**Informal Logic**

# Arguments from Fairness and Extensive Interpretation in Greek Judicial Rhetoric
# Arguments tirés de l'équité et interprétation approfondie de la rhétorique judiciaire grecque

Miklós Könczöl

Volume 44, numéro 1, 2024

URI : https://id.erudit.org/iderudit/1110664ar
DOI : https://doi.org/10.22329/il.v44i1.8291

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Éditeur(s)

Informal Logic

ISSN

0824-2577 (imprimé)
2293-734X (numérique)

Découvrir la revue

Citer cet article

Könczöl, M. (2024). Arguments from Fairness and Extensive Interpretation in Greek Judicial Rhetoric. *Informal Logic*, *44*(1), 1–18. https://doi.org/10.22329/il.v44i1.8291

Résumé de l'article

Les arguments construits à partir du principe d'équité tels que décrits dans la Rhétorique d'Aristote sont généralement considérés comme visant à atténuer la rigueur de la loi ou, en termes de procédure, à favoriser le défendeur. Cet article adopte une interprétation plus inclusive, à savoir que les arguments fondés sur l'équité peuvent fonctionner dans les deux sens. Dans l'exemple donné dans la Rhétorique, les arguments d'équité visent une interprétation restrictive du texte. Cela n'est peut-être cependant pas nécessaire. De même, l'équité peut parler en faveur du demandeur. Deux exemples peuvent étayer cette conclusion : un discours judiciaire d'Hypéride et la doctrine des enjeux apparaissant dans la rhétorique scolaire hellénistique.

# Arguments from Fairness and Extensive Interpretation in Greek Judicial Rhetoric

**MIKLÓS KÖNCZÖL**
*Department of Legal Philosophy*
*Pázmány Péter Catholic University*
*1088 Budapest, Szentkirályi utca 28;*
*Institute of Legal Studies*
*HUN-REN Centre for Social Sciences*
*1097 Budapest, Tóth Kálmán utca 4*
*Hungary*
*konczol.miklos@jak.ppke.hu*

**Abstract:** Arguments from fairness as described in Aristotle's *Rhetoric* are usually taken to aim at mitigating the strictness of the law or, in terms of procedure, to favour the defendant. This paper considers a more inclusive interpretation, that is, that arguments from fairness can work both ways. In the example given in the *Rhetoric,* arguments from fairness are directed at a restrictive interpretation of the text. That may not be necessary however. Likewise, fairness may speak for the claimant. Two examples may support this conclusion: a judicial speech by Hyperides, and the doctrine of issues appearing in Hellenistic school rhetoric.

**Résumé:** Les arguments construits à partir du principe d'équité tels que décrits dans la Rhétorique d'Aristote sont généralement considérés comme visant à atténuer la rigueur de la loi ou, en termes de procédure, à favoriser le défendeur. Cet article adopte une interprétation plus inclusive, à savoir que les arguments fondés sur l'équité peuvent fonctionner dans les deux sens. Dans l'exemple donné dans la Rhétorique, les arguments d'équité visent une interprétation restrictive du texte. Cela n'est peut-être cependant pas nécessaire. De même, l'équité peut parler en faveur du demandeur. Deux exemples peuvent étayer cette conclusion : un discours judiciaire d'Hypéride et la doctrine des enjeux apparaissant dans la rhétorique scolaire hellénistique.

**Keywords:** Aristotle, equity, extensive interpretation, fairness, rhetoric, stasis.

 *Informal Logic*, Vol. 44, No. 1 (2024), pp. 1–18.

## 1. Introduction

The prevailing view in the interpretation of Aristotelian equity or fairness (*to epieikes*)[1] is that rhetorical arguments based on it are aimed at mitigating the rigour of the written law. In terms of the roles in legal procedure, this means that fairness favours the defendant (see e.g., Harris 2013, p. 27, n. 6 and 28, n. 11), and most interpreters agree that this is the only way in which arguments from fairness can be used, as the practice of supplementing legal definitions is not meant to be used to establish legal responsibility where a certain behaviour is not explicitly forbidden by the law.[2]

In modern scholarship, Max Hamburger was the first to argue for a broader understanding of fairness in his monograph on the development of Aristotle's legal and moral views (1971, pp. 94–95), yet his argument went largely unnoticed. In what follows, I shall revisit and argue in favour of such an interpretation first by summarising Hamburger's proposal (sect. 2) and the debate on the role of arguments from fairness in Attic legal practice (sect. 3). I shall then briefly identify the structure of these arguments as described by Aristotle (sect. 4) and finally present two examples that demonstrate the presence of arguments from fairness in support of an extensive interpretation of the law in contemporary judicial oratory (sect. 5) and later doctrine (sect. 6).

## 2. Arguments from fairness and extensive interpretation

Focusing on the development of Aristotle's views, Max Hamburger sees the starting point, Aristotle's earliest account of justice, in the *Magna Moralia* (a work of disputed authorship).[3] Here, in the first chapter of Book II, we read the following:

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[1] In the following, I refer to the works of Aristotle by giving the page and line numbers of Immanuel Bekker's edition (Bekker 1831).

2 Thus, explicitly Triantaphyllopoulos (1985, pp. 20–21). See also Kraut (2002, p. 109, n. 19), with reference to Shiner (1987). A similar view can be found in Brunschwig (1994, p. 142). The commentaries of Grimaldi (1980) and Rapp (2002) do not limit the scope of fairness to the mitigation of the severity of the law, but neither do they discuss the possibility that such arguments can be based in an extensive interpretation of the law.

[3] For my part, I accept Franz Dirlmeier's view (1958, pp. 146–147, p. 185) that the text is Aristotelian, at least in its content. In more recent literature, the

> The equitable man with his equity is he who is inclined to take less than his legal rights. There are matters in which it is impossible for the lawgiver to enter into exact details in defining, and where he has to content himself with a general statement. When, then, a man gives way in these matters, and chooses those things which the lawgiver would have wished indeed to determine in detail, but was not able to, such a man is equitable. It is not the way with him to take less than what is just absolutely; for he does not fall short of what is naturally and really just, but only of what is legally just in matters which the law left undetermined for want of power (*MM* 1198b 25–33, trans. Stock 1915).

As regards the text, Hamburger considers that it is "correct in principle but wrong in its particular formulation" as it is "misleading […] to suppose that such a gap in the law has no other meaning than to entitle the claimant to less than the law would give" (1971, p. 94, see pp. 90–93). The reason for this narrow view of *epieikeia*, he says, may be the strong influence of the earlier understanding of the expression *(ibid.),* which then gives way to a broader interpretation in Aristotle's later works. According to Hamburger, the *Nicomachean Ethics* (V.10, 1137a 31–1138a 3) adds much to the conceptual analysis of *epieikeia*, clarifying its relationship with law and justice, but he still finds it wanting as the "material aspect […] has only been touched upon in the old, traditional meaning of not to be a stickler for one's rights" (Hamburger 1971, p. 99).

It is only in the *Rhetoric* that it becomes entirely clear that *epieikeia* is meant to serve as a corrective of written law within the framework of the division of roles described in the introductory chapter of Book I.[4] Aristotle wants laws to be as detailed as possible, but he is aware of the fact that even the best laws cannot cover

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*Magna Moralia* is also considered Aristotelian (see e.g., Cooper 1973; Rowe 1975; Kenny 1978, pp. 219–239).

[4] See *Rh.* 1354a 26–30: "it is clear that the opponents have no function except to show that something is or is not true or has happened or has not happened; whether it is important or trivial or just or unjust, in so far as the lawmaker has not provided a definition, the juror should somehow decide himself and not learn from the opponents" (trans. Kennedy 2007).

all possibilities. Thus, *epieikeia* works in the space left for the judge to perform his task of deciding about the facts.[5]

The interpretation of *epieikeia* in the *Rhetoric* is sufficiently general to cover arguments in both directions: for the denial of responsibility as well as for its extension. In this sense, it corresponds to Hamburger's insight formulated in his discussion of the *MM*:

> even though only the aspect of yielding is stressed […] [i]f we consider the other side, the other party to the contract, involved in this equitable adjudication we at once realize that this party receives—under the same title of epieikeia—more than what the letter of law would give (Hamburger 1971, p. 95).

While Hamburger may not be entirely justified in formulating his expectations as to the "correctness" of Aristotle's wording, his observations concerning the differences between approaches reflected by the three works are nevertheless pertinent.

## 3. Arguments from fairness in Attic judicial oratory

According to the widespread view that may now be regarded as the traditional one in classical scholarship, Athenian law (or ancient Greek law in general) relied on the use of fairness to a great extent.[6] In these accounts, fairness is identified with the use of extra-legal arguments (see e.g., Todd 1993, pp. 54–55; Moreno 2007, p. 218; see Harris 2013, p. 28, n. 11),[7] and it is sometimes argued that such arguments actually prevailed over strictly legal ones (see e.g. Lanni 2006, pp. 2–3). This view has several different sources and, interestingly, does not seem to be based primarily on an analysis of the actual arguments deployed in extant judicial speeches. Rather, it attributes a considerable weight to contemporary opinions about the way popular courts made their decisions,

[5] Grimaldi (1980, p. 299 *ad* 1374a 26 [1]) also draws attention to the parallel (*Rh.* 1354a 26–b 16).

[6] In earlier literature, the most influential exponents of this view are Vinogradoff (1913, 1922, pp. 63–71), Jones (1956, pp. 64–65), see Harris (2013, p. 27, n. 2).

[7] See also Lanni (2006, ch. 3), where she discusses fairness under the heading 'Extra-Legal Argumentation.'

which can be found, for example, in the orators[8] but also in Aristotle (see *Rh.* 1354b 6–11, 33–1355a 1).[9] A second source may be Aristotle's discussion of *epieikeia* arguments, taken together with his list of what may be regarded as *epieikes*, but also with the topics against written law (see e.g., Vinogradoff 1913, p. 84; Hurri 2013, p. 156). This view also seems to result from a comparison between Greek and Roman law (see e.g., Vinogradoff 1913, p. 81; Wolff 1975, pp. 397–398) on the one hand, and the ancient Greek and modern Western legal cultures (Lanni 2006, pp. 115–116) on the other, with the differences being emphasised in both cases. Thus, the different approaches of individual authors notwithstanding, proponents of this view all agree that fairness played a serious, perhaps definitive, role in Athenian legal practice and also that its importance was somehow due to the character of the Athenians' approach to law, which was reflected in the functioning of their institutions.[10]

The first challenge against the traditional view was formulated in modern scholarship by Harald Meyer-Laurin (1965), who argued that an analysis of the evidence does not confirm that fairness would have served as a basis for judicial decisions. As for Aristotle's discussion of *epieikeia* in the *Rhetoric*, Meyer-Laurin claimed that it is based on a moral rather than a legal conception of fairness (1965, pp. 50–52) and that it has no connection with contemporary legal practice.[11]A different interpretation of the orators' evidence and of Aristotle's passages has been offered by Edward Harris in his recent work (2004; 2013). Affirming the presence of *epieikeia* in the legal argumentation of the Attic orators, and denying at the same time the extra-legal character of such arguments, Harris regards fairness as a principle that informed legal interpretation by the courts, without requiring the judges to

[8] See, for example, Lysias in his speech *Against Nicomachus* (or. 30, 27).

[9] See also the corresponding passages of the Aristotelian *Athenian Constitution* in Ruschenbusch (1957, pp. 257–258).

[10] The view that the courts in ancient Athens were practically making law is formulated by Ruschenbusch (1957).

[11] Meyer-Laurin (1965, p. 52) quotes Wolff's view (1945, p. 102, see Wolff 1975, p. 399) that Aristotle seems to have been "only tangentially interested in legal questions."

decide *contra legem* and against their judicial oath (Harris 2013, pp. 45–46). Seen in this light, Aristotle appears as an author whose theory is based on, and not formulated against, contemporary practice (Harris 2013, p. 45, see also Triantaphyllopoulos 1985, p. 24).To be able to assess the role played by fairness in legal argumentation, one should first define the nature of the evidence one is looking for. These methodological considerations are important because they apparently influence the research outcomes. Meyer-Laurin's (n.d.) starting question is "whether there was regard for equity in Athenian positive law," and he analyses judicial speeches to see "whether litigants appeal to equity arguments and the courts react to equity considerations." In doing so, he is looking for references to what he calls "principles of jurisprudence" (*das juristische Prinzip*), excluding at the same time "rhetorical appeals to equity."[12] While the latter move is completely justified, the requirement of referring to the legal principle of *epieikeia* seems problematic. What Meyer-Laurin wants the speakers to argue, in order for their arguments to qualify as arguments from fairness, is that moral considerations should be given precedence over the provisions of written law. What he finds, in turn, is that the reasoning of judicial speeches is based primarily on written law, however irrelevant these references may be, with moral considerations mentioned only in order to show that the application of the statutes is not going to lead to an unjust decision.

Unlike Meyer-Laurin, Harris grounds his survey (2013, pp. 26–32) of the evidence in his analysis of Aristotle's discussion of *epieikeia* in the *Nicomachean Ethics* and the *Rhetoric*. Due to the insights gained from that, Harris is not looking for *epieikeia* being opposed to law in general. Rather, he seeks to identify argumentative patterns in the speeches that correspond to Aristotle's topics of fairness. What he finds, then, is arguments that seek to vindicate "justice beyond (written) law" without questioning the validity of written law. The rationale for going beyond the strict interpretation of the legal text is, Harris argues, the principle of fairness that can be discovered in the legal system of the polis. Thus, the orators

[12] Quotations follow the English translation of David Mirhady (Meyer-Laurin n.d.).

can invoke fairness as an aspect of the spirit of the laws, which is also present, even if in an imperfect form, in the statutes relevant for the respective cases. In terms of legal history, this means that Athenian law did in fact recognise *epieikeia*. In terms of arguments from fairness, this means that they are somehow linked to the concept of a legal order, which provides backing for a not-so-strict interpretation of the law.

## 4. The structure of the argument (*Rh.* 1374a 28–b 1)

It is this latter observation in particular that is of great importance for us now as it is closely related to the operation of arguments from fairness. Aristotle presents this type of argument in Book I, Chapter 13 of the *Rhetoric.* The starting point here is the classification of just and unjust acts (1374a 18–28): in some of these cases, we may classify the conduct in question as just or unjust on the basis of unwritten laws (arguments based on written laws are included in the topic of definition). There are two reasons for this: one is that the moral value of the act is outside the scope of the written laws. The other possibility is that the unwritten law becomes relevant because of a deficiency in a specific piece of legislation. The latter is the area of application of equity as "justice beyond the written law."

Again, written rules can be incomplete for two reasons: either because the legislator overlooked something or because they did not want to go into details. The latter, according to Aristotle, is due to the fact that "in many cases it is not easy to define the limitless possibilities [...]. If, then, the action is undefinable, when a law must be framed it is necessary to speak in general terms" (1374a 28–1374b 1, trans. Kennedy 2007). He illustrates this situation with the following example: if the only condition for the offender to be punished under the rule punishing "assault" is that he must attack the victim with "iron," then the person wearing an iron ring on his hand "by the written law […] is violating the law and does wrong, when in truth he has [perhaps] not done harm, and this [latter judgment] is fair" (*ibid.*).

Thus, according to the argument, the judges need to examine not only the facts but also the rule to be applied. And the result of

this examination may well go against the generally accepted meaning of the text: in the example, the iron ring should not be regarded as "iron."[13] The most convincing way of demonstrating this may be, instead of denying the validity of the law, to propose "supplementing" its text so that the decision can correspond to the (presumed) will of the legislator.[14] In the example, the addition may relate to the characteristics of the iron object (thus distinguishing a ring from a weapon) or to the perpetrator's state of mind (whether or not they intended to cause injury with the ring). Ultimately, this means that the argument is intended to exclude a conceptual element of "assault": the defendant admits to having "raised his hand" or "hit" the other person, but they did not commit "assault."

This move links the argument from fairness to the other topic discussed just before it in the *Rhetoric*, definition. The latter can also be applied in cases where the defendant "admit[s] having done an action and yet do[es] not admit to the specific terms of an indictment or the crime with which it deals" (1373b 38–1374a 2, trans. Kennedy 2007). The difference is that arguments based on definition, according to Aristotle, are related to the written law (see 1374a 19–20).[15]

The above insights suggest that arguments from fairness work through the definition of legal terms: the speaker needs to define the essential elements of the legal provision to show that the rule cited by the opponent cannot be applied to the case. The examples discussed by Harris illustrate that these definitions may not become explicit in a speech. Aristotle's example, on the other hand, serves to explain the structure of arguments from fairness to his

[13] In this context, one of Aristotle's examples is worth mentioning: "[it is] fair to look not to the law but to the lawgiver, and not to the word of the lawgiver but to his intention" (*Rh.* 1374b 11–13).

[14] This error, as Aristotle puts it in the *Nicomachean Ethics,* is due to the general wording, i.e. the absence of distinctions (1137b 21–22). In such a case, the defence suggests, judges must apply a distinction beyond the text of the law, adding to the text "what the legislator would have enacted if he had known [of the case]" (1137b 23–24).

[15] From the examples given in that passage, we can conclude that in these cases either the law does not contain any definition (presumably the Athenian rule on theft or *hybris*) or at least the definition given by the speaker does not contradict the wording of the legal facts.

readers, including the role of the reference to the legislator's intent. Such references may not appear in (extant) judicial speeches either.

Harris's research thus draws attention to the key elements of fairness-based arguments that emerge in forensic speeches and also confirms that these elements correspond to the key elements of Aristotle's description of such arguments. With this in mind, we can now return to the question of whether these arguments really work both ways. As I have mentioned, fairness is usually taken to favour the defendant, and Aristotle's example in the *Rhetoric* confirms that impression, but the sphere of equity as "justice beyond written law" seems to be broader.

In fact, scholars' apparent unwillingness to seriously consider the possibility of "extensive" *epieikeia* may stem from three factors. Firstly, and most importantly, Aristotle presents the arguments related to both *epigramma* and *epieikeia*, as well as his examples, from the perspective of the defendant, and the example of the iron ring reflects this perspective (along with some of the subsequent topics). Secondly, where *epieikeia* is mentioned in the orators, it refers to a lenient application of the law.[16] Thirdly, continental scholars at least might be influenced by the 19th-century idea of *nullum crimen, nulla poena sine lege*, an integral part of Western legal thought.

Of these sources of reluctance, the last one is the least problematic, as *epieikeia* arguments work through the interpretation of existing laws rather than the invention of new ones (that is to say, the speaker would not acknowledge that there is no law prohibiting the act under consideration). As for the perspective of Aristotle's discussion, it should not be taken as a conclusive evidence since there are arguments where the perspective is that of the claimant. In chapters 10–12, he focuses on the questions of what kind of people harm what kind of people and for what reasons,

[16] Thus, for example, in the funeral oration of Gorgias (DK 82 B 6), or in the oration of Demosthenes *Against Meidias* (or. 21, 90). See Harris (2013, p. 34), and Saunders (2001, pp. 71, 75–80). See also Thucydides' account of the debate on the fate of the Mytileneans (3.40.2), where Cleon warns the Athenians not to be misled by "the three qualities least compatible with imperial power: compassion, a love of speeches and a sense of fairness" (trans. Mynott 2013).

adding, however, that the orator should examine these points according to whether he is accusing or defending.[17] In chapter 14, the topics of magnitude are presented from the perspective of the claimant, while in chapter 15, arguments related to non-technical proof are listed for both parties, with the distinction made according to whether the proof supports the speaker's cause or not. The evidence of the orators is rather meagre if one only considers the passages where the terms *epieikeia* or *to epieikes* occur, and in most of these they are used "as a general term of commendation for moderate and decent persons" (Saunders 2001, p. 75). Even where *epieikeia* clearly refers to a legal phenomenon, it refers to a general attitude rather than to a specific claim or argument.

## 5. Fairness and extensive interpretation in practice (Hyp. 13)

These considerations raise the question of what we should be looking for in forensic speeches when looking for arguments from fairness. If one wishes to find examples of such arguments based on extensive interpretation, then, as in the case of "lenient" fairness, one should not expect speakers to make a claim that the defendant should be punished as that is what fairness requires. Rather, it seems more reasonable to look for a specific argumentative structure here too: arguments in favour of an extensive interpretation of the statute cited, most likely making references to the legislator's intent, and aimed at the interpretation of key conceptual elements of the text.

Looking at extant pieces of Athenian forensic oratory, we see that such structures do occur. Perhaps the best example of this is Hypereides' speech *Against Athenogenes* (or. 13).[18] In order to

[17] See *Rh.* 1368b 29–32: "For it is clear that the accuser must examine how many of the things which cause each of them to commit the wrong most often, and what they are, are present in the case of the other party, and what they are not, and how many of them are present in the case of the other party."

[18] Vinogradoff (1913) also mentions it as an example of the argument from fairness but mainly because the speaker wants to be exempt from the consequences of the contract. As an example of an extensive interpretation, the speech is understood (alongside the accusatory speech of Demosthenes *Against Dionysiodorus*) by Kasai (2010), but his arguments are less than convincing. The relevant arguments are correctly identified but not as arguments from

show that a certain contract is unlawful and therefore not valid, the speaker quotes several laws, which are *prima facie* irrelevant for his case.

The speaker in the case is Epicrates, a young citizen who bought a perfume shop from Athenogenes with the price including the slaves working in the shop. The contract they signed only specified part of the debts owed by the slaves, the rest being referred to in general terms as "other debts, if any." After the sale was concluded, creditors began to appear, and Epicrates soon realised that he owed a considerable sum, some five talents. The speech aims at proving that the seller, Athenogenes, was acting in bad faith. Epicrates' strategy is to have the seller convicted of fraud so the contract is taken as null and void and he himself is free of the debt. He explains that he originally wanted to buy only one of the slave boys because he had fallen in love with him. However, Athenogenes connived with a woman, Antigona, whom Epicrates asked to intercede on his behalf, to give the impression that Athenogenes was reluctant to accept the offer and might change his mind. Athenogenes then said that he was willing to sell the whole shop and both of the servants who worked there. As for the debts, he only said that the value of the stock exceeded the amount they owed by far. Feeling that he needs to act in haste, Epicrates accepted the offer at once.

After the narrative part, Epicrates cites four laws to show that the validity of contracts may be challenged in the case of fraud. The first prohibits lying on the market. While their contract was clearly not about a market sale, Epicrates says that the fraud took place 'in the marketplace' for it was there that the defendant, Athenogenes, gave insufficient information concerning the debts attached to the workshop he sold. The second law is about the deficiencies of slaves, which the seller has to disclose before making a contract, for otherwise the transaction can be cancelled by the buyer. Here again, it requires some efforts from Epicrates to show why this provision is relevant for the selling of a workshop. He does so with the help of an argument *a fortiori*: in the case of

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fairness (but as examples of "open texture") by Harris (2000). Fairness is regarded as a non-legal consideration (which may thus at most motivate methods of non-literal interpretation) by Aviles (2011).

bad health, the buyer only loses the price of the slave, whereas the 'deficiency' of Midas, the slave he bought, may result in Epicrates and his friends losing all their money. The third reference seems to be the most far-fetched one as it is to a law that sets the criteria for the legitimate birth of children, providing that the mother has to be married according to the law. The emphasis, Epicrates argues, is on the lawful circumstances of the betrothal, that is, the parties' expression of consent. Finally, he cites the law about testaments, which sets limits to the freedom of making testaments in cases where the testator "is affected by old age, illness or insanity" or if he is "influenced by a woman or imprisoned or otherwise coerced." Here, Epicrates' point is that he was misled by Antigona, a *hetaira*, who he thinks acted according to Athenogenes' plan to create the impression that Epicrates had to arrange the sale as soon as possible.

In fact, these references serve the reconstruction of the legislative intent (Harris 2000, p. 50) since it is in them that the *ratio legis* appears in an explicit form—that is, where a distinction is made between "lawful" and "unlawful" legal transactions. Yet he needs to persuade the judges that the laws are relevant for the case. This, in turn, requires an extensive interpretation in each case since the statutes he mentions are apparently meant to cover different situations. The final aim of the speaker is to show that the defendant had wrongful intent, and that therefore the law that forbids some similar behaviour should be applied.[19] By doing so, he urges the judges to go beyond the written law in terms of its

[19] Another case in which the problem of the expression of legislative intent even comes to the surface is the speech of Lysias *Against Theomnestus* (or. 10). Here the speaker is the accuser, who accuses Theomnestus of having used one of the unspeakable words (*aporrhēta*). The accused, he says, can argue that he did not in fact use the forbidden term, "murderer" (*androphonos*), but only said that the claimant "killed his father" (*ton patera apokteinai*, 6). The intention of the lawgiver, the accusation says, is quite clear, and focuses on the meaning of the words, not on their form. We can hardly expect the legislator to list all words with the same meaning in the law (*poly gar < an> ergon en tōi nomothetōi hapanta ta onomata graphein hosa tēn autēn dynamin echei*). Instead, he declared his will with regard to all synonyms by mentioning only one explicitly (*peri henos eipōn peri pantōn edēlōsen*, 7).

letter but not its spirit.[20] *Epieikeia*, on the one hand, makes sure that only wrongdoers are punished, but on the other hand, that no wrongdoing goes unpunished.

## 6. Extensive interpretation and fairness in rhetorical theory (Hermog. *Stat.*)

Scholarship dealing with the history of rhetoric sometimes finds in Aristotle's work an early precursor of the so-called "doctrines of issues" (*staseis*),[21] a key element of Hellenistic rhetoric (see Navarre 1900, pp. 261–263; Braet 1999, pp. 408–433). Due to the rather fragmentary evidence, it is practically impossible to prove any direct influence here.[22] Nevertheless, certain parallels in authors elaborating on the issues, if not compelling, at least confirm the possibility of including extensive interpretation among the methods of arguing from fairness.

The most obvious place to look for parallels of Aristotelian fairness seems to be the passages describing the issue of "quality" (*poiotēs*), where mitigating circumstances are discussed, with reference to the sub-*stasis* of *syngnōmē,* which also has a prominent place among the Aristotelian topics related to fairness. In what follows, however, I shall not focus on these links, but following my previous line of thought, on passages reflecting the interpretive nature of fairness.

Commentators of the *Rhetoric* do not fail to mention the issue of definition (*stasis horikē*) as a parallel to the passage devoted to the role of definitions (*Rh.* I 13, 1373b 38–1374 a 18). In the first textbook to offer an elaborate system of issues, that of Hermagoras of Temnus,[23] definition did not appear among the issues related to the interpretation of law but the so-called "logical questions" (*zētēmata logika*), next to "conjecture" (*stochasmos*), focusing on the facts of the case, and "quality" mentioned above. "Legal ques-

[20] On Lysias' speech see Harris (2000, pp. 49–50).

[21] The most detailed historical overview of *stasis* theory is still Calboli Montefusco (1986).

[22] On the fragmentary nature of the rhetorical tradition and the necessary caution in historical reconstructions, see Heath (2004, chs. 2–3).

[23] The most recent edition of the fragments is Woerther (2012), now replacing Matthes (1962).

tions" (*zētēmata nomika*), on the other hand, include those of "letter and intent," "conflict of laws," "ambiguity," and "collection." Yet, in some later textbooks, definition also appears in the latter group as "legal definition."

Neither of these classifications is irrational: the Hermagorean system of "logical issues" is based on the separation of "lines of defence" available for the defendant: if one has to admit to having done something, they can challenge the legal classification of their action, and if there is no way of arguing that, they can still focus on extenuating or mitigating circumstances. "Legal" definition, in turn, highlights the aspect of definition that links it to questions related to the interpretation of normative texts. While Aristotle apparently does not arrange the topics according to the presumable "strength" of the arguments, nor does he seek to establish a comprehensive system like later textbook authors, he still seems to be aware of both aspects of arguments from definition. On the one hand, he suggests that arguing from definitions makes sense only if there is no disagreement concerning the facts, and he makes the topic precede those of fairness to which he attaches the discussion of mitigating circumstances. On the other hand, the juxtaposition of definition and fairness helps the reader realise the interpretive nature of the latter, also hinted at in the *Nicomachean Ethics*.

It is in the textbooks of the Second Sophistic, and the treatise of Hermogenes of Tarsus *On Issues* (*Peri tōn staseōn,* ed. Patillon 2009) in particular,[24] that the mutual connection between arguments based on definition and the legislator's intent becomes clear. There, the author gives the respective "heads" (*kephalaia*) of argumentation for each issue and also the order in which these should follow one another. In his unified system of 13 issues, "definition" comes after "conjecture" as in the earlier tradition. In the case of the issue of definition, he writes, "the matter to be judged is clear" (2.2.1), that is, there is no disagreement concerning the facts, yet the case is "incomplete": "The issue of definition is an enquiry into the description of an act that is partially performed and partially deficient with regard to the completeness of its description" (2.2.6–9). Hermogenes also explains where the

[24] Quotations follow the English translation of Malcolm Heath (1995).

incompleteness comes from: "when some deficiency is supplied a description is immediately available, and the act contains no further scope for enquiry" (2.2.3–5).

In Hermogenes' treatise, the names of most issues also appear as "heads." Through that, he illustrates the role references to the legislator's intent can play within an argument from definition and *vice versa,* how definition and "collection" can be used in cases where an opposition between the "letter" and the "intent" of a legal text is made. Such links between the individual issues may well have been recognised by earlier rhetoricians as well, but in Hermogenes these are highlighted even among issues belonging to different groups. While some textbook authors of Late Antiquity were known for their eagerness to clearly demarcate particular issues and attribute just one to each speech, Hermogenes' approach seems to be closer to that of Aristotle, at least insofar as he seeks to identify the possible overlaps and connections among various argumentative approaches in judicial cases.

Finally, it is worthwhile to have a look at the issue of "collection," mentioned by Hermogenes as the opposite of definition, while classifying it among the "legal" issues and defining it as "the comparison of an act not made explicit in writing with what is explicit, where someone equates what is not explicit with what is" (2.11.4–6). The heads of arguments recommended for this issue follow almost the same order as those of definition (see 2.1.6–8), which is hardly surprising given their functions. What is even more remarkable, however, is the similarity of Hermogenes' "collection" with the "strict side" of Aristotelian fairness, which, I argued, can be connected to extensive interpretation.

## 7. Conclusion

In Aristotle's *Rhetoric*, the discussion of arguments from fairness is part of the more general question of lawful and unlawful actions. Accordingly, "justice beyond the written law" may include what we would hesitate to call fairness, in cases where the unlawfulness of an injury can only be shown with the help of analogies. Commentators generally do not seriously count with that possibility, and only explain the nature of fairness meant to mitigate the

rigour of the law. Based on the context of Aristotle's example, as well as on evidence from contemporary oratory and later doctrine, it seems that "justice beyond the written law" works both ways since the claimant as well as the defendant can refer to definitions backed by the legislator's presumed intent.

**Acknowledgements:** Work on the paper was made possible by a Bolyai Research Grant of the Hungarian Academy of Sciences, and financial support received from ÚNKP-21-5 New National Excellence Program of the Ministry for Innovation and Technology, funded from National Research, Development, and Innovation Fund.

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