation, with reference to, for instance, (a) the allocation of legal decision-making power and responsibility among the officials, (b) the allocation of effectively protected legal rights and legal duties among the citizens, and (c) the principles adopted for the allocation of the scarce resources in society. With respect to professionals in the study of history, literature, religion, or the arts and aesthetics, the situation would again be different as to the kind of knowledge required from the intended universal audience.

Moreover, not even the discursive fields of science, philosophy, or legal analysis are internally homogenous but are, instead, divided into divergent intellectual schools, branches, movements, or approaches to the issues under scrutiny, each with a different set of theoretical premises "on what there is" in the world. A scholar committed to the basic tenets of scientific and philosophical realism sees the world in a manner that is radically different from his colleague who has adopted the grounding premises of, say, phenomenology with its striving for pure knowledge, or textual hermeneutics with sensitivity towards tradition and cultural pre-understanding, or the Marxist conception of law and society where the laws of economics take priority vis-à-vis any phenomena dwelling on the ideological surface level structure of society. For the legal realist, law is a *social fact* that is brought into existence through the decisions by the courts of justice and other officials. For the other philosophical alternatives mentioned, law is conceived as the self-evident, a priori kind of a phenomenon, if legal phenomenology is opted for; a tradition-based and linguistic phenomenon, if legal hermeneutics is adopted; or an ideological surface-level reflection of the more grounding laws of economics, if a Marxist approach to the law and society is preferred.

Needless to say, the adherents of, say, American or Scandinavian legal realism, legal phenomenology, legal hermeneutics, or a Marxist conception of law and society each define the conception of law and the notion of a universal audience in highly divergent terms. Similarly, the representatives of legal positivism see the law and the criteria of legal argumentation in a manner that is very different from the one adopted in the tradition of natural law philosophy. What is common to the various readings of Perelman's universal audience under the Western *épistémè* and the resulting highly diversified conditions of valid argument is only the censure and ruling out of certain illegitimate means of influencing the audience of argumentation, such as an appeal to unfounded prejudice, the use of threat or other compulsion in argumentation, the intentional spreading out of lies and disinformation, an appeal to the formal authority of the speaker, or any other types of manipulating the audience by irrational means, as pointed out by Jürgen Habermas as the prerequisites of an ideal speech situation. Still, what will count as a legitimate step in legal argumentation before a universal audience to a great extent depends on the specific notion of rationality adopted by the speaker and the premises of the world-view adopted in the intended universal audience as the speaker conceives it.

4.3 The Realm of Rhetoric and the Quest for Value-Cognitivism

In Perelman's writings on the new rhetoric and in Aulis Aarnio's contributions to legal argumentation theory, the notion of the *audience* of argumentation gains vital importance. As concerns the audience of legal argumentation Aarnio puts forth the *regulative principle* for the legal doctrine[26]:

> Legal dogmatics ought to attempt to reach such legal interpretations that could secure the support of the majority in a rationally reasoning legal community.

Aarnio's notion of rationality in legal reasoning is defined by means of the two criteria of *legal predictability* that should guide the procedure of legal discretion and *content-based acceptability* that concerns the outcome of legal discretion.[27] But what do the key concepts of *rationality* in legal argumentation and *legal community* signify, to be more exact? Aarnio's theory of legal argumentation and the concept of legal audience are based on Perelman's idea of the new rhetoric and the notion of an ideal or universal audience entailed therein.

Aulis Aarnio bases his theory of legal argumentation on a set of theory premises, viz. Jürgen Habermas' notion of ideal speech situation (*ideale Sprechsituation*) and Chaïm Perelman's idea of an universal audience (*l'auditoire universel*)[28]; the rationality rules of legal discourse by Robert Alexy, based on Habermas' idea of communicative rationality[29]; and John Rawls' seminal idea of decision-making behind the veil of ignorance.[30] Moreover, Aarnio's theory of law is committed to Aleksander Peczenik's three-partite model of the sources of law, as now adapted to the Finnish legal system.[31]

Alexy's rationality rules of legal discourse comprise the following kinds of rules[32]:

(a) *consistency rules* prohibit the use of contradictory arguments and require that the speaker adheres to the rule of excluded middle and the general transitivity rule;
(b) *efficiency rules* prohibit the use of consciously misleading arguments based on linguistic disagreement;

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[26] Aarnio, *The Rational as Reasonable*, p. 227.

[27] Aarnio, *The Rational as Reasonable*, p. 185 et seq.

[28] Aarnio, *The Rational as Reasonable*, pp. 202, 221–226 (on Perelman) and pp. 195–196, 224–225, 231–235 (on Habermas), Aarnio, *Reason and Authority*, pp. 202, 220–221 (on Perelman) and pp. 209, 210–211, 214–216 (on Habermas); Aarnio, *Laintulkinnan teoria*, pp. 278–279, 282 (on Perelman).

[29] Aarnio, *The Rational as Reasonable*, pp. 195–204; Aarnio, *Reason and Authority*, pp. 214–215, 222; Aarnio, *Laintulkinnan teoria*, pp. 211–216; cf. Alexy, *A Theory of Legal Argumentation*, pp. 187–206.

[30] Aarnio, *Reason and Authority*, p. 228; cf. Rawls, *A Theory of Justice*, pp. 136–142.

[31] Aarnio, *The Rational as Reasonable*, pp. 89–95; Aarnio, *Laintulkinnan teoria*, pp. 220–256; cf. Peczenik, *Vad är rätt?* pp. 209–288; Peczenik, *On Law and Reason*, pp. 319–371.

[32] Aarnio, *The Rational as Reasonable*, pp. 196–198; Alexy, *A Theory of Legal Argumentation*, pp. 187–206.

(c) *sincerity rules* require that the other party or parties to a discourse ought to be taken seriously and prohibit the use of force, deception, and prejudice vis-à-vis the other parties to a discourse;
(d) *generalization rules* prohibit the use of ad hoc and *ad hominem* arguments;
(e) *justification rules* require that each argument be backed by (other) rational arguments, if it has been challenged.

The introduction of Rawls' *veil of ignorance* in the novel context of the judge's legal discretion may invite trouble, however. In Rawls' theory of justice, the veil of ignorance was introduced as a conceptual device for framing the *original position* that is thought to conceptually precede the state of having entered a social contract.[33] By means of the veil of ignorance, Rawls could justify the adoption of the grounding rules of justice and the institutional arrangements in a society committed to the idea of *justice as fairness*. In the original position, the parties to the social contract are denied any knowledge concerning their own social position or possession of wealth, so they cannot have any specific interests to defend, either. All the knowledge they have is equal to general knowledge of the human nature and the general scarcity of resources in society.[34]

Rawls argued that the parties to the negotiations on a social contract, in which the grounding principles of social justice and the institutional arrangements in society are to be settled by rational argument, would agree upon a set of principles to the effect that each participant is given the widest sphere of personal freedom that is compatible with a similar sphere of freedom enjoyed by the others. The allocation of the scarce resources in society will be attained by reference to the principle according to which all the offices and vacancies in society are open for all to apply, on the condition that they meet up with the specific criteria demanded by the task or position concerned. Social inequality cannot be justified except by having recourse to what Rawls called the *difference principle*. Thus, improving the position of the well-off members in society is allowed only on the condition that the position of the less well-off members of society is thereby also improved.

When the veil of ignorance is detached from its initial philosophical context of drafting a social contract and placed in the context of the judge's legal decision-making process, as Aarnio suggests, the setting is radically different from the Rawlsian *tabula rasa* situation that conceptually predates the locking-up of the institutional structure of society and the principles of social justice adopted in it. The

[33] Interestingly, John Searle has argued that if there is a language in a community, it entails that the speakers have already entered a social contract (in some sense of the term), to the effect that there can be no pre-contractual original position where language would be used as a means of communication: "... to have language is already to have a rich structure of institutions. Statement making and promising are human institutions as much as property or marriage. (...) If by 'the state of nature' we mean a state in which humans live like other animals without any institutional structures, then *for language-using human beings there can be no such thing as the state of nature*." Searle, *Making the Social World*, p. 134. (Italics in original.)

[34] Rawls, *A Theory of Justice*, pp. 137–138.

judge is – *per definitionem* – placed in a decision-making situation where the institutional structure of society and the general principles of social justice have been determined *in abstracto* in legislation and/or precedents, while it is the judge's task to define their content *in concreto* for the particular case at hand. As a consequence, the Rawlsian veil of ignorance cannot be extended to the judge's legal discretion without seriously distorting its Rawlsian philosophical content. A court of justice is an *institutional fact* the existence of which necessitates the pre-existence of a set of legal rules on the court organization, judicial procedure, and the legal order in general. Thus, the idea of a veil of ignorance cannot be part of the frame that guides a judge's legal discretion, except in the rather trivial sense that the delivery of justice in a court should not pay attention to the subjective character of the persons involved in the case but only to the arguments presented by them.

Aarnio defines the audience of a legal assertion on how to construct and read the law by reference to Perelman's notion of universal audience[35]:

> The universal audience consists of *enlightened persons*, i.e. persons who are adept at using reasons. It is an *ideal* audience in the sense that no-one can possibly think of addressing the universal audience so that each and every one of its members could de facto have a stand on the issue concerned.

Aarnio makes the two further distinctions between a *concrete* and an *ideal* audience, on the one hand, and a *universal* and a *partial* audience, on the other.[36] When looked upon from the point of view of Perelman's new rhetoric, the difference between an ideal and universal audience, on the one hand, and a concrete and partial audience, on the other, is far from self-evident. Aarnio, moreover, argues that Perelman is committed to a *value-cognitivist* and *value-objectivist* position as to the definition of the universal audience[37]:

> What is important in Perelman's notion of a universal audience is that *value judgements*, too, obtain an objective character in it. Thus, Perelman makes the presumption that a value judgment is rationally justified only when each (rational) human being can accept it. Value judgments, if they successfully pass the test of approval by the universal audience, obtain a rational justification that is similar to that given to propositions concerning empirical reality. (. . .) If we accept the notion that in a universal audience even a *value judgment* can be justified by means of rational discretion and in such a manner that the audience will finally reach consensus, we have ended up in supporting a cognitivist theory of values. As was noted above, Perelman's treatise would seem to hint at such a possibility. This means that by increasing knowledge [on the subject of disagreement] two initially diverging standpoints, held by two distinct members of the universal audience, can be made to converge.

Aarnio's reading of Perelman might invite criticism, though, since Perelman's idea of the universal audience need not be committed to the alleged presumption of value-cognitivism or value-objectivism.

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[35] Aarnio, *Laintulkinnan teoria*, p. 279. (Italics by Aarnio; translation by the present author.) – I make use of the original, Finnish edition of Aarnio's book here.

[36] Aarnio, *The Rational as Reasonable*, pp. 221–225; Aarnio, *Laintulkinnan teoria*, pp. 280–283.

[37] Aarnio, *Laintulkinnan teoria*, pp. 279, 282. (Italics by Aarnio; translation by the present author.)

According to Aarnio, a concrete audience can be either universal or partial. A *concrete and universal* audience comprises all the humans alive at the moment of time *t*. Such a category obviously has no field of application in legal argumentation, since the idea of having a concrete audience that would adhere to a common set of universal values is highly unrealistic. A *concrete and partial* audience consists of a restricted number of listeners, such as the attendants of a university lecture, the jury of a court, or the members of a parliamentary legislative committee in front of which arguments on legislative drafts are presented. In such a case, the sentence on legal interpretation that is put forth by the speaker either is or is not acceptable from the point of view of the listeners, while the use of manipulation, compulsion, or other kind of irrational argumentation has not been ruled out as means of influencing the audience. For Aarnio, such a conception of argumentation is not acceptable, since it pays no respect to the legitimate expectations of legal protection of the citizens.

An ideal audience, too, can be either universal or partial. An *ideal* and *universal* audience consists of all the enlightened persons, capable of taking part in rational argumentation. According to Aarnio, such a notion of the universal audience is the one introduced by Perelman. As was pointed out above, Aarnio argues that Perelman is committed to the idea of *value-cognitivism* in argumentation, while Aarnio himself opts for a relativist conception of values. Thus, in Aarnio's model there is no guarantee of an ultimate value consensus in the ideal audience, not even after a full round of argumentative turns. Finally, an *ideal* and *partial* audience consists of those persons who are committed to the rules of rational discourse, on the one hand, and who share a common *form of life* and the values entailed therein, on the other, the term "form of life" taken in the Wittgensteinian sense. The members of an ideal and partial audience all share a set of common values bound to a certain form of life, while the presumption of universal values and ultimate consensus concerning them, which Aarnio ascribes to Perelman and his notion of argumentation, need not be made.[38]

Still, the distinction between an (ideal) universal audience and concrete (partial) audience would seem to be sufficient for the present purpose. A universal audience is invariably an ideal audience if defined in the constructive and subject-aligned manner suggested above by Perelman (and Wihuri), and not in the more objectivist manner suggested by Aarnio. In consequence, the presumption of an ultimately converging consensus on values and interpretation-bound meanings can be relaxed in favour of a more permissive notion of the universal audience. When the universal audience is defined, as Perelman himself suggested, as a *subjective thought construct in the mind of the speaker* used as a reference for argumentation by him,[39] the distinction between an ideal or concrete *universal* audience gets blurred and falls down: since it is no more than a subjective thought construct of the speaker,

[38] Aarnio, *Laintulkinnan teoria*, pp. 282–283.

[39] Perelman and Olbrechts-Tyteca, *Traité de l'Argumentation*, pp. 25–30: *L'auditoire comme construction de l'orateur*.

the conceptual boundaries of the universal audience are for the speaker himself to define in light of the prevailing socio-cultural conception of rationality in question. And, on the other hand, since a *concrete* audience is invariably a *partial* audience as well, there is not need for the distinction between a concrete audience and a partial audience, either.

As I see it, Aarnio's argument as to the value-objectivism or value-cognitivism in Perelman's new rhetoric cannot find adequate support in the latter's writings on the issue. In fact, such a notion would be contrary to the basic philosophical premises and intentions of an Aristotelian rhetoric. The Greek philosopher's idea of rhetoric is aligned with the kind of premises, and the inferences based on them, that are *not* true or untrue by definition, unlike the tautologies and analytical truths of formal logic and mathematics of the type "a = a" or "((a → b) & (b → c)) –> (a → c)". Similarly, the claims of Aristotelian rhetoric depart from the self-evidently valid, intuitive, and a priori truths of a rationalistic or intuitive philosophy, like Descartes' famous inference *cogito, ergo sum*, and from the self-evident logico-conceptual necessities of a philosophical phenomenology or rationalistic natural law philosophy.[40] Moreover, the scope of the new rhetoric will not cover the observation sentences or protocol sentences in the sense referred to by the *Wiener Kreis*, the truth-value of which is subject to verification or falsification according to the experiential and empirical methodology of the natural sciences.

Rather, the Aristotelian rhetoric and its later Perelmanian variant deal with the kind of reasoning, the premises and conclusions of which are not known to be (necessarily) true or untrue, but are only more or less adequate, reasonable, or acceptable, as judged by audience addressed by the speaker. Instead of logical deduction and the preservation of the original truth-value of the premises of philosophical reasoning, the topics and rhetoric by Aristotle, the new rhetoric by Perelman, and the legal argumentation theory based on such premises all analyse practical reasoning and the commonly held conceptions, judgments and opinions (*opinions communes* & *sens commun*) that dwell within the realm of morals, politics, practical philosophy, and law.[41]

Within the realm of rhetoric, we are dealing with beliefs and assertions that can be argued *pro et contra* in a more or less plausible manner, to the effect of possibly convincing the intended audience, no matter whether we are dealing with a set of sentences on how to construct and read the law; the definition of good, right, and just in moral philosophy; value judgments in the study of history, literature, or aesthetics in the context of the humanities; or the interpretation of the rules of some social convention and etiquette in a social situation in the social studies. In such a discourse on what is legally or morally right and acceptable, the rigid rules of formal logic have to recede, giving way to a far more flexible conception of argumentation.

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[40] On the self-evident truths of natural law philosophy, cf. Finnis, *Natural Law and Natural Rights*, pp. 64–65: "The good of knowledge is self-evident, obvious. It cannot be demonstrated, but equally it needs no demonstration." Cf. Finnis, *Natural Law and Natural Rights*, p. 85.

[41] Cf. Perelman, "Une théorie philosophique de l'argumentation", p. 255.

Aristotle's and Perelman's notion of the realm of rhetoric exemplifies an *ars disputationis*,[42] i.e. the skill of *reasonable disagreement* among the parties o a dispute that cannot be formalized into a set of logical syllogisms, because of the definitional uncertainty of the premises and the resulting conclusions of reasoning.

If, in fact, the process of argumentation and deliberation in front of a universal audience would ultimately lead to a converging consensus on the societal values concerned, even the process of judicial deliberation and legal argumentation would end up in an overarching consensus on the issues under scrutiny. The ideal or universal audience would then function as the ultimate reference of *consensus-seeking* legal objectivity. In ascribing the attribute of meaning-converging value-objectivism and value-cognitivism to Perelman's notion of universal audience, Aarnio's argument has the unfortunate side-effect of turning the Aristotelian idea of argumentation that takes place in terms of relative uncertainty and reasonable disagreement into one based on absolute certainty vis-à-vis the value premises entailed, since after a full round of arguments presented in front of the universal audience we would ultimately have an over-arching consensus as to the values entailed and the outcomes of legal reasoning.

The initial discord among the participants to a legal dispute would be effectively dismantled by recourse to the internal dynamics of such consensus-oriented reasoning in the universal audience, thereby turning the initial disagreement into final agreement and consensus on the values entailed. As a consequence, there would be no logical space left for the kind of *pro et contra* argumentation and, possibly, ultimate uncertainty and disagreement as to the outcome of deliberation that, however, is a distinctive mark of Aristotelian rhetoric.

The tautological, or analytical, truths of logic and mathematics; the intuitive, a priori truths of Réné Descartes' *cogito, ergo sum* and other self-evident truths of rationalistic philosophy; the logico-conceptual and metaphysical premises of phenomenological philosophy, and the equally self-evident (*per se nota*) truths concerning the human nature and human society by the natural law philosophy all claim to evade the Aristotelian idea of subjecting the conceptions, beliefs, and judgments of practical reasoning to the tribunal of a *pro et contra* argumentation, with no access to absolutely certain knowledge on the issue. Formally valid deductive logic has no need for the less-than-exact reasoning cherished by the Aristotelian or Perelmanian rhetoric[43]:

> What is evident is, at the same time, necessarily true and immediately recognizable as such. An evident proposition has no need for a proof, since such a proof would consist of a necessary deduction of something that is not evident from a set of premises that are themselves evident. – In such a system, there is no place for argumentation.

[42] Sampaio Ferraz, Jr., "Topique", p. 615.

[43] Perelman, "Une théorie philosophique de l'argumentation", p. 248: "Ce qui est évident est, à la fois, nécessairement vrai et immédiatement reconnaissable comme tel. La proposition évident n'a pas besoin de preuve, la preuve n'étant qu'une déduction nécessaire de ce qui n'est pas évident à partir de thèses évidents. – Dans un tel système, il n'y a nulle place pour l'argumentation." (Translation by the present author.)

Therefore, the *realm of rhetoric* occupies the logical space that extends "between the evident and the irrational".[44] It is, in other words, situated in a logico-conceptual space limited by the analytical truths of formal logic and mathematics and the self-evident truths of phenomenology and natural law theory, on the one hand, and by the irrational emotions, passions, and other phenomena that lie beyond the domain of reason, on the other. In the old and new rhetoric alike, we are dealing with what is no more than *adequate*, *justifiable*, or *reasonable* in light of the notion of a universal audience that the speaker has constructed in his mind, reflecting his idea of rationality that can be universalized for the audience at hand. Contrary to Aarnio's philosophical stance, Perelman's universal audience will have no room for the ultimately converging effect of the claimed value-consensus, value-cognitivism, or value-objectivism, due to its entailment of the uncertainty of legal argumentation and its being open to various interpretations of the social and cultural values in an *ars disputationes*. Thus, the universal audience will always leave room for the divergent, possibly dissensus-inducing arguments, instead of hosting an inducement for overarching consensus in legal or moral argumentation.

4.4 The New Rhetoric and Its Alternatives

The Aristotelian and Perelmanian approach to the issues on law provides a highly feasible alternative to the isomorphic theory and the coherence theory considered above. Like the coherence theory, the rhetorical account rejects the notion of an isomorphic relation between the specific fact-description of a legal norm and the state of affairs in fact realized in the world, as the isomorphic model of law would have it. Similarly, it turns down the idea of textual coherence among the institutional and societal sources of law under the coherentist premises or law as integrity. Now, it is the intended universal audience (*l'auditoire universel*) of legal interpretation, taken as a subject-bound, mental *thought construct* of the speaker as outlined by Chaïm Perelman and Lucie Olbrechts-Tyteca in *Traité de l'Argumentation* that will serve as the reference for legal construction or other kind of practical reasoning. The impact of the pragmatism-aligned *consensus* theory of truth can be seen here.

Perelman's new rhetoric manages to get along with a somewhat less complicated "furniture of the world", or philosophical ontology, than the isomorphic theory, since it need not adhere to the metaphysical prerequisites of the Wittgensteinian picture theory of language. Instead, a set of rationality conditions that define the characteristics of the ideal, universal audience will do. Yet, under the theoretical premises of Wittgenstein's *Tractatus Logico-Philosophicus*, the language – world relation could not itself be captured by semantically meaningful linguistic expressions, since they failed to satisfy Wittgenstein's criteria of meaningfulness.

[44] In French: *entre l'évident et l'irrationnel*. Perelman, "Une théorie philosophique de l'argumentation", p. 255 *in fine*.

Though the definition of truth as a language–world correspondence might be thought to best satisfy the genuinely philosophical criteria of human knowledge, turning such a definition into a workable tool of philosophical analysis will meet with grave theoretical obstacles. We cannot possibly gain knowledge of the states of affairs that prevail in the world without first having gained access to the logico-linguistic categories of the *épistémè* in Michel Foucault's sense of the term, i.e. the epistemic order of things that determines how the "words" (*les mots*) and "things" (*les choses*), or linguistic categories and the phenomena in the world, are connected to one another.[45] The chains of logic and language will not loosen their grip on us, no matter how intensely we wished for a shortcut for direct knowledge of the phenomena "out there" in the world, untouched by the possibly distorting categories of the human language and the ever-present constraints of the prevalent *épistémè*.

When the concept of truth is defined by the approval or disapproval of an ideal, universal audience, the metaphysical premises concerning the world "out there" can be loosened and a more community-based idea of human knowledge be adopted instead. The cost of such a philosophical move is paid in terms of the *constructive*, shifting rationality conditions of a universal audience, and the very conception of discourse rationality may significantly vary, depending on the particular world-view of the speaker and the context of argumentation. If the universal audience is defined, as Chaïm Perelman preferred, as a subjective *thought construct of the speaker*,[46] it can provide no more than a highly subject-related, fictitious or hypothetical reference for argumentation.

In that, Perelman's ultimate reference of legal or moral argumentation resembles Dworkin's idea of the fictitious super-judge Hercules, J. whose overwhelming capacities in legal construction and interpretation guaranteed the attainment of legal integrity. The trouble with Perelman's notion of rational argumentation has to do with the very notion of the universal audience. How could we define the universal audience as a mental construction of the speaker vis-à-vis the rationality conditions of, say, legal deliberation, while evading a down-right *solipsistic* conception of such argumentation, with no inherent links to the similar conceptions sustained by the others?

Anchoring the criteria of the truth and knowledge to the approval of an ideal or universal audience has the welcome effect of ruling out any perfectly *coherent fairy-tales* from among any set of true propositions of the world, such as the nonsensical world of the *Alice in Wonderland* or the world of witchcraft and wizardry in J. K. Rowling's books on *Harry Potter*, no matter how perfectly such an account of the (fictitional) world might meet up with the coherentist criteria laid down by the theory of literature or aesthetics.

Still, even a fully reasoned consensus on some scientific or other issue may be grounded on totally mistaken premises, like Galileo Galilei's clash with the

[45] Foucault, *Les Mots et les choses*; Siltala, *Oikeustieteen tieteenteoria*, p. 1 et seq.

[46] "*L'auditoire comme construction de l'orateur*", Perelman and Olbrechts-Tyteca, *Traité de l'Argumentation*, pp. 25–30.

Catholic Church and Italian Inquisition at the birth of the novel empiricist science in the seventeenth century bear ample witness of. Even the consensus theory of truth and knowledge necessitates some ontic conception of the subject matter of legal construction and of the institutional or societal premises entailed, so that the presence (or absence) of such an approval might be rightly targeted at the *legal*, and not e.g. moral, economic, or religious, phenomena. The consensus theory of truth and knowledge cannot provide the objects of legal construction by itself, but a pre-ordained conception of the world is needed.

Unlike the isomorphic theory, the coherence theory of law and the new rhetoric are able to cover the hard cases of legal discretion, too, where the judge is confronted with the interpretation of less than clear-cut rules or the weighing and balancing of legal principles, with reference to Makkonen's semantically *vague* and *unregulated* situations of legal decision-making. Perelman's theory of legal argumentation is ultimately affected by the same kind of inherent weakness as Dworkin's theory of *law as integrity*: if the universal audience is no more than a thought construct of the speaker, how can we ever be certain that the outcome of legal construction and interpretation really matches with the prevailing idea of legal justice? In Dworkin's theory, the solipsistic legal discretion of the fictitious superjudge Hercules cannot be supervised by any external means, and the same goes for the universal audience under the new rhetoric.

The coherence theory underscores the relations that prevail among arguments derived from the institutional and societal sources of law, while the new rhetoric gives priority to the reactions of the intended audience of such reasoning. The two criteria, i.e. textual coherence under the coherence theory of law and the approval or disapproval of the outcome of interpretation at the universal audience under the new rhetoric, may well lend support to one another. The justification given in support of a particular reading of the law gives indirect information of the significance accorded to the universal audience, of legal integrity, or any other criterion adopted as the reference of how to construct and read the law.

Still, the authority, or argumentative weight, of the outcome of legal reasoning cannot be extended beyond the weight or authority of the premises of the frame of analysis adopted in such legal construction. Any stance on how to construct and read the law based on the subjective thought construct of the universal audience in Perelman's new rhetoric or on the fictitious super-judge Hercules in Dworkin's theory of legal integrity is always vulnerable to G. E. Moore's *open question argument*: "now that you have defined the criterion of justice in legal argumentation as so-and-so, well, *is* that justice?" In addition, the coherence theory of law and the new rhetoric equally fail to give an account of the *external* effects of law, such as the economic consequences of law in society.