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

[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

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[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,

[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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