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Fairness, Definition and the Legislator's Intent: Arguments from *Epieikeia* in Aristotle's *Rhetoric*

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The paper first seeks to reconstruct, on the basis of Aristotle's explanation and example in the *Rhetoric* (1374a 26–b 1), how the shortcomings of a legal text, resulting from an omission made by the legislator, can be plausibly argued to provide sufficient ground for not applying the rule contained by the text. Second, it argues that the topics of fairness listed by Aristotle (1374b 2–22) cannot be used to reconstruct Aristotle's views on the functioning of *epieikeia* in judicial decision-making.

KEYWORDS: Aristotle, definition, *Epieikeia*, fairness, justice, legislator's intent, *Rhetoric*

1. INTRODUCTION

In Aristotle's *Rhetoric*, Book I, Chapter 10, a general classification of just and unjust deeds (1373b 1–6) is intended to serve as an outline of the possible topics of arguments useful in judicial speeches, where the goal (*telos*) of rhetoric is persuasion about lawfulness. Some of these deeds, Aristotle states (1374a 20–26), are just or unjust (lawful or unlawful) according to unwritten laws, and these can be divided in two groups: those resulting from a high level of virtue or vice, which are regulated by social norms other than written law (cf. Harris, 2013a, p. 30), and those related to some shortcoming (*elleimma*) of a particular written law. In the second case, however, it *should* be regulated by the written law of a specific political community, but the respective law somehow fails to provide the adequate rules. Fairness (*to epieikes*) is a kind of justice applicable to the latter kind of situation: it is justice beyond written law (*to para ton gegrammenon nomon dikaion*, 1374a 27–28).

The interpretation of Aristotelian fairness has always been a favourite topic of legal philosophers and legal historians alike. For both groups, it is important as the opposite of the strict application of the

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law. Philosophers therefore mostly study it as an historical example of legal decisions being based on moral considerations rather than positive law. For legal historians, the same problem appears as the question of whether Athenian (or ancient Greek) law did recognise grounds of judicial decisions outside of written law. While both approaches have proven fruitful in providing new insights for legal history and philosophy, the following discussion looks at fairness primarily from a rhetorical perspective, focusing on how arguments from fairness function in legal argumentation.

Starting from a brief reconstruction of the concept of fairness on the basis of Book V, Chapter 10 of the *Nicomachean Ethics*, I shall first compare Aristotelian and Platonic fairness. The analysis of the relevant passages of the *Rhetoric* follows in two parts: first the conceptual summary and the example (1374a 26–b 1) given by Aristotle are examined to map the structure of *epieikeia* arguments, then the links between these arguments and the list of *epieikeia*-related topics (1374b 2–22). I hope to show the close relationship between arguments from fairness and arguments from definition on the one hand, and the distance between the formal description of fairness and the subsequent list of topics on the other.

2. FAIRNESS IN THE *NICOMACHEAN ETHICS*

In the *Nicomachean Ethics*, we find the most detailed discussion of fairness in Book V, Chapter 10 (1137a 31–1138a 3), in an excursus between problems related to the notions of "being treated unjustly" and "acting unjustly". Aristotle approaches the topic through the ambiguity of the usage of the term *epieikes*:

> [S]ometimes we praise what is fair and the corresponding man, in such a way that we transfer the term to other features we are praising, too, in place of 'good' […] while at other times it appears odd […] that what is fair should be something praiseworthy when it is something that runs counter to what is just. (1137a 35–b 4)[1]

The solution of the problem comes from another ambiguity: that of the term "just". In one sense, "just" means "legally just", and it is in this sense that *epieikeia* "runs counter to what is just" and "is better than what is just in one sense". In a more general sense, however, what is just

[1] Quotations from the *Nicomachean Ethics* follow the text of Rowe's translation (Broadie & Rowe, 2002), with occasional modifications.

comprises what is *epieikes* (1137b 8–11). The reason for the ambiguity is that while laws aim at justice by their nature (see 1129b 14–24), they may still lead to unjust decisions in individual cases and may need rectification through *epieikeia*:

> The cause of this is that all law is universal, and yet there are some things about which it is not possible to make universal pronouncements. So in the sorts of cases in which it necessarily pronounces universally, but cannot do so and achieve correctness, law chooses what holds for the most part, in full knowledge of the error it is making. (1137b 13–16)

It is in those cases, i.e. where a general rule fails to take the particular circumstances of a given case into account, that fairness can play a role in the application of law:

> [O]n these occasions it is correct, where there is an omission by the lawgiver, and he has gone wrong by having made an unqualified pronouncement, to rectify the deficiency by reference to what the lawgiver himself would have said if he had been there and, if he had known about the case, would have laid down in law. (1137b 21–24)

Aristotle emphasises that such cases do not result from intellectual errors made by the legislator, nor do they indicate the technical deficiency of a piece of legislation. Rather, they are inevitable consequences of the tension between the universality of the law and the singularity of human actions (see 1137b 17–19).[2] A related, and equally important, point he makes is that 'rectification' does not mean denying the validity of the law, but has to be made with reference to the legislator's intention.

Thus, although Aristotle is aware that legislation may contain errors (see 1129b 24–25), *epieikeia* is not meant to correct that sort of deficiency by amending the law.[3] Its purpose is to bring about justice in the individual case, thus fulfilling the actual intention of the legislator.

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[2] He also adds that there is another means of regulation, the decrees, which allow for a greater flexibility on the part of the legislator. As decrees are made for individual cases rather than generalised types of behaviour, they do not have to provide rules for an infinite number of cases. See 1137b 27–32.

[3] *Pace* Hurri (2013, p. 154). Cf. also Saunders (2001, p. 80; ibid. n. 29), mentioning the possibility of "a piecemeal modification", with reference to Brunschwig (1980, pp. 525–526). See further Mirhady (1990, p. 395) on the judges acting as legislators.

Consequently, it works through the interpretation of the law rather than against the law (see Brunschwig 1996, p. 140; Harris, 2013a, p. 28).

3. *EPIEIKEIA* IN PLATO

Aristotle's observation that legal regulation in itself cannot provide adequate grounds for decision in each particular case is strikingly similar to what the Stranger says in Plato's *Statesman*:

> [L]aw could never accurately embrace what is best and most just for all at the same time, and so prescribe what is best; for the dissimilarities between human beings and their actions, and the fact that practically nothing in human affairs ever remains stable, prevent any kind of expertise whatsoever from making any simple decision in any sphere that covers all cases and will last for all time. […] But we see law bending itself more or less towards this very thing, like some self-willed and ignorant person, who allows no one to do anything contrary to what he orders, nor to ask any questions, not even if after all something new turns out for someone which is better, contrary to the prescription which he himself has laid down. (294a 10–c 4)[4]

In the *Statesman*, the conclusion is not formulated with regard to the judge but to the legislator, i.e. the ruler of the state. Laws, imperfect as they are, serve as general instructions for cases where the ruler cannot make a decision himself. In those cases, however, where he is present, he must be allowed to overrule these general instructions, for his personal expertise and ability to consider all the circumstances will probably lead to better decisions than the legal rule would in itself.

It is only in the *Laws* that Plato addresses the same problem with reference to the application of law, apparently accepting the fact that the legislator cannot be present everywhere to adjudicate legal disputes, and that therefore judges need to be authorised to exercise a certain level of discretion. What exactly this level should be depends on the skills of the judges concerned. The establishment of the facts is necessarily subject to judicial deliberation, for the facts of the individual case cannot be legislated upon in advance. Yet the Athenian speaker seems to be quite confident that in Magnesia, the city to be founded along the lines set by the dialogue, there will be a citizenry that can provide competent judges who can be left to decide some other

[4] Translated by Rowe (1995).

questions as well. Concerning penalties, for example, the Athenian says that

> the judge must assist the lawgiver in carrying out this same task, whenever the law entrusts to him the assessment of what the defendant is to suffer or pay, while the lawgiver, like a draughtsman, must give a sketch in outline of cases which illustrate the rules of the written code. (934b 6–c 2) [5]

The sketch that follows is, however, a fairly detailed one: Plato apparently seeks to eliminate from Magnesian legislation much of the ambiguity present in its Athenian counterpart (see Harris, 2013b, pp. 205–209).[6]

But can judges in Magnesia go beyond written law in order to reach a more just verdict? It seems that there is at least one type of affairs where they can. One of the Magnesian laws provides that in case a father dies having a daughter but no (natural or adopted) son, the male relative who comes next in the order defined by the law has to marry the daughter (924e 3–925a 2). The legislator, however, has to take into account the possibility that the prospective heir cannot marry the daughter because of her physical or mental illness (925d 5–e 5, 926b 2–6). Such cases have to be adjudicated by a panel of arbitrators (*diaitētai*) who are allowed to grant exemption from the legal obligation (926a 6–7, b 7–d 2).

Arguably, this is a case of *epieikeia*, albeit Plato does not use the term for it.[7] We see the tension between the law formulated in universal terms and the circumstances of the individual case (925d 8–e 2); the preamble to the law asks for understanding (*syngnōmē*) on behalf of both the legislator (for his inability to consider individual cases) and the persons asking for exemption (for their inability to obey the command of the law) (925e 6–926 a 3); and in the procedure reference has to be made to the legislator's intent (926c 2–4). This makes clear that fairness is not directed against the validity of the law and that it actually serves

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[5] Translated by Saunders (1970).

[6] Cf. also the remark made by Saunders (2001, p. 87): "Not only will the gaps be fewer, but the actual laws will be far less open-ended conceptually; for the Magnesian citizen is conditioned not merely by an intensive educational process but by the frequent legal preambles: he will have fairly firm ideas about what (say) justice, virtue, heresy, good and bad artistic standards, really *are*".

[7] See Saunders (2001, pp. 84–86), with some qualifications based on certain differences between the typical form of *epieikeia* and Plato's description of the situation.

the good of the political community better than a strict enforcement of the general rule.

What makes this kind of fairness interesting (and characteristic of Plato's Magnesia) is that, as Trevor Saunders put it,

> the need for it is recognised, but only in rare and extreme cases; and its operation is taken clean out of private hands and transferred to senior officials who act on criteria subserving the public interest. […] To put the point in a lapidary manner, Plato has nationalised a private virtue. (Saunders, 2001, p. 92)

This is essentially the same as what happens to rhetoric in Magnesia: it is taken over by the legislator and subordinated to the interest of the state.[8]

4. FAIRNESS AND DEFINITION IN THE *RHETORIC*: AN EXAMPLE

Coming back to Aristotle, we may now see how the very fact of including the discussion of *epieikeia* signals an important departure from Plato's doctrine.

Unlike in the *Nicomachean Ethics*, where he speaks about the legislator's awareness of the problems caused by the inevitable generality of legislation, in the *Rhetoric* Aristotle mentions two possibilities (cf. Kraut, 2002, p. 108, n. 17): shortcomings in written law may be either due to the ignorance of the legislator, or on the contrary, brought about by him through the deliberate use of general terms and the lack of distinctions. He then gives an example for the collision of a strict interpretation of written law and fairness, resulting from the inevitable lack of complete conceptual determination in normative texts:

> In many cases it is not easy to define the limitless possibilities, for example how long and what sort of iron has to be used to constitute 'wounding', for a lifetime would not suffice to

[8] It should be noted that this kind of *epieikeia* does not serve justice directly. The aim of the legislator is, rather, to avoid enforcing the law in cases where its addressees would prefer to suffer punishment, as the law cannot fulfil its function of guiding human actions in those cases, and even if they obeyed would not serve the public interest. It could be argued, however, that the exception serves justice indirectly, as it would be unjust to punish those who decline to obey the law only because obeying it would be worse than suffering whatever punishment (cf. 925e 2–5), which amounts to some kind of a necessity (cf. 926a 2–3).

> enumerate the possibilities. If, then, the action is undefinable when a law must be framed, it is necessary to speak in general terms, so that if someone wearing a ring raises his hand and strikes, by the written law he is violating the law and does wrong, when in truth he has not done any harm and this (judgement) is fair. (1374a 31–b 1)[9]

In the introductory chapter of the *Rhetoric*, Aristotle has already pointed out the limits of the legislator's competence in terms of questions of fact (1354b 11–16). Here, however, he goes one step further, asserting that even if the legislator has got a definite intent (in the example it may be that people should refrain from assaulting others with weapons made of iron), its formulation as it appears in the written text is likely to be imperfect. Therefore, the argument can be made before the court that in addition to applying the rule previously given to the particular facts of the case, the judges also have to establish what provisions the text of the law actually contains. The result of their examination of the rule may contradict what is generally understood to be the 'ordinary meaning' of the text. Of course, the speaker need not highlight that this is what happens in the court: rather, he may propose a reading of the text as the one that genuinely reflects the intention of the legislator.

Arguments from the legislator's intent have a twofold character. On the one hand, they exemplify what are often termed 'teleological' arguments.[10] As Jacques Brunschwig puts it in his interpretation,

> there exists a perfectly applicable law, but […] a mechanical or blind application of it would be too severe according to the moral intuitions of the judge and those of the society in which he works. (Brunschwig, 1996, p. 139, following Shiner, 1987)

Consequently, the argument is based on the assertion that the legislator would not have intended the law to lead to such a verdict. On the other hand, the legislator's intent is still something referred to in "rule-based reasoning", where it appears as a means of interpretation, which is intended to help establish the meaning of a normative text, by explaining how the legislator actually meant what he put into words. What is important for us to see here is that this method of reasoning, i.e.

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[9] Quotations from the *Rhetoric* follow the revised text of Kennedy's translation (Kennedy, 2007), with occasional modifications.

[10] The consequentialist nature of teleological interpretation is highlighted by Cserne (2011, p. 38).

advocating fairness by way of interpreting the text, makes it possible for the orator to avoid questioning the authority of written law.

We have seen that in the *Nicomachean Ethics* Aristotle emphasises the link between the "correction" of the law and the legislator's intention (which also appears among the topics of fairness listed later in the *Rhetoric*). The problem here is, apparently, that whatever one thinks about the legislator's writing skills, the most obvious way of knowing his intention is still to read the text of the law. Thus, arguments for a not-so-ordinary meaning of the text have to face a good deal of scepticism. This kind of scepticism is well illustrated by a quotation from L. L. Fuller's fictitious *Case of the Speluncean Explorers*, in which a judge says that

> [t]he process of judicial reform requires three steps. The first of these is to divine some single "purpose" which the statute serves. This is done although not one statute in a hundred has any such single purpose, and although the objectives of nearly every statute are differently interpreted by the different classes of its sponsors. The second step is to discover that a mythical being called "the legislator," in the pursuit of this imagined "purpose," overlooked something or left some gap or imperfection in his work. Then comes the final and most refreshing part of the task, which is, of course, to fill in the blank thus created. *Quod erat faciendum*. (Fuller, 1949, p. 364)[11]

What, then, remains of *epieikeia* for arguments that can be safely used in a speech without appearing to be seeking "to be wiser than the laws" – to use the words of Aristotle (1375b 23–24)? It may be a good idea to come back to the example Aristotle gives for using fairness in a particular case of judging an offence. "[I]f someone wearing a ring raises his hand or strikes, by the written law he is violating the law and does wrong." Here the discrepancy between the law and the truth is due to the fact that the law does not define "how long and what sort of iron has to be used to constitute 'wounding'." The law, as far as it can be reconstructed from Aristotle's words, forbids and punishes assault with iron. In case someone strikes another person with an iron ring on his hand, the conceptual requirements for applying the law obtain and the

[11] It should be noted, however, that in Athenian legal discourse the legislator is never regarded as a "mythical being," although the historical identity of legislators is not examined either. References to the legislator are rather used to attribute a single intention to the law of the polis, cf. Harris (2000, pp. 50–51).

action qualifies as "wounding". In such a case, applying the sanctions of wounding would lead to injustice, as it would mean treating different actions (e.g. deliberately using a sword and wearing a ring) in the same way. This is, in the words of the *Nicomachean Ethics*, an error that results from the lacking qualification (cf. 1137b 22).

In such a case, the defendant can suggest that further qualification has to be added by the judges, saying "what the legislator would have included." For example, further details concerning the characteristics of the object made of iron can be described, in order to make the difference between a ring and a weapon appear in the judgement. Or the intention of the person "raising his hand or striking" can be taken into consideration, in order to distinguish between the deliberate use of a weapon and wearing a ring on one's hand—"looking not to the action but to the deliberate purpose," as Aristotle puts it later (1374b 13–14). These qualifications would then concern the concept of 'wounding' as defined by the law. The defendant would argue that he "raised his hand" or "stroke" but did not "wound," denying not the fact itself but its legal qualification.

This way of reasoning would then be strikingly similar to what is described in Chapter 13 in the paragraphs immediately preceding the discussion of fairness. Arguments from fairness as well as those concerning the *epigramma* focus on the moment of decision, which is essentially about the correspondence between the description of what happened on the one hand, and the abstract case contained by the legal rule on the other.[12] In other words, the question in both cases is if a certain rule is relevant for a certain human action. Looking for the difference between the two kinds of argument, we find Aristotle referring to *epigramma* as "what the laws regulate" (1374a 19–20) and to *epieikeia* as related to unwritten law (20–26). Thus, in the case of the former the speaker concentrates on how the individual action can be best described with the legal terms given in the law. In the case of the latter, in turn, the focus is on how the legal provision should be (re)formulated to express the legislator's (presumable) intention. In light of that, Aristotle's advice about having definitions at hand (1374a 6–9) may equally refer to those arguing from fairness.

5. TOPICS OF FAIRNESS

Interpreters rightly note that Aristotle's discussions of *epieikeia* comprise two different perspectives: one that focuses on the corrective

[12] Cf. the distinction between *Sachverhalt* and (*gesetzlicher*) *Tatbestand* in German legal doctrine (*Rechtsdogmatik*), see e.g. Larenz (1969, pp. 230–233).

function of *epieikeia* and one looking at *epieikeia* as a virtue (see e.g. Rapp, 2002, p. 503). This distinction is very important because it is only by keeping these perspectives separate that one can account for the difference between the theoretical reconstruction of *epieikeia* at 1374a 26–1374b 1 and the list of related topics at 1374b 2–22. While it is not very difficult to see how *epieikeia* as a way of statutory interpretation can help the speaker persuade the judges on the one hand, and to contribute to a just decision on the other, the topics of fairness, or at least some of them, seem much more puzzling.

The sentence that introduces the list of topics (1374b 2–3) by establishing a link with the preceding discussion of *to epieikes* makes clear, at any rate, that the following list shows characteristic examples of fair and unfair actions and persons.

5.1 Understanding

The actual list of examples begins with having understanding (*syngnōmē*).[13] *Syngnōmē* appears in Book VI of the *Nicomachean Ethics* as a capacity related to deciding about what is *epieikes* (1143a 19–24). While it is sometimes interpreted as some kind of an extra-legal consideration based on empathy alone (see, however, Grimaldi, 1980, p. 302), in the *Nicomachean Ethics* Aristotle makes it clear that it is directed at truth, which is also emphasised at the end of the example in the *Rhetoric*, where *to alēthes* is opposed to the *gegrammenos nomos* (1374a 36–b 1). The framing[14] of the following distinctions between errors (*hamartēmata*) and wrongs (*adikēmata*), and errors and

[13] The opening phrase of the list, *eph' hois te gar dei syngnōmēn echein, epieikē tauta*, raises problems in terms of rendering as well. Kennedy (2007, p. 100) takes *tauta* to refer to *eph' hois*, and *hois* to be the indirect subject of *syngnōmēn echein*, which results in the translation "those actions that [another person] should pardon are fair." The reason why one should pardon anything that is *epieikes* is not quite clear, however. The subsequent phrases (about distinguishing between *hamartēmata*, *atychēmata*, and *adikēmata*, see below) suggest that it is *syngnōmēn echein* that is to be considered as *epieikes*, and its indirect subject *eph' hois* […] *dei*: "it is fair to pardon what should be [pardoned]." The plural form *tauta*, instead of *touto*, may be explained either by the multiplicity of the situations where *syngnōmē* is needed, or by the instances of *epieikeia* that follow. Grimaldi (1980, p. 302) rightly sees *syngnōmēn echein* as an instance of the *epieikē*, but fails to give a satisfactory explanation for his interpretation.

[14] The section on *syngnōmē* seems to be finished by "to be forgiving of human weakness is fair" (1374b 10–11).

misfortune (*atychēmata*), respectively, suggests that making such distinctions belongs to the domain of *syngnōmē*.

Aristotle gives exact criteria for each of the three cases (1374b 6–10). Misfortune, he says, cannot be anticipated by reason (*paraloga*) and is not caused by an evil moral disposition (*mē apo mochthērias*). Errors, in turn, can be anticipated (*mē paraloga*) but do not stem from moral badness either (*mē apo ponērias*). It is only wrongdoing that can be anticipated by reason and result from an evil moral disposition, from which wrongs committed because of desire (*di' epithymian*) are no exception.

Apparently, then, it is only the wrongs that deserve the full rigour of the law, while errors and misfortune call for a more lenient treatment. While Aristotle gives no examples here, his criteria make it quite clear what cases belong to each of these categories. Wrongdoing, which has been defined at the beginning of Chapter 10 (1368b 6–7 and 9–10), is the case the legislator has in mind when drafting a law about a certain crime. Compared to that, an adequate adjudication of errors and misfortune may require some additions to the legal definition of the crime, just as described under the heading of fairness.

In the case of misfortune, the wrongful intention on the part of the person committing the crime is missing altogether. The paradigmatic case of that is the harm caused by a natural disaster, as e.g. in the case of a storm that prevents a ship from reaching a port.[15]

Errors, on the other hand, belong to the actions done "willingly" (*hekōn*), i.e. "knowingly and unforced" (cf. 1368b 9–11). These cases are usually regarded as the class of human actions covered by "negligence" in modern Western legal terminology (see Hamburger, 1971, p. 102; Harris, 2013a, p. 32).

5.2 Letter and intent

The next topics of *epieikeia* oppose the letter of the law and the intent of the legislator (1374b 11–13). As opposed to *syngnōmē*, where the focus was on the perpetrator's attitude, these topics focus on the desirable way of statutory interpretation (cf. Harris, 2013a, p. 32). Looking at the legislator's intent is, as we have seen, essential for building up an argument from fairness, at least if one wants to avoid making the impression of urging a decision *contra legem*.

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[15] For examples of *trierarch*s being acquitted, most probably due to their excuses of *force majeure*, see Harris (2013a, pp. 44–45).

5.3 Intention

After the opposition of letter and intent, further topics concerning the perpetrator follow. The first of these regards deliberate choice (*prohairesis*) as opposed to the action itself (1374b 13–14), thus continuing the considerations related to *syngnōmē*. On the other hand, this topic seems to respond to that of definition, where Aristotle says that the question of whether an action qualifies as a certain crime should be decided on the basis of *prohairesis* (1374a 11–13). A further link is to Chapters 10–12, where the probabilities are related to intention rather than an action being actually committed.

5.4 Part and whole

The next two topics oppose the part and the whole, first in the abstract, then in terms of the perpetrator's behaviour. The former is, in itself, sufficiently general to be regarded as another formulation of the essence of *epieikeia*, i.e. the requirement of achieving a decision that is adequate to the individual case. The second one, however, may seem more problematic, as it seems to call for a decision based on past events rather than on the action under dispute.[16] While this possibility cannot be excluded, there are other possible explanations which come closer to what seems to be the basic principle of *epieikeia*. First, past events may be considered, if not for deciding about the lawfulness of an action, then for imposing a penalty.[17] Such a reading would also highlight a possible Platonic influence.[18] Second, the general behaviour of the defendant may be used as indirect proof for his moral character and, consequently, his *prohairesis* in the specific case (cf. Saunders, 1991, p. 113; Johnstone, 1999, pp. 95–97; Lanni, 2006, 60–61). Third, it is also possible that

[16] References to past deeds do occur in oratory. An example may be mentioning public service, which is rejected as irrelevant e.g. by Lysias 12.38. Cf. Harris (2013b, pp. 127–128), pointing out also that courts may not have paid attention to such arguments (with examples from Aeschines 3.195, Dinarchus 1.14, Demosthenes 21.143–147, 19.273 and 277, 24.133–134).

[17] See e.g. Dinarchus, *Against Philocles* 11. Cf. Saunders (1991, pp. 113–118) and Lanni (2006, p. 62). Harris (2013b, pp. 131–136) points out that in the *timēsis* the scope of relevant information was broader than in the first part of the trial, where the judges had to decide the question of guilt.

[18] Cf. e.g. *Laws* 862c 6–e 2, where the Athenian speaker explains that punishments should differ according to whether the perpetrator can be "healed" or not.

these topics are not only meant to be used in connection with the judges' decision but also for displaying fairness within a speech.[19]

5.5 Memories

There are two further topics that concentrate explicitly on past deeds (1374b 16–18). The first one opposes good things to bad things experienced by the same person, and the second one good things done by someone to good things done to the same person. Here again, it is hard to see how these could contribute to persuasion concerning the lawfulness of a specific action. Moreover, unlike in the previous topics, the opposition is not between one's general character and an individual action but between (perhaps several) particular actions, and the emphasis is not on the actions themselves but on the act of *mnēmoneuein*. Therefore, the second option of interpretation mentioned above in connection with the topics of "part and whole" is out of question. It seems more likely that it is not the judges who remember something but someone of the other participants of the legal procedure, and that *mnēmoneuein* is used here in the sense of mentioning something.

5.6 Attitudes to wrongdoing and litigation

In the case of the last three topics (1374b 18–22) there is no doubt that they do not regard the judges' attitudes but those of the litigants (or someone who is not directly involved in the case but is characterised in the speech). They say that fairness requires patience, and that it is fair to prefer settling a dispute through words to doing so through deeds. The former may be regarded as an echo of the *Nicomachean Ethics*, 1138a 1–2, although the three topics in the *Rhetoric* follow an order from the most general to the most specific, and being patient does not in itself contain any reference to litigation.

The opposition of words and deeds is widespread in Greek literature and the variety of contexts in which it appears does not allow for attributing one single meaning to it. What seems the most likely here is that, as mentioned above, the three topics start with a general attitude (patience) and finish with the choice between arbitration and judicial decision-making. Hence, one may reconstruct the three steps as three choices between (1) being patient and trying to retaliate; (2) trying to

[19] A striking parallel for this usage of *epieikeia* can be found in the treatise *On types of style* (*Peri ideōn*, 2.6) attributed to the 2nd-century (AD) rhetorician Hermogenes of Tarsus. For an English translation see Wooten (1987).

settle the dispute through arguments (which includes the possibility of a legal debate) and physical retaliation; (3) settling the dispute through arbitration and taking the issue to court.

The third topic is accompanied by a brief explanation concerning the nature of arbitration, according to which its *raison d'être* is that unlike judges, arbitrators base their decisions upon fairness rather than the laws. While this opposition may seem to suggest that courts are not allowed to take *to epieikes* into consideration, which would contradict both what Aristotle says in the *Rhetoric* and the *Nicomachean Ethics*,[20] and contemporary judicial practice (see Roebuck, 2001, p. 182; Harris, 2013a, p. 34; *pace* Meyer-Laurin, 1961, p. 41), it is in fact the arbitrators who are in the focus here and Aristotle seems to mean only that they do not have to provide an explanation that is supported (exclusively) by an interpretation of the written law.[21]

6. CONCLUSION

Having accepted an argument from fairness, the judges have to "supplement" the text of the law interpreted, thereby making it irrelevant for judging the action under dispute. The intention of the legislator is thus referred to in order to make it clear that it would be contrary to this intention to punish the defendant for having committed the crime he is charged with (cf. Harris, 2013a, p. 31). In this sense, we may agree with Jacques Brunschwig, who argues that the phrase used by Aristotle in the *Nicomachean Ethics* ("what the lawgiver would himself have said had he been present, and would have included within the law, had he known") refers to two different things. Supplementing the text by adding further qualification of the action in terms of facts or intention is done by reconstructing the abstract and general will of the legislator, while deciding that the rule thus obtained is not relevant for the facts of the case is "what the lawgiver would himself have said had he been present." Yet these are two consecutive steps of the same line of reasoning: the teleological or consequentialist part of the argument, which leads to the decision not to apply the law needs the backing of the

[20] See *Nicomachian Ethics* 1132a 4–32, where Aristotle describes the judge as *dichastēs*, i.e. who establishes the just mean (cf. Mirhady, 2006, p. 2; see also Harris, 2013a, p. 32, n. 20).

[21] On the general character of arbitration see Meyer-Laurin (1961, pp. 41–45) and the survey of Roebuck (2001). On the difference between the judge (*dikastēs*) and the arbitrator (*diaitētēs*), both Meyer-Laurin (1961, p. 37, n. 130) and Mirhady (2006, pp. 2–3) quote Aristotle's criticism of Hippodamus' ideas concerning the ideal constitution (*Politics* 1268b 4–13).

interpretive or rule-based part, in order to make the judges feel safe in deciding the case, apparently "according to the laws and decrees of the Athenian people." On the other hand, Aristotle's final clause "had he known" highlights the interdependence of the two steps. It is on the basis of the knowledge of the particular circumstances of the case and pondering the consequences of their judgement that the judges can decide where the text says less than what is necessary for a just decision. Taking into account the particular situation and offering a corresponding interpretation of the general rule of decision, the topic of definition can serve the aims of fairness, so that the speaker will be able, once again, "to make clear what is just."

Unlike the conceptual approach summarised in the first part of the paper, the subsequent list of topics seems to have a much broader scope, which does not in every case fit the interpretive method. The last three topics, in particular, do not say anything about how the judges should decide. Neither the importance of patience, nor the opposition of words and deeds can be used as an argument concerning the merits of the legal case. The remark attached to the last one, where arbitration and adjudication by the court are compared, may appear in an arbitration case as a means of reminding the arbitrators of their duty to make a fair decision, but the assertion that "it is fair to prefer arbitration to adjudication" cannot really contribute to such a decision. Therefore, their place in Aristotle's list is best explained if one does not read them as topics for arguments in the strict sense. Together with some of the other items of the list, they seem to serve as topics of characterisation focusing on the *ethos* aspect of the speech rather than the *logos* (cf. Harris, 2013a, p. 32). What connects them to the other, "legal" topics and the preceding discussion of what is *to epieikes* in law is that they likewise stem from Aristotle's definition of fairness and represent popular beliefs of morality. One should not, however, look in them for principles of legal interpretation, nor can they be used to reconstruct Aristotle's views on the functioning of *epieikeia* in judicial decision-making.

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Fairness and Legal Reasoning
Commentary on Könczöl's Fairness, Definition and the Legislator's Intent

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1. INTRODUCTION

Könczöl's essay is a critical study on the concept of fairness from a rhetorical perspective in legal argumentation. In my view, this paper has two main features (which correspond to the author's declared aims): i) a philological interest since the author presents an accurate reconstruction of the concept of fairness on the basis of the classical sources. The analysis focuses on Aristotle, taking into account the most relevant passages in the *Rhetoric* and in the *Nicomachean Ethics*. Then, the Aristotelian version of *epieikeia* is compared to the one proposed by Plato in the *Statesman*. ii) A rhetorical approach: the author lists a possible topic of arguments based on fairness that is useful and used in judicial speeches.

In this comment, I argue that these points should imply further theoretical and methodological insights, which are relevant in the contemporary developments of legal theory and legal reasoning. My goal is to recast the outcomes of Könczöl's analysis in a broader dimension linked to the debate in legal theory, by evaluating the relation between positive law and fairness in light of argumentation theory and by drawing attention to the argumentative process of fairness in legal reasoning.

2. MULTIPLE WORDS FOR *EPIEIKEIA*

The classical concept of *epieikeia* has played a key role in legal systems for ages, since Roman lawyers were aware of the inseparability between *ius* and *aequitas*. There are different ways of language translation and multiple (seemingly) equivalent options, including equity, equality, justness, fairness and reasonableness. Regardless the specific linguistic choice, in principle, each word requires true fairness in opposition to the letter of the law. Equity is what allows the law to be applied in

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practice, in the different and concrete circumstances, which could have not been embodied in law. The common shaping concept appeals to introducing a creative or corrective element for realizing a fair development of law. The tension between the law and the case is, in fact, inescapable and, therefore, the rules depend on their further interpretive and creative concretizations.

This conception of fairness addresses the following questions: what does it mean creative? Is it reducible to the effort of an affordable ruler? Does it depend on the interactions of the parties in trial?

3. LEGAL REASONING, FAIRNESS AND ARGUMENTATIVE REASONABLENESS

This paper deals with the fundamental issues of legal reasoning and interpretation (Canale & Tuzet, 2008), within the framework of theory of argumentation.

According to rhetorical tradition, the principle of fairness implies a non-formalistic approach to legal reasoning, involving the usage of arguments from fairness in legal argumentation. The decision-making process cannot be reduced to a formalistic way of inference: in a deductivistic framework, a legal provision plays the role of a major premise, a statement of fact is the minor premise and the conclusion is an individualized norm inferred by law. In order for a deductivist model to work, it is necessary that both the relevant legal rules and the facts are undisputed, without problems of interpretation or proofs. The fact is that it is not possible to contain a legal decision in a legal deductive syllogism for several reasons.

First, plural sources. Legal pluralism has become a major theme in legal studies: the existence of legal plurality is not just a fact but has turned to be an institutional value. The presence of multiple legal systems (national and international) and therefore plural values in law has become an *institutional* feature of contemporary legal contexts (Puppo, 2013). The selection of suitable norms and their interpretation according to the performing values is not an automatic procedure but a controversial one, which happens in trial.

Secondly, the rule of law in the State-nation is not based anymore on one leader social class which could generate a dogmatic policy of law interpretation, thanks to shared social interests. Legal organisation of society is congruent with its social organisation: social diversity implies different extra-legal expectations. As to law, it is as plural as social life itself.

Third, the concept of legal entity has turned to be fluid because, accordingly to what in facts happens, there is an explosion of multiple

legal acts. To describe the state, it has been used the economical term "inflation" describing a chaotic state of policymaking. This legislative inflation makes the rules conflicting or contradictory. Following the doctrine of principles by Dworkin, in 1992, Gustavo Zagrebelsky, an Italian jurist and a Constitutional Judge, identified a criterion of order in the Constitution Act, considering it not as a normative act but as a fabric of principles (Zagreblsky, 1992). This scholar restored in Italian Jurisprudence a new concept of law, open to values than to the strict positive law, influenced by the constitutional law. To his mind, law has to be mild, in declared opposition to the positivistic idea of strict law (*dura lex sed lex*).

The point is that mildness is not a feature of law itself, but it regards the application of law. Recalling Opocher's legal perspective, the core of legal experience is not positive law but the judicial decision-making process (Manzin, 2014). In a narrow sense, interpretation of law can be understood by reference to the argumentative methodologies employed by judges in judgment: the linguistic interaction with the parties, the topical selection of legal arguments, the role of the institutional contexts, the interpersonal dimension of the process, the uses of rhetoric (Tomasi, 2012, 2015).

In the field of argumentation, argumentation theorists draw insights from logic, rhetoric, communication studies, discourse analysis, stylistics. Taking the pragma-dialectical theory as a possible model for understanding and assessing legal reasoning, to be considered reasonable the exchange of thoughts and moves need to be in accordance with the rules for conducting a critical discussion (van Eemeren, 2011). By the way of these rules, the ideal model provides clear points of orientation for the parties involved: if the interaction proceeds in an adequate fashion, the parties will come to an acceptable settlement of the dispute.

4. FAIR AND REASONABLE TRIAL

Aristotle shaped the concept of fairness to the lesbian rule: it was a particular flexible mason's rule made of lead that could be bent to the curves of a moulding and used to measure irregular curves. The rule is a metaphor for flexibility in practical reasoning: in the Nicomachean Ethics Aristotle discussed the difficulty of legal congruence with reality:

> For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so

> too the decree is adapted to the facts (Aristotle, Nicomachean Ethics, bk V, ch. 10).

Out of metaphors, fairness consists in a fair trail in which the interpretation of the legal provision is argued by the parties and, finally, by the judge. Before an impartial judge, parties must set their positions, demonstrate the soundness and the coherence, resist to objections, persuade each other's. Claiming trial, conflicting parties make a shared decision about their conflict by communicating about their different standpoints, trying to understand each other's reasons and arguing each other in an institutionalized framework. The third party, without expressing a personal option, would play a mediating role to help the parties to solve the conflict in a reasonable way, favoring the setting (Greco Morasso, 2011). During the communicative interaction, if the parties pursue the same goal towards a reasonable solution of the problem, by the end of the debate the parties should show mutual understanding and respect the final decision.

To my mind, the argumentative account squares perfectly well with the classical concept of fairness reconstructed by the Author, demanding for the application in the legal context of argumentative techniques for analysis and evaluation of arguments (Feteris, 1999).

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