THE NEW THEORY OF ARGUMENTATION AND AMERICAN JURISPRUDENCE

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The purpose of this essay is to compare American legal philosophy with the new theory of argumentation developed by Chaim Perelman. Our analysis can be summarized in the following way: Oliver Wendell Holmes, Benjamin Cardozo, John Dewey and many other eminent representatives of American philosophy and jurisprudence found that in order to develop their ideals and theories, they had to go beyond the formalistic logic of syllogisms. They started to search for new methods but they never did solve the problem. The answer that they sought, however,was provided by the professor of logic, philosophy, and jurisprudence at the Université Libre of Brussels, Chaim Perelman, inventor of the newly elaborated theory of argumentation which he himself has called the New Rhetoric, after Aristotle.

Here we will concentrate chiefly on the problems of jurisprudence and morality in politics. In the first chapters we will analyze the respective ideas of the American authors; afterwards we will show how the New Rhetoric is an organic and logical continuation and evolution of American jurisprudence.

I

It is a matter of fact that in the twentieth century most eminent representatives of American jurisprudence have found that formal logic is inadequate for the interpretation and application of legal norms, either statutes or the common law. For many social, economic, and political reasons, Americans realized that the life of the law cannot rest on the logic of syllogisms, long before their European counterparts. Why the Americans have the priority in this field is a topic

for a special study, which is not pertinent to our theme.

From the very beginning of his practical and theoretical activity, Justice Oliver Wendell Holmes helped to lay down the premises for the new juridical methodology.

In the lectures on «Agency» which were delivered in 1891, Holmes asserted «that the whole outline of law is the resultant of a conflict at every point between logic and good sense—the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust» ([1]).

Could this sentence be interpreted as a condemnation of the use of logic, or of common sense ? Is there really an unbridgeable chasm between the two ? It would rather appear that Holmes wanted merely to state that an indiscriminate use of formal logic (the logic of syllogisms) could lead to «manifestly unjust» consequences and that therefore in the process of interpreting and applying the law we should use tools other than formal logic. We should not abandon logic, but we should not expect or demand too much from the rigorous use of syllogisms.

Should we, on the other hand, decisively turn to «good sense» and rely mainly on it to solve legal problems ? This policy would not be advisable either. «Good» or «common» sense is often identified with «natural justice» or «natural law» and vice versa. Holmes' critical remarks about «natural law» should be applied to «good sense» as well: «The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere» ([2]).

The conflict between formal «logic» and «good sense» (which usually presents itself under natural reason or law), according to Holmes, sometimes becomes a conflict between an alleged consistency of logic (indeed, leading to injustice) and the naiveté of familiar convictions.

([1]) Oliver Wendell Holmes, *Collected Legal Papers* (New York: Peter Smith, 1952), p. 50.

([2]) *Ibid.*, p. 312.

Legal norms should not be treated like abstract mathematical axioms because law is directly connected with the real conflicts of life.

> But the provisions of the constitution are not mathematical formulae having their essence in their form; they are organic living institutions... Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth ([3]).

What is «vital» should not be treated like a «dead letter», or like a formula for life which is reduced to its «form». Law is the response to our aspirations, to the experience of mankind, and is not reducible to a formula whose meaning has been pre-determined. Mere reading of the legal norms is not sufficient; it is equally necessary to consider their whole line of growth as well. One should start at the beginning, but only in order to realize fully that law, as the «witness and external deposit» of our lives, registers the moral development of society ([4]). For this reason, an uncritical or dogmatic application of formal logic to the living organisms of the law brings about results which are repellent from the human viewpoint.

And yet, after numerous criticisms of the insufficiency of logic, we find Holmes making the following statement: «The training of lawyers is a training in logic. The process of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic» ([5]).

These words were to become famous in juridical literature to indicate how important logic is in legal training ([6]).

Strictly speaking, Holmes' notion of formal logic differs from that usually accepted in our time. Discrimination and

([3]) Gompers v. U.S., 233 U.S. 604, 610 (1913). In *The Holmes Reader*, p. 205.

([4]) HOLMES «The Path of the Law», *Collected Legal Papers*, p. 170.

([5]) *Ibid.*, p. 181.

([6]) *The Holmes Reader*, p. 209.

analogy are foreign to formal logic. Nevertheless the fact that Holmes treated formal logic more broadly does not alter the tenor of our remarks.

In an address delivered to the Supreme Court of Massachussetts in 1897, Holmes stressed how vain was the conviction of those who looked for certainty in the application of logic to law: «And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man» ([7]).

The above is one of his most important observations concerning the importance of logic in legal practice: logic creates the illusion of certainty; actually such certainty either does not exist or cannot be attained. Even should it exist to a certain degree, it would not owe its existence to the logic of syllogisms.

The most damaging illusion, however, is the illusion that legal conclusions are free from subjectivity, that they are completely detached from the individual who harbors them; that they have a life of their own. The contrary is true. As Holmes writes:

> Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form ([8]).

Legal conclusions can always be given in a logical form. It is for this reason that lawyers are trained in logic. This is not to say that they are not to be trained to apply logic to the interpretation of legal norms (this very often becomes impossible when the quantitative measurements are not known), instead they learn how to present their own subjective conclusions in an objective, impersonal, logical, form. Training in

([7]) HOLMES, *Collected Legal Papers*, p. 181.
([8]) *Ibid.*

logic does not pertain to the essence of professional activity in the field of law, but to the forms of legal presentation: subjectivity must be presented as objectivity.

These considerations do not make a good case for formal logical thought in the sphere of law. And because one is not able to reach an exact logical conclusion in a given case, one's conclusions

> ... can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident; no matter how ready we may be to accept it ...

Such is the essence of Holmes' view of the role of logic. Every judicial decision (not concerned with technical problems such as data), apart from its logical form, embodies the preference of a given body rather than a determination drawn from the «iron logic,» which supposedly is the one correct, certain, and absolute expression of absolute justice. On the contrary: juridical decisions are subjective because they reflect the personal preference of the author who is subject to the influence of the changing moods and opinions of the public.

«No concrete proposition is self-evident ...» this means that a proposition must seek the adherence of the minds of one's hearers. The so-called compelling force of self-evidence, obviousness, rationality, and logical consistency, are not sufficient in themselves. One must use the force of argument to persuade those at whom the arguments are directed. This last conclusion was never expressed by Holmes. It portends the great leap from the realm of formal logic to the realm of argumentation.

Holmes did not leave one stone on another in destroying illusions about the role of syllogisms in law. But he did not

(9) *Ibid.*, p. 181.

have anything to replace formal logic so that reasonableness in juridical practice would be assured.

The ground for the New Theory of Argumentation was cleared by Holmes. But it was John Dewey who added new dimensions to his analysis.

II

In his essay «Logical Method and Law»» John Dewey analyzes Holmes' ideas about the place of logic in the interpretation of law. Dewey concludes that whenever Holmes uses the words (in his legal writings), «logic» or «logical,» he means «formal logic,» logic as «formal consistency,» the consistency of «concepts ... irrespective of the consequences of their application to concrete matters-of-fact» ([10]).

Jurists are inclined to use the ready-made, familiar, concepts of logic, because it is convenient and economical for them to do so. No further effort is required to devise a new pattern; furthermore, recourse to logic gives rise «to a sense of stability, of a guarantee against sudden and arbitrary changes of the rules» ([11]). One should be wary of this use of logic and «a sound logic» will guard against it.

Dewey views formal logic, or the logic of syllogisms, as a logic which is not «sound» (concerning application to law, morality, and politics). But what is «a sound logic ?» Here Dewey's explanations are meagre. He does, however, make an important comment regarding Holmes' famous expression: «The actual life of law has not been logic: it has been experience». ([12])

([10]) John Dewey, *Philosophy and Civilization* (New York: Minton, Batch and Co., 1931), p. 130.

([11]) *Ibid.*, p. 131.

([12]) This sentence is one of the first to appear in the book by Holmes, *The Common Law*. Later one reads: «The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which the judges share with their fellow-men, have a good deal more to do than the syllogism in determin-

Dewey understands that here Holmes uses the word logic in the traditional orthodox way, meaning the logic of syllogisms and Dewey stresses that there exists an antithesis between such logic and experience, between this logic and good sense. Consequently, there is a need for «another kind of logic» ([13]).

This «other» logic would not assert that reason has «fixed forms of its own» anterior to the subject matter, to which «the latter have to be adapted» ([14]). Orthodox logic is a logic of «rigid demonstration», but not of «search and discovery», Dewey states. The logic of syllogisms pays no attention to the social consequences of decisions made with its help.

What can be said of the «other» kind of logic which Dewey recommends ? It will be a logic which will reduce the influence of habit: it will facilitate the use of good sense; it will take into account the social consequences of legal decisions; it will deal with the *operations* of thought and not only with its *results;* it will not arrogate to itself the presumption that every possible case which may arise can be resolved simply on the basis of a fixed antecedent rule.

According to formal logic, a logical conclusion «subsumes» a particular under an appropriate general principle; nothing more need be said.

According to the «other kind of logic», general rules do not mechanically decide concrete cases; nothing necessarily follows automatically from general statements or general legal rules. General rules can only act as «generic ways» which may aid in solving any given question.

Dewey calls this «other logic» an «experimental logic,» ([15])

ing the rules by which men should be governed. This embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics». (Cambridge: The Belknap Press of Harvard University Press, Mass., 1963), p. 5:

[13]) John DEWEY, *op., cit.,* p. 132.

([14]) *Ibid.*

a «sound» logic, a «vital» logic ([16]) and finally the «logic of inquiry,» ([17]) because it is «flexible.» ([18])

The use of the «logic of inquiry» does not reduce «predictability» in the sphere of law. Quite the contrary: theoretical certainty will be replaced by practical certainty ([19]). Social needs will be met because the logic of inquiry relates to consequences and not to antecedents ([20]).

There is a gap, Dewey writes, between antecedents and the new requirements of life. Whoever uses antecedents alone must do so in an arbitrary manner covered with syllogisms.

Those who use the «experimental logic», however, are more *creative,* more oriented toward reality and give more assurance that the law will be applied as regularly as possible. «Gambling» with old rules does not increase «practical certainty», but instead serves the «virtual alliance between the judiciary and entrenched interests» ([21])

Such are the social characterisitcs of the «logic of inquiry», as understood by Dewey. This logic serves to promote progress, it is basically anti-conservative, it is oriented toward social justice.

Moreover, this «vital logic» takes into account the fact that «the personal element cannot wholly be excluded» ([22]) from judicial decisions. But how can such a «subjective» decision preserve its authority, its aura of objectivity? The answer can only be through the introduction of the element of the audience.

The absence of the latter element is what separates Dewey's «logic of inquiry» from the new theory of argumentation propounded by Perelman, as applied to jurisprudence.

Holmes proved that the logic of syllogisms can lead to un-

([15]) *Ibid.*, p. 133.
([16]) *Ibid.*, p. 136.
([17]) *Ibid.*, p. 139.
([18]) *Ibid.*, p. 140.
([19]) *Ibid.*, p. 136.
([20]) *Ibid.*, p. 138.
([21]) *Ibid.*, p. 139.
([22]) *Ibid.*, p. 136.

reasonable, inhumane results. Dewey proved that formal logic can aid «the bulwarks of reaction» ([23]). He subsequently elaborated his logic of experience. Perelman went beyond Dewey.

In considering the reasonableness of moral norms Dewey advances half a step further toward rhetorical logic.

In the «Afterword» (1946) to his book, *The Public and Its Problems* (first published in 1927), Dewey makes the following remarks concerning moral norms and their social value:

> ... in order to interest the citizens in an actual war, it it has been necessary to carry on a campaign to show that superior moral claims were on the side of a war policy. The change of attitude is not fundamentally an affair of moral conversion, a change from obdurate immorality to a perception of the claims of righteousness. It results from greatly intensified recognition of the factual consequences of war ([24]).

From Dewey's point of view, as expressed in one of his last writings, what is moral or immoral does not depend on any unchangeable, absolute moral category; it depends on public understanding and the perception of what should be regarded as a right (moral, just) way of acting. According to the absolutistic philosophies of morality and truth, when one party supports a war and a second opposes it, only one can represent the requirements of morality and justice; the other must be sunk in «obdurate immorality». Once we admit the public's opinion into the spectrum of our evaluation, the results of our analysis will be broader, deeper, more flexible, but by this we do not mean (more eclectic), more humane. Both factions, pro-and-anti-war, may represent moral and social values at least for a time. When the dialogue goes on, when new facts about the conduct of the war and the behavior of the aggressors become known (Dewey refers to WW

([23]) *Ibid.*, p. 139.

([24]) John DEWEY, «Afterword» in *The Public and its Problems* (Chicago: The Swallow Press, 1954), p. 224.

II), when the public becomes more and more persuaded by the old and the new arguments of the pro-war faction—then, more and more people will perceive who represents «*superior* moral claims». From the absolutistic dogmatic viewpoint, when one changes one's moral attitude, one has undergone a «moral conversion». Not so, says Dewey. In this respect his theory coincides with the New Rhetoric. New moral awareness and a change of mind are a normal, non-revolutionary, development resulting from the public dialogue. It also means that opposition to war may become morally untenable at a certain point, although for a while it may have been regarded morally justifiable. The majority will view their political adversaries as representatives of obdurate immorality. At any rate, the moral, or immoral, has no absolute content.

In this manner Dewey made once more a turn toward the rhetorical tradition.

III

Chaim Perelman has become one of the most creative and innovative authors in the fields of philosophy, logic, and jurisprudence during the forty years of his scholarly activity.

The foundation and elaboration of the new theory of argumentation, which he calls The New Rhetoric, represents a new philosophy and methodology of the social sciences.

In the essay, «The New Rhetoric: A Theory of Practical Reasoning», Perelman tells of his own intellectual evolution. His first study on justice was published in 1945. One of his principles was that there is an insurmountable barrier between the judgment of facts, and values.

He was deeply dissatisfied with a philosophical inquiry carried on within the limits of logical empiricism because it «was not able to provide an ideal of practical reason, that is, the establishment of rules and models for reasonable action» ([25]).

([25]) Chaim PERELMAN, «The New Rhetoric: A Theory of Practical Reasoning», in *The Great Ideas Today 1970*, Encyclopaedia Britannica, Chicago, 1970, p. 280.

In this frame of mind he asked himself: «... is there a logic of value judgments that makes it possible for us to reason about values instead of making them depend solely on irrational choices, based on interest, passion, prejudice, and myth ?» ([26])

Perelman was not prepared to accept any form of subjectivism, scepticism, absolutism, or intuitionism in his theory of value; he could not accept existentialist subjectivism, although he appreciated the existentialist criticism of positivist empiricism and rationalistic idealism.

A clue toward the solution of his dilemma was given Perelman by the method employed by the German logician Gottlob Frege who analyzed the reasoning used by mathematicians. The result of these investigations and the tracing of the actual empirical logical reasoning to achieve value judgments by moralists, politicians, and authors are documented in *The New Rhetoric.*

Perelman writes:

> For almost ten years Mme L. Olbrechts-Tyteca and I conducted such an inquiry and analysis. We obtained results that neither of us had ever expected. Without either knowing or wishing it, we had rediscovered a part of Aristotelian logic that had been long forgotten or, at any rate, ignored and despised. It was the part dealing with dialectical reasoning, as distinguished from demonstrative reasoning. ... We called this new, or revived, branch of study, devoted to analysis of informal reasoning, *The New Rhetoric* ([27]).

In this way the ancient rhetoric was revived. But a renaissance is never simply a rebirth of the past. It has new elements and operates in a new manner under new circumstances.

The New Rhetoric was born as a result of the practical and theoretical needs posed by the social and intellectual devel-

([26]) *Ibid.*
([27]) *Ibid.*, p. 281.

opment of our century. Traditional empiricism, positivism, neopositivism, pragmatism, rationalism, and all their new forms were unable to answer the topical questions of our day. The new requirements of life were pressing: people had to make decisions, they wanted to make them in a reasonable way. In the twentieth century especially we have seen successive waves of irrationalism by right and left wing totalitarianisms, not only in the emerging nations, but also in all well-established western democracies ([28]). From the very beginning, *The New Rhetoric* has served as a tool for analysis of the spheres of life which go beyond the ambit of formal logic, thereby being relegated to methods usually far from the conscious application of reason.

IV

The New Rhetoric has three basic elements which establish its methodological basis for a philosophy of consistent rationalism:

— a new solution for the relationship between the reasonable and the rational;
— the problem of the audience;
— the problem of the dialogue.

There have always been a number of intellectuals who believed that when one presents a clear argument, truthfully and logically substantiated, the mere power of the syllogism and truth should be sufficient to make a definitive impact on the minds of everyone able to think.

Such intellectuals adhere to Descartes who said that if two men have contrary judgments about the same thing, one at least must be mistaken and irrational, although it may be that

([28]) Cf. Stephen HASELER in *Commentary*, vol. 64, No. 2, August, 1977, p. 80. Let us remember that already in 1939 George Orwell observed that a simple restatement of the obvious had become a duty for the intelligent man. The situation has not improved in the last three decades.

both are in error. At any rate, as Descartes writes, if the reasoning of either were certain and evident, he would be able to convince his opponent of its truth ([29]).

The point of departure of the theory of argumentation is diferent: according to the New Rhetoric, the Descartean claims are excessive and unreasonable. It is Perelman's contention that both parties may have good, resonable, opinions because human, practical, political, and moral problems cannot be reduced to the antinomy, true or false. There are problems which cannot even be presented in the categories of formal logic, they cannot by syllogistically expressed or proven. Diverse opinions can be *reasonable* at the same time because there is a difference between what is rational and what is reasonable. This distinction lies at the heart of Perelman's New Rhetoric and Pluralism ([30]).

According to various forms of philosophical and juridical positivsm, formal logic and experience are the sole tools for providing demonstration and verification. If the rational is so narrowly defined, then nearly the entire sphere which is concerned with action, including politics and morality, «is turned over to the irrational» ([31]).

> The only reasonable decision would seem to be one that is in conformity with the utilitarian calculations. If so, all ends would be reduced to a single one of pleasure or utility, and all conflicts of values would be dismissed as based on futile ideologies ([32]).

The reduction of the rational to one principle leads to either *irrational pluralism,* or to *monism* of values. The monism of values is usually irrational and unreasonable, it

([29]) PERELMAN analyzes this idea in «Désaccord et rationalité des décisions», in *Droit, morale et philosophie,* Paris, ²1976, p. 162 (English translation by W. Kluback).

([30]) The problem of pluralism will be discussed later.

([31]) Chaim PERELMAN, «The New Rhetoric: A Theory of Practical Reasoning», p. 302.

([32]) *Ibid.*

often has been used for the purposes of the authoritarian regimes, especially those which pretend to be based on rationality («crackpot realism»—see below). The official Soviet theory of morality, for instance, introduces the following generally known axiom as the basis of socialist ethics: anything which helps to achieve the victory of communism all over the world is moral ([33]). This concept obviously reduces the problems of morality to the requirements of current political tactics, although one could easily «prove» that once the given premises are accepted, all the conclusions concerning morality, being syllogistically correct, are rational. But, are they reasonable ?

The same manner of reasoning could be applied to the logically correct conclusions which the Nazis drew from their premises, namely that the good of the *pure* German race should be regarded as the highest criterion of politics, law, and morality. How can these «rational» Nazi conclusions be refuted ? Are logical, positivistic methods sufficient ? The Nazi, Stalinist, and other inhumane ideologies can only be proved unreasonable by expanding the concept of reason beyond formal logic.

> ... if one is not prepared to accept such a limitation to a monism of values in the world of action and would reject such a reduction on the ground that the irreducibility of many values is the basis of our freedom and of our spiritual life; if one considers how justification takes place in the most varied spheres—in politics, morals, law, the social sciences, and, above all, in philosophy—it seems obvious that our intellectual tools cannot all be reduced to formal logic ... ([34]).

([33]) P. KOLONITSKY, «Communist Morality and Religious Morality», *Molodoy Bolshevik*, Nov. 1951, «Communist morality serves the cause of the construction of communism...» p. 53; «The whole ideology of communism, including communist morality, is subordinated to the cause of the liberation of the toilers.» p. 60.

([34]) Chaim PERELMAN, «The New Rhetoric: A Theory of Practical Reasoning», p. 302.

The New Rhetoric does not eliminate formal logic, does not reject the value of syllogisms concerning deduction and induction, but reserves a proper place for them in the totality of human reasoning. The concept of reasonable is inherently pluralistic; it is incompatible will all pretensions to monism or totalitarianism.

The distinction between the «rational» and the «reasonable» is not new. It has been discussed almost since the rise of modern rationalism.

Both words, rational and reasonable, Perelman writes, derive from the same substantive; both connote a conformity to reason, but they are rarely interchangeable; one would call a deduction which conforms to the rules of logic, rational, but not necessarily reasonable. A compromise thereof, however, he stresses, may be called reasonable. Let no one forget: a rational decision may be unreasonable, and vice versa.

For example: Perelman analyzes Godwin's famous argument that there is no rationality in loving one's own father more than other persons unless it is possible to prove that one's father is a better human being than other men. Perelman comments that Godwin's thinking may be logical and rational, but who would call it reasonable, or humane?

This example and many others like it indicate that «the idea of reason is shown in at least two diametrically opposed ways» ([35]).

This observation is one of the most important philosophical premises constituting the foundation of political, juridical, and moral pluralism: rationalism may lead to monism and absolutism; reasonableness—to a pluralistic vision of the world.

The *rational* may be described as what «corresponds to mathematical reason; for some it is a reflection of divine reason, which grasps necessary relations» ([36]). The *rational* imposes its outlook on all reasoning beings because «it owes nothing to experience, or to dialogue, and depends neither on education, nor on the culture of a milieu or an epoch». It is

([35]) Chaim PERELMAN, «The Rational and the Reasonable», presented in October 1977 at the Ottawa Conference on *Rationality Today*.

([36]) *Ibid.*

«associated to self-evident truths» ([37]). According to Bertrand Russell «the rational man would only be an inhuman monster» ([38]).

The man who tries to be consistently rational separates reason from his other human faculties. He is a one-sided being, functioning like a machine.

The reasonable man, on the other hand, is not always «rational». He is influenced by «common sense», or, «good sense», and endeavors to do what is accepted by his own milieu, and if possible, by all. He takes into account changing circumstances, the evolution of mankind, its sensitivity, the development of morality, the changing criteria of decency. For, «the reasonable of today is not the reasonable of yesterday ...» ([39]). Without such a broad concept of the reasonable, reason would be converted into a conservative fortress, into an instrument of ossification, rather than a means by which the obsolete is repudiated. What is reasonable changes as mankind changes. A reasonable individual at any time can live within a variety of groups, with many ideals and philosophies. He is prepared to live in a pluralistic world.

What is rational can easily lead to biased, socially inadmissible conclusions; when this happens, Perelman writes, we must reevaluate the whole system. In law, he continues, the idea of «the reasonable corresponds to an equitable solution» ([40]).

In general, «reasonable» opposes the uncritical acceptance of established reality; it promotes pluralistic change; the rational pertains to stabilization.

There is an amazing similarity between Perelman's concept of the reasonable and C. Wright Mills' idea of «crackpot realism». Mills uses this expression in many books and essays referring to the Eastern and Western rulers and their pseudo-intellectualism. Mills writes:

([37]) *Ibid.*

([38]) *Ibid.*

([39]) *Ibid.*

([40]) There is, incidentally, also a link between the dialectic of the reasonable and the dialectic of justice and equity.

> In the American white-collar hierarchies and in the middle levels of the Soviet 'intelligentsia'—in quite differing ways but with often frightening convergence—there is coming about the rise of the crackpot realist. All these types embody a common ethos: rationality without reason ([41]).

Mills accuses both world ruling groups of rationalizing the rules of the game leading to world-catastrophies. To cope with their «unreason» they appeal to logic and to realism. According to them, to be a «utopian» means merely to acknowledge values other than those accepted by the power-elites.

> But in truth, are not those who in the name of realism act like crackpots, are they not the utopians ? Are we not now in a situation in which the only practical realistic down-to-earth thinking and acting is just what these crackpot realists call 'utopian' ? ([42])

Here we approach yet another meaning of «unreasonableness»: it defends what is possible and desirable; it does not capitulate to «necessary reality». Rationalists accept reality as necessary, whereas the truly reasonable man tries to overcome what has become obsolete or otherwise undesirable.

Limited realism, or rather rationalism, serves today as the philosophical foundation of modern, «mindless» conservatism ([43]).

> While the intellectuals have been embraced by the new conservative gentility, the silent conservatives have assumed political power ... these men have replaced mind by the platitude ... so widely accepted that no counter-

([41]) C. WRIGHT MILLS, *Power, Politics & People*, ed. Irving Louis Horowitz (New York: Oxford University Press, 1974), p. 393.

([42]) *Ibid.*, p. 402.

([43]) There are conservatisms which officially are based on irrationalistic ideas, but the modern Western and Eastern conservatisms present themselves as rather rationalistic social orders or movements.

> balance of mind prevails against them. Such men as these are crackpot realists, who, in the name of realism have constructed a paranoid reality ... ([44]).

Mills argues that various sociological and political concepts are a modern «rationalism without reasonableness». They justify the social status quo and conservative mindlessness which are *a priori* inimical to any innovation, to democratic pluralism. Modern rationalism tends toward uniformity, toward *Gleichschaltung*, whereas the reasonable opposes uniformity, undermines any form of absolute order, and recommends pluralism in every sphere of life, in the material and the spiritual, the economic and the political.

The New Rhetoric, as applied to morality and politics, represents the view that one can and should find a reasonable basis for justifying the norms of behavior and of political norms ([45]). Many philosophers since Hume have argued that it is impossible to demonstrate that one set of moral rules is to be prefered over another. The New Rhetoric asserts that if logicians dismiss the mere possibility of preferences based on reason in the sphere of the «ought» (Sollen) then «we must enlarge the domain of the logicians' investigations. This enlargement would complete formal logic through the study of what since Socrates has been called *dialectics* ... I prefer to qualify it as argumentation, and contrast it with formal logic conceived as the theory of demonstrative proof» ([46]).

One should never overlook the fact that after all moral principles are formulated because there are reasons for formulating them. In this case one can argue whether they should be adopted at all, and if so, how they should be applied to given situations and controversies.

([44]) C. WRIGHT MILLS, *op. cit.*, pp. 603-610. Mills refers the same characteristics to the communist and capitalist «realists» and rationalists.

([45]) Chaim PERELMAN, «La justification des normes», in *Human Sciences and the Problem of Values*, Entretiens d'Amsterdam de l'Institut International de Philosophie, The Hague, 1972, pp. 48-49 (English translation by W. Kluback).

([46]) *Ibid.*, p. 48.

Positivists assimilate the justification of norms into the logical demonstration of propositions. The question of truth in our behavior (its principles) is meaningless, because our actions and decisions cannot be «true». They can be described as expedient, reasonable, equitable, thoughtful, conforming to moral norms or legal provisions. Our decisions and actions are of course based on information concerning facts. The information may be true or false, and truthfulness or falsity may influence our decisions and behavior ([47]).

The New Rhetoric is not a theory of pure contemplation; it is a theory of argumentation for practical purposes in order to find a way to make the most reasonable, efficient, and just decisions which might gain the maximum support of a public divided by various controversies. It is a theory which consciously helps to make practical but reasonable decisions, directly aiming at action.

V

Dialogue is the form and the soul of the process of argumentation. From the rhetorical viewpoint, discourses in the courts are a form of dialogue which is also one of the philosophical bases of American juridical theory and practice.

The first precondition for the existence of dialogue is an interest of at least two participants in an exchange of ideas and in gaining the adherence of intellects.

A second precondition for the existence of dialogue is freedom for the participants. The interlocutor should not be afraid to raise questions and use counterarguments. One cannot gain the adherence of minds of those who fear or hesitate actively to participate in the dialogue.

Every speaker (writer) knows his *audience* more or less, knows the public he wants to address.

«We consider it preferable to define an audience, for the purposes of rhetoric, as the ensemble of those whom the

([47]) *Ibid.*, p. 49.

speaker wishes to influence by his argumentation» ([48]).

The concept of the audience is very important in the structure of the New Rhetoric.

At times one tries to persuade one individual, at other times, whole social groups. A speaker should know what distinguishes one social environment from another. He should know «the social functions exercised by its listeners» ([49]). The speaker (writer) should always be aware that his audience is changing all the time, therefore the truly great orator must know the art of «continuous adaptation» ([50]). But Perelman, like Demosthenes, does not identify «adaptation» with a reduction of rhetoric to the level of mere «flattery». The New Rhetoric is not the art of hypocrisy:

> ... it must not be overlooked that the orator is nearly always at liberty to give up persuading an audience when he cannot persuade it effectively except by the use of methods that are repugnant to him. It should not be thought, where argument is concerned, that it is always honorable to succeed in persuasion, or even to have such an intention ([51]).

We have approached what the New Rhetoric is not. It is not the art of using immoral means for immoral ends. It is not the art of employing questionable methods to achieve a goal.

Only perverted forms of the New Rhetoric can be used by despotic, or totalitarian rulers because the theory presupposes a dialogue with the public which cannot occur under despotism; such a dialogue is required because Perelman believes that an active audience will sooner or later be able to detect deliberate lies and misrepresentations, thereby correcting error.

([48]) Chaim PERELMAN and L. OLBRECHTS-TYTECA, *The New Rhetoric, Treatise on Argumentation,* Notre Dame University Press, 1969., p. 19.
([49]) *Ibid.,* p. 21.
([50]) *Ibid.,* p. 23.
([51]) *Ibid.,* p. 25.

When argumentation fails to achieve its desired effect, that still does not mean its premises were completely wrong, unjust, or unfounded. Arguments can be rejected by an audience for various reasons, but in a free exchange of arguments lies can sooner be brought to light than under many other circumstances.

The New Rhetoric does not take anything for granted. And Perelman's struggle against all the open or hidden vestiges of the theory of Descartes that truth is what «I see clearly and distinctly» became the most important battle of new and consistent intellectualism against the alleged intellectualization of the twentieth century.

In the twentieth century common sense has ceased to be such an effective weapon against the new attack coming from the Hobbesian new Kingdom of Darkness ,because this new Kingdom presents itself at first as a realm of logic and reason. Rationality is used against Reason. Reason therefore must be strengthened by the new theory of argumentation and the reasonable solutions must be pluralistic.

The New Rhetoric is aware that many people take for granted as obvious and rational what really needs to be proved. They accept old concepts although circumstances have changed radically.

Formal logic does not question its premises, while the New Rhetoric, on the other hand, is critical of everything. It does not take anything for granted, it does not accept without question anything that was established in the past; it rejects all explicit or implicit assumptions, premises, and propositions, compelling people to cut the roots of common-sense itself, to the facts, and truths themselves.

From the standpoint of the theory of argumentation, facts designate what has been agreed upon by a given audience as incontrovertible ([52]). But a fact can cease to be a fact either because doubts have been raised about it among the given public or because the original public has expanded and the

([52]) *Ibid.*, p. 67.

new members have come to question what was for others uncontestable ([53]).

Does this imply that «facts» are completely subjective? The problem is that rhetorical debate does not concern the narrow problems of the natural sciences where an experiment can be repeated in order to dispel all doubts. It is not possible to find an ultimate criterion to support a political party, for example, which could affirm something to be a fact independdently of a listener's attitude ([54]). A fact without the power of argumentation behind it cannot survive by itself in a world of dissenters. A fact does not possess its own vitality, its power to survive autonomously.

All these observations concerning «facts» apply to «truth», albeit in a more complex way ([55]).

Rhetorical argumentation never discontinues; it is like Heraclitus' river: you cannot step into the same river twice. And truth, although ever-changing, still remains something tangible and applicable, because it is continuously questioned in the endless dialogue of unlimited audiences. Heraclitus observed: «Opposition is good ... everything originates in strife ... hidden harmony is better than apparent harmony» ([56]).

Rhetoric is an instrument for establishing the true, hidden connections which lie under the surface. Rhetoric always reminds us that the best emerges «out of differents» ([57]).

Are we condamned to eternal doubt and unrest? «In changing, it rests ... «and that «which tends to destruction ... is called concord and peace» ([58]). Such is one of the pre-Aristotelian wells of rhetoric. They all determine the intrinsic link

([53]) *Ibid.*, pp. 67-68.

([54]) *Ibid.*, p. 68.

([55]) *Ibid.*, pp. 68-69. What is the difference between facts and truths? From the standpoint of argumentation, it is a relative difference. «The term 'facts' is generally used to designate objects of precise, limited agreement, whereas the term 'truth' is preferably applied to more complex systems relating to connections between facts.»

([56]) HERACLITUS, «Fragments» 46, 47, in Milton C. Nahm, *Selections from Early Greek Philosophy* (New York: Appleton-Century Crofts, 1964).

([57]) *Ibid.*, p. 46.

([58]) *Ibid.*, p. 83.

between the New Rhetoric and democratic pluralism: there is nothing perfect, no order can pretend to exclusive uniqueness, no social group or party can have a monopoly on absolute wisdom or knowledge.

The New Rhetoric constitutes a philosophical and methodological basis for the democratic concept of pluralism. And vice versa: pluralism leads to the theory of argumentation and needs it for its own existence. Theory and methodology are inseparable from it. These general methodological and philosophical considerations have their direct impact on the philosophy of law.

VI

There is one common point of departure between the New Rhetoric and American jurisprudence as characterized, partcularly, by the three titans: Holmes, Pound, and Cardozo.

The New Rhetoric accepts the same point of departure in jurisprudence as that expressed by Benjamin N. Cardozo: »The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites ,these are the problems of the law» ([59]).

The New Rhetoric regards the law as a set of rules which are not dogmas, but are useful as a very specific technique for the resolution of the conflicting interests between individuals, social groups, and society (the state) as a whole. The New Rhetoric, while agreeing with Cardozo that the problems of law are «the reconciliation of the irreconcilable» and «the merger of antitheses», supplies the philosophy and practice of law with additional instruments and concepts.

In the New Rhetoric one reads:

> This effort to resolve incompatibilities is carried on at every level of legal activity. It is pursued by the legisla-

([59]) Benjamin N. Cardozo, *The Paradoxes of Legal Science* (New York: Columbia University Press, 1928), p. 4.

> tor, the legal theorist, and the judge. When a judge encounters a juridical antinomy ... he will introduce distinctions for the purpose of reconciling what, without them, would be irreconcilable ... These rival solutions may themselves also appear as incompatible ([60]).

The New Rhetoric represents the idea, as American jurisprudence does, that incompatibilities in the sphere of law, its interpretation, and applications, are inevitable because they result from the development of life. Every resolution of incompatibilities creates a new chain of opposites, and a new demand for a new compromise. From the intellectual viewpoint a compromise is not an easy result to achieve: on the contrary, it is compromise which calls for the greatest intellectual effort ([61]). It is less difficult to fight than to find a reasonable, «peaceful» solution.

Whatever Perelman wrote concerning the idolatry of the expression «clear» is in one or another way connected with the famous expression of Justice Holmes about «a clear and imminent danger» ([62]).

What is clear in one situation might not necessarily be clear in another set of circumstances. «Clarity» should not be the beginning of the interpretation and application of law, but rather the end.

Holmes once observed, as we have already mentioned, that the training of lawyers is a «training in logic» ([63]); on the other hand he argued that the life of the law has not been logic, it has been experience:

> The felt necessities of the time, the prevalent moral and political theories; intentions of public policy avowed or unconscious, even the prejudices which judges share

([60]) Chaim PERELMAN and L. OLBRECHTS-TYTECA, *The New Rhetoric*, pp. 414-415.

([61]) *Ibid.*, p. 415.

([62]) Abrams v. U.S., 250 U.S. 616 (1919).

([63]) Harvard L. REV, «The Path of the Law,» in *Collected Legal Papers*, p. 170.

> with their fellow men, have had a good deal more to do than syllogisms in determining the rules by which men should be governed ([64]).

Are these two statements made by Holmes concerning the place of logic and experience in the sphere of law incompatible? Not from the point of view of the New Rhetoric. It is The New Rhetoric which shows a way to reconcile logic and experience in the endless process of argumentation. There is no use of the logical syllogism «proving» that the given meanings of the legal provisions are the only ones which are logical and should be respected. If the people do not want to abide by them, then only terror can impose and enforce them. Such an imposition will not be reasonable. Taking into account the persuasions and the feeling of the people, Perelman's theory of argumentation serves as an instrument proving that alleged logical interpretations can indeed be unreasonable, that formal logic pushed to its extremes, becomes a monstrosity.

This observation leads us to the dispute which has been going on for over a century: does legal logic, as it has been known traditionally, actually exist? Perelman argues that when jurists use the basic Aristotelian schemas ,there is as little basis for speaking of legal logic as there is for speaking of «zoological» or «astronomical» logic, for the simple reason that there is only one logic at work in all domains. We just reject as inadequate «*le formalisme juridique*», or the «*Begriffsjurisprudenz*» or other attempts to make formal logic «the heart of law». The real problem lies in whether logic reduced to formal logic allows one to resolve juridical controversies. Perelman replies:

> Certainly not. It is exceptional that the controversies come about from the fact that one of the antagonists commits an error of formal logic. It would suffice to show him the error so that he may retract it, like every

([64]) HOLMES «The Common Law (1881)» in *The Holmes Reader*, p. 209.

normal person who has been shown his mistake in addition ([65]).

Formal logic should continue to be used, but everybody using it ought to realize that it is only one of the intellectual instruments and is not alone sufficient to reach the goal of interpretation and application of the law, which is justice and equity. «The opposition between letter and spirit is the stumbling block of mechanical jurisprudence» ([66]), Perelman writes.

Even the strict observation of the letter of the law, based on formal logic only, is impossible. How would it be possible even to observe the first pre-condition of the application of formal logic, the demand that the same signs always preserve the same meanings. Without this precondition, the law of identity ceases to be valid, and as a result, for example, a contradiction would no longer be false.

There are situations in which the court or the authorities must find solutions to particular problems although the law has not foreseen such situations. Formalistic juridical and formalistic logical syllogisms will be of no practical help in solving such problems. One must then seek other means, which Aristotle specified as dialectical reasoning, and Perelman characterizes «as a recourse to argumentation» ([67]).

A judge or anyone who applies legal rules is not only a mouthpiece for the law, or a preprogrammed computer. He is also a social being who confronts various values pertaining to the given legal and social system and he must serve these values and understand their hierarchy of importance. Every decision rendered by a judge, even one based upon explicit legal material, nevertheless remains personal ([68]). This legal reasoning bears his personal imprint. This decision is not a

([65]) «Le raisonnement juridique», in *Die Juristische Argumentation*, ARSP, Beiheft 7, 1972, p. 2 (English Translation by W. Kluback).

([66]) *Ibid.*, p .4.

([67]) *Ibid.*

([68]) *Ibid.*, p. 7.

formal demonstration, but an argument aiming to persuade those whom it addresses.

The underpinning of a judge's decision is essentially legal, yet it is intertwined with other «good» reasons, moral, political, economic, and even religious. The underpinnings considered good at one period and in one milieu will not be considered the same in another. They are «socially and culturally conditioned as are the convictions and aspirations of the audience they must convince» ([69]).

According to Perelman every application of law is creative and every time legal norms are applied, some interpretation is required. The famous rule: *interpretatio cessat in claris* (interpretation is unnecessary when the text is clear), does not make much sense, because in order

> to decide that a text is clear we must see if any reasonable interpretation of it that could be given would lead to a similar solution for all other individual cases. But we are never sure that all concrete situations have been examined. A text considered in relation to known cases could pose a problem of interpretation in a new situation ([70]).

The introduction of the theory of argumentation to legal reasoning is necessary because mere legal reasoning is charged with the tension between the propensity to conciliate stability with change, continuity with adaptation, security with justice, equity with the common good. The special esteem which legal security enjoys in legal reasoning distinguishes it from other practical reasoning. Legal philosophy, and legal practice, therefore, usually try to minimize the role of the personal will and accidental perceptions.

> But the personal factor cannot be eliminated from legal reasoning. Like all argumentation, being the function of

([69]) *Ibid.*, p. 9.
([70]) *Ibid.*, pp. 10.

> the people who argue, its value will depend, in the final analysis, upon the integrity and intelligence of the judges who determine its specific nature ([71]).

This aspect should be borne in mind even when assessing the role of the judicial power ,which under any constitutional system of division of powers cannot be subordinated to the legislative power entirely. If it were subordinated, then, as Perelman observes, the judge's role would be limited to the establishment of facts, subsumption under a legal text, and the drawing of the conclusion in the form of a syllogism ([72]). But this would constitute not the rule of law, but the rule of the letter of the law (if this were indeed possible) over the spirit of the law, as already mentioned.

Since World War II, the judge's power over the interpretation and application of law has steadily been growing in Western European countries ([73]). In this way a rapprochement between the Continental and the Anglo-Saxon judicial systems has begun, and is still in progress ([74]). I would like to propose a general conclusion, that the methodological basis for the rapprochement between the Anglo-Saxon and the Continental jurisprudence and the practice of law is the wide acceptance of the theory of argumentation and its pluralistic attitude. Jurists use this methodology and theory, although, like Molière's hero, Mr. Jourdain, they do not know that they are using it. Jurists subscribe more and more to the view that:

> In a political community or before a court we may have to choose between several equally reasonable eventualities; the criterion for the decision can be recognized by everyone as involving opportune considerations, but this

([71]) *Ibid.*, p. 13.

([72]) PERELMAN, «Droit et rhétorique», in Festschrift Th. VIEHWEG (in the press), (English translation by W. Kluback).

([73]) *Ibid.*

([74]) *Ibid.*

does not in the least imply that the solution that has been put aside is unreasonable ([75]).

Once the restrictions of formal logic with its demands for achieving a uniform interpretation and application of the given rules of law have been overcome, the specifics of dialogue enter upon the scene. What is reasonable and equitable may openly be explored. Pluralistic attitudes have gained entry into the courts.

VII

Let us consider the following reversals in decisions of American courts during the last century.

In 1907 the Court found that a statute forbidding women to work at night was arbitrary and unconstitutional (People v. Williams, 189 NY 131). Eight years later a like statute was found to be reasonable (People v. Schweinler Press, 214 NY 395).

At the turn of the nineteenth and twentieth centuries a systematic «Jim Crow Code» was elaborated sanctioning all sorts of humiliating treatment for black people, including segregation. These legal rules and practices were documented in the decision, Plessy v. Ferguson (163 US 537, 1896). Justice John Marshall Harlan was the only one who denounced the «separate but equal» doctrine. He used the now famous expression that the U.S. Constitution is «color-blind».

Sixty years later the prophetic arguments of Justice Harlan were to become the official moral and legal standards in this country. In the Brown v. Board of Education decision (347 US 483, 1954), the Plessy doctrine was overturned, at least within the domain of education.

In 1940 the Supreme Court ruled that the State authorities had the right to compel school children to salute the flag

([75]) PERELMAN, «Désaccord et rationalité», p. 167 (English translation by W. Kluback).

(Minersville School District v. Gobitis, 310 US 586) in order to foster patriotism. Justice Harlan Fiske Stone dissented. Only two years elapsed before the Court reversed itself and found that no compulsion in such matters is permitted (West Virginia State Board of Education v. Barnette, (319 US 624, 1943).

The number of such examples could be increased substantially.

If interpreted from the viewpoint of the logic of syllogisms and the Cartesian philosophy these contradictory court decisions could be regarded as proof that the court was wrong at least once in each instance ,perhaps twice. But once we accept that legal norms do not contain absolute truth which must be discovered and stated once and for all, we are obliged to change our attitude, our system of thought and our understanding of values. Once we connect the results of the interpretation and application of law with social values which inevitably change, there arises a new pluralistic possibility for reasonable interpretation.

In this respect the remarks made by Roscoe Pound are important: «Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude» ([76]).

The emphasis has changed from «the content of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised» [77]).

Cardozo makes this idea even more specific in his comments:

> Courts know today that statutes are to be viewed, not in isolation or in vacuums, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day condi-

([76]) ROSCOË POUND, «Administrative Application of Legal Standards, Proceedings American Bar Association, 1919, pp. 441-449 quoted in E. Cardozo, *The Nature of the Judicial Process,* (New Haven: Yale University Press) p. 73.

([77]) POUND, p. 451, in Cardozo, *op. cit.,* ibid.

> tions, as revealed by the labors of economists and students of the social sciences in our own country and abroad ([78]).

What does he mean by Present-day conditions ? They are not definitively described; they consist of various, contradictory, social relations and ideas. There are ideas which tend to conserve existing social and legal relations and there are others which deny their necessity or justifiability. «Present-day conditions» can include various concepts of morality, justice, and even equality and fairness. The differences spring from the variety of the social and moral conditions in which people live, from the variety of their educational, ethical, and religious backgrounds, from the variety of their understanding and emotions. Dissenters should not be condemned as unreasonable.

These problems were assessed by John Dewey more than by anyone else in a general philosophical form. In his essay, «Nature and Reason in Law», Dewey writes that there is no foundation for adherence to a kind of epistemological realism in politics and jurisprudence by which human reason is «confined to discovering what antecedently exists» ([79]). One is denied the right to use the creativity of one's own intelligence when one must restrict one's thinking to the discovery of the «Order of Nature» or «Higher Reason», instead of acting for the sake of good consequences.

> ... we find that the chief working difference between moral philosophies in their application to law is that some of them seek for an antecedent principle by which to decide; while others recommend the consideration of the specific consequences that flow from treating a specific situation this way or that, using the antecedent

([78]) Benjamin N. CARDOZO, «The Nature of the Judicial Process» *op. cit.*, p. 81.

([79]) John DEWEY, *Philosophy and Civilization* (New York: Minton, Balch & Company, 1931), p. 168.

material and rules as guides of intellectual analysis but not as norms of decision ([80]).

In this way Dewey approached the threshold of the theory of argumentation and pluralism as applied to jurisprudence in particular. The result of the above analysis can be summarized in the following way:

— one should discriminate between the notions of reasonable and rational;
— without the rhetorical concept of audience there would be no sensible grounds for moral and juridical norms;
— one should reject the excessive demands of Descartes' philosophy and of formal logic as the sole instrument of reason;
— one should expand the methods of scholarly inquiry by the deliberate introduction and use of the theory of argumentation and the philosophy of pluralism. Pluralism is the point of departure and the result of rhetorical methodology in any social science, including jurisprudence. The American theory of law, the creative American juridical practice, encompassing more spheres of life than jurisprudence in any other country, and the revived rhetorical reasoning have become inseparable.

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[80]) *Ibid.*, p. 172.