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The Role of *Ethos* in Legal Rhetoric

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ABSTRACT: What is the role of *ethos* in legal rhetoric? Is it like an etiquette or does it have an aim? I claim that the first option represents a misleading interpretation due to the transit of the concept from Athens to Rome. I support instead an iatrolological conception of *ethos*, which aims to the goal of taking care. Finally, I will propose an example of iatrolological *ethos* that can be found in legal interpretation.

KEYWORDS: Baumlin, *ethos*, legal interpretation, *pistis*, rhetoric

1. INTRODUCTION

The paper will be divided in three sections. The second section explores possible reasons underlying a certain interpretation of *ethos*, in which it has lost its autonomy as *pistis* and has been assimilated to *logos* and/or *pathos* – I will call this interpretation “option 1”. In this way *ethos* represents a sort of stable warranty (similar to what in the legal field would be called an *iuris et de iure* presumption) because of the trust attributed to *mores* in Roman society. The third section tries to restore a conception of *ethos* as independent *pistis*, claiming for an iatrolological *ethos*. It means that *ethos* has an aim *per se*, and this aim is connected to the practical-moral way of being of the Heideggerian *Besorgen*, which means to take care. I will call this second interpretation of *ethos* “option 2”. I will finally propose an example – in the fourth section – linked to the iatrolological role of *ethos* in the legal interpretation. In conclusion I will point out the opportunity to shift the attention, in analysing *ethos*, from the audience to the speaker. It is eventually worth to remember that, in a rhetorical perspective, *ethos*, *logos* and *pathos* are always connected in the speech (Piazza, 2015, p. 49): however, in order to stress the role of *ethos* and its evolution I will consider them here separately.

2. ON THE NON-INDEPENDENCY OF *ETHOS*: OPTION 1

Ethos represents a technical *pistis* and it is described as an ethotic mean of persuasion (Wagemans, 2021, p. 581) based on the character of the speaker (Piazza, 2015, p. 49). Even though the noun “*pistis*” has several meanings (Piazza, 2015, pp. 45-46) I will refer here as ‘mean of persuasion’. Piazza explains that there are two places in *Rhetoric* where Aristotle talks about *ethos*: second chapter, Book I (1356a 4-13) and first chapter, Book II (1378a 6-19) where he explains the skills connected to the rhetorician (Piazza, 2015, p.

91)¹. Based on these two different places it is possible to sketch two different interpretations connected with it.

Aristotle affirms that “[*ethos*] is realized by means of the character when the speech is said in such a way able to make worthy of faith the one who speaks” (Piazza, 2015, p. 92, my translation). Based on this passage *ethos* can be tracked only through the words used in the speech and can be found within it. In this way, *ethos* is not clearly distinct from *logos*, because both seem to be founded in the speech itself (Piazza, 2015, p. 78). It causes a problem of overlap, and in this way the role played by the single *pistis* is not clear anymore.

The foundation of option 1 can be found in the transit of the concept of *ethos* from Athens to Rome. Precisely in this moment, *ethos* started to lose its autonomy. In fact, in the Greek society *ethos* was considered an autonomous category in the Aristotelian rhetoric, the ethotic one. However, *ethos* lost its independent position and started, along centuries, to be assimilated to *logos* or even *pathos*. It happened because of three main reasons.

The first reason deals with a linguistic problem. As usually happens with translations (it happened, for instance, for the passage from *nomos* to *lex*: Manzin, 2022, p. 139; Irti, 2021, p. 122), the original meaning of *ethos* was misrepresented. In fact, it was translated in latin with “*mores*” (from Quintilian) or “*sensus*” (from Cicero) both referring to the emotional sphere, because of the importance attributed by Roman society, losing in this way its contact with the concrete habits of the speaker (Plantin, 2001, p. 330). But, as

Plantin reminds, *ethos* in ancient Greek meant both “the habitual residence of an animal and the habitual character of a person and by extension his habits of life” (Plantin, 2001, p. 330, my translation), similar to what today would be called the ‘lifestyle’ of a person: there are no emotional aspects in this definition, contrary to the Roman translation of the concept.

The second reason can be found in the different configuration of the trial in Athens and Rome. Since the Roman trial, the figure of the accused began to split into that of the *patronus* and the *cliens* (Montefusco, 1992, p. 247). *Patronus* is what today we would call lawyer, whereas the *cliens* is the client, the accused. In Athens, the defendant used to defend himself without any mediation of anyone (Kennedy, 1968, p. 419; May, 1981, p. 308); therefore, the speaker's *ethos* was identified with a single person, of the accused himself. Differently, at the time of Cicero, the ethical component was traced back to two people (albeit manifested in the single speech of the rhetorician): the *cliens* and the *patronus* (van den Bergh, 2009, pp. 160-166). In this way, *ethos* was represented by the *mores* of the *cliens*, mentioned in the defense by the rhetorician (in order to show to the judge that the accused was from an honorable and decent family) and in the activity of the *patronus* itself. In this way, the defendant's *ethos* was not only strengthened, but even replaced by that of a further subject distinct from the offender, the *patronus*: and the *patronus* with his *mores* and his reputation could guarantee the position of the client.

There is also a third reason connected with this change and it has something to do with the introduction of doctrine of speaker's tasks, called the doctrine of *docere*, *conciliare* and *movere* (Montefusco, 1992, p. 249; Žmavc, 2018, p. 349). This doctrine has introduced some sort of goals for the speech of the rhetorician, who had to: inform, keep

¹ I choose the interpretation of Piazza and not the one offered by Clayton (Clayton, 2004, p. 186) who includes Book III in the places of *Rhetoric* where Aristotele talks about *ethos* because this latter encloses indications about style, that in this paper are assimilated to the elements I include in option 1.

the attention but in particular, to provoke benevolence. Because of this last task, and because of the importance attributed to *mores* by Roman society, the rhetorician was used to emphasize the *mores* of the client and to degrade other party's *mores*. The most important element was therefore considered to be the *mores*, not the facts actually happened or the reasons of the other party.

Thereby *ethos* in Roman society is reduced to the mention of the *mores*, an empty etiquette suitable for the historical context of that time. In this way, the Aristotelian *ethos* flattens in the emotional importance transmitted about the *mores* of the parties and of the lawyers, due to the relevance that *mores* had in Roman society – contrary to the Greek *polis*. In this way, the authentic meaning of *ethos* was manipulated. Therefore, considering *ethos* only or mainly linked to the words (*logos*) used in a speech (which can also have an emotional relevance, connected in this sense with *pathos*) is misleading and, historically speaking, it is an interpretation based on the wrong transplantation of concepts from two different communities, the Greek one and the Roman one.

3. ON THE INDEPENDENCY OF *ETHOS*: OPTION 2

However, this is not the only passage where Aristotle talks about *ethos*, so it is possible to underline a different position. Aristotle also affirms that: “three are the causes that make those who speak credible. The same are, in fact, the reasons why we believe, beyond the demonstration. They are wisdom, virtue and benevolence” (Piazza 2015, p. 95, my translation). In this part, Aristotle connects the capacity of the speech to be persuasive with the intellectual, moral and emotional-relational qualities of the rhetorician (Piazza, 2015, p. 95). In this way *ethos* is not only linked to the discourse but it includes other different elements. I will call this interpretation “option 2”.

Option 2 is an inclusive interpretation that can be found in most of the contemporary literature. *Ethos* has been described as composed not only by the words of the speech but also linked to the fact that the speaker covers an institutional position (Amossy, 2001, p. 19) or has some kind of authority (Plantin, 2011, p. 332) or there are expectations that need to be satisfied before the speech (Herman, 2022, p. 5). Recently it has been studied because of the pandemic, in order to understand the trust of the population towards the national authorities (Kjeldsen et al., 2022, p. 3): in this context *ethos* is described “not a fix quality in a sender or a text but constantly negotiated with trust” (Kjeldsen et al., 2022, p. 3) and therefore with audience as well. Preferring a pragmatic approach, as someone does (Amossy, 2001, p. 5; Walton, 2006, pp. 60-63; Žmavc, 2018, p. 350) allows also to suggest that *ethos* can be connected to a certain aim of the speaker².

It is actually possible to find a certain aim of *ethos*: this is what Baumlin and Meyer affirm in what they consider a possible ‘manifesto’ for the twenty-first century (Baumlin, Meyer, 2018, p. 22). He claims that *ethos* is something in between the speaker and the audience (Baumlin, 2018, p. 4), confirming the inclusive interpretation of option 2. But even more, he defines *ethos* as “dwelling-place”, a notion that goes back to Heidegger (and before him, Heraclitus). According to an Heideggerian interpretation of the notion of

² Note that, claiming that *ethos* has a function *per se*, it is not the same of affirming the function of the speech act which of course has, at least an attempt to it, through the illocutive aim (Searle, 2019, pp. 178-179): here I mean to refer to the aim of the speaker himself or herself (which can be realised through the speech act).

“dwelling-place”, it represents the place of the *Da-Sein*. *Da-Sein* has what Heidegger calls a “fundamental determination” namely, the practical-moral way of being: and the goal of this practical-moral way of being consists, for Heidegger, in taking care (*Besorgen*). This is why Baumlin and Meyer attribute to *ethos* an iatrological value (Baumlin, Meyer, 2018, p. 22) – from *iatros*, meaning “medical” – because it is considered connected to precisely this practical-moral way of being of the speaker. The fact that it is a “fundamental determination” seems to suggest that it is not something avoidable: the question regarding the best way to take care (of the others or of myself) is hidden in everyday life and in this sense is a “dwelling-place” (Baumlin, Meyer, 2018, p. 12), it is familiar to everyone. For this reason, *ethos* does not only regard what someone knows or is (Tindale, 2011, p. 343) but also what someone does, and this is why it is in the end connected to an ethical issue. The experience gained through actions is subsequently shown in the speech of the rhetorician.

4. IATROLOGICAL *ETHOS* IN ACTION: THE EXAMPLE OF LEGAL INTERPRETATION

The value and the role of the iatrological *ethos* can be seen in the legal field, more precisely in the position of the judge and in her/his attitude towards the vulnerable subjects involved in a judicial trial. It is possible to point out different places where its function is visible: for instance, in the legal interpretation, in the application of teleological norms and in the individuation of particular kinds of legal exceptions (Diciotti, 2018, p. 19, p. 22, p. 25). I will consider here the first example, namely the legal interpretation.

Before commenting the example proposed by Diciotti, it is preliminary important to remind that nowadays vulnerability has a relevant place in the legal doctrine, especially because of the frequent use by the European Court of Human Rights: from a simple quantitative point of view, it is possible to notice that the use of this concept has increased along the years, from seven judgments containing this word in 2000, to seventy judgments mentioning it in 2013 (Diciotti, 2018, pp. 13-14). In line with the attitude of the Court, a particular protection is given towards vulnerable subjects also in the Italian context, through article 2 and 3.2 of the Constitution with the principle of solidarity (Bresciani, 2020, pp. 118-119).

Vulnerability is a complex concept for two different reasons: *i*) because of its vagueness and *ii*) due to the tension with other legal principles. I will briefly explain both these reasons:

- i*) Vulnerability is described as a vague concept (Diciotti, 2018, p. 16; Casadei, 2008, p. 291), without a codified definition (at least in the Italian legal system, as pointed out by Poggi, 2020, p. 85). It is possible to derive three different meanings based on the interpretation of the European Court of Human Rights (Diciotti, 2018, pp. 14-17) summarized in a few words as follows: vulnerability can be used in a strict sense (meaning someone is vulnerable because of certain external circumstances), in a broad sense (meaning someone is vulnerable because of certain internal circumstances) or in a very broad sense (meaning someone is vulnerable because of particular internal circumstances, representing a “general disadvantage compared to other people”, *ibid.*, p. 17,

my translation). The meanings adopted by the judgments of the Court are vulnerability in a broad and very broad sense.

- ii) Moreover, it is also worth to mention that this concept involves tensions with other legal principles, such as the right of the self-determination (Conza, 2019, p. 122; Bresciani 2020, p. 111; Poggi, 2020, pp. 84-85). In fact, the risk pointed out is legal paternalism, which deals with the problem of “whether the need to protect weak and vulnerable persons against their will (and, therefore, by themselves) can justify the intervention of the legislator criminal; and, if so, to what extend” (Bresciani, 2020, p. 111, my translation). The implicit premise refused by legal paternalism consists in the so-called “myth of autonomy” (Corso, 2018, p. 62) which consists in two different claims already supported by Kant (see also Coyle, 2018, p. 82): the first one regards the fact that the individual can emancipate from the needs, developing his or her moral abilities, no matter the psychological conditions; the second one claims that the human dignity acquires value because of the invulnerability of the individual, such as the capability of tolerate pain. The myth of autonomy, from a Kantian philosophical position, entered in the modern and post-modern legal domain as well. It is testified for instance, by the idealized *homo economicus* at the basis of the first studies of the economic analysis of law, also called with the acronymous “EAL”, (Silvestri, 2019, p. 406) based on the assumption – subsequently criticized (Silvestri, 2019, p. 411, p. 419) – that everyone is able to have a complete information and to choose the best option for himself or herself and, in the thesis of Bresciani, by the principle that the State cannot interfere with the private life of citizens (codified, for instance, in art. 8 ECHR). The limit is however tricky. While it is easily recognizable that a subject can never have totally complete information regarding a choice that must be taken, it is not the same in affirming the legitimacy of the help to suicide, especially for whom it is considered valid the “argument of incompetence” by which “the most vulnerable people, the sick ones, who would have more reasons to give up their lives, are not competent to do so, or at least that there is a presumption of incompetence in their regard” (Poggi, 2020, p. 85). In fact, it is well known the tension between the right to self-determination and the article 580 of the criminal Italian code in the “Cappato trial”³ (Conza, 2019, pp. 122-124), where in the end (with the judgment of the Constitutional Court 242/2019) the right of self-determination was considered to prevail.

It is relevant to underline that both these issues deal with the idea of iatrolological *ethos* because in both circumstances what is needed to be understood is the best way of protecting people involved in the legal controversy. This attitude of protection, in concrete, is shown by the interpretation of the Court and it involves not only the parties in the trial but also future and precedent parties in a similar situation as well as citizens, because of their right to know about the legal consequences of their actions.

In between these constraints the role of iatrolological *ethos* takes place. Article 3 of the Convention of Human Rights states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. In order to establish what torture is, the Court does

³ The explanation of the trial is available at <https://www.associazionelucacoscioni.it/the-cappato-trial-step-by-step> (consulted on 26.09.2023).

not consider only the legal material (such as the disposition, or precedents) but it mainly takes in consideration the effects that a certain act, potentially considered as torture, has provoked towards the subjects involved in the legal controversy. Therefore, the act will be more likely considered as a torture if the subjects involved are vulnerable, namely are in a fragile position and they need protection. Usually, these subjects considered by the Court are children, incapacitated, detained, belonging to discriminated minorities, asylum seekers and immigrants (Diciotti, 2018, p. 30). More precisely,

This way of characterizing the cases referred to in art. 3 seems be based on the idea that the distinction between qualifiable and not qualifiable treatments as torture or as punishment or inhuman or degrading treatment depends not only on the different aspects of the activities that give rise to these treatments but also by the effects of these activities on individuals different for their particular characters or the situation in which they are (Diciotti, 2018, p. 20 [my translation]).

Therefore, the iatrogenic *ethos* in this case can be found in the attitude of the judge in considering massively the role of these vulnerable subjects and, because of their role, defying what torture is in a specific legal trial. In other words, the attention on the effects of the action towards vulnerable subjects is able to shape the meaning of a concept – and to influence concretely the life of the subjects involved. Moreover, it shows that *ethos*, again meant as essentially connected to a role of protection, is actually at the core of legal interpretation and at the core of law, described as the distinctive element of the legal domain (Kahn, 2006, p. 934) and linked to the roots of law itself (Puppo, Tomasi, 2023).

5. CONCLUSION

Affirming that *ethos* finds its aim in protection, opens up many questions and critical points such as: what is the best way of protecting in the specific case? Or, how is it possible to verify that choice to be the best one? Many needs of protection are usually involved in a case: which one does have the priority?

In order to try to reply to them, it could maybe be helpful to shift the attention from the legal controversy to the qualities of the one/s who judge/s the controversy (I am referring to the virtue jurisprudence proposed by Solum, 2003, pp. 198-199); in rhetorical terms, from the audience to the speaker. As well known, audience and consent are key elements for persuasion⁴, and they have been revaluated after the Second World War especially thanks to the work of Chaïm Perelman and Lucie Olbrechts-Tyteca (Piazza, 2015a, p. 49). Analysing the concept of audience in recent studies (such as the one proposed in the *New Rhetoric*, the “constitutive audience” by Charland and also the idea of “cognitive environment” by Tindale) Kjeldsen has noted that “they are speculative, theoretical constructions” (Kjeldsen, 2018, p. 4) made by the speaker. Based on this construction, it could be claimed that the speaker only must adapt his or her speech and manners in such a way suitable for the audience she or he has in mind, in order to obtain persuasion: in this way, the speaker “builds” his or her *ethos* (Clayton, 2004, p. 186). However, the idea behind the iatrogenic *ethos* I support is partially different.

⁴ Following Piazza, 2015, p. 34 I reject the distinction between conviction and persuasion, unknown by Aristotle and Greek communities generally speaking, and introduced centuries later by Kant.

The audience is a constituent of the rhetorical situation (Bitzer, 1968, p. 6) and, at least in vernacular rhetoric (Kjeldsen, 2018, p. 28), it is always characterized by active participants (Kjeldsen, 2018, p. 6): it surely represents a prominent role of the listeners. Nevertheless, the idea behind the iatrological *ethos* of Baumlin seems to refer to something already there, belonging to the speaker before the speech. *Ethos*, according to this reading, it is not entirely created for the purpose of a certain speech towards a certain audience. However, audience has a role in *recognizing ethos* and, in this sense, it seems possible to affirm that it is co-built by the audience and the speaker. In fact, “a speaker cannot give herself or himself trust; the audience extends that to them” (Tindale, 2011, p. 342). The issue of the construction of *ethos* could therefore be studied from two different perspectives: the one of the audience, for instance, through audience studies (Kjeldsen, 2018; Kjeldsen et al., 2022) and the one of the speaker himself or herself, which seems to be the one closer to the idea of iatrological *ethos* supported by Baumlin. Since *ethos* aims at protection, the problem that arises is the follow one: what is the best way to take care and to show this intention to an audience? This is why *ethos* is connected to the fact that the speaker needs to develop certain virtues in order to understand what and how concretize this intention. It is in fact relevant to remind once again the framework by which rhetoric was originally conceived:

[...] it is important to keep in mind that for Aristotle the goal of an individual learning about ethics and politics is to acquire the knowledge and training necessary to behave virtuously; therefore, it makes sense to assume that his purpose in teaching ethics and politics was primarily to help his students become men who would behave virtuously throughout their lives (and potentially to share their knowledge and training with others) (Clayton, 2004, p. 191).

In this way, even though *ethos* is manifested within the speech, the construction of it goes beyond it, involving not only the effects of the decision but also the development of particular virtues (not all virtues are, in fact, connected to deliberation: Corso, 2022, p. 55) of the speaker and therefore the capability of managing exigence, audience and constraints which pertains the rhetorical situation (Bitzer, 1968, p. 6). A virtue can be defined as “ability to identify issues or needs that provide reasons to act in a given situation” (Amaya, 2022, p. 13) or as “attitude to choose the right mean” (Corso, 2022, p. 56): however, in both these cases, this ability or attitude needs to be experienced and improved (Trujillo, 2022, p. 88 talks about “training” referring to legal ethics) – in fact, prior reputation, namely what someone has or has not done, also matters in the meaning of *ethos* (Herman, 2022, p. 5; Amosy, 2001, p. 7; Tindale, 2011, p. 344). And, in this training, the possibility to educate emotions (relevant because of their cognitive role: Amaya, 2022, p. 19; Corso, 2022, p. 57; Puppo, 2023, pp. 84-85), is for sure included, as nowadays well known (Amaya, 2022, p. 22; Corso, 2022, p. 58; Puppo, 2023, p. 101).

This second perspective on the study of *ethos* therefore leads to emphasize the role of the agent: that is, of the development of his or her character and thus of his or her virtues. Because of that, it supports a conception of Aristotelian *ethos* linked to a precise methodology, that is, virtue ethics (Campodonico, Croce, Vaccarezza, 2019). It confirms the possibility, on one hand of considering Aristotle – at least within *Rhetoric* – a virtue argumentation theorist (Aberdein, 2021, pp. 221-226); on the other hand, it stresses the importance of considering argumentation “as a practice rather than [on] arguments as

products” (Gascón, 2016, p. 446), where also the virtues of the speaker, and not only the cogency of arguments, are relevant.

Iatrological *ethos*, has, therefore, a role: and its role aims at protection. In the end of this research, I propose that iatrological *ethos* could be described as the rational and emotional capability of taking care in the best way possible, according to what the speaker has lived and learnt through his or her life (similarly to the experience of the encounter rhetoric proposed by Tindale, 2021, pp. 28-29). It is manifested through the speech but it is not limited to it, because it includes virtues; and, therefore, the possibilities and will (or the lack of them) that he or she has in order to cultivate them.

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