# TOPOI AT WORK

**Alexandra Anca CODREANU**

## *Abstract*

*At borderline of language philosophy, rhetoric and pragmatics topoi as understood by Aristotle, Perelman or Ducrot underlie legal reasoning. This article looks into the use of topoi in non argumentative, normative texts. The claim is that the knowledge representation function performed by topoi validates their use in laws and contracts. Legal provisions on quality assurance in higher education in the British and Romanian systems of law will be used as corpus. A clear identification of the way topics operate and are dealt with in professional communication using such normative texts will contribute to more efficiently teaching English for Legal Purposes.*

***Keywords***: topoi, legal reasoning, knowledge representation, audience acceptance, gradual inference rules, polyphony

## *Introduction*

While *topoi* are basic concepts in argumentative discourse, in normative discourse they can be difficult to pin down, our present interest being to understand their role in the latter. Ducrot's theory of language argumentativity can provide a positive answer to this inquiry, by its claim that argumentativity is a characteristic of language in general, law included. Our research intends to find if and in what way *topoi* in normative discourse are different from argumentative discourse, a positive answer qualifying them among the traits that define the genres belonging to such discourse. The study focuses on the way in which topics can help in the use of legal normative texts.

## *Topoi Theory*

The starting point in discussing *topoi* is rhetoric. As the discipline has been understood in various ways, the concept can carry distinct significances and uses. Heuboek (2009: 37) distinguishes four senses of rhetoric: *literary rhetoric* – the organization of the discourse: *topoi*, tropes, figures of speech etc. – Quintilian's *ars bene dicendi*, the study of methods of persuasion and argumentation focusing on the intended effect of the communication, this approach originating in the classical rhetoric of Aristotle and reaching our times by Perelman and Olbrechts-Tyteca's (1969) *New Rhetoric*, "the study of the methods of proof used to secure adherence"

(Perelman & Olbrechts-Tyteca, 1969: 1), yet another approach that looks at discourse as communication, i.e. symbolic *interaction*, the intentionality and instrumentality requirements calling for a rhetorical organisation of the discourse, and a fourth social (and social constructionist) sense, looking at the capacity of language to share organized experience, and therefore *organize collective experience,* considering communicative events in their interaction with macro-social structures and entities. The last sense makes possible the study of the interaction between argumentative and normative discourses within the social practice of the law.

Referring to the meaning of *topoi* related to invention, as one of the five canons of rhetoric in the classical tradition, it can be said that while invention as a skill focused on "discovering and formulating arguments on any subject, opinions on the resolution of any problem, or reasons for or against any proposed course of action", based on the fact that "to say something well, one must first have something to say", the *topoi* address the need of having something to say and in that sense they are "things to talk about" (Balkin, 1996: 1).

Balkin lists the "interlocking meanings and evocations" of *topos* as a spatial metaphor of place, *topoi* envisaging places from which one can argue, "commonplaces", – concepts, subjects or maxims that are widely shared in the culture or are associated with the wisdom that has been distilled into common sense, boxes into which situations and events can be placed – located, categorized and organized in their proper places, places in the mind, as Aristotle suggested, from which different arguments might be fetched, perspectives or ways of looking at things." (Balkin, 1996: 3)

Based on such meanings, Balkin concludes that "Topics are heuristics; they provide a roadmap, or starting point, for the discussion of problems and the resolution of difficulties. They are both a method of problem recognition and a means of problem solution. Invention uses topics to identify and analyze difficulties placed before an actor. Hence invention and topical reasoning are essentially pragmatic in nature – for they are directed to the solving of problems about what to do (Balkin, 1996: 4).

## *Topoi in Classical Rhetoric*

Aristotle identifies the role *topoi* play, while stating the purpose of his *Topica*: "Our treatise proposes to find a line of inquiry whereby we shall be able to reason from opinions that are generally accepted about every problem propounded to us, and also shall ourselves, when standing up to an argument, avoid saying anything that shall obstruct us."(Aristotle, 1963: 100a *apud* Kreuzbauer, 2008: 58). The table below shows Aristotle's topics.

| Common Topics | Special Topics |
|---|---|
| Genus / Species<br>Division<br>Whole / Parts<br>Subject / Adjuncts<br>Comparison<br>Similarity / Difference<br>Degree<br>Relationship<br>Cause / Effect<br>Antecedent / Consequence<br>Contraries<br>Contradictions<br>Circumstances<br>Possible / Impossible<br>Past Fact / Future Fact<br>Testimony<br>Authorities<br>Witnesses<br>Maxims or Proverbs<br>Rumors<br>Oaths<br>Documents<br>Law<br>Precedent<br>The supernatural<br>Notation and Conjugates | Judicial<br>justice (right)<br>injustice (wrong)<br>Deliberative<br>Definition<br>the unworthy<br>the advantageous<br>the disadvantageous<br>Ceremonial<br>virtue (the noble)<br>vice (the base) |

Aristotle 2.23. *Silva Rhetoricae* (http://rhetoric.byu.edu)

## *Rhetoric as communication*

Discussion of problems or resolution of difficulties implies the fact that the problem or difficulty is already identified when the search for arguments and recourse to *topoi* begins. In argumentative discourse the speaker knows what he wants to do, the contended object as well as his opinion is clear from the very start. In the case of normative discourse, the concern of the speaker (drafter) is with finding areas that are related to the object of his discourse and describing ways in which such areas should exist so as to ensure agreement, satisfaction, well-being of the beneficiaries. Here lies the first "macro *topos*" of the normative discourse, "the good" as opposed to "the evil". This goes as far back as Aristotle's special topics **right, advantageous, virtue** (see the table above). To discuss the rhetoric of normative discourse we need to use the approach that sees discourse as symbolic

interaction, driven by intentionality and instrumentality. A different purpose will require different instruments.

Teun A. van Dijk (2000) identifies topics as semantic macrostructures, representing what speakers find most important. In his view "topics operate as regulators of the overall coherence of discourse, they point to how discourse is planned and globally controlled and understood, and are best remembered by the recipients". In such capacity, in discourse, topics may be typically *expressed* (and hence studied) in announcements, summaries, headlines, conclusions and thematic sentences.

Ducrot and Anscombre (1983) extend the scope of rhetoric by claiming the argumentativity of language in general. They provide a theoretical framework in which *topoi* are gradual inference rules in many cases argumentation is based upon. These rules link gradual properties called topic fields. According to them (Ducrot and Anscombre, 1983: 149-150 *apud* Tuţescu) *topoi* are tracks to follow if reaching a determined conclusion is intended. Scaling underlies argumentation understood in this way. This is a pragmatic approach to *topoi*, as linguistic representations of action – and knowledge – which fall within the domain of Pragmatics and Linguistics of Enunciation. According to this theory, *topoi* are common sense rules which deal with the ordering of quantities in their respective space (Trousse and Galaretta, 2004: 1).The linguistic predicates are seen as degrees of these topical fields. Given two topical fields P and Q a *topos* has one of the following forms:

\the more x is P, the more y is Q" or \the more x is P, the less y is Q"
or \the less x is P, the more y is Q" or \the less x is P, the less y is Q".
where x and y are members of the fields P and Q respectively.

Ducrot notices that *topoi* are discourse fragments contained (written) in (at least some) words of the language-system. According to him, words can describe related kinds of conduct viewed in different ways. Ducrot would say that in the language-system itself, we have two *topoi*, T1 and T2, for every situation: in his example of the words *courageous, timorous*, *prudent* and *rash* topos T1 ascribes value to the fact of confronting danger, to the fact of taking risks, and it does so by relating the notion of risk and the notion of goodness. Topos T2, on the contrary, relates the notion of risk and the notion of evil (badness).

In law, *topoi* related to the way something ought to be done according to one value position (normative), can conflict when values according to which norms are made conflict themselves. Thus, the good brought about by complying to the laws devised to curb, dissuade, punish crime is evil from the point of view of the protection of the right to freedom, in case a conviction has been wrongful.

Another way *topoi* can be seen is as linguistic translation and descriptors of actions within argumentation. Grandchamp (1995: 305-306) proposes, for a given utterance, the construction of the signification of the underlying sentence, which

captures its polyphonic and argumentative aspects. The signification of a sentence is viewed as the application of an argumentative super-structure to the signification of Terminal Sub Sentences, free of operators or connectives. The signification must finally be interpreted in the context of the utterance.

## *Methods of proof to secure adherence*

Perelman (1958) identifies the need for a judge to make his decision acceptable. He also mentions the relevant intellectual procedures that make the latter fulfil that need, introducing a theory of non-stringent reasoning (*le raisonnable* as opposed to *le rationnel*) which does not meet the criteria of validity required by formal logic but is nonetheless reasonable, plausible or acceptable. A feature of this form of reasoning is the *"topoi",* certain theses whose acceptance by the audience can be assumed and from which the arguer can proceed to develop his line of reasoning. As Aristotle was the first to list such *topoi* in his *Rhetorics,* Perelman calls his theory "new rhetoric", seen as the art of increasing the acceptance by an audience of principles presented to it and as a particularly suitable technique for obtaining assent in arguments about values, and therefore typical of legal argument.

Perelman's foremost insistence is on the importance of the audience in any kind of rhetorical reasoning (s. *52)*. He raises the question, "who is the audience of a judgment?" and helps to account for the wide differences of judgment style between the courts of the major legal systems.

For the *New Rhetoric* (Perelman, 1958/1983: 113) – *topoi* are not places that hide arguments any more, but very general premises that help us build values and hierarchies. Perelman identifies a topical mode of reasoning in the way justice administration operated in the French civil law in the third and most recent of three main periods that he identifies. The following table illustrates his findings:

| **Purpose of actions: To fulfil the function of law** | |
|---|---|
| Exegetical school<br>1790 – 1880 | - attributing a fact situation to a certain fixed legal category;<br>- supplying the minor premise and inevitable conclusion to a principle of the Code. |
| Functional and sociological school<br>1880 – 1945 | - using arguments, not of formal logic, but arguments such as a contrario, a fortiori, analogy, reductio ad absurdum and so on (s. 33);<br>- making use of fictions and irrebuttable presumptions;<br>- judges' willingness to modify the law (s. 36). |

| | |
|---|---|
| Topical mode of reasoning 1945 – present | - the reasoning process follows, rather than precedes, the choice of solution;<br>- the decision determines the course of the reasoning of the judgment, rather than the other way round;<br>- needs to obtain the assent of the community to the solution, i.e. to justify it, preventing purely subjective and whimsical decisions and ensures still some predictability and stability in the law. |

*Apud* Prott, 1976: 558

## *Topoi in the legal theory of Herbert L. A. Hart*

Analysing the use of topics, Herrero (1999) intends to find a place for interpretation within the legal theory of Herbert L.A. Hart in view of identifying "the potential benefits of collaboration between what we call continental legal thinking and English speaking legal thinking". The two approaches of topics Herrera focuses on are one from the ancient style of legal reasoning, lasting through renaissance to this century due to Theodor Viehweg, and the other, Perelman's "new rhetoric" – connected to Hart's legal thinking, recognizing the central role of the idea of acceptance in the three identified approaches to the law. (rules – primary, secondary (of recognition), open texture, discretion)

*Topics* as Viehweg understands them, like the *new rhetoric*, focus on the awareness of law being limited as a system, the legal reasoning argumentative and dialectical nature, as well as that of a technique aimed at providing solutions to particular legal problems, the need to have the acceptance of the target or beneficiary represented both by the legal community and the public at large.

## *Legal Topoi characteristics*

Herrero (1999: 167), inspired from Aristotle, discusses *topoi*'s function of providing premises of arguments used in dialectic discourse as 1. "places where we directly find premises" – geographical metaphor; or 2. "places where we do not directly find premises but only ideas about how to build them" – linguistical words or sentences. As such, *topoi* possess a certain degree of generality: linguistically they are terms more general than the premises they help to build. Also topoi enjoy a certain degree of general collective acceptance as being plausible.

The feature of generality enables *topoi* to play a role in organising texts, while their plausibility another one in text acceptance.

As Esser (1956) has argued, four specific judicial *topoi* help the judge in these cases to arrive at a solution. The solution in turn is acceptable for going along a track recognized by the members of the professional community within a "field"

bounded by commonly accepted value-judgments. The specific *topoi* are reason (natural reason), equity, the nature of things (*Natur der Sache*) and, finally, the implicit logic of the legal order. The latter topos relates various fields of law to each other. The fields in turn are characterized by topical orderings and the acceptance of "standard-solutions" for various "law jobs" (Kratochwil, 1989/1995: 142). Among the *topoi* of particular importance in legal reasoning are „the general principles of law" and the traditional maxims**.**

Esser identifies the constituent elements of a legal system as rules of law (in precedents or statutes) on how particular questions are to be decided, and additional elements like legal maxims, general clauses, concepts, institutions, doctrines, the rules of the legal art. The latter are intended with the following meanings:

General clauses, in German terminology, are sections of a code or statute which do not contain a definitely formulated rule of law but refer the judge to some extralegal standard. For example, according to the German Civil Code, a promissory has to perform his promise in accordance with *good faith and fair dealing.* As to the American law, an example of the use of a general clause is when reparation is demanded of one who has invaded another person's interest in bodily security by failing to exercise *the carefulness of a reasonable man.*

"concept" – in a narrower sense, viz. in that of fixed patterns of thought and articulation which are used consistently whenever reference to the thought pattern in question occurs in the course of legal thinking. E.g. such terms as title, fee, contract, easement, heir.

Institution – not expressly defined – such phenomena as property, marriage or family, in which a large number of typically interrelated patterns of behaviour are recognized as belonging together and such recognition has found articulation in a concise term of generally understood but not always clearly defined meaning.

Doctrines – the formulations of alleged necessities of legal significance, such as the proposition no promise can be legally valid without a consideration, or that an expectation created in one person by the words or conduct of another must be protected or that the intention of contracting parties that their contract be governed by the law of a certain state cannot be valid unless such a choice of law is permitted by the proper law of contract.

Rules of legal art or craftsmanship indicate how a precedent is to be used, a statute to be interpreted, an instrument to be construed. Subtle and rarely articulated, they are considered „the constitutional law of judicial legislation".

All these are brought together under the name of „principles", contrasted as such with the separate „rules of law".

## *General principles of Law*

Dworkin (1967: 22-28) distinguishes among rules, principles, policies and standards. Referring to sources of international law, the Encyclopaedia Britannica mentions as "A third source of international law identified by the International Court of Justice's statute, „the general principles of law recognized by civilized nations." **Good faith**, the most important principle of international law, governs the creation and performance of legal obligations and is the foundation of treaty law.

Another important general principle is that of **equity**, which permits international law to have a degree of flexibility in its application and enforcement. The Law of the Sea treaty, for example, called for the delimitation on the basis of equity of exclusive economic zones and continental shelves between states with opposing or adjacent coasts.

## *General principles of Community Law*

The Treaty Provisions in Article 164, Article 173 and Article 215 (second paragraph) identify three groups of general principles of law: principles of administrative legality and due process, the economic pillars of the internal market, and fundamental rights.

There are also general principles which pervade all three categories. One of them is **Equality** present in Article 141 (TEC) on non discrimination:

*1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied….*
*3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value…..*

Other general principles are that of fundamental human rights, the supremacy of EC law, even if in conflict with the Member States' constitution or Proportionality (*Verhältnismässigkeit).* A different category of principles refers to **procedural rights** – right to a hearing **„the rights of the defence", non-self-incrimination** and **legal representation.** Also there are the principle of **legal certainty** – principle of **legitimate expectations** and the principle of **non-retroactivity**.

## *Traditional Maxims*

We randomly exemplify the category with four maxims: *audi alteram partem*, *ipso iure, onus probandi* – burden of proof, *Actus non facit reum nisi mens sit rea* – The act does not make one guilty unless there be a criminal intent.

e.g. *Transocean Marine Paint Association v. Commission*. This case made extensive references to English law in adopting the right to a hearing into Community law. Advocate General Warner examined the various legal systems of Member States and emphasised the role natural justice played in England. He showed that the notion of *audi alteram partem* is, in one way or another, also present in most other Member States. The Court adhered to Warner's opinion when it stated that „a person whose interests are perceptibly affected by the decision taken by a public authority must be given the opportunity to make his point of view known". This was considered by the Court to be a general rule of Community law. This principle was later referred to by the ECJ as **„the rights of the defence"** and today also covers rights such as that of **non-self-incrimination** and **legal representation** (Mifsud-Bonnici: 1996).

## *Topoi in Laws*

The first matter to be established when setting on the analysis of *topoi* in specific texts or classes of texts is what *topoi* will be looked for. Choosing among the various interpretations should be made as a function of the way the respective concept helps in the analysis of the genre itself.

It is common sense and self-evident that both Aristotle's common and special (judicial – justice – right vs injustice - wrong) topoi are present in laws.

Mann (1972: 217) mentions the legal *topoi* of causation, foreseeability, due process, reliance, interest and reasonableness as identified by Vieweg (1972), Esser (1956: 20, 47f, 59-65, and 185) and Dworkin (1967). Dworkin mentions that principles as well as concepts and doctrines can be carriers of legal *topoi.*

Taking Van Dijk's course to topics as "regulators of the overall coherence of discourse" (Section 1 above), we look at summaries, headlines, conclusions and thematic sentences in laws to see what *topoi* they express.

Following Ducrot, we can see what gradual inference rules, topic fields, voices operate in laws.

Finally it can be noted, in Perelman's spirit, the role the audience plays or how it models the configuration of laws.

## *British Law*

We have looked at the Education Reform Act 1988 Chapter 40 to find out what *topoi* it includes. We believe that the "overall coherence of the discourse" is justified by the purpose of the document as best fulfilled in the drafter's professional opinion so as it meet all the expectations of the law's beneficiaries or addressees. The purpose is stated in the long title of the law, placed at the very end of the text: "An act to amend the law relating to education." The self-understood purpose, considering that the amendments it contains automatically discard previous provisions of similar nature, is to regulate all activities and institutions involved in education.

In its electronic format, the law bears the Official Coat of Arms of the United Kingdom of Great Britain and Northern Ireland and the title Education Reform Act 1988, subtitle Chapter 40, the specific date of issue in square brackets: [29th July 1988] and has four sections (parts) and 13 schedules. It also has a preamble.

The preamble establishes the authority of the law. Due form is established by the right author, "the Queen's most Excellent Majesty", in the right circumstances, "by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same". The performative act of legiferation is expressed by the formula: "Be it enacted".

The scope of jurisdiction is specified as "England, Wales and Northern Ireland, also the basis for the United States' No Child Left Behind Act of 2001".

The object, i.e. the relations and activities it regulates – education, is present in the very title, while the collocation it is in, "Education Reform" points to the fact that this is the amended version of the law, excluding provisions that have been replaced with amended versions.

The sections are entitled: Schools, Higher and Further Education, Education in inner London, Miscellaneous and General. The Schools section includes five chapters: the Curriculum, Admission of pupils to county and voluntary schools, Finance and staff, Grant-maintained schools, and Miscellaneous. All parts, including the Miscellaneous and General, have "Miscellaneous" sections: Miscellaneous (Part 1), Miscellaneous and Supplementary (Part 2), Miscellaneous and Supplementary (a subsection of Part 3, which does not have chapters) and Miscellaneous provisions – a subsection of section 4.

The Curriculum chapter has eight subdivisions: Preliminary, Principal provisions, Religious education, Duties with respect to certain requirements, Standing advisory councils on religious education, Curriculum and Assessment Councils, Special cases, Supplementary.

*1 Duties with respect to the curriculum*

*(1) It shall be the duty—*

*(a) of the Secretary of State as respects every maintained school;*

*(b) of every local education authority as respects every school maintained by them; and*

*(c) of every governing body or head teacher of a maintained school as respects that school;*

*to exercise their functions (including, in particular, the functions conferred on them by this Chapter with respect to religious education, religious worship and the National Curriculum) with a view to securing that the curriculum for the school satisfies the requirements of this section.*

*(2) The curriculum for a maintained school satisfies the requirements of this section if it is a balanced and broadly based curriculum which—*

*(a) promotes the spiritual, moral, cultural, mental and physical development of pupils at the school and of society; and*

*(b) prepares such pupils for the opportunities, responsibilities and experiences of adult life.*

## *Romanian Law*

The Romanian "*Legea educaţiei naţionale*" states the principles that have been observed in drafting the law at the very beginning. There are 13 principles stated in Title I Art. 3: from equity, quality and relevance to focusing education on its beneficiaries.

If we look at Title I, Article 2, Paragraph (1):

*(1) Idealul educaţional al scolii româneşti constă în dezvoltarea* ***liberă, integrală şi armonioasă*** *a individualităţii umane, în formarea personalităţii autonome şi în asumarea unui sistem de valori care sunt necesare pentru împlinirea şi dezvoltarea personală, pentru cetăţenia activă, pentru incluziune socială şi pentru angajare pe piaţa muncii.* (The educational ideal of the Romanian school consists in the **free, complete and harmonious** development of individuals, building autonomous personalities and enabling embracing the value system needed for personal fulfilment and development, in view of exercising active citizenship, achieving social inclusion and finding employment in the labour market.)

we can fiind issues that can be formulated as *topoi* the way identified by Ducrot and Ascombre:

*The more harmonious, free and complete an individual is as a result of being educated within the Romanian education system, the closer the system is to its ideal.*

or again the reverse:

*The less harmonious, free and complete an individual is as a result of being educated within the Romanian education system, the farther the system is from its ideal.*

Such formulations become practical indeed when, for instance, someone in the appraisal mechanism looks for reasons behind poor social inclusion, or unemployment claimed to be avoided in a system governed by the proposed Law on Education. Once the fault in the text of the law is found, or in its enforcement, the possibility exists that the situation be amended.

As in the case of the British law, the elements or *topoi* that make the law enforceable are present, like the scope of jurisdiction, the object i.e. the relations and activities it regulates viz. education, main modifications from previous statutes, entry into force, and stakeholders.
It includes seven sections called "Titlu" (title). The first and last of a general character (Dispoziţii generale and Dispoziţii tranzitorii), while the middle five cover areas of education: the national education system including Învăţământul preuniversitar, Învăţământul superior and Educaţia permanentă, curricula, management, human resources, public education assets and financing.

## *Conclusion*

*Topoi* are present in laws and contracts as organising factors, either expressed or implicit, capturing polyphonic and argumentative aspects: a law in force is the expression of the acceptance of the audience for whom it has been meant. Their scalar nature plays an important part in ensuring the "all-inclusiveness" of the law, allowing the actors in charge with enforcing the law to decide whether a certain feature of an act under scrutiny falls to a larger or smaller extent under the jurisdiction of the respective law.

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***The author***

**Alexandra Anca Codreanu** was a Lecturer in English for Business Communication at The Bucharest Academy of Economic Studies. She is a trainer in Legal English at the National Institute of Magistracy (INM). Also she is a materials designer for academic courses and textbooks on English for Law and for business communication.