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The Impact of Rhetoric on Jerome Frank's "Digestive Jurisprudence"

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Abstract: The paper analyses the relationship between law and rhetoric and their intersection areas, particularly focusing on the significance of rhetoric in contemporary judicial proceedings. In the 20th century, the issue of the relationship between law and rhetoric (explicitly or implicitly) became relevant particularly through the scientific excellence of the school of American legal realism, but more recently, it has been somewhat neglected. The authors of this paper devote particular attention to the judicial decision-making theory of Jerome Frank, a prominent legal realist. It is for his radical positions, as a fact sceptic, that he seems to have unconsciously, subtly but persistently, woven into his works the idea of the importance of rhetoric in judicial decision-making processes.

The authors explore the reasons behind Frank's hesitation for most of his scientific career to give rhetoric (particularly that of Aristotle, which he quoted most) its deserved place. It was only in one of his later works that Frank attempted to build a bridge between his judicial decision-making theory (insisting on the importance of prejudices and subjectivities of a judge to the judicial decision) and rhetoric (aimed at persuading the judge, evoking his emotions, and creating the image of a particular reality in his eyes). It seems that his effort was only a partial success because, even then, he primarily focused on the methods of touching the "souls of the audience", overlooking the importance of the rhetorical means (primarily logical) that did not lend support for his theory.

Keywords: Jerome Frank, digestive jurisprudence, rhetoric, Aristotle.

INTRODUCTION

Since its very beginning, rhetoric has in some way continually developed hand in hand with law. The dominant opinion is that it evolved as a theoretical discipline from the oratorical practice, precisely from the forensic oratory of Ancient Greece. Given the nature of those poleis and the society in which a man most often had to represent himself personally in disputes, the mutual dependence between rhetoric and law was more than obvious. The law's heavy reliance on rhetoric in judicial proceedings was doubtlessly influenced by the jury character of the trial (particularly in democratic Athens), where lay citizens took part in the decision-making process, and they had to be swayed by speech (Gagarin, 2017).

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Initially, it seems that little can be added about the relationship between law and rhetoric beyond what ancient authors have already said. While there is an almost inexhaustible body of literature about their correlation in antiquity (e.g. Lanni, 2006; Bablitz, 2007), a more recent theory has paid little attention to their modern relationship. This topic was made relevant at the conceptual level (through judicial decision-making theories) in the first half of the 20th century by the representatives of American legal realism (particularly Jerome Frank), but without a separate, explicit analysis of the intersection points of these two fields. Thus, for example, Karl Llewellyn (1930: 450–451), in one of his most influential articles, focuses only on defining rhetoric as the art of handling legal rules: "One observes the importance of the official formulae as tools of argument and persuasion; one observes both the stimuli to be derived from, and the limitations set by, their language. Very rapidly, too, one perceives that neither are all official formulae alike in these regards, nor are all courts, nor are all times and circumstances for the same formula in the same court. The *handling* of the official formulae to influence court behaviour then comes to appear as an art, capable only to a limited extent of routinization or (to date) of accurate and satisfying description." In modern theory, the problem of the legal-rhetorical relationship receives particular attention from the Belgian lawyer and philosopher Chaïm Perelman (Perelman & Olbrechts-Tyteca, 1969). Also, the efforts of Neil MacCormick in this field should not be neglected. In his attempt to resolve the tension between Rule of Law and legal certainty, bearing in mind arguable character of law, MacCormick (2005: 280) comes to the conclusion that "it is everyone's right to develop the best argument they can on any problem" and "that right is also grounded in respect for the Rule of Law". In that way, MacCormick (2005: 33) follows the path set by John Dewey towards 'defeasible certainty'. MacCormick (2005: 280) is aware that any fact can be twisted by rhetoric of immoral lawyers, but he clearly states that "that is not within the legitimate rhetoric of their profession, but is a betrayal of it".

This paper will focus on the influence of rhetoric (primarily Aristotle's rhetoric) on the judicial decision-making theory of Jerome Frank, who is regarded as the most radical and extreme representative of American legal realism (Avramović, 2021). His view is most often labelled in a derogatory way as "digestive jurisprudence", due to its emphasis on the influence of various subjectivities on the judge's decisions in particular cases (which is often banalized by the example of a full or empty stomach of the judge, i.e. whether the judge was hungry or overeaten during the trial). The term 'digestive jurisprudence' is considered to have emerged from a work of Felix Cohen (1937: 9), who, describing the potential factors affecting judicial decisions, included, among the weakness of intellect, political beliefs, and economic backgrounds, the "digestive disturbances" (Tuzet, 2023). The American legal realists' approach to judicial decision-making Erhenzweig (1969: fn. 19) defines as the "breakfast rule".

Even at first glance, it becomes clear that a connection between the analysis of various prejudices (pre-judgments) in judicial decisions (based on parties' physical appearance, dressing style, social status, gesticulation, adopted behaviours, education, temperament, etc.) and rhetoric, as the art of persuasion (convincing), must be or has already been made. However, a thorough analysis of Frank's work (which pays full attention to the influence

of the personality and behaviour of judges and jurors on the legal outcome) proves the contrary.[3] Let us start from the beginning.

THE PLACE OF RHETORIC IN THE MOST FRUITFUL PHASE OF CREATIVITY OF JEROME FRANK

This section of the paper will cite and analyse the places in Frank's works where he touches on rhetoric (especially that of Aristotle). Particular attention will be given to Frank's capital works *Law and the Modern Mind*[4] and *Courts on Trial*[5].

In his anthological work *Law and the Modern Mind*, Frank makes altogether three references to Aristotle. First, when he speaks about the impact of Aristotle's scientific method on scholasticism (Frank, 2009: 69–70). Second, when he points to Aristotle's conception of *equity* as the modification of rules in their application to a particular case – through judicial discretion (Frank, 2009: 149–150). Thereby he quotes the passages from Aristotle's *Politics* and *Ethics*. And finally, third – when he writes about Aristotle's conception of equity further on, this time (the only time in this book) by explicitly referring to the particular passage in Aristotle's *Rhetoric* (Frank, 2009: 168–169). Here, he quotes and relies on Aristotle's determination of equity: "To pardon human failings, and to look to the law giver and not to the law; […] to prefer arbitration to judgment, for the arbitrator sees what is equitable, but the judge only the law, and for this an arbitrator was first appointed, in order that equity might flourish" (Aristotle, 2007: 1347b). Frank sees the judge not as a logical automaton, but as an arbitrator, a "sound man", who brings justice to the parties, making wise use of the possibility of discretion.

In another passage, Frank also refers to Cicero (as a lawyer, though), specifically criticizing his saying *Legibus servimus ut liberi esse possimus* (We are in bondage to the law in order that we may be free). Frank finds this saying pretty but also primarily rhetoric since he himself does not view the law as a machine or judges as machine tenders. Nevertheless, like with Aristotle, in mentioning Cicero, Frank makes no explicit mention of rhetoric (or Cicero's *De Oratore*) or rhetorical instruments, except the remark about the cited Cicero's saying being rhetoric.

Although in *Law and the Modern Mind* Frank does not essentially deal with ancient rhetorical heritage (which seems inevitable to him), he indirectly, in several places, touches on the very essence and basic elements of rhetoric – the orator and the audience (but almost never using these terms). For example, when he refers to various judges' and jurors' prejudices (racial, religious, political, economic) that directly affect judicial decisions, he speaks of individual, concealed, unconscious prejudices, such as physical appearance, tone of voice, and gestures. He further includes "plus or minus reactions to women, or unmarried women, or red-haired women, or brunettes, or men with deep voices or high-pitched voices, or fidgety men, or men who wear thick eyeglasses, or those who have pronounced gestures or nervous tics" (Frank, 2009: XXV).

3 This research was inspired by a great piece of work that points to Frank's familiarity with and frequent quoting of Aristotle's Rhetoric, but not the passages related to rhetoric as a way of arguing the facts and persuading the judges but, surprisingly, primarily the ones related to philosophical questions (Anapol, 1970: 17).
4 Originally published in 1930.
5 Originally published in 1949.

Frank (2009: 115; 1973: 151) further notes that the judge's sympathies and antipathies largely depend on the personality of witnesses, lawyers, or parties in a case: "His own past may have created plus or minus reaction to women, or blonde women, or men with beards, or Southerners, or Italians, or Englishmen, or plumbers, or ministers, or college graduates, or Democrats." Moreover, he draws attention to the fact that a twang, cough, or gesture can arouse painful or pleasant memories in the judge, which, in the case of a witness, can affect his wrongful perception of both the witness and the witness's testimony (Frank, 2009: 115; Frank, 1973: 151). That both physical and mental traits of the speakers (only witnesses, in Frank's case, because he did not associate them with orators) are important, Frank emphasizes by criticizing the impossibility of second instance courts (which do not typically hear testimonies) to have full insight into testimonies. Because, as he says, the tongue is not the only organ for conveying testimony – also crucial are the manner, tone, and eyes (Frank, 2009: 118). The upper court that hears the words only indirectly (having only a stenographic report before it) has an incomplete insight due to not actually seeing the witness testifying. Therefore, Frank (2009: 117) pays full attention to the following elements (as Nušić (2017) would put in his *Rhetoric* to both the inward and the outward of an orator): his look, the pitch of his voice, his posture, his yawns, his expression, his bearing, his gestures, his shrugs, his eyes, the hesitation or readiness with which his answers are given, his self-possession or embarrassment, his air of candour or of seeming levity. Aware that judging is not a mechanical process executed by the judge, Frank essentially dealt with the different feelings and characters of the orators (participants in a lawsuit), but he failed to call things by their proper names.

On the importance of oratorical talent, Frank reflects only once in this work, notably when he writes that many judicial decisions are a result of irresponsible jury caprice or prejudice. As facts that are often decisive for the success of a lawsuit, Frank (2009: 191) specifies "that the defendant is a wealthy corporation and the plaintiff is a poor boy; that the principal witness for one of the parties is a Mason or a Catholic; that the attorney for the accused is a brilliant *orator* (underlined by the authors)". Thus, he indirectly acknowledges the importance of rhetoric and oratorical skill, ranking it high as one of the three exemplary facts that can decide the outcome of a case.

In Frank's mature work *Courts on Trial,* he quotes Aristotle on many occasions, but mostly in passing and by referring to general passages – on pages 139, 193–194 (on the importance of practical wisdom, experiences in politics, medicine), 221, 265, 293, 381, 378 (about differences between legal and equitable justice), 401, 404, 405, 406–407 (about government of laws, and not of men), 424 (about distinguishing between the desirable and the possible). He makes only a few references to Aristotle's *Rhetoric*, two of which are particularly important, as this is where he is coming closer to the significance of rhetoric for his theory. The one remaining Frank's reference to Aristotle's *Rhetoric* (1371b) has no relevance for this paper because it involves the part concerning the feeling of pleasure (Frank, 1973: 272).

In one of the places, Frank deals in greater detail with Aristotle's *Rhetoric* (partly also with *Nicomachean Ethics*) but primarily with the attitude of this famous philosopher towards natural law and equity. Moreover, Frank criticizes the followers of the natural law school precisely for not carefully reading Aristotle's *Rhetoric* and paying attention only to the parts concerning natural law (as they regarded Aristotle as one of the first and most influ-

ential advocates of that idea). Their focus, in Frank's view, is general, like one on parallel validity (alongside written laws) of the general, universal, unwritten, natural laws that apply at all times and places. Most of Frank's criticism is directed at their failing to note that Aristotle's *Rhetoric* is largely a handbook on how to win a lawsuit and their disregarding the passage where Aristotle says that, whether one likes it or not, winning in court requires appealing to the prejudices of judges and jurors (Frank, 1973: 358).

However, Frank, too, fails to go beyond what he already stated about these, even in his view, important passages of Aristotle's *Rhetoric*. On the contrary, he also slips into the field of iusnaturalists, continuing the discussion about justice and equity. Using the figure of modesty (that he is an amateur in philosophy), he, nevertheless, accepts the view that Aristotle's use of the words "natural" and "by nature" is inconsistent with respect to human matters, which brings him closer to the opinion that Aristotle's natural law represents an ideal that is acceptable for people but incapable of being fully realized (Frank, 1973: 360). A little later, still dealing with natural law, he points to Aristotle's influence on Aquinas (Frank, 1973: 363, 366).

At the end of a part of the book *Courts on Trial* that is devoted to natural law, he once again refers devotees of the natural law idea to re-read Aristotle's *Rhetoric*. However, Frank here takes a significant step further and, notably, comes closest to Aristotle's rhetoric. He does not fail to emphasize the importance of the facts in the judicial process that Aristotle insisted upon. At the same time, he points out to iusnaturalists (who, in his view, ignore the subjectivity problem) that Aristotle also refers to other things that affect judicial decisions. These things include the judge's feelings, emotions, and prejudices that can lead to the distorted image of the truth, which is why litigants must know the ways of "working on the emotions of the judges" (Frank, 1973: 372). At this point, Frank quotes Aristotle in a footnote, emphasizing that he was also aware of the frequent unsuccessful testimonies due to the manipulation of the judge's feelings.

In this book, Frank (1973: 380) further draws attention to the fact that general passages of judicial oratory preserved in Aristotle's *Rhetoric* unambiguously show that the problem of pure law had constantly been called into question regarding everything else that could influence the judges' reasoning. However, Frank stops at this point; he does not go on to analyse characters and feelings, even less the logical rhetorical instruments present in Aristotle's *Rhetoric*.

Furthermore, when Frank (1973: 347) touches on Cicero in this work, he sees him primarily as a philosopher rather than an orator. He criticizes him for being a devotee and representative of natural law ideas (the principles of universal, eternal justice, legal equality) who acts differently in practice - e.g. defending Catiline, of whom it was clear to everyone that he was guilty (Frank, 1973: 350–351). In Frank's words, Cicero "did nothing to close the gap between those ideals and the judicial realities. He kept his noble principles in one pocket and his actual lawyer's practices in another" (Frank, 1973: 35). Frank (1973: 34) sees Cicero's ideals, such as that of equality before the law, as untrue if similar cases are decided differently "solely because of inequalities in the skills in wiliness of lawyers". In this place, although again not explicitly, Frank actually pointed to the importance of oratorical qualities in judicial proceedings and, indirectly, to the importance of Cicero as one of the greatest not only lawyers and philosophers, but also orators in ancient Rome. Despite this critical attitude towards Cicero due to deviation from his ethical ideals and natural law to

which he was adherent, Frank (1950a: 255) explicitly writes about the importance of Cicero's oratorical skill for the outcome of a judicial proceeding in a later article.

In the book *Courts on Trial*, Frank indirectly touches on rhetoric and oratory in several places. At the very beginning, he points out that in the courtroom battle, the parties do not use weapons or physical force but mainly verbal weapons, ones of persuasion as a means to influence the "consciousness" of the judge or jury to rule in their favour (Frank, 1973: 9). Frank believed that judges, like other people, suffer from human weaknesses. This is especially evident during the hearing of witnesses. In this book as well, Frank indirectly indicates the importance of rhetoric during testimony. As he says, judges "must determine the facts from what they see and hear, from the gestures and the other conduct of the testifying witnesses as well as from their words" (Frank, 1973: 22). Thus, Frank (1973: 186) sees the trial as a communicative process. And judges, as beings of flesh and blood, are not immune to numerous unconscious, hidden prejudices and prejudices rooted in childhood, which affect the correct determination of facts (and therefore their decisions). This is another point where Frank draws attention to what is also the main subject of interest of rhetoric – the importance of the personality of the speaker, his gestures, facial expressions, etc. "The judge's belief about the facts results from the impact of numerous stimuli – including the words, gestures, postures and grimaces of the witnesses – on his distinctive 'personality'; that personality, in turn, is a product of numerous factors, including his parents, his schooling, his teachers and companions, the persons he has met, the woman he married (or did not marry), his children, the books and articles he has read" (Frank, 1973: 152). What makes the legal outcome uncertain is that no one can know with certainty in advance (before the trial) what the stimuli will be – the words and gestures of the witness, or how the judge or juror will react to those stimuli (Frank, 1973: 337).

Based on the analysis of Frank's most fruitful phase of creativity that yielded these two capital works, it can be preliminarily concluded that Frank was not unobservant of the importance of rhetoric (as evidenced by the analysed passages clearly showing that he dealt with it indirectly), but for some reason he was unwilling to deal with it explicitly, or specifically, to establish a bridge between law and rhetoric.

FRANK'S READING OF ARISTOTLE'S *RHETORIC* WITHOUT ARISTOTLE'S RHETORIC

Frank's theory of judicial decision-making calls out so much for the establishment of a connection with rhetoric, which is more than obvious, that it seems incredible that Frank consulted Aristotle's *Rhetoric* without paying attention to rhetoric itself but primarily to the parts dealing with philosophical topics (natural law school, justice, the idea of equality). At first glance, one gets the impression that the rhetorical elements of persuading the judge were secondary to other elements of "digestive jurisprudence". Is that really so?

In his *Rhetoric*, Aristotle paid special attention to the feelings that can and should be evoked in the judge, because he knew that the judge's subjective belief ("judge's certain frame of mind") is one of the ways to the desired legal outcome. He criticized the old manuals of rhetoric that were almost exclusively focused on the ways of igniting passions and emotions in judges, without dealing with enthymemes that form the "body of per-

suasion" and concern the subject, the facts. However, Aristotle (2007: 1354a) was aware that "verbal attack and pity and anger and such emotions of the mind do not relate to fact but are appeals to the juryman". He praised the Athenian Areopagus for forbidding the speaking out of the subject, "for it is wrong to warp the jury by leading them into anger or envy or pity: that is the same as if someone made a straight-edge ruler crooked before using it" (Aristotle, 2007: 1354a). This, however, does not mean that Aristotle did not deal with feelings and characters, on the contrary. He believed that to be convincing, one must arouse the listeners' feelings, "for we do not give the same judgment when we are grieved and rejoicing or when being friendly and hostile" (Aristotle, 2007: 1356a). For this reason, he dedicated a significant portion of the second book of *Rhetoric* to the analysis of the traits of different characters, as well as feelings, and various ways of influencing the audience' souls (which this paper will not address with special attention, as neither Frank did, and it seemed necessary).

In forensic oratory, in addition to persuasive arguments, it is particularly important for the speaker "to construct a view of himself as a certain kind of person and to prepare the judge" and gain the affection of the listeners (Aristotle, 2007: 1378a). Aristotle (2007: 1378a) regards as essential in forensic oratory to evoke a certain mood in the audience, "for things do not seem the same to those who are friendly and those who are hostile, nor [the same] to the angry and the calm but either altogether different or different in importance: to one who is friendly, the person about whom he passes judgment seems not to do wrong or only in a small way; to one who is hostile, the opposite…".

It is very unusual that Frank did not deal with at least some, for his theory, key points of Aristotle's *Rhetoric* and, above all, those related to feelings, emotions or, as Aristotle (2007: 1378a) would say, "things through which, by undergoing change, people come to differ in their judgments". Is it because he considered that the importance of rhetoric is inevitable and self-evident, or maybe because he wanted to put in the foreground other elements (primarily psychological) affecting the judge's decision-making that have not been sufficiently valued until then?

CONCLUDING REMARK – FRANK ON THE WAY TO ESTABLISHING A BRIDGE BETWEEN LAW AND RHETORIC

One could get the impression that Frank, in his most fruitful phase of creativity, was somewhat wary of Aristotle's understanding of rhetoric, which seemed to him not to be completely consistent with his theory of judicial decision-making. This is evident in his unwillingness to quote some important passages of Aristotle's *Rhetoric*. Indicatively, in the part of the text related to the education of lawyers, in the book *Courts on Trial*, Frank (1973: 245; 1948: 957) hesitates to direct to or even recall Aristotle's *Rhetoric*, while he does so in the part of an almost identical text, he published a year earlier in a scientific article titled *Say It with Music*. In both places, Frank discusses Max Rheinstein's comments on the reform of the legal education curriculum he advocated toward the "science of administration of justice" and the suggestion he accepted that it is not really a "science" but the "art of administration of justice".

Rheinstein believed that the deficit of American legal education at the time (which was based primarily on "law in books") had historical roots. As he notes, three groups of people dealt with law in ancient Rome: the jurisconsults, the orators, and practical politicians. However, only the work of jurisconsults became the foundation of all legal science, not only in Civil Law but also in the Common Law orbit. Practical work in the administration of justice remained outside the lawyer's field of interest and education (Frank, 1973: 244). Here, Rheinstein meant primarily the absence and significance of oratorical skill and practice. Following this lead, in a later article, Frank returns to the Roman jurisconsults who, as he puts, gave legal opinions based on hypothetical statements of facts and looked down upon the practicing advocates (this time Frank calls them the "orators") who participated in trials and fact-finding procedures (like Cicero, who, using the tools of his skill, appeared in court and won). He relates this point to modern jurisconsults, primarily the above-mentioned Llewellyn, who was a member of the same school as Frank but who represented different views – he was a sceptic regarding the application of legal rules, and hence his conception of rhetoric as the art of handling legal rules rather than facts, as Frank (1950a, 255) understood it. Frank reproaches modern jurisconsults for paying no attention to the importance of fact-finding (and therefore not realizing the significance of oratory and rhetoric – which, likewise, as it seems, Frank did not see or did not want to see in full light), but instead are focused exclusively on legal rules.

That art of administration of justice, as Frank sees it, would serve two (but in the book he expands to three) purposes. For this paper, the first purpose mentioned in both places is relevant, namely, "to equip future lawyers to cope with courthouse realities, no matter how ugly and socially detrimental some of those realities are; for a lawyer cannot competently represent his clients if he is ignorant of the *devices* (underlined by the authors) which his adversaries may utilize on behalf of their clients" (Frank, 1973: 245; 1948: 957). These devices are actually rhetorical means, and this art actually rests primarily on rhetoric.

Frank (1948: 957) points to it indirectly and discretely only in the mentioned article, where in the footnote, after the above-mentioned words, he refers to (but does not quote) Aristotle's *Rhetoric*, 1355b. Aristotle there talks about the importance of a person's ability to defend himself with speech: "In addition, it would be strange if an inability to defend oneself by means of the body is shameful, while there is no shame in an inability to use speech; the latter is more characteristic of humans than is the use of the body. And if it is argued that great harm can be done by unjustly using such power of words, this objection applies to all good things except for virtue, and most of all to the most useful things, like strength, health, wealth, and military strategy; for by using these justly one would do the greatest good and unjustly, the greatest harm" (Aristotle, 2007: 1355b). In the same place, Aristotle determines the function (as well as definition) of rhetoric, which "is not to persuade but to see the available means of persuasion in each case".

Frank was much more specific in an older article in which he deals with the education of lawyers. There he probably brought rhetoric the closest to law, pointing out its key importance. Namely, when he critically drew attention to exclusively "book lawyers" (who would probably best teach "library-law"), he explicitly emphasized the well-deserved importance of rhetoric: "The lawyer must learn the jargon of the courts, the art of judicial rhetoric" (Frank, 1933: 914–915).

Finally, he established a bridge between law and rhetoric only in the second part of the work (published in 1950, a year after the book *Courts on Trial*) in which he criticized lawyers once more (now those who follow the ideas of John Dewey), but also all other legal thinkers who ignore the features of litigation discovered by Aristotle in his *Rhetoric*, which he sees as universal, timeless (Frank, 1950b: 502). In the first part of the work, which was published in the same year, he drew attention to the conduct of Edward Levi, who quotes Aristotle's *Rhetoric* but fails to refer to the places about the influence of feelings on judicial decisions (Frank, 1950a: 250). As already mentioned, he did the same in *Courts on Trial* pointing out that followers of the natural law school overlook the fact that Aristotle's *Rhetoric* is primarily a manual on how to win a court case.

Again, he neglected the fact that he himself had not dealt with the subject more seriously than *en passant* until this work. In this work, Frank (1950b: 485–488) devotes a separate section (Seven) to Aristotle's handbook on how to win a court case, dealing with rhetoric for the first time in considerable detail in Aristotle's *Rhetoric*. He paid tribute to Aristotle's rhetoric and especially highlighted those places (the most essential for his theory) that primarily refer to the influence of the judge's feelings on the court decision (from playing on the *good will* card to making the judge laugh). Frank (1950b: 487) drew attention not only to Aristotle's distinction between the emotional reactions of old and young judges, but also to the fact that Aristotle was aware that his instructions would probably be effective for men of a given type, but not always, because people are infinitely various. However, even here he did not touch on the parts of Aristotle's *Rhetoric* that refer to the means of persuasion such as syllogism or enthymeme.

Frank's enthusiasm for Aristotle's *Rhetoric* reflected in this work is truly surprising. He seems to really have never read Aristotle's *Rhetoric* before or seen the passages related to the importance of rhetoric. Here, Frank (1950b: 502) puts Aristotle's *Rhetoric* (and the parts related to rhetoric, i.e. to the features of judicial proceedings) on a pedestal and declares it the touchstone of any systematic legal thinking or legal philosophy. In the end, with this work, Frank atoned for his previous omissions that involved his reluctance to forge a stronger bond between law and rhetoric, which has been secretly present and more than obvious in his work all the time.

Without wishing to add to Frank's writing, one could ponder that the reason for Frank's avoidance of Aristotle's rhetoric in the creative phase that resulted in his most influential books is precisely Aristotle's critical attitude towards ancient rhetoric, which was aimed at inflaming the passions of the judge. As already mentioned, Aristotle places the main emphasis on rhetorical instruments (such as syllogism or enthymeme), which he conceives of as the "body of persuasion". These seem to be two different views of rhetoric, where Frank would almost certainly favour an approach that focuses primarily on arousing the judge's feelings for achieving a desired legal outcome (a bit reminiscent of a sophistic approach).

One should always keep in mind the fact that, for Frank, the judge is not a simple logical automaton that mechanically derives a conclusion from two premises. For him, the man (judge) is almost entirely a being of passion (which makes the outcome of a judicial proceeding completely uncertain). This is also true for Aristotle, although Aristotle gives preference to logical means of persuasion over passions. Aristotle's advocacy for the government of law and not of man, because law is free from human passions, "wisdom without desire" (Aristotle, 1959: 1287a), is a commonplace in literature.

Just as *ethos* and *logos* were important for Aristotle, it seems that *pathos* was important for Frank. This is clearly seen in the position Frank put forward in one of his court opinions: "If, however, 'bias' and 'partiality' would be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will… Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference" (*In re J. P. Linahan*, 1943).

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REFERENCES

Anapol, M. (1970). Rhetoric and law: An overview. *Today's Speech*, *18*(4), 12–20.

Aristotle. (1959). *Politics* (H. Rackham, Trans.). Harvard University Press.

Aristotle. (2007). *On rhetoric* (G. Kennedy, Trans.). Oxford University Press.

Avramović, D. (2021). *Sudije, pravo i psihologija – ogled o sudijskom odlučivanju na tragu Džeroma Frenka* [Judges, law and psychology: Study on judging, on the trail of Jerome Frank]. Beograd: Službeni glasnik.

Bablitz, L. (2007). *Actors and audience in the Roman courtroom*. Routledge.

Cohen, F. (1937). The problems of a functional jurisprudence. *Modern Law Review*, *1*(1), 5–26.

Erhenzweig, A. (1965). Psychoanalytical jurisprudence: A common language for Babylon. *Columbia Law Review*, *65*(8), 1331–1360.

Frank, J. (1933). Why not a clinical lawyer-school? *University of Pennsylvania Law Review*, *81*(8), 907–923.

Frank, J. (1948). Say it with music. *Harvard Law Review*, *61*(6), 921–957.

Frank, J. (1950a). Modern and ancient legal pragmatism – John Dewey & Co. vs. Aristotle: I. *Notre Dame Law Review*, *25*(2), 207–257.

Frank, J. (1950b). Modern and ancient legal pragmatism – John Dewey & Co. Vs. Aristotle: II. *Notre Dame Law Review*, *25*(3), 460–540.

Frank, J. (1973). *Courts on trial*. Princeton University Press.

Frank, J. (2009). *Law and the modern mind*. Transaction publishers.

Gagarin, M. (2017). Rhetoric and law. In M. MacDonald (ed.), *The Oxford handbook of rhetorical studies* (pp. 43–52). Oxford University Press.

In re J. P. Linahan, Inc., 138 F.2d 650 (2d Cir. 1943). Retrieved March 25, 2024 from https://law.justia.com/cases/federal/appellate-courts/F2/138/650/1481751/

Lanni, A. (2006). *Law and justice in the courts of classical Athens*. Cambridge University Press.

Llewellyn, K. (1930). A realistic jurisprudence: The next step. *Columbia Law Review*, *30*(4), 431–465.

MacCormick, N. (2005). *Rhetoric and the rule of law: A theory of legal reasoning*. Oxford University Press.

Nušić, B. (2017). *Retorika* [Rhetoric]. Talija izdavaštvo.

Perelman, C., & Olbrechts-Tyteca, L. (1969). *The new rhetoric: A treatise on argumentation*. Notre Dame University Press.

Tuzet, G. (2023). Digestive jurisprudence restated: On breakfast and digestion as bias-arousers. *Annals of the Faculty of Law in Belgrade*, *71*(3), 417–439.