The Reasonable as Rational?

On Legal Argumentation and Justification

Festschrift for Aulis Aarnio

Edited by

Werner Krawietz
Robert S. Summers
Ota Weinberger
Georg Henrik von Wright

Duncker & Humblot · Berlin

The Reasonable as Rational?

Festschrift for Aulis Aarnio

The Reasonable as Rational?

On Legal Argumentation and Justification

Festschrift for Aulis Aarnio

Edited by

Werner Krawietz
Robert S. Summers
Ota Weinberger
Georg Henrik von Wright

Duncker & Humblot · Berlin

Die Deutsche Bibliothek – CIP-Einheitsaufnahme

The reasonable as rational? : on legal argumentation and justification ; Festschrift for Aulis Aarnio / eds.: Werner Krawietz ... – Berlin : Duncker und Humblot, 2000
ISBN 3-428-09265-1

Fremddatenübernahme: Klaus-Dieter Voigt, Berlin
Druck: Berliner Buchdruckerei Union GmbH, Berlin
Printed in Germany

ISBN 3-428-09265-1

HOMMAGE À PROFESSOR AULIS AARNIO TO HIS 60th BIRTHDAY

By Werner Krawietz

Dear Aulis,
Dear Friends and Colleagues, Ladies and Gentlemen!

I.

1. We have all been invited to this delightful dinner and entertainment in order to have a celebration, albeit somewhat prematurely, on the occasion of Aulis' sixtieth birthday which actually takes place on 14th May. This event, in fact, appears *so important* to me that I am convinced one can't begin these celebrations soon enough. I do wonder, however, what his actual birthday is going to be like if even the run-up to it is being celebrated in this way. Looking back over my frequent visits to Finland I cannot remember ever before having encountered such a large number of your renowned Finnish friends and guests, with the exception perhaps of the IVR World Congress of 1983 which was organized by our highly esteemed colleague and friend Professor Georg Henrik von Wright and yourself in Helsinki. I have noticed, by the way, that Finnish Fins and Swedish Fins are peacefully united over dinner here in Tampere, but perhaps there is nothing unusual in that! I am most grateful, indeed, for the great honour of being given the opportunity of speaking to you on this important occasion.

2. I owe this opportunity of addressing a few words to you, Ladies and Gentlemen, to the fact, above all, that I have arrived so *late*. *Too late*, in any case, to take part in the International Symposium which ended this afternoon. My foreign colleagues and friends have, therefore, kindly permitted me to address to you a few words in conclusion, on the proviso, however, that they must be brief. I know very well that the most able representatives of their disciplines in many countries have been present here in Tampere during the last few days engaging in lively discussions and in a stimulating exchange of ideas in the course of your Symposium, dear Aulis. In contrast, I find myself in something like the role of the Olympic torch-

bearer, who carries the message of this great competition without taking part in it himself. Except that the Olympic torchbearer appears at the beginning of the games while this messenger has arrived very belatedly at the end, late, indeed, very late, but, I hope, still not too late to honour our friend Aulis.

II.

1. We have gathered here to pay tribute to our friend and colleague Aulis, and it is a great privilege and a particular pleasure for me to present Aulis Aarnio with this *Festschrift*. In it the work of the *international community* of legal scholars has been collected for the purpose of honouring him. I should also like to convey warm congratulations from my co-editors, your friends and colleagues Georg Henrik von Wright in Helsinki, Ota Weinberger in Austria (Graz) and Robert Summers of Cornell University/ Ithaca. All four editors, dear Aulis, are very happy to present to you this *Festschrift* with nearly fifty contributions from nearly twenty countries.

2. Together with the other *Festschrift* editors I should also like to extend to you the congratulations of the publishing house Duncker & Humblot in Berlin, in particular, those of its head and director, *Professor Simon* with whom you have published over the last decades collections of papers which have introduced your work to the German-speaking countries. These were followed by a series of 'Beihefte' to the periodical RECHTSTHEORIE with the proceedings of international symposia which you organized in Austria and Finland including the various IVR World Congresses, among them the memorable *X. World Congress for Legal and Social Philosophy* which took place in Helsinki in nineteen hundred and eighty-three and set the standard for *all* future congresses.

3. It was only a week before the beginning of this Symposium that I received a single copy of this *Festschrift* for Aulis from the publishers in Berlin. This copy is a one-off, a unicum, if you like, and so it will remain. That is to say, that the volume I brought with me is hand-bound in the form of a book containing the contributions, but it is made up of page-proofs some of which have not yet been corrected. The publisher was kind enough to have this improvised version printed. At least another half dozen papers are as yet missing. They have been written but their translations into English have not been completed. These will be included in the final version of the printed book. I should, finally, also like to convey warm congratulations from all your friends and colleagues who have contributed to your *Festschrift*. A good number of them are present here.

III.

1. Legal scholars rarely enjoy much attention outside their own legal circles at home. In a very real sense, Aulis Aarnio proves the point by being the exception that establishes the rule. As far as I have learned during my visits to Finland Aulis is best known in some circles for his work in *Family Law*, *Matrimonial Law* and *Law of Inheritance*. But this expertise is not the reason why I am here and why so many colleagues in Europe and all over the world have contributed to a *Festschrift* for Aulis. Most of these colleagues are not concerned with these specialized areas of legal dogmatics in their own countries, but work in the fields of legal theory, philosophy of law and the like. Among his colleagues from abroad Aulis Aarnio is best known as a *legal theorist and legal philosopher*. In my own country it is a great rarity for somebody to receive a *Festschrift* on the occasion of a sixtieth birthday. I have been told that this is also the case in Finland and that it is unusual for an academic to receive such an honour before his or her sixty-fifth or seventieth birthday. I am not surprised, however, that Aulis proves the exception yet again. He sets new standards in whatever he is involved in.

2. It was quite natural to give your *Festschrift* the title "The Reasonable as Rational? On Legal Argumentation and Justification". There is no need to explain to him or to the assembled company why this is so. The volume pays tribute to Aulis Aarnio as a figure whose work ranges over the Anglo-Saxon world of law, on the one hand, and over the European legal systems, on the other. It has become ever clearer over the course of the last decades that Aulis Aarnio has given impetus to and even directly influenced many new developments in our fields. Without the role he has played a number of these new developments would not have taken place or come to fruition at all.

3. This, of course, is not the occasion for a lengthy *Laudatio*. That is included in the *Festschrift* and can be perused later. The occasion does give me the opportunity, however, to say that all those who have contributed to this volume (and others, no doubt, too) value and appreciate Aulis Aarnio for his openness and enthusiasm, his boundless energy and vigour and, indeed, his lust for life. His great warmth, his fairness, and his ability to engage in a wide variety of different projects and to do so self-critically have won him a great number of friends over the years. All of us here, Ladies and Gentlemen, I am sure, know and agree that Aulis Aarnio is regarded with great respect, high esteem and warm affection in very many countries all over the world. Something of that respect, esteem and affection is reflected in the *Festschrift*, dear Aulis, as you will see later.

IV.

1. On the whole we think we know reasonably well what the scientific thinking, achievements and publications of friends and colleagues consist of. At least, I thought I did in the case of Aulis Aarnio, who has been my very good friend for something like twenty years. But one can be wrong in such matters as I found out in the course of preparing this *Festschrift*. When I was in danger of being overwhelmed by the wealth of material yielded up by Aulis' bibliography, I instructed my assistent to make at least a numerical identification and count of the different kinds and types of publications which are normally part of a legal scholar's scientific output. This job took a suspiciously long time for my assistent to complete and to tell me the result. I learned that our friend Aulis has published twenty-six books and nine collections of essays since the nineteen sixties. To these we must add two-hundred and thirty scientific papers both in Finnish and in twelve international languages, as well as another two-hundred and eighty newspaper articles in the field of culture, politics and society, not to mention book reviews, commentaries and interviews; five hundred and ninety-four publications altogether, as my assistent finally announced joyfully and, no doubt, with some relief. I remember clearly answering my assistent with a nonchalant "Well, that's very interesting!" But since that day I have been making a great effort to get up a little earlier every morning in order to maximize my own scholarly output!

2. It seems that, despite all the above publications Aulis still had some time to spare, enough, in any case, to write two historical novels and two plays. One of these plays, "The Priest of Kostia", is going to receive its first performance in the *Ramppi Theatre* in Kangasala on the fifteenth of June of this year.

3. Aulis Aarnio asked me to dispense with the customary *Laudatio* in appreciation of his person and his scholarship, and I shall, of course, respect his wishes. I may be permitted, though, I hope, to make some brief remarks.

a) I have already pointed out that Aulis Aarnio's work in the field of legal theory and legal philosophy in the last twenty-five years has done a great deal to acquaint the European legal systems and the Anglo-American world of law with the Scandinavian legal theory and philosophy, especially, the Finnish contribution to it.

aa) The fact that Aulis convened many international Symposia which served the scientific clarification of this particular field surely deserves to be mentioned here.

bb) I should also like to point to the work on the theory and philosophy of law undertaken by Otto Brusiin and edited and published in the German language by Urpo Kangas which was initiated by Aulis Aarnio.

cc) Equally, the *Brusiin-Lectures* which have had wide international recognition and have recently been published in English, are also the result of his initiative.

b) Another important aspect of his scholarship are his comparative researches undertaken from the point of view of the Finnish legal system and its theory and philosophy of law concerning contemporary legal thinking in Germany, Austria, Hungary, Great Britain, Poland and in other legal systems.

aa) These international activities which – ranging beyond Europe – have also included the USA and Canada, as well as embracing Japan and Korea took him swiftly to the top of the World IVR, the International Association for Legal and Social Philosophy which today has forty-four member states.

bb) From nineteen hundred and eighty-three to eighty-seven he held the office of president of the IVR, and from nineteen hundred and eighty-seven to ninety-five that of vice-president.

cc) The Academy of Sciences of the Russian Federation made Aulis Aarnio a Full Member in nineteen hundred and ninety-five having already been a member of the Finnish Academy of Science and Letters and since nineteen hundred and ninety-one *President of the Department of Science of Law*. The University of Lund has decided in nineteen hundred and ninety-seven to award him an honorary doctorate.

4. From an international perspective it would certainly not be an exaggeration to say that Aulis Aarnio fulfills an important and successfull bridgeing function of lasting significance for the development of the theory and philosophy of law in our time. Today, thanks to a large extent to his efforts, a *dialogue* and a *mutual exchange* in legal thinking exist between different centres all over the world. This exchange continues despite the fact that Aulis Aarnio in 1991 finally shifted the centre of his activities from Helsinki to Tampere. He is one of those individuals who are at the hub of things wherever they find themselves.

5. Aulis Aarnio is numbered today among the most brilliant minds in modern legal theory. He leads a life of vigorous scholarly activity preparing the way for further opportunities for the meeting of minds and fruitful exchanges of ideas. He himself has often been the first to tread the new path, and in the course of the past decades he himself has strengthened, consolidated and expanded such newly established ties. Indeed, it would be true to say that it was through his diverse and wide-ranging activities that

the rapidly growing scientific dialogue in legal theory and philosophy was made possible. The symposium ending today and the *Festschrift* compiled by a great number of colleagues from around the world give an idea of the debt the international academic community owes to Aulis Aarnio.

V.

Let me sum up! In modern legal theory and philosophy of law Aulis Aarnio is a figure ranging over and facilitating discussion between and among diverse legal cultures. In recent years various theorists have refined legal thinking in terms of concepts of *practical reason*. Such approaches entail the problem that they very often confuse law with morals ignoring the fact, as I see it, that there is a clear-cut border-line between these two disciplines – not only for the legal scholar but for the legal theorist and the legal philosopher, too. Until now Aulis Aarnio's writings have consisted largely of scholarly efforts to analyse, reconstruct and evaluate their central tenets and, where their theories are sketchy and incomplete, to suggest lines of further development. But that is by no means all. When it comes to defining the nature of the *original contribution* which Aulis Aarnio has made to contemporary legal thinking a great deal could be said. I shall limit myself to some brief remarks.

1. To explore this wide field would require a new international symposium in Tampere, and I am putting my name down for it here and now!

2. If there is one thing that has *renewed and fundamentally changed* legal thinking in the last century then it is the development of *Analytical Theory and Philosophy of Language* in conjunction with the achievements of formal Logic and its application to law. This development is closely connected with three personalities and scholars of worldwide fame who are among us tonight, namely with our greatly esteemed colleagues and friends *Georg Henrik von Wright, Ota Weinberger* and *Eugenio Bulygin*. Such a constellation of stars, Ladies and Gentlemen, can only be compared – if I may be allowed to avail myself of a reference to the popular music scene – with an open-air concert of the three tenors, José Carreras, Placido Domingo and Luciano Pavarotti. I would suggest that one needs no more than the fingers of one hand, in fact, to count the names of that select *group of leading scholars* who today determine the fate and the development of a logic of norms around the globe. We owe it to the research interests and achievements of Aulis Aarnio that the most famous of them are present here today.

3. I myself have learned one simple but fundamental lesson from the *Big Three*, namely, that it does not suffice simply to *do* this or that. Rather, one

has to have very good *reasons* for what one does. Even from the institutional point of view one has to be in the position to *justify* what one does. I have also learned that one ought to dinstinguish between *internal* and *external* justification in the field of action theory and theory of norms. However, I must admit, *I still don't understand this distinction.* Presumably my lack of understanding is bound up with the fact that the *reasons* ordinarily presented within the framework of an *internal* justification turn up, where I am concerned, as *external* reasons and vice versa.

There is a point, though, on which the *Big Three* agree (more or less!): *Firstly*, it makes sense to make use of formal logic in the process of building a theory of practical legal argumentation; *secondly*, it would be a mistake to regard the interpretation and the understanding of law merely as an application of formal logic. It is precisely from this point that Aulis starts with his attempt to rationalize and justify the *practical juridical argumentation.* Because of his achievements in this field - which lack of time prevents me from characterizing more closely - Aulis Aarnio must, indeed, be regarded as *one* of the founders of a *New Analytical Jurisprudence.* In the last decade he has been working on a more wide-ranging theory of the nature, structure and functions of modern legal systems which in its final version is not yet fully available.

Conclusion

To return to the person of Aulis, the hero of this story, him whom we are celebrating today: all these scholarly achievements are only *external* indices of his life: of a remarkable career, of his great success in his work. Underlying them are the *internal* ones, the attributes of his character, his compassion and his great generosity as a human being. Both are, without the slightest doubt, ample *justification* for these celebrations.

I should like to express *here and now* our warm and heart-felt congratulations to Aulis, not only on behalf of myself but on behalf of all his friends and colleagues in the Old and New World, for science is not national but international in its dimensions. It is in accordance with this conviction that you, dear Aulis, have, after all, lived and worked all your life.

CONTENT

III. Norms and Normpropositions in the Perspectives of Legal Expressivism

IV. New Constitutionalism and Legalism in Modern State Legal Systems

V. Law, Meta-Legal Positivism and Legal Dogmatics as a Rational Legal Science

VI. Democracy, Legislative Powers and Ultimate Authority

VII. On Normative Argumentation and Justification and the Critique of Legal Reasoning

I. New Analytical Hermeneutics, Moral Relativism and Legal Rightness

RECHT UND RICHTIGKEIT

Von Robert Alexy, Kiel

Positivisten wie Nichtpositivisten stimmen heute weitgehend darin überein, daß das Recht aus mehr besteht als aus der puren Faktizität von Verhaltensregelmäßigkeiten, Befehlen, psychischen Dispositionen oder der Ausübung von Zwang. Das Recht hat neben dieser faktischen oder realen Dimension auch eine kritische oder reflexive Seite, die über jene hinausweist.[1] So findet sich sowohl bei Autoren, die einen begrifflich notwendigen Zusammenhang zwischen Recht und Moral bestreiten, als auch bei solchen, die eine derartige Verbindung behaupten, die These, daß das Recht einen Anspruch auf Richtigkeit oder Gerechtigkeit erhebt.[2] Der alte Streit zwischen dem Positivismus und dem Nichtpositivismus kann damit auf einem neuen Schauplatz fortgeführt werden, der durch die Frage nach der Bedeutung und den Konsequenzen des mit dem Recht verbundenen oder im Recht erhobenen Anspruchs auf Richtigkeit abgesteckt ist. Den Dreh- und Angelpunkt des Streites bildet unverändert das Verhältnis von Recht und Moral. Dieses wird nun mit der Frage angegangen, ob der Anspruch auf Richtigkeit einen Zusammenhang zwischen Recht und Moral zu stiften vermag, der den positivistischen Rechtsbegriff sprengt. Zur Vorbereitung einer Antwort soll zunächst gefragt werden, was unter einem im oder vom Recht erhobenen Anspruch auf Richtigkeit überhaupt zu verstehen ist. Sodann wird es in einem zweiten Teil darum gehen, ob ein solcher Anspruch tatsächlich notwendig mit dem Recht verbunden ist. In einem dritten Teil werden dann die Konsequenzen des Anspruchs auf Richtigkeit für das Verhältnis von Recht und Moral zu erörtern sein.

---

[1] Vgl. *H. L. A. Hart,* The Concept of Law, 2. Aufl., Oxford 1994, S. 57, 82ff.

[2] Vgl. einerseits *N. MacCormick,* The Concept of Law and „The Concept of Law", in: Robert P. George (Hrsg.), The Autonomy of Law, Oxford 1996, S. 172, 175, 189, und andererseits *R. Alexy,* Zur Kritik des Rechtspositivismus, in: Archiv für Rechts- und Sozialphilosophie, Beiheft 37 (1990), S. 11, 19ff.

I. Zum Begriff des Anspruchs auf Richtigkeit

1. Die Subjekte

Die Rede davon, daß das Recht einen Anspruch auf Richtigkeit erhebt, klingt zwar vertraut, erscheint aber bei näherem Hinschauen zunächst eigentümlich. Daß Menschen oder ganz allgemein Rechtssubjekte Ansprüche erheben können, die sich auf das Recht stützen, versteht sich von selbst; wie aber soll dem Recht als solchem das Erheben eines Anspruchs möglich sein? Ansprüche können in einem voll ausgebildeten oder strengen Sinne nur von handlungsfähigen Subjekten erhoben werden. Ein solches aber ist das Recht weder in Gestalt einzelner Rechtsnormen noch als Rechtssystem im ganzen. Wenn man nicht auf abstrakte Subjekte oder Gesamtheiten wie den Staat oder die Rechtsgemeinschaft abstellen will, was neue Probleme mit sich brächte, bleibt daher nur die Möglichkeit, den Anspruch auf Richtigkeit mit denjenigen Subjekten zu verbinden, die im und für das Recht tätig sind, indem sie es schaffen, interpretieren, anwenden und durchsetzen. Das sind in letzter Instanz stets einzelne Individuen oder Personen. Es könnte eingewandt werden, daß der Anspruch auf Richtigkeit durch diesen Rekurs auf Personen zu sehr subjektiviert werde. Ob jemand irgendwelche Ansprüche erhebe, sei seine Sache. So könne ein Richter auf die Frage, ob er sein Urteil für richtig halte, den Kopf schütteln und es als Katastrophe bezeichnen. Um diesem Einwand zu entgegnen, ist zwischen einem subjektiven und einem objektiven Erheben zu unterscheiden.[3] Eine Person erhebt einen Anspruch subjektiv, wenn sie ihn erheben will. Es kann dann auch von einem persönlichen Anspruch auf Richtigkeit gesprochen werden. Demgegenüber handelt es sich um einen objektiven Anspruch auf Richtigkeit, wenn jeder, der in einem Rechtssystem entscheidet, urteilt oder argumentiert, diesen Anspruch erheben muß. Dieser objektive Anspruch ist keine Privatsache, sondern mit der Rolle eines Teilnehmers am Rechtssystem notwendig verbunden. Man könnte ihn deshalb auch als „offiziell" bezeichnen. Am klarsten tritt der objektive oder offizielle Charakter im Falle des Richters zutage, der den Anspruch auf Richtigkeit als Repräsentant des Rechtssystems erhebt. Mit der Unterscheidung zwischen einem subjektiven oder persönlichen und einem objektiven oder offiziellen Anspruch ist zugleich deutlich, weshalb die Rede vom Anspruch des Rechts auf Richtigkeit intuitiv so plausibel ist. Der Anspruch wird zwar von Personen erhoben, aber für das Recht. Man könnte deshalb auch sagen, das Recht erhebt ihn durch Personen, die in ihm und für es tätig sind.

---

[3] In diese Richtung auch *P. Soper,* Law's Normative Claims, in: Robert P. George (Hrsg.), The Autonomy of Law, Oxford 1996, S. 218.

2. *Die Adressaten*

Das Gegenstück zu der Frage, wer den Anspruch auf Richtigkeit erhebt, ist die Frage, wem gegenüber dieser Anspruch erhoben wird. Ein Kreis von Adressaten ist schnell identifiziert. Es ist der der Adressaten der jeweiligen Rechtsakte. So erhebt der Gesetzgeber gegenüber den Adressaten der Gesetze, der Richter gegenüber den Parteien des jeweiligen Prozesses und der Verwaltungsbeamte gegenüber den Adressaten seiner Verwaltungsakte einen Anspruch auf Richtigkeit. Dieser Adressatenkreis kann als „institutionell" bezeichnet werden. Es ist für den Anspruch auf Richtigkeit im Recht von entscheidender Bedeutung, daß der Kreis seiner Adressaten weiter ist als der des jeweiligen Rechtsaktes. Es gibt neben dem institutionellen einen nichtinstitutionellen Adressatenkreis. Dieser umfaßt jeden, der sich auf den Standpunkt eines Teilnehmers des jeweiligen Rechtssystems stellt. Eine solche innere Perspektive oder ein solcher interner Standpunkt[4] wird mit der Frage eingenommen, was in dem jeweiligen Rechtssystem geboten, verboten und erlaubt ist und zu was es ermächtigt. Diese Frage kann von jedem gestellt werden, und jeder kann versuchen, eine Antwort zu geben und zu begründen oder eine von anderen gegebene Antwort zu kritisieren. Es sind also die auch sonst mit dem Anspruch auf Richtigkeit oder Wahrheit verbundenen Akte des Fragens, des Urteilens und Behauptens und des Begründens und Argumentierens, die den Kreis der Adressaten des Anspruchs auf Richtigkeit im Recht definieren. Dieser hat somit auch hier einen durchaus universellen Charakter. Die einzige, allerdings entscheidende Einschränkung besteht darin, daß zu dem nichtinstitutionellen Adressatenkreis nur diejenigen zählen, die sich auf den Standpunkt des jeweiligen Rechtssystems stellen. Das unterscheidet den Anspruch auf Richtigkeit im Recht von dem einer universalistischen Moral. Hier wird nicht gefragt, was in einem bestimmten System, sondern was schlechthin gilt. Im einzelnen ist wegen der Möglichkeit, an Rechtssysteme, etwa in Gestalt der Menschenrechte oder des Postulats der Rechtssicherheit, universelle materielle oder formelle Anforderungen zu stellen, weiter zu differenzieren. Zu einer ersten und allgemeinen Bestimmung des Adressatenkreises mag das Gesagte jedoch ausreichen.

3. *Das Erheben*

Bislang ging es nur darum, wer gegenüber wem im Recht den Anspruch auf Richtigkeit erhebt. Die Frage, was das Erheben dieses Anspruchs bedeutet, blieb dabei offen. In der Literatur wird selbst dort, wo mit dem Recht verbundene Ansprüche eingehend erörtert werden, kaum Aufmerk-

[4] Vgl. *Hart* (FN 1), S. 89.