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Towards a Metatheoretical Postmodern Approach to Legal Reasoning

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This paper focuses on legal reasoning, arguing that although methodological theories are important, they are not enough to explain how to reason in law. In fact, because the different philosophical perspectives vary so significantly in their ability to resolve legal conflicts, when a less "adapted" perspective decides a legal question, the results can be disastrous. Thus, this paper inaugurates a new attitude, stating that a general philosophical perspective is the only way out. Relying on a metatheoretical postmodern approach, it argues that logic, analysis, argumentation and hermeneutics are complementary theories that offer a unique perception of law. It concludes that the approach proposed makes possible not only a comprehensive view of the way legal reasoning behaves, but more than this, a proportionate flexibility to both civil and common law systems.

Keywords: *Paraconsistent Logic; Metatheoretical Postmodern Approach; Metatheoretical Perspective; Paraconsistent Deontic Logic; Ontological Hermeneutics*

Introduction

Although legal scholars have devoted much attention to legal decisions, no approach seems to offer a definite answer. Especially when discussing methodology, legal theorists have focused on norms and interpretation of precedents.

In this context, this paper has two main purposes. First, it argues that although methods of legal reasoning are important, they are not a definite answer to the problem. The proposal to reconsider the problem of rationality of judicial decisions through a metatheoretical postmodern approach is very useful for a deeper understanding of the way courts should decide. Second, this paper shows that despite their very dissimilar natures, legislators and judges deal with legal reasoning in similar ways. Relying on a perspective that brings together lawmaking with decision-making, I argue that these two different spheres should converge in their perspectives to reach the best answer possible.

The discussion proceeds in seven parts. Part I concentrates on the reasons to adopt a metatheoretical perspective. Parts II to VI provide a critical presentation of the role that logic, analysis, argumentation and hermeneutics play in the approach. Finally, Part VII proposes a unified approach to lawmaking and legal reasoning.

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Why a Metatheoretical Postmodern approach?

Legal theorists have focused on many perspectives when discussing legal reasoning, such as logic (deontic logic, defeasibility logic, etc.), analysis (linguistic analysis, economic analysis, etc.), argumentation (topical–rhetorical conception, procedural conception, etc.) and hermeneutics (epistemological hermeneutics, ontological hermeneutics, etc.). However, no methodological theory has achieved massive acceptance among legal scholars, because usually methods of legal reasoning, in combination with substantive law, determine the outcome of legal cases. The discussion about the proper method is often an implicit discussion about the desired outcome of a case. Therefore, I propose in this article a look "from the outside". Striving for a neutral approach is useless when based in the outcome of a case. Thus, the interpreter has to avoid using methods to pursue a specific outcome. Furthermore, methodological theories have not been sufficient. I believe a general philosophical perspective is the only way out. Thus, this work intends to build a broad perspective of legal reasoning as a metatheoretical postmodern[2] approach that adopts a plurality of viewpoints, avoiding the thesis that the process of legal cognition is purely creative and hence completely undetermined.[3]

One should observe that the perspectives chosen to compose the approach, although subjective to some extent, are not arbitrary. If one were to compose a list of the main philosophical conceptions of reasoning, it would include logic (the formal use of statements in order to determine whether arguments are coherent and can yield adequate results), analysis ("[…] *the process of breaking up a concept, proposition, linguistic complex, or fact into its simple or ultimate constituents.*"[4]), argumentation (a rational activity aiming to convince an audience about the acceptability or refutability of propositions), and hermeneutics (a general theory of interpretation). My claim is based on the search for a coherent theory of legal reasoning that can be "universal", and since single methodologies have not been sufficient, I believe a combination of the perspectives is a possible way out. Logic, analysis, argumentation and hermeneutics are complementary theories of legal reasoning that offer unique perceptions to both civil and common law systems, avoiding the problem of different legal cultures.

Therefore, in the metatheoretical approach the different perspectives (logic, analysis, argumentation and hermeneutics) should be applied in distinct phases (so-called "layers") of legal reasoning. There is no hierarchy between them. For instance, a case could be first seen though logical methods, which is "the nearest to the facts"; next, one could try to solve the controversy with analysis; then, if they previous layers were not enough, one could adopt an argumentative perspective; finally, if the previous perspectives have failed, the interpreter can act "hermeneutically". Thus, the first layer usually solves the case with logical methods, guaranteeing predictability and juridical security. However, as the

[2]Postmodernism means here a reaction to modernism, an attempt to deconstruct all paradigms that ignore the fusion of ontological-epistemological perspectives of legal reasoning.
[3]See Kutz (1994) at 1030.
[4]Audi (1999).

interpretative task is infinite, a new moment will ask for a different perspective – analysis. This dialectical-spiral perception reaches, in the next layers, argumentation or hermeneutics without ignoring the historicity of understanding and, more importantly, constructs the meaning of norms from a fusion of horizons.

Note that I am not arguing that the simplest cases could be always solved with logical and analytic methods, that more difficult cases usually demand argumentation techniques and the hardest require hermeneutic intuition. Moreover, I am not adopting Alexy´s theory either, which combines logic, analysis and argumentation.[5] I propose, instead, the combination of different perspectives in a concrete conception of legal reasoning that should be, at least, coherent and rational, since *"it is impossible to separate completely legal epistemology and ontology."*[6]

These preliminary considerations allow concluding that there is no unique, universally acceptable methodology of legal reasoning. Nevertheless, my scheme is still important because it is able to adapt itself to evolution of law over time. Additionally, the metatheoretical approach does not establish any hierarchy among the different perspectives (logic, analysis, argumentation and hermeneutics), since the order in which they are applied is determined by the individual case - although it suggests a most-common way to search for the correct decision.

The debates among legal scholars about legal reasoning have reached high complexity levels, incorporating the hermeneutical turn and argumentative theory achievements, but they still demand a new approach that is no longer limited to methods, but to the foundation and legitimacy of law and philosophy themselves.

Paraconsistent Logic as the first layer

First, there is no agreement over what the logic of legal reasoning really is. Legal scholars have adopted many different systems, such as deontic logic, defeasibility logic, etc. None of these offer a definite answer to jurists. I do not intend here to develop a general analysis of what the role of logic should be in legal reasoning, which would lead to vagueness and unpredictability. Although formalistic systems are usually incompatible (e.g., classic logic and defeasibility logic), there is a type of logic that has been ignored by most jurists and could "fit" law's special features, named paraconsistent logic. Differently from other logical systems, paraconsistent logic formalises juridical dilemmas or conflicts that arise in "real" law. The importance is easily seem because it does not adopt the principle of non-contradiction, which holds that contradictory propositions cannot both be true at the same time (e.g., the statements "*B is C*" and "*B is not C*" are mutually exclusive). In other words, it is possible to reason with inconsistent "information" (e.g., one court decides in one direction, whereas another decides differently) in a controlled way, since "contradiction" in paraconsistent logic is not really contradiction; it is merely a subcontrary-forming operator.[7] As a result,

[5]Alexy (2005).
[6]Stelmach & Brozek (2006) at 217.
[7]See Slater (1969).

paraconsistent logic makes it possible to formalise inconsistent but non-trivial theories. It allows one to distinguish between inconsistent theories and to reason with them, allowing a close dialogue among analysis, argumentation and phenomenological hermeneutics. Contradiction between judicial decisions is then philosophically challenged, precisely because paraconsistent logic accepts different forms of inconsistency.

For the purposes of this study, one should realize that Godoy[8] adopts a DL paraconsistent calculus that discharges the disjunctive syllogism - $(\phi \vee \psi) \wedge \neg\phi \Rightarrow \psi$. He departs from a propositional calculus named C1, based on the positive logic of Hilbert-Bernays, and changes some of its basic axioms. Godoy structures the DL paraconsistent, especially the Cn hierarchy[9], adding the postulate $\alpha \vee (\alpha \rightarrow \beta)$ and "De Morgan Laws", $\neg(\alpha \wedge \beta) \leftrightarrow (\neg \alpha \vee \neg \beta)$ and $\neg(\alpha \vee \beta) \leftrightarrow (\neg \alpha \wedge \neg \beta)$. The dialectical original about the definition of unity of contraries also assumes a dynamic character, because juridical norms are not static, but always subject to change. Finally, Godoy shows how the formalization of law problems is compatible with analysis and hermeneutics.[10] As an example, one could take the case of anencephaly abortion. Abortion is a crime against the "potential life" of the foetus and, in Brazil, it is only authorised in cases of rape or to save the mother's life. During four months, a preliminary injunction was granted by Supreme Court Justice Marco Aurélio Mello, authorizing a woman to decide whether to keep a foetus with anencephaly.[11] After various months, the court held that mothers have the right to decide. Anencephaly allows the political debate between unconditional foetal right to life and women's rights to health, dignity and to decide what to do with their bodies. Most countries allow women to abort in case of an unviable foetus. Brazil, however, does not. When it comes to abortion, the predominant view in the political arena is conservative.[12] In this complex context, paraconsistent logic can play an important role, by enabling one to reason over propositions that are in direct contradiction, without trivialisation of the system. Thus, by adopting an L1 system, Queiroz[13] developed the formula $((g \wedge f) \Rightarrow (F_j\ a)) \wedge ((g \wedge f \wedge a) \Rightarrow O_j s)$ to represent the structure of a norm that prohibits abortion and the formula $((g \wedge f \wedge m) \Rightarrow O_j t) \wedge (g \wedge f \wedge m \wedge \neg t \Rightarrow s)$ to represent women's right to life. The propositional symbols have the following meanings: 1) "g": there is pregnancy; 2) "f": the foetus is alive; 3) "a": intentional termination of pregnancy; and 4) "s": there is sanction. Queiroz also systematises the whole system as $((g \wedge n) \Rightarrow O_j v) \wedge (g \wedge n \wedge \neg v \Rightarrow s)$, balancing the deontic commands $O_j t$[14] and $O_j v$[15] in the simplified formula $(d \Rightarrow t) \wedge (w \Rightarrow v)$.

[8]Godoy (2009).
[9]See Costa (1993).
[10]Godoy (2009).
[11]See Diniz & Velez (2008).
[12]Diniz & Velez (2008).
[13]Lacerda e Silva (2012).
[14]The right to life of the fetus imposes an obligation to prevent threats, which is represented by Ojt.
[15]Ojv means the right to end the fetus' life.

I do not intend to go deeper into Queiroz's analysis[16]. I merely stress that complex cases can be represented in a logical system. In other words, it is possible to identify and isolate the most important arguments used in a certain case through a logical system and reason about the subject matter. Paraconsistent logic provides an in-depth understanding of the case and could be used to decide accordantly with the rules and principles that regulate a legal system.

It is not the aim of this work, however, to go further into paraconsistent deontic logic[17]. One has to realise, however, that syllogism, analogy and other types of logic are not enough to understand the complexity of legal reasoning. More importantly, paraconsistent deontic logic is compatible with analysis, argumentation[18] and hermeneutics. In addition, Perelman's new rhetoric holds that the arguments used do not have to be logically correct – although logic could be used as a *topoi* –, since even invalid arguments could be rhetorically effective.[19] Thus, logic does not occupy a special position; it is a *topoi* adopted as the first layer in the metatheoretical approach to understand the textual meaning. It could be insufficient to reach a final decision. Logic somehow formalises legal reasoning, although it is not able to guarantee the right answer. It does not consider vagueness of textual propositions, the peculiarities of the case and social values (justice, predictability and policies).

Second Layer: Linguistic Analysis

Linguistic analysis is an anti-formal method that plays an important role, holding the importance of language examination to make serious philosophy. Thus, the second layer of the metatheoretical approach takes into account linguistic analysis, since it is concerned with the pragmatic dimension of language, allowing one to understand the rules that govern everyday experience and construct a system of interconnected meanings.[20]

In fact, the linguistic-analytical perspective adopted here reduces a case to ordinary language. This "conceptual scheme" makes the approach strong by easily estimating results and avoiding arbitrariness. In this context, the Speech Acts Theory explores the ways certain concepts "function" in language.[21] A speech act is an utterance that has a specific function in language, i.e., "*the performance of several acts at once, distinguished by different aspects of the speaker's intention: there is the act of saying something, what one does in saying it, such as requesting or promising, and how one is trying to affect one's audience.*"[22] Conventional procedures (including in law) determine the necessary conditions of a successful action (e.g., "I do" as an answer to "Do you take this

[16]For further details, see Lacerda e Silva (2012).
[17]See Costa & Wolf (1989); Costa & Wolf (1985).
[18]It is important to say that logic has a close connection with argumentative theories. See MacCormick (1992), and also MacCormick (2005).
[19]See Perelman & Olbrechts-Tyteca (1969).
[20]See Stelmach & Brozek (2006).
[21]Austin (1975) at 1962b.
[22]Bach (1998).

woman as your wife?").[23] In some cases, however, performatives turn out to be unfortunate.[24] Austin differentiates performative acts *("an expression reducible, or expandable, or analysable into a form or reproducible in a form, with a verb in the first person singular present indicative active"*[25]) and constative acts (*"realty description"*), proposing a "paraphrase criterion" that differentiates them.[26] After a careful analysis, he concludes that his attempts to formulate a criterion do not succeed, since every typology of infelicities acts underlies vagueness.[27]

Thus, Austin develops a more complex conception of so-called speech acts as "a basic unit of communication". In this new approach, speech acts are classified in three different categories. A locutionary act reflects the performance of an utterance. It is the act of saying something and also its verbal, syntactic and semantic aspects. An illocutionary act means the socially valid verbal action of an utterance, such as ordering, apologizing, etc. Finally, a perlocutionary act reflects effects and consequences, such as enlightening, inspiring, etc.[28] The method is a good example of linguistic analysis, although Searle criticises the differentiation between locutionary and illocutionary acts, arguing that meaning is an illocutionary force.[29] He introduced the notion of an "indirect speech act", when *"the speaker communicates to the hearer more than he actually says by way of relying on their mutually shared background information, both linguistic and nonlinguistic, together with the general powers of rationality and inference on the part of the hearer."*[30] In other words, the subject intended to be communicated might be different from the real meaning. In connection with indirect speech acts, Searle presents two categories of illocutionary acts: primary and secondary. The primary illocutionary act is the "indirect one", which is not *"literally performed"*. The secondary illocutionary act is the "direct one", performed in the literal meaning of the sentence.[31] Consequently, one has to put "*forward hypotheses concerning the problem […], and test them on examples motivated by intuitions regarding the use of ordinary language."*[32]

In my "framework", one should not disregard presuppositions that allow the interpreter to reconstruct the system of values and institutions assumed by lawmakers.[33] An analysis of shared linguistic conventions becomes indispensable to understand what the law is and what it ought to be.[34] Turning to the example of anencephalic foetuses, one has to realise the principles and rules involved in the case and the locutionary acts that reflect the performance of the utterances. First, I

[23]Austin (1975) at 607-608.
[24]Austin (1975) at 607-608
[25]Austin (1975) at 607-608.
[26]Austin (1975) at 607-608.
[27]See Stelmach & Brozek (2006).
[28]Austin (1975) at 607-608.
[29]John R. Searle, A Taxonomy of Illocutionary Acts, in Günderson, K. (ed.), *Language, Mind, and Knowledge*, (*Minneapolis Studies in the Philosophy of Science*, vol. 7), 344-69 (1975).
[30]Searle (1975).
[31]Searle & Vandervecken (1985) at 184.
[32]Stelmach & Brozek (2006) at 70.
[33]See Sarkowicz (1995).
[34]Grabowski (1999).

should mention article 128 of the Brazilian Penal Code: *"There shall be no punishment of abortion practiced by a doctor: I - If there is no other way of saving the mother's life; II - If the pregnancy results from rape and abortion is preceded by the mother's consent or, if incapable, that of her legal representative."* It is clear that the Penal Code does not expressly allow the abortion of anencephalic foetuses. However, one should not ignore the constitution and illocutionary acts. In fact, the issue is deeply related with the influence of religious lobbying (illocutionary act) and the concept of the beginning of life.[35] Thus, the Brazilian Supreme Court held there is no absolute right to life, mentioning article 5, XLVIII, of the Constitution, which allows the death penalty during war. The court stated, to balance rights, that the foetus's right to life would cede to human dignity, sexual freedom, autonomy, privacy, physical, psychological and moral integrity, and health, according to article 1, numeral III; 5, main section and numerals II, III and X; and article 6, of the Constitution. In other the words, the court adequately adopted an "analytic approach", paying attention "[…] *to the mutually shared background information, both linguistic and nonlinguistic, together with the general powers of rationality and inference […]"* [36], to avoid any influence of religious aspects and adequately "*setting-up of a linguistic system and the placing of [the] expression[s] in the system."*[37] Therefore, the importance is quite clear of the second layer in analysing the language of statutes and the statements of witnesses, defendants, plaintiffs and other evidence presented to the court as linguistic resources to establish coherence in judicial decision-making, because it combines rhetorical and dialectical aspects that allow one to evaluate legal argumentation from the perspective of a rational critical discussion.[38]

Although linguistic analysis is strong and says something about how language is used, it might be insufficient to solve hard cases. It is difficult to accept that a single conceptual scheme would "fit" all legal reasoning. When constructing arguments, one should take advantage of ordinary language, rhetoric and hermeneutics. Thus, linguistic analysis should be a layer to construct the text's meaning, a second level approach that takes place when paraconsistent logic is not enough. Moreover, it dialogues with phenomenological hermeneutics, since the latter proposes an alternative ontology that does not contradict analysis. In sum, *"[a]nalysis without hermeneutics is empty, while hermeneutics without analysis is blind."*[39]

Rhetorical Conception of Argumentation and Legal Discourse: The Third Layer

Argumentation gives an unequivocal status to practical discourse, aiming at an epistemological equilibrium between both logic and analysis. When one faces a

[35]See Diniz & Vekez (2008).
[36]Searle (1975).
[37]Rudolph Carnap *apud* Stelmach & Brozek (2006).
[38]See Stelmach & Brozek (2006).
[39]Arthur Kaufmann *apud* Stelmach & Brozek (2006) at 14.

hard case and logic/analysis is not sufficient, the third layer in the search for the correct answer is argumentation. Undoubtedly, argumentation does not ignore logic or analysis. It aims to make possible a practical discourse, through *"logical, analytical and rational justification."*[40] The main ambition is to describe conditions that must be satisfied by each practical rational discourse.[41]

Perelman[42], as one of the main representatives of argumentation theories, holds that judges' discourses are models to other practical discourses and considers topic an essential method. In his chief work, the Polish law-philosopher differentiates "common places" (*loci communes*) – values that allow a speaker to formulate maxims and general rules for a given discourse – and "special places" (*loci specifici*) – linked with specific disciplines, such as law's general principles – resulting in a theory of argumentation called "the new rhetoric".[43] Its goal is to convince a universal audience, composed of all well-informed and reasonable people, according to the criterion of persuasiveness.[44] Perelman ties topic and rhetoric to form a coherent legal reasoning, emphasizing that the arguments must be in accordance with Kant's categorical imperative and the reason must be valid for the whole society.[45] In the metatheoretical perspective, the judge has the important role of bringing common places to the consciousness of the ones who are going to be submitted to the decision without using formal logic. In other words, the rationality of the argumentation stems from the agreement for an abstract and ideal institution, a so-called universal audience. The audience, in terms of judicial decision-making, is always universal, because it is not enough for judges to convince the parties involved (particular audience). They also have the duty to convince the entire human community affected by the decision.

Back to the case of anencephalic foetuses, Brazil's Supreme Court constructed ethical and juridical arguments in accordance with Perelman's approach and considering medical particularities of anencephaly. Aiming to convince a universal audience composed of all well-informed and reasonable people, the court stated that the decision was taken considering that Brazil is a secular federation (i.e., a State that separates religion and government). By adopting this argument, the justices – in accordance with Kant's categorical imperative – aimed to confer the idea of "moral neutrality" to the judgment, avoid criticisms based on ethics and oppose Catholic values related to the beginning of life. Furthermore, the Supreme Court promoted public hearings and collected scientific data to support women's right to decide, arguing that the perpetuation of pregnancy against their will is "cruel treatment of the State". The decision also tried to bring common sense to the consciousness of society by asserting arguments that could be expressed in public terms and based on constitutional principles/rules.[46]

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[40]Stelmach & Brozek (2006) at 70.
[41]This explains why argumentation theories usually are based on logic and analytical schemes, avoiding the absolutes of both positivism and relativism.
[42]See Perelman & Olbrechts-Tyteca (1969).
[43]Perelman & Olbrechts-Tyteca (1969).
[44]Perelman & Olbrechts-Tyteca (1969).
[45]See Stelmach & Brozek (2006).
[46]See Diniz & Velez (2008).

However, the complexity and openness of legal discourse can make the third layer insufficient, so one may also need to use a hermeneutical approach. That is, the logic-analytic-argumentation perspective could demand, in specific cases, a broader view to produce an adequate theory of legal reasoning, since it would be too narrow and hermeneutics would be too wide if detached from the previous perspectives.

The Fourth Layer in Legal Reasoning: Ontological Hermeneutics

In hard cases, one might be unable to reach a final answer – even though with no method to assert its correctness – through the approaches previously suggested, so hermeneutics has an important role in the process of legal reasoning. As I have already demonstrated, the perspective (e.g., logic, analysis, argumentation and hermeneutics) depends on the circumstances of the case and the habits of the interpreter. In most common cases, however, it should be adequate first to use logic; secondly, analysis; thirdly, argumentation; and finally, to adopt hermeneutics, although the order is not pre-determined in the spiral of comprehension. What the jurist cannot ignore is the metatheoretical view, since separately these perspectives lead nowhere.

Universalism in legal reasoning is intimately connected with the fundamental problem of understanding and the need for this approach arises especially in hard cases, where the standard perspectives do not suffice to search for the correct decision. In this context, ontological hermeneutics sees understanding as the universal point of departure for all cognitive human activity, i.e., *"the existence of being"* (*Dasein*), without discharging logic, analysis and argumentation in previous/later stages. Understanding is no longer a method and the cognitive "subject-object" relation is left behind, since phenomenological hermeneutics enables the junction of both objective and individual experiences.[47] By abandoning the quest for truth and method, Gadamer asserts that hermeneutics is a philosophy (more specifically, a mode of being) since the *"only being that can be understood is language."*[48] He describes the conditions under which understanding is possible and embraces three inextricably and usually divided aspects: understanding, explanation and application.[49] Understanding is realised through interpretation and the essence of interpretation is expressed in the application of law. In other words, Gadamer demonstrates that interpretation and application are parts of the process of understanding and all of them constitute the hermeneutical experience of the being.[50] Furthermore, any understanding is historically situated (*historicity of comprehension*), allowing one to be open not only to the past (*tradition*), but also to the present and to the future.[51] Tradition is central in Gadamer's approach, because understanding a subject is not a subjective event,

[47]See Streck (2010) at 699.
[48]Gadamer (1990).
[49]See Gadamer (1990).
[50]See Gadamer (1990).
[51]See Gadamer (1990).

since it is always influenced by time. Comprehension does not consist merely of a psychological state, but a shared institutional fact with unity of sense. When reading a text, one anticipates that it is perfectly meaningful. However, interpreting is a historical phenomenon rooted in an ever-changing tradition, which makes the hermeneutical process infinite.[52] 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 of philosophical hermeneutics: a critical and analytical thinking, *"previously excluding any imaginable doubt as meaningless.*"[53] 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.[54]

Thus, the phenomenological approach abandons the hermeneutic circle and moves to a new universal perspective, a so-called *spiral hermeneutic*, which considers the importance of historicity, the concept of pre-judgment (*Vorurteil*) and the link between the elements in the process of understanding (*linguistic character of understanding*).[55] When one enters in *interpretative situations*, one does so with all legal knowledge and the legal pre-understanding of institutions. Hermeneutics is universal not only because of the problem of language, but also due to the infinite task of hermeneutical experience in the search for cognitive unity and the correct legal decision. In sum, it is present at all levels of cognitive activity of jurists and deeply related with logic, analysis and argumentation.[56]

In this context, legal reasoning is the search for the correct answer through the hermeneutical experience of understanding (*concretisation*), applying an understood legal context to a concrete case that steams directly from being.[57] The essence of law is concrete/historical and can only be found in *applicatio*, since ontological hermeneutics has replaced objectivity with the historicity of understanding.[58] Unlike legal positivism, the metatheoretical approach sees legal reasoning as a spiral construction of the historical act of understanding. It adopts a postmodern perspective by deconstructing all paradigms that ignore the fusion of ontological-epistemological perspectives. Legal reasoning, thus, is the understanding

[52]Gadamer (1990).
[53]Husserl (1908) at 13.
[54]Accordingly, Streck (2010) asserts that *"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 (Sinngebung). 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."*-
[55]See Gadamer (1990.
[56]See Stelmach & Brozek (2006).
[57]See Kaufmann (2010).
[58]See Streck (2010) at 699.

of the human person, historical influences and his/her openness horizons to the future.[59]

Turning to anencephalic foetuses, one has to consider that hermeneutics was immersed in the previous "layers". Well, as I have already emphasised, interpretation and application are parts of the process of understanding and all of them are part of the hermeneutical experience of being. Thus, to apply norms through logic and analysis, one has to simultaneously interpret and understand them. Furthermore, the phenomenological approach adopts a *spiral hermeneutic*, which considers the importance of historicity, and consequently the task of understanding is infinite. In other words, even though the court could have held previously, in a different context, that the abortion of an anencephalic foetus was unconstitutional, the new hermeneutical experience allows a shift from the unconditional foetal right to life to women's rights to health, dignity and autonomy. In sum, although it is impossible to assess if one has reached a definite and correct decision, historical influences and society's openness to the future allowed a decision that challenged the religious paradigm that was prevailing in Brazil.

Legisprudence and *Applicatio:* Unifying Lawmaking and Legal Reasoning

Not only do judicial decisions have to be rational, lawmakers have a duty to reflect about the consequences of statutes and laws enacted. More than simply following the rules of the constitution, many legal scholars have tried to establish principles to measure the quality of legislation (e.g., duty to establish the facts, to achieve balance, prospective evaluation, to consider future circumstances and retrospective evaluation).[60] Nonetheless, legislation and legal reasoning inherently involve choices, so both reflect decision-making processes. In other words, rationality in legislating affects legal decisions. Thus, poorly reflected statutes and laws can generate unreasonable judicial decisions.

To avoid such "undesired decisions", I argue that legislators must adopt a logic-analytic-argumentative-hermeneutical point of view.[61] The legislative power cannot be exercised under purely volitional aspects. Rationality in legislating should be an informed choice about the effects on legal reasoning.[62] Lawmaking and judicial decisions are processes in which the same reasoning has to be adopted to guarantee predictability and rationality. Courts adopt a logic-analytic-argumentative-hermeneutical approach shared with legislators, which allows coherence in and between both decision-making processes. In short, judges and legislators have to reason in a similar vein to reach integrity, which is only possible though a unified approach to lawmaking-legal-reasoning.

[59]See Stelmach & Brozek (2006).
[60]Gusy (1985) at 292-295.
[61]See Wintgens (2000).
[62]See Wintgens (2000).

Conclusions

The fact there is no method guaranteeing that interpreters will reach the correct answer does not mean they are free to choose norms' meanings.[63] Judges should aim for the correct answer; otherwise law would lack legitimacy and one could question its autonomy over arbitrariness.

In this paper, I do not propose a method. Gadamer has shown that methods are not able to achieve truth by themselves. However, one should realise that by adopting a single philosophical approach to legal reasoning (logic, analysis, argumentation or hermeneutics) is not enough, as practice has demonstrated so far. A serious perspective requires a strong framework and the challenge is to implement it in a functional manner. Thus, I propose a pluralistic approach, a so-called logic-analytic-argumentative-hermeneutical process, weighing the priority of norms and precedents as a metatheoretical postmodern philosophy, not only due to its simplicity, but also because of the versatility of the model. An increasing challenge is brought to the functioning and integrity of legal reasoning that magnifies the importance of this approach.

The four layers do not ignore the principles of coherence (the final decision must be the most coherent in itself and with the previous decisions, although, as paraconsistent logic has shown, this is not a condition of the existence of law), "living reasoning" (the decision is not limited to itself, but part of humans' historical condition), adequacy (the decision should take into account all relevant circumstances to the case), normative density and functionality (a decision must justify itself in a reflective and rational way).

I do not intend to give a final answer about the subject in this short work. However, ignoring a metatheoretical postmodern approach means assuming inferior legal reasoning. In fact, because the different philosophical perspectives vary so significantly in their ability to resolve legal conflicts, when a less "adapted" approach is applied to decide a legal question, the results can be disastrous. The goal, however, is to provide a new perspective that might change this panorama.

It is not only a methodology, but also a new perspective that accomplishes legal reasoning. Single philosophical approaches are not enough. A metatheoretical postmodern perspective makes possible not only a comprehensive view of the way legal reasoning behaves, but more than this, proportionate flexibility to both civil and common law systems.

The discussion, from now on, is not whether a logic-analytic-argumentative-hermeneutical approach can change the way legal reasoning sees itself, but to implement its contributions. Risks do exist. However, it is necessary to see how far the approach can contribute so that sound legal reasoning triumphs.

[63]See Streck (2000) at 685-688.

References

Alexy, R. (2005). *Teoria da Argumentação Jurídica: a teoria do discurso racional como teoria da justificação jurídica*. São Paulo: Landy.

Audi, R. (1999). *The Cambridge Dictionary of Philosophy*. Cambridge: Cambridge University Press.

Austin, J.L. (1975). *How to Do Things with Words*. Cambridge: Harvard University Press.

Bach, K. (1998). '*Speech Acts*' in E. Craig (general ed.) *Routledge Encyclopedia of Philosophy*. London & New York: Routledge.

Costa, N.C.A (1993). *Sistemas formais inconsistentes*. Michigan: Editora UFPR.

Costa, N.C.A & R.G. Wolf (1985). 'Studies in Paraconsistent Logic II: Quantifiers and the Unity of Opposites', in *Rev. Comobiana de Matematica*s 19:59-67.

Costa, N.C.A & R.G. Wolf (1989). 'Studies in Paraconsistent Logic I: the dialectical principle of unity of opposites' in *Philosophia (Philosophical Quarterly of Israel)* 9(2)*:*189-217.

Diniz, D. & A.C.G. Velez (2008). **'**Aborto na Suprema Corte: o caso da anencefalia no Brasil' in *Rev. Estud. Fem.* 16(2):647-652.

Gadamer, H-G. (1990). *Wahrheit Und Methode*. Tübingen: J. C. B. Mohr.

Godoy, S.G.M. de (2009). *Estudos sobre a lógica paraconsistente DL e aplicações em Direito.* PhD diss. Universidade de São Paulo, Faculdade de Filosofia, Letras e Ciências Humanas. DOI: 10.11606/D.8.2009.tde-04022010-114639

Grabowski, A. (1999). *Judicial argumentation and pragmatics: A study on the extension of the theory of legal argumentation.* Krakow: Księgarnia Akademicka.

Gusy, C. (1985). "Das Grundgesetz als normative Gesetzgebungslehre?" in *Zeitschrift für Rechtspolitik* 18(11):291-299.

Husserl, E. (1908). Meditações cartesianas: introdução à fenomenologia (2001, Frank de Oliveira, trans.). São Paulo: Mandras Editora Ldta.

Kaufmann, A. (2010). *Filosofia do direito.* Lisbon: Fundação Calouste Gulbenkian.

Kutz, C.L. (1994). '*Just Disagreement: Indeterminacy and Rationality in the Rule of Law*' in *Yale Law Journal* 103:997-1018.

Lacerda e Silva, A.Q. (2012). *Análise de Argumentos Jurídicos com Lógica Deôntica Paraconsistente.* Brasília: Centro Universitário de Brasília.

MacCormick, N. (1992). 'Natural Law and the Separation of Law and Morals' in R.P. George (ed.) *Natural Law Theory: Contemporary Essays*. Oxford: Clarendon Press.

MacCormick, N. (2005). *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*. Oxford: Oxford University Press.

Perelman, C. & L. Olbrechts-Tyteca (1969). *The new rhetoric: A treatise on argumentation.* Notre Dame: Notre Dame Univ. Press.

Sarkowicz, R. (1995). *Poziomowa interpretacja tekstu prawnego.* Kraków: nakł. Uniwersytetu Jagiellońskiego.

Searle, J.R. (1975). 'A Taxonomy of Illocutionary Acts' in Günderson, K. (ed.), *Language, Mind, and Knowledge* (*Minneapolis Studies in the Philosophy of Science*), 7:344-369.

Searle, J.R. & D. Vandervecken (1985). *Foundations of Illocutionary Logic*. Cambridge: Cambridge University Press.

Slater, B.H. (1969). 'Paraconsistent Logics?' in *Journal of Philosophical Logic 24(4): 451-454.*

Stelmach, J. & B. Brozek (2006). *Methods of Legal Reasoning.* Netherlands: Springer.

Streck, L.L. (2010). "Deconstructing the Models of Judges: Legal Hermeneutics and Beyond the Subject-Object Paradigm' in *Nevada Law Journal* 10:683-708.

Wintgens, L.J. (2000). "La législation entre science et politique" in *Revue interdisciplinaire d'études juridiques* 44:115-155.