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## Judicial function in constitutional domains: a theoretical framework for assessing judicial reasoning in Constitutional Courts in South America\*

### *Função judicial em domínios constitucionais: um referencial teórico para avaliar o raciocínio judicial em Tribunais Constitucionais da América do Sul*

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#### Abstract

Constitutional courts are influenced to some degree by politics. Still, when assessing their judicial decisions, most of the legal community in South America tends to adopt a narrow, normative, and legalistic perspective, lacking

#### Resumo

*Os tribunais constitucionais são influenciados até certo ponto pela política. Ainda assim, ao avaliar as suas decisões judiciais, a maior parte da comunidade jurídica na América do Sul tende a adotar uma perspectiva estreita,*

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empirical and interdisciplinary approaches enriched by sociological and psychological perspectives. This paper reports some elements to surpass this mainstream perspective by departing from the rational acceptability thesis. The scope of the work is limited to a descriptive and normative sphere, and the method used is qualitative.

*normativa e legalista, carecendo de abordagens empíricas e interdisciplinares enriquecidas por perspectivas sociológicas e psicológicas. Este artigo relata alguns elementos para superar essa perspectiva mainstream, afastando-se da tese da aceitabilidade racional. O escopo do trabalho limita-se a uma esfera descritiva e normativa, e o método utilizado é qualitativo.*

**Keywords:** judicial function; discovery; justification; constitutional reasoning; judicial reasoning.

**Palavras-chave:** função judicial; descoberta; justificação; raciocínio constitucional; raciocínio judicial.

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1. Introduction; 2. Judicial decision-making process; 2.1. Judicial function; 2.2. Judicial reasoning; 2.2.1. Dealing with discovery and justification; 2.3. Judicial constitutional reasoning; 3. Conclusions; 4. References.

### 1. INTRODUCTION

The factors influencing judicial decisions is an under-explored research field in South America. The literature on constitutional reasoning lacks sufficient empirical research. Most theories in this field are prescriptive, relying on intuitive assumptions made by scholars about how they think judges make decisions rather than providing insight into the actual decision-making process. On the other hand, the empirical methodology focuses on studying human behavior and decision-making, using data to infer how judges actually make decisions<sup>1</sup>. This paper is part of the theoretical framework for a research study that aims to provide a tool for assessing the reasoning of judicial judgments of Constitutional decision-making Courts in South America by combining normative and empirical perspectives. This study aims to identify key characteristics that should be considered when evaluating Constitutional Courts rulings, with a particular focus on dissents.

The role of judges in judicial review matters is not a neutral task in which they “apply” rules. The nature of law, even before clear rules, implies discretion. Judges must interpret and fill the gaps that ambiguity and vagueness in the language used in provisions allow. In this process, both external and internal factors influence judicial decision-making. The discovery and justification contexts are interdependent in this task

<sup>1</sup> See DYEVE, Arthur; JAKAB, Andrés. Foreword: Understanding Constitutional Reasoning. **German Law Journal**, Frankfurt, vol. 14, num. 8, p. 983-1015, 2013. Available at: <https://doi:10.1017/S2071832200002133>; JAKAB, Andrés. Judicial Reasoning in Constitutional Courts: A European Perspective. **German Law Journal**, Frankfurt, vol. 14, n. 8, p. 1215-1275, Aug. 2013. Available at: <https://doi:10.1017/S207183220000225X> and; JAKAB, Andrés; DYEVE, Arthur; ITZCOVICH, Giulio. Appendix. In: JAKAB, Andrés; DYEVE, Arthur; ITZCOVICH, Giulio. **Comparative Constitutional Reasoning**. Cambridge: Cambridge University Press, 2017. p. 798-820. Available at: <https://doi:10.1017/9781316084281.023>.

and can be respectively identified with intuitive and deliberate thought. The relationship between these actions should be part of the study of judicial decision-making. Our approach is an attempt to contribute the theoretical background for empirical research that bridges the gap between prescriptive theories and actual practice.

## 2. JUDICIAL DECISION-MAKING PROCESS

### 2.1. Judicial Function

In Civil law countries, judges have been portrayed as executors, officials who apply the legislator's will. Montesquieu thought that a judge is just the "mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour"<sup>2</sup> "so their power is in some measure nothing"<sup>3</sup>, this idea can be found in common law as well<sup>4</sup>. The role of the judiciary is essentially the resolution of disputes deciding about the facts, the law to be applied, and its determination.<sup>5</sup> Researchers differentiate the judicial function on one side and the decision-making process on the other, the former deals with the inquiry about what the role of judges is meanwhile the latter asks about how judges perform their role<sup>6</sup>. We will deal with the first one in this section.

Courts with the power to declare unconstitutional acts of the legislative and executive branches have been criticized for their lack of democratic legitimacy under the concept of *countermajoritarian difficulty*. It is the "power to make decisions that do not derive from a prior legislative decision and that do not, therefore, represent the sovereign will . . . as it should be."<sup>7</sup> The objection rests in the assumption that power that doesn't come from *the people* is anti-democratic.

<sup>2</sup> MONTESQUIEU, Charles de Secondat Baron de. **The Spirit of the Laws**. Kitchener: Batoche Books, 2001 (1748).

<sup>3</sup> GUARNERI, Carlo; PEDERZOLI, Patrizia. **The Judicial System – The Administration and Politics of Justice**. Cheltenham: Edward Elgar Publishing, 2020.

<sup>4</sup> GUARNERI, Carlo; PEDERZOLI, Patrizia. **The Judicial System – The Administration and Politics of Justice**. Cheltenham: Edward Elgar Publishing, 2020. p. 124: as Atiyah affirms, the term *declarative theory of the law* developed by Blackstone, who considered that the judge is bound to declare the already-present law, free of any element of creativity since her task is to "find" in legal texts, customs or judicial precedents.

<sup>5</sup> BARAK, Aharon. The Role of a Supreme Court in a Democracy. **Hastings Law Journal**, San Francisco, vol. 53, n. 5, p. 1205-1216, 2002. p. 1205. Available at: [https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3495&context=hastings\\_law\\_journal](https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3495&context=hastings_law_journal).

<sup>6</sup> MCINTYRE, Joe. **The Judicial Function – Fundamental Principles of Contemporary Judging**. Singapore: Springer, 2019. See also HORWITZ, Paul. Judicial Character (and Does it Matter). **University of Minnesota Law School**, Minneapolis, vol. 26, no. 1, p. 97-167, 2009. Available at: <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1850&context=concomm>.

<sup>7</sup> BICKEL, Alexander M. **The Least Dangerous Branch**. The Supreme Court at the Bar of Politics. New Haven: Yale University Press, 1986. For a contemporary perspective, see the work of Jeremy Waldron.

The delegation theory has been a way to reconcile the judicial review of legislation with the need for democratic background. One of its variants is the Principal-Agent (P-A) model: in this approach, judges govern with other state officials by an explicit act of delegation “as a means to enforce the choices of the constitutional framers over recalcitrant legislative majorities”<sup>8</sup>, in this regard, constitutional courts are *agents*<sup>9</sup>. By contrast, the technocratic model sets judges as trustees of the political system, “exercising fiduciary responsibilities with respect to the constitution, defined as that body of legal norms governing how all infraconstitutional norms are to be made, interpreted, and applied.”<sup>10</sup> In both, the *Principal* is a fictitious entity: the people. Another perspective moves away from arguments made exclusively on delegation theory considering that courts are terrains of *democratic deliberation*, where expression is given to public reasons and ensuring “democratic practice does not subvert its ideals,”<sup>11</sup> and that “rights-based litigation offers a form of democratic participation, providing a voice to those who might have been excluded from electoral democracy.”<sup>12</sup>

It seems clear that constitutional courts are, to some degree, political actors. Not in a “restrictive understanding . . . equating “politics” with partisan behavior [but seen] as being more broadly about the “authoritative allocation of values,” to borrow David Easton’s classical definition.”<sup>13</sup> Kelsen himself acknowledged the fact that law is politics. As constitutional courts have the “authority to interpret and therefore to make the constitutional law [they] perform a political function,”<sup>14</sup> in reality, “No matter how they are conceived, constitutional courts are not neutral.”<sup>15</sup>

However, adjudication is inherently political in judicial review matters; in civil law tradition, the mainstream judiciary and scholars ignore that fact and continue

<sup>8</sup> DYEVE, Arthur. Technocracy and Distrust: Revisiting the Rationale for Judicial Review. **International Journal of Constitutional Law**, [s.l.] vol. 13, n. 1, p. 30-60, Jan. 2015. p. 30. Available at: <https://academic.oup.com/icon/article/13/1/30/689851>.

<sup>9</sup> STONE SWEET, Alec. Constitutional Courts and Parliamentary Democracy. **West European Politics**, [s.l.] vol. 25, n. 1, p. 77-100, 2002. p. 77

<sup>10</sup> STONE SWEET, Alec. The Politics of Constitutional Review in France and Europe. **International Journal of Constitutional Law**, [s.l.] vol. 5, n. 1, p. 69-92, Jan. 2007. p. 79. Available at: <https://academic.oup.com/icon/article/5/1/69/722503>.

<sup>11</sup> BELLAMY, Richard. The democratic qualities of courts: a critical analysis of three arguments. **Representation**, [s.l.] vol. 49, n. 1, p. 333-346, 2013. p. 333. Available at: <http://hdl.handle.net/1814/32375>.

<sup>12</sup> BELLAMY, Richard. The democratic qualities of courts: a critical analysis of three arguments. **Representation**, [s.l.] vol. 49, n. 1, p. 333-346, 2013. p. 333. Available at: <http://hdl.handle.net/1814/32375>.

<sup>13</sup> DYEVE, Arthur; JAKAB, András. Foreword: Understanding Constitutional Reasoning. **German Law Journal**, Frankfurt, vol. 14, num. 8, p. 983-1015, 2013. p. 1002. Available at: <https://doi:10.1017/S2071832200002133>.

<sup>14</sup> STONE SWEET, Alec. **Governing with Judges**. Oxford: Oxford University Press, 2000. p. 135.

<sup>15</sup> HARDING, Andrew; LEYLAND, Peter; GROPP, Tania. Constitutional Courts: Forms, Functions and Practice in Comparative Perspective. **Constitutional Courts: A Comparative Study (JCL Studies in Comparative Law)**. London: Wildy, Simmonds & Hill Publishing, 2009. p. 15. Available at: <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jrnatila3&div=23&id=&page=>

perpetuating the mythology: judges' task is "to apply the law, not make it."<sup>16</sup> But this legalistic vision by which virtue judging is an "objective" activity can also be found in common law countries like the United States, where John Roberts, at his Senate confirmation hearing, said "that the role of a Supreme Court Justice, which he promised to faithfully inhabit, was comparable to that of a baseball umpire. The umpire calls balls and strikes but does not pitch or bat or field."<sup>17</sup> This kind of statement operates as a *mask and shield*. "It hides and promotes the protection of a particular set of political objectives against contending objectives in the purely political spheres."<sup>18</sup> This relation between law and politics "uncover a striking paradox. Law can only perform this dual political function to the extent that it is accepted as law. A 'legal' decision that is transparently 'political,' in the sense that it departs too far from the principles and methods of the law, will invite direct attack."<sup>19</sup> That's why "Roberts can't have meant what he said"<sup>20</sup>, not because he is a hypocrite, but due to the paradox of judicial rhetoric "while it does pursue political ends, it is at its most effective when perceived to be value-neutral."<sup>21</sup> In conclusion, the judicial function in judicial review matters is not an aseptic activity in which official "apply" rules.

## 1.2. Judicial Reasoning

Law<sup>22</sup> is made with words, and words have an open texture quality. That's why in all fields of experience, "there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will indeed be plain cases constantly recurring in similar contexts to which general expressions were clearly applicable . . . but there will also be cases where it is not clear whether they apply or not."<sup>23</sup>

<sup>16</sup> DYEVE, Arthur. Unifying the field of comparative judicial politics: towards a general theory of judicial behaviour. **European Political Science Review**. [s.l.] Vol. 2, num. 2, p. 297-327, Jul. 2010. p. 299. Available at: <https://doi:10.1017/S1755773910000044>.

<sup>17</sup> EPSTEIN, Lee; LANDES, William M.; POSNER, Richard. **The Behavior of Federal Judges- A Theoretical & Empirical Study of Rational Choice**. Cambridge: Harvard University Press, 2013. p. 51.

<sup>18</sup> BURLEY, Anne-Marie; MATTLI, Walter. Europe before the Court: A Political Theory of Legal Integration. **International Organization**. [s.l.], vol. 47, num. 1, p. 41-76, May. 1993. p. 72. Available at: <https://doi:10.1017/S0020818300004707>.

<sup>19</sup> BURLEY, Anne-Marie; MATTLI, Walter. Europe before the Court: A Political Theory of Legal Integration. **International Organization**. [s.l.], vol. 47, num. 1, p. 41-76, May. 1993. p. 72. Available at: <https://doi:10.1017/S0020818300004707>.

<sup>20</sup> EPSTEIN, Lee; LANDES, William M.; POSNER, Richard. **The Behavior of Federal Judges- A Theoretical & Empirical Study of Rational Choice**. Cambridge: Harvard University Press, 2013. p. 51.

<sup>21</sup> DYEVE, Arthur; JAKAB, András. Foreword: Understanding Constitutional Reasoning. **German Law Journal**, Frankfurt, vol. 14, num. 8, p. 983-1015, 2013. p. 1002. Available at: <https://doi:10.1017/S2071832200002133>.

<sup>22</sup> Understood here as written one made by legislators among other officials instead of verdicts or customary which are part of the law.

<sup>23</sup> HART, H. L. A. **The Concept of Law**. 2 ed. Oxford: Oxford University Press, 1994. p. 126



This very nature of law, even before *clear* rules, implies judicial discretion. A limited one, but still discretion.<sup>24</sup> Indeed, it is inevitable “because it is impossible for social acts to pick out standards that resolve every conceivable question.”<sup>25</sup> Furthermore, it is “a widely acknowledged theoretical stance”<sup>26</sup>. Nevertheless, as the John Roberts case depicts, it is dangerous for judges to admit that they exercise discretion. “Courts preserve their legitimacy when they act as though there really is law “out there” to discover rather than admitting that the law is sometimes indeterminate and that they are filling in the gaps.”<sup>27</sup> And it is dangerous because it is seen as an invasion of legislature competencies and a break of the system of separated powers.

Language has both properties, ambiguity, and vagueness<sup>28</sup>. The first refers to “the multiplicity of sense: a term is ambiguous if it has more than one sense. A classic example is the word “cool”<sup>29</sup> The latter is related to “the existence of borderline cases: a term is vague if there are cases where the term might or might not apply. A classic example is the word “tall” . . . There are persons who are clearly tall and clearly not tall, but there are also borderline cases.”<sup>30</sup> In addition, some terms can be ambiguous and vague as the word “cool” in the temperature sense.<sup>31</sup>

<sup>24</sup> HART, H. L. A. **The Concept of Law**. 2 ed. Oxford: Oxford University Press, 1994. p. 143. And Dworkin in DWORKIN, Ronald. **Taking Rights Seriously**. Cambridge: Harvard University Press, 1977. p. 17: if someone's case is not clearly covered by such a rule . . . then that case cannot be decided by 'applying the law.' It must be decided by some official, like a judge, 'exercising his discretion,' which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.

<sup>25</sup> SHAPIRO, Scott J. The Hart-Dworkin Debate: A Short Guide for the Perplexed. **Michigan Law working paper no. 77**, [s.l.], p. 1-54, Mar. 2007. p. 17. Available at: <http://dx.doi.org/10.2139/ssrn.968657>. And on the case law system, Posner affirms: “When law is perfectly predictable, cases are not brought-all legal disputes are settled- and so precedents no longer fit, the law becomes unpredictable, which generates litigation and so incites the production of new precedents” in POSNER, Richard A. **How Judges Think**. Cambridge: Harvard University Press, 2010. p. 374.

<sup>26</sup> COMANDUCCI, Paolo. Legal Interpretation: A Tentative Report. In: KRAWIETZ, Werner; SUMMERS, Robert S.; WEINBERGER, Ota; VON WRIGHT, Georg Henrik (Eds.). **The Reasonable as Rational?: On Legal Argumentation and Justification**. “Festschrift” for Aulis Aarnio. Berlin: Duncker & Humblot, 2000. p. 463-482. p. 476.

<sup>27</sup> SHAPIRO, Scott J. The Hart-Dworkin Debate: A Short Guide for the Perplexed. **Michigan Law working paper no. 77**, [s.l.], p. 1-54, Mar. 2007. p. 33. Available at: <http://dx.doi.org/10.2139/ssrn.968657>.

<sup>28</sup> One can understand that law is made with words or utterances, and whatever the case, embrace the assertion. See: RAZ, Joseph. Sorensen: Vagueness Has No Function in Law. **Legal Theory**, [s.l.], vol. 7, num. 4, p. 417-419, May. 2002. Available at: <https://doi.org/10.1017/S1352325201704053>[Opens in a new window]

<sup>29</sup> SOLUM, Lawrence B. The Interpretation-Construction Distinction. **Constitutional Commentary**, Minneapolis, vol. 27, num. 1, p. 95-118, fall. 2010. p. 97. Available at: <https://hdl.handle.net/11299/163425>.

<sup>30</sup> SOLUM, Lawrence B. The Interpretation-Construction Distinction. **Constitutional Commentary**, Minneapolis, vol. 27, num. 1, p. 95-118, fall. 2010. p. 98. Available at: <https://hdl.handle.net/11299/163425>.

<sup>31</sup> SOLUM, Lawrence B. The Interpretation-Construction Distinction. **Constitutional Commentary**, Minneapolis, vol. 27, num. 1, p. 95-118, fall. 2010. p. 98. Available at: <https://hdl.handle.net/11299/163425>. Yet judicial constructions created from ambiguity and vagueness could sometimes supersede the linguistic meaning of the text. The question is, “When should construction override the linguistic meaning of an authoritative legal text?”

Conceptualizing vagueness backed by the term “borderline case” (or “indeterminate,” “undecidable”) displaces the discussion from one unclear word to another. The question is: when are we facing a “borderline case”? Some have classified them into relative and absolute indeterminate cases to answer the inquiry<sup>32</sup>. In contrast, others deny the existence of strong discretion<sup>33</sup> and absolute borderline cases.<sup>34</sup> For Sorensen, “If there are no absolute borderline cases in law, then there is no vagueness in law. [and] Therefore, vagueness has no function in law.”<sup>35</sup> Determine what constitutes or not a hard case is not feasible beforehand. MacCormick considers that defining a clear case requires “that is “covered” by a rule, and indeed by that interpretation of the rule which is best justified by consequentialist arguments and arguments of principle – whose application will not offend judicial conceptions of the justice and common sense of the law.”<sup>36</sup> On the contrary, it can be inferred that a hard or an unclear one doesn’t match those parameters.

Now, we will briefly discuss the interpretation during the judging activity. Some have stressed that the process involves two steps: *interpretation* in its narrower understanding and *construction*<sup>37</sup>. The first is “discerning the linguistic meaning in context (or communicative content) of a legal text.”<sup>38</sup> The second “is the activity of applying that meaning to particular factual circumstances.”<sup>39</sup> A complete justification of the option

<sup>32</sup> SORENSEN, Roy. Vagueness Has No Function in Law. **Legal Theory**, [s.l.], vol. 7, num. 4, p. 387-417, May. 2002. Available at: <https://doi.org/10.1017/S1352325201704053>[Opens in a new window]

<sup>33</sup> See DWORKIN, Ronald. The Model of Rules. **University of Chicago Law Review**, Chicago, vol. 35, n. 1, p. 14-46, autumn. 1967. Available at: <https://chicagounbound.uchicago.edu/uclrev/vol35/iss1/3/>. As Shapiro points out: “Once one recognizes the existence of legal principles, Dworkin claims, it becomes clear that judges are bound by legal standards even in hard cases” SHAPIRO, Scott J. The Hart-Dworkin Debate: A Short Guide for the Perplexed. **Michigan Law working paper no. 77**, [s.l.], p. 1-54, Mar. 2007. p. 12. Available at: <http://dx.doi.org/10.2139/ssrn.968657>.

<sup>34</sup> “Dworkin denies that there are absolute borderline cases.” SORENSEN, Roy. Vagueness Has No Function in Law. **Legal Theory**, [s.l.], vol. 7, num. 4, p. 387-417, May. 2002. p. 415. Available at: <https://doi.org/10.1017/S1352325201704053>[Opens in a new window]

<sup>35</sup> SORENSEN, Roy. Vagueness Has No Function in Law. **Legal Theory**, [s.l.], vol. 7, num. 4, p. 387-417, May. 2002. p. 390. Available at: <https://doi.org/10.1017/S1352325201704053>.

<sup>36</sup> MACCORMICK, Neil. **Legal Reasoning and Legal Theory**. Oxford: Clarendon Law Series, 1978. p. 277-278.

<sup>37</sup> Others prefer to name them “clarifying” and “creative” respectively “because popular and professional use of the term “interpretation” encompasses both processes” in GOLDSWORTHY, Jeffrey. Clarifying, Creating, and Changing Meaning in Constitutional Interpretation: A Comment on András Jakab, “Constitutional Reasoning in Constitutional Courts—A European Perspective.” **German Law Journal**, Frankfurt, vol. 14, num. 8, p. 1279-1295, 2013. p. 1281. Available at: <https://doi:10.1017/S2071832200002261>.

<sup>38</sup> SOLUM, Lawrence B. Legal Theory Lexicon: The Interpretation-Construction Distinction. **Legal-Theory Blog**, [s.l.], Feb. 5, 2017. Available at: <https://lsolum.typepad.com/legaltheory/2017/02/legal-theory-lexicon-the-interpretation-construction-distinction.html>.

<sup>39</sup> BARNETT, Randy E., Interpretation and Construction. **Harvard Journal of Law and Public Policy**, Cambridge, vol. 34, n. 1, p. 65-72, wint. 2010. p. 66. Available at: <https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2013/10/Barnett-Final-1.pdf>. See also: SOLUM, Lawrence B. The Interpretation-Construction Distinction. **Constitutional Commentary**, Minneapolis, vol. 27, num. 1, p. 95-118, fall. 2010. Available at: <https://hdl.handle.net/11299/163425>.



picked between 2 or more possible “must hinge then on how the choice between the competing versions of the rule is justified.”<sup>40</sup> Since interpretation is a very general term, Jerzy Wróblewski suggested three main senses: *sensu largissimo*, *sensu largo*, and *sensu stricto*<sup>41</sup>. For our interest, we will refer only to the *sensu stricto*, which is interpretation in its narrow sense, “a sub-class of interpretation *sensu largo* and occurs where are doubts in the understanding of a language when it is used, in a particular context, in an act of communication.”<sup>42</sup> The operative interpretation occurs when the *sensu stricto* kind of interpretation is performed by a “court or other legal tribunal . . . to determine the meaning in legal language in a way sufficiently precise to make a decision in the case and to provide a justification for the decision on the ground of the interpreted meaning of the provision in issue.”<sup>43</sup> In other words, it is the official application of law within the boundaries of sufficiently justified decisions.

The mainstream in legal scholarly has widely accepted the distinction between “how a judge actually reaches a decision and . . . how . . . publicly justifies”<sup>44</sup> it. Indeed, “What prompts a judge to think of one side rather than the other is quite a different matter from the question whether there are on consideration good justifying reasons in favor of that rather than the other side.”<sup>45</sup> The former is known as *discovery*. At the same time, the last as *justification*. Some authors “use other terms like the distinction between the *context* of discovery and the *context* of justification, between the *process* of discovery and the *process* of justification, or between the *logic* of discovery and the *logic* of justification.”<sup>46</sup> In United States, the distinction hasn’t had much attention and interest due to the influence of the realism. As a matter of fact, “some realists suggested that

<sup>40</sup> MACCORMICK, Neil. **Legal Reasoning and Legal Theory**. Oxford: Clarendon Law Series, 1978. p. 67-68. For mapping “the theories of interpretation circulating in legal milieu”, See: COMANDUCCI, Paolo. Legal Interpretation: A Tentative Report. In: KRAWIETZ, Werner; SUMMERS, Robert S.; WEINBERGER, Ota; VON WRIGHT, Georg Henrik (Eds.). **The Reasonable as Rational?: On Legal Argumentation and Justification**. “Festschrift” for Aulis Aarnio. Berlín: Duncker & Humblot, 2000. p. 463-482. p. 463-481.

<sup>41</sup> WRÓBLEWSKI, Jerzy. **Constitución y teoría general de la interpretación jurídica**. Madrid: Editorial Civitas S.A., 1985.

<sup>42</sup> MACCORMICK, D. Neil; SUMMERS, Robert S. **Interpreting Statutes**. Burlington: Ashgate Publishing Limited, 2010 (1991). p. 12.

<sup>43</sup> MACCORMICK, D. Neil; SUMMERS, Robert S. **Interpreting Statutes**. Burlington: Ashgate Publishing Limited, 2010 (1991). p. 13.

<sup>44</sup> SILVEIRA, Luiz. Discovery And Justification of Judicial Decisions: Towards More Precise Distinctions in Legal Decision-Making, **Law and Method**, [s.l.], n. 2, p. 1-18, Sep. 2014. p. 1. Available at: <https://10.5553/REM/000007>.

<sup>45</sup> MACCORMICK, Neil. **Legal Reasoning and Legal Theory**. Oxford: Clarendon Law Series, 1978. p. 16.

<sup>46</sup> SILVEIRA, Luiz. Discovery And Justification of Judicial Decisions: Towards More Precise Distinctions in Legal Decision-Making, **Law and Method**, [s.l.], n. 2, p. 1-18, Sep. 2014. p. 3. Available at: <https://10.5553/REM/000007>. For a broader explanation of the 2 contexts consult chapter 1 (Derecho y Argumentación) in: ATIENZA, Manuel. **Las Razones del Derecho**. 3ª reim., Ciudad de México: Universidad Nacional Autónoma de México, 2007. p. 1-28.

giving justified answers to legal issues is simply impossible.”<sup>47</sup> Nevertheless, the distinction has gained force in the field with Richard Wasserstrom<sup>48</sup>: “He intended to solve the tension between Legal Formalists and American Realists by stating that the rigid distinction between discovery and justification helped to understand the disagreements between these authors: while Formalists were studying the process of justification, Realists studied the process of discovery.”<sup>49</sup>

But a meticulous distinction could be undesirable and inaccurate because of the interdependence between the terms and processes:

*(1) The process of justification can only be initiated after the process of discovery has begun. (2) The process of discovery should only finish after the process of justification has come to an end, especially when interpersonal justification is one of the decision's intrinsic requisites. (3) All insights obtained by the process of discovery may form raw material for the process of justification, and vice-versa. (4) All reasons of justification may be used as reasons of discovery, and vice versa; thus, for all those reasons, it is imperative to understand both processes as intrinsically interrelated and interdependent. (5) The acts of discovery (insights) and the acts of justification (utterances) are, indeed, distinct and potentially independent instances. The possible dependence and the relations between these distinct acts, however, ought to be part of the study of legal decision-making.*<sup>50</sup>

When judges justify their decisions, they must do so in a manner that can be accepted even by the “losing” party.<sup>51</sup> Still more if it is a “hard case.” To comply, they must offer rational arguments. As Aarnio pointed out, “Try to reach such a solution and such a justification in a hard case situation that the majority of the rationally reasoning members of a legal community may accept your standpoint and your justification.”<sup>52</sup> It is

<sup>47</sup> SUMMERS, Robert S. Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification. *Cornell Law Review*, Ithaca, vol. 63, n. 5, p. 707-788, June 1978. p. 712. Available at: <https://scholarship.law.cornell.edu/clr/vol63/iss5/1>.

<sup>48</sup> WASSERSTROM, Richard A. *The Judicial Decision: Toward a Theory of Legal Justification*. Stanford: Stanford University Press, 1961.

<sup>49</sup> SILVEIRA, Luiz. Discovery And Justification of Judicial Decisions: Towards More Precise Distinctions in Legal Decision-Making, *Law and Method*, [s.l.], n. 2, p. 1-18, Sep. 2014. p. 3. Available at: <https://10.5553/REM/000007>.

<sup>50</sup> SILVEIRA, Luiz. Discovery And Justification of Judicial Decisions: Towards More Precise Distinctions in Legal Decision-Making, *Law and Method*, [s.l.], n. 2, p. 1-18, Sep. 2014. p. 10. Available at: <https://10.5553/REM/000007>.

<sup>51</sup> In judicial review cases, there are no parties. It must be understood as the plaintiff, but in judicial review, the audience is the entire society. However, what is mentioned applies to every case solved by judges, so we stand with the term used.

<sup>52</sup> AARNIO, Aulis. *The Rational as Reasonable - A Treatise on Legal Justification*. Dordrecht: Springer, 1987. p. 231. Roberto Saba wrote that the legitimacy of Constitutional Courts rests in “public reasons, in the sense of being founded on universalizable reasons,” in line with Aarnio's claim. In: SABA, Roberto. La legitimidad de las Cortes Constitucionales. *IberICONnect*, [s.l.], Dec. 16, 2021. Available at: <https://www.ibericonnect.blog/2021/12/la-legitimidad-de-las-cortes-constitucionales/>

what he called the “Rational Acceptability as a Regulative Principle for Legal Dogmatics.” But agreeing with this position requires some assumptions: The first is that there is not only one correct outcome for each case, as Dworkin seems to imply<sup>53</sup>. Really “No one can be a Hercules, but the very fact that we can intelligibly postulate such a being justifies the claim that every judge can and should try to get as close to Herculean competence as he can.”<sup>54</sup>The second is the theoretical difference among particular and universal audience suggested by Perelman<sup>55</sup>. The universal or ideal audience is composed by “the totality of being capable of reason”<sup>56</sup>. It is subject to conviction, whereas the particular audience holds persuasion<sup>57</sup>. “Of course, the universal audience never actually exists; it is an ideal audience, a mental construction of him who refers to it.”<sup>58</sup> In our case, the judge. This means that “the theoretical model presupposes an *ideal* audience, where the acceptance is given by idealised persons who not only share the standards of rationality but who also have (to some extent) a coherent value code.”<sup>59</sup> Summing up, we assume the Rational Acceptability thesis when courts try to convince the audience conformed to rational people. This departs from the fact that one only correct answer in law is not feasible. Despite this, comparing courts of different countries entails that judges consider “the expectations and beliefs of their particular domestic audiences,”<sup>60</sup> not all reasonable people.

<sup>53</sup> “Indeed, Dworkin does not say that there is one and only one correct solution in every case, but he maintains that one correct solution is possible *in principle* and that such a solution exists in *most cases*.” AARNIO, Aulis. *One Right Answer?* In: AARNIO, Aulis. **Essays on the Doctrinal Study of Law**. Dordrecht: Springer, 2011. p. 165-176. p. 167. Dworkin’s propositions on the matter can be summarized as follows: “1) For every actual and potential question faced by a sitting judge, there exists an answer to settle that question; 2) That answer is discoverable; 3) That answer is exclusive; 4) That answer is correct, it is the right answer.” In: LEVIN, Joel. **How Judges Reason**-The Logic of Adjudication. Frankfurt: Peter Lang Publishing, 1992. p. 212.

<sup>54</sup> MACCORMICK, D. Neil, Dworkin as Pre-Benthamite. **The Philosophical Review**, Durham, vol. 84, num. 4, p. 585-507, Oct. 1978. p. 593.

<sup>55</sup> For Perelman, argumentation is “the discursive techniques allowing us to induce or to increase the mind’s adherence to the theses presented for its assent” PERELMAN, Chaim; OLBRECHTS-TYTECA, Lucie. **The New Rhetoric A Treatise on Argumentation**. Notre Dame: University of Notre Dame Press, 1971. p. 4.

<sup>56</sup> PERELMAN, Chaim. *The Social Contexts of Argumentation*. In: PERELMAN, Chaim. **The Idea of Justice and the Problem of Arguments**. London: Routledge & Kegan Paul, 1963. p. 154-160. p. 155.

<sup>57</sup> LONG, Richard. *The Role of Audience in Chaim Perelman’s New Rhetoric*. **Journal of Advanced Composition**. [s.l.], vol. 4, p. 107-117, 1983. p. 109.

<sup>58</sup> PERELMAN, Chaim; OLBRECHTS-TYTECA, Lucie. *Act and Person in Argument*. **Ethics**. Chicago, vol. 61, num. 4, p. 251-269, Jul. 1951. p. 252. Available at: <https://www.journals.uchicago.edu/doi/10.1086/290789>

<sup>59</sup> AARNIO, Aulis. **The Rational as Reasonable** -A Treatise on Legal Justification. Dordrecht: Springer, 1987. p. 170.

<sup>60</sup> JAKAB, András; DYEYRE, Arthur; ITZCOVICH, Introduction: *Comparing Constitutional Reasoning with Quantitative and Qualitative Methods*. In: JAKAB, András; DYEYRE, Arthur; ITZCOVICH, Giulio. **Comparative Constitutional Reasoning**. Cambridge: Cambridge University Press, 2017. p. 1-35. p. 5. Available at: <https://doi:10.1017/9781316084281.023>.

However, legal reasoning<sup>61</sup> differs from the other<sup>62</sup> kinds of reasoning, and thus, it has particular types of arguments. We refer here, with no exhaustivity claim, three proposals in which rest part of our scheme: Giovanni Tarello<sup>63</sup> identified interpretative arguments consisting of 14 topoi.<sup>64</sup> Similarly, Summers and Taruffo<sup>65</sup> presented 11 arguments in *Interpreting Statutes*. Finally, Macagno and Walton used the previous schemes to group arguments. First, in “eleven general categories,”<sup>66</sup> and then 65 in 5.

But justification does not rely solely on arguments separately considered. On the contrary, built-in structure models support the outcome. We will review two approaches that support the methodology. The first one was not established in advance as a methodology that allowed to classify schemes supporting decisions. Instead, it was depicted as findings in the *Interpreting Statutes* project. In reality, Summers and Taruffo described the structure of justificatory elements of the opinion and sketched it in three:

- (a) *simple subsumptive*, where the justification is reduced to the skeleton of a judicial syllogism. It has two variations.

<sup>61</sup> We mean that although it shares grounds with general reasoning, it has particular features. Following Habermas, Alexy has stated that the rational-legal discourse is a specific case of the general practical discourse. See ALEXY, Robert. **A Theory of Legal Argumentation - The Theory of Rational Discourse as Theory of Legal Justification**. Oxford: Oxford University Press, 2010. In the same vein, Sunstein: “Does law have special forms of logic? Does it offer a distinctive form of reasoning? To both questions, the simplest answer is no. The forms of logic and reasoning in law are entirely familiar—the same forms as elsewhere” in SUNSTEIN, Cass R. **Legal Reasoning and Political Conflict**. 2 ed., Oxford: Oxford University Press, 2018. p. 13.

<sup>62</sup> For instance, See SAMUEL, Geoffrey. Is legal reasoning like medical reasoning? **Legal Studies**, London, vol. 35, n. 2, p. 323-347, Jun. 2015. p. 342. Available at: <https://doi.org/10.1111/lest.12063>. “Legal reasoning is about manipulating facts (*accommodatio factorum*) to make them conform in an isomorphic way with a conceptual structure implied by a legal text (statute, contract or will) or by a precedent or line of precedents.”

<sup>63</sup> TARELLO, Giovanni. **L'interpretazione della legge**. Milano: Guiffrè Editore, 1980.

<sup>64</sup> LA TORRE, Massimo; PATTARO, Enrico; TARUFFO, Michele. Statutory Interpretation in Italy. In: MACCORMICK, D. Neil; SUMMERS, Robert S. **Interpreting Statutes**. Burlington: Ashgate Publishing Limited, 2010 (1991). p. 213-256. p. 223. These are the arguments: (1) *a contrario*, (2) *a simili ad simile* (or analogical), (3) *a fortiori*, (4) *a completitudine*, (5) *a coherentia*, (6) psychological, (7) historical, (8) apagogic (or *reductio ad absurdum*), (9) teleological, (10) authoritative (*ab exemplo*), (11) systemic, (12) naturalistic, (13) argument from equity (14) argument from general principles of law.

<sup>65</sup> SUMMERS, Robert S.; MACCORMICK, D. Neil. Interpretation and Comparative Analysis. In: MACCORMICK, D. Neil; SUMMERS, Robert S. **Interpreting Statutes**. Burlington: Ashgate Publishing Limited, 2010 (1991). p. 461-510. p. 464. (1) Arguments from standard *ordinary meaning*, (2) Arguments from standard technical meaning of ordinary words or of technical words, legal or non-legal, (3) Contextual-harmonization arguments, (4) Arguments invoking precedents, (5) Arguments based on statutory analogies, (6) Arguments of a logical-conceptual type, (7) Arguments from general principles, (8) Arguments from history, (9) Arguments from statutory purpose, (10) Arguments from substantive reasons, and (11) Arguments from intention of the legislature.

<sup>66</sup> MACAGNO, Fabrizio; WALTON, Douglas. Arguments of statutory interpretation and argumentation schemes. **International Journal of Legal Discourse**. [s.l.], vol. 2, n. 1, p. 47-83, Jun. 2017. p. 50. Available at: <https://doi.org/10.1515/ijld-2017-0002>. (1) Argument from exclusion of what is not stated (*a contrario* arguments), (2) Argument from Analogy (*legis* and *iuris*), (3) *A fortiori*, (4) Authoritative which embody psychological, historical, naturalistic -natural meaning- and authoritative, (5) Absurdity argument, (6) Equitative argument, (7) Argument from the coherence of the law, (8) Teleological or purposive argument, (9) Economic argument, (10) Systematic argument, and (11) Arguments from the completeness of the Law.

- (b) *complex or sophisticated subsumptive*. The decision follows from premises deduced logically. But these premises are justified as well in sub-premises. This way of justifying takes, in turn, two forms:
  - (b.1.) *Cascaded inferential passages – linear reasoning* in which deduction consists of a chain of deductive passages, and each of them are justified by the previous step.
  - (b.2.) *Legs of a chair*. In this model, each conclusion is supported by several steps.
- (c) *Discursive alternative justification*. Here the final decision is not presented as a logical consequence of given premises but as the outcome of judicial choices made according to arguments and priority rules<sup>67</sup>.

Meanwhile, the Comparative Constitutional Reasoning project portrayed<sup>68</sup> 3 similar “general types of legal argumentative structures.”<sup>69</sup> Compared with the first, this one was designed beforehand as part of the questionnaire that reporters had to solve in each country. It was used to answer the inquiry related to the usual structure of arguments in the 40 landmark cases selected from each country:

- (a) *one-line conclusive arguments*: It is a self-standing structure in which every premise is presented as a necessary component of the argument.
- (b) *parallel conclusive arguments*: It is a cumulative parallel structure in which distinct, autonomous considerations lead to the same conclusion.
- (c) *parallel, individually inconclusive, but together conclusive arguments*: Different considerations made in the opinion are important to solve the issue, but none are necessary and sufficient to conclude on their own.

### 1.2.1. *Dealing with discovery and justification*

As Silveira notes, making a strict distinction between contexts of discovery and justification does not reveal how the interdependence relationship is held in the judicial

<sup>67</sup> SUMMERS, Robert S.; MACCORMICK, D. Neil. Interpretation and Comparative Analysis. In: MACCORMICK, D. Neil; SUMMERS, Robert S. **Interpreting Statutes**. Burlington: Ashgate Publishing Limited, 2010 (1991). p. 461-510. p. 492. They also found that courts differ in justification styles. While some have a magisterial opinion, others have a dialogic and argumentative style. Those findings should be contrasted when our proposal is applied in the region. p. 501.

<sup>68</sup> JAKAB, András; DYEVI, Arthur; ITZCOVICH, Giulio. Appendix. In: JAKAB, András; DYEVI, Arthur; ITZCOVICH, Giulio. **Comparative Constitutional Reasoning**. Cambridge: Cambridge University Press, 2017. p. 798-820. p. 802. Available at: <https://doi:10.1017/9781316084281.023>.

<sup>69</sup> JAKAB, András. Judicial Reasoning in Constitutional Courts: A European Perspective. **German Law Journal**, Frankfurt, vol. 14, n. 8, p. 1215-1275, Aug. 2013. p. 1226. Available at: <https://doi:10.1017/S207183220000225X>. In this early version, the names were different: (a) Deploying one conclusive argument, or a chain of arguments following from one another; (b) cumulative- parallel arguments or reasoning like “the legs of a chair”—several arguments support a certain legal interpretation independently; every argument would suffice on its own, but there are more of them; or (C) mentioning only relevant factors, any of which is not conclusive, but if taken together, they provide a certain solution.

decision-making process. In line with that understanding, researchers have stated “that judges generally make intuitive decisions [discovery] but sometimes override their intuition with deliberation [justification].”<sup>70</sup> As a result of empirical evidence and recent psychological findings on the human mind, they posited “the “intuitive-override” model of judging (IOM).”<sup>71</sup> Therefore, judicial decisions can be predominately deliberative rather than intuitive, recognizing the importance of deliberation in constraining the inevitable, but often undesirable, influence of intuition.<sup>72</sup>

“Ideally, judges reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors.”<sup>73</sup> Despite their efforts, however, judges, like everyone else, are affected by biases related to “our unconscious minds that unknowingly inform our opinions of people, information and events . . . Social scientists have identified over 100 categories of such cognitive, decision-making and memory-related biases.”<sup>74</sup> This fact reveals the attention scholars worldwide have recently gained to unconscious and automatic processes developed in the mind that influence behavior and decision-making in many fields, such as economics<sup>75</sup>, and with lesser study, law.

Rationality is bounded, besides biases, by factors like willpower and self-interest, as Jolls, Thaler, and Sunstein have observed.<sup>76</sup> And among several types of bias associated with the judiciary, the *cognitive* has found a flourished research field due to the seminal work of Kahneman and Tversky in the 70s. The model of dual-process

<sup>70</sup> GUTHRIE, Chris; RACHLINSKI, Jeffrey J.; WISTRICH, Andrew J. Blinking on the Bench: How Judges Decide Cases. *Cornell Law Review*, Ithaca, vol. 93, n. 1, p. 1-44, Nov. 2007. p. 3. Available at: <https://scholarship.law.cornell.edu/clr/vol93/iss1/9>.

<sup>71</sup> GUTHRIE, Chris; RACHLINSKI, Jeffrey J.; WISTRICH, Andrew J. Blinking on the Bench: How Judges Decide Cases. *Cornell Law Review*, Ithaca, vol. 93, n. 1, p. 1-44, Nov. 2007. p. 3. Available at: <https://scholarship.law.cornell.edu/clr/vol93/iss1/9>. In congruence with the model, but from the System 1 and 2 perspectives GOLECKI, Mariusz Jerzy. Judicial Reasoning from the Perspective of Behavioural Law and Economics. In: BENCZE, Mátyás; YEIN NG, Gar. *How To Measure the Quality of Judicial Reasoning*. Cham: Springer, 2018. p. 57-76. p. 67: Judges firstly make their initial, intuitive decision under System 1 thinking, and then control it in some cases where it is possible, contemplating the result of the first stage and comparing it with the results of the deliberative and conscious cognitive processes of System 2. Decisions are thus firstly based on intuition and then, in some cases, corrected by the operation of cognitive, rational process based on valid reasons rather than hints or gut feelings.

<sup>72</sup> GUTHRIE, Chris; RACHLINSKI, Jeffrey J.; WISTRICH, Andrew J. Blinking on the Bench: How Judges Decide Cases. *Cornell Law Review*, Ithaca, vol. 93, n. 1, p. 1-44, Nov. 2007. p. 3. Available at: <https://scholarship.law.cornell.edu/clr/vol93/iss1/9>.

<sup>73</sup> NUGENT, Donald C. Judicial Bias, *Cleveland State Law Review*, Cleveland, vol. 42, n. 1, p. 1-60, 1994. p. 4. Available at: <https://engagedscholarship.csuohio.edu/clevstlrev/vol42/iss1/10>.

<sup>74</sup> GOODMAN, Andrew. *How Judges Decide Cases – Reading, Writing and Analysing Judgments*. 2 ed. London: Wildy, Simmonds & Hill Publishing, 2018. p. 30.

<sup>75</sup> SHILLER, Robert J. *Irrational Exuberance*. 3 ed. Princeton: Princeton University Press, 2016.

<sup>76</sup> JOLLS, Christine; SUNSTEIN, Cass R.; THALER, Richard H. A Behavioral Approach to Law and Economics. *Stanford Law Review*, Stanford, vol. 50, n. 5, p. 1471-1550. May. 1998. p. 1545 Available at: <https://doi.org/10.2307/1229304>.



theory has been customary since the acclaimed book “Thinking, Fast and Slow” which Kahneman describes as follows: “System 1 operates automatically and quickly, with little or no effort and no sense of voluntary control. System 2 allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration.”<sup>77</sup> They are also called *intuitive* and *deliberative* thought. The former would have a dominant performance in the discovery phase, while the latter would do the same in the justification context.

Our brain uses heuristics<sup>78</sup> as shortcuts to solve problems in the decision-making process. Heuristics are more related, but not exclusively subscribe, to system 1. We can mention the most important of them: anchoring<sup>79</sup> and adjusting<sup>80</sup>, availability<sup>81</sup>, framing effect<sup>82</sup>, and representativeness.<sup>83</sup> In a research based on surveys solved by 167 judges, it was shown that heuristics “can produce systematic errors in judgment”<sup>84</sup> “under some circumstances simply because of how they -like all human beings- think.”<sup>85</sup> In conclusion, “rational decisions not influenced by intuitive processes and emotions do not exist.”<sup>86</sup>

<sup>77</sup> KAHNEMAN, Daniel. **Thinking, Fast and Slow**. New York: Farrar, Straus and Giroux, 2011.

<sup>78</sup> For a more exhaustive definition of heuristic: “are satisficing cognitive procedures that can be expressed as rules one reasons in accordance with; they require little cognitive resources for their recruitment and execution; they operate by exploiting concepts.” In: CHOW, Sheldon J. Many Meanings of ‘Heuristic’. **The British Journal for the Philosophy of Science**, [s.l.], vol. 66, n. 4, p. 977-1016. Oct. 2014. p. 1010. Available at: <https://doi.org/10.1093/bjps/axu028>.

<sup>79</sup> It occurs when people consider a particular value for an unknown quantity before estimating that quantity and occurs by a priming effect, as an automatic manifestation of System 1. KAHNEMAN, Daniel. **Thinking, Fast and Slow**. New York: Farrar, Straus and Giroux, 2011.

<sup>80</sup> Is a deliberate attempt to find reasons to move away from the anchor. It is linked to system 2, especially when “insufficient” adjustment. KAHNEMAN, Daniel. **Thinking, Fast and Slow**. New York: Farrar, Straus and Giroux, 2011.

<sup>81</sup> The process of judging frequency by “the ease with which instances come to mind. KAHNEMAN, Daniel. **Thinking, Fast and Slow**. New York: Farrar, Straus and Giroux, 2011.

<sup>82</sup> Our decisions are influenced by the way information is presented. Equivalent information can be more or less attractive depending on what features are highlighted. *Why do our decisions depend on how options are presented to us?* THE DECISION LAB <https://thedecisionlab.com/biases/framing-effect/> (Last visited Dec. 23, 2021).

<sup>83</sup> It is associated with the similarity of the description to the stereotypes. Although it is common, prediction by representativeness is not statistically optimal. KAHNEMAN, Daniel. **Thinking, Fast and Slow**. New York: Farrar, Straus and Giroux, 2011.

<sup>84</sup> GUTHRIE, Chris; RACHLINSKI, Jeffrey J.; WISTRICH, Andrew J. Inside the Judicial Mind. **Cornell Law Review**, Ithaca, vol. 86, n. 4, p. 777-830. May. 2001. p. 821. Available at: <https://scholarship.law.cornell.edu/clr/vol86/iss4/2>.

<sup>85</sup> GUTHRIE, Chris; RACHLINSKI, Jeffrey J.; WISTRICH, Andrew J. Inside the Judicial Mind. **Cornell Law Review**, Ithaca, vol. 86, n. 4, p. 777-830. May. 2001. p. 829. Available at: <https://scholarship.law.cornell.edu/clr/vol86/iss4/2>.

<sup>86</sup> GOLECKI, Mariusz Jerzy. Judicial Reasoning from the Perspective of Behavioural Law and Economics. In: BENCZE, Mátýás; YEIN NG, Gar. **How To Measure the Quality of Judicial Reasoning**. Cham: Springer, 2018. p. 57-76. p. 67.

Regarding emotion, “it has been suggested that [it] should be treated as a special kind of heuristic based on the operation of the experiential [system 1].”<sup>87</sup> And although it has been treated mainly as psychobiological and individual, it is the truth that lately has also been recognized “as an outcome of social interactions, embedded in interpersonal and interprofessional relations.”<sup>88</sup> Emotions play an enormous role in decision-making, that’s why only by accepting and expecting that hypothesis is “that it can be actively evaluated, and rejected if inappropriate.”<sup>89</sup> Since the Gage case,<sup>90</sup> “research has further demonstrated that within the frontal lobe, the ventromedial and dorsolateral regions . . . have particular importance in decision-making processes.”<sup>91</sup> As the *Ventromedial cortex*<sup>92</sup> has been associated with ‘non-conscious’ decision-making, that is, the generation of choices and decisions based on ‘hunches’ and ‘gut’ feelings and also to the capacity to process information and make decisions quickly and apparently ‘automatically’; and the use of experience,<sup>93</sup> it would suggest consistency with the system one functioning.

<sup>87</sup> GOLECKI, Mariusz Jerzy. Judicial Reasoning from the Perspective of Behavioural Law and Economics. In: BENECZE, Mátyás; YEIN NG, Gar. **How To Measure the Quality of Judicial Reasoning**. Cham: Springer, 2018. p. 57-76. p. 66. As Kahneman asserts: “The affect heuristics is an instance of substitution, in which the answer to an easy question (How do I feel about it?) serves as an answer to a much harder question (What do I think about it)” KAHNEMAN, Daniel. **Thinking, Fast and Slow**. New York: Farrar, Straus and Giroux, 2011.

<sup>88</sup> ROACH ANLEU, Sharyn; MACK, Kathy. **Judging and Emotion A Socio-Legal Analysis**. New York: Routledge, 2021. p. 198.

<sup>89</sup> BENNETT, Hayley; BROE, G.A. Judicial Decision-Making and Neurobiology: The Role of Emotion and The Ventromedial Cortex in Deliberation and Reasoning. **Australian Journal of Forensic Sciences**, London, vol. 42, n. 1, p. 11-18, Mar. 2010. p. 17. Available at: <https://doi.org/10.1080/00450610903391457>. In recognizing emotion and managing in the judicial decision-making process, See: MARONEY, Terry A. Emotional Regulation and Judicial Behavior. **California Law Review**, Berkeley, vol. 99, n. 6, p. 1485-1556, Dec. 2011.

<sup>90</sup> Phineas Gage was a railroad construction worker, and while working, an explosion caused a one-meter iron to cross his skull and pass through the anterior part of the frontal lobe. His doctor, John Harlow, noted that though Gage’s cognitive and motor functions were intact (e.g., speech, general knowledge, memory), discrete areas of thinking and behavior were impaired: judgment, reason, and regulation of behavior. BENNETT, Hayley; BROE, G.A. Judicial Decision-Making and Neurobiology: The Role of Emotion and The Ventromedial Cortex in Deliberation and Reasoning. **Australian Journal of Forensic Sciences**, London, vol. 42, n. 1, p. 11-18, Mar. 2010. p. 13. Available at: <https://doi.org/10.1080/00450610903391457>. The case was read before the Massachusetts Medical Society by his physician in 1868. HARLOW, John Martyn. Recovery from the Passage of an Iron Bar Through the Head. **History of Psychiatry**, [s.l.], vol. 4, n. 14, p. 274-281, Jan. 1993. Available at: 10.1177/0957154X9300401407.

<sup>91</sup> BENNETT, Hayley; BROE, G.A. Judicial Decision-Making and Neurobiology: The Role of Emotion and The Ventromedial Cortex in Deliberation and Reasoning. **Australian Journal of Forensic Sciences**, London, vol. 42, n. 1, p. 11-18, Mar. 2010. p. 13. Available at: <https://doi.org/10.1080/00450610903391457>

<sup>92</sup> Human brain is divided into parts, which include the frontal, temporal, parietal, and occipital lobes. The frontal lobe is again subdivided in the orbitobasal cortex and the dorsolateral region. The ventromedial cortex is the smaller subsection of the orbitobasal cortex that is closer to the midline. BENNETT, Hayley; BROE, G.A. Judicial Decision-Making and Neurobiology: The Role of Emotion and The Ventromedial Cortex in Deliberation and Reasoning. **Australian Journal of Forensic Sciences**, London, vol. 42, n. 1, p. 11-18, Mar. 2010. p. 13. Available at: <https://doi.org/10.1080/00450610903391457>.

<sup>93</sup> BENNETT, Hayley; BROE, G.A. Judicial Decision-Making and Neurobiology: The Role of Emotion and The Ventromedial Cortex in Deliberation and Reasoning. **Australian Journal of Forensic Sciences**, London, vol. 42, n. 1, p. 11-18, Mar. 2010. p. 13-14. Available at: <https://doi.org/10.1080/00450610903391457>.

In comparison, the *Dorsolateral cortex* works in typically conscious processes providing “the primary neural substrate for attention and ‘working memory’<sup>94</sup>, which grants assessing information. And as long as “Dorsolateral function is more classically related to traditional concepts of deliberation and judgment”<sup>95</sup>, it would suggest consistency with the system two functioning.

Several other kinds of factors, both exogenous and endogenous, influence the judicial decision-making process. One exciting research published in 2011 showed *Extraneous factors* altering the outcome of courts. In this case, it could be inferred that *fatigue* (or hunger) is another element in the mental process of deciding. Based on 1,112 judicial parole rulings made by eight experienced Jewish-Israeli judges, researchers found “that the likelihood of a favorable ruling is greater at the very beginning of the workday or after a food break than later in the sequence of cases.”<sup>96</sup> There is a substantial empirical research field underexplored, especially in South America, regarding circumstances affecting judicial decisions.

As a final remark, it is meaningful to present the recent approach by which understanding the error in judgment is not enough to recognize bias but also noise. So, what is noise? It is “the unwanted divergence of judgements, the unreliability of the measuring instrument we apply to reality.”<sup>97</sup> This type of unpredictable error cannot easily be seen or explained; that’s the reason the authors propose “strategies for noise reduction . . . [as] *decision hygiene*”<sup>98</sup> techniques. The writers develop “sequencing information, structuring the decision into independent assessments, using a common frame of reference grounded in the outside view, and aggregating the independent judgments of multiple individuals”<sup>99</sup> among them. We urge legal scholars to carefully acknowledge that our understanding of judicial decisions requires empirical and interdisciplinary approaches. Pitifully, we lack them, and the general rule continues to be a merely normative and legalistic insight.

<sup>94</sup> BENNETT, Hayley; BROE, G.A. Judicial Decision-Making and Neurobiology: The Role of Emotion and The Ventromedial Cortex in Deliberation and Reasoning. **Australian Journal of Forensic Sciences**, London, vol. 42, n. 1, p. 11-18, Mar. 2010. p. 14. Available at: <https://doi.org/10.1080/00450610903391457>.

<sup>95</sup> BENNETT, Hayley; BROE, G.A. Judicial Decision-Making and Neurobiology: The Role of Emotion and The Ventromedial Cortex in Deliberation and Reasoning. **Australian Journal of Forensic Sciences**, London, vol. 42, n. 1, p. 11-18, Mar. 2010. p. 15. Available at: <https://doi.org/10.1080/00450610903391457>.

<sup>96</sup> DANZIGER, Shai; LEVAV, Jonathan; AVNAIM-PESSO. Extraneous factors in judicial decisions. **Proceedings of the National Academy of Sciences**, Washington D.C., vol. 108, n. 17, p. 6889-6892, Apr. 2011. Available at: <https://doi.org/10.1073/pnas.1018033108>.

<sup>97</sup> KAHNEMAN, Daniel; SIBONY, Olivier; SUNSTEIN, Cass R. **Noise - A Flaw in Human Judgment**. New York: Little, Brown Spark, 2021. p. 363.

<sup>98</sup> KAHNEMAN, Daniel; SIBONY, Olivier; SUNSTEIN, Cass R. **Noise - A Flaw in Human Judgment**. New York: Little, Brown Spark, 2021. p. 323.

<sup>99</sup> KAHNEMAN, Daniel; SIBONY, Olivier; SUNSTEIN, Cass R. **Noise - A Flaw in Human Judgment**. New York: Little, Brown Spark, 2021. p. 323.

### 1.3. Judicial Constitutional Reasoning

We have claimed that law has its kind of reasoning without ignoring its reliance on the general reasoning language. If we have already addressed judicial rationale, why do we aim to approach the “constitutional reasoning?” The argument is similar to the one made before to support our decision: it has distinctive features which differ from the general judicial discourse.

Constitutional interpretation “should be understood as just a specific case of statutory interpretation.”<sup>100</sup> Nevertheless, as the law has an open texture quality that allows discretion, in constitutional grade, the abstraction of terms is even greater than at the statutory level, which could arguably imply further discretion. Following that logic, one must wonder what to understand by interpretation and its properties when used in constitutional adjudication. A broad understanding of interpretation implies the way for “determining the content of a normative text,”<sup>101</sup> and debates about determining that content, according to Sunstein, “must be resolved by asking what approach to interpretation will make for the best system of law, all things considered.”<sup>102</sup> Notwithstanding, that query is exceedingly difficult to answer, as he recognizes. Differences between statutory and constitutional reasoning can be depicted from Hart’s beliefs about discretion:

*When a statute leaves it open to an adjudicator to determine what is “fair,” “safe,” “reasonable,” and so on, it confers a certain discretion - a choice undetermined by law but open to reasoned justification. Yet, in his new analysis of constitutional provisions referring to “due process” and “freedom of speech,” among others, he imputes the chosen interpretation of those values back into the law itself, rather than, as his statutory case might suggest, to the discretionary power of the court.<sup>103</sup>*

Wróblewski affirms that the “interpretative process is not cognition, it is a creation of norms according to the interpreter’s views of what ought to be done. The result of such interpretative process is not a proposition; it is a norm.”<sup>104</sup> By contrast, Ja-

<sup>100</sup> JAKAB, András. **European Constitutional Language**. Cambridge: Cambridge University Press, 2016. p. 20.

<sup>101</sup> JAKAB, András. Judicial Reasoning in Constitutional Courts: A European Perspective. **German Law Journal**, Frankfurt, vol. 14, n. 8, p. 1215-1275, Aug. 2013. p. 1219. Available at: <https://doi:10.1017/S207183220000225X>

<sup>102</sup> SUNSTEIN, Cass R. **Legal Reasoning and Political Conflict**. 2 ed., Oxford: Oxford University Press, 2018. p. 186.

<sup>103</sup> GREEN, Leslie. The Concept of Law Revisited. **Michigan Law Review**, [s.l.], vol. 94, n. 6, p. 1687-1717, 1996. p. 1706. Available at: <https://repository.law.umich.edu/mlr/vol94/iss6/15>. We do not share this view because we depart from the fact that law is open-textured; therefore, the bigger its indeterminacy as in constitutional provisions, the greater the discretion exercised by judges.

<sup>104</sup> WRÓBLEWSKI, Jerzy. Normativity of Legal Science. **Logique et Analyse**, Leuven, vol. 9, n. 33, p. 60-77, 1966. p. 71.

kab contends that “what is traditionally called ‘a method of interpretation’ is a type of argument used to interpret a text.”<sup>105</sup>

To understand constitutional reasoning, we will briefly refer to two approaches. Firstly, Dyevre<sup>106</sup> classifies it into four types: (1) the analytical-conceptual; (2) the decision-making; (3) the political communication; and (4) the normative approach. The first focuses on the context of justification and the reasons provided for those who invoke constitutional discourse in support or against the exercise of public authority. The second one considers judicial opinions as policy instruments; therefore, it tries to investigate the factors such as attitudes, collegial dynamics, and external influences that modulate the content of these policies. The third one is subdivided into (3.1.) Constitutional argumentation as *audience-tailored communication* and (3.2.) Constitutional *rhetoric*.

The former (3.1.) stresses that public officials’ exercise of coercive power is legitimate to the extent that its addressees accept it as appropriate. That’s why the job of constitutional courts should be seen by society just as the “application of the law.” On the other hand (3.2.), constitutional rhetoric focuses on symbolic and emotionally-laden language- recurring to terms with a positive connotation such as “fundamental rights, human dignity, and the rule of law” or the resource of “cherry-picking” cases when justifying a particular outcome the court want to reach instead of proceeding through analytical formulation.

The normative approach gathers four theories by which scholars prescribe how constitutional reasoning might be done: (4.1.)<sup>107</sup> Some authors consider that judicial review should have just an editorial function because the content of rights must primarily fall on the people’s elected representatives, it is to say, in the legislature.<sup>108</sup> (4.2.) revolves around using moral arguments as a basis for constitutional reasoning, and (4.3.)<sup>109</sup> concept considers that although constitutional judges are not apolitical, they should avoid political and ideological terms to maintain the appearance of being distant from them. Instead, they need to use technical legal jargon in their opinions. Finally, (4.4.)<sup>110</sup> recognizes courts’ increasing use of tests like balancing, proportionality, and reasonableness worldwide, leading to less rigor in judicial justification due to the lack of rational reconstruction.

<sup>105</sup> JAKAB, Andrés. Judicial Reasoning in Constitutional Courts: A European Perspective. **German Law Journal**, Frankfurt, vol. 14, n. 8, p. 1215-1275, Aug. 2013. p. 1219. Available at: <https://doi:10.1017/S207183220000225X>

<sup>106</sup> DYEYRE, Arthur; JAKAB, Andrés. Foreword: Understanding Constitutional Reasoning. **German Law Journal**, Frankfurt, vol. 14, num. 8, p. 983-1015, 2013. p. 987-1015. Available at: <https://doi:10.1017/S2071832200002133>.

<sup>107</sup> Constitutional reasoning and institutional arrangements.

<sup>108</sup> Bellamy highlight this property of constitutional reasoning. BELLAMY, Richard. Democracy as Public Law: The Case of Rights. **German Law Journal**, Frankfurt, vol. 14, n. 8, p. 1017-1037, Aug. 2013. p. 1017. Available at: <https://doi.org/10.1017/S2071832200002145>

<sup>109</sup> Judicial candor vs. Judicial concealment.

<sup>110</sup> Proportionality and other means-end tests.

Secondly, Posner describes nine theories<sup>111</sup> of judicial behavior, which would ultimately explain judges' reasoning. The first is a pure *attitudinal* view that understands judicial decisions exclusively grounded on judges' political preferences. Then he describes the *strategic*, *sociological*, and *psychological* approaches that overlap with the *economic* approach. Those perspectives claim that the decision-making process relies on the anticipation of reactions of other actors such as legislators, the public, additional sitting judges, and other factors such as the panel composition and the unconscious processes of the human mind.

The *organizational* perspective departs from the principal-agent distinction asserting that judges are motivated, among others, by precedents. The *pragmatic* point of view considers the decision regarding its practical consequences rather than on the deduction of premises. In that sense, it is similar to the strategic theory. The *phenomenological* prospect is considered a bridge between the pragmatic and legal views, studying first-person consciousness. It is to say how it feels to make a judicial decision. At last, the *legalist* theory remarks that judicial decisions are determined by "the law," conceived as a body of preexisting rules found in canonical legal materials such as constitutional and statutory texts. Judgments are, from this position, the product of syllogism and come complete with a set of rules of interpretation.

Posner thinks that "legalists have too narrow a sense of what the law (or doing law) is and that attitudinalists exaggerate the influence of politics, not only partisan politics but also ideological politics, on judicial behavior."<sup>112</sup> And remarks that "even this most political of courts, in its most political domain, that of constitutional law, is, to a degree, legalistic."<sup>113</sup> So, if the nature of a court that deals with constitutional issues is inescapably political, "we may at least hope that it might be restrained in the exercise of its power, recognizing the subjective character, the insecure foundations, of its constitutional jurisprudence."<sup>114</sup> In the end, Posner concedes that judging is political and influenced by preconceptions and considers judges' attributes (such as background, personality traits, and professional and life experiences) in the judicial decision-making process. Besides, it is impersonal and nonpolitical as well in the sense that many judicial

<sup>111</sup> Attitudinal, strategic, sociological, psychological, economic, organizational, pragmatic, phenomenological, and legalist. Then he introduces the labor-market participant theory as a global perspective of judicial behavior in POSNER, Richard A. **How Judges Think**. Cambridge: Harvard University Press, 2010. p. 19-77.

<sup>112</sup> POSNER, Richard A. **How Judges Think**. Cambridge: Harvard University Press, 2010. p. 47.

<sup>113</sup> POSNER, Richard A. **How Judges Think**. Cambridge: Harvard University Press, 2010. p. 56.

<sup>114</sup> POSNER, Richard A. **How Judges Think**. Cambridge: Harvard University Press, 2010. p. 323. In the same vein, Hart Ely affirms: "Judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." In HART ELY, John. **Democracy and Distrust: A Theory of Judicial Review**. Cambridge: Harvard University Press, 1980.



decisions are the product of a neutral application of rules not made up for the occasion to facts reasonably found.<sup>115</sup>

Additionally to these theories, some features of judicial decision-making are exclusively framed in domains of constitutional reasoning. One of the most widespread<sup>116</sup> practices is the proportionality test. It is “the principal element of a culture of justification, in which the court is not concerned primarily with delimiting governmental power, but with subjecting it to rationality and justification.”<sup>117</sup> Through it, judges “exercise dominance over policymaking and constitutional development.”<sup>118</sup> Nevertheless, the test has faced many objections, like in the balancing stage in which Alexy’s theory assumes “that principles can be assigned values and that we can compare balancing outcomes on this basis.”<sup>119</sup> This assignation of values can be seen as a sophisticated way of hiding judges’ personal preferences behind an apparent objective method. That’s why some have claimed that “the success of proportionality may be due to its being an empty concept which allows the courts to do whatever they want.”<sup>120</sup>

Another feature that must have our attention regarding constitutional reasoning is the relationship between constitutional courts and political branches of government, namely, legislature and executive. Courts anticipate the consequences of their decisions, and in the same way, political actors anticipate judicial decision-making. That fact means that, on the one hand, “Courts do not only nullify political decisions, but they can also request (political) actions by making directives”<sup>121</sup> enabling the judicial policymaking that has had much criticism<sup>122</sup>. Although “To understand and assess judicial policymaking, however, one must look closely at how judges reach their decisions

<sup>115</sup> But there are often no rules at all to be applied in constitutional matters. Instead, abstract terms are commonly used to solve judicial review cases: “democracy,” “interpretation,” “separation of powers,” “objectivity,” “reasonableness,” and (of course) “justice,” as Posner notes in a critic made to Aharon Barak in POSNER, Richard A. **How Judges Think**. Cambridge: Harvard University Press, 2010. p. 363-368.

<sup>116</sup> As Groppi and Ponthoreau conclude: “proportionality stands out as fertile ground for the flourishing of citations of foreign precedents” in GROPPi, Tania; PONTTHOREAU, Marie-Claire. **The Use of Foreign Precedents by Constitutional Judges**. Oxford: Hart Publishing, 2013. p. 417.

<sup>117</sup> COHEN-ELIYA, Moshe; PORAT, Iddo. Proportionality and The Culture of Justification. **American Journal of Comparative Law**, [s.l.], vol. 59, n. 2, p. 463-490, Spr. 2011. p. 490. Available at: <https://doi.org/10.5131/AJCL.2010.0018>.

<sup>118</sup> SWEET, Alec Stone; MATHEWS, Jud. Proportionality Balancing and Global Constitutionalism. **Columbia Journal of Transnational Law**, [s.l.], vol. 47, n. 1, p. 72-164, 2008. p. 72.

<sup>119</sup> DYEYRE, Arthur; JAKAB, András. Foreword: Understanding Constitutional Reasoning. **German Law Journal**, Frankfurt, vol. 14, num. 8, p. 983-1015, 2013. p. 1014. Available at: <https://doi:10.1017/S2071832200002133>.

<sup>120</sup> COHEN-ELIYA, Moshe; PORAT, Iddo. Proportionality and The Culture of Justification. **American Journal of Comparative Law**, [s.l.], vol. 59, n. 2, p. 463-490, Spr. 2011. p. 466. Available at: <https://doi.org/10.5131/AJCL.2010.0018>.

<sup>121</sup> ENGST, Benjamin G. **The Two Faces of Judicial Power- Dynamics of Judicial-Political Bargaining**. Cham: Palgrave Macmillan, 2021. p. 193.

<sup>122</sup> See TARR, G. Alan. **Judicial Process and Judicial Policymaking**. 7 ed. New York: Routledge, Taylor & Francis Group, 2019.

and the effects their decisions actually have.”<sup>123</sup> Some features depicted in this paper can contribute to achieving this aim. On the other hand, “the mere knowledge that courts can review allows policies already constraints policymakers.”<sup>124</sup>

In that politics-judiciary game<sup>125</sup>, constitutional courts sometimes opt to make vague decisions that imply a greater degree of non-compliance. But “Why would judges craft opinions”<sup>126</sup> with that risk? Vangberg and Staton argue that

*Opinion vagueness can reflect efforts to resolve core tradeoffs associated with judicial policymaking that bear some resemblance to standard accounts of political delegation. Vagueness offers judges the ability to manage their uncertainty over policy outcomes and to hide likely defiance from public view. At the same time, vagueness removes a central source of pressure for compliance that judges can place on other policy makers. Using a game-theoretic model, we identify conditions under which judges use vagueness precisely as legislatures use statutory discretion.*<sup>127</sup>

They also stress that courts must balance three concerns: managing policy uncertainty, increasing pressure for compliance, and masking potential resistance to their decisions. Their model includes these variables to explain vagueness in judicial decisions and opinions.

## 2. CONCLUSION

Constitutional courts’ legitimacy rests on the sense that their decisions are based on reasons that can be universally accepted. Nonetheless, this aspiration is unrealistic, especially in judicial review matters, because this kind of court is political to some extent. The assumption that justices merely “apply the law” serves as a mask and a shield. A judicial decision honestly based on political motivation would lack broader acceptability by the people. It would only reach its political aim as far as it is perceived as value-neutral.

<sup>123</sup> TARR, G. Alan. **Judicial Process and Judicial Policymaking**. 7 ed. New York: Routledge, Taylor & Francis Group, 2019. p. 297.

<sup>124</sup> ENGST, Benjamin G. **The Two Faces of Judicial Power-** Dynamics of Judicial-Political Bargaining. Cham: Palgrave Macmillan, 2021. p. 193.

<sup>125</sup> Engst designed a game-theoretical model that involves courts and legislature and was tested in the German Federal Constitutional Court (GFCC) setting.

<sup>126</sup> STATON, Jeffrey K.; VANBERG, Georg. The Value of Vagueness: Delegation, Defiance, and Judicial Opinions. **American Journal of Political Science**, Hanover, vol. 52, n. 3, p. 504-519, Jul. 2008. p. 504. Available at: <https://doi.org/10.1111/j.1540-5907.2008.00326.x>.

<sup>127</sup> STATON, Jeffrey K.; VANBERG, Georg. The Value of Vagueness: Delegation, Defiance, and Judicial Opinions. **American Journal of Political Science**, Hanover, vol. 52, n. 3, p. 504-519, Jul. 2008. p. 504. Available at: <https://doi.org/10.1111/j.1540-5907.2008.00326.x>.

The law experiences attributes of the language: ambiguity and vagueness. That is why judicial discretion is unavoidable, even in cases with “clear” rules. However, admitting this fact is risky because it could be seen as an invasion of the legislature’s powers. In adjudication matters, judges need to interpret when there are doubts about understanding the language in a particular context. As in constitutional domains, the abstraction of terms is even greater than at the statutory level; it would arguably imply further discretion. Then, constitutional reasoning developed by Constitutional Courts is characterized by distinctive features such as the proportionality test and the relationship between the courts and the political branches of government.

In the adjudication process, two phases are involved: discovery and justification. The first refers to how a judge reaches the outcome, while the second indicates how she publicly justifies it. However, a detailed distinction could be undesirable and inaccurate because the processes are interdependent, as evidence has shown. Judges approach the result intuitively but sometimes override their intuition with deliberation. Therefore, judicial decisions can be predominately deliberative rather than intuitive, recognizing the importance of deliberation in constraining the inevitable, but often undesirable, influence of intuition.

Judges, like everyone else, are affected by biases related to our unconscious minds that unknowingly inform our opinions. Additionally, rationality is also limited by factors like willpower, self-interest, and heuristics. Our brain uses the last as shortcuts to solve problems in the decision-making process. Heuristics are more related, but not exclusively subscribed, to system 1 and the functioning of the Ventromedial cortex. In contrast, system 2 is related to the Dorsolateral cortex function, with a relevant performance in the justification context. As a result, decisions are always influenced by emotions and intuitive processes.

In this paper, we reported some limitations and factors influencing the decision-making process that must be considered in a tool designed to assess judicial reasoning in constitutional decision-making courts in South America. This research field can be developed through further empirical research, enabling a more comprehensive and accurate description of how judges make decisions. Finally, we strongly recommend that scholars not rely solely on normative theories when studying judicial decision-making but instead prioritize practical perspectives.

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