BETWEEN THE PAROXYSM OF REASONS AND NO REASON AT ALL: PARADOXES OF A LEGAL PRACTICE // ENTRE O PAROXISMO DE RAZÕES E A RAZÃO NENHUMA: PARADOXOS DE UMA PRÁTICA JURÍDICA

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>> ABSTRACT // RESUMO

An analysis of court decisions of the Brazilian Superior Courts, according to the theoretical instruments of the Theory of Legal Argumentation, indicated a substantial deficit of rationality in the justifications produced by the judges on the reasons grounding their decisions. There is a notable difficulty in clearly establishing the links between the decision taken and the reasons behind it, as well as in associating it with other elements of the legal order (general rules and jurisprudential standards). Institutional and historical conditionings can serve as plausible explanations for this scenario, and the present article seeks to explore, even if only initially, some of the hypotheses to explain this characteristic of the Brazilian argumentative practice. // Uma análise das decisões judiciais dos tribunais superiores brasileiros indica um acentuado déficit de racionalidade nas justificações produzidas pelos julgadores quanto às razões de suas decisões, se utilizados os instrumentos teóricos da Teoria da Argumentação Jurídica. Há uma notável dificuldade em se estabelecer claramente a vinculação entre a decisão tomada e suas razões, bem como em relacioná-la com outros elementos do ordenamento jurídico (normas gerais e padrões jurisprudenciais). Condicionamentos de caráter histórico e institucional podem servir como explicações plausíveis para este quadro e o presente artigo procura explorar, ainda que de modo inicial, algumas hipóteses explicativas da configuração da prática argumentativa brasileira.

>> KEYWORDS // PALAVRAS-CHAVE

Legal Argumentation; superior courts; argumentation theory; rationality. // Argumentação judicial; tribunais superiores; teoria da argumentação jurídica; racionalidade.

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1. INTRODUCTION

Over the last years we have been recurrently seeing from different theoretical perspectives a movement of criticism of the legal activity in Brazilian courts. In this criticism is highlighted the low technical quality of the decisions and the difficulty in conceiving of them a coherent line of justification. The general picture is, thus, of a huddle of more or less erratic decisions.

The present article seeks to analyze the argumentative practice of the Brazilian superior courts, focusing on the Federal Supreme Court (STF) and the Superior Court of Justice (STJ), to understand if such criticism — sometimes made more with a polemical approach rather than an academically-oriented one — can be supported by the actual argumentative practice of the referred courts. In the end, the analysis will allow us to raise a few hypotheses to explain the situation and to suggest new directions for the research.

For the purposes of the analysis, as will be explained in detail further ahead, the court decisions were selected from the Federal Supreme Court (STF) and the Superior Court of Justice (STJ). However, the hypothesis of work is more comprehensive and covers the characteristics of argumentative practices employed by the other superior courts, as its main objective is to outline the elements that will allows us to understand why such characteristics were found. It is evident that an empirical confirmation of the hypothesis would have to be provided so that the research could conclusively affirm that these characteristics are common to all superior courts.

The most general finding, analyzed from recent and relevant decisions, is that there is an abundant argumentation in most cases, and an absolutely laconic one in others that would require more care in the argumentation. In addition, there is always a difficulty in determining the relationship between the grounds listed and the decision taken, making the public and social control of the quality of the decision very difficult.

Paradoxically, however, these decisions — so rarely submitted to social control in view of their characteristic — have been applied more significantly on guaranteeing human rights in Brazil, producing an interesting finding: rights are affirmed through a decision-making culture of authoritative outlines.

The present study reflects on this situation, although it does not explore all the implications deriving from this paradox. Therefore, the study is divided in two sections. The first one explores the argumentative characteristics of some recent decisions of the Brazilian Superior Courts and seeks to offer a picture of what can be concluded after an analysis based on the instruments of the theory of legal argumentation. The second part presents the aforementioned hypotheses and raises questions capable of inspiring future studies.

2. ARGUMENTATION IN THE SUPERIOR COURTS AND ITS CHARACTERISTICS

In order to familiarize the reader in relation to the premises from which the analysis starts, it is important to bear in mind that the role of the Judicial branch in the creation of Law is one of the central aspects of contemporary legal theories and it represents a sort of point of confluence amongst the several theoretical perspectives on the legal phenomenon.

A set of elements can be reconstructed in order to justify our finding. This explanation certainly includes the centrality of the Constitution in contemporary legal systems and the broadening of the sense of legal norms that derive from this centrality. Articulated to it, the overcoming of theoretical models based on the conception of the formal validity of legal norms, replaced with theoretical models that emphasize the argumentative dimension of Law is also a key aspect; as well as the increasing importance of the Judicial branch in social regulation as a branch that not only settles individual disputes, but also significantly acts in the resolution of disputes between the other branches, between social groups and between the organized civil society and the State.

It should not be dismissed, on the other hand, the difficulty in finding institutional solutions for the control of the contemporary legal activity through models of recruiting and selection specifically designed for the context of a more technical and less political Judicial branch. Last but not least, the necessity of applying elements for the rational control of court decisions, present in their justifications, is also important in order to improve their social control.

More than a theoretical issue, however, this is a relevant practical question over which more knowledge needs to be produced, since it is expressed in important decisions that define the social regulation of contemporary States. Its suitable understanding implies the execution of careful and empirical analyses as to how legal argumentation is in fact carried out in each national context — since that, as it is well-known since the studies on Classical Rhetoric, the agent of the argumentation is inserted in an argumentative practice constantly reconstructed by consensuses presumed or reflected by the participants of that practice. Therefore, what is accepted as rationally grounded or capable of being accepted as a good reason depends, at least to some extent, on the adequate comprehension of the lexicon of a historically limited audience. The participants of a practice will develop their arguments by wielding authors and ideas, managing certain types of arguments and taking certain concepts as assumptions, eventually conforming to a peculiar content and argumentative framework, albeit naturalized and incorporated as the standard to be adopted.

In this sense, each legal argumentative environment constructs and naturalizes a "means of argumentation", which can be briefly defined as the formal standard used in the formulation and presentation of decisions, including its presentation in the form of votes, the existence or not of discussions and divergences consigned in the dockets, the use or not

of doctrinal and jurisprudential references, the presence of institutional, material and formal arguments.[1]

The present article has this understanding as the background; but, instead of continuing on the valid and important theoretical discussion of these aspects, it seeks to shed a light on the argumentative practice of the Brazilian superior courts, comprehending, as previously mentioned, that beyond the theoretical dimensions, it is necessary to verify how this reality is seen in each institutional context and how the judicial aspect of the legal practice is applied in the construction and reconstruction of rights.

With the intention of seeking an approximation that allowed understanding how this problematic is translated into the argumentative practice of the Brazilian courts, analyses were carried out on recent and relevant decisions taken by the Federal Supreme Court (STF) and the Superior Court of Justice (STJ). The present study chose a methodology of work that consisted in using the Toulmin model[2] for the internal analysis of court decisions, determining their argumentative structure, and the requisites for a rational decision proposed by Neil MacCormick[3] for the external analysis of the decisions. The research covered decisions taken by the STF and the STJ over recent years, and was carried out between 2011 and 2013.

For the year of 2011, the selected STF decision was on the application of the Amnesty Law[4]. In 2012 were selected the decisions of the STF and the STJ on the dangerousness of persons affected with mental disorders, and the analysis covered a total of 65 court rulings (14 rulings from the Federal Supreme Court and 51 from the Superior Court of Justice)[5]. In addition, the STF decision on the "Clean Record Law" was also examined, considering its incidence on the construction of political rights[6]. Deepening the analysis of the decision taken by the STF on the Amnesty Law, the research also produced a reflection on the dimension of gender in the court's discourse, seeking to understand if the court was specifically sensitive to violence against women over the period covered by the amnesty granted by the law under analysis[7].

In 2013 and under the perspective of the STJ, the choice was for the decision that discussed the applicability of the Dry Law (Especial Appeal 1,111,566-DF), considering its relevance for the protection of individual rights[8]. Covering the decisions of state courts and the STF decision, the court rulings recognizing or not the possibility of same-sex unions were also analyzed. The analysis covered 186 rulings from the courts of justice and the Direct Action of Unconstitutionality ADI 4,277[9].

The data collected in these analyses, as one can imagine, are very fertile and multi-faceted, requiring a deeper and meditated-upon reflection in order to allow the outline of a definitive "result" that defines the state of the art of justification in the Brazilian superior courts. Some findings, however, could not be discussed under the specific perspective of this work.

First of all, it seems quite evident that the decisions taken by the STF in controversial cases, such as some of the analyzed decisions (Same-sex Unions[10] and Amnesty Law[11]), are provided in extremely large rulings which are, therefore, of difficult technical analysis. The argumentation

made by the Justices covers such a broad and varied set of aspects and employ an equally broad and varied set of sources that the mere separation of the grounds of the decision — the *ratio decidendi* — and their comments or additions — *obiter dicta* — is practically an impossible endeavor. It should be added to the extension and amplitude of the references the peculiar characteristic that in some decisions there is no clear discussion among the judges on the **same issues**. Therefore, a synthesis of the grounds of the decision is a task given to the hermeneut, and it is made based on criteria that are external to the decision.

On this specific point, moreover, there are quite significant signs that the STJ follows the same patterns, as one can see, for example, in the analysis made on the judgment of the Especial Appeal that discussed the application of the "Dry Law", in which the justices clearly did not discuss the same arguments, making the comparative analysis or summary of the reasons used to decide the issue extremely difficult.[12]

It can also be noted that the system of collegiate decision adopted in Brazil — of individual votes previously prepared by the judges (and their advisors) based on the lawsuit and taken to the judgment session without the others having necessarily had a previous knowledge of the opinion of the rapporteur or of the opinion of each judge — contributes to that difficulty. In the majority of cases, it can be clearly noted a text structured beforehand, produced in the office, which either is not modified in the moment of the collegiate decision or, if it is, it comes simply added of new arguments or of a re-edition of arguments already listed in the main part of the vote of each judge[13].

This picture creates a reality that can be defined in short as a set of decisions rather than a collegiate decision, in which it is possible to find undisputed agreements and disagreements resulting in majority votes or unanimous decisions. In other words, although it is a collegiate decision, it is not always and exactly the product of a debate of the collegiate, but a superposition of legal positions, which redound in a decision, occasionally with agreement on the foundations, but not necessarily so[14].

It is evident that this institutional reality — the system of individual ready-made votes presented to the collegiate and the subsequent incorporation of everything that is said throughout the judgment session in the full ruling — would allow, in principle and in theory, a better control of the production of the decision, as everything is registered in the final text. The first paradox appears here, in the finding that this mechanism of extreme publicity of the reasons of the decisions of all and each one of the judges involved is exactly what causes this difficulty in understanding what the reasons for the decision were.

The next step of the decision taken in the plenary, which corresponds to its transformation in a syllabus that summarizes the decision taken by the collegiate, on its turn does not necessarily obey the reasonable assumption that it should represent a synthesis of all of the positions that defined the decision. Normally carried out by the rapporteur or by the judge who led the majority vote, it quite often represents only the grounds of his/her own opinion and does not clearly and comprehensibly incorporate what

was exposed by the others that, quite often, agreed on the decision but not on the same grounds.

It is quite evident that a reconstruction of the grounds of any court decision is a task to be made *a posteriori* and in an external way, i.e. by the hermeneut. In no court there is a clear identification of what the *ratio decidendi* are by the judges themselves. It is alarming, however, that the difficulty is such that a reasonable concordance between two technically capable and well-prepared hermeneuts cannot always be reached, and this refers to decisions of great impact in the Brazilian legal order, such as, for example, the decision that recognized same-sex unions. It is not, as one could perceive, an ordinary decision and it underlines the relevance of the judicial function, most of all because its adoption implied an interpretation quite distant from the literality of the constitutional text[15].

The sum of these factors results in a quite scary diagnosis which could be summarized as follows: it is possible to tell **what** was the decision taken, but not necessarily is it possible to understand what were the reasons behind it and, sometimes, what is the reach of the decision[16]. If we consider, as it usually happens in contemporary legal orders, that the jurisprudence orients or binds posterior decisions, it would be reasonable to suppose that there would be an increasing care in the explanation of the reasons, as the role of the Judicial branch is increasing significantly as a true regulator of social conducts, as pointed out in the beginning of this reflection.

Another important aspect that can be inferred from the referred analysis is on the use of the doctrine to support the construction of decisions. It was observed that there is an abundant use of references to authors, both national and foreign, frequently cited with an evident character of appeal to their authority, as the quotes or mentions made are not suitably discussed and inserted within the discursive context of the decision. It should be clarified that the adequate mention to theoretical concepts can even be desired and help in the comprehension of the reasons why a decision was taken. What is arguable, however, is the successive listing of authors whose congruence is of difficult perception. A symptomatic example of that is the vote of the rapporteur in the decision that recognized same-sex unions, in which, along 32 pages, 14 different authors are mentioned, ranging from Hans Kelsen to Carl Jung, going through spiritualist Chico Xavier, musician Caetano Veloso, and philosophers Jean-Paul Sartre, Hegel and Nietzsche. The second vote of the same decision cites 13 authors along 11 pages. The justice that signs it affirms, furthermore, that a sentence is and should be "what the judge felt to be appropriate, the sentiment of court" and in sequence makes, as he expressly affirms, a "digression" of about 9 pages to, in the end, adopt integrally the vote of the rapporteur. Such abundance of citations may be explained as an attempt to construct an image of erudition of the judge issuing the vote even more than — as would be expected in a case of such complexity and amplitude — an argumentation aimed at the understanding of a spectator that needs to be convinced of the correction of the reasons for which the decision was taken.

The analysis of the decisions also allows us to verify that there is little care in the application of the jurisprudence as a precedent that serves as the grounds for a new decision. Thus, not always the position previously adopted by the collegiate is maintained and sometimes there is not even a more careful discussion on the reasons why the court has changed its positioning. In a similar sense, but in the opposite direction, our judges seem to think that if there is an agreement with the already established jurisprudential current, the definitive argument is to simply refer to the previous decision, without discussing its pertinence to the new case, limiting themselves to invoking the decision without presenting any type of explanation of their reasons. In summary, it seems possible to affirm that here we also find a reasonable difficulty in understanding how the jurisprudence works as an element of control in the rationality of decisions in the context of an affirmation of the Judicial power as an important focus of the construction of rights.

In this sense, the position of the STJ seemed to be extremely serious and symptomatic in what was observed in the analysis[17] of its decisions on the application of civil commitment based on the dangerousness of the agent[18].

On this matter, the jurisprudence of the Federal Supreme Court was consolidated in the sense that the maximum duration of civil commitment is of thirty years. In the Superior Court of Justice, however, there were until recently three distinct orientations on this subject: (i) there is no maximum limit for the duration of civil commitment, whose extinction is conditioned to the cessation of the dangerousness; (ii) this limit is determined by the maximum penalty abstractly applied for the criminal offense committed; (iii) the duration of civil commitment is limited to a maximum of thirty years.

The aforementioned research showed that the majority of judgments were made by the same Panel and, therefore, the same issue was decided by a reasonably stable composition of judges.[19] In spite of that, it was found that jurisprudential changes are not being institutionally promoted through debates in collegiate institutions, but through a change in the individual understanding of each Justice[20].

As it can be easily perceived, the orientations found in the STJ are incompatible with one another and it is particularly serious to note that all of the rulings of the STJ analyzed in the aforementioned study were unanimously approved by the Justices that compose the integrating institutions of the court.

This analysis deserves some detailing as it can serve as a good observation point for the problem under examination. Having verified the argumentative structure of each of the selected rulings, a prevalence of arguments of deductive nature and of internal justification[21] of the decisions was noted. Apart from the unanimous approval by the judges that compose the collegiate institutions, the rulings do not have within themselves any discussions over the points of disagreement, i.e. the disagreement is not given due consideration when making decisions.

Apparently, therefore, our judges of the STJ understand these cases as "easy cases"[22], where there is no need to justify the premises applied more

broadly, being sufficient to mention them and "to apply the norm to the case *in concreto*". But more than that, if there are distinct jurisprudential orientations and the judgments are all by unanimity, it seems reasonable to suppose that the justices always follow the vote of the rapporteur, without discussion on the content of their positions, conceiving their duties as a mere adhesion to the opinion expressed by a colleague.

The argumentative problems found in the decisions on this matter, however, are not restricted to these. Some specific argumentative problems were identified and discussed in the outcomes of the research[23]. In short and for the purposes of illustration, it can be observed, on the relationship between law and psychiatry in the analyzed court decisions, that the silence of the courts on the problem of dangerousness can be interpreted as an argumentative deficit, as the very notion of "dangerousness" needed some grounds for its application in order to make sense in the context of a legal order that protects individual freedom and human dignity.

As these argumentative problems can clearly demonstrate, it is shocking to note that the freedom and the lives of those submitted to the control of the penal system are treated with no argumentative care and the cases judged are simply assumed as "easy cases", with no kind of external justification to rationally allow the discussion on the quality of the premises adopted. Good or bad luck, understood in their broadest possible sense, will play a relevant role in deciding the fate of claimants: if their *habeas corpus* petition depends on the rapporteur, their civil commitment will have duration of 30 years, a few years or will last until the dangerousness disappears. As the definition of dangerousness adopted in medical reports is absolutely broad and general[24], once again good or bad luck will act upon the observation of this requisite for the application of civil commitment.

Apparently, we are before a situation in the extreme opposite of what was verified in the judgment on the Amnesty Law and on the Same-sex Unions: instead of incredibly large texts, with an excess of reasons held, authors quoted and previous decisions cited (even if without the due argumentative conclusion), here there is an eloquent silence that allows the court to avoid the debate amongst positions, assuming as "natural" that each of the judges have their own opinion on the topic, but that it is also necessary to reach an agreement. The "agreement", here, is "everyone respecting each other's opinions" as to enable decisions by unanimity.

Having made the analysis on the characteristics of the decisions, the following section presents reflections on this argumentative practice.

3. FROM MANY REASONS TO NO REASON AT ALL: THE PARADOX OF LEGAL ARGUMENTATION IN BRAZILIAN COURTS

As we could see in the previous item of this work, apparently the Brazilian superior courts, in particular the Federal Supreme Court and the Higher Court of Justice, argument differently depending if the case is "easy" or "difficult". In the "easy cases" there is no explicit argumentation and the decision-makers limit themselves to invoking legal norms and

jurisprudential precedents, taking for granted the correction of their application to the case being judged. In those considered to be "difficult", on the opposite, there is a great exposition of elements and reasons to compose the rationale of the decision.

Paradoxically, however, as we could see in the case of civil commitment, there is no detailed and broad argumentation to justify the normative and factual premises, including in cases where there is disagreement among the judges. Here, however we want, the qualification of a case as "easy" seems like a push. In this case, it seems that it would be necessary to face the controversy so that from it could be drawn something beyond a position simply derived from authority and, in the absence of a superior authority clearly identified, from the numeric prevalence of the majority position. In other terms, even if we have a skeptical position on the rationality of court decisions, it seems obvious that addressing divergences is a desirable conduct to serve as a guide for future decisions. Not doing so is giving little importance to the duty of justification of court decisions; it is indicating that the court decides in a certain way because that group of circumstantially chosen people decided on that occasion that it was going to be that way.

From another perspective, if we focus on a case such as the one that recognized same-sex unions, it seems evident that the extensive argumentation of the ruling and the abundance of national and foreign scholars, quotes from the legislation and from foreign jurisprudence, rhetorical ornamentations and poetical exhilarations do not serve to the reasonable purpose of clarifying to the claimants the reasons why the court has found it plausible to recognize same-sex unions despite the fact that the constitutional text mentions that the stable union is between man and woman. Instead of the scarcity of arguments, the other side of the aforementioned paradox appears here as a paroxysm of reasons. So many are the reasons presented, that at the end we are no longer capable of summarizing them into a coherent set of arguments and an herculean interpretative effort is required in order to eventually say that the decision was taken by invoking, for example, the principle of human dignity, of freedom or of equality. The final result, despite the apparent abundance of grounds, seems to be the same: we know what the court has decided, but there are serious difficulties in showing how the decision was grounded and, even more than that, what consequences it implies for other future cases.

The illustration that both cases can give us show an image of the judicial function in the superior courts that relies on the authoritative aspects of the position, through which the judge feels authorized to express, in their decisions, more of their personal opinion (and their favorite authors, being jurists or not) than clearly and comprehensibly clarifying the reasons for their decision. Considering the institutional embarrassments already discussed in the previous item, the construction of the decision reveals more than what one would suppose at first glance: a sum of opinions and positions on what the legislation or the constitution means to say. The judge is, here, someone chosen by their erudition and by their technical capacity, who should constantly emphasize these characteristics and demonstrate their individuality.

This first part of the analysis could be summarized by indicating a low level of institutional commitment and an excessive attachment to the construction of a public image of the judge, possibly enhanced by their constant media exposure, in particular in "major" cases, followed and discussed by the press and, to some extent, by the public through televised sessions. If the media overexposure can work as an explanation for this exacerbation of the individual before the institution — the justice before the court — it should be underlined once again that this does not happen only in "major" cases. It would be easy, it seems, to blame the official TV channel of the Judiciary or the media and their interest on the "major" cases for the characteristics pointed out herein. On the contrary, as previously discussed, the analysis made of the decisions on the application of civil commitment, which by no means were appealing to the media or deserved much attention from the jurists, seem to confirm that each of the justices of the STJ votes "according to their own conscience" and thus produces an absolutely shocking situation of jurisprudential incoherence. The appellant can but expect that their request will be examined by a rapporteur whose position is the least onerous for their request. It means to say, furthermore, that apparently the brief of appeal presented by the attorneys, in an attempt to rationally convince them, produces little effect.

We could certainly find uncountable practical and institutional conditionings that would serve as explanation for this reality. Instead of blaming the official TV channel of the Judiciary and the media we could say that the means in which the holders of first-rank positions in the Judiciary are selected is what represents this great Gordian knot that needs to be disentangled. The procedural system could be discussed as well as its abundance of opportunities for taking a case to the STF or the STJ. Or maybe this list should also include an anathema to the Federal Constitution and its extensive list of rights.

It is also true that quoting a doctrine is not an evil in itself, and neither is making a discourse strongly anchored in rhetorical artifices to produce emotion[25]. However, it is a fact that the extremely long, almost incomprehensible decisions — where the doctrine is used as an appeal to the authority and as a demonstration of eruditeness — little contribute to the construction of a Judiciary on a par with the normative texts, including the constitutional ones, which affirm that the justification of reasons is mandatory as a mechanism of control of the judicial activity under the Rule of Law.

Somehow, it seems that the explanation should not be sought separately in these elements, but in a conjugation of both. When articulated, these elements point out to the conclusion required to really understand that the form of argumentation does not derive from the personal opinions of any justice, but that it is also impossible to avoid it being influenced by the kind of justice that we have.

Reflecting on this aspect, it can be said that this form of writing court decisions is not occasional or a mere expression of the individual idiosyncrasies of the justices. I believe that, to a greater or lesser extent, according to individual profiles, it reveals a well-rooted conviction that the judicial

function, especially in the superior courts, is that of expressing opinions or even the preferences of values of the justices, being more useful for the construction of their public image than to the clarification of the reasons for the decision. Behind the form of writing, it is reasonable to suppose that there is a conception of Law that privileges authoritative aspects rather than normative ones. Being straightforward, it seems that the justices express in the sentences what they believe Law to be according to their point of view, and they justify their decisions much more in view of their preferences rather than guided by a commitment to the normative texts. We have, therefore, a personal view of the judicial function and a conception of Law that relies on the authority of the decision much more than its correctness.

If this argument stand its ground, in order to advance on this reflection, it is now necessary to understand what is the role played by the constant invocation, here and there within the decisions, of technical standards required by another kind of judicial activity. If we are to believe in what many decisions of our courts are saying, they are doing nothing less than applying the good *standard* of the theory of post-positivist Law, wielding with alleged mastery texts from Dworkin and the famous weight formula of Alexy to guarantee rights and apply conditions of protection of citizenship. They act from a condition of argumentative legitimation to dismiss the position of the infra-constitutional legislator, for example, by invoking the rational capacity of the court to work as a counter-majoritarian mechanism of protection or the notion of argumentative representation. Therefore, these authors and their conceptions of Law are apparently behind the way of thinking and way of argumentation of our judges.

Without going into details on a complex discussion on the acceptability of these authors in Brazil or on what is or could be a post-positivist theory of law, it seems possible to affirm that there is a noticeable mismatch between the position adopted and the responsibilities that both authors recognize and recommend to the judicial function. If they were really Dworkinian or Alexyan, much more argumentative care in the reconstruction of precedents and in the clear presentation of the reasons of the decision would have to be employed. Therefore, somehow the summit of our Judiciary reads and uses from these authors what is convenient and what is convenient only...

Evidently, it is not expected or desired from a court, especially a constitutional one, a certain fidelity to a specific author or school of thought, and this argument is not claiming that. The important argument here is that maybe we are faced with something beyond what a superficial glance could reveal. Maybe we could say that behind this form of thinking and its expression in the decisions there is a set of more complex reasons, linked to the division of power and its use in the context of the Brazilian State, managed from a discourse that, while suggesting respect to the parameters of the Rule of Law, manipulates concepts as to allow the empowerment of the Judiciary in the confrontation with the other branches. Paradoxically, therefore, a theory of law and, within it, a theory of argumentation with strong rationalist pretentions are used in favor of an exercise of power

that does not match the idea of affirmation of rights, construction of citizenship or the Rule of Law.

This picture, in which, as we have seen, theories are managed and an argumentative form is conceived and is under constant use seems to resemble the historical formation of a legal culture with strong rhetorical and personal elements, whose roots would be interesting to investigate. Maybe by looking at the history of the institutions and the history of the Brazilian legal thought could help us comprehend this curious paradox through which the Brazilian citizenship sees rights being attributed, reconstructed and re-signified through decisions whose control is, if not impossible, of difficult reach.

Another very interesting aspect to be verified in continuity with the investigation already carried out is on the effective use of legal decisions of foreign courts as well as of foreign authors. As verified, there is a great profusion of references, whose character, at first glance, seems to be of rhetorical reinforcement, as an appeal to the authority. It is necessary, however, a more careful verification to evaluate if we are before a circulation of juridical models, with the incorporation of concepts, procedures and argumentative practices, or if it really is just a purely rhetorical invocation.

>> ENDNOTES

[1] Here we adopt the perspective summarized by Manuel Atienza in his recent "Course of Legal Argumentation", in which the author, from a reconstruction of the contributions from Raz and Summers (among other authors), classifies the reasons of the justification of a decision in material reasons (which relate to the actual content of the justified action, its evaluative quality), formal or authoritative reasons (those arising from the affirmation that they derive from the order of an authority recognized by the system) and institutional reasons (those arising from the division of competences or power among several institutions and that serve to justify why a course of action, although desirable, may not be within the competences of that who decides it). See, in particular, chapter IV — La concepción material: premisas e razones. ATIENZA, 2013, p. 275-287.

[2] TOULMIN, 2006, *passim*.

[3] MACCORMICK, 2008.

[4] ROESLER; SENRA, 2012.

[5] ROESLER; LAGE, 2013.

[6] Cfe. MOREIRA, 2012.

[7] ROESLER; SENRA, 2013.

[8] CHAIM, 2013.

[9] For the details of the analysis, see ROESLER; SANTOS, 2014.

[10] BRASIL. 2011. Supremo Tribunal Federal. **Ação Direta de Inconstitucionalidade Nº 4277**. Inteiro Teor do Acórdão. Relator: Min. Ayres Britto. Acess on April 5, 2012. Available at: <http://www.stf.jus.br/portal/geral/verPdfPaginado.asp?id=400547&tipo=TP&descricao=ADI%2F4277>.

[11] BRASIL. 2010. Supremo Tribunal Federal. Argüição de Descumprimento de Preceito Fundamental no. 153. Inteiro Teor do Acórdão. Relator: Min. Eros Grau. Access on August 3, 2011. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=612960>.

[12] BRASIL. 2012. Superior Tribunal de Justiça. Recurso Especial nº. 1.111.566/DF. Inteiro Teor do Acórdão. Relator: Min. Marco Aurélio Bellize. Access on July 8, 2013. Available at: <https://ww2.stj.jus.br/processo/jsp/revista/abreDocumento.jsp?componente=ITA&sequencial=1114564&num_registro=200900250862&data=20120904&formato=PDF>.

[13] As an example, it can be mentioned the vote of Justice Gilmar Mendes in the ruling of Direct Action of Unconstitutionality ADI 4277, in which it can be seen that the Justice starts by making a series of considerations and conceptual references in a kind of vague way and then mentions them again in a more systematic and organized manner in the final part of his vote. It is presumed that the first part was produced in the plenary and that the second had been written beforehand while studying the lawsuit in the office. BRASIL. 2011. Supremo Tribunal Federal. **Ação Direta de Inconstitucionalidade Nº 4277**. Inteiro Teor do Acórdão. Relator: Min. Ayres Britto. Access on April 5, 2012. Available at: <http://www.stf.jus.br/portal/geral/verPdfPaginado.asp?id=400547&tipo=TP&descricao=ADI%2F4277>. See in particular pages 728-751, in which the Justice briefly exposes his opinion and cites several authors (Perelman, Haberle, Alexy) and then the vote restarts, from page 752 until 806, citing again the same excerpts from the same authors along the same steam of thought already exposed in the preceding pages.

[14] In some cases decided by the superior courts the expression "median vote" is used meaning the position reached after a debate of the collegiate. In these occasions, one justice of the majority position is chosen to write the vote and they should make a summary of the agreement reached in the plenary. An example of this type of decision and how it is registered in the court ruling can be found in Direct Action of Unconstitutionality ADI 3105, judged by the STF in 2004.

[15] The constitutional text says the following:
"Art. 226. The family, basis of the society, enjoys special protection from the State.
(...)
§ 3º — For the effects of protection from the State, the stable union between man and women is recognized as family entity, and the law should facilitate its conversion into marriage."

[16] A good example of this reality could be the decision on same-sex unions, referenced above, over which there is still doubt whether it has also authorized adoptions by same-sex couples, something that will certainly need to be clarified by the STF in the near future.

[17] ROESLER; LAGE, 2013.

[18] The research carried out the surveying and analysis of all court rulings on this subject of the Federal Supreme Court (STF) and the Superior Court of Justice (STJ) that complied with the selection criteria. The jurisprudential research was carried out in the websites of the respective courts, using the keywords "dangerousness" and "non-imputability" or "diminished responsibility". A code was used to substitute part of the words so that a single search could also include results using the words "non-liable" or "non-imputable". Besides, a time delimitation criteria was adopted from July 13, 1984, date of publication of Law 7,209, which reformed the General Aspects of the Criminal Code, and Law 7,210 (Law of Criminal Enforcement), which compose the core of the current legal discipline on non-imputability and civil commitment, up to 15 June 2012, date of publication of the most recent ruling of the STJ by the time of the jurisprudential research. Overall, 14 rulings of the Federal Supreme Court and 51 of the Higher Court of Justice were analyzed.

[19] In the context of the research, only *HC 142.672/RS*, judged on April 10, 2010; *HC 70.497/SP*, judged on November 12, 2007; and *HC 27.993/SP*, judged on December 9, 2003, were assigned to the Sixth Panel. All other decisions were taken by the Fifth Panel.

[20] Taking into account only the current composition of the Fifth and Sixth Panel of the STJ and the rulings included in the research criteria, Justices Jorge Mussi and Gilson Dipp adopt the first orientation (inexistence of time limit). Justice Laurita Vaz, up to February 2008, also endorsed this opinion, but in two cases subsequent to September 2009 followed the STF jurisprudence. Likewise, Justice Arnaldo Esteves Lima, who was a member of the Fifth Panel and now chairs the First Panel (which does not rule on criminal matters) seems to have changed position: in a case judged in November 2008, he argued in favor of the indetermination of a maximum duration of civil commitment, but in two other judgments after October 2009, he understood that the limit should be the maximum penalty indicated for the criminal offense. In his vote on Especial Appeal *1.103.071/RS*, Justice Arnaldo Esteves Lima informs that Justice Maria Thereza de Assis Moura, of the Sixth Panel, also adopts this position.

[21] Internal justification is that which correlates the normative and factual premises of the decision, taken as well-founded, producing the conclusion which is then expressed in the actual decision. It is the opposite of the external justification, qualified as that which dissertates on the establishment of both or of one of the premises — normative and factual — and which requires the use of a variety of argumentative techniques. See ATIENZA, 2002, p. 50-51.

[22] In this context, the "easy cases" are those which do not require external justification of the premises of the decision and would, therefore, have a simplified argumentative path, in which it would be sufficient to mention the normative premise, the factual premise and draw the conclusion from the relationship between both. The classification of a case as "easy" or "difficult" is, therefore, a decision previously taken by the hermeneut/judge, who operates in an argumentative context given and harmonized by the constitutional, legal and jurisprudential norms. Therefore, cases are not "easy" or "difficult", but should be framed as such in the argumentative tradition in a given moment.

[23] ROESLER; LAGE, 2013.

[24] Take as an example the indicators of dangerousness adopted by the Institute of Forensics Medicine (IML) of the Federal District: "– On the life curve: emotional instability at work, integration with groups with no constructive activities, early episode of criminal behavior, high number of legal and police incidents, quick recidivism, early development of the disease. – On the morphology of the crime: crime with aggravating factors, crime without plausible psychological motif, crime with multiplicity of blows, crime executed without feelings or emotions, crime practiced against helpless victims. – On psychiatric complications: psychomotor agitations, psychotic outbreaks or episodes, anger-fueled crimes, necessity of high doses of medicaments. – On the yearly psychological examination: explosive disorder, lack of criticism on the offense committed, lack of plans for the future, hallucinations, delirium, lack of remorse, lack of positive feelings, egocentrism of feelings. It is also important to evaluate the bonds of the patient with the family and the desire and interest to live with them." *Apud* BRAVO, 2004, p. 129.

[25] A historical predicament, made by José Murilo de Carvalho could be useful here: our "rhetoric behavior" did not start with the 1988 Constitution, with a larger dissemination of the knowledge on foreign legislations, doctrine and jurisprudence, or with the birth of the official TV channel of the Judiciary. In this respect, let us take a look at the text: "In any case, this trace of the Portuguese style, or its rhetoric, was transferred to Brazil and might still be present today. By changing the names of poets Marcial and Juvenal for other names, Vemey's observation continues to be valid. What is being suggested here is that the omnipresent phenomenon of the citation of foreign authors and of the concomitant importation of ideas should not be seen only as an indicator of intellectual dependence, or as a correct or incorrect expression of ideas. What is being suggested is that a useful key for the reading could be given by the style of argumentation. Within the Brazilian tradition, the argument of authority was an indispensable requisite, it was a resource of the argumentation, a rhetoric *per se*. In principle, therefore, quoting a foreign author did not necessarily mean an adhesion to their ideas, although it could also mean that." CARVALHO, 2000, p. 143.

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