REVISTA ESMAT
20

ARGUMENTATION

ARGUMENTAÇÃO

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RESUMO

O presente artigo analisa a forma de argumentação volátil que se tornou lugar comum nos últimos anos na prática jurídica brasileira, com a abertura do Direito para os princípios jurídicos, os quais passaram a dominar, principalmente em sede de controle de constitucionalidade, a construção dos textos motivacionais de decisões dos tribunais, devido à carga normativa de menor densidade, permissivos da fluidez dos juízos. No entanto, essa possibilidade argumentativa leva a uma moral jurídica empobrecida.

Palavras-Chave: Argumentação. Motivação. Moralidade.

ABSTRACT

This article analysis the form of volatile argument that has become commonplace in recent years in Brazilian legal practice with the opening of law to legal principles.Such principles came to dominate mainly in terms of constitutionality control, the construction of motivational texts from court decisions, due to less dense normative burden permissive of the fluidity of the judgments. However, this argumentative possibility leads to impoverished legal morals.

KEYWORDS: Argumentation. Motivation. Morality.

1 INTRODUCTION

The theme of this approach carries, in the manner of Sisyphus, one of the cornerstones of modern legal argumentation theory, yoking the concept of argument to that of modernity which, in Zygmunt Bauman (2001), appears shaken by the ambivalence of the concepts.

This ambivalence of arguments that springs from the condition of modern man, self-aware of his virtual environment, but not always self-aware or capable of self-determination based on his own choices - discredits legal discourse as coming from the (Lockean) readily good man. This, aggregated to the social environment, would aim, in his actions, always at the realization of the common good, a theme visited by Freud (1969) when confronted with the malaise in civilization.

A considerable number of individuals no longer determine or justify their actions based on deeply-rooted moral principles, as some religious individuals - labeled fundamentalists - still do. Rather, they present themselves as personas, in the Jungian sense of the term, which seek to base their actions on typical stimulation of their time and cultural environment.

It is believable that these personas may in fact hold technical knowledge of the disciplines they set out to study, be able to articulate rational argument well and convince the audience with their assertions, to make their opinions as appropriate as possible to their intended scope, at the height of extreme individualism, which permeates our time of rights.

However, relative moral behavior, which in a sense admits the "truth of reason" - in Leibniz's expression (1996, pp. 395-396), produces malleable concepts at the expense of dense morality, a social fact that perhaps led Marx and Engels (1983, p. 24) to declare that "everything solid and stable is crumbling.

Let us consider a hypothesis, from the point of view of social justification, in which two types of moral individuals are pitted against each other: a newborn child needs a blood transfusion, but the parents profess to be Jehovah's Witnesses, religious individuals with rock-solid values that guide their individual actions. With the parents' refusal of treatment, the decision to transfuse or not is up to the doctor, or, exceptionally, is transferred to a Judge.

Medical conduct and/or even judicial intervention in these cases, to perform or authorize a blood transfusion, are usually presented as the fruit of a moral not as dense as that of these Witnesses, due to the cognitive elements, which influence this decision making, being keylined by a específicfic academic

training, a situation that refers to the possibility of assimilation of an "academic moral" expressed in profissional swears.

Thus, decisions of this type - self-defined as technical, capable of supplanting the moral-religious basis, and which are finally justified by the attempt to save a life (right to life) - seek, in the background, to relativize the concepts derived from religious dogma. This hypothesis hide the antidogmatism of scientfic speculation, what Leonardo Boff (1993, pp. 20-28) perceived as the "spirit of the inquisitor," or the mere diffuse attempt to adapt the subject's conduct to what other "contractors" expect of him in the public sphere, as a result of the secularist belief that religious individuals must also obey the norms of social behavior, even if opposed to their faith dogmas.

The argumentation, in cases of this kind, makes use of what Bauman (2001) called "liquid modernity", due to the fluidity of the concepts that inform it, making use even of open legal norms - as in the case of the principle of human dignity -, which lack rational conformation.

This type of application of principles indicates the existence of systemic openings that end up being filled by the authority of the argument, not always based on the best argument, and that take into account the subjectivity and the "place of speech" of the operator of legal concepts, letting one perceive an "asynchronicity" in the time of rights.

As one can view from this construction, the term liquid modernity attracts the fluid dynamics of social relations in the contemporary and coexistential environment, by forming particular existential visions propelling rational operations. These, in turn, progressively move away from dense moral concepts, or even "all-or-nothing" legal rules.

Thus, a net argumentation could well be seen as a type of relativist construction, such as the one referred to by Gustav Radbruch (1999) in his academic circular chrismated as the "five minutes of philosoy of law". In it, the German jurist proposes, in the post-war period, a jusnaturalist return to the general principles of law, given the unease caused by positivism in the Nazi-fascist period, applying to law a positivist solids diluent that will imprint its mark on the Nuremberg Court.

The dilution of legal concepts operated in the West as a result of vertiginous changes in social behavior, such as the advent of new means of communication and globalization, has culminated in the diagramming of a softened law, susceptible to various correct answers to base decisions that interfere with

institutions solidificated over centuries, even those of religious origin - in this case - creating what we could call a "judicial neopattern".

In the analysis that follows, I consider the possibility that legal argumentation, as a method of persuasion, may rely fundamentally on the morality internalized in legal norms and on the conceptual openness of principles, factors that, in many moments, place it against the denser moral core responsible for the dynamic constitutionalization of the State, especially in the so-called counter-majoritarian decisions.

I emphasize, however, that I do not intend a deep dive into the related topics of the legal interpretation or hermeneutics, to which the construction of arguments is related, in its context of basing judicial decisions or postulations.

2 THE CHANGING OF THE DISCURSIVE PARADIGM OF MODERNITY

There is no argument[1] that can be elaborated outside the historical community, temporally situated; which results in the verification that argumentation[2], as a form of concretization of Law, is essential to the system of integration of the legal order, integration that operates in the process in which individuals, generally with good technical training, participate. In other words, for the argument to compose an understandable and acceptable legal discourse, its enunciation depends on the existential moment of its addressees and the current acceptance of its enunciations.

A speech eventually given in Brasília, in 1989, on "the fall of the Bastille", would not have the same meaning as another, on the same subject, given at the start of the French revolution in 1789, insofar as the elements of immediate cognition of both would be temporally different, even if the more recent one contained illustrations referring to the same historical fact, the alleged finding of political imprisonment.

This occurs due to the circunstances involving the community of addressess of the discourse, the community of interpreters who are different in the two moments and, therefore, would not understand it univocally. With such a finding,

[1] Assumo, aqui, a prévia compreensão de argumento de Anthony Weston (2009, p. 11) de que "argumentar significa apresentar um conjunto de razões ou provas que fundamentam uma conclusão. Aqui, um argumento não é meramente a afirmação de certos pontos de vista, e não é puramente uma disputa. Os argumentos são tentativas de fundamentar determinados pontos de vista com razões". (grifos nossos).

[2] Sobre a teoria da argumentação jurídica, constata Robert Alexy (2011, p. 548) que "o ponto de partida da argumentação jurídica é a constatação de que, no limite, a fundamentação jurídica sempre diz respeito a questões práticas, ou seja, àquilo que é obrigatório, proibido e permitido".

one can foresee that the legal terminology undergoes significant changes over time and does not say the same thing within the argument, in different temporal lapses, because of the etymological distinctions and their contextual significates (PÊCHEUX, 1999).

The community of interpreters that can be designated as the audience – the characterization of Chaïm Perelman (2005) is used here –, which in fact confers an immediate meaning to the discourse, is a living and historical community. The argument, captured in the realtionship between the speaker and the local audience, only acquires a certain meaning in its spacial-temporal moment, evidencing that the performative words of the arguments gain signification when understood by its addressees and in the circumstances of the discourse, due, eventually, to the competence, beliefs and emotions that involve the audience and its interlocutor.

Understanding depends, so to speak, on the adherence of listeners or readers to the argument, a fact that reveals its convincing end or consensus seeking. This first observation of the discourse historically situated in the audience reveals the relational aspect of the argument with the cultural reality experienced by society (ORLANDI, 2002), allowing by situating the discourse in its historical circumstances, isolating it from the universal context, to position this dynamic of the argument (of legal argumentation) in the space-time relationship of the local audience.

The image used by Freud, that of the (historical) construction of Rome as a psychic entity and fruit “of a long and abundant past”, in his allegory of the psychic formation of the individual, serves as a representative diagram of how the legal argument is formed. Although it allows the historical landmarks of its edification to be situated, these are present in a complete and a-historical way at the moment of the construction of the argument.

Thus, some of the marks of the social changes that characterized the transition from Antiquity to Modernity could be mentioned, changing the legal language and the concept of the legal norm, precisely because they arose from the immediacy of events. Among them there are some that changed the political and cultural configuration of Europe and its Colonies, which took place between the 17th and 19th centuries, namely: the Glorious Revolution and the Industrial Revolution, which began in England, and the French Revolution, the latter deflagrating what came to be called the "modern era", or simply "modernity", historical facts that altered the perception of legal discourse.

The Industrial Revolution, for example, did not just carve out a change in the system of production of its time to overcome manufacturing methods, because until the 18th century Europe was basically an agrarian economy. Along with a whole process of change in the means of production – the coal and iron revolution (1780 to 1850) and the steel and electricity revolution (1850 to 1914) –, it became necessary for humans to progressively adapt to the changes involved in this transition from feudal to industrial economy (HENDERSON, 1969, p. 22-26), which also inferred important modifications in language and human behavior.

Moreover, it was not only a matter of man adapting to new working or manufacturing conditions, but also of experiencing a cultural revolution that would directly influence the emergence of new customs and, so to speak, produce the softening of certain moral understanding, with the replacement of the ideas, scenarios, or models that configured society, considering the absence of a linear history applicable to all social quadrants.

Thus, when Karl Marx and Friedrich Engels wrote the Communist Manifest (1848), in the Spring of the Peoples, with the backdrop of this industrial age, the desconstruction of the concepts rooted in 18th century society had already begun, represented in the conception of family, property, religious practice, and racial conceptions arising from slavery and the exploitation of wage labor (MARX; ENGELS, 1983).

Modern discourse, therefore, in order to deconstruct the conceptions founded in ancient society and claim the emergence of a "new humanity", needed to dilute concepts and adapt them to the reality, which was synthesized as a society stratificated into social classes, as it did with regard to the role of women in society, seeking to integrate them into the labor market out of a capitalist need, not by admitting their equal dignity. With this, it engendered a relationship between the argument and the position occupied in stratificated society by the emissary and the receiver of the discourse, giving rise to moral[3] and a fluid discourse.

In Max Weber's (1998, p. 91) construction, two interconnected structures arise from this context – capitalism as a form of production and the bureaucracy of the

[3] Nesse ponto, apoio-me na posição de Richard Posner (2012, p. 11), a de "[...] que os critérios de validade de uma pretensão moral são dados pela cultura em que essa pretensão é afirmada e não por uma fonte transcultural ('universal') de valores morais. Isso significa que é só em vista de um efeito polêmico que podemos chamar a outra cultura de imoral, a menos que acrescentemos: 'a nosso ver'. Porém, rejeito o 'relativismo vulgar' que prega que temos o deverde tolerar culturas cuja visão é diferente da nossa". (grifos nossos).

modern state - imposing the monopoly and unassailable jurisdiction as an instrument of social control through rationally justified legal argument. The author understands this process, in Habermas' exposition, as the institutionalization of a rational action with similar respect.

Traditional conceptions dissolve, so to speak, and existential possibilities diversify in a social structure that is increasingly unequal and dependent on state regulation (HABERMAS, 2000, p. 4), transforming the law and judicial decisions[4] into the moral paradigm to be imposed on a given society (a legislated morality). Nevertheless, a strong positivist current advocated an insipid law, whose application would result from a pre-established hermeneutic[5].

However, some societes remained immune to these changes, even though they assimilated transformations in their production system, due to an ingrained morality or attachment to religious systems[6] - as in the case of Islam.

In Brazil, with the advent of the Republic and in the first quarter of the 20th century, the language of law changes substantially, and legal argument becomes increasingly dependent on real power factors, which not only configured the possible constitution, appearing to shape to the influence of Anglo-American law present in the edition of our first Republican Constitution[7], but also separated the State from the Oficial Church.

The nascent juridical structure of the Republic, which intends to be separated from the religious moral core from then on, starts to embrace a certain hermeneutic realism in the social sense of the law. This situation influenced the advent of the Civil Code, from 1916, after the so-called "Law of Introduction to

[4] Em Portugal, a chamada Lei da Boa Razão (1769) já se antecipava a esse cenário, com a sua tentativa de regular a aplicação do Direito. Esse instrumento legislativo, segundo Almeida Costa (2000, p. 366), visou também "fixar normas precisas sobre a validade do costume e os elementos a que o intérprete podia recorrer para o preenchimento de lacunas".

[5] Alexy (2009, p. 4) constata que "ao conceito positivista de direito restam apenas dois elementos de definição: o da legalidade conforme o ordenamento ou dotada de autoridade e o da eficácia social. As numerosas variantes do positivismo jurídico resultam das distintas interpretações e ponderações desses dois elementos de definição".

[6] Zygmunt Bauman e LeonidasDonskis (2014), ao discorrerem sobre a soberania na Modernidade, acentuam que, embora continuemos a viver os conceitos pós-vestfálianos de autonomia dos Estados, não encontramos nisso uma uniformidade. Dizem os autores (2014, p. 222-223): "O processo de emancipação das sobras lançado pela 'soberania de Vestfália' é prolongado e até agora tem sido doloroso e distante da uniformidade. Enquanto muitos poderes (interesses financeiros e comerciais, redes de informações, tráfico de drogas e de armas, criminalidade e terrorismo) já alcançaram a liberdade de desafiar e ignorar esse fantasma, na prática, se não na teoria, a política (a capacidade de decidir como e por que os poderes devem ser empregados) ainda sofre constrangimentos".

[7] No prefácio de Homero Pires à coletânea de textos que compõem os Comentários à Constituição Federal Brasileira, de Ruy Barbosa (1932, p. 5), o organizador da obra cita Carlos Maximiliano: "Este (Ruy Barbosa) e a Commissão foram profundamente influenciados pelo exemplo norte americano".

the Civil Code", edited, in 1942, with marks of approximation between the "Liberal State and the Social State of Law", because it intended to move away from the theological argumentation.

This social end, since explained as the most important choice-which shows itself in the bond of utility that unites an act (means) to its result (end) in a given opportunity (hypothesis) - is seen as the desired result and the interest of the agent (LOPES, 1943, p. 140). Thus, legal realism relativizes the normative precepts that were so dear to the nascent Brazilian positivism.

Brazilian modernity, even with late industrialization, was also characterized as a gradual change of life in society[8] by making it increasingly fluid and disentangled from those static models that conditioned it in the almost real estate system of the previous century and that fused statecraft with spiritual power in the personification of the ruler, who had created the State-Church symbiosis[9].

However, even this modern language of Law, which is based on social and cultural changes, has in some respects changed some desecrated concepts in order to use them in an atavistic way as a source of power for the State. Thus, the use of symbology and mythical-religious beliefs continued to be used as a source of repressed argumentation, a fact still present in new generations, in an attempt to justificate supposedly secular arguments.

Nothing compares, however, to the events that followed World War II and led to the so-called Cold War and its overcoming with the globalization that broke out in the 1980s, as a vector for behavioral changes in a considerable part of the Western world. In Brazil, in particular, most of the precepts built into the codification of the New State - such as the criminalization of various moral behaviors - dissolved with pluralism, many of them based on court decisions[10].

The construction of the legal argument in this dissolution of solids presents itself, in a certain aspect, necessary to the new stage of legal discipline, suggesting itself as a vector for the discovery of which reasons are best adapted to the degree of cultural development of the addressees of the norm, to produce

[8] Principalmente a partir de 1930, que de certa forma sofre os efeitos das ideias modernistas, de que a Semana da Arte Moderna, ou Semana de 22, é uma espécie de símbolo.

[9] A submissão dos documentos religiosos ao placet régio vai dar na chamada "questão dos bispos" e na mudança de paradigma do constitucionalismo brasileiro (SCAMPINI, 1978, p. 44-50).

[10] A jurisprudência brasileira, por exemplo, lentamente alterou a compreensão de "consentimento da ofendida" para descaracterizar o crime de estupro no caso da presunção, quando a vítima era menor de quatorze anos de idade, culminando pela revogação do art. 244 do CP pela Lei nº 12.015, de 2009.

the expected eficacy of the process of deciding conflicts and, as a consequence, of the use of public force.

Thus, with conceptual modernity comes a form of legal discourse detached from the primary source of law, in which rational argument (motivation) even admits of ruling against the precepts of the law, or in the seas now navigated, in "interpretation conforming to the constitution."

On the other hand, the technological revolution brought about by the advent of personal computers and, subsequently, the formation of the public Internet network, which prepared the virtual space of smartphones, gave birth to a network capable of receiving and transmitting a vast amount of information instantaneously, without respecting legal boundaries, nor caring about the authenticity of its origin, as Lyotard (2011)[11] had predicted, thus significantly diminishing traditional sources of knowledge. With this, they impose, in the current stage of development of social media, an intrinsic need for approval [like] of the argument, even at the expense of its fallacious content.

With the amplfication of the audience of recipients of legal argument - especially court decisions - to the virtual environment, in which comments on what has been established in the decision-making process are rapidly replicated, the interpreters/applicators of Law have entered a phase of greater argumentative liquidity. This was due to the perspective of the reasons for the decisions being better received by the opinionated audience, which also became mobilizing and composed of "moral activists" and virtual ones.

3 AN UNDERSTANDING OF THE PREAMBULAR LANGUAGE OF LAW

As García de Enterría (1999, p. 26) notes, the French Revolution, which symbolically builds the political structure of the modern state, substantially changes the language of law, and it should be considered here that this revolution was first and foremost a rupture in legal linguistics and a consequence of the rational justification of law, a landmark, were it not for the Constitution of the United States of America (USA), of modern Western law.

[11] No texto composto, em 1979, o autor francês antevê os efeitos (Matrix) institucionais da informatização, com a hipótese de que "[...] O cenário da informatização das sociedades mais desenvolvidas permite iluminar, com o risco mesmo de exagerá-los excessivamente, certos aspectos da formação do saber e dos seus efeitos sobre o poder público e as instituições civis, efeitos que permaneceriam pouco perceptíveis noutras perspectivas [...]" (LYOTARD, 2011, p. 11).

With the French Revolution and its proclaimed universal declaration, not only did new rights emerge, concerning the humanistic conception that is allocated to the State structure, but also the way of declaring and expounding its postulates changed.

The preamble declaration, which precedes the bureaucratic text of the French Constitution of 1791, enunciates the Human and Citizen's Rights in a comprehensive way - with the positivization of its axioms as principles, precepts that resulted from the momentary overcoming of the arbitrariness in the monarchic and absolutist government, to institute a government of men submitted to the written law, even if, at that moment, this was only a declaration of intentions.

It is evident, then, that the revolutionary society sought to create spaces of freedom that did not exist until then, declaring rights of the individual against the State, and constituting what later became known as Fundamental Rights, in an attempt to prevent a return to absolutism, in which, it must be said, France failed enthusiastically.

It is, therefore, a sociological moment of linguistic deconstitution of the old law to adopt a fluid or softened language - compatible with modernity and the universalization of the ideals of the revolution, which is why this preambular Declaration becomes a milestone of change in European Public Law, slowly spreading to other peripheral societies.

In this way, the first traces of liberalism entered the Constitution of the Empire of Brazil in 1824 (after some revolutionary attempts), in the structure of a title topographically located in the body of the Constitution, in which rights were declared, conceived as "Das Disposições Gerais, e Garantias dos Direitos Civis e Políticos dos Cidadãos Brazileiros". These rights would subsequently guide all legislative production, which would give rise to the first Codes of the Empire and the structuring of the Brazilian Jurisdiction, allowing the emergence of a technical language.

However, in the first stage of the formation of this legal structure, culturally, religious morals were imposed as a result of the oficiality of the Church (which even held the birth register for those who acquired formal citizenship by being baptized Catholic), at which point citizenship became confused with fidelity to the oficial creed. This provides legislation surrounded by such guidelines (even on land ownership), produced by a society endowed with deep-rooted moral concepts derived from the Catholic vision of regulating community life.

The Brazilian Republic, in this respect, with the profusion of other religious confissions and the disappearance of the unity that held the State in a cohesive direction of accomplishing its objectives, fissures the monolithic block of Brazilian legal discourse, allowing a legislation to emerge, in certain aspects, contradictory from the point of view of social morality, considering that the majority of the population remained attached to the previously oficial religious creed, but settled with the growing secularity of the State.

In this preamble, the language of Brazilian law liquefies, with the breaking of the moral-religious paradigm, molding itself to the various factors of power and to the immediate needs of those who produce the Laws and Jurisprudence, giving vogue, in the insurgent Republic, to the growth of the plurality of moral conceptions and the softening of behavioral norms, which will gradually reflet themselves in legal argumentation.

4 THE LAW TIMES

The impossibility of dissociating law from its time of production (ALEXANDRINO, 2011, p. 11) becomes clearer under the perception of the evolutionist components, which are apparently the result of the new beginning of problematization of the notions of State and its essential functions, which, in Montesquieu and the Federalists, took their first modern forms.

The historical-evolutionary system seeks to replace the introspective process of examining the law with an external one, which needs to be adapted to the social fins for which it was issued. In this way, the will of the legislator can no longer be considered in an absolute manner as the will of the law, but rather as interpretative data (text of the norm) that will compose the legal discourse, which is increasingly flexible and adaptable to circumstantial interests.

Thus, the morality of modern Law, imbricated in the law and in the jurists' reasons that manifest themselves particularly in postulations and judicial decisions, is increasingly relative, weakened, and pulverized, although the current tendency to adopt binding precedents and decisions reveals an attempt to return to the lost legal cohesion.

Such factors produce a law to its time, as if it presented evolved legal institutes - which have acquired this capacity for moral adaptation, or, in the

Freudian view of the psychic city as edifications in which all phases of development continue to exist – (FREUD, 1969, p. 88).

Freudian view of the psychic city as edifications in which all phases of development continue to exist – (FREUD, 1969, p. 88); by virtue of this, it can be said, based on the observation that Law has its time, that Modernity presents itself as an increasingly rapid and liquid time of rights.

Apparently, there is a correlation between the various levels of modern legal systems, defined and articulated among themselves, forming legal currents that are systematized as in an evolutionary process. Hence, certain legal systems are considered to be grouped into "legal families", as if they were descended from one another, although no longer in closed castes, as was previewed when one spoke of Roman Law, for example[12].

From this perspective, the interrelation of these levels of analysis, conclusive of the development of several areas of science, has generated a system of supposedly universal rights, which are introduced in a range of national systems – considering, for example, the current understanding of sovereignty, in which political positions are more evident than technical ones.

The breaking down of cultural borders – which is sympathetic to the loss of substance of sovereignty and nationality – increasingly relativizes the moral content, which presents itself as a real factor of social cohesion on the path to globalizing the foundations of Law, which can be called the "recolonization" of peripheral cultures. These, in turn, become flexible to these concepts, in a phenomenon contrary to what has been called "decolonization.

This infusion results in what Zygmunt Bauman (2001) has perceived as "moral blindness" or the loss of human sensibility, which reflects the possibility of the trivialization of evil, considering that we live in a world of contrasts, with wealth and power accumulating vertiginously, while the basic needs of a huge number of people are left aside, without moral scruples.

In this observation that law has its time, we can glimpse that "our time" is liquid, a time of rights that are concretized at various levels and realized within the possible or according to circumstances.

[12] "Na apreciação da gênese dos direitos fundamentais podem considerar-se vários níveis de análise: o nível filosófico-cultural (ou seja, o do movimento das ideais), o político-constitucional (abrangendo todos os movimentos políticos com a aprovação dos documentos constitucionais) e o nível técnico- jurídico (o domínio da Ciência do Direito). Esses diversos planos, definidos e articulados entre si, constituem um dos mais extensos e complexos capítulos da História da civilização ocidental, que só de modo muito imperfeito poderíamos descrever. (ALEXANDRINO, 2011, p. 12).

5 THE ALLEGED EVOLUTION OF RIGHTS AND THE LEGAL ARGUMENT

The intention of universalizing the guidelines of the declaration of rights, now fundamental, in the national legal system, with its embryo resulting from the French revolutionary movement, together with the cultural changes brought about in the old continent with the transformation of the productive system, ends up generating its expansion bases.

The slow formation of these public freedoms was the result of a humanistic haurida philosophy from the Renaissance - man as the central figure of philosophic cogitation - which likewise fed on a humanistic literature since the millennium, allocated by historians in the 14th century, and then the filosófic theories of the 15th century, which led to a return to the knowledge of the Greeks, present in the interlocutions of several medieval authors such as Aristotle and Plato.

However, what draws attention in the French Revolution is the fact that, for the revolutionaries, it was not enough to depose the ruler or to establish a new political order, they intended to constitute a new society based on ideas that had the individual as the helical center of social relations; to protect their individuality, and to assure them rights against the prevailing despotism, under the shield of individual rights and guarantees.

At another point, when Modernity begins to dissolve the legal concepts that provided the prelude to this new phase of rights, legal principles assume the central position of discourse by confusing themselves with the "general principles of law," and then standing out in each branch of its disciplinary tree as specific and positivized principles.

The rise of legal principles to the core of modern constitutions and the doctrinal elaboration of constitutionalists allowed these axioms to be recognized as legal norms, giving Law the elements of a less dense discourse, although more concerned with the construction of the argument of integrity.

Dworkin (2002), in particular, glimpsed in the jurist's elaboration, with respect to the construction of the argument, something correlated to the literary writer's work, composing a collective work that lacks complementarity and coherence, merging these attributes in what he calls "principle of integrity".

In the historical quadrant, therefore, of this discourse based on open axioms, Law increasingly needs the argument as a structure to substantiate the normative decision (abstract or concrete), whether in the text of the rule, in the scope of the

rule, or in the application of the rule itself, when it becomes something closer to its effectiveness.

In this context, one asks, as Olivier Reboul (2004) did, "how to definit argumentation?" The French author immediately clarifies that argumentation cannot be taken as a set or sequence of arguments, but rather "as a proposition intended to lead to the admission of another. A clue serves as an argument to a policeman or a lawyer, for example - 'because', 'in fact', 'because'... and the expression 'Considering the facts as they are'..." - indicating an interrelationship between arguments.

It can be seen in this assertion by Reboul (2004) that the argument is not satisfied in itself, that is, it does not present itself as a self-sufficient element in the formation of discourse, nor does it predicate an isolated and involutive structure. Moreover, some arguments are demonstrative and others argumentative, which prevents their definition exclusively from their own closed structure, depending on the understanding of the addressee, as the receiver of the discourse - that is, they are not solid.

Argumentation, in this line of teaching, "is a totality that can only be understood in opposition to another totality: demonstration". According to Reboul, the constitutive elements of the discourse are what distinguish argumentation from demonstration, because the former: i) is addressed to an audience; ii) is expressed in natural language; iii) its premises are credible; iv) its progression depends on the speaker; and v) its conclusions are always contestable (REBOUL, 2004, p. 91-92).

As can be seen from this simple exposition, argumentation depends on the dialectical relationship between what is said and what can be demonstrated, which implies that the argument evidences ideas that cannot be demonstrated or are untrue, even though it may autonomously convince the audience of their reasonableness. This is common in operations with pre-defined legal principles, supposedly in conflict and which allow weighting as a way of resolving the tension (often only present in the mind of the applier of the principle).

The result of these operations, guided by the subjectivism of the arguments, although it may indicate the correctness of its premises, fails to demonstrate decisions that cannot be demonstrated in practice, and implies social consequences that are disconnected from the premises of the constitution of society and the State.

In this aspect, the argument reveals a potentially mutant structure, even if it is dependent on its demonstrability to prove itself as valid and effective. Savigny's historicist precepts are very current, under the aspect that the arguments used in legislative processes are often out of step with, or even contrary to, the degree of cultural evolution of the population[13], in order to cast a new morality (proto-moral), presenting themselves as ideals that are partly inaccessible to the population, which also applies to judicial decisions.

In the current stage of development of legal argumentation taken by the recurrence of principles, more and more the argument depends on a demonstration of the progress of the legal institute present in the discourse, even if this alleged evolution shows itself more as a mutation of what was primarily conceived, as a product of a moral involution or liquidity of concepts.

6 MORAL RELATIVISM IN ARGUMENT FORMATION

I first emphasize, from a philosophy point of view, that relativism predicates the non-existence of an "absolute concept," that is, of an absolute truth, so that the production of knowledge would assume the cultural pattern of the society from which it originates.

However, as Weber (1998) noted in his analysis of epistemology, a consensus can be reached on certain truths or concepts, since, even if generated in different cultural environments, they end up proving to be scientifically valid or true, as occurs, for example, with this aspect of the legal concept of human dignity[14], which states that man cannot be used as a means for unjust and dehumanizing fins.

[13] A alusão aqui é a polêmica sobre a adoção de um Código Civil unificador do Direito alemão aos moldes do Código de Napoleão, que Arnold Wehling (2009, p. 753) sintetiza como "o momento mais emblemático do conflito entre as duas posições foi a polêmica entre Savigny e Thimbault, na qual aquele defendeu a historicidade das normas jurídicas e particularmente da lei, enquanto este defendia seu caráter universal, aplicável a toda humanidade em quaisquer condições de tempo e espaço".

[14] "Ao contrário da fabricação, a ação jamais é possível no isolamento. Estar isolado é estar privado da capacidade de agir. [...] A crença popular do 'homem forte', que isolado dos outros, deve a sua força ao fato de estar só, é ou mera superstição, baseada na ilusão de que podermos 'produzir' algo no domínio dos assuntos humanos – 'produzir' instituições ou leis, por exemplo, como fazemos com mesas e cadeiras, ou produzir homens 'melhores' ou 'piores', ou é, então, a desesperança consciente de toda ação, política e não política, aliada a esperança utópica de que seja possível tratar os homens como se tratam outros 'materiais'." (ARENDT, 2010, p. 236-237).

Well then. Associated with the term moral, relativism substantiates judgments that can manifest themselves differently, depending on whether they come from one individual or another. This implies recognizing, in modern volatility, subjectivity that has come to play a hypertrofied role in the composition of legal arguments and, at the same time, in the concretization of rights.

This association of the terms "moral-relative" brings us closer to what is of interest here, thus allowing us to say of the so-called irrationalist and methodological theories, because the conceptual production of legal discourse is immersed in the uncertainties of today's society.

In Ralf Dreir's explanation, one can list as methodologically irrationalist those theories that contain specifically irrationalist theses with respect to their scope and methods of knowledge.

Some of these groups of theses align themselves as methodological irrationalism in the negative sense, which are defined as limitative or relativistic. The limitative thesis considers the existence of fields inaccessible to rational knowledge, the starting point of so-called irrationalism.

In another parallel, relativism holds that the criteria of rationality are relative to the corresponding social-historical context, dependent on social consensus, for which slogans such as "perspectivism of knowledge" (Nietzsche), "existential solidarity of thought" (K. Mannheim) and "dependence on vital forms of rationality" (Wittigenstein, P.Winch), according to Dreier, would clarify the substance of these rational paradigms.

The intersection of such concepts informs that, in the construction of the legal argument, not only the acclaimed and traditional sources of Law act in the limiting circle of understanding of the interpreter/applicator, but also primary elements that, in their own way of forming the reasoning, are obscure, decontextualized from their time.

Lon Fuller's The Case of the Cave Explorers allows for a digression on the possibility that a diversity of filosófic or moral conceptions may determine diametrically opposed decisions founded on compelling legal discourses, which, in Dworkin's (2002) view, would be equally valid[15].

[15] 16Dworkin (2002, p. 127), escrevendo sobre casos difíceis, predica que: “O juiz continua tendo o dever, mesmo que nos casos difíceis, de descobrir quais são os direitos das partes, e não inventar novos direitos retroativamente. Já devo adiantar, porém, que essa teoria não pressupõe a existência de nenhum procedimento mecânico para demonstrar quais são os direitos das partes nos casos difíceis. Ao contrário, o argumento pressupõe que os juristas e juízes sensatos irão divergir frequentemente sobre os direitos jurídicos, assim como os cidadãos e os homens de Estado divergem sobre os direitos políticos.” E arremata

This plurality of correct arguments draws the question that morality depends on religion, considering that "common sense" points to this intricate conclusion that morality and religion are inseparable.

The way in which a religion is structured, fruit of a historical construction that has in its helical center a core of beliefs to base faith, leads to this impression, especially for the religious subject (who has a double moral burden on himself), because not following the precepts of his religion would mean a heresy or sin, making it seem that such moral precepts also feed the global system of society, even the legal system.

The deepening of this perception, however, leads to a different conclusion, as worked out by the great theologian Thomas Aquinas, who related morality and religion based on natural law, considering that everything in nature has a purpose, allowing us to conclude that natural laws do not definit only how things are, but how they "should be" (RACHELS, 2006, p. 54). It is precisely in this should-be, whether natural or not, that morality moves away from the religious core, enabling the emergence of a relational morality.

In this perception of morality, behavior can be natural or unnatural, contrary to nature (natural-being-duty), and thus considered wrong or inadequate (RACHELS, 2006, p. 56). Although the natural theory currently has few followers in the religious sphere, other thinkers shared these same impressions, coining concepts that still influence the conception of morality and are present in legal interpretation.

However, although this moral-religion relationship is present in the social environment, religion does not prove to be determinant for the moral understanding of the subject, when considered in its totality and as a result of social relations that establish behavioral patterns. In this aspect, it can be seen that morality establishes a relationship with reason and individual conscience, without disregarding the external behavioral pattern of the other, which does not always share the same moral precepts.

One cannot demand, socially speaking, that a rich merchant behave like Peter Valdeus (Lyon , 1173 AD), who, after hearing a minstrel singing the parable that it would be easier for a camel to go through the eye of a needle than for the rich man to enter the kingdom of heaven, gave up most of his possessions and gave them to the poor.

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que tal análise não garante que “todos eles deem a mesma resposta a essas questões”. (DWORKIN, 2002, p. 127).

Most rich people would "rationally" think of other non-religious concepts and social standards to determine their moral conduct.

Rachel sentences that "morality and religion are, in one word, different" (RACHELS, 2006, p. 63), and indeed they are, because morality assumes independent characteristics, although it is, in many respects, influenced by religious concepts. Along these lines, the legal theory embraced by Radbruch denotes that "there is no necessary relationship between morality and the legal duty, the latter must be strictly separated from the moral duty, according to the dominant doctrine in the West in the eclipse of Natural Law, that is, since the middle of the 19th century." (RADBRUCH, 1999, p. 11).

The naturalistic tendencies of Law, extracted from Thomas Aquinas' conception, when "overcome", gave rise to a pure positivism, which predicated a law immune t1o morality, ascetically separated from it, raised to the top of the legal theories by Hans Kelsen, whose vector was the descriptive character of legal science and the practical or irrational character of value judgments (ABBAGNANO, 2000, p. 183).

This positivism generated, as Hart pointed out, an impoverished morality internalized in Law, insulated in the positivized rule, and ,with it, the emergence of relativistic tendencies, transubstantiating the meaning of legal argumentation, based on rational judgements and, particularly, on the application of legal principles as a method of weighting, which abdicate a dense morality.

Argumentation, as Reboul (2004, p.92) recognizes, constitutes the adoption of a proposition that aims to lead to the admission of another, giving it a sequencial meaning that depends on the acceptance of the previous premise for the argument to reach its end.

In this quadrant, the theses propounded by Dworkin, Finnis, Rawls and other authors who, in Posner's view, created "academic moral theory", although with diversificated premises, are designated to "improve" or perfect the moral behavior of people, proposing that Law should follow the bases of academic moral theory. Posner, pragmatic in the face of this disagreement, advocates that morality is a local social phenomenon and that there are no "moral universals"; in his view, there are "tautological universals" capable of defining undesirable conduct, such as: it is wrong to kill, steal etc.

Since such consensuses about right and wrong arise from social agreements, due to the relationship of the various individuals with the collective environment, giving up part of their freedom so that society maintains its cohesion, these conduct norms would not translate into universal moral precepts.

It then concludes that

> [...] não existe um realismo moral que signifique alguma coisa, e o que resta é uma forma (não uma forma qualquer) de relativismo moral. O relativismo, por sua vez, supõe um conceito adaptacionista da moral, em que esta é julgada – não do ponto de vista moral, mas, sim, do mesmo modo pelo qual um martelo pode ser julgado apto ou inapto a realizar seu objetivo de meter pregos na madeira ou no gesso – segundo a contribuição que dá para a sobrevivência ou os demais objetivos de uma sociedade ou de algum grupo dentro desta. O relativismo moral implica que a expressão 'progresso moral' deve ser usada com extrema cautela, pois não é objetiva, mas, sim, dependente de uma perspectiva; o progresso moral está nos olhos de quem o vê. (POSNER, 2012, p. 8).

Leaving aside the standards of legal realism, so in vogue with pan – principialism, what I highlight from Posner's imprecation is the influence of moral relativism in the formation of the concept of "moral progress" or, using a terminology more in line with this brief study, in the "moral vanguardism" that implies the so-called judicial activism, with its consequences on the theory of Law.

It happens that too often this moral vision, or a lack of it, enters the legalargumentation system with claims of university. As Posner (2012, p. 11), "the validity criteria of a moral claim are given by the culture in which that claims is afirmed, not by a transcultural (universal) source of moral values."

From this possibility that universals are concepts that are not dense in the face of the diversity of cultural patterns of the various peoples that absorb them, whether as axioms or even as documents of International Law, as in the case of the Declaration of the Rights of Man, flow the realization that they do not possess the functionality of morally transmitting themselves to the various social environments.

The entry of these precepts into the local legal system depends on a series of factors, among them, its own legislative procedures, a fact that puts the law back within the historical process of the production of an impoverished moral duty-to-be.

As each of these societies lives its own stage of cultural evolution, with its own cultural characteristics, the arguments based on axioms such as "human dignity" are liquefied, in the sense of Bauman's expression (2001), giving rise to a liquid argumentation, making people believe that this discourse has a collective moral standard, when the subjectivities of the interpreter/applicator at that moment in time override it.

7 CONCLUSION

The presentation of an argument that is chained to another as the link of a chain, in the aspiration to convince the addressee of the discourse of a certain rational truth, replicates the absolutist concept of the "authority of the argument", since the author of legal discourse, unlike the religious preacher, can not base himself on solid of concepts taken as universal, to the point of making them fluid.

In the legal field, the sublimation of legal principles that have entered the core of the Constitution, with their normative functions recognized by not a few theorists, has produced, in relation to the legal rule, the same phenomenon that modernity operated in morality, melting its solidity, giving rise to what Zagrebelsky (2003) has called a "ductile law" or the attempt to adapt the law to social pluralism.

Thus, when legal argumentation moves towards the weighting of principles, which admittedly has as its starting point a subjective choice of the applicator/interpreter of the rule, elements emerge in the context of the argument capable of being molded to momentary needs, known as real power factors.

The legal argumentation, in this context, becomes volatile, as it requires a "softening" of concepts to optimize the application of the Law, thus creating a legal morality impoverished by the utility of the decision, which prescribes correctness, and this weak morality potentiates the "risk of pondering" or in the words of Habermas (2000), of "breaking through the wall of fire".

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