

# Aristotle on the Rhetoric of Law

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AS A DISCRETE TREATMENT of the rhetorical tactics of argumentation about law and the presentation of evidence, *i.e.*, the ἄτεχνοι πίστεις, Aristotle's *Rhetoric* 1.15 is important for philologists<sup>1</sup> as well as for researchers of rhetoric,<sup>2</sup> legal historians, and philosophers.<sup>3</sup> The cursory nature of Aristotle's text has proved obfuscating, however, and many of its words and phrases must be carefully considered from various points of view for proper evaluation. The present study concentrates on the sections dealing with argumentation about law and contract (1375a25–b25, 1376a33–b30), the latter of which Aristotle treats largely in terms of the former. Here Aristotle is to a great extent using concepts that he discusses more fully in earlier chapters of the *Rhetoric* and in the *Nicomachean Ethics*. But some of these concepts—such as fairness (τὸ ἐπιεικές) and universal law (ὁ κοινὸς νόμος)—need to be freshly considered from the perspective of this chapter, for Aristotle here makes a shift by which he identifies fairness and universal law with their counterparts in the Athenian courtroom, justice (τὸ δίκαιον) and the beneficial (τὸ συμφέρον). A highly organized structure underlying the apparently haphazard series of arguments affords an opportunity to study the interplay between these concepts that has not previously been exploited. Since the structure has gone unnoticed in recent commentaries, this

<sup>1</sup> E. M. Cope, *The Rhetoric of Aristotle*<sup>5</sup> (Cambridge 1877); W. Grimaldi, *Aristotle, Rhetoric I: A Commentary* (New York 1980: hereafter 'Grimaldi'). For background and issues relating to the presentation of evidence see my "Non-technical *pisteis* in Aristotle and Anaximenes," *AJP* 112 (1991) 5–28.

<sup>2</sup> R. Volkmann, *Die Rhetorik der Griechen und Römer* (Leipzig 1885) 178–90; J. Martin, *Antike Rhetorik* (Munich 1974) 97–101.

<sup>3</sup> *E.g.* J. Triantaphyllopoulos, *Das Rechtsdenken der Griechen* (Munich 1985) and F. D. Miller, Jr., "Aristotle on Natural Law and Justice," in D. Keyt and F. D. Miller, ed., *A Companion to Aristotle's Politics* (Cambridge [Mass.] 1991) 279–306. I pass over much recent literature on Aristotle's legal thought, since I find it largely unhelpful for exegesis of *Rh.* 1.15. In the future I expect to clarify my view of such concepts as κοινὸς νόμος and τὸ ἐπιεικές in a wider survey of Aristotle's thinking.

paper proceeds by pairing coordinated passages and outlining Aristotle's progression of thought in them.

## I

Before proceeding, we need to resolve two textual difficulties that will affect our interpretation of the passage as a whole. The first appears at 1375a25-27: *πρῶτον μὲν οὖν περὶ νόμων εἴπωμεν, πῶς χρηστέον καὶ προτρέποντα καὶ ἀποτρέποντα καὶ κατηγοροῦντα καὶ ἀπολογοῦμενον*.<sup>4</sup> In view of the omission of *καὶ προτρέποντα καὶ ἀποτρέποντα* from MS A<sup>2</sup> the phrase is athetized by L. Spengel (1867), A. Roemer (1885), and M. Dufour (1960). I. Bekker (1831), W. D. Ross (1959), and R. Kassel (1976) print it without athetesis. Grimaldi, the most recent commentator, is "not certain that we should exclude the phrase" (319). The problem arises because Aristotle states only three lines before that non-technical *pisteis* belong exclusively to forensic oratory; but the phrase "proposing and opposing" suggests political and not forensic argumentation (*Rh.* 1.3, 1358b22-24). In support of the phrase Cope, Kassel, and Grimaldi point to passages in the section on witnesses that suggest political discussion and infer from them that Aristotle does not mean what he states explicitly at 1375a25f, but that he intends the non-technical *pisteis* to enjoy a wider application than simply in the courtroom. But this seems incorrect. The first part of the section on witnesses, in which the political passages occur, is exceptional in the whole chapter.<sup>5</sup> It consists of a listing of different sorts of witnesses, the strongest appearing first and the weaker ones after. The rest of the chapter consists of almost perfectly symmetrical pairs of arguments for and against the persuasiveness of each non-technical *pistis*. So it is rather the first part of the section on witnesses that needs to be treated cautiously; a different explanation of the phrase *καὶ προτρέποντα καὶ ἀποτρέποντα* needs to be found.

It may be that Aristotle is not so much advocating the use of non-technical *pisteis* in deliberative or epideictic oratory—although he would probably not protest if they were introduced—as simply acknowledging that political terminology

<sup>4</sup> "First, then, let us discuss laws (and see) how they are to be used *in proposing and opposing*, and in accusation and defence."

<sup>5</sup> See my article (*supra* n.1) 13-16.

does enter the courtroom. In some cases one of the two litigants attempts to persuade the judges not only to decide the facts of the case as judges, but also to evaluate the validity of the relevant law as legislators (*cf. Eth. Nic.* 5.10, 1137b22f: ὁ κὰν ὁ νομοθέτης αὐτὸς ἂν εἶπεν ἐκεῖ παρῶν; *Lys. Adv. Alc.* 1 4: πρῶτον περὶ τούτων νυνὶ διακάζοντας μὴ μόνον δικαστὰς ἀλλὰ καὶ νομοθέτας αὐτοὺς γενέσθαι; *Lycurg. Leocr.* 9; *Anaximenes Rh. Al.* 36.21). By means of such argumentation the one litigant attempts to transform a purely forensic discussion (in which only the facts of the case are considered) into one that is extra-legal and semi-political, where the judges assume the rôle of legislators; the other litigant obviously argues against this attempted transformation. For this reason Aristotle introduces into his discussion of law the terminology of deliberative oratory. The phrase καὶ προτρέποντα καὶ ἀποτρέποντα is an example (*cf.* 1358b8f). Support for this explanation appears in the use of συμφέρον. At 1362a17, for example, Aristotle asserts that τὸ συμφέρον is the goal of deliberative oratory, but at 1375b3 and 13 it is also a matter of concern to judges.

With πρότρεποντα and ἀποτρέποντα Aristotle therefore indicates that he will be considering arguments in support of extra-legal, semi-political argumentation in a case (πρότρεποντα) as well as arguments against this sort of procedure (ἀποτρέποντα). These can be used for both prosecution and defense (καὶ κατηγοροῦντα καὶ ἀπολογοῦμενον). Between the two sets he sketches two different lines of argumentation based upon legal interpretation and the obsolescence of a law (1375b8–15). The sentences he uses to describe them are syntactically quite different from the rest of the section and they describe situations that are accordingly quite different.

A second and vital textual problem appears as Aristotle introduces the five pairs of coordinated arguments.

1375a27–29: φανερόν γὰρ ὅτι, ἐὰν μὲν ἐναντίος ἦ ὁ γεγραμμένος τῷ πράγματι, τῷ κοινῷ χρηστέον καὶ τοῖς ἐπιεικέσιν ὡς δικαιοτέροις.

1375b16: ἐὰν δὲ ὁ γεγραμμένος ἦ πρὸς τὸ πρᾶγμα....<sup>6</sup>

<sup>6</sup> “If the written (law) tells against (our) case, clearly we must employ the universal (law), and arguments based on fairness inasmuch as they are more just.” “But if the written law is favorable to our case....”

The phrase ἐπιεικέσιν ὡς, printed by Kassel, has a variant, ἐπιεικεστέροις καὶ, adopted by Ross and supported, if not unequivocally, by Grimaldi, who interprets the passage “we must use the more equitable interpretation, that is to say the more just” (319). If we accept this version, however, we are led to ask “an interpretation more equitable than what?” An interpretation of the law is not being sought at this point in the text, but rather a suspension or non-application of it. There is no mention of interpretation until 1375b11–13.

At 1375a28f Aristotle is stating that in arguing for the non-application of the law—and this would include only a clause of it—one can employ two distinct concepts, ‘the universal law’ and ‘fairness’.<sup>7</sup> These two concepts, under different labels, are discussed again and again in the section, and the reading ἐπιεικέσιν ὡς makes it clearer that two and not three concepts are involved. Fairness is here meant to be identified with justice, not to be a distinct concept. There is no doubt that the Greek is strained in both textual variants, although Aristotle uses a similar pattern in his discussion of contracts at 1376b21: οὐκ οὐκ οὐκ τοῦτο σκεπτόν, ἀλλ’ ὡς δικαιοτέρον. Moreover, the use of the comparative with τὸ ἐπιεικές makes little sense. Those who read ἐπιεικεστέροις have understood the omitted substantive to be “laws” (νόμοις), and this is probably the only possible interpretation (also the one presumably understood by the mistaken copyist). But a law governs ‘the general’, while fairness comes into play only when a specific situation does not conform to the general law. It ensures that despite deficiencies in the law, justice will be served (see *Eth. Nic.* 5.10, 1137b13f). Since arguments based on fairness are altogether distinct from the law, only the positive and not the comparative form of the adjective is needed. ἐπιεικέσιν stands for ‘arguments based on fairness’, the sort of arguments listed at 1374b2–23.

<sup>7</sup> The *communis opinio* about this passage needs correction: e.g. M. Ostwald, “Was There a Concept ἄγραφος νόμος in Classical Greece?” in E. N. Lee, ed., *Exegesis and Argument* (Assen 1973) 81: “Aristotle lumps these ‘higher considerations’ together under the term κοινὸς (νόμος) which consists of ἐπιεικέστερα and δικαιοτέρα.” But κοινὸς νόμος is an altogether distinct concept from τὸ ἐπιεικές.

## II

The five arguments for extra-legal argumentation and the five arguments against are arranged symmetrically in a one-to-one correspondence. Nowhere is this correspondence clearer than in the first pair of arguments, concerning the judges' oath:<sup>8</sup>

(1)

1375a29–31: καὶ ὅτι τὸ γνώμη τῆ ἀρίστη τοῦτ' ἐστί, τὸ μὴ παντελῶς χρῆσθαι τοῖς γεγραμμένοις.

1375b16–18: τὸ τε γνώμη τῆ ἀρίστη λεκτέον ὅτι οὐ τοῦ παρὰ τὸν νόμον ἔνεκα δικάζειν ἐστίν, ἀλλ' ἵνα, ἐὰν ἀγνοήσῃ τί λέγει ὁ νόμος, μὴ ἐπιорκῆ.<sup>9</sup>

Aristotle apparently considers this oath of the greatest importance for any argument about law or legal procedure (see 1376a19; 1377a14, 24f, 29; 1377b10). He never challenges its validity and is only concerned with its interpretation. With good reason: for despite the cautious way in which he formulates the positive argument, one would search in vain for a similar example in the orators. The negative argument seems, in contrast, to be familiar (e.g. Dem. 23.96f). This does not mean, however, that Aristotle's view was necessarily remote from that of the practitioners of forensic oratory. One should not expect Aristotle's argument to be reproduced word for word or even with the same logical force. Demosthenes (20.118), for example, exhorts the judges to apply the principle of the phrase δικαιοσύνη γνώμη to the law, even though the phrase was only supposed to apply either where there was no relevant law or where, as Aristotle says, the judges are really ignorant of what the law means (see also Dem. 23.96, 39.39ff, 57.63).

The junction of the initial pair of arguments is to bring the procedural legitimacy of extra-legal argumentation into the discussion. The heliastic oath, which bound judges to decide

<sup>8</sup> Cf. A. Biscardi, "La 'gnome dikaiotate' et l'interprétation des lois dans la Grèce ancienne," *RIDA* 17 (1970) 219–32.

<sup>9</sup> "And that the (phrase in the judges' oath) 'according to my best understanding' means this: Not to use the written laws exclusively." "And that 'according to my best understanding' does not mean to judge contrary to the law, but (is there) so that, should one be ignorant of what the law says, one would not commit perjury."

cases according to the law, was the biggest stumbling block for the Athenian orator who wished to engage in extra-legal argumentation. His only means of circumventing the oath was offered by the phrase in the oath cited by Aristotle. With it the orator is to assure the judges that it is legitimate (in the widest sense of that term) to entertain extra-legal argumentation. A parallel argument, that the judges should decide the facts of the case based on probabilities and not on testimony, is given at 1376a19.

Burnet noted the relevance to the heliastic oath of *Eth. Nic.* 6.11, 1143a19–24 (ἡ δὲ καλουμένη γνώμη, καθ' ἣν συγγνώμονας καὶ ἔχειν φαμέν γνώμην, ἡ τοῦ ἐπιεικοῦς ἐστὶ κρίσις ὀρθή· ὀρθὴ δ' ἡ τοῦ ἀληθοῦς),<sup>10</sup> but he did not point out its relevance to our understanding of the *Rhetoric*. In this passage Aristotle is of course more concerned with a form of cognition than with jurisprudence, but it is clear that he is drawing his explanation of it from a forensic setting. The association of concepts suggested by the linguistic association of γνώμη and συγγνώμη triggers in his mind the idea of fairness and the fairminded man (note also the occurrence of 'truth' at 1375b3, *infra*).

(2)

1375a31–b2: καὶ ὅτι τὸ μὲν ἐπιεικὲς ἀεὶ μένει καὶ οὐδέποτε μεταβάλλει, οὐδ' ὁ κοινός (κατὰ φύσιν γὰρ ἐστίν), οἱ δὲ γεγραμμένοι πολλακίς· ὅθεν εἴρηται τὰ ἐν τῇ Σοφοκλέους Ἀντιγόνη· ἀπολογεῖται γὰρ ὅτι ἔθαψε παρὰ τὸν τοῦ Κρέοντος νόμον, ἀλλ' οὐ παρὰ τὸν ἄγραφον,

οὐ γάρ τι νῦν γε κάχθές, ἀλλ' ἀεὶ ποτε .

ταῦτ' οὖν ἐγὼ οὐκ ἔμελλον ἀνδρὸς οὐδενός.

1375b19: καὶ ὅτι οὐ τὸ ἀπλῶς ἀγαθὸν αἰρεῖται οὐδεὶς, ἀλλὰ τὸ αὐτῷ.<sup>11</sup>

<sup>10</sup> J. Burnet, *The Ethics of Aristotle* (London 1900) 279.

<sup>11</sup> "And that fairness always remains and never changes, nor does the universal (law)—for it is by nature—but the written laws change often; whence are said the lines in Sophocles' *Antigone*. For she defends herself by saying that she has buried (her brother) contrary to the law of Creon, but not contrary to the unwritten (law):

for it is not something for now or yesterday, but exists always.

Thus I did not hesitate because of any man."

"And that no one chooses the good in itself, but the good for himself."

The second pair of arguments goes on to reintroduce the intellectual means by which one circumvents the law, namely the concepts of universal law and fairness, which Aristotle had first introduced at 1375a27–29. The distinction between fairness and universal, or natural, law has been put succinctly by K. Kuypers: “Während ... das Naturrecht in engerem Sinne im allgemeinen die fundamentalen Rechtsnormen des Zusammenlebens enthält, ist die Billigkeit immer auf das Konkret-Individuelle der menschlichen Wirklichkeit und des menschlichen Handelns bezogen.”<sup>12</sup> Fairness is associated with the individual; universal laws are directed toward issues of the family and community, such as the unwritten law that compels Antigone to care for the corpse of her brother.

Here Aristotle urges, on the positive side, the metaphysical priority of the two concepts over written law: they are permanent and never change. On the negative side the Aristotelian thinker would have to concede the view of the positive side as true, so he completely disregards it by arguing (implicitly) that the point is irrelevant in the courtroom, where psychological considerations play a larger rôle (see 1354b7–11). No one, litigant or judge, when faced with his own litigation or with a quick decision in the courtroom, truly seeks fairness or universal law, which are represented in the negative argument by τὸ ἀπλῶς ἀγαθόν; he seeks only what is good for himself. Aristotle is being cursory (ἐπιδραμεῖν: 1375a23), and he does not pause to expand the negative argument by spelling out at this point ‘the good in itself’. But τὸ ἀπλῶς ἀγαθόν is given priority by its position at the beginning of the phrase, which is coordinated with the position given to fairness and universal law in the positive argument. The positioning illustrates Aristotle’s consistent interest in the interplay of higher intellectual concepts in considerations of law.

(3)

1375b3–5: καὶ ὅτι τὸ δίκαιόν ἐστιν ἀληθές τι καὶ συμφέρον, ἀλλ’ οὐ τὸ δοκοῦν· ὥστ’ οὐ νόμος ὁ γεγραμμένος· οὐ γὰρ ποιεῖ τὸ ἔργον τὸ τοῦ νόμου.

<sup>12</sup> K. Kuypers, “Recht und Billigkeit bei Aristoteles,” *Mnemosyne* SER. 3 5 (1937) 298.

1375b20: καὶ ὅτι οὐδὲν διαφέρει ἢ μὴ κεῖσθαι ἢ μὴ  
 χρῆσθαι.<sup>13</sup>

The third pair of arguments moves from the metaphysical and psychological tension of the second pair to a political question: what is the function and goal of law? More importantly, it is also here that Aristotle makes a crucial and very interesting step: he gives new labels to the concepts “fairness” and “universal law,” which he mentions first at 1375a27–29 as the intellectual tools of extra-legal argumentation, and whose metaphysical priority over written law he confirms in the second positive argument. Here they appear again, this time not in the language of the philosophical school but in that of the courtroom. Fairness (τὸ ἐπιεικές), which otherwise seldom appears in the extant speeches of the orators and then only as a general term, is here implicitly associated with ‘true justice’ and so with the countless references to τὸ δίκαιον that appear in the orators. Likewise universal law, which is also rare in the orators, is associated with τὸ συμφέρον, again a ubiquitous phrase in forensic oratory.

Other examples of these new links of concept and language may be found elsewhere in the *Rhetoric* and *Nicomachean Ethics*. In his discussion of fairness (*Rh.* 1.13), for example, Aristotle cites the example of the man wearing a ring who raises his hand to strike someone, or actually does strike someone. According to the letter of the law the ring is a piece of metal, a weapon, and so the man is guilty of a serious charge. In *truth*, says Aristotle—that is, according to fairness—the man is not guilty of that serious charge: κατὰ δὲ ἀληθὲς οὐκ ἀδικεῖ, καὶ τὸ ἐπιεικές τοῦτό ἐστιν (1374b1). Here the identification of fairness with true justice is explicit and, I think, definitive. Further, the phrase ἐπιεικέσιν ὡς δικαιοτέροις (1375a29) implies that arguments based on fairness are more just, and seems closely akin to the identification of fairness with justice as something true (ἀληθές τι).

The connection between universal law and the idea represented by τὸ συμφέρον is more difficult to confirm, beyond pointing to the matrix of thought surrounding them that

<sup>13</sup> “And that the just is something true and beneficial, but the apparently just is not, so that the written law (is not just); for it does not fulfill the function of the law.” “And that there is no difference between the law not existing and its not being applied.”



strongly suggests their association. (This ‘matrix’ recurs at 1375b12f in the discussion of legal interpretation.) But at *Eth. Nic.* 5.1, 1129b14–16 Aristotle says that laws aim at what is beneficial in common to all those who have political power: οἱ δὲ νόμοι ἀγορεύουσι περὶ πάντων, στοχαζόμενοι ἢ τοῦ κοινῆ συμφέροντος πᾶσιν ἢ τοῖς ἀρίστοις ἢ τοῖς κυρίοις κατ’ ἀρετὴν ἢ κατ’ ἄλλον τινὰ τρόπον τοιοῦτον. He goes on to say (b25f) that this is a form of justice. The connection of universal law with the beneficial becomes more plausible if ὁ κοινὸς νόμος can be viewed both in the sense of the delimited universal law to which Antigone appeals in the second positive argument (other examples of which are suggested at 1374a20–25), and also in the sense of ‘law in general’ as devoted to some form of justice related to the benefit of the community (πρὸς τὸ κοινόν: 1373b19). κοινός suggests the two senses more easily than is possible in English.

(4)

1375b5f: καὶ ὅτι ὡσπερ ἀργυρογνῶμων ὁ κριτὴς ἐστίν, ὅπως διακρίνη τὸ κίβδηλον δίκαιον καὶ τὸ ἀληθές.

1375b20–23: καὶ ὅτι ἐν ταῖς ἄλλαις τέχναις οὐ λυσιτελεῖ παρασοφίζεσθαι τὸν ἰατρόν· οὐ γὰρ τοσοῦτο βλάπτει ἢ ἁμαρτία τοῦ ἰατροῦ ὅσον τὸ ἐθίζεσθαι ἀπειθεῖν τῷ ἄρχοντι.<sup>14</sup>

The fourth pair of arguments now shifts from direct discussion of the law to the rôle of the judges. Rhetorically, this would represent a shift from τὰ πράγματα to τὸ πάθος, the laws being the direct subject of discussion and the judges being in this case the listeners whose ‘emotion’ is to be stirred (see 1356a1–4). The warning against becoming accustomed to disobeying one who is in charge only makes sense as an exhortation to the judges to adhere to what the legislators, like doctors, have prescribed in the written laws (*Eth. Nic.* 1.13, 1102a20f).

The tension between the concepts of fairness and universal law is suggested here for the first time; it is made more explicit

<sup>14</sup> “And that the judge is just like an assayer of silver, so that he distinguishes the counterfeit justice from the true.” “And that in other disciplines it does not pay to outsmart the doctor; for the mistake of a doctor does not harm as much as the practice of disobeying the ruler.”

at b12f. The positive argument focuses again on true justice (*i.e.*, fairness), emphasizing that when entertaining argumentation based on fairness the judges, like the assayer of silver, focus on details of the case and the individuals involved that escape the general parameters of the written law. In the negative argument, on the other hand, Aristotle extends the association of universal law and the beneficial by pointing out the ‘disadvantageousness’ of extra-legal argumentation. It is only when the rôle of the judges is introduced that considerations of diverging interests become apparent. The judges, as representatives of the polis, do have an interest distinct from that of either litigant, who might be better served by considerations of their particular circumstances beyond the written law. The positive argument concentrates on the details of the case, which would be to the advantage of at least one of the litigants; the negative argument concentrates on the well-being of the state.<sup>15</sup>

(5)

1375b7f: καὶ ὅτι βελτίονος ἀνδρὸς τὸ τοῖς ἀγράφοις ἢ τοῖς γεγραμμένοις χρῆσθαι καὶ ἐμμένειν.

1375b23–25: καὶ ὅτι τὸ τῶν νόμων σοφώτερον ζητεῖν εἶναι, τοῦτ’ ἐστὶν ὃ ἐν τοῖς ἐπαινουμένοις νόμοις ἀπαγορεύεται.<sup>16</sup>

The trend of Aristotle’s scheme would suggest that after dealing with τὰ πράγματα in the third pair of arguments and τὸ πάθος in the fourth, he would proceed in the fifth pair to discuss τὸ ἦθος. And he well might be addressing the rôle of the speaker—I think he is—but the evidence is not conclusive. At the beginning of the second book Aristotle says that the speaker is supposed to argue for his own intelligence, virtue, and good will. Here he would argue for his being the ‘better’ man. Grimaldi cites as a parallel 1375a15ff: ἀμείνωνος γὰρ μὴ δι’ ἀνάγκην δίκαιον εἶναι· τὰ μὲν οὖν γεγραμμένα ἐξ ἀνάγκης, τὰ δ’ ἄγραφα οὐ. But a second passage (1365b35f) is equally important: οἱ γὰρ ἐμμεμενηκότες ἐν τοῖς νομίμοις ἐν τῇ ἀριστοκρατίᾳ

<sup>15</sup> See also *Rh.* 1.13 1373b19–24; *Pol.* 2.8 1268b25–69a9.

<sup>16</sup> “And that it is of the better man to use and abide by the unwritten laws rather than the written.” “And that to seek to be wiser than the laws, this is what is forbidden among the laws that are praised.”

ἄρχουσιν. ἀνάγκη δὲ τούτους φαίνεσθαι ἀρίστους. The differences in meaning suggested by the words βελτίων, ἀμείνων, and ἄριστος should not be overlooked, even if we lack at this point the sort of word study that would enable conclusive distinctions. ἀμείνων at 1375a15 appears (as could ἄριστος at 1365b35) to suggest the rightmindedness of a person to do justice voluntarily and without compulsion, while βελτίων suggests rather an ability of intelligence to recognize what is right independent of the canon of written law. This distinction is consistent with the formula at 1368b9f: ἐκόντες δὲ ποιούσιν ὅσα εἰδότες καὶ μὴ ἀναγκαζόμενοι. It is also supported by the negative argument, which singles out the attempt to be more intelligent than the laws as forbidden by the best laws.

For Aristotle the ideal of legal procedure is represented by the Areopagus at Athens, and one finds in his discussion of it the best external clue that the fifth pair of arguments relates to the rôle of the speaker. According to *Rh.* 1.1 (1354a21–31) ἅπαντες γὰρ οἱ μὲν οἴονται δεῖν οὕτω τοὺς νόμους ἀγορεύειν, οἱ δὲ καὶ χρῶνται καὶ κωλύουσιν ἔξω τοῦ πράγματος λέγειν, καθάπερ καὶ ἐν Ἀρείῳ πάγῳ, ὀρθῶς τοῦτο νομίζοντες ... ἔτι δὲ φανερόν ὅτι τοῦ μὲν ἀμφισβητοῦντος οὐδέν ἐστιν ἔξω τοῦ δεῖξει τὸ πρᾶγμα ὅτι ἔστιν ἢ οὐκ ἔστιν, ἢ γέγονεν ἢ οὐ γέγονεν· εἰ δὲ μέγα ἢ μικρόν, ἢ δίκαιον ἢ ἄδικον, ὅσα μὴ ὁ νομοθέτης διώρικεν, αὐτὸν δὴ πού τὸν δικαστὴν δεῖ γινώσκειν καὶ οὐ μανθάνειν παρὰ τῶν ἀμφισβητούντων.<sup>17</sup> The speaker is to confine himself to the facts and to avoid extra-legal questions. But the judges are not “forbidden” from entertaining extra-legal argumentation except in the oath, which is already mentioned in the first pair of arguments and is unlikely to be implied again in the last pair.

The tension between considerations of fairness and advantageousness in the fourth pair of arguments seems almost inverted here. The positive argument, with its recourse to unwritten laws (“die fundamentalen Rechtsnormen des Zusammenlebens”), evokes the idea of a greater advantage for the polis. But fairness, which is essentially extra-legal in character, cannot be used in support of the legal side of the argument. So in its stead Aristotle goes full circle by using an argument reminiscent of the beginning of the *Rhetoric* and with it closes his discussion of law.

<sup>17</sup> See also *Ath. Pol.* 67.1; *Dem.* 23.96f; *Lys.* 3.46.

Between the arguments for and against extra-legal argumentation Aristotle inserts two sentences concerning the interpretation of a law or laws and the obsolescence of a law (I have modified Kassel's punctuation somewhat to reflect my view that Aristotle means to treat interpretation within a single sentence):

1375b8–13: καὶ εἴ ποῦ ἐναντίος νόμῳ εὐδοκιμοῦντι ἢ καὶ αὐτὸς αὐτῷ (οἷον ἐνίοτε ὁ μὲν κελεύει κύρια εἶναι ἅττ' ἂν συνθῶνται, ὁ δ' ἀπαγορεύει μὴ συντίθεσθαι παρὰ τὸν νόμον) καὶ εἰ ἀμφίβολος, ὥστε στρέφειν καὶ ὄρᾶν ἐφ' ὁποτέραν τὴν ἀγωγὴν ἢ τὸ δίκαιον ἐφαρμόσει ἢ τὸ συμφέρον, εἶτα τούτῳ χρῆσθαι. καὶ εἰ τὰ μὲν πράγματα ἐφ' οἷς ἐτέθη ὁ νόμος μηκέτι μένει, ὁ δὲ νόμος, πειρατέον τοῦτο δηλοῦν καὶ μάχεσθαι ταύτῃ πρὸς τὸν νόμον.<sup>18</sup>

Interpretation is needed both where there is a conflict between two laws or between clauses of a single law and where there is some ambiguity in a law. In both situations the tension between considerations of fairness (here represented by 'the just') and universal law (again represented by 'the beneficial') comes into play. Since the written law or laws are unclear, extra-legal argumentation needs to be introduced.

These sentences are logically and syntactically different from those of the other ten arguments. The others can be introduced in any situation. A litigant can always attempt extra-legal argumentation even if he wishes to circumvent only a minor clause in a law. But in the case of these two sentences inserted in the middle, certain conditions must be true: either an antinomy or an ambiguity in the law must exist, or else the relevant law must be obsolete. But these conditions do not always exist, so Aristotle casts the sentences in a conditional form.

<sup>18</sup> "And if somehow a law is contradictory to a well-reputed law, or even to itself (such as the one that says that those things agreed under contract are binding, and the other that forbids illegal contractual obligations), as well as if it is ambiguous, so that one must turn it over and see which interpretation accords either with the just or with the beneficial, one must use this interpretation. And if the circumstances under which the law was passed no longer remain, but the law does, one must try to clarify this and to fight in this way against the law."

In sum, the proposal for extra-legal argumentation (1–5 above) asserts that the written law is at least *partly wrong*—or wrong for a particular situation—and so must be at least partly and perhaps only temporarily suspended so that there can be a just decision in the case at hand; but it does not assert that the written law is wholly wrong. The sentence on legal interpretation, on the other hand, asserts only that the written law is *unclear*; it makes no claim about the validity of the law. Only the second of the two middle arguments suggests that a law, because of changing circumstances, can be no longer valid.

### III

Aristotle discusses two aspects of contracts, their credibility and their validity. In the first part of the section (1367a33–b7) he points out that their credibility is inextricably tied to that of their signatories and custodians and suggests that the interested reader should pursue a line of argumentation about their credibility by means of his treatment of witnesses. The second part of the section, in which he discusses the validity of a contract, shows surprising similarities to his treatment of law. Of course Aristotle makes much of the inherent likeness of a contract to a law, but the similarities in the two accounts do not stop there. The order is reversed from that in the discussion of laws, with arguments in favor of contracts given first; but the same symmetrical pattern is followed with four coordinated arguments on each side. As at 1375a26 and b16 Aristotle coordinates the μέν at 1376b6 with the δέ at b15.

(i)

1376b7f: ἡ γὰρ συνθήκη νόμος ἐστὶν ἴδιος καὶ κατὰ μέρος.

1376b17f: ἄτοπον γὰρ εἰ τοῖς μὲν νόμοις, ἂν μὴ ὀρθῶς κείμενοι ὧσιν ἄλλ' ἐξαμάρτωσιν οἱ τιθέμενοι, οὐκ οἴομεθα δεῖν πείθεσθαι, ταῖς δὲ συνθήκαις ἀναγκαῖον.<sup>19</sup>

<sup>19</sup> “The contract is a private law and applies to particulars.” “For it is strange if we think we do not have to obey laws whenever they are not rightly framed and those who made them were mistaken, but (think it) necessary to obey contracts.”

As in the section on law, this first pair of arguments puts the legitimacy of extra-contractual argumentation under discussion. The first positive argument presents the contract as a private law; but in contrast with a law that a city legislates for itself (see 1368b7f), a contract is valid only in a limited way, that is, between private individuals. Against this Aristotle suggests a premise that he would not have formulated against an actual law, namely, that one does not have to obey a law that has been improperly made. In the section on law Aristotle never indicates that legislators make mistakes (although at 1.13 [1374a29f] he does suggest something of the sort), even when he has great reason to do so. Perhaps he felt that although one must admit privately that legislators do make mistakes, it would be impudent to do so before a court. But in this case the *τιθέμενοι* are only to be thought of as private legislators, who are making laws for themselves; they are not *νομοθέται*. Of course the larger implication is there, but the negative argument seems least threatening when, in juxtaposition to the positive argument, it appears to relate only to an *ἴδιος νόμος*, in the sense that it is fashioned by and governs individuals acting privately.

(ii)

1376b8f: καὶ αἱ μὲν συνθήκαι οὐ ποιοῦσι τὸν νόμον κύριον, οἱ δὲ νόμοι τὰς κατὰ τὸν νόμον συνθήκας.

1376b19–23: εἶτα ὅτι τοῦ δικαίου ἐστὶ βραβευτῆς ὁ δικαστής· οὐκ οὖν τοῦτο σκεπτέον, ἀλλ' ὡς δικαιότερον· καὶ τὸ μὲν δίκαιον οὐκ ἔστι μεταστρέψαι οὔτ' ἀπάτη οὔτ' ἀνάγκη (πεφυκὸς γάρ ἐστιν), συνθήκαι δὲ γίνονται καὶ ἐξαπατηθέντων καὶ ἀναγκασθέντων.<sup>20</sup>

The second positive argument appears to be an attempt to anticipate an argument of the sort given at 1375b9f: οἷον ἐνίοτε ὁ μὲν (νόμος) κελεύει κύρια εἶναι ἅττ' ἂν συνθῶνται, ὁ δ'

<sup>20</sup> “And contracts do not make laws valid, but laws give validity to contracts made in accordance with law.” “And then that the judge is an umpire of justice; it is not this (the contract) that must be examined, but with a view to what is more just; indeed it is not possible to pervert justice by deception or compulsion—for justice is based on nature—but contracts are among those things affected by deceit and compulsion.”

ἀπαγορεύει μὴ συντίθεσθαι παρὰ τὸν νόμον.<sup>21</sup> Thus the negative argument admits such an argument from the beginning by not even challenging the validity of the contract, but instead changes the focus of the dispute to extra-legal argumentation, this time focusing on the possible peculiarities of the case (deception or compulsion) that might suggest an extra-legal approach. Again reference to the details of the case and the word δικαιοτέρον suggest that Aristotle's 'justice' implies his notion of fairness, a key intellectual tool for extra-legal argumentation.

(iii)

1376b9–11: καὶ ὅλως αὐτὸς ὁ νόμος συνθήκη τις ἐστίν, ὥστε ὅστις ἀπιστεῖ ἢ ἀναιρεῖ συνθήκην, τοὺς νόμους ἀναιρεῖ.

1376b23–29: πρὸς δὲ τούτοις σκοπεῖν εἰ ἐναντία ἐστὶ τινὶ ἢ τῶν γεγραμμένων νόμων ἢ τῶν κοινῶν, καὶ τῶν γεγραμμένων ἢ τοῖς οἰκείοις ἢ τοῖς ἀλλοτρίοις, ἔπειτα εἰ ἄλλαις συνθήκαις ὑστέραις ἢ προτέραις· αἱ γὰρ ὑστεραὶ κύριαι, ἢ αἱ πρότεραι ὀρθαί, αἱ δ' ὑστεραὶ ἠπατήκασιν, ὁποτέρως ἂν ᾖ χρήσιμον.<sup>22</sup>

The coordination of the third pair of arguments is suggested by the word *τις*: the negative argument concedes that a law is in general *a certain sort* of contract, but the implication of the phrase is that there are other contracts as well as other laws. For this reason the potential conflict between the contract, on the one hand, and laws and other contracts, on the other, can be exploited. Five cases are distinguished altogether. Interestingly, this pair of arguments corresponds to the two sentences in the section on law that deal with the interpretation and obsolescence of a law or laws (1375b8–15). Conflicts with contemporary laws

<sup>21</sup> Cf. Hyperides *Adv. Ath.* 6: ἐρεῖ δὲ πρὸς ὑμᾶς αὐτίκα μάλα Ἀθηνογένης, ὡς ὁ νόμος λέγει, ὅσα ἂν ἕτερος ἕτερω ὁμολογήσῃ, κύρια εἶναι.

<sup>22</sup> “And in general the law is itself a certain sort of contract, so that whoever disobeys or abolishes a contract abolishes the laws.” “In addition, examine whether the contract is contrary to any written or universal laws, and in the case of written laws either to those of the city or foreign ones, and then (whether it is contrary) to earlier or later contracts; for later contracts are valid, or else the earlier are correct and the later deceitful, whichever argument is useful.”

and contracts are mentioned first, then cases in which contracts have been superseded. Also like those two sentences, this pair of arguments is set off from the previous ones by a distinct stylistic device. The first two pairs are coordinated, the positive arguments connected simply by a καὶ (1376b8) and the negative arguments, which are longer, with πρῶτον μὲν (1376b15f) and εἰθ' (b19). The presence of ὅλως in the third positive argument and of πρὸς δὲ τούτοις in the negative signals a qualitative shift in this argument similar to the one accomplished by the shift from the repeated καὶ ὅτι to the conditional construction in the section on law.

Here the sense of 'universal laws' differs from that implied in the latter part of the section on law, where the phrase conveyed the general purpose of law, namely what is beneficial, rather than definite rules ('Rechtsnormen'), as in Antigone's appeal at 1375b1f. But the connection is not totally severed. The implication of the positive argument is that by nullifying a contract and so destroying the laws, one is doing something that is 'in general' harmful, since laws exist for the general benefit of the polis. Thus we see underlying this pair of arguments conflicting aspects of κοινὸς νόμος, *law in general*, and a definite *universal law*.

(iv)

1376b11–14: ἔτι δὲ πράττεται τὰ πολλὰ τῶν συναλλαγμάτων καὶ τὰ ἐκούσια κατὰ συνθήκας, ὥστε ἀκύρων γιγνομένων ἀναιρεῖται ἢ πρὸς ἀλλήλους χρεῖα τῶν ἀνθρώπων. καὶ τὰλλα δὲ ὅσα ἀρμόττει, ἐπιπολῆς ἰδεῖν ἔστιν.

1376b29–31: ἔτι δὲ τὸ συμφέρον ὁρᾶν, εἴ που ἐναντιοῦται τοῖς κριταῖς, καὶ ὅσα ἄλλα τοιοῦτα· καὶ γὰρ ταῦτα εὐθεώρητα ὁμοίως.<sup>23</sup>

The last pair of arguments (and the suggestion of further unsketched arguments) goes beyond considerations of law and

<sup>23</sup> "Moreover, most voluntary transactions are done in accordance with contracts, so that if they become invalid, the commerce of people with each other is destroyed. And the other suitable things are obvious." "Moreover, look at the beneficial, if perhaps there is something contrary to the interest of the judges, and anything else of this sort; for these things are easy to see in a similar way."



justice to what is advantageous for the polis as a whole inasmuch as it is represented by the judges. The positive argument points out that in general, contractual agreements are the basis of commerce among human beings and thus ought not to be threatened (see *Eth. Nic.* 5.5, 1133a25–b10); the negative argument ignores what is true in general and appeals specifically to the advantage to the judges.

It is interesting to see how Aristotle has distinguished the idea of universal laws, which he mentions in the third pair of arguments, from that of the advantage to the judges; they are linked in argumentation about law. He can do so because of the difference between a contract and a law. A law, as an act of the state, is in that sense proprietary to that state and to the judges as its representatives. Extra-legal argumentation, which obviously affects the status of the law, can thus be made directly with regard to the judges without explanation. But in the case of a contract, which is an agreement only between private individuals, a distinct plea must be made to the judges to assert their own interests. Neither the positive nor the negative argument make any appeal to justice or to the legitimacy of such argumentation; the whole matter is reduced to the judges' benefit.

The passages discussed above stand at a junction between philosophical thought about the nature of justice, law, and contracts, and the practical considerations of argumentation in a courtroom. They lead to further considerations about the way the Attic orators treat laws and contracts in the courtroom and about the intellectual milieu in which Aristotle did his jurisprudential thinking. Here he does not simply present sophistic tricks, or means of making the weaker argument the stronger, but sketches lines of reasonable (from his point of view) argumentation that exist on both sides of the issues, argumentation the judges should consider before making a decision. These lines of reasoning are based upon the procedural rules of the court, such as those inherent in the heliastic oath, upon the philosophical concepts involved, and upon the rôles to be played by the judges and speaker. These rules, concepts, and

rôles are for Aristotle the rhetorician τὸ ἐνδεχόμενον πιθάνον (1.2 1355b26) of the rhetoric of law.<sup>24</sup>

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*July, 1990*

<sup>24</sup> This paper was prepared during a year at the Seminar für klassische Philologie, Göttingen, under the sponsorship of the German Academic Exchange Service (DAAD), and a version was read at the Victoria meeting of the Canadian Society for the History of Rhetoric in May 1990. The translations are my own, in consultation with Professor George Kennedy.