Law and legal argumentation

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ABSTRACT
The main objective of this article is to approach the studies of argumentation and rhetoric, based from the classical world, to the contemporary argumentation of Robert Alexy's Discourse Theory in the field of Discourse Analysis. It discusses what is Argumentation in the General Sense and Classical Rhetoric, then the postulates of Argumentation in Legal Discourse are presented. To articulate the philosophical postulates of Socrates, Plato and Aristotle about the use of rhetoric and the contributions of the Analysis of the use of legal argumentation in the discourse with Robert Alexy, who will deal with legal argumentation in the discourse of judicial decisions from the philosophical point of view. The study arose from the factual analysis of argumentation by legal practitioners in the presentation of problems and in the decisions rendered by judges. This research presents the construction of the legal discourse that is based on legal argumentation so that it does not summarize the common argumentation used in the non-legal discourse. The bibliographic review method is used, consulting articles from indexed journals for its development. The research based on Alexy, and the legal discourses in decisions when based on legal argumentation are related to the field of Philosophy.

Keywords: Rhetoric, Persuasion, Argumentation.

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INTRODUCTION

The objective of this article is the analysis of Robert Alexy's Theory of Legal Argumentation[5] to the detriment of the use of argument in the general sense and the use of rhetoric, with a view to the critical reconstruction for the foundation of legal discourse. For this, it is necessary to carry out a thorough study on the art of argumentation, that is, knowing how to persuade through a well-formulated discourse.

The study of argumentation goes beyond several areas of knowledge, namely, Philosophy, Sociology, Linguistics and Law. To this end, the domain of argumentation is essential, especially when it comes to legal argumentation, considering that society expects from law operators answers of complex content and based on social problems, so that legal questions have emerged since the 5th decade of the twentieth century about the failure of positive law, bringing to the fore the importance of discussions about argumentation. In this context, new theories and theorists have emerged in the legal argumentative conception, which is divided into three distinct categories: formal, material and pragmatic. According to Habermas[6], *argumentation* is a "type of discourse in which participants thematize controversial validity claims and seek to resolve or criticize them with arguments" and that *arguments* would be as "means with which it is possible to obtain intersubjective recognition of a validity claim raised by the proponent in a hypothetical way"[7], so that "reasons that are systematically linked to the claim of validity of a problematic externalization", [8]and with this the "force" is measured, contextualizing it, by the acuity of the reasons, which is revealed, for example, by the effectiveness in convincing the participants of a discourse, motivating them to assent to the respective *claim of validity*.

ORGANIZATION OF LANGUAGE IN DISCOURSE

Argumentative techniques should be the object of research in the school field, so that argumentation does not consist only in the production of text, but also in the way of knowing how to express oneself. Thus, argumentation should be seen as a necessary activity; However, it depends on several factors that must be considered in order to have a good argument:

> The true substance of language is not constituted by an abstract system of linguistic forms, nor by isolated monologic enunciation, nor by the psychophysiological act of its production, but by the social phenomenon of verbal interaction, carried out by the enunciation or enunciations. Interaction thus constitutes the fundamental reality of language[9].

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[5]ALEXY, Robert. Theory of Legal Argumentation: The Theory of Rational Discourse as a Theory of Legal Grounds. 3. ed. Rio de Janeiro: Forense, 2011, p. 20.
[6]HABERMAS, Jürgen. Theory of Communicative Action: Rationality of action and social rationalization. Martins Fontes, 2012, p. 44, 48, 60, 61.
[7]REBOUL, O. Introduction to Rhetoric. Translated by Ivone Castilho Benedetti. São Paulo: Martins Fontes, 2004.
[8]MY DICTIONARY. Rhetoric. Available at: https://www.meusdicionarios.com.br/retorica/. Accessed: 30 out. 2023.
[9]BAKHTIN, Mikhail. Marxism and the Philosophy of Language: Fundamental Problems of the Sociological Method in the Science of Language. São Paulo: Hucitec, 1986.

According to Abreu[10], arguing is the art of convincing and persuading. To convince is to "manage information", to speak to the reason of the other, demonstrating, proving; it is to build something in the field of ideas; it's making the other think like us. To persuade is to know how to manage the relationship, to speak to the emotion of the other; it is to build on the terrain of emotions; it is "sensitizing the other to act".[11]

There are particular characteristics of argumentation as a result of which the problems inherent to his study are revealed, Perelman[12] points out the initial distinction between demonstration and argumentation, which results in fundamental sociological consequences for the thought he will develop throughout his work:

> Argumentation is essentially communication, dialogue, discussion. While demonstration is independent of any subject, even the speaker, since a calculation can be performed by a machine, argumentation in turn requires that contact be established between the speaker who wants to convince and the audience willing to listen[13].

It is true that it would be impossible to argue without referring to rhetoric, since the art of arguing permeates the way of managing discourse, in order to obtain the final goal, which would be the effective result in relation to social practices.

As Reboul stated[14], Rhetoric conceives of argumentation as the act of assigning the floor to an audience, submitting to it theses that are not necessarily true, but credible and reasonable. Therefore, an argument is a set of statements connected by the existence of one or more premise that purports to offer reasons to show the other that the conclusion is true.

WHAT IS RHETORIC AND HOW DID IT COME ABOUT?

Rhetoric is a word that means **to convey ideas with conviction**, the **art of speaking well**, **communicating clearly**. It is a word that originates from the Latin *rhetorica,* which came from the Greek *rhêtorikê*[15].

As Reboul put it[16]:

> The birth of rhetoric is traditionally attributed to the Sicilian Corax and dates back to the fifth century B.C., a historical period characterized by the transition from tyrannical rule to democratic rule. During this period, numerous legal conflicts were fought by citizens who, stripped of their property by tyranny, resorted to justice in an attempt to recover them. However, the figure of the legal professional as it is known today was not known, so that

[10]ABREU, A. S. The Art of Arguing: Managing Reason and Emotion. São Paulo: Ateliê Editorial, 2003.
[11]ABREU, 2003, p. 25.
[12]PERELMAN, C. Argumentation. Einaudi Encyclopedia. v. 11. Lisbon: Imprensa Nacional-Casa da Moeda, 1987, p. 234-265.
[13]*Ibid*., p. 235.
[14]REBOUL, 2004.
[15]Available at: https://www.meusdicionarios.com.br/retorica/. Accessed: 16 out. 2023.
[16]*op. cit.*

> citizens who sought the solution of their conflicts in the judiciary had to provide for themselves the support of their theses.

It was through the treatises of Corax and Tisias, the poetic and philosophical incursions of Gorgias and Protagoras,[17] that the first propositional manifestations of rhetoric were made. According to Cicero's testimony:

> When, says Aristotle, tyranny was destroyed in Sicily, and questions between private individuals, after a long interval, were again submitted to the courts, for the first time, in that people of penetrating mind and naturally inclined to discussion, the Sicilians Corax and Tthisias, were seen to give a method and rules. Before, no one followed a set course, nor submitted to a theory, and yet most expressed themselves with care and order.[18]

According to Pernot[19], the use of oratory is used in high regard at the beginning of the century. IV, being ostensibly placed in the judiciary and political circles[20].

Corax of Syracuse and Tisias were his disciple as the first to introduce rhetoric to Athens, according to Reboul[21].

> Aware of this growing practical need for discursive elaboration, Corax and his disciple Tísias, around 465 B.C., launched the first methodical treatise on the art of the word – a manual that presented, in a didactic way, lessons on how to properly support a thesis in court, with a view to overcoming any demand.

And the author presents:

[17] Protagoras, born in the city of Abdera, lived between the years 490 and 420 B.C. As for the dates of birth and death, there is a slight variation between the testimonies. According to Guthrie, the sophist lived between 492 and 422 B.C. (Guthrie, 1995). Diogenes Laertios, on the other hand, states that Protagoras lived until the apogee of the 84th Olympiad, which, in turn, occurred in 441 B.C. According to Philostratus (Lives of the Sophists I, X, 1-4), Protagoras was a listener of Democritus, having been, among the Sophists, the first to charge for his office. Aeschius of Alexandria also testifies about the relationship between Protagoras and Democritus. In: Life of Protagoras. Plato's Scholium to the Republic, 600c. The following contributions to the history of rhetoric became known as belonging to Chalcedonium: the use of opposing or double discourses (dissoì lógoi), the use of commonplaces, and the concern for the correctness of words (orthoépeia). In a general sense, and according to the testimonies of Plato and Sextus Empiricus, it was in the sphere of knowledge that Protagoras made the greatest impact by defending the thesis of [...] "Let man be the measure of all things, for those that are, that are, for those that are not, that are not." (Sixth Empiricus. Pyrrhonic Hypotypes I, 216). No less important is his thesis on religion, which has come down to us summed up by Sextus Empiricus as follows: "With regard to the gods, I am not able to say either whether they are or what they are. There are many obstacles." (Against the Mathematicians IX, 55). As a result of his ideas concerning the gods, Protagoras is said to have been sentenced to death. We may regard him as the most respectable representative of the so-called ancient sophistry. Since we do not have any of his writings at first hand and everything we have about Protagoras has its origin in the ancient testimonies, especially those of Plato, Aristotle and Sextus Empiricus, we emphasize that any attempt to reconstruct his thought will invariably suffer the influence of the suggested source

[18][...] ait Aristóteles, cum sublatis in Sicilia tyrannis res privatae longo intervallo iudiciis repeterentur, tum primum, quod esset acuta illa gens et controversia natura, artem et praecepta Siculos Coracem et Tisiam conscripsisse: nam antea neminem solitum via nec arte, sed accurate tamen et descripte plerosque dicere. CÍCERO, M. Túlio. M. Tulli Ciceronis Retórica, Tomus II. A. S. Wilkins. Oxônio. e Typographeo Clarendoniano. [*S. l.*]: Scriptorum Classicorum Bibliotheca Oxoniensis, 1911.

[19] PERNOT, L. Rhetoric in Antiquity. Paris: Le Livre de Poche, 2000, p. 42.

[20]According to Pernot (2000, p. 42): "The Athenian oratorical practice develops under different circumstances, appearing for the first time in the legal and political framework. In court, the parties were obliged to plead their cases in person, without the possibility of being represented by a lawyer. There was no public prosecutor's office, so that accusations were necessarily brought by individuals: in private actions, by the injured party; in public actions, by any citizen."

[21]REBOUL, 2004.

> At this time, rhetoric, understood as the art of persuasion, acquired more and more prestige, because there was a belief that those who mastered their techniques would be able to convince anyone of anything. Therefore, in that judicial context, praxis indicated that the winning cause in a judicial conflict did not necessarily have to be the fairest, but certainly the most efficiently sustained in court, which allows the observation that rhetoric does not argue from the true, but from the verisimilitude[22].

According to Amossy[23]:

> From Sicily, then dominated by the Greeks, rhetoric migrated to Athens and there found fertile ground for the development of its postulates, with the flourishing of the Greek polis, where political decisions were made through broad popular participation, in collective debates organized so that people could exercise their right to free opinion and expression, within an institutional framework endowed with laws.

Socrates and Plato[24] were opposed to the idea of using Rhetoric, since this method of study had no basis of knowledge, but a crude mechanical way of elaborating speeches in such a way as to persuade anyone. Socrates criticized the Sophists who were the teachers who traveled from city to city teaching anyone who paid for the Rhetoric.

According to Ramsey[25]:

> Plato constructs a specific nomenclature for the persuasive practices of his opponents in order to combat them even more acutely, suggesting that it is easier to attack something that is defined. The act of naming would therefore already be, at least in the Gorgias dialogue, part of the strategy of disavowing rhetoric

According to the philosopher, rhetoric was the negation of philosophy, and this practice needed to be abolished from the study of the Greek people. Due to this, Socrates began to confront the supposed thinkers of the time and as a consequence, in addition to the accusation of corrupting the youth to worship other gods than those accepted by the Greeks, this led to his death.

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[22]*Ibid*.
[23]AMOSSY, R. New Rhetoric and Linguistics of Discourse. *In*: KOREN, R. ; AMOSSY, R. (org.) After Perelman: What Policies for New Rhetoric? Paris: L"Harmattan, 2002.
[24]The important passage in the Rhetoric (II, 24) which discusses the idea of probability (eikós) by attributing it first to Corax and Tthisias, and then to Protagoras, is as follows: "For that which is outside probability is produced in such a way that what is outside probability is also probable. If so, the improbable will be likely, but not at all. Just as in eristics, the failure to add to what extent, in relation to what, and in what way I make the argument specious, so it is the same in rhetoric, because the improbable is probable, but not absolutely, only relatively. It is from this topic that the Art of Corax is composed: "if a man gives no pretext for an accusation, for example, if, being weak, he is accused of violence (because it is not probable); but if it gives rise to an accusation, for example, if it is strong (it will be said that it is not probable, precisely because it would seem probable)". The same is true of other cases, since a man is bound or not to give rise to being accused. Both cases, therefore, seem probable, but the one will appear probable, while the other is not absolutely probable, except as we have said. Here, too, is to make the weaker argument stronger. Hence, with justice, men would be indignant at the statement of Protagoras, for it is a deception and a probability not true but apparent, and exists nowhere else but in rhetoric and eristics." "[...] (ARISTOTLE, Rhetoric II, 24).
[25]RAMSEY, R. "A Hybrid Techne of the Soul? Thoughts on the Relation between Philosophy and Rhetoric in Plato's "Górgias" and "Phaedrus"". Rhetoric Review, n. 17, 1999, p. 247.

ROBERT ALEXY THEORY OF ARGUMENTATION

The Theory of Argumentation has been studied since classical antiquity, going through several phases of development from its historical context to the study of argumentation in the legal field. According to Rodriguez, the most evident efforts to study argumentation in law date back to 1970, when the legal philosopher Chaim Perelman began his course in argumentation at the University of Brussels[26].

But it was after the French Revolution, through the application of the differentiation of powers[27], that the judiciary began to be required to issue reasoned decisions. However, it was Robert Alexy who began the demonstration of the basic supports that present the development until he reached the conclusion of the main ideas that make up the legal [28]argumentation.

For the German philosopher, it would be rare that the judicial decision did not result from the logic that exists in the statements of the legal norms in force, accompanied by empirical postulates taken as true or demonstrated[29].

For Alexy, as if the difficulties related to the classification and the way of using the aforementioned canons were not enough, his main problem would also be the imprecision, since the rule is defined that can result in different conclusions if the interpreters have divergent understandings on the issue. Therefore, for the author to assume such canons of interpretation, although useful, cannot be used as sufficient rules for the foundation of legal decisions[30].

Robert Alexy's theory is based on a rational enterprise, in which sufficient rules of internal and external justification are presented to achieve consistent and controllable decisions. Rational knowledge of the discourse is possible through the observation of precepts that are indispensable for the achievement of any well-founded consensus, and the author teaches that the formal and traditional logic of how to interpret and apply the law often does not meet situations of conflict between norms

In view of the indispensability of evaluations in the Science of Law and jurisprudence, it cannot be concluded that in judicial decisions there is a margin of liberality for subjective moral beliefs of the applicators of Law. Therefore, there were several attempts to objectify the application of these value judgments[31].

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[26]RODRIGUEZ, Victor Gabriel. Legal Argumentation: persuasion techniques and informal logic. 5. ed. São Paulo: Martins Fontes, 2011, p. 8.
[27]Through the application of a system of checks and balances, prerogatives and duties were attributed to each of the branches of State Power.
[28]ALEXY, 2011, p. 20.
[29]*Ibid*., p. 19.
[30]*Ibid*., p. 21.
[31]Four procedures are listed in the work: "1) to be based on physically existing convictions and consensus, as well as on non-legal norms physically in force or followed; 2) refer to valuations that, in some way, can be extracted from the existing legal material (including previous decisions); and (3) to have recourse to supra-positive principles. [...] 4) appeal to empirical knowledge [except the assumptions in (1)]" (ALEXY, 2011, p. 29).

Alexy, in general and historical terms, classifies legal arguments as follows:

> The arguments that may be used in the legal reasoning can be classified in various ways. The choice of classification basically depends on the purpose pursued. For our purposes, a distinction can be made into four categories: linguistic, genetic, systemic, and that of general practical arguments. Linguistic arguments are based on the verification of a factually existing usual language. Often, especially in the large number of so-called simple cases, they lead to a definitive result. Then, the decision is set, and any other decision will only be possible if the law is developed against the literalness of the text. However, it is often only possible to say that the norm is vague or, in some way, misguided. Thus, a decision can be justified only by other arguments. Genetic arguments target the factual purposes pursued by the historical legislator. Often, they are not applicable because they cannot be found or because they are too vague or contradictory. Moreover, the power of the genetic argument is debatable, as shown by the controversy between subjective and objective theory as to the scope of interpretation. Systemic arguments are based on the idea of the unity or coherence of the legal system. They represent the correct central point of thought expressed, somewhat exaggeratedly, in the coherence model. They can be divided into eight subgroups that can only be defined but not explained here: (1) the arguments that ensure consistency, (2) the contextual, (3) the systematic-conceptual arguments, (4) the arguments of principle, (5) the special legal arguments, such as analogy, (6) the arguments of precedent, (7) the historical, and (8) the comparative. General practical arguments form the fourth category. They can be divided into teleological and deontological arguments. Teleological arguments are oriented to the consequences of an interpretation and based on an idea of what is good. Deontological arguments express what is legally right or wrong without looking at the consequences[32].

Alexy points out that the critiques of Legal Discourse Theory are important because:

> One of the main problems with discourse theory is that its system of rules does not offer a finite procedure of operations by means of which a rational agent can always arrive at a precise result. There are three reasons for this. Firstly, the rules of discourse do not contain any definition as to the starting procedures. Starting points are the normative convictions of the participants and the interpretations of interests. Second, the rules of discourse do not define all the steps to be taken in argumentation. Thirdly, a series of rules of discourse have an ideal character and can therefore only be carried out approximately, i.e., partially. To this extent, discourse theory does not offer determinate decisions[33].

Unlike Habermas, Alexy concludes that this deontological character of the normative system (legal principles and rules) does not imply *absolutes*, but can be understood as constituted, among other things, by *optimization mandates*[34].

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[32]Alexy (2011) points out that this is a very convergent finding at the level of legal theory, citing authors such as Karl Larenz, Friedrich Müller, Kriele, Engisch, among others.
[33]ALEXY, Robert. The idea of a procedural theory of legal argumentation. Legal theory, caderno 2,1981.
[34]Habermas (2012, p. 259) is explicit in arguing that: Principles and rules have no teleological structure. They cannot be understood as precepts of optimization - as suggested by the "weighting of goods" in the other methodological doctrines - because this would suppress their sense of deontological validity. The author argues that: In the course of the cases, a transitive order is established between the principles, without this scratching its validity, without pragmatically explaining, however, what he means by transitive order, because, on this point, he seems to agree with Dworkin in relation to the thesis that: in the conflict between principles, an "all or nothing" decision is not necessary. It is true that a particular principle enjoys primacy, but not to the point of nullifying the validity of the principles that give way. One principle takes precedence over the other, according to the case to be decided.

LEGAL ARGUMENTS FOR THE LEGAL PRACTITIONER

In the field of the judiciary, it is necessary to make good use of argumentation, that the discourse is formulated in a clear and precise manner and that one has the power to convince the interlocutor, since his role in the lawyer's case is to represent his client. Therefore, it is important to have an argument permeated by certainty in what is being transmitted in order to be successful in the dispute.

Legal logic is structured from legal knowledge, which consists of the dialectical reasoning used in Law to obtain success at the time of decision, because the judge will base himself on the thesis presented by the lawyer to create his convictions, that is, to analyze the concrete case, so that he will not analyze truths, but to value the closest and most admissible narrative that brings you conviction, the power of persuasion.

According to Foucault, "The production of discourse is at the same time controlled, selected, organized, and redistributed by a certain number of procedures and dangers, to dominate its random happening, to evade its heavy and fearful materiality."[35]

Dialectical logic has great importance in discourse, since the work with law is eminently argumentative, and arguments are the basis of law.

> In law, nothing is done without explanation. You do not make a request to a judge without explaining why, otherwise the request is said to be unreasonable. In the same way, no judge can render a decision without explaining the reasons for it, and for this he builds argumentative reasoning. Without argumentation, the law is inert and inoperative[36].

Soon. Argumentation tends to persuade the speaker to achieve success in legal argumentation.

FINAL THOUGHTS

In this work, forms of argumentation and rhetoric were presented. Initially, it was made the approach of what would be argumentation in general regarding the use of language, related to Rhetoric from the point of view of some philosophers and the paramount importance of realization in Legal Discourse, from the perspective of Robert Alexy's Theory of Argumentation.

It should be noted that legal norms are not only based on various orientations, but also on principles, to enable a new way of delimiting the Law, which is to know how to interpret and apply these norms in legal discourses, and how to make themselves understood by the legislator. For this reason, it is important that the speaker has the use of considerable premises, relating to the use of language techniques that guarantee them to reach reason and meaning, in the appropriate way of using the use of persuasion. We conclude that the study of the Theory of Argumentation is the basis

[35]FOUCAULT, Michel. Ethics, sexuality and politics. Rio de Janeiro: Forense Universitária, 2004, p. 8-9.
[36]RODRÍGUEZ, Víctor Gabriel. Legal Argumentation: persuasion techniques and informal logic. São Paulo: Martins Fontes, 2005, p. 5-6.

for the operator of Law, insofar as it points out ways to relate a legal reasoning in the search for persuasion and convincing of its audience.

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