FOCUS TWO

ROLE OF RHETORIC IN RULE OF LAW

RHETORIC OF THE LAWYER AND PHILOSOPHICAL CONVERSATION

Guy Haarscher

Abstract The article focuses on the difference between strategic rhetoric and philosophical conversation. It first tries to distinguish between sophistical manipulation and valid strategic argumentation. In order to do that, the author tries to give a new meaning to the old Aristotelian tripartition between logos, ethos, and pathos. Then, he uses Chaim Perelman’s theory of argumentation to show that the standard of rationality in practical reasoning is a specific one. After having clarified the very concept of strategic argumentation, the author distinguishes it from the notion of philosophical conversation. He tries to show that if the latter is completely replaced by the former, the danger exists that victimization and morals “a la carte” will generate a defeat of critical thought.

Keywords rhetoric, strategic rationality, reasonableness, philosophical dialogue, ethics

INTRODUCTION

What would a lawyer do, whose duty is to present his client’s case in the best light possible, if he had in mind an argument that would strengthen the position of his opponent? Normally he would keep quiet: It is not for him to use that argument because...
his speech involves very serious consequences for the individual or corporation he represents. Or if he nevertheless decided to present the argument, he would still do it from a strategic perspective: in trying to present himself in a good light (what rhetoricians call an ethos). Such an example of honesty can strengthen his other positions, some of which might be difficult to defend as such before a judge or a jury. The same goes for political rhetoric, especially at the end of an election campaign, when a candidate will not make a “gift” to his opponent, even if he considers that, on a particular point, the latter is right.

I do not consider such a strategic argumentation in a negative perspective: It is an essential element of a lawyer’s activity. My goal is different.

**I. MAKING THE WEAKER CAUSE APPEAR STRONGER: PERSUADING OR CONVINCING AN AUDIENCE?**

Ordinarily, when the lawyers’ mode of argument is criticized, it is because the public believes that they are capable of defending any cause (that is, without “believing” in it) by making use of sophistic rhetoric. We know that in Athens, sophists were accused of corrupting young people by teaching them to make the objectively weaker cause appear stronger. In short, they manipulated the audience through the magic of their words so that the public adhered to positions which, considered in a cold, reflective way, would have revealed their intrinsic weakness. But thanks to the efficacy of the oratory, the argument that seemed strong prevailed.

The sophist — in a pejorative sense — uses any rhetorical trick to win the support of the audience. We need, in order to understand what is at stake in such a manipulation, to remember the famous distinction between “persuading” and “convincing.” You have persuaded someone of something when, regardless of the type of speech that you used, he adheres to a thesis after listening to you or reading your text. The concept of persuasion is very broad. It is not normative: In such a context, one does not criticize the means that have been used to get to the result. One only indicates a fact, that is, the success of a speech. Whoever adheres to the thesis goes in the direction that is desired by the speaker, and therefore offers the latter what he wants to get. Such is the power of speech: It is not necessary to resort to violence. Maybe the listener has been seduced by the charisma of the speaker, or he is too ignorant to be able to understand the issue. He might also have been guided more by emotions (for instance fear) than by reason, or he did not see the weaknesses of the argument because the speaker carefully concealed them.

**II. LOGOS, ETHOS, PATHOS: STATEMENT AND ENUNCIATION**

However, the idea of “conviction” is more narrow, and at the same time more valuable than persuasion: It means that the audience or the reader has been rationally convinced. The conviction thus forms a subset of the group consisting of persuasive words (or images, behavior, etc.) in general. In such a case, the speaker or writer develops good arguments in front of his audience. These arguments rationally create adhesion.
Here reason plays a dominant role (but no real argument is only based on reason).

In rhetoric, one often distinguishes between three basic elements of the argumentative process: first the logos, the element of reason, that is to say rational conviction. Second the ethos, that is, the image that the speaker conveys: his personality, his charisma, his reputation, and positive or negative prejudices that the public has about him. Argumentation is never totally disembodied and ethos will always play a role, albeit less present when the discussion becomes more technical. If we want to use linguistic terminology, we can say that logos is related to the content of a statement. The best way to know the importance of logos in an argument is to imagine that we find the reasoning written on a sheet of paper without knowing who the author is; then we cancel the possible effect of the ethos of the speaker (although the style of the written text may be seductive and even manipulative).

Often, resorting to the context of enunciation (here the ethos of the speaker) forms a strategy dedicated to disqualifying a discourse that we do not want to hear because we do not like the consequences of the thesis: “If you say so...” In this way, we cast suspicion on the speaker and we can dispense with having to refute the statement on the merits (the logos): people will not listen to it, and even if the arguments are valid, the audience will be “wary.” This is a strategy that can be called, according to René Girard, the “poisoning of the source”: You disqualify the author, and there will always remain “something” in the mind of the public. You will at the same time generate doubt concerning all that the enunciator has said (whatever the merit of the arguments, that is, their rational content). In such a perspective, the ethos (the point of view of enunciation) will replace the logos (the content of the statement). If such a perverse work of “poisoning” is brought to completion, one will not even need the artifice of sophistry to get rid of the “embarrassing” content. Some European Communists were very skillful in acting in such a way (as are today the promoters of communitarianism — we will get to that).

Of course, the emphasis put on enunciation can also have the opposite effect: the aura of a person (her reputation, her power of seduction, etc.) will ensure that the public, conquered in advance, will not really scrutinize the content of the speech: He will accept it too hastily without checking in a rigorous way the relevance of the arguments. Ethos and logos can therefore cancel each other out, but they can reinforce each other as well.

The third dimension of discourse is called pathos. This concerns the emotion aroused in the audience by a presentation or a text. If the speaker (or writer) appreciates in a correct way the feelings, hopes, and fears of his audience (or readership), he will be able to use them. In the best case, taking into account the affective dimension will strengthen the discourse and add to logos an efficiency that the simple consideration of rational arguments would probably not have generated. In the worst case, emotion will overwhelm the public and allow the speaker to distract his attention, so that the latter will not see the weakness of the reasons that have been given.

Strictly speaking, ethos and pathos contribute in varying degrees to the persuasion of
the audience, beyond the strict rigor characteristic of conviction (logos). And certainly, if ethos and pathos take up too much space, the rational dimension will lose its importance and sophistry will reign.

III. STRATEGIC RHETORIC AND THE NOTION OF THE “REASONABLE”

There are probably sophists among lawyers, but I shall not address this problem. I shall rather consider the constraints imposed on their speeches by the very nature of their mission, in particular its strategic nature. The logos of a lawyer is subject to constraints: He will not use arguments, even if they are sound, which would lead to his defeat in the tribunal. The judge and the jurors know that this is a perfectly normal behavior for an attorney. Of course, if in addition the advocate plays in an immoderate way on ethos and pathos, he will turn into a sophist, and persuasion will then contain only snippets of real conviction. But I want here to take the rhetoric of the lawyer at the best of itself. It should be noted in this context that procedural constraints prevent the lawyer most of the time (but not always) from giving free rein to the temptation of sophistry, which is the best shared thing in the world (to use the famous statement by Descartes on “common sense”).

The adversarial principle, the presence of professional judges (even in a jury trial), the remedies, the public character of hearings, etc. — all these elements contribute to the steering of the debate and reduce the danger of sophistry, that is to say, they prevent the strategy from turning into manipulation. It is not quite the same in the polemical literature or in political debates (e.g. in Parliament): Certainly, the public judgment and criticism must theoretically act as a “brake,” but in reality the speech often descends the slippery slope leading to sophistry.

Here we must point out that, even when the dimension of the logos is dominant, it is only very rarely, in human affairs, in the logical and scientific sense: In the latter context, a statement is either true or false, and a chain of argument is valid or invalid. Chaim Perelman used, in that perspective, the notion of the “reasonable.” In moral, political, and legal matters, one must usually settle for “good reasons.” A good argumentation in which logos plays the dominant role does not lead, contrary to what happens in a mathematical demonstration, to a necessary conclusion that imposes itself on the mind of every rational interlocutor. It generates the conviction by a set of “reasons” that tip the scales one way or another. A “reasonable” conclusion has such a characteristic. Reasonableness is perfectly compatible with the very idea of a democratic society, where what is considered preferable today may well not be so in the future, when other arguments will tip the balance in the opposite direction. It also implies a flexible view of

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1 Descartes, *Discours de la Méthode*, First Part (1637).
the law which must adapt to changes in society. Moreover, one says, in American
criminal procedure, that a jury must be convinced “beyond reasonable doubt” in order to
convict an accused. One does not say “beyond all doubts” (which would apply to a
mathematical demonstration, or to the philosophy of Descartes, who wants to totally
eliminate doubt), but “reasonable doubt”: There is always an element of uncertainty in
human affairs, but at some point alleging doubt in order not to decide would become
unreasonable. In short, even when logos is predominant (this must be so when one has to
resolve a dispute or determine guilt or innocence of an accused), it must be understood in
the sense of reasonableness and not of a binding demonstrative reason (the “rational” in
the strict sense of the term).

The rhetoric of the lawyer is based on the “reasonable,” but, as we have seen, with
limitations due to the strategic nature of the relevant argumentation. Such limitations are
normal, but a danger must be highlighted, that is, the transplantation of this strategic
rationality — for which the lawyer’s rhetoric constitutes the paradigm — in areas where
it has no use. The Perelmanian rhetoric of the reasonable is particularly meaningful when
the speech is dedicated to defending a thesis, and when its success or failure have a vital
importance, for example for the freedom of an individual or his property (judicial
rhetoric), or the result of an election (political rhetoric).

IV. PHILOSOPHICAL CONVERSATION

Yet philosophical conversation works quite differently. This is of course also a form
of argumentation (a rhetoric), but it is not a zero-sum game, as is the activity of a lawyer.
Philosophy is a game where everybody wins, to use here a formula of the French
philosopher Michel Serres. It is a conversation between friends: Friendship, Aristotle says,
is key to sociability, but it plays an even more crucial role here. Indeed, in the true
philosophical conversation one looks for the truth or the best action leading to the “good
life.” The result belongs to all, regardless of whether a participant has contributed more or
less than others to the final conception. Even if what he proposed was totally refuted, he
is “enriched” as much as others by theses that open to all new possibilities and life
improvements. There is no strategic challenge: Nobody “loses” something. Although
there are still disagreements, they have no strategic significance: They do not result in
consequences for the positions and interests of a particular person. The ideas promoted in
a philosophical conversation do not reflect interests but rather assumptions that one
willingly abandons when they are invalidated during the discussion, allowing the progress
of all.

It might be objected that this is actually an extreme idealization of the situation: For
many reasons, the strategic dimension may always reappear. If the speakers are, for
instance, in competition for an academic position, the “victory” of one participant (the
force of his ideas) will have important consequences in terms of interests. And we cannot
ignore the narcissism of individuals, or questions of image and reputation, and the
difficulty that somebody faces when he has to admit he was wrong.

Understandably, philosophical conversation as I have just described it in a schematic way has no place within the activities in which the success or failure of discourse entail significant consequences for the parties, and interlocutors in general. But conversely, such a strategic rhetoric should in no way “overflow” into the field of philosophical conversation that is so important for human relations: The latter must not be “annexed” by an imperialism of strategic thinking.

Very often, this concerns less the lawyers themselves than the image of their rhetoric in the public and the danger of adopting in all occasions a strategic rhetoric, which could only lead to ethical degradation of human relationships.

V. THE RHETORIC OF VICTIMIZATION

I recently participated in a debate on the Israeli-Palestinian conflict. My interlocutor was a member of a pro-Palestinian organization, and I guess that the public perceived me as being rather pro-Israel (at least I am concerned about the dangers for the very existence of Israel and the transformation of a quite legitimate criticism of the Israeli government into an attack on “Zionism” which is often the quite transparent mask of outright anti-Semitism). In my mind, the debate was supposed to be a conversation; neither of us did apply for a position, we were not the respective “lawyers” of the Israeli government and the Palestinian Authority. We were only supposed to seek common solutions, or at least a possible compromise in a dialogue with the public (the room was full). So I said what I thought and I criticized the government led by Benjamin Netanyahu, and of course I strongly denounced the continued colonization of the occupied territories. I also said that the Palestinians had missed many opportunities in the peace process, and that they would do well to occasionally clean up their own door instead of, for example, circulating particularly biased textbooks that do not contribute to appeasement.

My idea was that if everyone recognized the wrongs done by his own camp, confidence might arise and progress towards peace would again become possible. Basically, I was trying to unblock the process in the mentalities, knowing that this is only an element (but an important one) in a very complex geopolitical problem. We must emphasize here the notion of trust. If you routinely defend without any reservation the members of your community, if you try to cover up or minimize the abuses they have committed, even if they are guilty in terms of shared values, you will inevitably generate distrust in your audience: The latter will think that you are prepared to justify the worst when one of “yours” is accused. And therefore the audience will believe that the evil could be repeated tomorrow. If the interlocutor does exactly the same but by reversing the signs, hostility will redouble. Each one will consider his community as an “ontological” victim and the other as an eternal executioner, and the whole dialogue will be doomed to failure.

So I decided that I had to do the reverse, starting by strongly criticizing the Israeli
authorities. But my interlocutor behaved as a “lawyer.” She defended tooth and nail the Palestinian positions, and used what I offered her on a tray (criticism of Israel) to drive the point home: “even my opponent says so...” It looked like she was before a political assembly and was seeking a vote on a resolution or any action in favor of her “cause.” So I found myself in an embarrassing position, because I had placed myself at the outset in the field of philosophical conversation. She would not concede anything, and only sought to make her theses prevail (all she could “take,” she took), just as in a courtroom or an election campaign. She did not try to inform the public and seek possible solutions to a devastating conflict (in that part of the world, any little improvement already amounts to a miracle).

I therefore said to her that the discussion was meaningless, since our rhetoric choices were incompatible. Philosophical conversation basically assumes that we adopt clear criteria for judging human actions. If you are convinced that human rights must be defended everywhere and always, you condemn their violation, even if it has been committed by one of “yours.” I would say, more radically, “especially” if the author is a member of your “community”: Such an act is bad for your own cause and should worry you first and foremost. Certainly, such a self-critical attitude is not without dangers: The members of your community will quickly accuse you of treachery (“he said what our opponents say”). But it is the way of wisdom, and first of all the way of philosophical conversation. However, if you consistently try to justify abuses by your own kin, by denying or minimizing their evil acts, by seeking all possible excuses, calling on the context while refusing to argue in the same way about the evil committed by the other, then such a strategic attitude will lead you to sophistry and make conversation impossible.

CONCLUSION

If everything becomes strategic, an essential element of humanism (that lies at the foundation of civilization) will disappear. What is considered unacceptable here will be systematically apologized there. We shall apply strict moral principles to others (“it’s bad, it’s unbearable, we cannot accept it”), and a flexible, contextualized morality to our kin. It is always possible to find excuses for evil: If we cannot deny it, we will affirm that we were “obliged” to do so. This is an eminently perverse, expanded notion of the state of necessity. And of course, we shall apply that argument only to the members of our group. There will be a dramatic defeat of both thought and morality. Speech will be annexed by interests and conflicts, and conversation will disappear in favor of agonistic discourse.

Strategic reason must play its role in the areas where it appears to be necessary (democratic societies are based on debate and discursive conflict regulation), but it cannot engulf the whole speech at the risk of ruining the very notion of “humanist” philosophical conversation.