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LEGAL ARGUMENTATION AS PART OF THE CATEGORIES OF THE COMMON THEORY OF LAW

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Abstract: *The present article explores the importance of the legal argumentation as a means of achieving a certain legal outcome. It reveals its specificity and dogmatic character, which justifies its inclusion as part of the problems explored by the general theory of law. It examines the essence of the knowledge, focusing on its practical applicability. It is concluded that, without legal argumentation, prerequisites are created to undermine the fundamental legal principles and the function of the law as a regulator to be violated. The objectives of this report are three: Outlining the importance of the legal argumentation; The justification of the theoretical position in the subject of study of the general theory of law and the identification of the urgent necessity of theoretical research in the field of the legal argumentation.*

Keywords: *legal argumentation, concept for legal argumentation, ontological characteristics, necessity of argumentation.*

INTRODUCTION

The General theory of Law studies the law in its entirety. As a basic discipline, the general theory of law formulates the essence, the structure, the basic elements, the principles and institutes, the rudimentary regularities of manifestation of the law, all the categories of this science. Legal argumentation is an intellectual and practical activity that justifies the correctness, credibility, justifiability and non-contradiction of particular legal theses.

The necessity for argumentation is unconditional at every stage and at every level of the legal activity. Without legal argumentation, the regulating function of the law would be impracticable or, at least, substantially impeded. In respect of the place and the significance of the concept "legal argumentation", it should be included in the subject of a study of the general theory of law.

EXPOSITION

I. The general theory of law is fundamental, general theoretical, abstract and methodological scientific discipline. One of the basic functions of the general theory of law is the theoretic-cognitive /gnoseological/ function. It is directed towards studying the nature of the legal knowledge and its relation to the legal reality. The purpose of the gnoseological function is to outline the essence and the meaning of the law as a social regulator. The general theory of law achieves this result with the formation of the fundamental legal categories and concepts and the construction of basic theoretical constructions and concepts for the law. The legal knowledge fulfills its meaning through its practical realization in the reality. This is accomplished through the function of practical application of the general theory of law.

1. The terms "category" and "concept" are essential for the general theory of law. In philosophy, the concept of "category" refers to basic concepts reflecting the most common and essential characteristics, sides, relations of the reality and knowledge. The categories are formed in the process of historical development of the knowledge and allows a deep penetration in the legal matter. The process of assembling sets of facts and data can not be elementary. It supposes the passage of knowledge from sensory perceptions to the abstraction. The core of the abstract thinking is the ability to form categories and concepts. Law categories are in certain relationships

and connections between themselves. They are not freely located, but are developed from one another in respect to the development of the knowledge and the objective reality. [1]

The concept is a form of reflection of the law - from real reality, into ideas and judgments. Through the concepts, the essence of the occurrences and the processes is reached and it is possible to summarize their essential signs.

The concepts build the sense and the meaning of terms in the legal language. The main function of the concepts is the mentally separation of the signs of the occurrences and their essential features. As a result of this differentiation and individualization, the depth of the cognitive process is reached. /from Latin cognition - knowledge/. Although each concept carries a high degree of generality and abstractness, it does not mean that it does not bear the signs of the peculiar. On the contrary, the scientific legal concepts always reflect the individual peculiarities of the reflected occurrences. [2]

The concepts and categories in the law are expressions of the evolving knowledge. Simultaneously with the achievements and the evolution of the law, a reflection of the social reality, are enriched as the content and number of the categories and the concepts that it deals with. This process of continuous dynamics, enrichment and further development is an expression of the most significant sign of the doctrine of the dialectical method of scientific knowledge.

The general theory of law is no exception. In 1638, the first encyclopedia of law was published in Cologne. At this point, branch laws are already a fact, but there is no general theoretical discipline to explain the general concepts with which they deal. For the first time, the encyclopedia defines separate legal concepts and derives their essential characteristics. The number of the methodological and systematic developments in the field of the theory of law gradually increases. Today, the subject of the general theory of law is "everything that has legal nature and is laden with legal significance".[3] Legal categories and concepts are constantly enriched according to the needs of legal doctrine and social needs. One of the most recent concepts in the law of considerable interest is the legal argumentation.

2. Although the legal argumentation originated from Ancient Greece and Ancient Rome, it was built in its present form only in the XIX-th century. From this period date the main theoretical studies in this field. A significant contribution to the development of the argumentation have: Haim Perelman and Lucy Olbrecht-Titeka, Stephen Thulmin, Rob Grotendorst and France Emeren, Georg Brutian and others. They try to bring out the essence of the argumentation, the types of arguments, the ways of extracting them, construct structures of construction, and analyze the methods and means with which it handles, the logical, rhetorical and linguistic peculiarities. A major focus in the work of the researchers is the development of a structure and methodology to achieve a high degree of convincing in the argumentation.

Today, the argumentation is needed at every contact of the lawyer with the legal matter. Legal argumentation has been implemented at every level and at every stage in legal activity. From the preparation for the defense of a given legal position, through the conflict of legal theses, to the completion of every claim proceedings - the writing of the judgment. Argumentation is inevitable in all types of legal procedures and proceedings, as part of the mechanism of realization of the law.

Legal argumentation is an intellectual, logical and practical activity that aims to justify and perceive by the recipient of a particular legal theses by justifying and asserting it by retrieving arguments. In order to understand the essence of the legal argumentation, its existence should be examined in a consistent and complete manner.

The ontology of the argumentation as a legal activity supposes characterization of those that implement it; the object to which it is directed, the means and conditions of action, its objectives and results.

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[1] Rozental. M., (1968), Philosophical dictionary , Moscow, “Political literature” publishers, p. 235
[2] Quoted essay, p. 425
[3] Mihailova, M. (2013), Law in its integrity, Sofia, Feneya publishers, p.11

The subjective and objective aspect of its manifestation should be distinguished. From a subjective point of view: the subjective aim pursued by the argumentator, his perception of the means by which he will achieve it, what basis he will point, what arguments he will bring out to justify his position and disprove the opponent's one /if there is an opponent/, what are the possible results in view of the good or bad argumentation. From an objective point of view, what are the legal frameworks that the argumenting one is bound to observe; what are the possible ways in which he is "allowed" to handle the type of legal procedure and the terms; what results can be objectively achieved. [1]

Subject of the argumentation is a person or a group of people who motivate a specific legal theses /argumentators/. The subjects of the argumentation can be divided into six groups: Subjects who, unilaterally, without a counter-opposed argument, perform a legal argumentation in order to achieve a legitimate result; decisive entities, with authority powers that refuse /obstruct/ the achieving the desired result; entities in a legal dispute situation - argumenting two opposing legal theses; Court/arbitration or other decision-making body - by motivating the decision; Prosecution or pre-trial bodies in case of unilateral argumentation in case of indictment, request for imposing a restrictive measure or other procedures.

As can be seen from the characteristics related to the different groups of subjects, the approaches in the legal argumentation can be reduced to monological and dialogical.

The addressee of the argumentation is the subject or subjects to whom the efforts are directed, in order the theses of the argumentator to be perceived, often written in a deliberate act.

Aim of the legal argumentation is the achievement of the desired legal outcome by the argumentation as a result of the legal position that is accepted and justified in the theses. Almost always, the aim is to take a specific action or to force the opposing party to idle, but the goal may also be only to adopt and validate the specific legal theses /for example, in claims to establish something/. The diversity of the specific goals is too great, but always in the center is the perception of the theses bound by certain interest.

Legal argumentation has its own structure. It consists of the following elements - legal theses- in the form of a statement /s/ which should be grounded; reason - which is an argument in favor of the theses; arguments - theoretical or factual situations that prove the theses in a philosophical sense; Disprove /not mandatory element/ demonstration - is the connection between the arguments and the theses, which shows the way in which it is being constructed; requests of the party/ parties are not a mandatory element.

Legal argumentation is a complex, multifunctional and multi-dimensional legal category. It takes place within a specific legal relationship governed by the law between two or more legal entities. It implies the manifestation of a particular fact of life, covered by normative reality, with the occurrence of which is connected to the emergence, modification or termination of subjective rights, legal obligations or imperatives. The legal argumentation is aimed at achieving a certain legal result - a change in a legal situation or the occurrence of a legal change desired by the subject.[2]

3. The need for legal reasoning today is grounded by a number of prerequisites - enhanced legal safeguards over fundamental human rights and freedoms, securing an independent judiciary, the need to ensure fair justice and law enforcement, the duty to establish the truth, the free advocacy and etc. Contemporary Lawyers' work in different directions, firmly confirms that without competent legal argumentation it is almost impossible to achieve the sought legal results. N.V.Mihalkin writes that "naked" information could not achieve the necessary impact". It would be a delusion to think that a well-educated man, in a confrontation of theses with another educated person, would be able to fight without good reasoning. [3] It is not possible to justify and put forward

[1] Alekseev, A., (2006), Philosophical text, ideas, argumentation, specimens, Moscow, "Progress - Tradition" publishers, p. 103-114

[2] Kuznetsov, A., (2013), General theoretical and historical legal issues of the legal science and practice, Nizhegorodskoi academy newspapaer MVD Russia, № 23

[3] Mihalkin, N., (2016), Logic and argumentation for lawyers, Moscow, Iurait publishers, p.203-204

any legal argument just by exposing the facts of life and the quoting of normative texts. This only shows inexperience and helplessness.

Due to the upper said, we can not to accept that the legal argumentation should be an independent element of research from the general theory of law as a basic legal category. Just as the interpretation in law and the realization of the law are part of the problems that the general theory of law examines, the legal argumentation should be analyzed as part of the problems of the scientific discipline. Public development predetermines a person's quest not simply to accumulate knowledge, but to make it happen in practice in order to solve the issues with which the law meets him and to overcome the difficulties arising from its realization. By the means of the general theory of law, certain practical applications for developing and improving of the current legal concepts and categories can be reached. They produce systems of effective methods and means, as well as the rules for their use, in order to support the regulatory function of the law. The legal argumentation is precisely such a means of achieving the legal result desired by the subjects, and its problems should be covered by the theory of law. It is important to note that in the process of development of legal knowledge, science and practice are developing in ever greater unity. The system of scientific knowledge and legal practice are in constant dynamics. It is an endless process of movement, the beginning of which is the limited and partial knowledge of some basic legal concepts, and the current moment is connected with the discovery of ever more comprehensive, detailed and in-depth judgments and conclusions about the being of the law.

Legal argumentation arises at a certain stage in the development of the human society. It is historically confirmed that it continuously and permanently accompanies the realization of the law in its all manifestations. Argumentation, like the rest of the knowledge, is constantly evolving, enriching and developing. Its specifics and peculiarities are related to the socio-cultural and political conditions, the philosophy of law and the complex legal practice. The contemporary interest in the epistemological issues of the legal argumentation on a global scale is determined by the principles of equality of the parties, racing start, autonomy of the civil subjects, legal certainty; the increased guarantees for the right of defense, the presumption of innocence, but also the gnoseological understanding of the mistakes made in pre-trial and judicial proceedings and those resulting from the misuser. Many of these are under-estimation, misunderstanding and weak control of legal argumentation.[1] Unlike the European countries, the United Kingdom and the United States of America, where already have a number of theoretical studies, in Bulgaria there are no such studies, which creates particular difficulties.

CONCLUSION

Ius est ars boni et aequi (The law is an art for the good and the just), wrote Celsius nineteen centuries ago. But without legal argumentation, "law ceases to be an art, nor can it be good and just".[2] Takov added that it can turn into literalism, and the iniquity shall settle there. In order to prevent that well known instrument is necessary. This instrument is the legal argumentation.

Legal argumentation is an essential legal element and should not be ignored and neglected as an object of a theoretical study. Its place is in the general theory of law as a fundamental legal discipline, giving an idea of the law as a whole phenomenon, its reality and meaning, and analyzing the whole categorical and conceptual apparatus of the legal regulator. Legal argumentation is a conceptual area of knowledge. It has a dogmatic character, based on its essential characteristic, structure, methodology, object, subject, addressee, approaches, mechanism, goals and results.

Not knowing in theoretical aspect of the legal argumentation leads to impossibility of practical realization. This makes the problem extremely significant and implies the need for in-depth research into the theory of law.

[1] Makeeva, E., (2003), Legal argumentation as an object of a gnoseological analysis, Moscow, MGU publishers, p.3
[2] Takov…p. XI

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