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Methods of Legal Reasoning

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This basic thesis is surrounded by some troublesome issues. An explanation must be given, for instance, of what exactly constitutes "an economically efficient allocation of goods". Economists and lawyers have offered at least two explanations. First, one can speak of Pareto-efficiency. The allocation of goods is Pareto-efficient in the given society if it is not possible to better the situation of any member of the society without worsening the situation of others. Secondly, one can apply Kaldor–Hicks efficiency: the allocation of goods is efficient if it is impossible to better the sum of the welfare of the society, even with the assumption that the situation of some of the members of the society can be worsened. It is not our aim to analyze the above mentioned definitions of efficiency. We need only stress that the concept of economic efficiency is not univocal, and that controversy over the understanding of efficiency plays an important role in debates concerning the foundations of the economic analysis of law.

The problem of defining economic efficiency should be placed within a more general framework. The basic thesis of Law and Economics demands that efficiency is taken as the main indicator of what the law is (should be). This suggestion seems to contradict traditional conceptions of what a legal system is: according to the traditional account, the legal system should secure justice, not efficiency. For the proponents of Law and Economics, however, there exists no tension between justice and efficiency. We can even say that efficiency is an economic explication of justice. One does not have to add that this assumption is controversial. We leave the issue here, only highlighting its existence.[48]

Another premise of the economic analysis of law is based on the fact that economic models employ the concept of a person who acts rationally (*homo oeconomicus*). This assumption is often questioned by psychologists who maintain that much human behavior is far from being "rational". This particular objection can be challenged by saying that the criticized assumption has proved useful – at least to a certain degree – in the history of economics. One should add here that, in contemporary economics, models are built in which the assumption in question is in various ways "loosened".[49]

Let us observe further that the basic thesis of the economic analysis of law can be read in two ways: descriptively or normatively. In the first case we will say that the law is economically efficient. In the second – that it should be. The pioneers of Law and Economics attempted to justify the descriptive thesis. For instance, one of the aims of Posner's *Economic Analysis of Law* is to show that the precedents of American courts in tort law lead to economically efficient results. As time has passed, more

emphasis has been placed on the normative dimension of the basic thesis.[50] Below we will read the basic thesis normatively for it enables us to show that the tools of economics can serve not only the theory of law, but also legal practice.

3.3.2 Idea of Economization

Let us look at the following example. Let us assume we have a simple legal system consisting of just one norm:

(A) Whoever causes damage to someone else must redress it.

The obligation expressed in (A) is not very precisely determined. Almost all the concepts used in its formulation give rise to interpretational problems. How should one define "damage"? What does it mean that a person A caused damage to a person B? Should it be the case that only those actions of A that directly result in a damage count as torts? What does it mean to "redress" the damage? These are the questions to be answered in the process of interpreting of (A). What are the criteria of interpretation to be employed?

Let us look at the following situation. John has caused damage to Adam. Therefore, on the basis of (A), he has to redress it. But in certain circumstances we may ask: should John redress the entire damage? Such a question is sound in a situation in which Adam's behavior contributed to the damage. What are the criteria for answering it?

Let us try to build a simple economic model, which can serve as a basis for the required answer. What indicators need to be taken into account? It is clear that we need to know the value of the damage. Let us call it S. Let us assume further that Adam could have undertaken an action that resulted in no damage. Such an action naturally has its own cost. Let K_P stand for the cost of Adam's preventive actions. The comparison of S and K_P does not tell us much. Obviously, if the cost of the preventive action K_P is higher than the damage S, then undertaking the preventive action would be irrational.

Let us consider now whether we should expect the plaintiff (in our case: Adam) to undertake preventive action when $K_P < S$. The answer to this question will be positive only if the damage occurs in every case in which the plaintiff refrains from acting. If, however, the plaintiff's refrain does not in every case result in damage, the inequality $K_P < S$ is useless. Let us assume then that by P we will understand the probability of damage where the plaintiff does not undertake the preventive action. Let us assume, further, that undertaking the preventive action eliminates the possibility of the damage. In such circumstances, every time the unit cost

of prevention is lower than the unit cost of the damage ($K_P < P \cdot S$), it is rational to undertake preventive action. Let us illustrate this using our example. Assume that the damage S, John has caused to Adam is 100. Let the probability of the damage P equal 10%, and the cost $K_P - 4$. It is easy to observe that $K_P < P \cdot S$, for $4 < 10$. It would be rational then for Adam to undertake preventive action. If he refrained from doing this, the court could say that his behavior contributed to the damage. John will not, therefore, be responsible for the entire damage.[51]

Let us look more closely at how the court's reasoning runs here. John has caused damage to Adam; the damage amounts to 100 and the question the court has to answer reads: should John redress the entire damage, or only a part of it? The court will choose the former possibility only if Adam's behavior did not contribute to the damage. When can one say that this is the case? Our simple economic model suggests that it is the case when the unit cost of prevention is lower than the value of the damage multiplied by the probability of its occurrence.

The model presented above is, of course, quite simplistic as it rests on many idealistic assumptions. We have assumed, for instance, that the preventive actions reduce to 0 the probability of the occurrence of the damage. What if, however, the preventive actions reduce the probability only by half? Let us inspect the table below (from now on by P we understand the probability of the occurrence of the damage in the given circumstances):

	K_P	P (%)	S	**Expected damage**	**Total social costs**
Situation 1	0	10	100	10	10
Situation 2	4	5	100	5	9

Under these changed circumstances, in Situation 1, in which the plaintiff does not undertake the preventive actions, the social cost is 10. In Situation 2, in which preventive actions are undertaken reducing the probability of the occurrence of the damage to 5%, the social cost equals 9 (that includes the expected damage and the cost of the preventive action). Since the social costs in Situation 2 are lower, this is the desired situation; the plaintiff should therefore undertake the preventive actions. If he refrained from doing so and damage occurred, the court will hold him responsible for contributing to the damage. If P_1 stands for the probability in Situation 1, and P_2 for the probability in Situation 2, the rule forming the basis of the court's decision can be formulated in the following way: if $(P_2 \cdot S) + K_P < P_1 \cdot S$, then the plaintiff contributed to the damage.

Another assumption made in the model constructed above was risk-neutrality. A risk-neutral person values the certainty of receiving 5,000 USD equally with a 50% chance of receiving 10,000 USD. A risk-averse person, by contrast, values the certainty of receiving a certain amount of money more highly than a 50% chance of receiving double that sum. Finally, a risk-lover prefers a 50% chance of receiving 10,000 USD to the certainty of receiving 5,000 USD. If we replaced our assumption of risk-neutrality with the assumption that the person in question is risk-averse, the difference in the total social cost between Situation 1 and Situation 2 would increase: in Situation 2 the risk of the occurrence of damage is lower than in Situation 1, and this constitutes an added value for the risk-averse person (note, however, that there may be no good reason to abandon the assumption of risk-neutrality in constructing a model for the purpose of answering a general interpretational question).

The following further assumptions are also implicit in the model given above: (a) that the parties' level (frequency and duration) of activity does not affect the determination of the cost of the preventive actions; (b) that the court is capable of determining precisely the costs and results of both parties' actions; (c) that all the costs are measurable and can be expressed in monetary terms.[52] It is vital to question whether acceptance of these assumptions is sound. In other words: how do the assumptions influence the results of the analysis, and is their influence significant enough that the assumptions should be analyzed themselves? With regard to risk-neutrality and the level of activity, it is possible to extend the mathematical structure of our model to include those additional factors. Assumptions (b) and (c), however, highlight an essential problem concerning the economic analysis of law.

One of the greatest difficulties with the economic analysis of a legal case is the "economization" of the case, i.e., quantification, estimation of the costs and values of states of affairs and actions. If John damages Adam's car, which is worth 10,000 USD, then the value of the damage can easily be estimated. Imagine, however, that John's car crashes into Adam's bicycle. If the only thing damaged is the bicycle, the values can be straightforwardly calculated. But if Adam breaks his leg in the accident, the situation becomes more complicated. And in such a case how can one verify whether or not Adam contributed to the occurrence of the damage? How should the cost of the preventive actions be calculated?

The problem of estimating the amount of the damage is not only troublesome for the economic school; this is a typical problem in legal practice. In civil codes one usually finds some rules that help to determine the values in question. In other systems the rules are developed by the courts.

Therefore, the indicated problem does not exclusively affect the economic analysis of law.

From the above discussion a picture can be constructed in which application of the economic method is divided into three stages. In the first stage a case is "economized", i.e., the relevant aspects of the case are quantified and expressed in monetary terms. At the second stage, a suitable economic (mathematical) model is developed to assist in answering the questions that arise in the case. Finally, at the third stage, conclusions are drawn from that economic model. Problematic decisions are made in all the three stages. In the first stage actions and states of affairs to which it is difficult to ascribe a definite economic value are nonetheless "estimated". In the second stage one can always question whether the constructed model takes into account all the important factors, or whether it is based on over-simplistic assumptions. The third stage, leading "from economics back to the law", can also be troublesome, although the principle that governs it – to promote solutions minimizing the total social cost – seems clear.

The three-stage account of the application of the economic method is, of course, a simplification. For instance, the first stage cannot be completely detached from the second; the possible economic models determine what can be "economized" in a given case. Similarly, the conclusions we draw from the model do not have to end the analysis. If they are unacceptable then they may lead to a revision of the model or to a new "economization" of the case. Even so, the three-stage scheme described above does give a satisfactory account of the key elements of the economic method.

3.3.3 Limits of the Method

The limits of the application of economic analysis to law will now be considered. In order to do this, several examples from various areas of law (especially private law and criminal law) will be addressed more closely, and some typical situations faced by lawyers will be analyzed (interpretation of law, creation of law, determination of sanction to be applied, etc.).

It is not surprising that economic analysis has been used most widely in private law, in which economic efficiency may be considered the highest aim. In the example presented in the previous section, the construction of an economic model proved useful in the interpretation of a generally stated legal norm constituting tort liability:

Whoever causes damage to someone must redress it.

Imagine now a legislator who is about to introduce such a norm, but they want to make more precise the concept of tort liability. Let us

assume that the legislator has to choose between two different ways of determining liability. The first bases liability on the condition that the actor could have undertaken steps to minimize the probability of the occurrence of damage. If the action that caused the damage was undertaken with due care the agent is not liable; otherwise he/she is held responsible for the damage (this type of liability is called negligence). The second way of determining liability involves declaring responsible anyone who has caused damage, irrespective of whether or not he acted cautiously (this is called strict liability). From the economic perspective, the first conception assesses liability according to whether the agent incurred the relevant cost of the preventive actions (=acted with due care) or not. In the second conception the agent is held liable irrespective of any costs he incurred to undertake the preventive actions.

Let us consider which of the conceptions should be applied by the legislator. From the point of view of the economic analysis of law, the question is which of the models of liability leads to the most economically efficient solution, i.e., which minimizes the total social cost. Let us look at the two tables:

Preventive actions	K_S	P (%)	S	**Expected damage**	**Total social cost**
No	0	20	100	20	20
Yes	4	5	100	5	9

Preventive actions	K_S	P (%)	S	**Expected damage**	**Total social cost**
No	0	20	100	20	20
Yes	4	18	100	18	22

K_S stands here for the costs of the preventive actions. In the case of the first table the preventive actions that cost 4, reduce the probability of the occurrence of the damage from 20% to 5%. In this way the social cost without the preventive actions equals 20, with them it equals 9. This means that undertaking of the preventive actions is reasonable, for it leads to better results in terms of social cost. The second table illustrates a situation in which the preventive actions reduce the probability of the occurrence of the damage only by 2%, from 20% to 18%. In this case the total social cost without prevention is 20, whilst, with it, it is 22. This time refraining from the preventive actions is the optimal decision.

Consider now what would be reasonable behavior for an agent in both cases depending on the conception of liability accepted. In Situation 1, accepting the conception of negligence leads to the following results: (a) if

the agent does not act with due care (cost 4), he will have to redress the entire damage (20), whilst (b) if he acts with due care (cost 4), he will not be held liable, therefore his costs are limited to the cost of the preventive actions (4). It is clear, then, that a rational actor would rather pay 4, in order to avoid paying 20. If, in Situation 1, the strict liability conception is adopted, the agent who does not undertake the preventive actions would pay 20, otherwise – 9 (costs of prevention + the costs if damage). Therefore, in Situation 1, the agent would choose the economically efficient route of undertaking the preventive actions no matter which conception of liability is followed. Let us observe, however, that in the case of strict liability his costs are significantly higher than in the case of negligence (9 to 4). This means that the frequency of his activity will be much lower with strict liability than with negligence (for higher costs will make the activity less efficient).

In Situation 2, following the conception of negligence leads to the agent paying 4, if preventive actions have been undertaken, and paying 20 if they have not. Rational behavior requires undertaking those preventive actions, which in Situation 2 lead to a solution that is economically inefficient (social cost 22). The conception of strict liability, on the other hand, results in the agent who undertakes the preventive actions paying 22, or 20 otherwise. In this case there will be no prevention, which is an efficient solution. Let us observe that in cases like Situation 2, acceptance of the negligence approach leads to inefficiency and enables the agent to increase the frequency of his activities (low cost that equals 4). Strict liability, by contrast, is an efficient solution in Situation 2, and decreases the frequency of the activities in question (high costs equaling 20).

The following conclusions can be drawn from the analysis of the problem above: should negligence or strict liability be chosen? It is easy to observe that in such cases as Situation 1, undertaking the preventive actions produces desirable results: the probability of the occurrence of damage decreases from 20% to 5%. The efficiency of preventive actions in Situation 2 is much worse (from 20% to 18%). What does this say about the kind of activity described by the tables? The activities in Situation 2 have to be dangerous, for the probability of the occurrence of damage is in their case very high, and the preventive actions do not help considerably here. Demolishing old buildings is a good example of such activity. From the point of view of a society, the level of frequency of this activity should be as low as possible. Thus strict liability is recommendable here. The activities of Situation 1, on the other hand, are less dangerous, for it is relatively easy to decrease the possibility of damage in their case. Building a highway may serve as an example. This activity

is often socially acceptable and the law should encourage it. Acceptance of the conception of negligence, rather than strict liability, acts as encouragement, for its costs are lower than those of strict liability.

A short survey of legal regulations in different countries shows that legal systems comply with this analysis. In the United States, Germany, France or Poland, tort liability is usually based on negligence or similar ideas. Only dangerous activities are treated differently, using strict liability or something similar.

The examples discussed above may give the impression that application of the economic analysis of law is restricted only to those parts of private law that concern torts. It is true that that area of law was explored in early works on Law and Economics. Today, however, economic analysis is applied to all kinds of problems in private law. A lot of work is devoted to the concept of property, and there are also important contributions concerning contract law. An interesting shift of perspectives may be observed here. Consider interpreting the provisions of an agreement. In the provisions of law, the main purpose of interpretation – from the economic point of view – is to reduce social cost. Agreements, however, should be interpreted in a way that minimizes the costs of the parties. Proponents of the economic analysis of law also analyze other areas of private law, such as insurance law, legal procedure, etc.[53]

More problematic is the application of the economic method to criminal law. An exception is the determination of a sanction, and designing the system of sanctions, which does seem to fit with economic analysis. J. Bentham wrote in 1788: "the profit of the crime is the force which urges man to delinquency: the pain of the punishment is the force employed to restrain him from it. If the first of these forces be the greater, the crime will be committed; if the second, the crime will not be committed".[54] Bentham's observation can be presented as a simple economic formula. Let Z stand for the income expected from the crime, K for the loss connected with the punishment, and P for the probability of punishment. Someone who acts rationally will commit a crime only if the expected income will be higher than the cost of punishment multiplied by the probability of punishment:

Crime will be committed if $Z > P \cdot K$.

As in the previous cases, this model is significantly simplified. It can naturally be extended in various ways, for instance by taking into account different attitudes towards risk (one can suppose that there are a relatively high number of risk lovers amongst criminals). Especially problematic is the estimation of the value of Z, P and K. For example, the expected income, or cost, of many types of crime should include such

factors as "psychological value". This is an important problem, but the analysis here is *ex definitione* simplified. It is only necessary for present purposes to outline what the economic method is.

Suppose for instance that we would like to determine whether it is rational – within a given system of sanctions and law enforcement – to enact norms that apply more severe sanctions and to increase the expenditure on law enforcement. In order to answer this question let us return, for a while, to the perspective of a potential criminal. According to the model above, the crime will be committed if $Z > P \cdot K$. Clearly the probability of punishment P depends on the state of law enforcement. The value of K, on the other hand, is connected to how the system of sanctions is designed. One has to add that this system has its economic dimension. If most crimes are punished with imprisonment, then the expenses for penitentiary system are high.

On the one hand, therefore, we have the social costs resulting from crimes, and on the other, the costs of prevention, which are equal to the expenses of law enforcement. A system of criminal law is efficient if the costs of prevention are lower than the costs of the crimes that were avoided because of the prevention. In other words, investing in law enforcement is efficient up to the point when the marginal cost of prevention equals the marginal cost of the crime avoided thanks to the additional prevention.[55] These simple dependencies are helpful in resolving the question of whether to increase expenditure on law enforcement and/or whether to introduce more severe sanctions: the move will be rational as long as the system of criminal law remains efficient.

This solution is not, of course, the result of a painstaking economic calculation; it follows rather from general considerations, which are nevertheless based on a simple economic model. More precise analyses can be carried out, for instance, regarding what kind of sanction is the most efficient for specific types of crimes. One can consider, e.g., whether it is better to apply monetary or non-monetary sanctions.[56] The sanction should be determined in a way that deters the potential criminal from committing the crime. Therefore, with the given probability of punishment P, K has to be calculated in such a way that $Z < P \cdot K$ holds. If this aim can be achieved with monetary sanctions then these should be applied. The reason for this is simple: from the economic point of view monetary sanctions are less expensive than the non-monetary, because they enable us to avoid expenses for penitentiary system.

It is easy to identify some factors that prevent monetary sanctions from serving their purpose (i.e., they fail to deter). One such factor is the limited property of the potential criminal. If a sufficiently deterring

monetary sanction was significantly higher than the value of the property then non-monetary sanctions would have to be applied (including imprisonment). Similarly, the lower the probability of punishment is, the more severe the monetary sanctions have to be (in order that $P \cdot K > Z$); in such a case it may turn out that, even for a potential criminal who has some property, the level of K will be so high that it will not serve its purpose as a deterrent. The application of non-monetary sanctions can also prove necessary when the expected income from a crime (Z) will be so high that the rule $Z < P \cdot K$ would make K extremely high.[57] Therefore, the monetary sanctions do not serve their function, either in the case of a person who has limited property, or in the case of a rich man who is planning to steal 1 million USD. The soundness of this analysis is reflected in the fact that, in penal codes, most "basic" crimes carry non-monetary sanctions.[58]

This, and other economic analyses of sanctions, can provoke two kinds of objection. First, one can question the assumption that people who commit crimes act rationally. Second, the "economization" of punishment makes us forget about a basic dimension of criminal law, namely the notion of a just punishment.

It is indeed the case that the simple model of behavior for the potential criminal is based on an assumption that the acting person is rational and that he/she will calculate potential income and loss. As has already been stated, the assumption of rationality is the basis for most of the economic models. The problem is, however, that unlike private law, in criminal law this assumption seems highly counter-intuitive. This is because, traditionally, criminologists and sociologists speak of crimes in psychological and sociological terms, underlining the a-typical qualities of criminals. This, however, does not constitute a decisive argument against the application of economic analysis to criminal law. It can – at the very least – serve as an alternative to traditional criminology. Observe, for instance, that a lot of crime is committed in anticipation of profit. Moreover, the rationality assumption is also questioned in relation to the classic economic models. Despite this, the assumption proves useful, because what is analyzed is not the behavior of a specific person; we apply economic tools to model the behavior of certain markets (of wheat or of crimes!) in which their members "statistically" act in a rational way.

The second of the mentioned doubts, which concerns the substitution of justice with efficiency, has already been analyzed above. Let us repeat here that economic efficiency can be treated as an explication of justice. If this controversial thesis is accepted then one should not speak of a "substitution" of justice with efficiency. A sanction which is optimal in

terms of economic efficiency is also just. Moreover, the acceptance of the thesis that efficiency is an explication of justice facilitates not only the analysis of how sanctions should be applied, but also of the most basic concepts concerning criminal responsibility. In literature, different analyses concerning intent, error, self-defense, etc. can be found.[59] On the other hand, the dismissal of the thesis that efficiency is an explanation of justice, does not necessarily lead to questioning the usefulness of the economic analysis of criminal law. On this second reading, the economic analysis may be regarded as an alternative approach to the problems of criminal policy.

Apart from private and criminal law, other areas of law can also be analyzed with the use of the economic method – for instance legal procedures, or constitutional law.[60] The latter is connected to a field of research which makes extensive use of economic analysis, e.g., political science and the theory of social choice. The problems analyzed in this context aim not only to answer questions of what the law should be, but also enable one to look at the role of legal systems from a more general perspective. A good point of departure for such analyses is the notorious Coase Theorem. Coase, the Nobel Prize winner for economics in 1991, published at the beginning of the 1960s a famous article, "The Problem of Social Cost".[61] In the article a theorem is formulated that can be reconstructed in the following way: in a world where the transaction costs equal zero, the allocation of goods is efficient irrespective of the initial distribution of property rights.[62] The notion of "transaction costs" used above causes heated debates in economic and legal-economic literature. Usually by "transaction costs" one means either the cost of establishing and maintaining property rights, or the cost of transferring the property rights.[63] Coase Theorem says in effect that if there are no such costs then, no matter how the legal system is built, (irrespective of the initial distribution of property rights), an efficient allocation of goods will be achieved. In other words, assuming that the transaction costs equal zero, the form of law has no importance; what counts is whether there is any law or not.

One should not of course conclude that – because of what the Coase Theorem says – the law is useless, or that we can enact anything in the belief that the market will "take care of itself". Nevertheless, some interesting conclusions for legal theory and philosophy follow from the theorem as it points out an important relationship between the form of law and transaction costs. In reality those costs never equal zero, and hence the way the legal system is built matters. If, following proponents of Law and Economics, it is assumed that law should promote economic

efficiency then, on the basis of the Coase Theorem, at least two directives for creating (or interpreting) law can be formulated. The first says that – if possible – legal norms should minimize transaction costs. According to the second, if high transaction costs cannot be eliminated, then the law should aim at an efficient allocation of goods not counting on the "invisible hand of the market".

Not all the assumptions behind, and consequences following from the Coase Theorem will be considered here. It is only necessary to show that economic analysis can be suitably applied to the most general legal-theoretic issues. Moreover, economic analysis here does not consist in the construction of a mathematical model (although the Coase Theorem has a very precise mathematical form).

A good summary of the examples presented above is given in the following words of G. Becker: "Indeed, I have come to the position that the economic approach is a comprehensive one that is applicable to all human behavior, be it behavior involving money prices or imputed shadow prices, repeated or infrequent decisions, large or minor decisions, emotional or mechanical ends".[64] The method of economic analysis can be applied not only in private law but in any area of law, including most general problems of the philosophy of law, such as the justification of the existence of law.

3.3.4 Conclusions

The analysis in the previous section demonstrates that there are various branches of the economic analysis of law: they use various tools, take advantage of mathematical modeling more or less directly, and are based on different assumptions. They are all similar, however, in that they aim to express a legally relevant case in the language of economics and to attempt to draw conclusions in which economically efficient solutions are promoted.

Admittedly, the assumptions standing behind the economic analysis of law are objectionable. The "substitution" of justice with efficiency, "calculating" of values that seem unquantifiable, the acceptance of the counter-factual model of *homo oeconomicus* – all this is problematic. One can argue, however, that the weakness of the economic method is also its strength. In applying this method, it is not necessary to have recourse to intuitions, or other vague categories. Moreover, although it is true that economic models (especially those presented above) simplify significantly the modeled reality, there is no reason why they could not be extended, taking into account all these important elements highlighted by our case (illustrated in Section 3.3.2). Still, the presented method,

based on the principles of economics, displays consistency and is also of some consequence. If the economic method is applied only in the sphere of private law, then two kinds of utility, or justice (one for private law, and another for other areas of law) must be justified. From this point of view it seems only reasonable to apply the economic method in any area of law, and to any legal issue whatsoever.

3.4 SUMMARY

3.4.1 Features of Analysis

In this chapter two special methods of analysis have been discussed: linguistic and economic. Economic analysis can relatively easily be identified as analysis$_3$, i.e., analysis as translation. A proponent of Law and Economics attempts to "translate" the case that interests her into the language of economics and interprets the obtained result. It is difficult to classify linguistic analysis in a similar way. It displays the features of analysis$_3$, but in some contexts also of analysis$_1$ and analysis$_2$.

It is appropriate to point out now the most important feature of the presented methods and, more generally, of any kind of analysis. In analysis$_1$ one seeks logical reasons for the analyzed sentence; the reasons have to be self-evident or accepted earlier on some basis. Analysis$_2$ leads to decomposition of a given entity into more basic elements. Finally, analysis$_3$ aims to translate the "interpreted case" into a language, which is simpler, clearer, "more basic". This key feature of any analytic method can be, somewhat broadly, expressed in the following way: any analysis leads to reducing (expressing) the analyzed case (example) to a certain *chosen conceptual scheme* (the conceptual scheme thesis). In the case of economic analysis, the scheme in question is the conceptual scheme of contemporary economics. Linguistic analysis, in turn, reduces *analysanda* to the conceptual scheme of ordinary language. The conceptual scheme thesis is, as has been observed in describing the two methods, both the weakness and the strength of analysis. It is a weakness because it is easy to object to the selection of a "chosen" conceptual scheme as an arbitrary decision. It is a strength because the choice of such a scheme makes analysis a well determined method, the assumptions of which can be easily identified and, the results of which can be estimated similarly easily.

3.4.2 Analysis in Law

It is difficult to assess the possible applications of analysis in law. From what has been said so far it follows that, in legal reasoning, at least analysis$_2$ and analysis$_3$ are of certain value. Analysis$_1$, i.e., the search for

logical reasons, cannot be straightforwardly applied, although one cannot exclude it (the similarity between analysis$_1$ and the method of presuppositions has already been remarked upon). The examples discussed above, in which analytic methods are applied to law show that lawyers find it hard to accept a single conceptual scheme as "the chosen" one. It is relatively easy to find legal applications of various domain-related analytic methods; at the same time it is maintained, or at least assumed, that there exists a pluralism of conceptual schemes. Lawyers construct their arguments taking advantage of economics, common sense, ordinary language, ethics, etc.

A good illustration of this is found in the various "theories" of legal dogmatics and legal practice. Precepts of civil law (e.g., concerning property), of criminal law (the structure of crime), and of constitutional law (construction of the proportionality principle) can all be treated as instances of analysis (analysis$_2$ or analysis$_3$). They are analyses, however, that are confined to a specific domain and make use of various "conceptual schemes" (usually referring to the vague category of common sense); in other words they do not form part of any wider project which analyzes the entire legal system within the framework of a unique, chosen conceptual scheme.

This suggests that what lawyers do cannot be called analysis (it is not possible to have an analysis without a chosen conceptual scheme). Naturally, this is only a descriptive diagnosis: a statement of how things are, rather than a statement of what lawyers should do. On a normative level one can support the application of "full blooded" methods of analysis. However, the idea of using only some analytic tools in legal discourse, which would be easier to accept by the lawyers than a "full blooded analysis", leads to some theoretical problems. One can maintain, of course, that various analytic methods should be used (locally) for constructing arguments. But in that case, a new theory is needed, one that is capable of comparing arguments built with the use of analytic methods based on different conceptual schemes. Argumentation theories may provide an answer to this theoretical challenge.

NOTES

1. Quoted after J. Hintikka, U. Remes, *The Method of Analysis*, Dordrecht, D. Reidel, 1974, p. 8.
2. R. Descartes, *Regulae ad directionem ingenii*, Rodopi Bv Editions, 1998.
3. B. Russell, *Our Knowledge of the External World*, Routledge, London 1993, p. 214.

4. Similar types of analysis are identified by M. Beaney, in "Analysis", *Stanford Encyclopedia of Philosophy*, plato.stanford.edu. Beaney tags them: *regressive analysis*, *decompositional (resolutive) analysis* and *transformative (interpretive) analysis*.
5. R. Carnap, "Die Methode der logischen Analyse", in *Actes du huitième Congrès international de philosophie, à Prague 2–7 Septembre 1934*, Prague: Orbis, 1936, p. 143.
6. See for instance J.M. Bocheński, "Subtelność" [Subtlety], in *idem*, *Logika i filozofia. Wybór pism* [Logic and Philosophy. Selected Writings], PWN, Warszawa 1993, pp. 133–149.
7. Descartes, *Discours de la méthode*, French and European Pubns, 1965.
8. Cf. I. Hacking, *Why Does Language Matter to Philosophy*, Cambridge University Press, 1975.
9. B. Russell, *Theory of Knowledge*, George Allenand Unwin, London, 1984, p. 119.
10. That is how M. Beaney puts it, see his "Analysis", *op. cit*.
11. J.M. Bochenski, "O filozofii analitycznej" [On the Analytic Philocophy], in *idem*, *Logic . . .*, *op. cit*., p. 38 ff.
12. P.F. Strawson, *Analysis and Metaphysics*, Oxford, 1992, p. 2 ff.
13. See the entry "Metaphysics" in: *The Concise Encyclopedia of Western Philosophy and Philosophers*, Routledge, 1992.
14. J.L. Austin, "A plea for excuses", *Proceedings of the Aristotelian Society*, 1956–7, p. 125.
15. *Ibidem*, p. 126.
16. See *Analysis . . .*, *op. cit*., p. 15 ff.
17. H.L.A. Hart, *The Concept of Law*, 2nd edition, Oxford University Press 1994, p. 213.
18. J. Austin, *The Province of Jurisprudence Determined*, Hackett Publishing, Indianapolis, 1998.
19. H.L.A. Hart, *The Concept . . .*, *op. cit*., p. 19.
20. Cf. J. Woleński, "Wstęp. Harta *Pojęcie prawa*" [Introdution: Hart's *The Concept of Law*], in H.L.A. Hart, *Pojęcie prawa*, J. Woleński (transl.), PWN, Warszawa 1998, p. XIX. See also J. Woleński, *Issues . . .*, *op. cit*.
21. H.L.A. Hart, *The Concept . . .*, *op. cit*., chapter X *passim*.
22. *The Province . . .*, *op. cit*., p. 201.
23. *The Concept . . .*, *op. cit*., p. 84.
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25. P.F. Strawson, "On Referring", *Mind* 59, 1950, pp. 320–344.
26. Cf. A. Grobler, "Presupozycje" [Presuppositions], in R. Wójcicki, *Ajdukiewicz. Teoria znaczenia* [Ajdukiewicz. Theory of Meaning], Prószyński i S-ka, 1999, pp. 96–105.
27. A semantics for presuppositions was developed by B. van Frassen, "Presuppositions, supervaluations, and self-reference", *Journal of Philosophy* 65, pp. 136–152.
28. J. Wolenski, "Introduction. . .", *op. cit*., p. XX.
29. Cf. R. Alexy, *Theory . . .*, *op. cit*.
30. A. Ross, *Directives and Norms*, London, 1968.
31. T. Opalek, *Z teorii dyrektyw i norm* [Theory of Directives and Norms], Warszawa, 1974.
32. R. Dworkin, *Taking Rights . . .*, *op. cit*.
33. J. Austin, *How to do Things with Words*, 2nd edition, Oxford, 1976, p. 5.
34. A. Stroll claims that the analysis of what "does not count as normal" in order to establish "what is the normal case" is one of the most characteristic features of Austin's philosophy". See A. Stroll, *Twentieth Century Analytic Philosophy*, Columbia University Press, New York, 2000, pp. 170–171.

35. *How to do Things . . .*, *op. cit*. p. 16.
36. *Ibidem*, p. 41.
37. *Ibidem*, p. 54.
38. *Ibidem*, pp. 607–608.
39. J. Searle, *Speech Acts*, Cambridge University Press, Cambridge (Mass.) 1977. We have to mention that Searle stresses that his book is a work in the philosophy of language and is not an example of linguistic philosophy. However, although Searle's argumentation contradicts sometimes Austin's methodology, Searle's debt towards Austin is obvious. See also A. Grabowski, *Judicial Argumentation and Pragmatics*, Księgarnia Akademicka, Kraków 1999, 61 ff.
40. See for instance J. Searle, "Austin on Locutionary and Illocutionary Acts", *The Philosophical Review,* vol. LXXVII, no. 4, 1968, pp. 405–424; A. Grabowski, *Judicial . . .*, *op. cit*., p. 77 ff.
41. *How to do Things . . .*, *op. cit*., p. 151.
42. Cf. A. Grabowski, *Judicial . . .*, *op. cit*., chapter III.
43. Cf. *ibdem,* chapter V.
44. Cf. R. Sarkowicz, *Poziomowa interpretacja tekstu prawnego* [Three Level Conception of Legal Intepretation], Wydawnictwo UJ, Kraków, 1995.
45. O.W. Holmes, "The Path of Law", *Harvard Law Review* 10, 1897, p. 469.
46. Cf. H. Pearson, *Origins of Law and Economics – The Economists' New Science of Law. 1830–1930*, Cambridge, Cambridge University Press, 1997.
47. Cf. E. Mackaay, "Schools: General", in *Encyclopedia of Law and Economics*, http://encyclo.findlaw.com.
48. Cf. L. Kaplow, S. Shavell, "Fairness vs. Welfare", *Harvard Law Review*, February 2001, pp. 967–1380; R. Posner, *Economic Analysis of Law*, Aspen Publishers, 6th edition, 2002.
49. Cf. Th. S. Ulen, "Rational Choice Theory in Law and Economics", in *Encyclopedia of Law and Economics*, *op. cit*.
50. Cf. J.D. Hanson, M.R. Hart, "Law and Economics", in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Blackwell, Malden – Oxford 2000, pp. 311–331.
51. Such a rule was actually formulated by Justice L. Hand in *US vs. Carroll Towing Co*. case; cf. J.D. Hanson, M.R. Hart, "Law and . . .", *op. cit*.
52. Cf. J.D. Hanson, M.R. Hart, "Law and . . .", *op. cit*.
53. Cf. S. Shavell, *Foundations of the Economic Analysis of Law*, Belknap, 2004.
54. Quoted after E. Eide, "Economics of Criminal Behavior", in *Encyclopedia of Law and Economics*, *op. cit*., p. 346.
55. The marginal cost is the additional cost incurred for production of an addition unit of the given good or of conducting the given service. In our example the marginal cost of prevention is the additional cost for law enforcement, while the marginal cost of crime is the cost of crimes that are avoided thanks to the investments in law enforcement.
56. Cf. S. Shavell, *Foundations . . .*, *op. cit*.
57. Cf. *ibid*. See also K. Pawłusiewicz, B. Brożek, "Prawo karne w świetle ekonomicznej analizy prawa (Uwagi krytyczne)" [Criminal Law in Light of the Economic Analysis of Law. Critical Remarks], *Państwo i Prawo*, 12, 2002.
58. Cf. S. Shavell, *Foundations . . .*, *op. cit*., chapter 24.
59. Cf. S. Shavell, *Foundations . . .*, *op. cit*.; K. Pawłusiewicz, B. Brożek, "Criminal Law . . .", *op. cit*.

60. See S. Shavell, *Foundations . . .*, *op. cit*.
61. R.H. Coase, "The Problem of Social Cost", *Journal of Law and Economics*, 3, 1960, pp. 1–44.
62. See S.G. Medema, R.O. Zerbe, "The Coase Theorem", in *Encyclopedia of Law and Economics*, *op. cit*., *passim*.
63. See D.W. Allen, "Transaction Costs", in *Encyclopedia of Law and Economics*, *op. cit*., *passim*.
64. G. Becker, *The Economic Approach to Human Behavior*, Chicago, The University of Chicago Press, 1976. p. 81.

CHAPTER 4

ARGUMENTATION

4.1 INTRODUCTION

As a philosophy of interpretation, argumentation provides the humanities, including legal theory, with methods which appeal to logic and analysis (both discussed in the preceding chapters), as well as to hermeneutics (to be discussed in the final chapter of this book); it therefore has a wide application. Given that this philosophy occupies a position amidst formal logic and "hard" analysis on the one hand, and "soft" hermeneutics on the other, it is rightly described as "the third way" in the methodology of the humanities. By means of argumentation one can justify interpretative theses of normative character. This kind of justification is usually based upon the criteria of fairness, equity, validity, reliability or efficiency, rather than on the criterion of truth (these criteria can be regarded as counterparts to the criterion of truth which are to be applied in the normative sphere). Proposed definitions of the first three of these criteria usually appeal to the notion of rationality; as regards the criterion of efficiency, its definitions are based on empirical (psychological) considerations rather than on the notion of rationality.

Even though argumentation rejects the criterion of truth, replacing it with the above mentioned counterparts, it nevertheless aspires to be consistent, both with logic and with every kind of rational analysis. More specifically, argumentation aims both to create its own analysis – informal logic – and to draw widely from various other methods of analysis (ranging from linguistic to economic). However, the uniqueness of argumentation, which enables one to distinguish it from more formal methods, lies in its openness to other philosophies of interpretation, hermeneutics in particular. It is difficult to refute the fact that the basic rules determining the criteria for accepting practical discourse are justified by an appeal to intuition. The only controversial issue is what kind of intuition is invoked when these rules are formulated – namely, whether this intuition is purely rational (analytical), phenomenological (assumed by the proponents of hermeneutics), or, rather, psychological. The role of psychological intuition is particularly important in theories

which hold that the aim of a discourse is to persuade an opponent, to win a dispute at any price – in other words, in those theories which assert that argumentation is to be evaluated solely in terms of its efficiency.

Furthermore, argumentation is a specifically "legal" method. A history of the most important theories of argumentation may serve as a justification of this thesis: they either arose from legal theory or were invented with a view to being applied primarily in the field of law. Two views are typical in this context. The first one (formulated by Perelman) holds that legal argumentation (a judge's reasoning) is paradigmatic for all other types of practical reasoning. The second one (whose author is Alexy), in turn, holds that practical legal discourse is a special example of general argumentative discourse (it is the so-called *Sonderfallthese*). Whether these views are convincing or not is of course another issue, to which we will return in Section 4.2. It should be noted here, though, that these views express an unequivocal conviction that a practical discourse occupies a particular position within the framework of a general discourse and for that reason deserves separate and special treatment.

4.1.1 Philosophies of Argumentation

Contrary to popular opinion, controversy about good reasons in practical discourse began, not in twentieth-century metaethics and legal theory, but in the ancient philosophical schools. The proponents of contemporary theories of argumentation continue to pursue the methodological investigations begun by specialists in hermeneutics, dialectics, topics, and – at least to some extent – even sophistry and eristic. The fact that philosophies of argumentation draw on such different traditions and sources has given rise to an endless discussion about their essence and the scope of their application. This discussion is usually pursued at the meta-theoretic level; in consequence, the problem of practical applications of particular conceptions is almost entirely left out of the account. Theories of argumentation which appeal to different, not always compatible, sources, provoke the justifiable objection of eclecticism. Some of these theories contain elements of two different approaches – transcendental (objective) and psychological (subjective). Moreover, some philosophers want to attribute the characteristics of formal logic to the informal logic of argumentation, and, in consequence, to assess a practical, argumentative discourse by means of the criterion of truth. Furthermore, one has often given to particular – key – concepts of the philosophy of argumentation different, constantly redefined, meanings with the sole view of immediately justifying one's thesis. Terminological confusion and the multiplication of philosophical problems have

resulted in decreasing interest in the theories of argumentation at the end of the twentieth century. The "existence" of these theories seems to be confirmed only by seminars, conferences and a huge number of publications. The theories, themselves, however, have not exerted any serious influence on legal practice; research of the theories of argumentation has remained unknown to most representatives of legal practice, and useless to those few who have become acquainted with it. For all this, it must be conceded that in many hard cases, in which interpretation based on logic and analysis "is not sufficient", and in which one does not wish to apply relativistic (to a greater or lesser degree) hermeneutics, the only method that guarantees certainty and objectivity is argumentation. It is, in our view, one of the most important methodological alternatives for humanities as a whole and (above all) for jurisprudence. Accordingly, we shall attempt to present this philosophy of interpretation, describing in Section 4.3 a variant of it which, in our opinion, can be universally applied.

Let us begin, however, with a historical digression. As was said earlier, the problem of argumentation (together with questions concerning the understanding, interpretation and justification of interpretative decisions) was taken up by representatives of the ancient philosophical schools.

Hermeneutics. Problems connected with argumentation were discussed very early on in the oldest hermeneutical theories, especially in biblical, philological and legal hermeneutics. These theories were to provide universally valid rules concerning the interpretation and understanding of all kinds of texts (religious, literary, philosophical and legal). These universal rules were to be used in the very process of interpretation as well as in the context of that interpretation's application and justification. Thus hermeneutics, at least in the early stages of its development, was strictly connected with the philosophies of argumentation, especially with logic, dialectics, rhetoric and topic. Even though in the nineteenth century, hermeneutics became fully independent of the above philosophies (there arose general humanistic hermeneutics), its ties with them remained relatively close. In support of this claim, it is appropriate to recall the views of Schleiermacher, Dilthey, Misch, Lipps, Betti, Gadamer, or Ricoeur (regarding nineteenth- and twentieth-century philosophy of hermeneutics), and, for instance, Reinach and Kaufmann (regarding the philosophy of law). Hermeneutics will be dealt within Chapter 5.

Logic. There is also a close connection between the philosophies of argumentation and logic. Since antiquity, authors of various theories of argumentation have appealed to logic. Logic was used either directly – as

a method of argumentation – or indirectly – as one of the methodological foundations of a given philosophy of discourse (logic, for instance, made more precise the criteria for the acceptability of an argumentative discourse). Of course, the philosophies of argumentation appealed to various formal and more informal (soft) conceptions of logic. The resultant dilemma can be generalized in the following way: (1) Theories of argumentation are supposed to attain maximum precision, or, to put it differently, to make possible the logical justification of theses advanced in an argumentative discourse. This explains why these theories frequently appeal to formal conceptions of logic, including classical logic, as well as different varieties of deontic and modal logic. (2) However, the possibility of formal logic's application in practical discourse turned out to be very limited. Thus, advocates of philosophies of argumentation have at their disposal at best less formal varieties of logic (frequently constructed only for the purposes of these philosophies).

In consequence, every philosophy of argumentation developed its own logic, and those logics varied greatly in terms of their value and scope of application. Another difficulty was that in antiquity the term "logic" was associated with other terms, which – like logic – were also important for argumentation (including analytics – the most easily understandable – as well as dialectics, rhetoric and topic). Besides, in those times, in at least some contexts, the terms "logic" and "dialectics" were used as synonyms; the point to be emphasized, though, is that in antiquity the term "logic" was already associated with such activities as thinking, reflecting and calculating, whereas the term "dialectics" was associated directly with discourse, i.e. with dialogue. A more strict definition of both terms can be found in Aristotle's works: he asserted that logic and analytics enable the derivation of true (apodictic) conclusions, whereas dialectics can serve only as a tool for deriving conclusions which can be regarded as right (i.e. probable). The reason why Aristotle treated dialectics, rhetoric and topic as different in nature from logic, was that they constituted a means of persuading opponents in a discussion, rather than of establishing the truth. Differences in the function of these two groups of theory underly Aristotle's distinction between logical conclusions – based on the criterion of truth – and dialectic conclusions – based on the criterion of rightness. This distinction is of special, if not fundamental, importance for contemporary theories of argumentation. We pay special attention to relations between various notions in the philosophies of argumentation. This is for the simple reason that the differences between these philosophies are frequently derived from the differences in the way these relations are understood. The point to be emphasized is that giving

arbitrary – torn from context – meanings to these notions is likely to give rise to rather fruitless academic discussions, which – fortunately – have little effect on those philosophies of argumentation that are of real importance.

Dialectics. Even though dialectics aspires to be a rather strict (in the logical sense) method, it can be most aptly characterized as a "soft" method of argumentation which aims to yield conclusions that are probably right. This is consistent with Aristotle's view, according to which dialectics is a method of practical philosophy appealing to the criterion of good, rather than a method making use of the criterion of truth (the latter criterion is used within theoretical philosophy). However, there exist some arguments which testify to the existence of a close relationship between logic and dialectics. More specifically, argument *a fortiori* and *argumentum per reductio ad absurdum* – frequently used in practical discourse – are simultaneously logical and dialectical in nature. According to Kalinowski, argument *a fortiori* in the form *a maiori ad minus* (if one is allowed more, then one is allowed less) can be regarded as a theorem of formal logic, provided that everything which is less important is contained in what is considered as more important.[1] Analogously, it seems that *argumentum per reductio ad absurdum* can be "transferred" from formal logic to the area of normative reasoning.

Let us, however, return to history. For Socrates, dialectics was a method of conducting a discussion (a philosophical controversy) embracing two separate parts: negative – elenctic, and positive – maieutic. The elenctic method (i.e. a method of refutation) involves pressing the false thesis of a disputant to its absurd consequences. This method was designed to purge a disputant's mind of false views. An important component of this method was irony, which provisionally assumes a disputant's false thesis to be true and forces the disputant – by means of skilled argumentation – to formulate a true thesis inconsistent with the one she initially defended (thus, this is in fact *argumentum per reductio ad absurdum*). "Socratic irony" in fact rests on "the knowledge of one's ignorance" – a particular capacity to recognize falsity, which should be acquired by every participant in a discussion. The maieutic method, i.e. "the obstetrician's method", in turn, consists of "eliciting the truth". The role of a person leading a discussion is essentially to ask questions and thereby "help the truth come to the world". According to Socrates, what constitutes the starting-point of a dispute is the establishment, by asking the simplest questions, of commonly known and empirically verified facts; more complex facts were to be established by means of analogy at

a later stage of the dispute. This kind of inductive generalization led to defining "common places" (Aristotle was to speak in this context about topics), i.e. universally valid theses.

According to Diogenes Laertios, the term "dialectics" was first used by Plato, who understood it to mean the activity of permanently applying reason, as well as acquiring practice in this activity. Plato uses dialectics both in order to investigate the world of ideas and to explain phenomena. In Phedo, he comes to the conclusion that the only truly scientific way of analyzing phenomena consists of an appeal to dialectics, rather than to teleological or causal considerations. Plato gives the term "dialectics" a very broad meaning: in his view, it is a method of pursuing a discourse (a conversation – a philosophical dialogue), a method of establishing relations between different theses, and philosophy *tout court*. It is philosophy *tout court*, because it enables one to grasp the world of ideas and phenomena in a non-empirical way. Given that dialectics is a science of ideas, i.e. about true autonomous beings, it can rightly be called metaphysics, i.e. philosophy *tout court*. Accordingly, since dialectics explores the relations between general notions and theorems containing these notions and ideas, it is a deductive method, which gives rise to and underlies logic in a strict sense.

Dialectics was also a central object of concern for Aristotle. He treated his logic and analytics as preparation for dialectics. The object of logic is merely the form of statements, whereas the object of dialectics is the content – the substance – of statements. An analysis of form (as something which is general) should precede an analysis of content (as something which is particular). According to Aristotle, the main goal of dialectics is ultimately discussion, though he also asserts that dialectics may serve as a tool for finding out the truth (in one of his works, he states that theses should be treated logically – through the prism of the criterion of truth, and dialectically – through the prism of the approval or the opinion of others, i.e. according to appearance). As was mentioned above, Aristotle distinguished logic (and analytics) – theory intended to provide true (apodictic) conclusions – and dialectics – theory intended to yield conclusions which pass as right, or find themselves in circulation where they pass as right. Thus, ultimately, the main function of dialectics is not to decide whether a given thesis is true or false, but, rather, to enable an audience to be persuaded that a given thesis is right; it is therefore a method of practical rather than theoretical philosophy. (A similar interpretation of Aristotle's dialectics was put forward by Schopenhauer in his *Eristic*.)

The philosophies of interpretation formulated in the nineteenth and twentieth centuries often made use of dialectic methods. Philosophy of

interpretation in the nineteenth century was developed, above all, by Schopenhauer (mentioned above), who was the author of a very influential conception of *eristic dialectics*. As for the twentieth century, it is worth mentioning (besides hermeneutics, which often drew on the method of dialectics – *vide* Reinach, Gadamer, Kaufmann) the views of Perelman, who built his philosophy of argumentation on "classical" – dialectical – grounds.

Rhetoric. Rhetoric may also confirm the interaction and close relationships between different argumentative methods and techniques. This discipline, which was originally purely philological, found its application in various philosophies of interpretation relatively early on, thus becoming (beside dialectics and topics) the third of the most important components of almost every theory of argumentation. This term always referred to the skill (art) of good, honest and reliable persuasion in speech and in writing. To be numbered amongst the most eminent representatives of ancient rhetoric are – from Greek philosophy – Gorgis, Isokrates, Aristotle, Demetrius from Faleron, Dionysus from Halocarnas, Hermogenes from Tarsus as well as – from Roman philosophy – Cicero and Quintilian. Over the course of time, the term "rhetoric" began to be used, not only in reference to oratory art, but also to the theory of prose, manuals of public speaking, a sort of pedagogical system, and of course, a certain type of philosophy of argumentation. The division of rhetorical disciplines corresponds to the structure of preparing and making a speech. The first stage (invention) involves collecting arguments that are relevant to a given case; the second one (composition) consists in constructing a speech which must be adapted to the given case; the third one (elocution) involves determining the requirements of style, as well as the rules and conditions of correct and precise expression – through the medium of language – of one's thoughts; the fourth stage (mnemonic) concerns memorizing the text of a speech; and the final stage (*actio*) encompasses all the techniques of delivering a speech (specifying how to impress the audience by one's voice, gestures, posture, mimic). The goal of a speech – which was an efficient persuasion – was to be attained by simultaneously affecting the reason, will and emotions of the audience. The following principles were ranked amongst the basic prescriptions of the art of rhetoric (i.e. the art of properly shaping "a persuasive message"): the principle of limitability (a speech should be an inherently coherent "living organism"); the principle of adequacy – of "a rhetorical tact" (a speech should take account of all relevant circumstances); the principle of functionality (a speaker should make use of rhetorical means of persuasion

in a reflective and purposeful way). Finally, the kind of speech to be delivered determined the "repertoire" of rhetorical techniques to be used (for instance, the following kinds of speeches were distinguished: encouraging, discouraging, accusing, defending; and, in addition, laudatory and circumstantial speeches, such as, welcome and farewell speeches).[2]

For Aristotle, rhetoric is the art of finding adequate means of persuasion in every situation. One may even say that rhetoric and dialectics are in fact the same discipline, since both share the same goal – to convince by means of speech – and both appeal to the same criterion of evaluation – efficiency. It should be emphasized, though, that rhetoric emphasizes this criterion more strongly than dialectics. Dialectics also appeals to the criterion of rightness, and even to the criterion of truth (since it retains close relations with logic and analytics). Developing Aristotle's definition of rhetoric, Perelman states the goal of rhetoric to be the analysis of discursive techniques designed to elicit or strengthen support for theses submitted to an audience for acceptance. This means that rhetoric is a way of convincing by means of discourse, rather than by means of the truth. For that reason, according to Perelman, rhetoric *sensu largo* also embraces dialectics and topics. Rhetoric cannot be identified with formal logic, since it is not possible to prove the truthfulness of premises which are used in the process of discourse. In a practical discourse, the degree to which particular theses are accepted may vary, since a controversy concerns values, or, put more precisely, the rightness of theses as opposed to their truth. Besides, one of the main goals of a practical discourse is to convince someone to accept one's reasons; thus, convincing always entails convincing *someone* (one or many persons) – and is therefore directed at an audience.[3] The rhetoric of Aristotle, Cicero and Quintilian became a starting-point for one of the most influential contemporary philosophies of argumentation – namely, "the new rhetoric" of Perelman (to be discussed in detail in the next section of this chapter).

Topics. Philosophy (or rather, the problems) of argumentation based on topics is connected with rhetoric (arguably most closely), as well as with logic and dialectics. The word "*topos*" meant in Greek and Latin "a place" from which a speaker or a writer derives "an inventive material". A *topos* may be located either in an indefinite place – a thought – or in a definite place – a sign, a symbol, a gesture, a word, a text. According to Aristotle (who – incidentally, does not provide a definition of *topos*), *topoi* were "elements" or "premises" out of which a dialectician could construct his syllogisms, and a rhetorician, his enthymemes. The structure of a dialectic syllogism differs from that of a logical syllogism.