ISSA Proceedings 1998 – Legal Rhetoric And Dialectic In The Renaissance: Topica Legalia And Status Legales

1. Introduction

By the late Middle Ages a greater theoretical interest in legal argumentation, spurred by a much expanded and deepened argumentative practice based on the revival of Roman law since the late eleventh century, had led to the emergence of a distinct genre of specialized commentary sections or separate treatises bearing titles such as *De modis arguendi in jure*. These *modi arguendi* systematized and supplemented the discussions of legal interpretation and argumentation which had before been limited to brief remarks in the course of glosses and commentaries on specific provisions of the Justinian *Corpus iuris* (Hohmann 1998). In this paper, I will discuss the next stage in the development of the theoretical literature dealing with legal argumentation, which is reached as the civil law tradition of the Middle Ages encounters Renaissance Humanism. **[i]** This development is marked in the sixteenth century by the ascendancy of works with titles such as *Dialectica legalis* or *Topica legalia*. Such titles make more explicit a strong reliance on dialectical models for the formal systematization of legal arguments, which had already characterized the earlier modi arguendi. But I will argue that in spite of this greater external emphasis on the instrumentarium of logic, the substance of the Topica legalia was in effect even more focused on rhetorical concerns than had been the content of the modi arguendi.

I will first place the emergence of works explicitly identifying themselves as dealing with legal dialectic in the context of the rhetorical reorientation of dialectic promoted by the *De inventione dialectica* of Rudolph Agricola (1444-1485), a work written around 1480, which began to exercise its influence even before the appearance of its first printed edition in 1515 (Cogan 1984: 163 n.1). I will relate this development to the explicit discussion of the relationship between legal dialectic and legal rhetoric in the *Dialectica legalis* (1534)**[ii]** and

the *Rhetorica legalis* (1541) by Christoph Hegendorff (1500-1540).**[iii]**
My argument will continue with an examination of additional rhetorical elements accompanying the *topoi* catalogues offered by 16th century books on legal dialectic, beginning with works marking the transition from the *modi arguendi* of the medieval Commentators on the *Corpus iuris* to the legal dialectic of the Humanist jurists in the Renaissance, the *Legalis dialectica* (1507) of Pietro Andrea Gambari (d. 1528),**[iv]** and the *Topica seu loci legales* (1516) by Nicolaas Everaerts (1462-1532).**[v]**
I will then investigate the use of the rhetorical status legales, a complex of arguments initially designed to be used by forensic advocates in dealing with issues of legal interpretation,**[vi]** in Renaissance works focused on that subject. Here I will pay special attention to the *Iurisconsultus sive de optimo genere iuris interpretandi* of François Hotman (1524-1590),**[vii]** who proposes a return to a reconceptualization of the *status legales* as the controlling scheme of legal hermeneutics.
Finally, I will discuss some rhetorical considerations which furthered the emergence of such a large number of works on legal dialectic and interpretation in the 16th century, and helped to define their distinctive characteristics compared to the modi arguendi of preceding centuries, considerations related to pedagogical exigencies, solicitude for the scientific status of legal scholarship, and concerns about the political implications of legal argumentation.

2. Legal Dialectics in the Renaissance and the Rhetorical Reorientation of Dialectic

Since medieval jurists made extensive use of dialectical methods (Otte 1971), and the modi arguendi of the later Middle Ages did in fact already offer for use in legal argumentation lists of topoi whose organization was to a considerable extent based on the dialectical loci which had been derived from Cicero's *Topica*, and transmitted from antiquity particularly in the *De topicis differentiis* by Boethius, it is at first somewhat puzzling why only in the course of the 16th century works on jurisprudential reasoning begin to use titles which explicitly refer to dialectic.**[viii]** The fact that the authors of the modi arguendi did by no means limit themselves to discussions of topics falling within specifically dialectical categories (Hohmann 1998: 44f.) cannot be decisive here, because we will see that the same is true for the authors of works on legal topoi in the Renaissance, who nevertheless do not hesitate to assign their works to the field of dialectic.
But the puzzle begins to resolve itself, when we consider that according to the

very same Boethian tradition which provided medieval jurists with much of the dialectical instrumentarium they used in their work, the application of dialectic to legal issues would not itself be regarded as belonging to dialectic, but rather to rhetoric. Boethius makes this very clear in his *De topicis differentiis* when he emphasizes that "Cicero's *Topica*, which he published for C. Trebatius, who was skilled at law, does not examine how one can dispute about these things [i.e. dialectical categories such as genus and species, similars, and contraries] themselves but how arguments of the rhetorical discipline may be produced". In this view, the application of dialectical topoi to concrete circumstances is a matter of rhetoric, which is concerned with arguments about "things taking on a quality", while dialectic addresses "arguments from qualities themselves", i.e. arguments concerning qualities in the abstract (Stump 1978: 95). Consequently, a medieval jurist would not consider a collection of topoi to be used in legal reasoning to be a work of dialectic, even though he might apply the term *topica* to it, since topics were part of both rhetoric and dialectic.**[ix]**

This changes in the course of what Marc Cogan has called the "semantic revolution of the history of invention" reflected in Rudolph Agricola's *De inventione dialectica* after 1480.**[x]** This work is part of the revaluation of rhetoric in Renaissance Humanism; even though Agricola "explicitly removes invention from rhetoric" (Cogan 1984: 181), his "dialectical" topoi are no longer general logical propositions, as they were in Boethius, but "a consistent set of empty locations which become filled with particular information when applied to a given subject" (Cogan 1984, 186), such as a specific legal issue or case. Thus Agricola's topoi, though categorized as dialectical, "perform exactly the function Boethius said was proper to *rhetorical* commonplaces: they draw arguments 'from [e.g.] that particular genus which is the genus at issue – not from the nature of genus, but from the thing which is the genus … [not] from qualities in themselves, [but] from things taking on a quality'" (Cogan 1984: 191); and so now under the name of dialectic "in effect rhetoric is extended to become the general logic of science and philosophy" (Cogan 1984: 192), insofar as these deal with contingent and probable rather than with necessary and certain knowledge.

This rhetorical reorientation of dialectic gave new impetus to the use of dialectic in the exploration of scientific investigation in different areas of human knowledge, including law, and several of the works dedicated to legal dialectic and juristic topoi in the 16th century, such as those published in 1520 by Chansonnette (1545: Praef. fol. 3r) and in 1573 by Vigelius (1573: Praef. fol. 3 f.) explicitly acknowledge the influence of Agricola. This does not mean, however,

that such authors follow Agricola's conceptions in every particular. A good example in this respect is Christoph Hegendorff's *Dialectica legalis* of 1534, whose treatment of legal topics is linked with Agricola through Chansonnette, but also prominently invokes earlier authors such as Cicero, Quintilian, and Baldus (Hegendorff 1547: fol. 57r), and which distinguishes rhetoric from dialectic along classical lines by referring to Cicero for the notion of dialectic as contracted rhetoric and rhetoric as dilated dialectic, which alludes to the metaphor, ascribed to Zeno the Stoic, of dialectic as the clenched fist and rhetoric as the extended hand. He points out that dialectic treats its subjects with sparse words, while rhetoric is in some ways also a form of dialectic, but modifies in the disputes with which it deals the naked surface of the dialectical material with varied patterns of words and things. But Hegendorff emphasizes that this is not a matter of vain ostentation, but of presenting matters in a more popular and clearer way, thus making them accessible to a broader public (Hegendorff 1547: fol. 8r).**[xi]**

In a later work, his *Rhetorica legalis* of 1541, he develops this distinction by assigning to dialectic the task of teaching how one can discuss any matter whatsoever according to a particular order and certain method (*ordine quodam et certa methodo*), while rhetoric adds ornaments of speech and the clear perceptions of things and words (*ornamenta orationis et lumina verborum et rerum*), by means of which naked facts (*res nude*) are given embellishment as well as vividness (*et exornari et illustrari*) (Hegendorff 1541: fol. 4r). This sounds somewhat similar to Ramus's reduction of rhetoric to matters of style and delivery,**[xii]** and some of Ramus's contemporary critics pointed out Hegendorff's influence on the object of their scorn (Ong 1983: 22, 48, 124, 215), but Hegendorff does not in fact accept such a limited notion of rhetoric. Rather than excluding invention from rhetoric, as Agricola had done, Hegendorff includes in the first book of his legal rhetoric an overview of the entire theory of *status* and of *loci*, which form the core of rhetorical inventional theory, and all of which he illustrates with examples from Roman law (Hegendorff 1541: fol. 9v ff.).**[xiii]** In his view, dialectical invention is concerned with exposition, for instance with showing what the law is, while rhetoric has a stronger pragmatic dimension, giving people reasons which move them to promote, observe, and love the law (Hegendorff 1541: 6v f.).

By contrast Agricola, who had claimed all of invention for dialectic also had to include the development of arguments which move audiences within the scope of his dialectical topics (Agricola 1967: 201; Cogan 1984: 190). And in fact most authors of legal dialectics in the 16th century did not follow Hegendorff's lead in

developing separate legal rhetorics, but rather incorporated in their treatment of legal topics considerations which in the classical tradition had been associated with rhetorical persuasion; as we will see, this is true even for Hegendorff himself.

3. Additional Rhetorical Elements in Renaissance Works on Legal Topoi

Thus legal dialectics in this period were rhetorical not only in their adaptation of dialectical topics to rhetorical ends, but also in their incorporation of persuasive considerations and commonplaces which went beyond the scope of those topics. I will begin my brief survey of such additional rhetorical elements in some Renaissance works on legal topoi with a work which illustrates very clearly the transition from the modi arguendi of the Middle Ages to the legal dialectics of the 16th century, Nicolaas Everaerts's *Topica seu loci legales of 1516*.**[xiv]** The fact that this rather traditional work was frequently reprinted and still extensively cited by prominent authors such as Grotius and Pufendorf in the 17th century illustrates well that no particular premium is put on innovation by most jurists when it comes to the methodology of legal argumentation. The 1544 edition offers on over 400 pages 100 topoi, considerably more than the 17 of Cicero's *Topica* or the 24 of Agricola's *De inventione dialectica*. In his *peroratio* at the end of the book, the author emphasizes that with more leisure he could add many more, which in fact he did in later editions.**[xv]** The link of this work with from which these had evolved is highlighted not only by the fact that Everaerts uses the terms argumentandi modi and loci legales interchangeably and characterizes the subject of his book as *materia tam subtilis et brocardica*, but also when he recommends for further study not only Cicero's *Topic*a, but also the works of several medieval Commentators (Everaerts 1544: 414f., 1ff.). The decisive progress made by Everaerts is in his much more extensive incorporation of legal sources and explanatory comments in his discussions; Johannes de Caccialupis (d. 1496) had already presented 133 topoi in his *Opusculum de argumentandi doctrina* (Caprioli 1965), but where for instance the earlier author had given only one example**[xvi]** in connection with the (non-dialectical) *locus a verisimilibus* (argument from probability), Everaerts offers six pages of legal references and comments (Everaerts 1544: 60ff.).

What links Everaerts with his predecessors is his emphasis on practical usefulness rather than systematic refinement and consistency. Thus he discusses the (dialectical) *locus a simili* on over seven pages, but then addresses numerous additional legal arguments from analogy under separate headings such as "from

carnal to spiritual marriage" and "from the wider or general purpose of the law to its extended application" (Everaerts 1544: 85ff., 157ff., 174ff.). Moreover, just as in the *modi arguendi*, we find *loci* which go beyond arguments emphasizing logical relationships between terms and directly appeal to normative evaluations, such as the argument "from the toleration of inconvenience" and "from the virtue of the end" (Everaerts 1544: 384, 411). Everaerts also follows the rhetorical tradition in discussions of legal reasoning by attending to arguments on both sides of many issues. He does this not only when he precedes his remarks on extensive interpretation with a separate section on restrictive interpretation, thus in effect covering the ground of the status *legales of ratiocinatio* (analogy) and *scriptum et voluntas* (letter and intent); but also when he offers opposing arguments within individual sections. And he offers methods by means of which "all arguments can easily be weakened", and "the force of any argument [can be] repulsed and averted".

A slightly earlier work, in dialogue form, the *Legalis dialectica* of Pietro Gambari (1507) links the project of approaching the ideal of a science of law (*legum scientiae*) with the use of the system of dialectics, which Everaerts had discussed only briefly in his introduction, as the organizing principle for the entire work (Gambari 1507: fol. 3v). And indeed Gambari keeps his topoi more closely tied to dialectical categories, rather than focusing more often on factual aspects of legal cases, which allows him to maintain a more readily recognizable systematic order. But even this work flirts with the argumentative needs of the advocate, when on its title page it promises the reader that it will show how "the involved meanings and subtle fallacies of the law [can be] unravelled as well as created" (Gambari 1507: before fol. 1r).**[xvii]**

Claude Chansonnette criticizes in his *Topica legalia* of 1520 the older tradition of legal topics for having assembled from the legal sources a "great forest of arguments", and he mentions in this context the 100 topoi of Everaerts (Chansonnette 1545: 2), even though he also definitely relies on the work of his predecessor (Kisch 1970: 62f.). But pedagogical concerns motivate him to tighten the discussion, and where even Gambari still presented over 40 loci, Chansonnete reduces their number to 26. He also emphasizes that in his book he will not only take legal scholars into account, but will also apply the considerations of rhetoricians to the law (Chansonnette 1545: Praef. fol. 3r). He does so on the one hand by taking into account legal practice and by invoking Agricola in order to distinguish prior judgments *(preiudicia)* from arguments lying outside the art of the jurist, such as the invocation of witnesses or documents, and then discussing

the use such authoritative judgments as the first of his topoi, with extensive reliance on Quintilian. And on the other hand by adding to the formally defined dialectical loci not only the topic of probability (*a verisimili*), which incorporates the rhetorical topics of the person and the act, but also two categories of arguments concerned with the interpretation of texts (*a scripto*) and with the contrast of letter and intent (*a sententia contra scriptum*) which in effect incorporate the entire scope of the rhetorical *status legales* into his legal dialectic (Chansonnette 1545: 4ff.).

Christoph Hegendorff differs in Book Four of his *Dialectica legalis* of 1534 from Chansonnette by following the classical Ciceronian tradition in placing prior judgments and authorities in the category of extrinsic proofs such as witnesses and documents. But he agrees with Chansonnette in adding to the formal dialectical topoi more material loci such as that of probability, and especially the text-related arguments which correspond to the status legales (Hegendorff 1547: fol. 56v ff.). He also arranges 36 of the specific types of legal analogies, which had been discussed in a scattered way in older collections of juristic commonplaces, in a now systematically appropriate fashion under the locus of similarity (Hegendorff 1547: fol. 67r ff.). In keeping with the perspective of the rhetorical handbook tradition, Hegendorff sees the usefulness of the legal topics quite pragmatically from the perspective of the advocate, who can avoid ridicule and defeat in court by mastering this argumentative method; similarly he recommends in Book Five the study of the fallacies as a way of steeling the advocate against the argumentative chicanery of his opponent (Hegendorff 1547: fol. 57r, 58r). Overall, Hegendorff emphasizes repeatedly that he wants to help the advocate who in court must fight with arguments, defeat his opponent, and persuade the judge (Hegendorff 1547: fol. 33v, 41r).**[xviii]**

Johannes Oldendorp also apparently relies on Everaerts and Chansonnette in his *Topicorum legalium traditio* of 1551 (Kisch 1970: 67), even though on the whole he inclines more towards older traditions of legal topics by including in his catalogue a larger number of directly value-oriented loci such as those of honorability and usefulness, necessity, impossibility, detriment or absurdity, and reason; and he, too, incorporates the *status legalis* of *scriptum et sententia* into his *topica legalia* (Oldendorp 1551: fol. 57ff., 137f.). Systematically more ambitious are the *Dialectices iuris civilis libri III* by Nicolaus Vigelius (1573), who acknowledges the influence of Agricola and arranges his entire legal dialectic in a scheme showing affinities with Ramist predilections, even though he does not restrict himself to dichotomies (Vigelius 1573: after 568). In Book Two (*de*

inventione) he precedes the formal dialectical topoi with the material locus of authority, thus emulating Chansonnette in reversing the order of Cicero's *Topica*, and he follows several of his predecessors by incorporating the substance of the status legales into his catalogue, here under four separate topoi related to purpose, wording, exceptions and changes of statutes and other legal dispositions (Vigelius 1573: 99ff.).

4. The Status legales in Renaissance Books on Legal Interpretation

The rhetorical status legales and the persuasive use of normative concepts left important traces not only in discussions of legal dialectic, but also in another category of works on juristic argumentation which gained increasing prominence in the course of the 15th and 16th centuries: books on legal interpretation.**[xix]** Of particular importance was the *Tractatus de iuris interpretatione* by Rogerius Constantius, which was written in Turin around 1463. This work sounded a key note for the following discussions on legal hermeneutics by presenting a concise summary of the thoughts of medieval jurists on the subject.**[xx]** The author frequently invokes Baldus, Bartolus, and Cinus and highlights the corrective, extensive, restrictive, and declarative types of legal interpretation as the primary ones discussed in the literature, agreeing with Baldus (and thus disagreeing with modern hermeneutics) in holding that the latter is not really a form of interpretation, since it only determines a clear meaning (Constantius 1549: 25ff.).**[xxi]**

The status legales are not directly introduced here, but it is readily apparent that the interaction of letter and intent (*scriptum et voluntas*) plays a part in all of these types of interpretation, while invocations of contradictory laws (*leges contrariae*) and ambiguity (*ambiguum*) are particularly suited to argue for correction or restriction, analogy (*ratiocinatio*) promotes extension, and definition (*definitio*) declaration. In a way, the terminology presented by Constantius is even more openly rhetorical than that of the classical status legales, since these refer to interpretive problems and arguments, while the medieval juristic terms quite clearly place in the foreground the results to be intended and reached by the interpreter. At the same time Constantius highlights that interpretive arguments give the legal advocate or scholar certain opportunities to claim some independence from dominant opinions, and that such arguments are directly related to substantive normative concepts. This becomes clear in several of the interpretive maxims which he offers his readers: strong reasons can justify a judge in deviating from the *communis opinio* of jurists; the number of authors

supporting an opinion is not supposed to be decisive; deviations from the c*ommunis sententia* should not be the rule, but they are appropriate when the singular opposing opinion accords better with humanity, reason, or equity;**[xxii]** the judge should select from among several different opinions the one which is more humane and reasonable (Constantius 1549: 35ff.). It becomes apparent that Constantius does not claim to offer a method ensuring a certainty of results when he emphasizes that what is needed for appropriate interpretations is not only an understanding of principles and a knowledge of necessary truths,**[xxiii]** but also philosophical and practical wisdom as well as skill.**[xxiv]**

The link with the Aristotelian tradition of *phronesis* is not yet broken here, for Rogerius Constantius clearly relates *prudentia* to contingent things, which do not always happen in the same way, and which require controversial deliberation and free choice (Constantius 1549: 214f.). This parallels Rudolph Agricola's approximately contemporary emphasis on the essential uncertainties and conflicting opinions attending topical investigations "of what pertains to life and morals [as well as] ideas about the nature of things" (Agricola 1967: 207), an emphasis which makes a rhetorically conceived dialectic of controversy appropriately applicable to all such questions Cogan 1984: 189).

A more direct use of the classical theory of status legales for the purpose of conceptualizing arguments about legal interpretation can be found in *De interpretatione legum*, written by Stephanus Federicis from Brixen in 1495. After an introduction which briefly addresses the questions of the ascertainment of facts (*quaestio coniecturalis*), of definition (*quaestio diffinitiva)* and of the proper legal forum (*quaestio iurisdictionalis*) (Federicis 1648: 15ff.), the author turns to the quaestio legitima, and thus to the four complexes of interpretive problems and arguments discussed in the framework of the status legales in its most common form: In the first part of the book conflicts between letter and intent are discussed, in the second contrary laws, in the third ambiguous laws, and in the fourth the application of similar laws to situations which are not specifically regulated (Federicis 1648: 35ff., 146ff., 226ff., 282ff.) The material offered in relation to those issues includes, in addition to general considerations and maxims on the scope and appropriateness of these types of arguments, and references to dialectical and rhetorical sources, many specific examples from different areas of currently valid law, an important factor essentially absent from discussions of the status legales in both classical and medieval rhetorical literature.

A particularly interesting attempt to develop further the theory of juristic

interpretation was undertaken by François Hotman in his *Iurisconsultus* of 1559. Here we actually find a return to a reconceptualization of the entire rhetorical theory of *status* as providing the controlling systematic scheme for legal interpretation. Hotman signals this theoretical move when he distinguishes three types of legal interpretation, the first of which is the province of Grammarians, the second of Dialecticians, and the third of Jurists. This division invokes the classical *trivium* and implicitly equates Jurists and Rhetoricians, since rhetoric is the third part of the trivium after grammar and dialectic (Hotman 1559: 60ff). The third, juristic, type of legal interpretation is then divided into another tripartite scheme of controversies, just as the status legales were conceived as focused on different *controversiae*.

The first of these Hotman identifies as ex iure, and it covers disputes arising from the contrast between law and equity, written and unwritten law. Maclean sees in this first category a reflection of Hotman's commitment to the Hermagorean theses, but in fact the contrast between law and equity, written and unwritten law, far from referring to "general propositions about moral and political issues which Cicero argued were not part of forensic argument", as Ian Maclean would have it (Maclean 1992: 122), had in fact dominated not only discussions of the *status qualitatis*, but also the treatment of the tension between letter and intent, and of the resulting need for equitable restriction and analogical extension of legal norms in particular, as well as the classical discussions of the *status legales* and their application in forensic practice in general.

The second controversy, *ex scripto*, focuses more narrowly on contradictions between written texts and the intentions to be discerned in them, which are further highlighted when apparently contradictory legal norms are at issue. While the third, *ex verbo*, deals with ambiguities and obscurities which need to be resolved by definitions (Hotman 1559: 85ff.). By using this scheme, Hotman is able to reduce the overlap between the classical status legales,**[xxv]** and moreover he in effect vindicates the claim of the *status rationales* to be applicable to all areas of argumentation, for the categories *ex iure, ex scripto*, and *ex verbo* correspond to the argumentative levels of *qualitas* (issue of value), *coniectura* (issue of fact), and *definitio* (issue of definition) in that part of classical *status* theory. Hotman here invokes against *De inventione* and the *Rhetorica ad Herennium* the *De partitione oratoria*, in which Cicero's concern, too, was a clearer system, and he also cites Quintilian (Hotman 1559: 93ff.).

Admittedly it is not entirely clear whether Hotman specifically intended the application of the status rationales to the organization of the status legales which

my analysis suggests, since he deviates from the usual sequence of the former.**[xxvi]** But this could be due to an effort to address the controversies in decreasing order of frequency, importance, or difficulty. In the final analysis, Hotman uses this reorganization of the traditional rhetorical categories to stake against the rhetoricians the claim of jurists to the theoretical investigation of legal interpretation, a claim which, however, was in fact no longer seriously contested by the professional teachers of eloquence.**[xxvii]**

5. Rhetorical Considerations Underlying Renaissance Works on Legal Dialectic and Interpretation

What was still contested then and is controversial even today is the extent of the power of legal scholars, judges, and administrators to interpret the law as that power potentially impinges on the law-making function of the legislative branch. Hotman dedicates to this topic, already much discussed in the Middle Ages, his long introduction, which significantly quotes not only legal sources, but also rhetorical works, especially Cicero's *De oratore* (Hotman 1559: 9ff.). Hotman's evident concern here, which he shares with many if not most of his colleagues,**[xxviii]** points to another dimension of rhetoricity in Renaissance works on legal dialectic and interpretation: their need to persuade various audiences of the practical appropriateness of the argumentative activity which their theorizing promotes. In conclusion, I will briefly address three aspects of this further rhetorical dimension which can help us understand some of the persuasive functions of the rather large number of these works which emerged in the 16th century: pedagogical exigencies, solicitude for the scientific status of legal scholarship, and concerns about the political implications of legal argumentation.

Pedagogical considerations which helped to promote a focus on legal dialectic and hermeneutics arose out of a feeling that the ever growing mass of legal sources and literature presented especially the novice law student with ever more insuperable difficulties in his efforts to gain a sense of command of his chosen discipline. At the same time the traditional medieval forms of legal instruction were beginning to disintegrate, if ever so slowly, under the onslaught of Humanist critiques. **[xxix]** Moreover, broader access to institutions of higher learning and wider variations in propedeutic curricula meant that less could be taken for granted and more needed to be explained and simplified for new generations of students. In this situation, more conscious attention to methods and structures underlying legal materials and activities through dialectical and hermeneutical

investigations held out the hope for help and relief, and the authors of works on these subjects often promised their readers greater clarity and ease in finding a way through the complicated maze of the law. The rhetorically reconstituted dialectic of the Renaissance was particularly suited for such relief work, since by its logical procedures for the arrangement of argumentative commonplaces and the derivation of specific arguments from the interaction between such general patterns and particular facts it promoted not only inventional faculties, but also a greater sense of the practicality as well as systematic order of the subject matter of law**.[xxx]**

Such developments also helped legal scholars to defend the scientific status of their discipline in the face of general intellectual trends towards greater attention to the empirical foundations, methodical perspicuity, and systematic rigor of the quest for knowledge. In this context, a preoccupation with "system" was motivated not only by the desire for more order and improved internal cohesion and consistency of legal knowledge, but also by growing hopes for the elaboration, by means of dialectical methods, of a hierarchical body of general principles underlying the surface confusion of legal sources and authorities, principles which would initially allow a more rational application and adaptation of existing law, and eventually permit the creation of a more reasonable and natural new legal order which would promote greater legal certainty and thus further enhance the scientific dignity of law, insofar as greater certainty meant higher scientific achievement.

This trend is particularly apparent in the movement, analyzed by Kees Meerhoff, from Rudolph Agricola's emphasis on dialectic as persuasion by probable discourse, as oratio, to Peter Ramus's insistence on dialectic as the search for truth, as ratio. As Meerhoff points out, "Ramus in effect rejects the Aristotelian distinction between logic, the art of truth, and dialectic, the art of probability. For him, logic and dialectic coincide."**[xxxi]** Part of the attractiveness of dialectic as a source of legal method is this opportunity, opened up by the ambiguity of the concept, to move imperceptibly from rhetoric to logic by pragmatic decontextualization of the problems examined. This helps explain why Hegendorff's project of a legal rhetoric found no significant echo in the intellectual landscape of his time, but appears more attractive in our own more skeptical world.

In the event, even the term "dialectic" still proved to be too strongly associated with dialogical procedures of the exchange of controversial opinions, and "logic", "hermeneutics", and "mathematics" coalesced in the course of the 17th and 18th

centuries in visions of an axiomatic system of natural law in which legal interpretation would ever more closely approximate a process of deduction of decisions from legal rules as major and facts as minor premisses.**[xxxii]**

The gradual movement of legal interpretation from the legal topics to legal hermeneutics reflected the fact that in more traditional legal dialectics the interpretation of texts appeared only as one set of considerations among others which entered into the discussions among legal scholars from which a *communis opinio* would emerge. While by contrast legal hermeneutics decisively foregrounded the authoritative text of the law and its correct interpretation, and was thus ultimately better able to accommodate the philological bent of Humanism (Kelley 1970: 19ff.), the codificatory efforts of enlightenment rationalism and natural law (Wieacker 1964: 322ff.), as well as later trends towards legal positivism (Wieacker 1964: 430ff.), than were the legal topics which had grown from the soil of scholasticism.

This brings us, finally, to the political rhetoric of legal dialectic and hermeneutics. Vincenzo Piano Mortari has highlighted the link between the accomplishments of juristic dialectics and the emergence of absolutist territorial states in Europe (Piano Mortari 1957: 366ff). A dialectically refined law promised more legal certainty to subjects, and probably more importantly for the immediate success of the enterprise, greater control to rulers. While initially the scholarly exhumation and political adoption of a Roman law adapted by an emerging class of professional jurists allowed the state to supersede older legal customs, eventually the confrontation of that law with underlying principles and systems extracted from or projected into it by dialectical methods permitted the increasing replacement of Roman law by territorial statutes, which reduced it more and more to a subsidiary role and prepared its ultimate reburial.

This process of dialectical refinement of the law initially emancipated scholars and rulers from the control of dominant juristic opinion and established legal tradition, allowing them to argue for change. But this rhetorical emancipation also developed its own anti-rhetorical dialectic: to be heard, deviating opinions may need to claim a status beyond opinion, and those who have brought about the political change they desired may want to insulate the result of their efforts against further change. In the works on legal dialectic and interpretation written during the 16th century, this change is reflected in the fact that while at the beginning of that period they still tended to address themselves to the needs of practicing lawyers and highlighted opportunities for arguing legal cases and issues *in utramque partem,* by the end of the century they increasingly insisted on

legal certainty and shifted their attention from advocates, criticized as partisan and blamed for fomenting litigation to a legal model at whose center stood presumptively neutral legal scholars and judges.**[xxxiii]**

The subsequent revival of the idea of an eternally valid and uniquely right system of natural law (Wieacker 1964: 249ff.) can be seen as a dialectical response to the dialectical deconstruction, effected by rationalistic reconstruction, of the foundations of the Roman law. The denial of the rhetoricity of the legal process was required as a matter of ensuring its rhetorical effectiveness, and the assertion of the apolitical autonomy of law became the existential lie intended to insulate it from critique and thus to promote its political survival.

NOTES

i. For a general discussion of this process see Maffei 1964; Piano Mortari 1986; and Kelley 1990: 144ff.

ii. Original title: Dialecticae legalis libri V.

iii. Latinized: Hegendorphinus.

iv. Latinized: Gammarus; the name also appears as Gammaro.

v. Latinized: Everardus.

vi. For extensive discussions see Martin 1974: 28ff. and Calboli Montefusco 1986: 60ff.; for an overview Kennedy (1963: 307ff.). For a discussion of the applicability of the status legales to modern legal argumentation see Hohmann 1989.

vii. Latinized: Hotomanus.

viii. On the development of the topics of argumentative invention in Roman antiquity see Leff 1983; on the relationships between dialectic and rhetoric in the Renaissance see Vasoli 1968 and McNally 1969; on the significance of a topical perspective for an understanding of modern law see Viehweg 1974.

ix. Thus Stephanus de Federicis in 1493 refers to an earlier and now apparently lost work of his as “my topics” (topica mea) (Maclean 1992: 79 n. 45).

x. For a general discussion of Agricola and his significance in the history of rhetoric see Conley 1994: 125ff.

xi. Cf. Cicero De finibus 2.5.17. Unless otherwise noted, translations in the text are mine.

xii. For discussions of Ramus’s treatment of rhetoric see Murphy in Ramus 1986: 11ff.; and Conley 1994: 128ff.

xiii. fol. 9v f. (status coniecturalis), 26r ff. (status iuriditialis), 36r ff. (status legales), 60v ff. (loci communes).

xiv. The original title of the 1516 Leuven edition was Topicorum seu de locis

legalibus liber.

xv. Troje (1977: 732) notes that the 1581 Frankfurt edition has 130 loci.

xvi. From Justinian's Digest: D. 4.2.23.

xvii. Nodosos sensus et acuta sophismata iuris […] soluere uel facere.

xviii. Certandum […] adversarius uincendus […] iudex persuadendus.

xix. For extensive overviews see Piano Mortari 1956 and 1978, Maclean 1992; for earlier treatments of legal interpretation see Piano Mortari 1958 and 1976.

xx. Overviews of medieval writings on legal interpretation are provided by Piano Mortari 1958 and 1976.

xxi. For further discussion of these categories see Maclean 1992: 114ff.

xxii. Singularis opinio esset humanior, vel rationabilior, et aequior quam communis.

xxiii. Intelligentia principiorum, scientia […] de his rebus quae aliter esse non possunt.

xxiv. Sapientia, prudentia, ars.

xxv. On conceptual and systematic difficulties within the classical theory of status see Hohmann 1989: 174ff.

xxvi. The usual (presuppositional) order is (1) coniectura, (2) definitio, (3) qualitas.

xxvii. Hotman 1559: 112 cites in jest the Roman legal institution of the interdictum uti possidetis, which serves the protection of possession; cf. Kaser 1992: 101.

xxviii. Further discussion of this controversy in Maclean 1992: 50ff.

xxix. On some of these changes see Merzbacher 1958.

xxx. For an example of efforts to reduce the Roman law to a coherent system see Sturz 1589; for a discussion of the general search for a scientific system of law in the 16th century see Troje 1969 and Mazzacane 1969; for the ideological implications of the process see Mazzacane 1971.

xxxi. K. Meerhoff (1988). Agricola et Ramus' Dialectique et Rhétorique. In: F. Akkerman (Ed.), Rodolphus Agricola Phrisius 1444-1485. Proceedings of the International Conference at the University of Groningen. Leiden: Brill; as quoted (in French) by Sharratt 1987: 39.

xxxii. For a general history of efforts to devise such systems see Stephanitz 1970.

xxxiii. On conflicts between proponents of a more pratically oriented and those of a more theoretically inclined jurisprudence in the 16th century see Schaffstein 1953.

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