REVISTA ELECTRÓNICA DE DIREITO

RED

The judicial decisions and their reasons: a study of the Brazilian Supreme Court's decisions on the crime of contemporary slavery

As decisões judiciais e suas razões: um estudo das decisões do Supremo Tribunal Federal brasileiro sobre o crime de escravidão contemporânea

Isabele Bandeira de Moraes D'Angelo

Investigadora de Pós-doutoramento no Centro de Investigação Jurídico-Económica (CIJE) da Faculdade de Direito da Universidade do Porto – UP

Professora Adjunta da Universidade de Pernambuco – UPE

Professora Permanente do Programa de Pós-Graduação em Direitos Humanos – PPGDH

Membro da Associação Luso Brasileira de Juristas do Trabalho – JUTRA. Líder do Grupo de Pesquisa Direito do Trabalho e os Dilemas da Sociedade Contemporânea

UPE Reitoria - Av. Gov. Agamenon Magalhães - Santo Amaro, Recife - PE, Brasil, 50100-010

belebm@hotmail.com

https://orcid.org/0000-0001-9592-6049

Pablo Ricardo de Lima Falcão

Professor Adjunto da Universidade de Pernambuco – UPE Campus Arcoverde

Coordenador do SOPHIA - Grupo de Estudos e Pesquisas Interdisciplinares sobre Retórica e Decidibilidade Jurídica (UPE/CNPq). Integrante do grupo de pesquisa Direito do Trabalho e os dilemas da sociedade contemporânea

UPE Reitoria - Av. Gov. Agamenon Magalhães - Santo Amaro, Recife - PE, Brasil, 50100-010

https://orcid.org/0000-0002-6417-286X

pablofalcao@hotmail.com

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ABSTRACT: In May 2018, on the 13th, 130 years of the abolition of slavery in Brazil were celebrated. However, has the exploitation of this workforce really ceased to be practiced in our country? Research has directed the practice of contemporary slavery still wide and its overwhelming numbers. Victims are condemned to sell their labor force precariously in order to survive. Another fact will darken its lawyers: the absence of convictions. Thus, the article again presents sets of sets of mandatory research groups, from the University of Pernambuco, at the Arcoverde Campus, which provided a question: What are the reasons for the absence of convictions for such a crime? Are these legal reasons? Is there really (IN) crime in Brazil? In response, 8 (eight) STF decisions were analyzed, with no delay of 6 (six) years, without a period from 2010 to 2016. The data were analyzed in two lines of attack: a) critical / dogmatic, centered on dogmatic labor policy in the light of Critical Social Theory and b) metadogmatic, centered on the linguistic approach to the legal phenomenon of decision-making. In the light of the first, the study takes a critical / prospective approach to the phenomenon of Sociology, Anthropology and History of Work; In the light of the rhetorical attack as a methodical destructurer, this analytical tool describes the cultural barriers and the condemnations denouncing the use of the expression "work analogous to slavery", the attempts to signify the related crime (Section XX) classic abusive exploitation (19th Century).

KEY WORDS: Contemporary slavery; Judicial decisions; Absolution; Brazilian Supreme Court.

RESUMO: Em maio de 2018 comemorou-se, no dia 13, 130 anos da abolição da escravidão no Brasil. Todavia, será que realmente a exploração dessa mão de obra deixou de ser praticada em nosso País? Pesquisas têm apontado na direção de que a prática da escravidão contemporânea ainda é ampla e seus números avassaladores. As vítimas são condenadas a venderem, de forma precária, sua força de trabalho para sobreviver. Outro dado assombra os juristas: a ausência das condenações. Assim, o presente artigo surgiu dos esforços conjuntos de dois grupos de pesquisa, da Universidade de Pernambuco, Campus Arcoverde, que passaram a indagar: Quais as razões das ausências das condenações por tal crime? Seriam estas razões jurídicas? Realmente (IN) existe tal crime no Brasil? Em resposta, foram analisadas 8 (oito) decisões do STF, no lapso de 6 (seis) anos, no período de 2010 a 2016. Os dados foram analisados em duas linhas de abordagem: a) crítico/dogmática, centrada no na dogmática jurídica do trabalho à luz da Teoria Social Crítica e b) metadogmática, centrada na abordagem linguística do fenômeno jurídico decisório. À luz da primeira, o estudo faz uma abordagem critico/prospectiva do fenômeno a partir da Sociologia, Antropologia e História do Trabalho; enquanto à luz da abordagem retórica como metódica desestruturante, tal ferramenta analítica descreveu barreiras culturais às condenações denunciando que o uso do da expressão "trabalho análogo ao de escravo" encontra dificuldades para significar o crime

abordado (Século XXI) sem relacionar às mesmas com características da exploração abusiva clássica (Século XIX).

PALAVRAS-CHAVE: Escravidão contemporânea; Decisões judiciais; Absolvição; Supremo tribunal federal brasileiro.

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* The authors wrote this article after a year of research in a Brazilian justice observatory on the crime of contemporary slavery 2017-2018. The researches were carried out by the authors together with the research group students: Labor Law and the Dilemmas of Contemporary Society and Sophia.

1. Introduction - 130 years of abolition: the old new farms

Classical Brazilian slavery, which took place in the colonial period, had, as its main feature, to be attributed directly to individuals belonging to the black race. In our country, the work of the enslaved African negroes was the work of the Portuguese settlers, particularly in agriculture and farming, for the exploitation of sugar cane and coffee.

Along with this, it was soon realized that the slave trade was the most efficient way to explore the wealth of the Brazilian natural resources. Therefore, the slave traffic was the closest commercial activity to what, later on, would be designated as capitalism.[1]

In the period ranging from 1516 to 1888, exploiting slave labor in Brazil was a licit activity. Thus, these workers were the property of the owners of the "*Engenhos*", who bought them through the slave trade. The initial enslavement of indigenous and African individuals in Brazil, followed soon after only by Africans, was permitted by law and allowed human beings to exploit, in almost every sense, other human beings who lost their freedom and dignity, to be reduce to goods. However, the work in conditions analogous to the slave in modern time has its own characteristics. Thus, the deprivation of liberty is no longer the essential element for its characterization, but human dignity, especially when it takes place in the urban environment. On the question, here is the understanding of Minister Luiz Barroso:[2]

> "Although distinct, both contemporary slavery and premodern slavery are equally perverse and violating to human dignity. Article 149 of the Brazilian Penal Code brings the legal type of penal offense in which there is a reduction of men to the condition analogous to slavery, having as elements the forced labor, exhaustive working hours, degrading conditions or debt bondage".

The Golden Law, signed on May 13th, 1888, formally abolished slavery in Brazil and represented the legal framework for the end of the right of property of one human being over another. However, the very law was not enough to halt the exploitation which has reemerged with new characteristics, and it is at this moment that the past and the present find matching points.

The principle of the "human dignity" embodied in article 1, item III, of the Constitution of the Federative Republic of Brazil of 1988, consecrated itself as a value that seeks to protect every human being against anything that may lead to disrespect, inherent and independent of any requirement or condition.

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[1] JOAQUIM NABUCO, *O abolicionismo*, Petrópolis, Vozes, 1977, p. 101.

[2] "The intrinsic value of the human person, the autonomy of the will and the community value are the minimum contents of dignity. Intrinsic value is the ontological element of dignity, the distinctive feature of the human condition, from which all persons are an end in themselves, not means to the attainment of collective goals or third-party purposes. Intelligence, sensitivity and the ability to communicate are unique attributes that serve as a justification for this singular condition. From intrinsic value, fundamental rights such as the right to life, equality and physical and mental integrity derive": Vide LUÍS ROBERTO BARROSO, *in* www.luisrobertobarroso.com.br, atual. 2010. [Consult. 29 ago. 2019]. www:<URL:http://www.luisrobertobarroso.com.br/wpcontent/uploads/2010/12/Dignidade_texto-base_11dez2010.pdf>, p. 38.

Even after the centenary of the abolition, Brazil formally recognized the existence of exploitation in conditions analogous to slavery in its territory in the year 1995, in the Government of Fernando Henrique Cardoso, from the edition of Decree 1538 of June 27th, which created the Interministerial Group for the Eradication of Forced Labor - GERTRAF, of the Ministry of Labor and Employment (MTE), one of the main instruments to eradicate contemporary forms of modern slavery. Brazil has also adopted several international standards and has signed treaties in order to eradicate such exploitation.

Even after so many normative efforts, Brazil is still at the top of the list when it comes to slave labor. The present article arose from the joint efforts of two research groups from the Law course of the University of Pernambuco. What are the reasons for the absences from convictions for the crime of reduction to the condition analogous to slavery? Are these legal reasons? Really (IN) is there exploitation of labor to the analogous conditions of slave in Brazil?

2. The analyzed decisions

The analytical tool chosen was Rhetoric as a Methodological Disruptor for Law[4] and the methodological criterion of the research was to delimit a time period (2010-2016). The return of the virtual search made on the website of the STF - Federal Supreme Court consisted of 8 (eight) decisions, from which only 4 (four) tried to judge the merits of the appeal, while the remaining 4 (four) decisions were limited to denying jurisdiction to the Constitutional Court, referring the case to the original court. Afterwards, the four votes analyzed under the typification or not of the tests as normative precedent of art. 149 of the Brazilian Penal Code (work similar to that of slave labor) were:

— VOTE 1:[3] ORDINARY RESOURCE IN HABEAS CORPUS 127,528 PARANÁ

REPORTER: MIN. TEORI ZAVASCKI

— VOTE 2:[4] SURVEY 3.412 ALAGOAS

REPORTER: MINISTER MARCO AURÉLIO PLENARY: 03/29/2012

— VOTE 3:[5] SURVEY No. 3,564 MINAS GERAIS (2014)

REPORTER: MIN. RICARDO LEWANDOWSKI

— VOTE 4:[6] SURVEY No. 3,564 MINAS GERAIS (2014)

REPORTER: MIN. RICARDO LEWANDOWSKI

[3] https://stf.jusbrasil.com.br/jurisprudencia/310900991/recurso-ordinario-em-habeas-corpus-rhc-127528-pr-parana-8622076-1620151000000/inteiro-teor-310901002?ref=amp. Access in 20/02/2020.
[4] JOÃO MAURÍCIO ADEODATO, *A retórica constitucional: sobre tolerância, direitos humanos e outros fundamentos éticos do direito positivo*, São Paulo, Saraiva, 2009.
[5] https://stf.jusbrasil.com.br/jurisprudencia/25295063/inquerito-inq-3564-mg-stf/inteiro-teor-146492142?ref=juris-tabs. Access in 20/02/2020.
[6] https://stf.jusbrasil.com.br/jurisprudencia/25295063/inquerito-inq-3564-mg-stf/inteiro-teor-146492142?ref=juris-tabs. Access in 20/02/2020.

From the 4 (four) votes analyzed, 50% (fifty percent) were against the typification of the labor injury to the criminal type, being on the result of the rhetorical analysis carried out on their argumentative lines which shall be treated in the following topic.

3. Samples found: rhetoric analysis of votes 2 and 4

3.1. Rhetorical analysis of vote 2

SURVEY 3.412 ALAGOAS

REPORTER: MINISTER MARCO AURÉLIO

PLENARY: 03/29/2012 EMENTA: CRIMINAL INQUIRY. REDUCING THE SIMILAR CONDITION OF SLAVE. MODERN SLAVERY.

UNCERTAINTY OF DIRECT COATION AGAINST FREEDOM TO GO AND COME. COMPLAINT RECEIVED.

The retor/decididor begins explaining his vow with the argument that refers to the subtlety of injurious actions in the contemporaneity, of a rather economic rather than a physical nature, but maintaining the common secular objective: that of reducing the victim to the condition of an object, suppressing its dignity and his freedom.[7]

It is the rhetorical strategy of the ethos type itself,[8] in which the retor/decididor seeks to extend the persuasive potential of his argument by appealing to the credibility he enjoys before his audience.

The rhetorical strategy of the ethos-type of third parties[9] follows, through which the retor/decidator seeks to expand the persuasive capacity of his speech by announcing that the denunciation resulted from the following administrative procedure: "Established in the *Attorney General's Office in the State of Alagoas*, due to facts contained in the report prepared by the *Special Mobile Inspection Group of the Ministry of Labour and Employment*

[7] "Modern 'slavery' is more subtle than that of the nineteenth century, and the restriction of liberty may stem from various economic constraints, not necessarily physical ones. One is deprived of his freedom and dignity by treating him as a thing and not as a human person, which can be done not only through coercion but also through the intense and persistent violation of his basic rights, including the right to decent work. Violation of the right to decent work impacts the victim's ability to make choices according to his or her self-determination. It also means 'to reduce someone's condition analogous to that of a slave'". Vide JOÃO MAURÍCIO ADEODATO, *A retórica constitucional: sobre tolerância, direitos humanos e outros fundamentos éticos do direito positivo*, São Paulo, Saraiva, 2009, p. 1.

[8] The ethos-type rhetorical strategy occurs when the retor/decider uses his credibility with his referring auditorium in order to persuade him of the reasonability of his thesis.

[9] The rhetorical strategy of the ethos-type of third parties is the search made by the rhetorician/decidator of external speeches to his that may have credibility before his referring auditorium, strengthening the thesis that was presented to them.

which [...] investigated a complaint that workers from that rural company were being subjected to the condition analogous to slavery".[10]

Next, there is the rhetorical strategy of the *Phátos*[11] type that seeks to sensitize the relevant audience through the list of harmful conduct described in the aforementioned complaint that acts as evidence in the proceedings, all confirmed by the personal interrogations of the victims, without contradiction between them:

> a) poor conditions of hygiene, food, transportation and accommodation and
>
> b) exhaustive days.

At this moment of the vote, the retor/decididor questions the thesis that the mere narration of illegal facts can necessarily lead to its configuration as a normative antecedent of art. 149 of the Criminal Code, which implies in the complaint that the decision-making procedure in the law is not syllogistic,[12] since it can not occur without the value action of the judge.[13]

It passes the retor/decididor to narrate the criteria of the criminal typology defined in the legal text by the ordinary legislator, making use again of the rhetorical strategy of type Ethos of third:

> a) submission to forced labor or the exhaustive day;
>
> b) subjection to degrading working conditions, restricting, by any means, locomotion due to debt contracted with the employer or agent, and
>
> c) constraint through physical coercion to render the locomotion unfeasible.[14]

Therefore, when assessing the evidence presented, the respondent decides that they may criminalize the harmful conduct duly occurred in the case under analysis, and indicates that the relevant legal scope is the civil-labor law, due to the sanctions applied: a) prohibition of establishment regarding manual cutting of sugarcane and b) termination of employment contracts of employees.[15]

He continues to use the rhetorical strategy of the Ethiopian type, citing an earlier judgment in which he figured as rapporteur, whose stated thesis was that "simple noncompliance with

[10] Vote 2, p. 7 (emphasis added).
[11] The rhetorical type *páthos* is a discursive strategy of the retor/decidator that seeks to persuade the audience by taking the emotion of this target in order to make it docile to the opinion of the one pronounced.
[12] The syllogism was the form of organization of deductive reasoning postulated by Aristotle in his Analytics (first and second). This was constituted of a minor premise (rule), a minor premise (problem) and a conclusion (inference) and served to demonstrate that the conclusion had already been potentially found in the premises before being constituted in act. Check in JOÃO MAURÍCIO ADEODATO, *A retórica de Aristóteles e o direito: bases clássicas para um grupo de pesquisa em retórica jurídica*, Curitiba, CRV, 2014.
[13] The list of labor infractions present in the complaint is long, but it is not possible to conclude from the narrative of typical facts the provisions of the aforementioned provision. Vote 2, p.7.
[14] Vote 2, p. 8.
[15] *Idem.*

norms of labor protection is not conducive to conclude by the configuration of slave labor, presupposing this the lack of freedom to come and go".[16]

The thesis is an indication that in the process of valuing legally relevant facts and their reference to the typical normative antecedent, some STF ministers see contemporary slavery in a decontextualized way, as previously stated, bearing in mind the strong characteristics of pre-slavery -Modern.

In order to strengthen its argument, the judge establishes the constitutional jurisdiction of the federal court to assess the causes of imputation of the practice of the crime described in art. 149 of the Criminal Code, which in the argumentative scope emphasizes its authority, speaking before its referring audience, as if it spoke of a privileged place of speech that practically exempted it from counter-argument, which can be read analytically as a rhetorical strategy supported by authority.[17]

Interestingly, the judge then quotes himself impersonally, using the signifier "rapporteur," which transforms his ethos-type rhetorical strategy into the rhetorical strategy of the third-type ethos.[18]

Next, the judge refers to the process of subsumption,[19] but now seeking an inverse effect to the previous, making positive his thesis and disregarding that the deliquescent facts of the present action conform to the normative antecedent of art. 149 of the Brazilian Penal Code.[20]

It should be noted that legal theses can be adopted with functions of attack or defense, since they do not act discursively but as mere opinions that need rhetorical strategies to appear, in front of their respective audiences, more persuasive than properly are, when viewed in isolation.

The retor/decididor reinforces his thesis by giving up the rhetorical strategy of doubt, in the sense of previously inducing his referent audience in the sense of the negative, unsaid, but implied answer.[21]

It is interesting to point out that before deciding to present his question, the decision-maker cries out for his audience to disregard the part of the speech that could rightly disconfirm his thesis: "In the case in question, *leaving aside the precariousness of verified working conditions*"[22] (emphasis added).

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[16] Vote 2, p. 9.
[17] "*It was decided that the Federal Court is responsible for examining the cases in which the criminal offense of article 149 of the Criminal Code* is imputed, since it is considered a crime against the organization of work, pursuant to article 109, item VI, of the Federal Constitution". Vote 2 p. 9 (emphasis added).
[18] "On the occasion, the *rapporteur* stated that 'organization of work' should encompass the element 'man'... aspects related to his freedom, self-determination and dignity". Vote 2, pp. 9-10 (emphasis added).
[19] HANS KELSEN, *Teoria Pura do Direito*, 6a ed., São Paulo, Martins Fontes, 1998.
[20] "In this precedent, *the aim was to subsume the facts provided for in article 149 of the Criminal Code***,** in view of the fact that many rural workers were being subjected to labor under escort, some chained, in a situation of total violation of freedom and of self-determination of each one'. Vote 2, p. 10 (emphasis added).
[21] "It is necessary to ask whether the factual material of the case, in particular testimony, *reveals the subjection of service providers to forced labor by restricting the right of movement*". Vote 2, p.11 (emphasis added).
[22] Vote 2, p. 11.

Let us then see the distinct discursive effects, with and without the intended omission:[23]

PM - Art. 149 of the Penal Code

Pm - "leaving aside the precariousness of verified working conditions"

C - doubt as to the normative nature of the facts / No Crime Without the omission

PM - Art. 149 of the Penal Code

Pm - Taking into account the precariousness of the working conditions

C - Choose by the normative typical of the facts/Crime.

The chosen strategy leads to the error of the auditorium (Erisma), in that it removes from the debate precisely the evidence collected and contained in the complaint, acting as an Eristc position that, pretending that what existed did not exist, shifts the result to the in the sense intended by the judge, to the detriment of the victims.

So, to justify the thesis that the workers were not victimized by actions that immobilized their right of movement, the statement "twice came to seek employment for themselves" twice for five (5) times that workers after signing the contract of employment "lived in the lodging" and for 2 (two) times that "went home when the break was 48 (forty eight) hours".

It draws attention to the rhetorical strategy of moving the temporal frame of the crime to the past, when it had not occurred. Secondly, the fact that the workers voluntarily sought employment does not necessarily have the effect that they could not, as they were, have been victims of the conditions provided for in criminal legislation. However, the testimony that two of the workers chose to stay in the housing when the break was 24 (twenty four) hours and to go home when it was 48 (forty eight) hours corroborated in the sense of the judge's thesis.[24]

Next, the respondent questions the legitimacy of the evidence, pointing to a "strange similarity of content"[25] which, in his reading, would necessarily imply doubt about the freedom to provide information. However, as the procedure was carried out with public authority holding public faith, the mere distrust of the judge should not have the power to make it void, a hermeneutic aspect that the same did not face as expected.

Next, the rhetorical strategy was to point to the seasonality of the sugarcane harvest[26] as justification for labor concentration in the respective property, disregarding the denunciation of actions that hindered the right of locomotion of the workers employed in it. By diverting the attention of its referent auditorium, the judge's intention was to avoid a greater argumentative effort to legitimize his thesis against the facts brought by the complaint.

[23] Cf. PABLO R. DE L. FALCÃO, "Do direito que é, aquele que vem a ser: implicações epistêmicas da relação entre decidibilidade jurídica e raciocínio lógico-dedutivo", *in Publica Direito*, 2006, p. 11.
[24] Vote 2, pp. 11-12.
[25] Vote 2, p. 13.
[26] Vote 2, p. 13.

In order to strengthen its argumentative line, the judge employs the rhetorical strategy of the type of ethos of third, according to a doctrinal standpoint that "the use of seasonal labor" would justify the provision of "poor housing and food".[27] That said, the retor/decididor argues that "distance and isolation from workplaces forces the employer... to deliver these consumption items directly to the worker".[28]

It should be noted that the judge seeks strategically to reverse the logic of actions, from the employer to the employees, when he places in the sphere of freedom of these the option to submit to "poor housing and food" with the purpose of saving expenses, to reduce spending and more monetary income.[29]

Having mentioned this, the criteria that he himself defined as sufficiently persuasive to rule out the criminal typification sought at the senior levels:

> a) Option of the worker to be subject freely to the precarious housing and feeding conditions in order to maximize their net income at the end of the worked period;
>
> b) Higher risk of the rate of return of the activity of agricultural enterprise, due to the illegal action of the contractor, which would be passed on by the employer to the workers, thus reducing their net income;
>
> c) The belief in the existence of "slave labor" leads to an increase in the "risk of hiring temporary agricultural labor" and this to the process of "mechanization in agriculture"[30] that negatively impacts the labor supply of "less qualified labor".[31]

In thesis of exercise against argumentative the reasons why are:

> a) The judge did not bring to the plenary the evidence of the costs borne by the workers and the percentage of their mentioned economy at the end of the period worked;
>
> b) The judge did not present arguments to indicate that the value of the risk factor of the rate of return of the activity of agricultural enterprise is so high that it implies in the amortization of it in the wages paid to the employees by the employer;
>
> c) The judge did not present evidence that there is in Brazil a mere "belief" in the use of labor in conditions analogous to slavery, nor in the relation between such a pretended belief and the effects that, according to his discourse, would follow. All this would imply a lower potential of his speech if it was contradicted, which makes us realize that judging in the STF puts the retor/decididor in a privileged place of speech, due to the lack of recursal prediction.

The following rhetorical strategy made reference to the closed criminal type, which theoretically limits the argumentative freedom of the judge to the criteria of the criminal

[27] Vote 2, p. 14.
[28] Idem.
[29] "Of course, from the point of view of the seasonal migrant worker, *what matters is the 'net income' that you will take home at the end of the day*, and that will serve as a basis to meet the needs of your family and your own in the future". Vote 2, p. 14 (emphasis added).
[30] Vote 2, p. 15.
[31] Idem.

type under analysis and, as we have already seen, the rhetorician defends the thesis that the case is not extracted evidence that workers were injured in their freedom of movement.[32]

Using a tone of veiled irony, the judge states that "the records of the investigation reveal nothing but working conditions... common to the Brazilian agricultural reality"[33], and there is no evidentiary evidence of malice on the part of the employers: "I do not see evidence that the investigated persons... have acted with a clear intention to subjugate rural workers."[34]

Thus, he concludes by saying: "I vote for not receiving the complaint, because I understand that it is not possible to frame the type of article 149 of the Criminal Code, the facts narrated."[35]

3.2. Rhetorical analysis of the vote 4

SURVEY No. 3,564 MINAS GERAIS (2014)

REPORTER: MIN. RICARDO LEWANDOWSKI

VOTE: MIN. GILMAR MENDES

The retor/decididor begins his vote by stating his position contrary to that presented by the Minister Rapporteur.[36]

It can be observed that the use of the rhetorical feature of irony in the strategic sense of discrediting the contrary thesis "if we are to discuss, given the premises that these groups establish, we will certainly have to interdict Brazilian cities", as well as the use of the resource rhetoric of the amplification of the argument to the absurd with the same purpose of discrediting the opinion of the Minister Relator "since - all the space where many people live... would have to be interdicted, because surely they do not have good housing conditions." At this moment of the vote, the rhetorical type *Patho* was employed, since the irony affects the sensitivity of the audience, in this case, seeking to a silent laughter, typical of the debauchery.

Following the vote: "So, in my opinion, I think that - the poor working conditions - are all regrettable, but I do not believe they are adequate to characterize the work situation analogous to that of a slave".[37] Notice now what the legal text states:

[32] "I do not confine such a large scale to the criminal type in question. *It is not open* [...] The precept is - over - restriction, by any means, of locomotion by virtue of debt contracted with the employer or the agent". Vote 2, p. 16 (emphasis added).
[33] Vote 2, p. 17.
[34] Idem.
[35] Vote 2, p. 21.
[36] "I find it very difficult to proceed with the framework as work... analogous to slavery - for - if we are to discuss, in view of the premises that these groups establish, we will certainly have to interdict Brazilian cities - since - all the space where many people live [...] would have to be forbidden, because they certainly do not have good housing conditions." Vote 4, pp. 1-2.
[37] Vote 4, p. 2.

> Art. 149. "To reduce a person to the condition analogous to that of a slave, whether by subjecting him to forced labor or an exhaustive journey, by subjecting him to *degrading conditions* of work, or by restricting by any means his movement by reason of debt contracted with the employer or agent".[38]

It should be noted that the judge modifies the legal spelling when he replaces the legislative expression "degrading conditions of work" by the judicial expression: "bad working conditions". Such a strategy seems to us to be sophistical, since it leads the audience to error as to its consequences, since it subtly substitutes a signifier with a more damaging effect on the right of the worker's personality (degrading conditions of work) to another with less impact (working conditions). Here the sophistic *erisma*[39] replaces the rhetorical *entimema*[40] as the presentation structure of the discourse uttered. Reply with quote:

> "This could be an [...] educational program to improve working conditions in the countryside, but [...] could not integrate the criminal type - because - the consequences are extremely serious [...] so that I will ask, with these reservations... to the eminent Rapporteur, - to direct me to reject [...] the denunciation in relation to art. 149".[41]

It should be noted that the voter used the rhetorical strategy of discrediting legislative drafting by proposing that the requirements therein "could not integrate... the criminal type" because of its social effects "because - the consequences are extremely serious". The ethos rhetoric type was highlighted here, since the Minister Gilmar Mendes structures his argument in his supposed credibility before his referring auditorium.

Seeking to justify his opinion, he adds arguments.[42]

In the same sense of the previous rhetorical strategy, the voter tries, by judicial means, to suppress positive legislative criteria by stating that "in this way, I have enormous doubts as to whether this should be treated... with the slave labor bias - the existence of bad conditions of shelter... does not seem to me sufficient for such characterization."[43] The ethos rhetorical type was again the founding basis of his argument. It should be noted that the rhetorical strategy chosen by the Judge seeks to change the *status quo* of legal discourse,

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[38] *Código Penal Brasileiro, Decreto-Lei* No 2.848, 7 December 1940, in http://www.planalto.gov.br/CCIVIL_03/Decreto-Lei/Del2848.htm. Access in 20/02/2020. (Drafting provided by Law No. 10,803, dated 11.12.2003) (emphasis added).

[39] JOÃO MAURÍCIO ADEODATO, *A retórica de Aristóteles e o direito: bases clássicas para um grupo de pesquisa em retórica jurídica*, Curitiba, CRV, 2014.

[40] PEDRO PARINI, "O raciocínio dedutivo como possível estrutura lógica da Argumentação judicial: silogismo versus entimema a partir da contraposição entre as teorias de Neil MacCormick e Katharina Sobota", *in Publica Direito*, 2006.

[41] Vote 4, p. 3.

[42] "So it does not seem to me that [...] we should subscribe to the guidance adopted by the Public Prosecutor's Office [...] because... from the resolutions adopted by the Ministry of Labor itself and that they start to compose the type of art . 149, we have demands that go far beyond our reality, not only rural... but also [...] urban... in this way, I have enormous doubts as to whether this should be treated [...] with the slave labor bias - since - the existence of poor conditions of shelter... does not seem to me sufficient for such characterization". Vote 4, p. 4.

[43] Vote 4, p. 4.

which results in the need for more argumentative effort to persuade his audience of reference, which does not seem to have been sufficiently tried by him.

The winning report, in the judgment analyzed, was the one given by the Rapporteur, as follows:

> "The Criminal Code has an eminently pedagogical function, in order to avoid extreme situations that may lead to... the scrapping of basic social relations, such as the relationship between capital and labor... *So, Mr. President, I think that, for the beginning of the criminal prosecution, we have a beginning of evidence that allows the defendant to defend himself and can eventually contest..., therefore, I keep my vote in the direction of receiving the complaint*".[44]

Finally, we come to the question: why was vote 4 defeated? Perhaps because his rhetorical strategy grounded in irony, in the argument of authority and in *erisma,*[45] has provided in his reference auditorium a non-persuasive effect, increasing the distance between them.

It should be noted here that Aristotle in his Rhetoric[46] had already warned his students about the formal nature of any discourse and, precisely because of such possibility of being used as virtue or as vice, sought, in the wake of Platonic-Socratic thinking of his master, to establish procedures for his ethical employment.

However, rhetoric as a de-structuring[47] method criticizes such an attempt at ethical proceduralisation, since persuasion can also be achieved by unethical strategies such as deception, bribery and threat, all of which can be described in the analysis of the judicial practice of a peripheral country such as Brazil.

3.3. Tables and graphics

We present below the tables 1 and 2 containing the quantitative result of the rhetorical strategies extracted from votes 2 (two) and 4 (four) analyzed.[48]

[44] Vote 4, pp. 1-2 (emphasis added).
[45] The Erisma is a false syllogism, for it respects neither the rules of logical syllogism which structures a true reasoning, nor the rules of rhetorical entymema which structures a true reasoning. The Erisma transfers the middle term from the premises (major and minor) and, in doing so, does not unite the predicate with the subject, resulting in a fallacious reasoning that induces the auditorium to error. Note from the authors.
[46] JOÃO MAURÍCIO ADEODATO, *A retórica de Aristóteles e o direito: bases clássicas para um grupo de pesquisa em retórica jurídica*, Curitiba, CRV, 2014.
[47] JOÃO MAURÍCIO ADEODATO, *A retórica constitucional: sobre tolerância, direitos humanos e outros fundamentos éticos do direito positivo*, São Paulo, Saraiva, 2009.
[48] In view of the limit of the number of pages, the other votes were not placed in the body of the text, however the links to the decision texts are in the references in this work.

TABLE 1: Result of rhetorical analysis of VOTE 2

SURVEY No. 3.412 ALAGOAS **REPORTER: MINISTER MARCO AURÉLIO**	
Proper Ethos	3
Others´ Ethos	3
Phatos	1
Logos	0
Erisma	3
Irony	1

SOURCE: Data from the author.

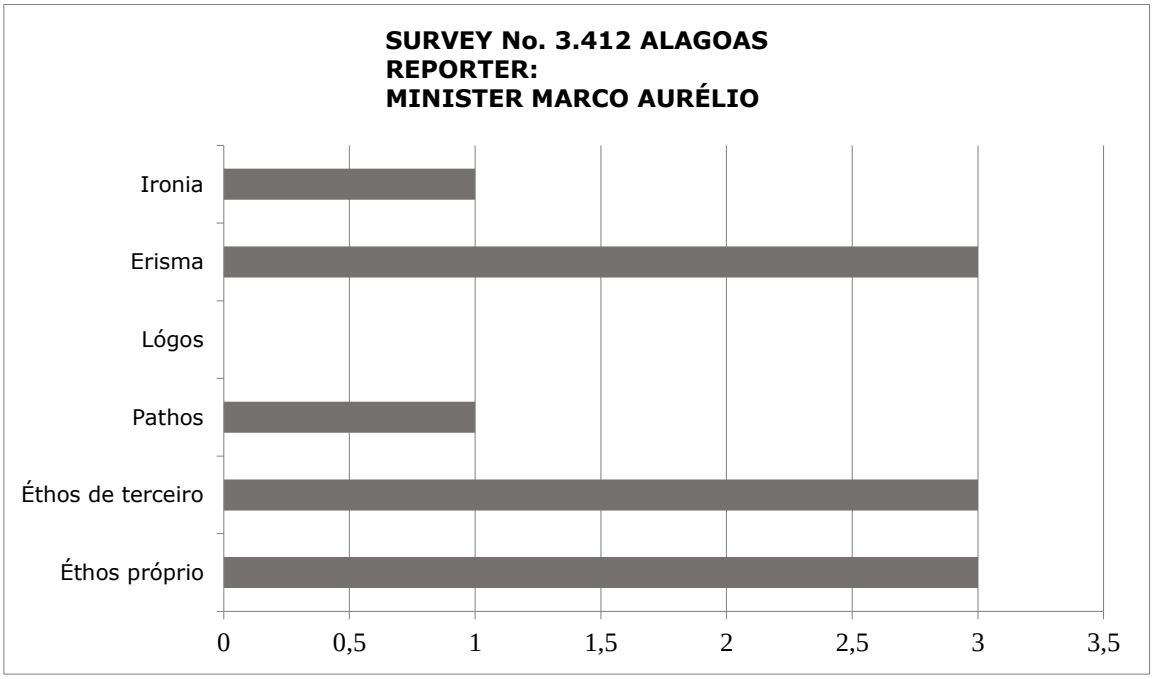
TABLE 2: Result of the rhetorical analysis of VOTE 4

SURVEY No. 3.564 MINAS GERAIS (2014) **REPORTER: MINISTER GILMAR MENDES**	
Proper Ethos	2
Others´ Ethos	0
Phatos	2
Logos	1
Erisma	1
Irony	1
Discredit	1
Argument a*d absurdum*	1
Authority argument	1

SOURCE: Data from the author.

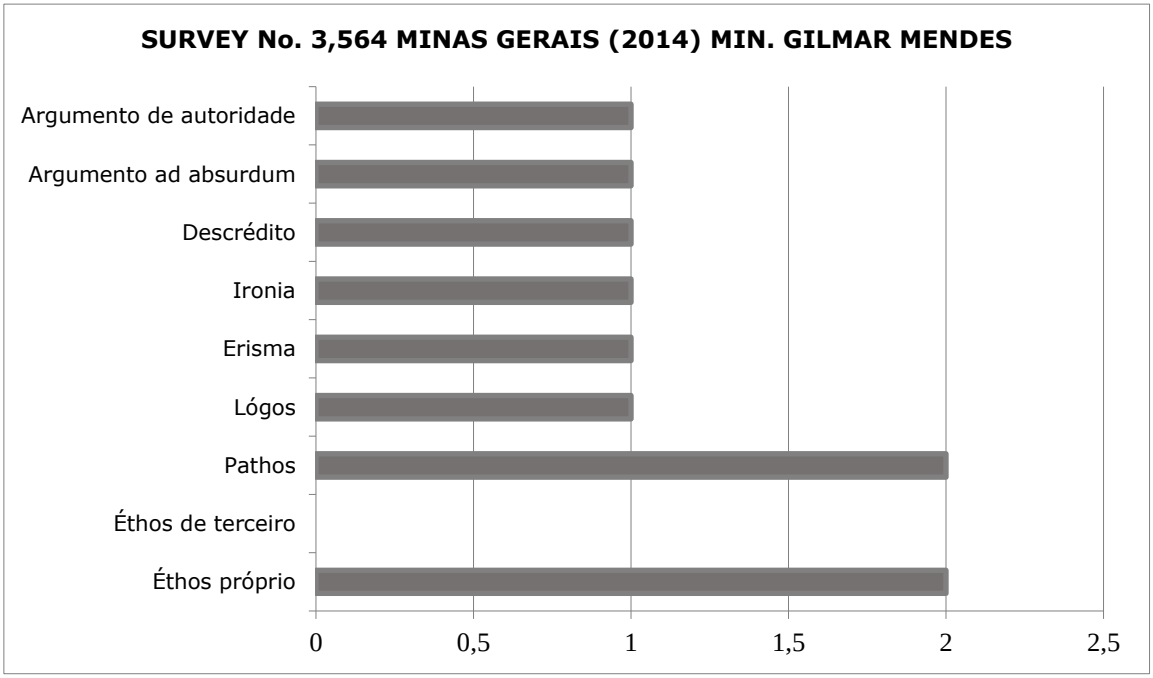
Next, we present graphs 1 and 2 highlighting the incidence of each rhetorical strategy employed by each of the deciding reporters in votes 2 (two) and 4 (four):

GRAPH 1: Result of the rhetorical analysis of VOTE 2



SOURCE: Data from the author.

GRAPHIC 2: Result of the rhetorical analysis of VOTE 4



Source: Data produced by the author.

4. Conclusions: the invisible fetters of legitimized exploitation

After all that has been presented especially in the annex that appears at the end of the present work, it follows the description of what was perceived by the application of the destructive rhetoric on the production of the STF in the Work Analogous to the Slave in Brazil, in the period from 2010 to 2016:

1. From the four (4) votes analyzed, two (2) were refractory to the significance of the constant factual situation in the denunciation as a species of the genre "work analogous to that of slave", typified in art. 149 of our current Penal Code;

2. From the strategies used in the votes against typing, there was only one (1) use of the rhetorical strategy logos, the only one to demonstrate argumentative effort in order to give the discourse a coherent structure that can be followed by the audience;

3. In these vows, the Phatos-type rhetorical strategy, which appeals to the audience's sensitivity in order to persuade it, found three uses, indicating signs of low rationality, in the sense commonly used by modern legal dogmatics, thesis in which the method that directs the judicial decision would be the deductive syllogism, incorporating the procedural fact to the normative legal precedent;

4. In them, the rhetorical strategy of these thirds was employed 3 (three times), which indicates that the decision-makers needed to strengthen their discourse with other discourses to gain more persuasive capacity to their audience;

5. It is important to emphasize the impact of the ethos rhetoric strategy found in the votes against the criminal classification of crimes 5 (five) times, indicating a strong indication that in the minds of the judges the classic image of premodern slavery is fixed;

6. The use of irony was applied twice (2), in the strategic aim of discrediting the credibility (ethos) of the thesis defending the criminalization of the offense;

7. The most serious point of the research is the use of the heir that was described 4 (four times) in votes 2 and 4, indicating that the respective REPORTERs / decision-makers vehemently sought to mislead their auditorium in order to make their argumentative lines more persuasive;

8. All mentioned, it has been proved that in fifty percent (50%) of the votes cast by the Federal Supreme Court between 2010 and 2016 (4 of 8 votes), in half of them, the Ministers judged the term "Slave-like work" because, when reading the expression "slave", they refer to the typical image of classical slavery.

Thus, from the samples found, it was observed that judicial decisions were limited to accepting the occurrence of contemporary slave labor when restricting freedom of movement in the strict sense. This has been, by the whole researched, the only factual element considered by the judges when applying criminal law.

Let us go back to the questions asked at the beginning of the research and to two in particular: "What are the reasons for absences from convictions for the crime of reduction to the condition analogous to slavery? Are these legal reasons?" The results of the rhetorical analyzes elaborated, especially those presented at the beginning of this conclusion, pointed to the argumentative effort, exclusive search for the condemnation of the evidence of the loss of liberty and de-characterization of the forms provided in art. 149 of the CP (degrading conditions, exhaustive days, among others) that the reasons for absences of condemnation are more political and economic than legal.

In addressing the issue see Robert Alexy:[49]

> "Such 'ignorance' as to the interpretation and application of the Criminal Law by the judges is not justified. The Court neglects the other qualifiers of the type provided for in art. 149 of the CP promoted a decision based on arguments other than legal ones."

In dialogues in the research groups of the authors of the present article, it has been considered, on several occasions, that these decisions are based on historical conceptions about the slavery experienced in Brazil until 1888. According to this idea, the term slavery continues to be associated with the restriction of freedom of movement, when in fact the legal good protected by the criminal type is the human dignity of the worker. Thus, for STF Ministers to be a slave is to be someone who can not come and go imprisoned in their place of work, most often under armed and chained surveillance.

As has already been stated and now proved by the elaborate rhetorical analyzes, this conveniently "romanticized" idea of slavery present in the decisions of our Courts constitutes a historical and juridical misunderstanding and this has been a recurring "mistake".

Not infrequently, historical documents reveal that several slaves circulated in the streets of Brazilian cities. It was common for the figure of the so-called "slave of gain", who should present to their masters, after a set period of time a previously stipulated amount[50]. The amount was called "newspapers". So the captives worked their own way "freely" to achieve these values, often living in their own homes.

Urban slavery and the relative ambulatory freedom of the slaves in the cities were constitutive characteristics of Brazilian slavery.

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[49] An argument of a form is only complete if *it contains all the premises belonging to this form*. This is called the saturation requirement. The premises that need to be saturated are of different types. This generates completely different ways of Rationale. (emphasis added). ROBERT ALEXY, *Teoria da argumentação jurídica: a teoria do discurso racional como teoria da fundamentação jurídica*, São Paulo, Landy, 2005, p. 240.

[50] Acording to Agostinho Malheiro, "even in cities and towns some allow their slaves to work as free men, but giving them a certain newspaper; the excess is their money: - and that they even live in houses other than their own, with more freedom." Cf in: MALHEIRO, AGOSTINHO MARQUES PERDIGÃO, 1866 A escravidão no Brasil: ensaio histórico, jurídico, social, vol. 1 ed. Rio de Janeiro, [s.n.] Disponível em http://www.ebooksbrasil.org/eLibris/malheiros1.html. Access in 20/02/2020.

Brazilian cities were then large slave centers, where they "came and went" in order to carry out their activities[51].

So, to imagine black human beings, in slave quarters, chained and flogged as characteristic of contemporary slave labor, points to the abyss in which lies the discernment of Brazilians, sometimes of the jurists themselves on the subject. Unfortunately, the great guiding vector of the democratic system persists the same as the one that was idealized by James Madison, as Noam Chomsky put it: "The government's primary responsibility is to protect the opulent minority from the majority".[52] Thus the discourse is that the legal order must protect the rights of minorities, but in practice what is realized is the maintenance of the old order in relation to the wealthier classes and a general public in each case.

References

ADEODATO, JOÃO MAURÍCIO, *A retórica constitucional: sobre tolerância, direitos humanos e outros fundamentos éticos do direito positivo*, São Paulo, Saraiva, 2009

ADEODATO, JOÃO MAURÍCIO, *A retórica de Aristóteles e o direito: bases clássicas para um grupo de pesquisa em retórica jurídica*, Curitiba, CRV, 2014

ALEXY, ROBERT, *Teoria da argumentação jurídica: a teoria do discurso racional como teoria da fundamentação jurídica*, São Paulo, Landy, 2005

BARROSO, LUÍS ROBERTO, www.luisrobertobarroso.com.br [Em linha], atual. 2010. [Consult. 29 ago. 2019]. Disponível em <http://www.luisrobertobarroso.com.br/wpcontent/uploads/2010/12/Dignidade_texto-base_11dez2010.pdf>

CHOMSKY, NOAM, *O lucro ou as pessoas: neoliberalismo e ordem global*, Rio de Janeiro, Bertrand Brasil, 2002

D'ANGELO, ISABELE BANDEIRA DE MORAES/ CONFORTI, LUCIANA PAULA, *Apresentação. Em Escravidão? Deus me livre!*, Recife, Edupe, 2018

FALCÃO, PABLO R. DE L.; "Do direito que é, aquele que vem a ser: implicações epistêmicas da relação entre decidibilidade jurídica e raciocínio lógico-dedutivo", *in Publica Direito*, 2006

KELSEN, HANS, *Teoria Pura do Direito*, 6ª ed. São Paulo, Martins Fontes, 1998

MALHEIRO, AGOSTINHO MARQUES PERDIGÃO, *1866 A escravidão no Brasil: ensaio histórico, jurídico,*

[51] One of these factors and perhaps the most difficult to overcome is the idea that only when there is restriction of the right to freedom in the strict sense is there "slavery". The weight of more than 400 years of slavery in Brazil and the images that are added to the term, such as whips and shackles, make it difficult to understand the true scope of practices analogous to slavery. It happens that slavery with direct restriction of freedom is seen in smaller numbers nowadays, and it is essential to expand the knowledge about the several practices analogous to slavery, as a form of prevention. Cf in: D'ANGELO, ISABELE BANDEIRA DE MORAES/ CONFORTI, LUCIANA PAULA, Apresentação. Em Escravidão? Deus me livre!, Recife, Edupe, 2018, pp. 6/7.

[52] NOAM CHOMSKY, *O lucro ou as pessoas: neoliberalismo e ordem global*, Rio de Janeiro, Bertrand Brasil, 2002, p. 180.

social, vol. 1 ed. Rio de Janeiro, [s.n.] Disponível em <http://www.ebooksbrasil.org/eLibris/malheiros1.html>

NABUCO, JOAQUIM, *O abolicionismo*, Petrópolis, Vozes, 1977

PARINI, PEDRO, "O raciocínio dedutivo como possível estrutura lógica da Argumentação judicial: silogismo versus entimema a partir da contraposição entre as teorias de Neil MacCormick e Katharina Sobota", *in Publica Direito*, 2006

Legislation

Código Penal Brasileiro, Decreto-Lei No 2848, 07/12/1940, *in* http://www.planalto.gov.br/CCIVIL_03/Decreto-Lei/Del2848.htm

Case Law

HABEAS CORPUS 127,528 PARANÁ https://stf.jusbrasil.com.br/jurisprudencia/310900991/recurso-ordinario-em-habeas-corpus-rhc-127528-pr-parana-8622076-1620151000000/inteiro-teor-310901002?ref=amp

SURVEY 3.412 ALAGOAS http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3076256

SURVEY No. 3,564 MINAS GERAIS https://stf.jusbrasil.com.br/jurisprudencia/25295063/inquerito-inq-3564-mg-stf/inteiro-teor-146492142?ref=juris-tabs

SURVEY No. 3,564 MINAS GERAIS https://stf.jusbrasil.com.br/jurisprudencia/25295063/inquerito-inq-3564-mg-stf/inteiro-teor-146492142?ref=juris-tabs

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