

Between Creativity and Arbitrariness: The Search for Legitimacy and Rationality in Constitutional Reasoning

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This article focuses on the necessary interaction between law and ethics in interpretation of norms, arguing that the attitude of the judge, legislative impact assessment and the procedure to reach a decision, more than its content, should be taken into consideration to ensure (formal and material) legitimacy of decisions. The proposal to reconsider the problem of rationality and legitimacy of judicial decisions from the perspective of philosophical hermeneutics is very useful for a deeper understanding of the creative power of the judiciary, especially because it is impossible to guarantee the correct answer, which does not allow the interpreter to give any meaning to norms. It inaugurates a new approach, which prioritises questioning about the very phenomenon of hermeneutics (no longer limited to the study of suitable methods to discover the true meaning of the norm). Thus, this study seeks to understand the impact of revelations brought by philosophical hermeneutics to control creativity in Law, an issue chosen for debate by representing one of the great contemporary hermeneutical challenges. Considering the juspolitical function of supreme courts and the lessons of philosophical hermeneutics, I determine the role of hermeneutics in controlling judges' creativity and assuring that decisions are ethically grounded, arguably legitimate and rationally appropriate with the principle of separation of powers. Furthermore, I associate, in a democratic state, enforcement of fundamental rights with the rule that prohibits courts from acting as lawmakers.

Keywords: *Constitutional Reasoning; Hermeneutics; Ontological-linguistic paradigm.*

Introduction

The debates about decisionism and existence of the correct answer are two of the most important in the general theory of law and have received several contributions in recent years.¹ Intending to overcome legal positivism, many scholars have urged the use of interpretation and the linguistic-ontological paradigm to solve the issue.

In this article, focusing on the necessary interaction between law and ethics in interpreting norms, I argue that the attitude of the judge, the legislative impact assessment and the procedure to reach a decision, more than its content, should be taken into consideration to ensure (formal and material) legitimacy to decisions. The proposal to reconsider the problem of rationality and legitimacy of judicial decisions from the perspective of philosophical

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¹ See Dworkin (1966) and Alexy (1998).

hermeneutics is very useful for a deeper understanding of the phenomenon of the creative power of the judiciary, especially because it is impossible to guarantee the correct answer, so that interpreter is not allowed to give any meaning to norms. It inaugurates a new approach, which prioritises questioning about the very phenomenon of hermeneutics (no longer limited to the study of suitable methods to discover the true meaning of the norm). Thus, this study seeks to understand the impact of revelations brought by philosophical hermeneutics to control creativity in law, an issue here chosen for debate because it is one of the great contemporary hermeneutical challenges. Considering the *juspolitical* function of supreme courts and the lessons of philosophical hermeneutics, I determine the role of hermeneutics in controlling judges' creativity and assuring that decisions are ethically grounded, arguably legitimate and rationally appropriate with the principle of separation of powers. Furthermore, I associate, in the democratic state setting, enforcement of fundamental rights with the rule that prohibits courts from acting as lawmakers.

Demystifying the Concept of Law

Legal scholars have devoted enough attention to legal decision. Especially when discussing how to overcome legal positivism, legal theorists have focused the matter of interpretation and precedents. However, it is not difficult to observe the absence of critical elements to understand the problem.

Constitutional Hermeneutics and the Theory of Precedents have been unduly criticised because, although they offer the most accurate description of the understanding process of Constitution and statutes, they have assumed many different approaches in Common Law and Civil Law countries.

When we talk about Hermeneutics, what first comes to mind is, in Common Law, the debate between originalism and living constitution, and, in Civil Law, the methods usually used to interpret the legal diplomas. These debates seem historical dichotomies that are always present and reduce interpreters' perspectives to the old issue of *voluntas legis* versus *legislatoris voluntas*.

The debates reached higher complexity levels, incorporating the hermeneutical turn and argumentative theory achievements, bringing a new approach that is no more limited to methods, but to the foundation and legitimacy of Law itself, as legal reasoning assumed different characteristics according to historical times.

Before the advent of the Civil Code of Napoleon, the idea that the judicial function could be understood as a projection of the mathematic reason and deductive logic prevailed. The judge was not required to create the Law, but only to enforce laws already enacted by legislative. Laurent affirmed that “[t]he codes will leave nothing to the interpreter; he/she has no function making the Law: the Law is done. Uncertainty does not exist, since the Law is written in authentic texts. The codes perform this task only if authors and

judges accept their new positions [...] I would say that they must resign themselves to it.”

Even today, MacCormick allege that legal reasoning follows the logical-deductive model, except in hard cases. In *Legal Reasoning and Legal Theory*, he aims to construct a descriptive and normative theory of legal reasoning, compatible with Hart's legal positivism. He adopts a method of cases' rational reconstruction, since the analysis of courts' decisions indicate the focus of his theory: the study of judicial justification process.² The Scottish professor maintains that logic should be applied to Law through a deductive model - more specifically, the “mixed hypothetical syllogism”. Legal reasoning assumes a logical-deductive character, because a judicial decision able to subsume the variables of the case in the legal norm, deriving as conclusion the normative consequence expected by the norm, is justified by Rule of Law. Furthermore, judges who structure their decisions deductively contribute to the achievement of legal certainty and predictability, due to the use of predetermined legal rules as reasons to decide (major premise of the argument). Additionally, the usage of normative-legal justification enables a reasonable anticipation of jurisdictional consequence.³

Criticisms of the syllogistic model of judicial reasoning were many, per-through the doctrine of François Geny, Kantorowicz, Erlich, the realism of Jerome Frank, the perspective of Holmes and, finally, Perelman.

Nevertheless, most of jurists allude to the creative role of judges' in applying the laws. They create the law to particular historical situation and place. *“The sentence must be understood as an axiological concrete experience, not only a logical act reducible to a syllogism.”*⁴

On the other hand, Kaufmann focus on the essentially analogical nature of legal reasoning. The analogy, he said, has not only the role to supplement gaps, but is present throughout the legal process laws' application. Law only reaches concretion in a decision issued to a specific case, given a historical moment. Thus, the laws themselves are not still the Law completely realised. It is a possibility, a criterion of judgment emanating from the legislature, which will become legal when effectively applied to the facts, consolidating the holding. Therefore, that are three main stages in the “effectiveness” of Law: the first covers general-abstract legal principles (legal idea); the second, the positive-formal laws, valid in a certain period (juridical proposition); and, finally, the

² Maccormick (1978) at 12.

³ Maccormick (1978) at 223. In this sense, Lacerda (2006) asserts that: *“Embora variadas as posições doutrinárias, pode-se compreendê-las caso se pense que os juristas, não obstante recusarem validade à concepção que vê o raciocínio judicial puramente como silogismos e o juiz como mero realizador desse raciocínio, continuam a dar algum crédito à dedução no processo de concretização jurídico, embora sobre pontos de vista diferentes: ou concebem que a dedução tem lugar no raciocínio do juiz sempre, embora em alguns casos mais difíceis ela tem seus limites, ou crêem que, embora não desempenhe nenhum papel fundamental no raciocínio jurídico propriamente, a dedução tem importância quando o juiz constrói argumentativamente seu raciocínio, sua conclusão, através da redação da sentença. Assim, embora não tenha utilidade enquanto instrumento de raciocínio, a dedução possui papel importante na fundamentação ou justificação das decisões judiciais.”*

⁴ Reale (2001).

concrete right, historically situated (legal decision). The logical sequence would be, consequently, the following: legal idea – juridical proposition – legal decision. Thus, one cannot get, through syllogisms logically determined, the Law. The legal method is not, according to Kaufmann, logical-deductive. Legal reasoning is analogical: there is only real Law when the judge, deciding, verifies similarities between the abstract and general norms and the concrete case, putting in correspondence the norm and the fact. In other words, “[t]he order - also the legal order – only exist in analogy of being, which is a midpoint between identity and contradiction, between equality and difference.”⁵

Therefore, not all-legal researchers present what is conventionally called “subsumption of facts to the rule” in a perfect syllogism, but rather as an analogy structure. The ruling is not possible by a simple syllogism. The interpretation and application of Law does not derive from a logical-deductive syllogism, but rather, from analogy, “[p]orque cuando se dice que la interpretación llega hasta el “sentido posible de la palabra”, se está desde ya em el centro de la analogía, porque este “sentido posible de la palabra” no puede ser unívoco ni equivoco, sino solamente análogo.”⁶

The analogical structure of legal reasoning is not, ultimately, a timeless law enforcement, but a historical attempt to resolve the conflict with justice, according to the means and procedures available.

*“El derecho vive e crece solo a causa de esta analogicidad, de esta “polaridad” entre la situación de la vida y el presupuesto normativo. Por ello, el derecho tiene ontológicamente la estructura de la historiedad.”*⁷

Therefore, the laws, by containing a generic and abstract prediction, are always marked by certain indeterminacy, which only ceases to exist at the time a case is decided, i.e., when we have the holding. A disagreement about what should be the best interpretation of the norm is part of the argumentative nature of Law, but it is essential that it remains reliably predictable. Therefore, certain indeterminacy in the interpretation of Law and its predictability are part of a democratic system, since it allows citizens to know what the Law expects from them. The interpreter must realise that uncertainty in the interpretation of Law and unpredictability of judicial decisions are distinct concepts. The indeterminacy in the interpretation of the Law is a feature of the legal phenomenon, part of its very nature and always depends on the individual case, which does not prevent citizens to know (previously) what to do to act according to Law. Otherwise, the unpredictability of judicial decisions is concerned with the increase of divergent judicial decisions and unexpected changes in jurisprudence, so that the application of the Law to the case becomes unpredictable.⁸

In sum, although there is a margin of indeterminacy across the hermeneutical process, reflected in the “principle of freedom motivated conviction”, it is part of the very nature of the legal phenomenon. On the other

⁵ Kaufmann (1958) at 72-73.

⁶ Kaufmann,(1958) at 40.

⁷ Kaufmann (1976) at 80.

⁸ See Cardozo (1921) at 166-67.

hand, unpredictability in judicial decisions should be rejected, since citizens would not know how to act. Thus, the very problem is not how people do reason, but how they ought to reason. The Rule of Law requires that similar cases be decided similarly, that each case be decided on its merits and that decision-making processes comply with applicable rules of procedure. There is no longer a State where judges are subject only to Law, but where jurisdiction is governed by procedures able to satisfy principles of argumentative correctness and social accountability. Making the reasoning behind such decision-making transparent and open to scrutiny shifts the decisions away from mere subjective preferences and towards objective rationale. Despite our search for transparent reasoning, we in the legal profession devote little research to developing our own general methodology. This is in dramatic contrast to other fields and professions. We in the legal profession largely content ourselves with “*knowing good legal reasoning when we see it.*” We spend relatively little time to develop theories for explaining precisely why good patterns are good and bad patterns are bad. In sum, we do not pay particular attention to the epistemology of legal reasoning.

Hermeneutics, Reasoning and Rationality

Hermeneutics is traditionally understood as a theory of interpretation. The expression comes from the Greek *hermeneuein* and designates a message that is not understandable.⁹ The Greek word comes from the god Hermes, a divine messenger, who transmitted messages from gods to mortals.¹⁰

Nowadays, legal scholars have attached due importance to legal decision, trying to explain how to find the correct answer, how to know if one has found the correct answer and what the content of the correct answer is.¹¹ Doubtless, the content must be the most appropriate to the case. Nevertheless, the decision could still be a result of the judge’s subjectivity. I argue that decisional rationality should not be a product of the interpreter’s choice.¹² Existing laws and precedents must determine decisions in all cases.¹³ It is necessary for plaintiffs and defendants to effectively participate and influence decisions’ construction, eliminating arbitrariness and false preconceptions.¹⁴ Judges must confine themselves to applying the law, even when using moral arguments in order to fulfil this duty.¹⁵ In short, law is not discretion¹⁶ and arbitrariness: it

⁹ Gadamer (1900) at 631.

¹⁰ *Id.*

¹¹ See Cruz (2011).

¹² Lênio Luis Streck (2010) at 683, 699.

¹³ See McCormick (2005).

¹⁴ Lênio Luis Streck (2010) at 683, 699.

¹⁵ See Carter & Burke (2007).

¹⁶ Analyzing the concept of discretion, Dworkin (1967) at 32 asserts that “[t]he concept of discretion is at home in only one sort of context: when someone is in general charged with making decisions subject to standards set by a particular authority.” The jusphilosopher identifies two “weak” senses of discretion. In the first, “we use ‘discretion’ in a weak sense,

must be a system that creates parameters to reach (formally and materially) the correct answer.

Thus, breaking with classical theories of truth, many attempts have been made to develop a theory of interpretation and legal reasoning that avoids arbitrariness. Historically, the common law tradition has always placed the judiciary at the centre. Judicial decisions are seen as constituting the written law, a body of precedents that constantly needs to be rationalised and developed into a coherent system.¹⁷ As common law has already shown, creativity and rationality of judicial decisions are complementary and closely linked to legitimacy. But decisions are not rational in themselves.¹⁸ The rationality of decisions follows from the possibility verification:¹⁹ arguments are essential to guarantee rationality and legitimacy. Otherwise, the decision would settle the case, but would not be constitutionally adequate and much less legitimate. As legal rationality is externalised in judicial decisions through justification, reasoning is not only a constitutional requirement, but also a legitimacy condition of judicial activity itself.²⁰ What justifies the application of law is not the decision itself, but the adoption of a decision-making process based on parameters that prevent the result from being a reflex of the judge's subjectivity, since it should be an application of a norm previously approved in accordance with legistics.²¹

simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment." (*Id.*) In the second, "we use the term in a different weak sense, to say only that some official has final authority to make a decision and cannot be reviewed and reversed by any other official Thus we might say that in baseball certain decisions, like the decision whether the ball or the runner reached second base first, are left to the discretion of the second base umpire, if we mean that on this issue the head umpire has no power to substitute his own judgment if he disagrees." (*Id.*) Nonetheless, Dworkin distinguishes these two "weak" senses of discretion from a "stronger" sense: "We use 'discretion' sometimes not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question." (*Id.*) The author also states that when a decision-maker has discretion in the strong sense he is "not controlled by a standard furnished by the particular authority" (*Id.*).

¹⁷ See Marinoni (2009) at 77.

¹⁸ Marinoni (2004).

¹⁹ *Id.*

²⁰ *Id.*

²¹ According to the analysis thus far presented, it makes sense to say that judges, public administrators and legislators exercise discretion. Nevertheless, the situation of the legislator seems no different from that of the judge and public administrator. Although legislators are accountable to their constituents, their range of choice is very limited, because the new perspective introduced with legistics describes legislative choices not as discretionary, but as a public service limited by impact assessment. The difference between legislative and judicial choice lies rather in criteria available to decision-makers than for the broader discretion. Judicial and legislative choices, no matter how difficult, must be made based on a circumscribed set of criteria, since officials are all accountable for their decisions.

Decisionism x Non-decisionism

Two doctrinal positions focus philosophically on the conditions and possibilities of norms' interpretation: decisionism and non-decisionism.

With risk of overstating the simplification, "decisionism" is a way of deciding inside a "frame", putting laws in second place.²² Kelsen admits that judges have certain liberty in interpreting within a frame of the norm – or even outside the frame.²³ It is called decisionist turn: the authority who applies the law not only has freedom to choose any of the possible interpretations within the frame, but also has the option to create new rights out of the box.²⁴ In short, "All methods of interpretation always lead to a possible result, never to a result that is the only correct one."²⁵ Therefore, arbitrariness is admitted based on an "ideology of the concrete case", i.e., each interpreter who wants to control the decision-making process sustains a distinguishing point from precedents and applies the law according to his/her discretion.²⁶ Accordingly to Hart, when someone responsible for making a decision does so without obedience to any limits imposed by a higher authority, he/she will be acting with "discretion power in a strong sense."²⁷ The problem, however, is how to fix boundaries between discretion and the practice of arbitrariness.

Dworkin argues, moreover, that the decision should be assessed critically, since the judge is committed to act according to the integrity and consistency of law, moving away from discretion and decisionism.²⁸ In contrast with decisionism, Dworkin supports the existence of one right answer.²⁹ What would be the correct decision in a specific case? According to Dworkin, it is one that satisfies two requisites: the decision is harmonic with previous cases and justifies the community's political morals.³⁰ This "shield" against discretion is immanent to democracy, since one cannot admit judges with broad discretion to decide "hard cases". In sum, Dworkin demonstrates that discretion is antidemocratic and, by rejecting any subjectivity from the judge and placing emphasis on political responsibility, overcomes arbitrariness.³¹ The search for correct answers is more than a simple possibility, but a necessity of each and every legal system.³²

In contrast, Habermas argues that Dworkin's proposal is not suitable for most contemporary democracies.³³ First, because Dworkin trusts in highly qualified judges – either for their professional knowledge, skills or personal

²² Kelsen (2000).

²³ See *Id.*

²⁴ See *Id.*

²⁵ *Ibid.*, at 129.

²⁶ See *Id.*

²⁷ Hart (1961) at 89.

²⁸ See Dworkin (1986).

²⁹ See *Id.*

³⁰ See *Id.*

³¹ See *Id.*

³² See *Id.*

³³ See Habermas (1929).

virtues. Secondly, because in a historical and social context of crisis, Dworkin's theory is not feasible, since the "hermeneutical reference to a pre-comprehension determined by reference principles should not give judges the history of authoritarian traditions with normative content; instead, this feature forces judges to a critical appropriation of an institutional history of law, in which practical reason left its traces."³⁴

However, one cannot eliminate discretion from judicial decision-making. As interpretation is subjective, one must assume that some degree of discretion is always present in applying the law. Thus, the solution must consider other perspectives, reconciling expectations concerning judges' role with the contributions of phenomenological hermeneutics.

The Ontological-linguistic Paradigm

Shifting the discussion to the level of comprehension, the ontological-linguistic turn conducted by Martin Heidegger³⁵ and Hans-Georg Gadamer³⁶ has overcome various attempts to establish rules or canons to the interpretative process, based on the predominance of either objectivity or subjectivity. The German philosophers surpassed the subject-object model through an ontological understanding of subject and de-objectification of the text.³⁷

Heidegger correlates the preconditions of interpreting to all human knowledge.³⁸ The philosopher redrafts the relationship between "comprehension" and "interpretation", giving primacy to the first and stating that "*interpreting is not to take knowledge of what is understood, but to develop the projected possibilities of comprehension.*"³⁹ In other words, Heidegger makes clear that understanding is not a passive situation, but rather a preliminary assessment which has to be confirmed by the hermeneutical

³⁴ Ibid, at 252.

³⁵ Heidegger (1993).

³⁶ Gadamer (1900).

³⁷ Lênio Luis Streck (2010) at 684.

³⁸ See Heidegger (1993).

³⁹ Heidegger (1993) at 78. Lênio Luis Streck (2010) emphasises that "*Comprehension is not a way of knowing, but a way of being. As Gadamer explains in detail in *Wahrheit und Methode (Truth and Method)*, comprehension—and, therefore, interpreting (which is explaining what has been understood)—does not depend on a method.5 This bold move leaps from the epistemology of interpretation to the ontology of understanding/comprehension. Heidegger identifies a double level in the phenomenology of understanding: the deep hermeneutical level, which structures the comprehension, and the apophantic level, which is logical in nature and merely explanatory or ornamental.6 This dual level permits us to demystify procedural argumentative theories. Heidegger questions the procedural forms of access to knowledge, an issue of great relevance for legal thinkers who are so fixated on the issue of method, which scholars consider to be the supreme moment of subjectivity and the guarantor of the "correctness of the interpretative processes."*7 In short: in order to interpret, we need to comprehend; and in order to comprehend, we need to have a pre-comprehension, composed of a prior meaning—which is essentially based on a prior attitude (*Vorhabe*), prior view (*Vorsicht*) and prior conception (*Vorgriff*)—which brings together all the parts of the "system."

operation. Thus, the understanding reflects not only a pendula going to and from the object, but a “fusion of horizons” (an object’s context, which is rooted in the past, and an interpreter’s context, rooted in the present). Additionally, the philosophy of conscientiousness’ solipsistic subject, i.e., a judge who “*decides according to his/her conscience*,” violates the Constitution.⁴⁰ Solipsism, grounded on the idea that comprehension can be established in states of personal experience without establishing a direct relationship between subjectivity and beyond-the-subject-comprehension, admits a “self” that knows and controls the “world”.⁴¹

In fact, when comprehension occurs in transcendental ego states of experience, without establishing a direct relationship between these states, it disregards the essential existence of more than one conscience to make dialogue possible, becoming an “*illegitimate comprehension*”. Heidegger, seeking to overcome Schleiermacher⁴², Dilthey⁴³ and Husserl⁴⁴, shifts the question of hermeneutics to a new ontology, where the Being is not absolute, but rather an open horizon of opportunity limited by the human condition.⁴⁵

Furthermore, tradition is central in Gadamer’s approach, because understanding a subject is not a subjective event, since it is always influenced by time. Comprehension does not consist merely in a psychological state, but a shared institutional fact with unity of sense. When reading a text, we anticipate that it is perfectly meaningful and every interpretation cannot but raise a claim of rightness. However, interpreting is an historical phenomenon rooted in an ever-changing tradition, which makes the hermeneutical process infinite.⁴⁶

Thus, with phenomenology, transcendental consciousness detaches itself from objects of the empirical world, despite not ignoring them in the task of understanding. That is the great contribution to philosophical hermeneutics: a critical and analytical thinking, “*previously excluding any imaginable doubt as meaningless*.”⁴⁷ It allows the interpreter to make an analysis of the case as a pure phenomenon, inquiring about the very foundation of the norm and its rationale.⁴⁸ In other words, the interpreter should focus his/her own subjectivity

⁴⁰ See Heidegger (1993).

⁴¹ Lênio Luis Streck (2010).

⁴² See Schleiermacher (1822).

⁴³ See Dilthey (1988).

⁴⁴ See Husserl (1908).

⁴⁵ See Heidegger (1993).

⁴⁶ Gadamer (1900).

⁴⁷ Husserl (1908) at 13.

⁴⁸ Accordingly to Lênio Luis Streck (2010) “*The common understanding of day-to-day legal hermeneutics has its roots in the discussion that led Gadamer to make an incisive criticism of classic hermeneutics, in which interpretation is understood to be the product of an operation performed in parts (subtilitas intelligendi, subtilitas explicandi, subtilitas applicandi, that is, first know/understand, later interpret, and then apply). The impossibility of separating these elements results from the impossibility of the interpreter first to “extract” from the text “something that the text contains within itself,” a species of Auslegung,3 as if it were possible to reproduce meanings. In contrast, Gadamer’s philosophical hermeneutics insists that the interpreter always attributes meaning (Sinnggebung). The event of interpretation occurs as a result of a fusion of horizons (Horizontenverschmelzung), because understanding is always the process of fusion of the supposed distinct horizons of the interpreter and the rule.*”

and circumstances of the case, preventing "subjective influences" and illegitimate preconceptions from possibly distorting interpretation.⁴⁹

The fact there is no method guaranteeing that interpreters will reach the correct answer does not mean the interpreter is free to choose norms' meanings.⁵⁰ The ontological-linguistic turn means that the subject cannot subjugate the object or even permit an arbitrary decision. Citizens must be able to predict legal consequences of their behaviour – and, to a certain extent, decisions – by knowing what is right and wrong. Although from an ideal perspective it should be empirically possible to know beforehand what the correct answer is, one must understand that there are no criteria to assess the correctness of decisions.⁵¹ Thus, the search for a correct answer is not the issue anymore; the issue is guaranteeing predictability and legitimacy to law.

Legistics and the “Quantum Leap” in Judicial Decisions’ Legitimacy

According to Wintgens, self-government requires a new posture of legislators, which has been described as the power “to create rules without the need for justifying them.”⁵² Thus, legitimate laws are those where citizens can see themselves as the laws’ rational legislators. In other words, justification is a condition of legitimacy of the legislative process, because legislators must express reasons for the laws that citizens must obey.⁵³ Hence, legistics emerges as a field of knowledge that deals with lawmaking under a systematic and critical perspective, aiming to improve the quality of legislation. It is usually divided into two major areas: formal and material legistics. Material legistics covers the doctrine and methodology of legislation, while formal legistics is responsible for legislative drafting. By applying material legistics techniques, lawmaking has incorporated a critical perspective, which aims to bring greater quality to legislation, prioritizing efficiency, effectiveness and enforcement of norms.

Wintgens, professor at Yale University and Catholic University of Brussels, seeks to analyse the importance of legistics in his article entitled “La législation entre Science et Politique.”⁵⁴ According to him, legistics must 1) adopt legislative techniques; 2) use deontic logic to create consistent norms; 3) use sociology of law for evaluation of conquests, increasing the level of trust in institutions (legislative dialogicity); and 4) adopt legislative review processes.⁵⁵

At this point, one can easily see the tension between the technical and the political views: while technicians must comply with the law, politicians must be aware of what is happening in society, as well as social expectations, acting to adapt laws to society’s needs.

⁴⁹ See Lênio Luis Streck (2010).

⁵⁰ Lênio Luis Streck (2010) at 685-688.

⁵¹ Lênio Luis Streck (2010).

⁵² Wintgens (2007).

⁵³ *Id.*

⁵⁴ Wintgens (2000).

⁵⁵ *Id.*

According to Wintgens, judges and lawmakers adopt a "hermeneutical point of view", subject to limitations on decisions due to constitutional norms. However, lawmakers have a larger sphere of freedom ("policy discretion"), which differs from that of judges. Due to this reason, a new theory of law can only be built from an external point of view and seek rationality in the legislative process: legislators must do more than simply establish their subjective preferences.⁵⁶

But how can rationality in the task of legislating be achieved? First, the legislature must take into consideration internal and external aspects of the norm, i.e., it must start from a "hermeneutical point of view".⁵⁷ Secondly, it must be based on the duty of reflection, i.e., on a "legisprudential perspective", focusing on various assumptions (duty to frame the facts properly; duty to think about the facts or think different alternatives; duty of prognostic or prospective assessment; duty to take into account future circumstances and duty to correct the law or duty of retrospective assessment).⁵⁸ In short, logistics must be understood as a true "rational theory of legislation", since, before positivation, it is important to think about the norm, under a critical perspective. Taking into consideration that all legal reasoning occurs under a "hermeneutical point of view," one can conclude that hermeneutics plays an indispensable role not only in the exercise of the judicial function, but also in the exercise of the legislative function, by allowing the legislation-rationality-application dialogue of the norm and the consolidation of the legal phenomenon as one and indivisible.⁵⁹

Thus, from a "hermeneutical point of view", logistics pays attention to seven different phases:⁶⁰

- 1) Questioning the impulse of legislating: nature, causes and consequences;
- 2) Establishing the objectives to be achieved with the norm to be enacted;
- 3) Establishing alternative scenarios;
- 4) Choosing possible solutions, taking into consideration the following principles:
 - Principle of subsidiarity impulse to legislate: the enactment of a new norm should only occur when existing institutions are not sufficient to solve the problem;
 - Principle of simplicity: the new normative proposition should avoid complexity;
 - Principle of adequacy: one should avoid arbitrary conduct, by only enacting normative propositions that are consistent with the object to be normalised;

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Delley (2004) at 7, 12.

- 5) Prospectively assessing effects: one should perform detailed study of the intended effects of the norm;
- 6) Executing the norm;
- 7) Retrospectively evaluating the impact or "self-correction of legislative process."

As a result, legistics presents itself as a new branch of juridical science interested in the moment that the norm is not still "valid". In other words, the crossroad between the worlds of law and policy is the place where legistics reveals all its potential. At this crucial moment of the process of lawmaking, legistics can decisively act so that the norm has efficacy and effectiveness.⁶¹

Therefore, the legislative process must be exercised in line with society, since, when laws are in harmony with reality, they become effective, organizing and transforming the context that gave them origin. In other words, the clash between the "normative force of the real"⁶² and the "normative force of the Constitution"⁶³ must be well understood by those who want to enact effective, efficient and enforceable normative acts.

Hence, among the advantages brought by the adoption of impact assessment, one could traditionally identify the quality of legislation, the increased dialogue between sources of law and the possibility of limiting/reducing administrative costs.⁶⁴ Nevertheless, I believe that impact assessment's potential is considerably broader: it permits delimiting the incursion of the judiciary in the "political discretion" of the legislature, setting limits and providing a basis for accountability in lawmaking. There is no doubt that numerous abuses have been committed, by forgetting that the exercise of the legislative function cannot escape the parameters previously set by the Constitution. The judiciary should be aware of its role. As with many other issues involving state responsibility, there is a pendulum which reflects judicial action: first, it leans to total irresponsibility; in a second stage, it leads to excessive accountability; until, finally, judges find a middle ground for their actions. I believe this should be the future of the state's responsibility in the exercise of lawmaking, taking into account the new horizons brought by impact assessment.

Therefore, the "instruments" proposed by legistics intend to incorporate – not replace – a new rationality for deciding.⁶⁵ In practice, legislators often seek to identify, by establishing personal criteria, public policies that they consider necessary to regulate the subject. In contrast, legistics searches to inculcate in courts and legislatures awareness of the economic and social impacts of decisions, bringing a new balance to the separation of powers, without disregarding "the real factors of power" and "the normative force of the real." It amplifies laws' sole function of guaranteeing rights, by assigning a function

⁶¹ Wintgens (2000).

⁶² Jellinek (1956).

⁶³ Hesse (1959).

⁶⁴ See Delley (2004) at 14, 18.

⁶⁵ See Wintgens (2000).

related with their own purpose, focused on norms' efficacy (horizontal, vertical and diagonal) and effectiveness. Thus, considering that both judges and legislators have a hermeneutical point of view, legislative impact assessment can serve as an important "tool" to limit judicial activism and improve the quality of legislation.⁶⁶ Creation of law is a legitimate activity when properly justified, since norms are enforceable through interpretation, based on norms that legitimise judicial decisions themselves (formally and materially).

Correct Answer and Philosophical Hermeneutics: The Search for Legitimacy and Rationality in Judicial Decisions

Doubtless, judges should aim for the correct answer. The search for the correct answer, however, does not guarantee that it will be reached. There is always the chance of issuing an incorrect decision. This does not mean, however, that various theories are not concerned with solving the crisis that law is experiencing. Yet, in this search, one cannot mix ontological perspectives and argumentative-procedural positions.⁶⁷ Obeying coherence/integrity and considering phenomenological hermeneutics' conquests would ensure to citizens the fundamental right to obtain hermeneutic-constitutionally adequate decisions – although they are not always correct answers.⁶⁸

Is there any procedure that leads to correct answers? The theoretical field of decisional phenomena concerns the rational justification of choices and rationalization of the decision-making process. Any decision can be considered arbitrary when abandoning its rational support – the norm. Thus, the normative decisional theory seeks to build models to guide decision-making, taking into account the decision of agents that ideally have rational behaviour. An example of the application of this approach is the concept *homo economicus* as a hypothetical being, an ideally rational agent whose choices always correspond to the highest probability of maximizing personal benefit. Meanwhile, descriptive decisional theory seeks to discover how decisions are made, i.e., by decision-makers who do not have behaviour identified as ideally rational. Despite the importance of promoting rational calculation as a source of decision-making, it should be emphasised that processes require the intervention of non-logical but nonetheless rational factors.

However, decisional theory seeks to rationalise the processes of decision-making – explaining the way decisions are made – and to justify the choices made. In any view of decisional activity, justifying the court's holding means making it acceptable to citizens, by indicating its legal foundation. Preventing arbitrariness in judicial decisions is carried out by presenting their reasons –

⁶⁶ See Wintgens,(2000).

⁶⁷ Lênio Luis Streck (2010) at 685,688.

⁶⁸ See Motta (2010). At this point, it is important to clarify that one cannot confuse philosophical hermeneutics with theory of legal argumentation. Although they are complementary perspectives, it is not possible to fuse the theses of Alexy and Manoel Atienza with the theory of interpretation in general.

and, consequently, giving them greater legitimacy. Since reasons do not have universal validity, the decision becomes open to critique and possible revision. A decision's review is important because it attempts to find alternative possibilities, encouraging reflection and the development of judicial understanding of the adjudicative function.

Thus, as legal rationality is externalised through a decision's justification, reasons cease to consist of a technical requirement for dogmatic judgments to assume the role of legitimacy guarantees of judicial activity itself. From any perspective one analyses decisional activity, justifying the court's holding means "making it acceptable by citizens through motivation". A decision's adequate reasoning means avoidance of arbitrariness. Justification thus becomes a reflex of the decision's rationality. Is any adequately motivated decision a correct answer? Since the point is not whether laws or judges give the correct answer, but how to reach them, some authors argue that an attitude of finding the correct answer, one that respects the system's integrity, is fundamental.⁶⁹ The search for the correct response is directly connected with the idea of integrity in law, i.e., a response will be possible only if it is based on a thorough review of existing precedents.⁷⁰

On the other hand, it is noteworthy that philosophical hermeneutics has demonstrated the mistake of imagining the existence of a method that can ensure the truth. The structural composition of the legal system itself is more complex than a closed system of rules/principles (positivism): no rule/principle is able to regulate its own application. In *Joint Anti-Fascist Refugee Committee vs. McGrath*, a case heard by the U.S. Supreme Court in 1951, Justice Frankfurter argued that due process, "*unlike some legal rules, is not a technical conception with a fixed content unrelated to time and place and circumstance. Due process cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, more particularly, between the individual and the government, due process is compounded of history, reason, the past course of decisions, and stabbed confidence in the strength of the demo, democratic faith we profess. Due process is not a mechanical instrument. It is not a yard stick. It is a process. It's a delicate process of adjustment and inescapably involving the exercise of judgment.*" Despite the importance of the due process concept, Justice Frankfurter ignored an important premise of Gadamer's theory: comprehension's historicity.⁷¹ People are more immersed in historicity than they can control.⁷² The idea of due process changes over time. It is not the same today as it at the time of the Magna Carta.

As a result, there is no longer a method, a predetermined answer, because one cannot say abstractly what the correct answer is. Although it exists, the human aspect involved prevents us from evaluating the decision. It is inevitable that judges will disagree and such divergence is part of the law, because each

⁶⁹ See Dworkin (1986).

⁷⁰ *Id.*

⁷¹ See Gadamer (1900).

⁷² See *Id.*

judge gives out his/her own opinion. Nonetheless, an interpreter should adopt an integration posture, with convincing and detailed arguments. No method is able to eliminate discretion.⁷³ When Gadamer opposes methodologism, it does not mean that hermeneutics permits arbitrary interpretations.⁷⁴ The case has to be taken seriously, requiring that judgments comply, at once, the criteria of legal certainty, rational acceptability and an ethical posture of the interpreter in pursuit of the correct answer. The more discretion granted to interpreters, the lower the probability of predicting the content of decisions and, therefore, the lesser the extent to which plaintiffs and defendants really participate of their “constructions”. It is indispensable that those who will feel the effects of the decision effectively take part in the process, verifying the rationality adopted, to legitimise the decision itself (by its form and content).

The proposal to rethink the problem of rationality and legitimacy of judicial decisions from the perspective of philosophical hermeneutics is very useful for a deeper understanding of the creative power of the judiciary, introducing a new approach that prioritises questioning the very phenomenon of hermeneutics – no longer limited to the study of methods to discover norms meanings – but rather to understand the comprehension itself and factors that legitimise decisions. Thus, the study of the revelations brought by philosophical hermeneutics to control the creative activity exercised by the judiciary is undoubtedly one of the great challenges of contemporary legal thinking. It is important to air the implications of creativity by analysing its influences in law’s enforcement, since this issue is related to restraining excesses and increasing judges’ accountability in implementing norms. In this scenario, what is the role of phenomenological hermeneutics? From the transcendental ego, phenomenology contributes to understand comprehension, allowing judges, in the decision-making processes, to criticise their consciences and, in the purity of conscience, extricate themselves from their preconceptions, paying attention to the limits of creative power.⁷⁵

⁷³ “Against this backdrop, we can see that the fact that the interpreter always attributes meaning (*Sinngebung*) to the text in no way suggests that the interpreter is authorised to attribute meanings to texts arbitrarily, as if the text and the meaning of the text were distinct factors that exist autonomously from each other. As Gadamer says, when the judge attempts to adjust the law to the needs of the present, the judge engages in a practical task, which demonstrates the importance that Gadamer gives to the Aristotelian-like program of a *praktische Wissenschaft*. Judicial interpretation of the law is not an arbitrary translation. Philosophical hermeneutics avoids all forms of personal/arbitrary and discretionary decisions. The fact that there is no method that can guarantee that the judge reaches the “correct” interpretation—a situation that Hans Kelsen denounced in the eighth chapter of *The Pure Theory of Law*—does not mean that the interpreter is free to choose the meaning that best suits him/her, a freedom that would encourage discretion and arbitrariness. The “intention” and the “knowledge” of the interpreter allow neither the arbitrary attribution of meanings, nor the attribution of arbitrary meanings. As Gadamer explains in *Wahrheit und Methode (Truth and Method)*, if one wants to say something about a text, one must let the text say something to him or her. (*Wer einen Text verstehen will, ist vielmehr bereit, sich von ihm etwas zu sagen lassen.*)” - Lênio Luis Streck (2010) at 685,688.

⁷⁴ Lênio Luis Streck (2010) at 685,688.

⁷⁵ Megale (2007).

Considering the *juspolitical* function of courts, philosophical hermeneutics plays an important role in controlling judges' creativity and assuring that decisions are ethically grounded, arguably legitimate and rationally appropriate with the principle of separation of powers.⁷⁶ In a democratic state, the enforcement of fundamental rights has to match the principle that prohibits courts from acting as lawmakers. The result itself is not the most important. "Any answer" is not enough: the decision must be justified, absorbing its formal and material legitimacy from the procedure adopted and the content of the norms that solves the case. There is no *a priori* correct decision, but a procedure to be followed, a certain attitude that should be adopted by the interpreter and an adequate justification that together contribute to legitimise the decision.

Between Creativity and Arbitrariness

As phenomenological hermeneutics has shown, one cannot believe there is just one way to truth, since comprehension is historically situated.⁷⁷ One has to overcome the temptation to believe in a universal and definitive answer in law. As Gadamer has advocated, Answers lead to new unresolved questions, in a spiral that enables the evolution of knowledge.⁷⁸ Nevertheless, argumentative-procedural theories claim, disregarding conquests of philosophical hermeneutics, that balancing principles is a way to solve conflicts.⁷⁹ However, the principle of reasonableness masks the real problem, namely that there is too much discretion in law. It is not possible to state, before analysing the case and its circumstances, that a particular method/procedure might reach the correct answer. Everything will depend on the underlying reality of interpretative activity in compliance with the necessary control of judicial creativity and the search for decisions' legitimacy. The law cannot be a product of arbitrariness, but rather of consistent and intact decisions with precedents, after a proper impact assessment of lawmaking, avoiding undue incursions of judges in the task of legislating.

How can we know the correct answer has been found? We may never know we have found the correct answer, because it is temporary: a new historical scenario may result in a "new correct answer". The claim that a definitive and timeless answer can be found is a serious mistake.⁸⁰ One cannot forget that everything changes, that comprehension is historically situated.⁸¹ What is in debate is no longer the mere contrast between different interpretations – expressly admitted by law – but the very legitimacy of hermeneutics itself. In other words, the problem of interpretation has become

⁷⁶ See Marrafon (2010).

⁷⁷ See Gadamer (1900).

⁷⁸ See *Id.*

⁷⁹ See Alexy (1998).

⁸⁰ See Gadamer (1900).

⁸¹ See *Id.*

the problem of the interpretive process (creative function of law) and the legitimacy of interpreting. It is necessary for the decision to have an ethical fundament and for the interpreter to avoid subjectivity, preventing "flawed reasoning" that has the intention of justifying a "preconceived" decision. The interpreter should pay attention to himself during the decisional process, "[...] *avoiding decisions based on prejudices and, in consequence, dictated by ignorance.*"⁸² The correct answer is not given "a priori", based on the solipsistic beliefs of each judge, but a process that takes into account intersubjectivity (subject-subject dialogue).⁸³ Judges must recognise their limits and accept that the law does not admit all interpretations. It is crucial to distinguish what law should be from what it actually is, because law is not what judges want it to be. The application of norms cannot be submitted to a solipsistic moral analysis of each individual; it must be properly founded in legal teachings and the trilogy of juridicity (legality, legitimacy – formal and material – and ethics).⁸⁴ Although interpretation can be creative, this cannot change the substance of the text, as it would be to amend a constitution illegitimately, violating the need of approval by the legitimate authority (legislature).

How, then, to define the final answer? Considering that it is impossible to know what the correct answer is, the final decision is given by a legitimate authority who says what the law means. The difficulty is defining who has the final word. Who decides who decides? Nowadays, a constitutional dialogue exists: in some cases, the judiciary gives the last word; in others, the legislative or executive branch decides the issue. Finally, in many cases, it is necessary for all three branches to act simultaneously.⁸⁵ Thus, defining who has the last word will somehow define the content of the final answer, especially because institutions have different behaviours. But this does not mean, and cannot mean, that the answer given by the one particular institution is the correct answer. On the contrary, the content of the correct answer is much more complex than simply accepting what an authority held. First, it is necessary to establish the kind of constitutionalism we want to implement. A classic vision, committed with a special deference to original intent, will be less sensible to the general argument that one institution is right. On the other hand, an approach to constitutional interpretation opened to ideas like living constitution⁸⁶ and a constitution of many minds⁸⁷ will surely embrace dialogue between institutions as a useful, if not an indispensable feature of ruling.

Finally, one could ask what the content of the correct answer is. Since comprehension is historically situated, the content of the correct answer changes over time. This does not mean that any response is satisfactory or that there is no control of judgments. Only with careful attention in delimiting the

⁸² Megale (2010).

⁸³ Lênio Luis Streck (2010) at 677.

⁸⁴ About juridicity, see Oliveira (2013).

⁸⁵ Answering the fundamental question of "who decide who decides", see Komesar (1994).

⁸⁶ Rehnquist (1975) at 693.

⁸⁷ Sunstein (2009).

creation of law can one have a hermeneutical process that respects the limits of constitutional interpretation, proportioning coherent arguments from a legal perspective. A fair trial combines historicity and legal precedents to achieve legitimacy with procedures previously established, free from illegitimate preconceptions and that allow citizens to make arguments in a judicial process with a chance to change a previous position of judges (principle of effective rebuttal). In sum, the search for “hermeneutical closure” is necessary not only to set the conditions to control constitutional interpretation, but also to establish that a) motivating the decision is a judge’s duty, b) each citizen is judged based on the Constitution, with relevant conditions to assess whether the decision is constitutionally adequate, c) decisions can be universalised, respect the existing precedents and be legitimised (formally and materially) by their legal reasoning, d) decisions are not products of the judge’s preconceptions, but instead allow effective power of persuasion (principle of effective contradictory), e) decisions are subject to internal and external control that allows the participation of the greater plurality of social groups and, finally, f) the interpreter must act according to a system of “hermeneutical ethics”.

Although it is an unrealizable dream to find the content of the correct answer, this does not eliminate the duty to aim for this outcome and be aware of our limitations. The interpreter has a much greater burden: to justify the content of the decision. It is noteworthy that legitimacy is extracted from concrete cases, more specifically from the dialogue between plaintiffs and defendants. The fact that the general holding of the case has to be motivated follows from the need to give legitimacy to judicial decisions. However, the fundamental right of each citizen to receive a constitutionally adequate decision does not imply a definitive answer exists. Definitive answers assume the abduction of temporality and, as Heidegger has already emphasised, “time is the name of being.”⁸⁸ We need to curb our craving for correct answers to every case and, mainly, our arrogance to completely control predictability. One can only have a definitive answer situated in space-time, but not *the* correct answer. When the discussion is brought to the legal sphere, one must find a solution, even when not sure whether the content is the best. Furthermore, there is not only a fundamental right to obtain the correct answer, but also a fundamental duty to adequately reason the decision. The complementarity between them represents a shield to illegitimate interpretations, by remembering the issues of consistency and integrity. Legal scholars need to create mechanisms to ensure that, in a transparent dialogue and careful analysis of each of the proposed solutions, one can reach a decision that may or may not be correct, but still is formally and materially legitimate.

Hermeneutics’ Ethicality

The processes of creation, interpretation and application of law should not only observe the indispensable decisional co-participation of society and

⁸⁸ Heidegger (1993) at 273. See also Lênio Luis Streck (2010).

citizens in legislative and jurisdictional processes, but also pay attention to assumptions established by juridicity. The principle of juridicity has singular importance, since it encompasses three distinct and complementary aspects: legality, legitimacy and ethics in decision-making.⁸⁹ One cannot ignore that the relations between law, ethics and politics are essential to achieve the fundamental right of citizens to obtain hermeneutic-constitutionally adequate decisions. As I have already emphasised, it is important, in modern democracies, to assure formal (procedure) and material (content) legitimacy to decisions. Moreover, the interpreter has to adopt an integration posture, in compliance to ethical standards of conduct (honesty and morality). The way to the correct answer – although uncertain – passes through considering the historicity of the interpreter and judicial precedents to legitimise the decision in compliance with a previously established procedure and an ethical posture of judges. Nevertheless, when persuasion fails, there is a risk that the decision will be a product of arbitrariness. *“Fair persuasion does not delude; it informs, clarifies and leads to adhesion with loyalty.”*⁹⁰ It is not enough to regulate; interpreters must have prudence as a virtue.⁹¹ Otherwise, the decision would become a dead letter due to lack of persuasive power.

Aristotle, distinguishing virtues and passions, ensures that the latter are not chosen, but virtues arise from subjects’ deliberation (intention).⁹² No one chooses to be afraid or fall in love.⁹³ However, virtues are chosen and depend on the decision taken by the agent. *“The prudent chooses the means seeking the end to be attained, in a situation where both are good as long as dictated by reason, because these examine the circumstances of each particular case circumspect, with diligence and foresight.”*⁹⁴ In other words, the answer to the conflict between creation and application of law cannot ignore interpreters’ prudence and virtue. For no other reason, the Code of Judicial Ethics in Brazil provides, in article 24, that *“A prudent magistrate seeks to adopt behaviors and decisions that are a result of rationally justified judgments, after having meditated and weighed arguments and counter-arguments available in light of the applicable law.”* Although the application of norms is not limited to a matter of prudence (*phronesis*), it is clear that, without it, comprehension would never be legitimate.⁹⁵

In this senses, Plato argues that virtuous acts are up to each one, because *“virtue has no master.”*⁹⁶ Every life will have a greater or lesser degree of virtue, since *“responsibility derives of the one who chooses how to act.”*⁹⁷ For this reason, *“The ones that lead the soul to be fairer would have the best life and the ones that lead to be more unfair would have the worst. The virtuous act*

⁸⁹ See Oliveira (2013).

⁹⁰ Megale (2010) at 98.

⁹¹ *Id.*

⁹² Aristóteles, at 168.

⁹³ *Id.*

⁹⁴ Megale (2010).

⁹⁵ Megale (2010).

⁹⁶ Platão, (1975).

⁹⁷ Megale (2010).

may seem difficult and painful, but it is the simplest and makes a better life."⁹⁸ The prudent act should pay attention to preconceptions in order to avoid bias in the trial. As I have previously argued, judges should be able to avoid "flawed reasoning", which has the intention of justifying a given "preconceived decision" (i.e., when magistrates decide in a given direction, in order to "exterminate cases" and reduce the volume of work). In the other words, interpreters should pay attention to themselves during the decisional process, "*avoiding decisions based on preconceptions and, in consequence, dictated by ignorance.*"⁹⁹

However, "*if rational choice, guided by the will to do good, decides the best step every time*"¹⁰⁰, there is no doubt that application cannot be subject to the solipsist moral analysis of each person, but must be properly founded on logistics conquests and the trilogy of juridicity (legality, legitimacy and ethicality), without disregarding the contributions of phenomenological hermeneutics. Considering that even well-reasoned actions have risk of failure, when interpreters do not act prudently, they achieve an illegitimate comprehension.

In sum, the lawmaking process and interpretation/application of norms should look for legitimacy of decisions, both formally (by adopting criteria that assure effective reasoning in development and implementation of norms) and materially (by preserving rights), without forgetting the moral accountability of judges to their own conscience.¹⁰¹

Conclusions

Between content and procedure, unpredictability appears to motivate legal scholars to undertake the long journey to law enforcement. Different critical theories (argumentative-procedural positions, philosophical hermeneutics, etc.) have a single objective: to solve the problem of ineffectiveness and arbitrariness in law. Jurists are duty-bound to enforce the law, and to do so they need to interpret it. Without hermeneutics, one would not know what texts said; but it is also known that direct access to language is impossible.¹⁰² So, which law do we want? Certainly, we only know that we do not want arbitrariness and pure discretion.

In conclusion, the question about the correct answer requires minimizing unpredictability in law. The ideal is to reduce randomness and the hermeneutical control mechanisms range from the duty to properly justify decisions, passing through the fundamental right of the citizen to obtain hermeneutic-constitutionally adequate answers and effective participation by the greatest social plurality of segments, up to achieving the most effective

⁹⁸ Megale (2010).

⁹⁹ Megale (2010).

¹⁰⁰ Aubenque (2003) at 184.

¹⁰¹ Motta (2010).

¹⁰² See Lênio Luis Streck (2010) at 683-699.

form of control, i.e., the moral accountability of judges to their own consciences.¹⁰³

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¹⁰³ See Motta (2010).

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