R I A

Revista Iberoamericana de Argumentación

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The Role of Argumentation in the Brazilian Supreme Court

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RESUMEN

En la Corte Suprema de Brasil, a diferencia de otros tribunales supremos, solo el relator tiene la obligación de justificar su voto, y para el recuento de votos no importa si hay consenso entre los magistrados o no. Este no-requisito de justificación del voto lleva a la práctica del "voto con el relator", lo que sugiere una doble interpretación: puede significar que uno acepta totalmente su decisión, así como con su justificación, pero también puede significar que uno está de acuerdo con su decisión y no con sus justificaciones. El no-requisito de un consenso de la mayoría, por otro lado, conduce a los casos en que se toma la decisión de la Corte por una mayoría que no solo no responde a un argumento común, sino posiblemente a argumentos divergentes y hay incluso casos de argumentos incompatibles. Un ejemplo auténtico de este tipo de caso será presentado y discutido.

PALABRAS CLAVE: Brasil, Corte Suprema, justificación argumental.

ABSTRACT

In the Brazilian Supreme Court, unlike others Supreme Courts, only the relator has the obligation to justify his vote, and to the counting of votes it doesn't matter whether there is consensus among the judges or not. This non obligatory justification of the vote leads to the practice of "voting with the relator", what suggests a double understanding: it can mean that one agrees entirely with his decision as well as with his justification, but it can also mean that one agrees only with his decision and not with his justifications. The lack of demand for a consensus of the majority, on the other hand, leads to cases in which the decision of the court is made by a majority that was not only formed behind a common argument, but by divergent arguments, there being even occurrences of incompatible arguments. A genuine example of this type of occurrence is presented and discussed.

KEYWORDS: argumentative justification, Brazil, Supreme Court.

RIA 4 (2012): 1-15
ISSN: 2172-8801

Revista Digital de Acceso Abierto http://e-spacio.uned.es/ojs/index.php/RIA
Editada por el Departamento de Lógica, Historia y Filosofía de la Ciencia

1. INTRODUCTION

My interest in classical rhetoric and the new rhetorics have led me to this incursion into the area of law, the privileged space for argumentative justification. In this paper, I propose to analyze its role as practiced in the Brazilian Supreme Court. The Federal Supreme Court (STF, in its Brazilian abbreviation), plays the role of guardian of the Federal Constitution. It is within the scope of this court, among other functions, mainly to judge the cases in which a violation of the Federal Constitution is alleged, such as in direct acts of unconstitutionality or in appeals against decisions in which there have been alleged violations of the legal mechanisms of the Constitution.

The Brazilian judiciary organs are classified according to the number of sitting judges, as single organs, when a single judge sits, and as collegiate organs, when more judges are congregated. The Federal Supreme Court is a collegiate organ and is composed of eleven judges (Justices), appointed by the President of the Republic once their nominations have been approved by the Senate. These justices are native citizens of Brazil, with more than thirty-five and less than sixty-five years of age, and are chosen by taking into account their legal prominence and stainless reputations. Composed of the plenary assembly, presidency, and two groups, the Federal Supreme Court passes judgment through one of these organs or the justice who writes the majority opinion, who is called the relator. The Internal Regulations minutely control the jurisdiction of the court. In this paper, I will discuss the deliberations of the court's plenary assembly.

According to the Internal Regulations, the plenary assembly is authorized to declare unconstitutionality by way of direct action as well as for diffuse control in cases of primary or appeal jurisdiction, whenever it is a question of deciding highly relevant constitutional issues or issues undecided by the plenary assembly, or when a justice requests a revision of the summation. It also has primary and appeal jurisdiction in other hypotheses that are considered in the internal regulations, as well as some jurisdiction in administrative matters.

2. THE DELIBERATIONS BY THE PLENARY ASSEMBLY

Although all the members of the court have the right to speak and to vote, and all are required to vote, only the relator is required to exercise the right to speak in order to

justify his vote. The other members may also justify their votes, but if they so desire, they may simply vote, accepting or rejecting the case being tried by voting yes or no.

This non-obligatory justification of the vote leads to the practice of "voting with the relator," a practice that suggests a double understanding: voting with the relator can mean that one agrees entirely with his decision as well as with his justification, with nothing to add or refute. But it can also mean that one agrees only with his decision and not the justifications that led him to that decision. In this case, the true meaning of the vote cannot be known: the result is known but not the justifications that led to such a result.

The same problem can also occur when a justice agrees with the vote of another justice who preceded him. In the case where he does not let it be known, it will also not be possible in this case to know if he agrees only with the decision or with the justification of that decision. This lack of clarity does not signify greater problems when the matter being judged can already count on consolidated jurisprudence, or when the ministers have already explained their opinion with respect to the matter. In treating problems as yet untreated by the court, for which the legal doctrine is still incipient and the jurisprudence not yet consistent, the problem is more serious, since the principle of publication is, in a way, compromised, as has been foreseen in the Constitution, which, among other rights, guarantees the citizen the right to have the reasons, the justification for the decision, made explicit.

> IX – all judicial decisions of the courts of the Judiciary power will be made public and *all decisions justified*, under pain of being null and void; the law, if the public interest requires it, is able to limit the presence, in certain acts, to the parties themselves and their attorneys, or only to the latter (my italics) (Federal Constitution of Brazil, 1988, art. 93, IX)

It is obvious that the STF follows the Constitution, and every decision of the court is, in some form, justified. What may be questioned is the form used to attain the justification presented to the parties involved, which in many cases is uncharacteristic of the collegial court, making it similar to the single court, in which decision and justification are offered by a single judge.

3. THE IMPORTANCE AND NEED FOR THE ARGUMENTATIVE JUSTIFICATION: PERELMAN AND HABERMAS

To defend the importance and need for the justification of judicial decisions, I refer here to two great names, linked to the new rhetorics, Habermas and Perelman, whose positions collide with the position of two other great positivist jurists, Kelsen and Hart.

> The underlying conception to the positions of Kelsen and Hart is that of Descartes, clearly expressed in the first part of *Discourse of the Method*. [...] It was he who, making from evidence the brand of reason, considered rational only the demonstrations that, from clear and distinct ideas, extended, by means of apodictic proofs, the evidence of the axioms to all theorems.
> (Perelman 1996b:1) (translation by the author).[1]

The idea of evidence as characteristic of reason is the centerpiece of all theories of knowledge derived from the positivist thought of Descartes.

In the positivist vision of Hart (Hart 1994: 335), when the judge finds himself in a discretionary judicial situation in which, among several legal and constitutionally possible hypotheses for the concrete case, he needs to choose between two or more alternatives that are valid before the law (not only before the law), he can make his decisions dogmatically, without the need to justify them. This choice is made according to certain criteria, such as opportunity, appropriateness, justice, equity, reasonability, and public interest.

For Kelsen (Kelsen 1991: 364), before the indeterminacy of the law, the judge has total freedom to choose among various possibilities of interpretation. If there are no established judicial criteria that can direct the judge to a given solution, his authority as judge allows him to choose any of the options, also without the obligation to justify his choice. In short, according to Kelsen and Hart, no limits are imposed on the judge in his discretionary field: his authority allows him to make any decision that he judges to be correct according to merely subjective criteria without the need for justification.

Habermas and Perelman, however, believe that positivism does not offer acceptable answers to current juridical problems and that the limits imposed by it should be revised.

Perelman's theory of justification offers help in overcoming positivism, since he supplies criteria for the control of discretionary judicial activity. The main effect of this theory is to establish for judges the need to justify, with arguments, the options that

[1] «A concepção subjacente às posições de Kelsen e Hart é a de Descartes, claramente expressa na primeira parte do *Discurso do método* [...] Foi ele que, fazendo da evidência a marca da razão, não quis considerar racionais senão as demonstrações que, a partir de ideias claras e distintas, estendiam, mercê de provas apodícticas, a evidência dos axiomas a todos os teoremas.»

imply value judgments. Perelman does not consider the mere argument of authority acceptable. His theory of justification offers judges a new challenge that is more adequate to contemporary democratic ideals than the argument of authority inherent in positivist theory: the need to persuade other people that their options are adequate. It is not enough to presuppose the legitimacy of a court's decisions in virtue of a fundamental norm or recognition rule, which leads us to a merely formal concept of legitimacy. It is necessary that legitimacy be won by means of an adequate justification of the decision.

When the judge does not make it explicit, when he does not justify his value choices, that reveals his understanding that his choices are objectively valid because of his authority, or because he considers that the hierarchy of values established by him is right and just. In both cases, the necessary respect for the citizens that have different opinions and values does not occur, and these people will have to obey the decisions of the courts. For a decision to be legitimate, it is necessary that the citizens accept it, and therefore it is one of the roles of the judges to convince society that their choices are the best. In the words of Perelman,

> The judge has as mission to say the law, but in a manner according to the conscience of society. Why? Because his role is to establish the judicial peace and the judicial peace will only be established when he has convinced the parties , the public, his co-workers, his superiors, that he judges equitably. (Perelman 1996b:58)[2] (translation by the author).

Perelman defines The New Rhetoric as «...the study of the discursive techniques allowing us *to induce or increase the mind's adherence to the theses presented for its assent*» (Perelman 1996b:4),[3] (translation by the author). For him,

> The role of rhetoric becomes essential in a less authoritarian and democratic conception of duty, when the lawyers insist on the importance of judicial peace, on the idea that the law should not only be obeyed, but also observed when more widely it is accepted (Perelman, 1996a: 554)[4](translation by the author).

According to Perelman,

> It is useless to try to define rational argumentation the way we define a demonstrative technique, namely, by its conformity to certain prescribed rules. Unlike demonstrative reasoning, arguments are never correct or incorrect; they

[2] «O juiz tem como missão dizer o direito, mas de um modo conforme a consciência da sociedade. Por quê? Porque o seu papel é estabelecer a paz judiciária e a paz judiciária só será estabelecida quando ele houver convencido as partes, o público, seus colegas, seus superiores, de que julga de forma equitativa.»

[3] «... o estudo das técnicas discursivas que permitem *provocar ou aumentar a adesão dos espíritos às teses que lhes apresentam ao assentimento.*»

[4] «O papel da retórica se torna indispensável numa concepção do direito menos autoritária e mais democrática, quando os juristas insistem sobre a importância da paz judiciária, sobre a ideia de que o direito não deve somente ser obedecido, mas também observado quanto mais largamente for aceito.»

> are either strong or weak, relevant or irrelevant. The strength or weakness is judged according to the Rule of Justice, which requires that essentially similar situations be treated in the same manner.(Perelman 1980: 83)

For him, «The insight that the Rule of Justice could be applied to any problem of justification was a crucial development in the system of thought that became the new rhetoric», (Perelman 1963: 80)

The Rule of Justice is a concept developed by Perelman from the analysis of what's common in several doctrines. He listed the six most common concepts of justice, namely: a) to each the same thing; b) to each according to his merits; c) to each according to his works; d) to each according to his needs; e) to each according to his rank; f) to each according to his legal entitlement. (Perelman 1963:7)

After the analysis of these six conceptions, Perelman comes to the conclusion that they have in common a certain idea of equality, but not only of pure equality, but of equal treatment. From this conclusion, he formulates, then, a concept of justice, which is called formal or abstract, that should be taken into consideration in the application of justice. Thus, justice, in this sense, would be "an action principle according to which the beings of the same essential category should be treated similarly." (Perelman 1963:16)

In short, to achieve a fair decision, the judge should be guided on the principle of equality.

The Rule of Justice designed by Perelman explicitly contemplates the principle of precedent, the previous treatment given to a similar situation. The judge can only depart from the precedent if he has sufficient reasons and he must justify it through argumentation. In the words of Perelman, «The rule of Justice invites us, in fact, to turn to precedent, when, for example, in the case of application of an implicit rule, all previous decision proceeded from a recognized authority»,[5] (Perelman 1996a:88) (translation by the author).

We must appeal to the sense of fairness when the law applied strictly in accordance with the Rule of Justice or when the precedent, strictly followed, leads to unfair consequences. In the absence of rules, or when the rules are contradictory, the judge should have recourse to the principles and values, whereas these are essential and constitutive part of the law.

According to Perelman,

[5] «A regra de justiça convida-nos, de fato, a transformar em precedente, ou seja, em caso de aplicação de uma regra implícita, toda decisão anterior emanante de uma autoridade reconhecida.»

> When antinomies of the justice appear and when the implementation of justice forces us to transgress the formal justice, we turn to equity. This, we could consider the *crutch* of Justice, is the indispensable complement of formal justice, every time the application of this proves impossible. It is a tendency to treat not too uneven the beings who are part of a same essential category. (Perelman 1996a:163),[6] (translation by the author).

According to Habermas' theory of justification, all persons are inserted in a great discursive process, in which all of them take part, and, in this context, a solution is not only legitimate when it is considered acceptable by the people involved in the discourse. In defense of justification, Habermas says that the rationality of those who take part in the justification is demonstrated in the way in which they act and respond to the reasons pro and contra which are available to them, and, being susceptible to criticism, can be improved. With this notion, Habermas joins the concept of justification to the concept of learning: "the arguments make possible behavior that can be considered rational in a special sense, to wit: one can learn from errors as long as they are identified" (Habermas 1987a: 43).

In Habermas' thought, the theory of argumentation and his analysis of the concept of rationality are crucial. As Habermas points out, he dedicated himself in his theorizing to thinking of rationality as the principle that governs the capacity of statements to be criticized, so granting rationality a fundamental role in argumentative practice. For Habermas, «rationality has less to do with knowledge or the acquisition of knowledge than with the form in which subjects capable of language and action use knowledge.» In this way, he who defends his points of view in a dogmatic way or is unable to justify them is considered irrational.

The rationality of a judge's vote, therefore, depends on the fact that the implied knowledge in it is warrantable, that is, that is grounded and that it can be criticized. For an opinion to be rational, it is sufficient that it be accepted for good reasons within a context of justification: «the rationality of a judgment does not imply its truth, but only its acceptability grounded within a given context» (Habermas 2001: 48). For Habermas, the idea of truth can only be developed by reference to the discursive performance of the valid intentions (Habermas 1994a: 120).

Both Perelman and Habermas considers the existence of a particular auditorium (real, concrete) and of a universal auditorium.

[6] «Quando aparecem as antinomias da justiça e quando a aplicação da justiça nos força a transgredir a justiça formal, recorremos à equidade. Esta, que poderíamos considerar a muleta da justiça, é o complemente indispensável da justiça formal, todas as vezes que a aplicação desta se mostra impossível. Consiste ela numa tendência a não tratar de forma por demais desigual os seres que fazem parte de uma mesma categoria essencial.»

For Perelman, «The *particular* auditorium is a group of addressees who has features in common: a 'segment', a forum of experts, members of a political party, a group of youngsters, or women etc.» (Perelman 1996: 22-23). But he says that

> All argumentation that only seeks to address a particular audience runs a risk that the speaker precisely to the degree that he adapts his discourse to the view of his listeners, threatens to rely on theories that are strange or even inhospitable to people other than those he is addressing at the moment. (Perelman 1996: 34),[7] (translation by the author).

Hence the relative weakness of the arguments that are only accepted by private auditoriums and the value given to views that enjoy a unanimous approval, especially from persons or groups who agree to very few things.

In short, Perelman argues for a universal auditorium that acts as a regulatory principle of argumentation.[8]

Habermas, similarly, speaks of moral norms accepted by all men. In both cases, the breadth of the auditoriuns is considered problematical and has been criticized.[9]

When it is a question of law, however, the auditorium to be convinced is more restricted: not a universal auditorium, but one formed by the members of a certain society with common values, which makes it possible to argue on the basis of values, and, consequently, justify a decision of value.

As can be seen, in the Brazilian Federal Supreme Court, the theory that prevails is the positivist one: since that court is the competent organ to try certain cases, the interpretation voted on by its justices becomes law only because its members have the authority for that purpose.

According to the research I have done, in several cases tried by the STF, there is, with the exception of the relator's position, no argumentation to clarify the reasons for the decision, to make explicit the criteria used, to explain the motives that have led to such a conclusion. In the words of Aulis Aarnio (Aarnio 1991:335),

> It is possible that the facts of the case be exposed in all their detail, but the position of the court with respect to the juridical issue can be formulated in a

[7] «Toda argumentação que visa somente a um auditório particular oferece um inconveniente, o de que o orador, precisamente na medida em que se adapta ao modo de ver de seus ouvintes, arrisca-se a apoiar-se em teses que são estranhas, ou mesmo francamente opostas, ao que admitem outras pessoas que não aquelas a que, naquele momento, ele se dirige.»

[8] In fact, Perelman is unclear on the concept of universal auditorium. He presents several seemingly contradictory definitions.

[9] See the criticism of the concept of universal auditorium: Atienza (2000), Antonio Pieretti (1969, 1993), Aulis Aarnio (1991), Eemeren & Grootendorst (1987,1993) referred to a supposed ambiguity in the universal audience concept and others problems.

> much more succinct way. For example, "as it has been clearly demonstrated… that X is found guilty according to article such and such of the Penal Code ….." A justification of the choice of alternative contents of the legal norm is offered, even in the case in which it is evident that the letter of the law can be interpreted in various ways."[10] (translation by the author).

The position that seems to me most adequate and democratic after examining the anti-positivist positions of Habermas and Perelman is to demand that the courts justify their decisions, especially those that involve value judgments. Even in cases in which it may be considered that the result of a decision-making process discussed in positivist conceptions is adequate to social values, or at least to the values of the theoretical common sense of jurists, the absence of justification is felt to impede, or at least make difficult, criticism of the method of making decisions used by a court and also preventing, according to Habermas, that learning takes place through error. The lack of demanding justification for the vote by all the justices therefore harms the improvement of the legal process, since it does not give incentive to argumentative justification in court.

4. THE LACK OF REQUIRING A CONSENSUS OF THE MAJORITY

Beyond this serious problem – the lack of justifying the vote by all the justices[11]– in the Federal Supreme Court there is still another serious problem: the lack of requiring a consensus of the majority. Even in the cases in which the justices produce the justification for the vote, for the verification of the votes it does not matter if the arguments, in case they are given, are the same, or if they are at least compatible, it being enough if they lead to identical conclusions.

The lack of demand for a consensus of the majority, on the other hand, leads to cases in which the decision of the court is made by a majority that was not only formed behind a common argument, but that was supported by divergent arguments, there being even occurrences of incompatible arguments among the justices.That being so, it

[10] «Es posible que los hechos del caso sean expuestos com todo detalle, pero la posición del tribunal com respecto a la cuestión jurídica puede ser formulada de una manera más bien lacónica. Por ejemplo "como obviamente há quedado demonstrado que (...), X es condenado de acuerdo com el artículo (...) del Código Penal (...)". No se ofrece una justificación de la elección de los contenidos alternativos de la norma legal, tampoco en el caso en que sea evidente que el texto de la ley puede ser interpretado de maneras diversas.»

[11] «One could defend the position that it is advantageous to restrict the justification to only one line of argumentation, to the arguments of the relator, because the more judges who give their own justification, the more problems of ambiguity, vagueness and misunderstanding might arise, and therefore more possibility of appeals. This may be true. However, considering the importance of the Supreme Court, guardian of the Federal Constitution and final appellate instance, I believe it is essential that all judges justify their decisions. Moreover, as the popular saying, *several heads think better than one.*»

cannot be said that the court always has a position; what it has, in most cases, are the individual positions of the justices, whenever we have them.

It is for this reason that in the Brazilian judicial system only the decisions – and not their justifications – resolve the case, which means that the decision is supported on quantitative data, the counting of yes/no votes, more than on qualitative data, which express the arguments. According to Perelman, "…they are those conclusions that most of the time are important [to the courts], much more than the reality of the facts, which constitute only a means of justifying the juridical consequences that result from them." (Perelman 1996a: 586).

The Brazilian system differs, for example, from the one used in the Supreme Court of the USA, and the Bundesverfassungsgericht of Germany, in which, besides all the members having to present their arguments to justify their votes, it is required that the majority of the justices reach an agreement, not only with respect to the results, but also with respect to the justification used to ground them.

The demand for consensus in the justification of the majority requires the justices to argue until they succeed in convincing their peers so that it is possible to reach an agreement. If there is a consensus among peers, society will also be convinced of the justice of the resulting judgment. The role of justification is then of supreme importance in these courts: first, because of the opportunity for exhaustive discussion of the questions involved; second, because it leads to consensus; third, because it convinces the auditorium.

Besides, when the American and German courts try a case, they not only establish the decision of a specific concrete case, but they offer the position of the court on the juridical issue. Thus, when the result of a case is not only a decision, but a position taken, the future decisions become more predictable and controllable, favoring juridical security, a principle that, according to the jurist Nicolau Junior, defines "..the minimum of necessary predictability that the State of Law should offer to every citizen, respecting which are the norms of living in society that he should observe and on the basis of which he can moderate juridical relations that are valid and effective" (Nicolau Júnior 2005: 21).

In the Brazilian court, predictability remains compromised, since there is a lack of transparency that often prevents the citizen from identifying the real significance of the votes of the justices. If in the STF not even the justices of the Court are persuaded by their peers, since justification is not obligatory, much less can it be conceived in justifications that affect the auditorium, the citizens of our society.

Although it is not impossible, it is rarely the case in which it can be said that there the STF has taken a position, whether because the justification is unanimous among the justices, or because they admit the same justification by a reasonable majority. That is because we can only learn about the justification of a justice when he expresses it, and our system allows him not to express it. Therefore, we cannot say that every decision of the STF expresses a position taken by the court.

In the American and German courts, since justification of all as well as the consensus of the majority is obligatory, there is always a position taken by the court. In Brazil, since there is neither the justification of all nor a consensus required for the justification of the majority, only by chance will we have consensual cases that reflect the position taken by the court. If chance is not favorable, it may happen that we will have only the justification of the relator or diverse justifications, and even divergent or incompatible ones.

As we saw, for Perelman, the Rule of Justice and the precedents are indispensable to enable the formation of a stable legal order, to ensure the security of transactions. (Perelman 1996:72)

In the case of the STF, as there is lack of consensus, we cannot recognize the precedents, because we cannot be sure of the ground of the decisions.

5. A CASE STUDY

An exemplary case is that of RMS 16.912/6716, cited and analyzed by the jurist Alexandre Costa (Costa 1999:13-17) in which several members of the court took part in a discussion on the limits of judicial control of constitutionality and the legislative activity of the state.

In a city in the state of São Paulo, there were offices of two Notary Publics, the first for notes and annexes, which included real-estate deeds, and another for Civil Registry. By means of a state law, another autonomous Notary Public office was created, an office for real-estate and annexes, separating itself from the first Office. In the bill that the legislature sent to be sanctioned by the governor, there was an article that resolved that the Official of the Civil Registry should, by priority, be named notary public of this new office, to whom the state owed compensation for the loss of an annex of its office some years previously. The governor vetoed this article of the bill because he considered it immoral, but his veto was overthrown by the legislative assembly and the governor ended up having to nominate the official of the Civil Registry.

Disagreeing with the decision, the official of the First office petitioned for a court injunction against the governor's nomination, arguing the unconstitutionality of the article of the referred to law that created priority in favor of the notary of the Civil Registry of Natural Persons. The injunction was refused at its origin, which made possible an appeal to the Supreme Court. The state court recognized that there was merely a case of immorality—which did not justify the annulment of the act.

In that case, the Federal Supreme Court made its decision unanimously, and the decision favored the injunction order. All the justices justified their votes. This unanimous decision, however, was not formed around a common argument, but from divergent justifications, some of which were incompatible with one another. Thus:

> **Justice No. 1** (relator) defends the argument of an offense against the principle of isonomy, which should govern the filling of any public post.
>
> **Justice No. 2** admits the unconstitutionality, but only because he understands that the competence to fill the posts belongs to the chief executive and not to the legislature.
>
> **Justice No. 3** understands that the fact of the title-holder of the office is a lifetime post makes it necessary that there be some compensation for his partial loss, as it is necessary to at least follow the custom and attribute to the notary public the right to choose to be the title-holder of any of the parts resulting from the separation. Later, after being convinced by the arguments of Justice No. 7, he adopted the position of the abuse of power.
>
> **Justice No. 4** understands that it is unconstitutional because the attribution of preference was introduced by the legislature instead of the exclusive jurisdiction of the judiciary, and, in addition, with this factor no objective of public interest was sought, but merely a person favored, which is inadmissible. He argues that the creation of a new office exists because of the priority granted. After some debate, he makes explicit his argumentation and assumes the diversion of power on the part of the legislator.
>
> **Justice No. 5** affirms that the law is unconstitutional because it has a private character, with the view of being of exclusive interest only to the beneficiary.
>
> **Justice No. 6** understands that the fact of the title-holder of the office is a lifetime post makes it necessary that there be some compensation for his partial loss, as it is necessary to at least follow the custom and attribute to the notary

the right to choose to be the title-holder of any of the parts resulting from the separation.

Justice No. 7 argues against Justice No. 4, saying that he prefers to use, in this respect, the notion of the abuse and not the diversion of power. After clarifying the difference between these two concepts, he argues that in the case in question there was abuse of power, an ostensive disregard of the principles that govern the conduct of the legislative power, a manifest abuse. Only Justice No. 3 is convinced by these arguments and reformulates his former position.

Justice No. 8 questions the argument of the abuse of power proposed by Justice No. 7, because he understands that to adopt this argument means to give power to the Supreme Court to declare a state law unconstitutional, which offends the autonomy of powers. He takes a more conservative position, adopting arguments of a formal character: invasion of jurisdiction and lack of generality of the norm.

Justices Nos. 9, 10, and 11 agree with the justification of Minister No. 8.

As can be seen, although in this specific case it cannot be said that there was no justification for the Justices' votes, the divergence of opinions given and the lack of a consensus are problematic, since they do not allow for the position of the court to be verified. The absence of the position of the competent public organ compromises the ability to convince society of the justice of the decisions made and does not offer the juridical security defined as the minimum predictability necessary for valid and effective juridical relations.

This case, however, is an exception. In most cases, the lack of justification of the votes in the STF is striking.

6. CONCLUSION

I conclude by defending a non-positivist position for the Brazilian juridical system, one that is truly democratic and that respects the diversity of positions of its citizens. And, considering the influence of the model of the Federal Supreme Court on the other collegial courts of the country, I would defend for all of them the value of justification.

REFERENCES

Aarnio, Aulis.(1991) *Lo racional como razonable: un tratado sobre la justificación jurídica.* Madrid: Centro de Estudios Constitucionales.

Aarnio, Aulis et al. (1997) *La normatividad del derecho*. Barcelona: Gedisa.

Atienza, Manuel. (2000) *As razões do direito*: teorias da argumentação jurídica. Trad. de Maria Cristina Guimarães Cupertino. São Paulo: Landy.

Brasil. (1988) *Constituição Federal do Brasil*.

Brasil. (1968) *Supremo Tribunal Federal. RTJ 45/2:530. DJU de 28.6.1968, p. 2440. Ementário 732/3:760*

Costa, A. Alexandre. *O princípio da razoabilidade na jurisprudência do STF: o século XX*. http://www.arcos.org.br/livros/o-principio-da-razoabilidade-na-jurisprudencia-do-STF: o-século-xx/ Aces. en 03/10/2009.

Eemeren, Frans H. Van; Grootendorst, Rob. (1987)"Perelman and the Fallacies."In:Eemeren , Frans H. Van; Grootendorst, Rob; Kruiger, Tjark. *Handbook ofArgumentation Theory***:** a critical survey of classical backgrounds and modern studies.Dordrecht-Holland / Providence-USA: Foris Publications.

Habermas, Jürgen. (1987a) *Teoría de la acción comunicativa I: Racionalidad de la acción y racionalización social.* Trad. de Manuel Jiménez Redondo. Madrid: Taurus.

- *Teoría de la acción comunicativa II: Crítica de la razón funcionalista*. (1987b)Trad. de Manuel Jiménez Redondo. Madrid: Taurus.

- "Notas programáticas para a fundamentação de uma ética do discurso".(1989) En: *Consciência Moral e Agir Comunicativo*. Trad. de Guido Antônio de Almeida. Rio de Janeiro: Tempo brasileiro, 61-141.

- *Moral consciousness and communicative action*. (1990) Cambridge: MIT.

- "Para o uso pragmático, ético e moral da razão prática."(1993) En: Stein, E., Boni (Eds.) *Dialética e Liberdade*. Petrópolis: Vozes, 288-304.

- "Teorías de la verdad". En: *Teoría de la acción comunicativa: complementos y estudios previos.* (1994a) 2a.ed. Trad. de Manuel Jiménez Redondo. Madrid: Cátedra, 113-158.

- "Aspectos de la racionalidad de la acción". (1994b).En: *Teoría de la acción comunicativa: complementos y estudios previos.* 2a.ed. Trad. de Manuel Jiménez Redondo. Madrid: Cátedra, 369-395.

- *Between facts and norms: contributions to a discourse theory of law and democracy*. (1996) Cambridge: MIT.

-*Vérité et justification*. (2001)Trad. de Rainer Rochlitz. Paris: Gallimard.

Hart H. L. A. *O Conceito de Direito*. 2a.ed.(1994) Lisboa: Calouste Gulbenkian.

Kelsen, Hans. (1986) *Teoria Geral das Normas.* Porto Alegre: Fabris.

- *Teoria Pura do Direito*. (1991) São Paulo: Martins Fontes, 1991

Nicolau Júnior, Mauro. Segurança jurídica e certeza do direito: realidade ou utopia num Estado Democrático de Direito?, En: www.jurid.com.br, disponível em 10/03/05, acesso em 25/03/08, 21.

Perelman, Chaïm. (1963) *The Idea of Justice and the Problem of Argumentation*. New York: Humanities Press.

- "L'interpretation juridique". (1972) En: *Archives de Philosophie du Droit*. Paris: Sirey, (L'interpretation dans le droit), 32.

- "Le raisonnable e le déraisonnable en droit" (1978). En: *Archives de Philosophie du Droit*. Paris: Sirey, Tomo 23.

- "The Rule of Justice". In: *Justice, Law, and Argument.*(1980) Dordrecht/Boston: Reidel Publishers.

- *Ética e Direito*. (1996a) São Paulo: Martins Fontes.

- Lógica Jurídica: Nova Retórica. (1998).São Paulo: Martins Fontes.

Perelman, Chaïm; Olbrechts-Tyteca, Lucie. *Traité de l'argumentation. La nouvelle rhétorique*. (1976) . Bruxelles y Vrin: Université de Bruxelles.

-*Tratado da Argumentação. A nova retórica.* (1996b) Trad. Maria Ermantina Galvão. São Paulo: Martins Fontes.

Pieretti, Antonio.(1969) *L'argomentazione nel discorso filosofico: analisi critica del pensiero di Chaïm Perelman.* Firenze: L'Aquila.

- "À la recherche d'une raison plurivalente".(1993) In: Haarscher, Guy (ed.). *Chaïm Perelman et la pensée contemporaine. Bruxelles: Bruylant,* 1993, p. 411-425.

Schwartz, Bernard.(1979) *Constitutional Law: a textbook.* 2a ed.New York: Macmillan.

- *Decision: how the Supreme Court decide cases*.(1996) New York e Oxford: Oxford University Press.

Schreckenberger, Waldemar. *Semiótica del discurso jurídico: análisis retórico de textos constitucionales y judiciales de la República Federal de Alemania.* (1987) México: Universidad Nacional Autónoma.

Willard, Charles A (eds.) (1987) *Argumentation: perspectives and approaches*. Dordrecht/Holland, Providence/USA: Foris, p. 274-282.

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