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Legal argumentation and chaim perelman's "the new rhetoric" as "third way" in the theory and philosophy of law - between positivist paradigm and legal hermeneutics

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Summary: Since the 50s of the twentieth century, we can observe the intensification of research into the arguments and the birth of numerous argumentation theories, that are applicable primarily at the level of law. Their origin should be seen in the quest to find a cognitive balance, the "third way" between various interlacing interpretative philosophies, especially between the positivist-analytical and the phenomenological-hermeneutical paradigm. It has been noted that formal logic, which has so far played a key role in the study of argumentation, is not sufficient to characterize the structure of all reasonings. This relation was perceived by Chaim Perelman, whose work was devoted to the analysis of legal discourse. The philosopher argues that a judge who makes a decision in the process of applying the law is in a permanent decision-making situation that occurs when the state of the case provides the choice of several alternative solutions. In addition, the final shape of the decision is influenced by the arguments of the interested parties, which creates the internal judicial discourse. The creator of the "new rhetoric" recognizes law as a way of organizing disputes leading to the resolution of decision problems, denying the syllogistic model of application of law. Pursuant to this fact, the concept of law, according to Perelman, assumes to present a clearly anti-formal nature. What is more, the "new rhetoric," understood as an argumentative practice applicable wherever logical reasoning can not be used and where there is no place for obviousness, forms part of the critical line towards legal positivism, thus claims to be the "third way" in theory and philosophy of law, as will be revealed in this article.

Key words: new rhetoric, legal discourse, Perelman, formal logic, argumentation.

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Argumentacja prawnicza i „nowa retoryka" Chaima Perelmana jako „trzecia droga" w teorii i filozofii prawa – między paradygmatem pozytywistycznym a hermeneutyką prawniczą

Streszczenie: Począwszy od lat 50. XX wieku zaobserwować można intensyfikację badań nad argumentacją i narodziny licznych teorii argumentacyjnych, znajdujących zastosowanie przede wszystkim na płaszczyźnie prawa. Ich genezy należy upatrywać w dążeniu do znalezienia równowagi poznawczej – tzw. „trzeciej drogi" między różnymi ścierającymi się filozofiami interpretacyjnymi, a zwłaszcza pomiędzy paradygmatem pozytywistyczno-analitycznym a fenomenologiczno-hermeneutycznym. Dostrzeżono bowiem, że logika formalna, która dotychczas odgrywała kluczową rolę w badaniach nad argumentacją, nie jest wystarczająca dla scharakteryzowania struktury wszystkich rozumowań. Zależność tę dostrzegł Chaim Perelman, w którego pracach analiza dyskursu prawniczego zajmuje miejsce szczególne. Filozof ten podnosi, iż sędzia mający wydać decyzję w procesie stosowania prawa znajduje się w permanentnej sytuacji decyzyjnej, która występuje, gdy stan sprawy pozwoli na wybór spośród kilku alternatywnych rozstrzygnięć. Dodatkowo, na ostateczny kształt decyzji wpływ mają działania argumentacyjne samych zainteresowanych, co czyni z procesu decyzyjnego swoisty wewnętrzny dyskurs sędziowski.

Twórca „nowej retoryki" uznaje prawo za sposób organizacji sporów prowadzący do rozstrzygania problemów decyzyjnych, negując sylogistyczny model stosowania prawa, co sprawia, że koncepcja prawa według Perelmana nabiera charakteru wyraźnie antyformalistycznego. Co więcej, „nowa retoryka" rozumiana jako praktyka argumentacyjna znajdująca zastosowanie wszędzie tam, gdzie nie można korzystać z dowodzenia logicznego oraz tam, gdzie nie ma miejsca na oczywistość, wpisuje się w nurt krytyczny wobec pozytywizmu prawniczego, mogąc tym samym pretendować do miana „trzeciej drogi" w teorii i filozofii prawa, co zostanie ukazane w niniejszym artykule.

Słowa kluczowe: nowa retoryka, dyskurs prawniczy, Perelman, logika formalna, argumentacja.

Introduction

Beginning from the fifties of the twentieth century one has been able to observe intensification of research on argumentation as well as the birth of numerous argumentative theories as a result of works by representatives of many disciplines - ranging from logic and philosophy through linguistics, rhetoric, psychology to information technology and artificial intelligence. This analysis will attempt to focus only on the argumentation that may be applied in the realm of law, trying to draw attention to the special place that is occupied by argumentation theories in the considerations on interpretative philosopies, and especially "the new rhetoric" by Chaim Perelman. Argumentation understood in such way constitutes so called "third way" in the methodology of humanistic and legal sciences, filling empty space between the postivist and analitical paradigm and phenomenological and hermeneutic one.

The theories of argumentation assume as the core of their reflection the act of argumentation itself (i.e. creating an utterance that justifies other statements being controversial as a rule), assuming at the same time various aims[2], such as, for example,

[2] Comp.: J.K. Skulska, *Funkcje współczesnej teorii argumentacji*. *Nowoczesne Systemy Zarządzania,* 2012, p.

analysis of argumentation structure or examining real ways of providing arguments. However, abstracting from the differences between those specific theories, one may point out one aim that they have in common, i.e. creation of an ideal model of argumentation that describes, most of all, formal conditions that should be met by every practical discourse (concerning practical matters, meaning what is or should be imposed, banned, allowed) in order to be perceived as acceptable, i.e. correct and rational.

In the case of a practical discourse, we usually do not refer to the "truth" criterion but rather to rationality that is made up of such notions as: justice, rightness, validity, appropriateness as well as to the criterion of efficiency that is purely empirical in nature. It is worth noting that one may also differentiate another type of an argumentative discourse, i.e. a theoretical discourse aimed at finding the truth. Legal discourse is correlated with the practical discourse, though - as Jürgen Habermas points out - in spite of basic cognitive difference between statements and norms, procedural conditions of a rational discussion on statements (theoretical discourse) and norms (practical discourse) are generally the same[3].

The relation between practical and legal discourse is the first disputable issue that should be solved when describing the problem of the theory of argumentation as it is the discourse that creates the space for "battle of arguments", which is especially important for the law being a discoursive subject providing place for solving conflicts between different entities. Jerzy Stelmach differentiates three possible relations between practical and legal discourse: 1) making a clear division between legal and practical discourse; 2) legal discourse as an exemplary case of a practical discourse; 3) legal discourse as a special case of a legal discourse[4]. The second approach is supported by Chaim Perelman, whereas the third by Robert Alexy. In the Polish doctrine of the theory of law, Alexy's point of view is shared by Zygmunt Ziembiński, who states that "Theories of legal argumentation are a special case of the general theory of practical discourse (practical argumentation), and thus the general theory of providing rational justifiication of values and norms"[5]. In turn, the very discourse is a process during which descriptive statements of truth or falsity are established (theoretical discourse), or correctness, appropriateness or inappropriateness of extra descriptive statements, and especially of norms (practical discourse)[6]. The differentiation between theoretical and practical argumentation refers to the philosophical distinction made by Immanuel Kant between theoretical and practical reason, where the type of utterance is assumed as a differentiating criterion. Therefore, arguments that are to support statements in a logical way (that are assumed the logical value of truth or falsity) are called theoretical argumentation, whereas arguments supporting directive statements (e.g. norms) and value judgments (evaluation) belong to practical argumentation[7].

249-265.

3 L. Morawski, *Co może dać nauce prawa postmodernizm?*, Toruń 2001, p. 14-15.

4 See.: A. Grabowski, *Dyskurs prawniczy jako szczególny przypadek ogólnego dyskursu praktycznego,* [in:] J. Stelmach (ed.), Studia z filozofii prawa, vol. II, Kraków 2003.

5 S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Ars boni et aequi, Poznań 2001, p. 77.

6 Ibidem, p. 77.

7 M. Wojciechowski, K. Zeidler, *Teorie argumentacji prawniczej,* [in:] Wielka encyklopedia prawa. Tom VII. Teoria i filozofia prawa, Warszawa 2016, p. 417.

Jerzy Stelmach points out to independence character of a legal discourse in relation to other types of discourses saying that: "Certainly, [legal discourse] has so many individual features that cannot be found in other types that it may be viewed as fully independent type of argumentative discourse (…). I would like to pay special attention to that as more and more often the law and process of legal argumention are perceived as a part of the social or political system. In my opinion, it may lead to legal discourse boundaries being blurred and making it as regards its functional way (application possibilities) completely useless"[8]. Resigning at this point from making a detailed explication of the above quoted approaches, irrespective of the fact whether they are approved or disapproved in the doctrine, one may clearly express the view that legal discourse occupies a special place within general discourse and thus deserves a detailed and separate analysis.

Ad fontes – term considerations and origin of legal argumentation

Aimimg at the origin of the theory of legal argumentation and its implication, at first one should consider the issue of differentiating legal argumentation[9] from among its other types as well as the problem of subject reference of the term "legal" in the expression of "legal argumentation". In most cases, it means argumentation in the context of court application of the law as Chaim Perelman claimed. If we abstract from simple and routine cases, the process of law application less and less resembles a mechanical act of deducting legal consequences from law rules and more and more often becomes more or less complex process of balancing arguments in favour or against some decision alternatives[10]. Andrzej Grabowski, however, points out that the scope of use of the term "legal argumentation" may be easily expanded to include argumentation in legislative discourse as well as that in the discourse of the science of law[11].

Taking into account that the scope of the discussed term may include all these views that deal with ways of justifying statements formulated within legal discourse, and interpretative statements are the only ones of key importance, it is worth asking about the relation between directives of the formal law interpretation and argumentation. Interpretation arguments are not identical with interpretative directives, although - as Maciej Dybowski claims - are correlated with them. Directives determine in a normative model of official law interpretation as a sequence of actions that should be undertaken by an interpreter, whereas arguments constitute justification of directives themselves, showing by this the relation with social dimension of such official interpretation[12].

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8 J. Stelmach, *Kodeks argumentacyjny dla prawników*, Kraków 2003, p. 26.

9 It is worth noting that the term "legal argumentation" is not synonymous with "legal understanding" that it is sometimes mistaken with as the latter has much broader meaning. See T. Stawecki, *O celowości rozumowań prawniczych w polskiej teorii prawa i praktyce prawniczej,* [in:] M. Wyrzykowski (ed.), Rozumność rozumowań prawniczych, Warszawa 2008, p. 42.

10 L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 1999, p. 151.

11 See.: A. Grabowski, *Judicial Argumentation and Pragmatics*, Kraków 1999.

12 M. Wojciechowski, K. Zeidler, op. cit., p. 417.

Having made the terminological considerations, I would like to turn towards sources of legal argumentation - and to be precise - to argumentative model of law application. It originated as result of the "clash" between interpretative philosophy rooted in legal positivism and phenomenological hermeneutics referring to intuition[13]. The beginnings of more profound research into argumentation go back to the end of the fifties of the 20th c. when Chaim Perelman's works were published ("*Legal Logic. The New Rhetoric"*) as well as Stephen Toulamin's - "*The Uses of Argument"*. The authors pointed out that formal logic that so far had played a crucial role in the research on argumentation, was no longer sufficient to characterize the structure of all reasoning. As Sławomir Lewandowski claims: "With reasoning based on rules of logic, we are certain that starting from true premises we will arrive at true conclusion but in order to be certain as regards the conclusion, one has to be also certain in the case of premises". In the case of making factual and normative findings, closing them within logical tautologies results in the fact that they show only a simplified version of a certain process and not a fully realistic description thus making use of formal logic in legal argumentation being subject to some limitations[14]. This problem was overlooked (or ignored) by classical legal positivism, whose important feature - besides the conception saying that current law in force is the result of the state that arises in the way of establishing or recognizing acts by subjects holding adequate competence - is the conceptual division between the law and morality. A collection of moral norms is therefore regarded as a normative system abstract from the positive law, which is especially implied by the statement on validation independence of the law from morality. It claims that legal norms in force are independent from the fact whether they realize certain moral values and whether they agree with some moral norms. Although positively oriented reflection on the law do not contradict the existence of the relation between the law and morality and do not deny the view that legal norms may be justified by moral evaluation but according to the positivist programme legal sciences should be free from valuating[15]. Eliminating the role of valuating and therefore roles of evaluation in law considerations leads to the creation of theories or fragmentary description of legal phenomena in a way incompatible with the reality. As Maciej Zieliński and Zygmunt Ziembiński claim, even with the most formal approach of a legislator, it is impossible to create a system of legal norms that would exclusively consist of norms of proceding established by norm makers in a complex way, without referring when constructing such a system to evaluation elements in interpreting of legal regulations nor to reasoning based on the coherence of the legislator's evaluation[16].

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[13] See.: J. Francis Mootz III, *Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition*", "Yale Journal of Law & the Humanities" Vol. 11, Issue 2, p. 311-382.

[14] S. Lewandowski, *Retoryczne i logiczne podstawy argumentacji prawniczej [Rhetorical and Logical Basics of Legal Argumentation]*, Warszawa 2015, p. 264.

[15] S. Wronkowska, Z. Ziembiński, op. cit., p. 50.

[16] M. Zieliński, Z. Ziembiński, *Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie*, Warszawa 1988, p. 122.

About controversies of legal syllogism

Accepting by the positivists of scientistic vision of science built over the philosophical positivism a la Auguste Comte that leaves valuation outside the area under consideration as well as specific perception of a legislator and subjects obeying law as separate entities were the factors determining the original idea of the syllogistic model of law application. It comprises the following actions: (a) establishing valid legal norm, (b) establishing factual condition of a case, (c) making the act of subsumption, (d) establishing legal consequences and issuing a decision of law application according to this that is characterized by being congruent with the current law in force. The model based on simplified syllogism known to formal logic since its introduction has proved to be incompatible with multi-dimensional legal reality and thus was put under criticism. It turned out, though, that there was some kind of dissonance because - as Stanisław Czepita points out - application of law as a righteous act which is axiologically neutral from its assumption and that should bring results not dependent on its evaluation from the point of view of the assumed aim of regulation, social effectiveness, etc., should provide implementation of certain values, especially objectivism and predictability of results by state legal institution[17]. Therefore, the simplified form of syllogism gave grounds to accuse it of triviality, which was also a starting point for creating one's own model of argumentation[18] by Stephen Toulmin[19]. This accusation has two aspects: firstly, according to the critical opinions, legal syllogism becomes useful only in the situation when all crucial decisions as regards factual and normative findings have already been taken; secondly, legal syllogism does not take into account valuation. However, within the doctrine, there are also views that defend such syllogism by trying to refute the above statements. For example, Bartosz Brożek points out that legal syllogism does not fill entirely the logical structure of legal reasoning as every partial decision in the process of law application may be logically traced back. As regards the alleged dissonace between values and logic, B. Brożek remarks that "Irrespective of the fact how much we expand the logical structure of our reasoning, finally we will have to accept some premises that are not logical in character (...)"[20]. Moreover, acts of valuation are not separated from logic as they may be equipped with certain formal structure - although not exhausting the whole process of reasoning - but possible to be written down in a formal way as for example Robert Alexy's Weight Formuła [21].

Second most often raised accusation against legal syllogism is the different status of statements making up such syllogism, which is treated as a special case of so called Jorgensen's dilemma that is based on four assumptions: 1) while applying

[17] S. Czepita, B. Brożek, *Stosowanie prawa: model sylogistyczny – model argumentacyjny,* [in:] O. Nawrot, S. Sykuna, J. Zajadło (ed.), Konwergencja czy dywergencja kultur i systemów prawnych?, Warszawa 2012, p. 77.

[18] See.: T. Zarębski, *Od paradygmatu do kosmopolis*, Wrocław 2005, p. 21-29.

[19] See.: S. Toulmin, *Ambiguities in the Syllogism,* [in:] The Uses of Argument, Cambridge University Press 2003, p. 100-114.

[20] S. Czepita, B. Brożek, op. cit., p. 96.

[21] See.: A. Grabowski, *Dyskurs prawniczy jako przypadek szczególny ogólnego dyskursu praktycznego*, [in:] J. Stelmach (ed.), Studia z filozofii prawa, Vol. II, Kraków 2003, p. 45 i n.

infallible methods of reasoning in classic logic, sentences must have a logical value; 2) norms are not sentences in the logical meaning; 3) norms may not appear as premises nor as conclusions in logical interferences; 4) there are logically correct reasonings conducted on norms. Looking at the legal syllogism through the prism of the above dilemma, one may easily conclude that the syllogism is reasoning about a norm basing on another norm and a descriptive sentence, if general norm constitutes the bigger norm, description of factual condition - the smaller norm and the conclusion - an individual norm[22]. The doctrine has come up with a few possible solutions of that dilemma. The most frequent one is ascribing such statements identical semiotic status by interpreting the smaller premise and conclusion of the syllogism not as a norm but as a sentence in a logical way - a sentence on the norm validity[23].

Obviously, the above presented reservations towards syllogism are not the only critical opinions voiced. For example, S. Lewandowski, following Ulfried Neumann, points out to the circularity of syllogism in the meaning of a vicious circle and B. Brożek perceives the weakness of syllogistic model in the fact that the classical logic cannot cope with conflicts between legal rules or a rule and a legal principle. He assumes that "the classical logic due to its monoteic character requires "completed" formalization of a legal norm, i.e. such that releases all possible exceptions from the norm"[24]. Lech Morawski also sees the weakness of the positivist conception of law application in its inability to be adapted to abrupt changes in law characteristic for the postmodernistic era[25]. He remarks that two facts have played a major role here: increasing scope of openness of legal terms (related with ever increasing use texts of unprecise, typological and valuating terms as well as general clauses in preparing legal) and increase in importance of legal principles and other non-definable rules in legal argumentations (relating to Dworkin's conception of legal rules and principles[26]). As profound analysis of the issue goes beyond my considerations, so I would like to proceed to the issues delimiting its area from the other extreme, i.e. to hermeneutics.

A few weords on hermeneutics

The theory of understanding, interpretation and explanation of legal texts, called legal hermeneutics, is one of the so called detailed hermeneutics (alongside the biblical and philosophical ones) that goes back in its orgins to Roman jurisprudence. What is important, from the legal point of view, two main trends have singled out within the area of hermeneutics - epistomological one (hermeneutics as a specific method of interpreting every text and represented by Friedrich Schleiermacher and Wilhelm Dithley) and ontological one (hermeneutics as a form of human existence,

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22 S. Lewandowski, op. cit., p. 130.

23 K. Płeszka, *Uzasadnianie decyzji interpretacyjnych przez ich konsekwencje*, Kraków 1996, p. 43 i n.

24 S. Czepita, B. Brożek, op. cit., p. 97. See also: B. Brożek, *Rationality and Discourse. Towards a Normative Model of Applying Law*, Warszawa 2007, p. 141-150.
B. Brożek, *Derywacyjna koncepcja wykładni z perspektywy logicznej*, „RPEiS" 2006, LXVIII/1, p. 81-92.

25 L. Morawski, *Główne problemy*…, op. cit., p. 151.

26 Ibidem, p. 157-163.

to the development of which contributed Edmund Husserl, Martin Heidegger, Hans-Georg Gadamer). Legal hermeneutics derives from both these trends, which results in the fact that it may be understood in a dual way: on the one hand as a theory of interpreting a legal text, on the other - a trend in philosophical and legal thought[27]. The hermeneutical process of text understanding comprises four elements: pre-understanding, hermeneutical circle, application and ahistorical character, which are responsible for interpretative "softness" of hermeneutic in contrast to rigid rules of the positivist paradigm. In a simplified and short form, I would only like to remark that pre-understanding indicates a preliminary and intuitive way of text understanding by its interpreter, even before the interpretation itself begins. The proper process of understanding consists of spirals of so called close-ups and corrections: the first intellectual act being an overview reading of the whole, which entails analysing details in order to solve some doubts and gives a fresh idea of the whole. The process has historical dimension as interpreter's historical situation co-determines meaning of a text, which turns the process of understanding into a creative and not recreative activity. In the views of these assumptions, according to A. Kaufmann "law does not exist before its interpretation"[28], which means that law is not ready construct but is co-shaped in the process of its understanding[29].

Legal argumentation and "the new rhetoric"

Lack of interpretative flexibility in the lights of legal positvism on the one hand, and too much arbitrariness in reading of the idea behind a text according to the principles of hermeneutics, on the other, have encouraged scholars to explore new theories of interpretation. Rhetoric has become one of many, and as it turned out later, the one enjoying great popularity. *Ars bene dicendi* conception and its status have undergone numerous transformations over the ages with a tendency to narrow its scope in comparison to its original, ancient idea. In the Middle Ages period it was deprived of its logical elements, including it into scholastic *trivium* (alongside grammar and logic). In the age of Renaissance, rhetoric was limited to its elocutory part, whereas the theory of invention and disposition were moved to the area delineated by dialectics. The revival of the art of speech may be dated back to the 18th century, when its was no longer perceived as the only science devoted to delivering speeches and became a symbolic mean of stimulating joint activities and attitudes due to its persuasive use of language. As Wojciech Cyrul points out, due to this reason "it starts to evolve towards the theory of coherent use of words and gesture aimed at convincing and encouraging others to follow a speaker's attitude, opinions and actions"[30]. Rhetoric, thus, does not concentrate only on the issue of knowledge reliability but on the practical issue such as discursive transformation of human's opinions. At the end of the 20th century, the idea saying that

[27] K. Gregorczuk, *Hermeneutyka prawnicza,* [in:] *Wielka Encyklopedia*…, op. cit., p. 175.
[28] J. Stelmach, *Współczesna filozofia interpretacji prawniczej*, Kraków 1995, p. 7.
[29] M. Zieliński, *Wykładania prawa. Zasady, reguły wskazówki*, Warszawa 2012, p. 71.
[30] W. Cyrul, *Wpływ procesów komunikacyjnych na praktykę tworzenia i stosowania prawa*, Warszawa 2012, p. 59. See also: K. Burke, *Rhetoric of Motives*, Berkeley 1969, p. 43.

the core of every reasoning as well as every discourse has persuasive character became popular. Therefore, contemporary rhetoric put into question the idea of exclusivity of objectivised criteria of justification in all spheres of social life as they do not constitute one way of rational argumentation in social matters[31].

The year 1936 is agreed to be considered as the beginning of contemporary rhetoric but still relating to its classical patterns when Ivor Armstrong Richards' work entitled „*The Philosophy of Rhetoric*" was published, which was a voice of a new school, later named as *the new rhetoric*[32]. One of its most eminent creators is Chaim Perelman (1912-1984), Belgian logician and law philosopher who based his topical and rhetoric conception of the theory of argumentation on the classical tradition of Greek philosophy, relating especially to Aristotle's output. After so called postivist period (1931-1945) devoted to studies on the theory of justice, Perelman started searching for "logic of value judgments" that could provide a tool making it possible to relate the sphere of values to sciences. As a results of these considerations, he published in 1958 together with his scientific collaborator - Lucie Olbrechts-Tyteca - the work entitled „*La Nouvelle Rhétorique: Traité de l'Argumentation*" (*The New Rhetoric. Treatise on Argumentation*), where he contained the results of analysis of numerous examples of argumentation making a synthesis of classical rhetoric with innovative trends brought by contemporary times.

Rhetoric in the view of Aristotle, understood as "abiility of methodical discovering of what in relation to every object may be convincing""[33], was redefined by Perelman to the following statement: "Indeed, the object of the theory of argumentation is the study of the discursive techniques allowing us to induce or to increase audience's adherence to the theses presented for its assent"[34]. This conception was completed by Perelman in his subsequent works by numerous detailed assumptions. Those constitutive for the "new rhetoric" include: firstly, rhetoric's aim is to convince with the use of a discourse, where use of all rhetorical tools are allowed, also those elaborated by topos knowledge, dialectics and other methods specific for disputes and conversations. Dialectics in itself forms in combination with rhetoric a coherent whole, where rhetoric performs the function of a practical discipline making use of dialectic techniques of convincing and persuasion, whereas dialectics constitutes a theoretical base for the conception of informal reasoning such as argumentation[35]. The very opinion is subject to gradation - when a dispute does not concern the truth but the issue of values, then the grade of acceptance of a statement may be different.

Secondly, Perelman claims that "argumentation may not provide what is obvious and one may not argument against what is obvious (...). Argumentation may

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31 J. Jabłońska-Bonca, K. Zeidler, *Prawnik a sztuka retoryki i negocjacji*, Warszawa 2016, p. 109.

32 R. Pindel, *Nowa retoryka w ujęciu Chaima Perelmana oraz Lucie Olbrechts-Tyteca w kontekście badania tekstu biblijnego*, „Śląskie studia historyczno-teologiczne" 2003, t. 36, z. 2, p. 414.

33 Aristotle, *Rhetoric,* I.2.1355b.

34 *Indeed, the object of the theory of argumentation is the study of the discursive techniques allowing us to induce or to increase the min's adherence to the theses presented for its assent*" (Ch. Perelman, L. Olbrechts-Tyteca, *The New Rhetoric. A Treatise on Argumentation*, transl. by J. Wilkinson, P. Weaver, University of Notre Dame Press, Notre Dame 1969, p. 4.).

35 J. Kiereś- Łach, *Chaim Perelman*, „Człowiek w kulturze" 2013, no 23, p. 352.

exist only where such obvious elements are undermined"[36], rejecting by this, methods of formal logic that are useful only when solving the categories of truth and falsity and are not possible in relation to normative premises in a practical discourse. The philosopher also raises that there is a difference between formal logic and rhetoric which consists in the fact that the latter refers not to the truth itself but rather to convincing an audience. The truth is impersonal and the fact whether it is recognized or not does not change its character[37].

Thirdly, Perelman assumes the notion of universal audience as the core of his argumentation that constitutes a final criterion of rationality and validity of an argument, and consequently - its convincing force. What is important, the universal audience does not have a real character and is described by Perelman as "all reasonable and well informed people" or "all well informed people ready to accept universally important proposals and reasoning". One may see here the relation to the conception of Immanuel Kant's categorical imperative as Perelman assumes that all arguments recognized by the universal audience may be ascribed the features of objectivity, rationality and universality. A principle applied in a specific situation becomes a universal rule (regulation) as being able to assess in the common sense categories is an inherent feature of every audience member and arguments recognized by all members (i.e. all reasonable humanity) cannot contain content contradicting the categorical imperative and thus such that may be regarded as "morally negative"[38].

Fourthly, the idea of a topos is a constitutive element of the new rhetoric. The author of "the New Rhetoric" described in his work the main types of legal toposes, dividing them into arguments and legal rules. According to Perelman, toposes do not have strict logical structure as they do not refer to form but to the very act of reasoning. Perelman analyses and describes in detail a catalogue of sixty-four legal toposes collected by Gerhard Struck as well as makes considerations on the conception of a topos and relations between them constituting specific places (*loci specifici*) and common places (*loci communes*) in a legal discourse. He claims that *loci communes* remain in the same relation to non-specific reflection as *loci specifici* to a detailed discipline, therefore general rules of law constitute only *loci specifici* of the law, whereas the most general statements provide starting point principles for non-specific reflection performing the function analogical to axioms in a formal system[39]. Fifthly, The main part of the "New Rhetoric" consists of the catalogue of argumentative techniques that Perelman tries to divide into a few categories (quasi-logical arguments, arguments based on the structure of reality, arguments creating such structure), however, they have identical aim - they are to offer official interpretation of the law with the use of argumentative technique while establishing premises. One should remember that the theory of argumentation as understood by Perelman

[36] Ch. Perelman, *Imperium retoryki. Retoryka i argumentacja*, transl. by M. Chomicz, Warszawa 2002, p. 19.
[37] Ch. Perelman, *Logika prawnicza. Nowa retoryka*, transl. by T. Pajor, Warszawa 1984, p. 145-150.
[38] K. Kukuryk, *Nowa retoryka prawnicza Chaima Perelmana,* [in:] Z. Władek, J. Stelmasiak, G. Gogłoza, K. Kukuryk (ed.), Księga życia i twórczości. Księga pamiątkowa dedykowana Profesorowi Romanowi A. Tokarczykowi, volume V Prawo, Lublin 2013, p. 172.
[39] Ch. Perelman, *Logic…*, op. cit., p. 161.

does not constitute a closed canon of rules of proceeding as his conception is a synthesis of widely perceived logic and rtetoric that is a method of conducting research on law problems[40]. Perelman's rhetoric is based on the assumption that rationality is not confined to logical formalism and not everything that is formally illogical is *ex definitione* unreasonable, which is related to differentiating of two functions of our mind: the rational one and the common sense one - argumentation preceding making a decision and acting provides adequate arguments to consider something as reasonable. Argumentation itself is described by Perelman as "expanded form of mind and rationality", which puts it in contrast to rhetoric of style that makes use of figures of speech with stylistic aims in mind. "The New Rhetoric" emphasizes persuasive power behind such figures, providing knowledge of mechanisms that help to justify one's own opinions. Such justification is done on the basis of probable reasoning (entymematic) gained through expierience and well established habits or through common sense. Knowledge is therefore described in a rhetorical way as sphere of permanent discourse, which prevents it from mental inertia leading often to reflectionless absolutizing of some opinions[41].

Theory of argumentation by that Belgian philosopher is a multi-dimensional and multi-aspect conception. Special care should be paid to such his works as, among others: "*The New Rhetoric and the Humanities. Essays on Rhetoric and its Applications"*[42]*, "Justice, Law and Argumentation. Essays on Moral and Legal Reasoning"*[43] and "*The Realm of Rhetoric"*[44].

At this point, I would like to proceed to the most important element of Perelman's theory that is of crucial importance for these considerations.

New rhetoric as "third way"

"The New Rhetoric" according to Perelman is to serve philosophy by being its methodological tool useful in practical sphere but at the same time being also an antipode of logic reduced to a formal discipline that concentrates on logical analysis and examining formal proofs. Perelman places logic everywhere where one cannot make use of logical proving and where there is no place for obvious things[45]. However, it turns out that "The New Rhetoric" is not the "third way" only in a methodological dimension, being also an alternative to logic as well as analysis and hermeneutics. According to Perelman, argumentation may also be considered in a broader way, i.e. as a position in a dispute between legal positivism and doctrine of natural law. Perel-

[40] See: B. Tecław, K. Zeidler, *Retoryka prawnicza,* [in:] J. Zajadło (ed.), Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć, Warszawa 2017, p. 277-280.

[41] J. Kiereś-Łach, op. cit., p. 194.

[42] See: Ch. Perelman, *The New Rhetoric and the Humanities. Essays on Rhetoric and its Applications*, Dodrecht–Boston–London 1979.

[43] See: Ch. Perelman, *Justice, Law and Argumentation. Essays on Moral and Legal Reasoning*, Dodrecht – Boston – London 1980.

[44] See: Ch. Perelman, *The New Rhetoric and the Humanities. Essays on Rhetoric and its Applications*, Dodrecht–Boston–London 1979.

[45] J. Kiereś-Łach, *Filozofia i retoryka. Kontekst myślowy „nowej retoryki" Chaima Perelmana*, Lublin 2015, p. 193.

man's conception constitutes an example of law application that does not assume a system of over-positivist law (natural law) but rejects also the positivist view of the law as limiting itself to a set of regulations and norms established by people as soveign body[46] and resulting from them.

Analysis of reasonings as conducted in a legal discourse occupy a special place in Perelman's works. The reasoning of a judge who is to give a judgment when the case allows for a choice from a few alternative solutions is for Perelman of primary importance. Considering the fact that a final form of such decision depends also on argumentative efforts of the parties involved, such a judge is in a permanent decision making situation, implying a certain way of internal communication that consists in trying to convince oneself. Such communication is described by Perelman as the most important paradigm of all detailed rhetorics. As the philosopher points out "a philosopher is not necessary when rules will lead anybody to the same solution (provided that such a person does not make mistakes), and there are proper rules of reasoning basing on disputeless premises. We need a judge when such rules are ambiguous and when reasoning does not lead to a conclusion but justifies the decision"[47]. By contradicting the assumptions of legal positivism, Perelman emphasizes many times that just solving a dispute is not a mere matter of legality and a judge in a decision making situation is rather influenced by previously conceived beliefs of what would constitute a solution that is reasonable, just and possible to be accepted[48].

What is more, Perelman perceives a dissonance between the idea of court law application, i.e. finding right - in one's own opinion - solution and society's expectations. He raises that law is created when conducting disputes that should be terminated by providing convincing and legally sufficiently justifiable solution, "however, every new act answers only the needs of political, economic and social environments"[49]. It is therefore necessary to harmonize the judiciary order with the views on justice and rights as prevailing in a given environment. Perelman sees in this the reason why coming from general and abstract norms to specific and individual ones is not an easy process of deduction but constant adapting of legal regulations to contradictory values in court disputes.These statements move Perelman closer to iusnaturalism, and more specifically - to the conception of the natural law of changeable content, assuming relativization of value system to evaluations of certain environment that recognizes such values in a given epoch (as opposed to classical conceptions of natural laws assuming absolute values as axiological justification of law)[50]. The consequence of adopting by Perelman of the above assumption is the possibility of withdrawing the acceptance of the universal audience for a specific statement due to obtaining by it of new knowledge or changing by the audience's members of the system of values supported by them.

The author of the conception of "The New Rhetoric" standing at the crossroads between the positivist versus legal and natural assumptions, quoting J. Esser,

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[46] K. Kukuryk, *Nowa retoryka*…, op. cit., p. 173.
[47] Ch. Perelman, *Justice*…, op. cit., p. 143-144.
[48] Ch. Perelman, *Logic*…, op. cit., p. 124.
[49] Ibidem, p. 125.
[50] M. Zieliński, Z. Ziembiński, op. cit., p. 123.

claims that in such approach "legal reasoning is no longer a simple syllogistic deduction whose conclusion is binding if it seems unreasonable: it does, however, become a mere search of right solution (*ars aequi*) that could be (or not) judged in the present legal order. Suddenly, then, a judge would stop to be subject to a legislator, which would defy the traditional differentiation between justice *de lege lata* and *de lege ferenda*"[51]. Therefore, a task attributable to a judge consists in searching for a synthesis taking into account value of the solutions as well as their congruence with the law.

Conclusions

As a summary of the above considerations let me quote the words by Jerzy Stelmach and Bartosz Brożek, who wrote the following passage on legal argumentation: "For the time being in many difficult cases where official interpretation referring to the methods of logic and analysis is not sufficient, and we do not want to use - to lesser or higher degree - the relativist hermeneutics, we are only left with argumentation that provides at least a minimum amount of certainty and objectivity. In our opinion, it is one of the most significant methodological alternatives both for humanities as a whole as well as, and maybe even most of all, for the legal sciences"[52]. Such alternative[53] is offered by "the new rhetoric" by Chaim Perelman, for whom reflecting on judge's reasoning constitutes a reference point for his considerations on philosophy, knowledge of morality as well as other areas in the form of a discourse, and most of all, allows to draw conclusions as regards the idea of the general conception of law recognized by the philosopher as a way of organizing disputes leading to solving decision making problems. Perelman negates the syllogistic model of law application, which makes the whole conception of "the new rhetoric" assume clearly anti-formalist character. Jerzy Wróblewski perceives in it three main signs of anti-formalism. Firstly, Perelman rejects the conception of heuristic function of formal logic in the process of law application and assumes that seeking decision is done by use of various arguments, which is a consequence of recognizing judge's legal reasoning as a paradigm of practical reasoning. Secondly, he negates also the conception of non-valuating character of a decision making process, emphasizing significant role played by evaluations. Thirdly, Perelman points out the possibility of existence of many interpretative decisions, rejecting at the same time the conception of one correct decision[54].

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[51] Ch. Perelman, *Logika*…, op. cit., p. 124.

[52] J. Stelmach, B. Brożek, *Metody prawnicze*, Kraków 2006, p. 163.

[53] Topical and rhetoric conception by Perelman is not obviously the only possible incarnation of the argumentative model of law application. For example, Robert Alexy's theory that is procedure-oriented is in contrast to Perelman's theory. Other scholars researching the problem of argumentation that have contributed considerably to the development of the theory include, among others: Neil MacCormic (see: *Legal Reasoning and Legal Theory*), Aulis Aarnio (see: *The Rational as Reasonable. A Treatise on Legal Justification*) and Alexander Peczenik (see: *On Law and Reason*). Each of them proposed his own conditions that a legal argumentation should meet in order to be recognized as rational.

[54] J. Wróblewski, *Logika prawnicza a teoria argumentacji Ch. Perelmana*, [in:] Ch. Perelman, Logika…, op. cit., p. 19.

In the context of conducted considerations it is worth paying attention once again in the Perelman's conception to the issue of evaluations and values. Evaluations decisive of the adequacy of the decisions of law application on the one hand cannot be subjective in character as they should take into account views of the environment, whom such decision is presented for acceptance. On the other hand, such decision must be in accordance with the law in force. Such intersubjective verifiability of the results of legal discourses may be an instrument of keeping legal system coherent as well as means of limiting arbitrariness of court judgments for which there is no place in the law system attaching importance to legal safety and law certainty. However, emphasizing the role of axiological elements and social context in the process of law application allows also for their adaptation to fast changing conditions of social and legal reality, which is also supported by the general rules of law and legal toposes as described by Perelman. The whole issue of legal reasoning (especially the court one) - as the philosopher claims - aims at working out dialectics where seeking solution that is both convincing and providing the condition of "court peace" will enrich methodological tools, allowing to keep the law system coherent and making it at the same time more flexible[55].

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[55] Ch. Perelman, *Logic*…, op. cit., p. 126.

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