THE NEED FOR A THEORY OF JUDICIAL DECISION AND ITS CRITERIA: THE JUDGE'S POLITICAL RESPONSIBILITY AND LIMITS ON INTERVENTIONS BY THE JUDICIARY

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ABSTRACT

This paper examines the need for a theory of judicial decision and for clear decision criteria, alongside the reserve of consistency, in order to measure the judge's political responsibility and to limit the interventions of the Judiciary. Three hypotheses are discussed: a) the theoretical common sense that guides Brazilian jurists is formed by remnants of exegetical positivism and of Kelsen's positivism, by Robert Alexy's theory of argumentation, by the jurisprudence of values, and by North American judicial activism; b) this common sense is untenable, because these theories were received in Brazil in a mistaken way and produce harmful effects on judicial decisions in a Democratic Rule of Law; and c) there is a need for a theory of judicial decision and for defined criteria to measure the judge's political responsibility, limit the interventions of the Judiciary, establish parameters for the use of precedents, and preserve the Democratic Rule of Law. After setting out this theoretical consensus and the criticisms of Lenio Luiz Streck—the indiscriminate use of principles, arbitrariness, and non-compliance with the law—the conclusion is that the need for such a theory has been demonstrated and that the prevailing common sense must be transformed to make room for it.

Keywords: Democratic Rule of Law; Theory of Judicial Decision; Legal Hermeneutics; Judicial Protagonism; Reserve of Consistency.

INTRODUCTION

The Judiciary intervenes ever more in legal relations, whether to extinguish them or to create or modify them. This intervention, however, has been consolidating judicial protagonism,[1] which is not admissible in a Democratic Rule of Law. At the same time, abstraction in decisions gains strength: the concrete case loses ground to precedents, applied without any democratic parameter.

It should be made clear from the outset that the object of this research is not the intervention of the Judiciary as such, but the manner in which it intervenes and the questions of interpretation that lie behind that act. The criticism is directed at judicial protagonism, not at intervention, which is inseparable from the very function of judging.

When an obligation to perform is imposed by judicial decision on the basis of an insurance contract, that decision must be grounded in a democratic and responsible way. It is not enough to support it with norms of indeterminate content, general clauses, and legal pseudo-principles—arbitrary resources, because anchored solely in the conscience of the one who judges—nor should it be limited to reproducing earlier decisions. The necessary interventions of the Judiciary cannot, therefore, serve as an excuse for the protagonism of the judge: the current consensus is suited neither to the ends of the 1988 Constitution nor to the Democratic Rule of Law that it erected. The grounding of the decision must focus on the judge's political responsibility[2] and on a basis of legitimation provided by a theory of judicial decision, linked to proposals of interpretation compatible with the Democratic Rule of Law and with the present stage of legal science.

The problems connected with judicial intervention are of two orders: the grounding of decisions and the limits of intervention. Although distinct, the solution to both lies in the same place—a set of theoretical proposals of interpretation that draw limits and sufficient conditions for a truly democratic adjudication, capable of establishing a theory of judicial decision and criteria[3] for the judge to decide. A set of criteria capable of making the decision democratic is not enough, however: a mechanism for measuring the judge's political responsibility must also be chosen. Reference is made here to the reserve of consistency,[4] whose function is to fix the minimum and necessary content—not only legal—that must appear in the grounds of the decision, operating alongside the theory of judicial decision and its criteria.

Judges must also change their stance regarding abstraction in decisions. The trend is towards the comparative analysis of cases: if case X is brought to court and has a legal ground similar to that of case Y, decided earlier, the solution given to case X will be identical to that of case Y—passing over countless particular questions. The central point lies in the absence of democratic criteria for comparing one case with another.

To address the problem, the following hypotheses are raised: a) the theoretical common sense *in terrae brasilis* comprises the remnants of exegetical and Kelsenian positivism, Robert Alexy's theory of argumentation, the jurisprudence of values, and North American activism; b) this common sense is untenable, insofar as these theoretical receptions are mistaken and generate harmful consequences for judicial decisions in a Democratic Rule of Law; c) there is a need for a theory of judicial decision and for criteria, alongside the reserve of consistency, to measure the judge's political responsibility, limit the interventions of the Judiciary, establish parameters for the application of precedents and, thus, keep the Democratic Rule of Law intact.

The method used is the deductive one, by means of the monographic procedure. The research technique is indirect documentation, in its documentary and bibliographical forms.

THE THEORETICAL COMMON SENSE IN BRAZIL

Exegetical Positivism and Its Remnants

Exegetical positivism, which emerged in nineteenth-century France, is characterized by interpretive rigour, since it was limited to the literal analysis of the text of the law. The judge, in that period, was the “mouth of the law”, in the sense that he functioned merely as the spokesman of the strict will of the legislator, at that time the monarch.

This derives from the scientific stance dominant at that historical moment, whose basis held that only facts, because they are subject to experience, were of a scientific nature. Hence the choice, in the legal field, of this object of a scientific nature, which for jurists came to be the law; legal studies were therefore limited to statutes and codes (Streck, 2011, p. 31). Positivism was thus a conception according to which only what was laid down in law was considered part of legal science; the rest, natural law, would no longer be part of the legal world (Bobbio, 1995, p. 26). This understanding arose with the formation of the modern State, after the dissolution of medieval society, which was plural and saw law as a social phenomenon (Bobbio, 1995, p. 26–27).

It was asserted that statutes were self-sufficient and capable of solving every problem, to the point that the law was nicknamed sacred. Problems of interpretation, evidently, existed and began to trouble the exegetes, above all because reality changes and the literal rigour of the legal provisions of former times admitted no change (Streck, 2011, p. 32). The solution found, at first, was the use of analogy and of general principles of law, seen in a strict and exceptional way; in any case, the rigidity lasted for years, and the correct interpretation was the one that reproduced the literal terms of the law.

As for the remnants of exegetical positivism, one finds that today it has repercussions in a direction contrary to its own nature: the judge, so as not to be the mouth of the law—something that is nowadays condemned—ends up subverting it through judicial protagonism (Streck, 2011, p. 31). He does not realize that, in fleeing legalist rigour, he acts as badly as if he were bound to legalism.

Consider the decision of the Federal Supreme Court on the abortion of anencephalic foetuses (ADPF 54), in which it was held unconstitutional to interpret this situation as falling under Articles 124, 126, and 128, items I and II, of the Penal Code. The STF did not confine itself to the text of the law, for it created a modality of abortion—or, according to some justices, merely of interruption of pregnancy. There was judicial activism, understood in this context as complete departure from the law, violation of the separation of powers, and a blow to the Democratic Rule of Law. Add to this the confusion of constitutional interpretation, especially regarding principles,

which have become theoretical alibis for introducing into the judgment the moral positions of the judges—their conscience—which are worth nothing legally.

The return to exegetical positivism is not being advocated here; the aim is to point out the problem of the total abandonment of the law, since disregarding it is as bad as observing and applying it in an absolute and blind way. Aristotle already observed that what is right is the mean, that is, what lies between excess and deficiency (2002, p. 50–55). Two decisions of Justice Luís Roberto Barroso, of the STF, should be cited at this point, as they make clear the theoretical confusion resulting from adherence, often unconscious, to exegetical and normativist positivism.

The first is based on the letter of the law (Criminal Action 565) and asserts that it is the National Congress that has the right to revoke political mandates; the second (Interim Measure in Writ of Mandamus 32,326), however, orders, on the basis of value arguments (metalegal ones), the annulment of the decision of the National Congress that did not revoke the mandate of Deputy Donadon (Streck, 2013c, p. 1–5). The judge is not authorized, at one moment, to use the formality of the law to deny a claim and, at another, to avail himself of interpretive latitude—Alexyan, for instance—to grant it. What is maintained, therefore, is the need for an interpretive middle ground capable of limiting the intervention of the Judiciary and of establishing parameters for the application of precedents.

Hans Kelsen's Pure Theory of Law and Its Remnants

Because of the growth of the problems linked to exegetical positivism, efforts were made to refine the scientific rigour linked to posited law, above all because the scope of this fact increased greatly with the intensification, in the twentieth century, of State intervention in society. This refinement is called normativist positivism by Streck (2011, p. 32). It is in this context that Hans Kelsen and his pure theory of law (PTL) appear.

Kelsen sought to develop a pure theory of law, that is, one free of external interference. He wanted to purify legal science of metaphysics, of ideologies, of politics, of morality, and of other scientific fields, for only thus could the exactness of the scientific method be achieved: Kelsen (2006, p. 11) wanted legal science truly to be a science, and not what it was becoming—and, it may be said in passing, is becoming again today. Justice itself, according to him, should not be counted for the purposes of legal science, given its indeterminacy and subjectivism (Kelsen, 2006, p. 54). Kelsen thus confined himself to the set of norms that makes up the positive legal order of the State, to which he gives the name of legal positivism (2006, p. 5)—a current little understood by legal professionals today, since a large part of them confuse exegetical positivism with Kelsenian or, as Streck calls it, normativist positivism.

One must start from the term norm, a fundamental concept of the PTL. Kelsen understood a norm as something that ought to be or to happen (*Sollen*): if conduct accords with what it prescribes, it will be lawful; if it is at odds with it, it will be unlawful. Moreover, the norm serves the legal practitioner as a scheme of interpretation, for it is through it that he sees reality (Kelsen, 2006, p. 4–5). Not every norm, however, has validity and binding force: Kelsen (2006, p. 9)

makes these characteristics conditional solely on norms produced according to rules of competence previously established in a hierarchically superior norm, which is the Constitution.

The Constitution, in turn, receives its validity from a superior founding rule, whose existence is merely presupposed, called the basic norm (*Grundnorm*)—which is not, at least not necessarily, the Constitution, but the first and supreme norm that inaugurated the legal order in a given place (Kelsen, 2005, p. 169). The system of the PTL is therefore unitary and can be seen as a stepped pyramid: the norms below the basic norm must be compatible with it, a norm being compatible when it is produced in the manner laid down by the superior norm (Kelsen, 2006, p. 33). Hence the observation that positive law may have any content, since what matters is the form in which the norm is produced, not its content (Kelsen, 2006, p. 221).

Another fundamental point is legal interpretation, which Kelsen (2006, p. 387) links to the stepped formation of the legal order: interpretation is a mental operation that reveals the meaning of the superior norm in order, in accordance with it, to ground the inferior norm—which may be, for example, an individual norm issued by a judge. Consequently, the application of law is merely one phase of the legal order. When a judge decides, he is not declaring something but constituting it, for he does not discover a previously established and finished right: he creates an inferior norm intended to produce effects on a specific situation (Kelsen, 2006, p. 261–262).

It so happens that higher-level norms are not complete, so as to leave room for freedom to the applier-creator. Hence Kelsen's assertion that these norms have the character of a frame to be filled (2006, p. 388). To complete, within the limits of the frame, the empty space left by the superior norm, the applier-creator performs an act of choice/will that may lead to more than one consequence accepted by the legal order (Kelsen, 2006, p. 392–395). Kelsen (2006, p. 396) thus lays down another basis of his theory: discretion in the act of applying/creating the inferior norm, given the incompleteness of the superior norms and the acceptance of more than one correct answer in the light of the legal order.[5]

Kelsen (2006, p. 77–78) further proposes that legal science must be free of morality, because moral standards are relative and vary according to time and place, which makes them useless for the evaluative appraisal of law. Finally, the PTL denies the legal character of principles, which would be of a nature other than legal and would be related to morality, politics, or custom (Kelsen, 2006, p. 145–156).

The PTL having been set out in broad outline, it must be said that, although this occurs unconsciously, a large part of case law—and of legal scholarship as well—is impregnated with Kelsen's normativist positivism, creating a scenario favourable to arbitrariness. The two decisions of Justice Barroso already mentioned make this discretion clear: the second ruling highlights the inclusion of metalegal arguments and the use of what Streck calls the external predators of law, and the first revives the exegetism of the judge as mouth of the law. This way of deciding is untenable at the present historical moment, so that a theory of judicial decision proves necessary.

Robert Alexy's Theory of Argumentation and the Jurisprudence of Values

Although exegetical and normativist positivism retain their basic differences, both adopted, with a difference of degree, the subsumption of facts under norms as the criterion for applying the law, so that this formula was the only one for a long time. This reasoning remains fundamental, but legal dogmatics has recently undergone a paradigm shift, having become aware of the insufficiency of subsumption (Barroso, 2009, p. 358).

Barroso (2009, p. 359) gives a pertinent example: two norms that bear on the same set of facts. On one side, freedom of the press and of expression; on the other, honour, private life, and intimacy—both expressly provided for in the Constitution. It so happens that they point to different solutions, for they protect different values. Within the logic of subsumption, only one would be applied, because the other would be immediately discarded. In the formula of balancing, by contrast, the work proceeds in a multidirectional way, that is, without discarding norms; on the contrary, they are brought together so as to create a synthesis applicable to the set of facts. In practice, this task becomes arduous, for the interpreter must consider the importance and pertinence of the norms for the case, carefully weighing the consequences of the decision.

This formula is called the technique of balancing, whose basis lies in Robert Alexy's theory of legal argumentation, and it presents itself as a technique for deciding hard cases. Barroso (2009, p. 361) states that balancing is a process made up of three stages: in the first, the interpreter identifies the norms bearing on the case; in the second, the facts and concrete circumstances and their correspondence with the normative elements chosen are examined; and the third consists of balancing proper, understood as the opposite of subsumption. The central point lies in the third stage, for it is there that the interpreter will apply the norm to the concrete case.

Alexy (2011, p. 90–91) explains the difference between rule-norms and principle-norms: "The decisive point in the distinction between rules and principles is that principles are norms which require that something be realized to the greatest extent possible given the existing legal and factual possibilities." Rules, on the other hand, are norms that are either fulfilled or not fulfilled, so that there is no possibility of balancing, from which follows the need to do exactly what the rule prescribes.

Principles are thus optimization requirements satisfied to varying degrees; and rules, determinations limited to what is legally and materially possible. Therefore, "the distinction between rules and principles is a qualitative distinction, and not a distinction of degree. Every norm is either a rule or a principle" (Alexy, 2011, p. 90–91). Where principles collide, one of them will have to give way for the other to be applied, without this implying its invalidation or exclusion (Alexy, 2011, p. 92–93).

Hence the existence of decisions pointing in opposite directions on the same matter and of opposing votes in the same judgment, for interpreters, faced with the same facts and norms, reach different conclusions by reason of the very nature of the balancing process (Barroso, 2009, p.

364). Alexy's theory aims at selecting the best argumentation: it does not serve to fix the correct decision, for in its view there is no single correct decision, but rather a rational justification pointing to the best decision among the possible ones (Barroso, 2009, p. 365). It therefore demands thorough reasoning whenever balancing is used, since the judge goes through the stages with a greater degree of discretion and must guide the parties along this interpretive path (Barroso, 2009, p. 366).

Faced with this picture, the problem of controlling the rationality of legal discourse arises, and it becomes more serious in proportion to the degree of freedom granted to the one who decides. In this context, the jurisprudence of values should be noted, which served Germany to reduce the tension produced after the Allies granted the *Grundgesetz* (Basic Law) in the aftermath of the Second World War. In the following years there was an enormous effort on the part of the *Bundesverfassungsgericht* to legitimize that grant, given the lack of popular participation in its drafting: the court invoked arguments that allowed decision criteria beyond the rigid structure of legality, so that the indication of values began to appear as a means of grounding decisions that went beyond the scope of the Basic Law (Streck, 2011, p. 48). Values were used, in short, out of a historically justified necessity.

Streck explains, however, that the jurisprudence of values was borrowed by Brazilian theorists to attribute to the Constitution the quality of a concrete order of values, with interpreters having the role of finding and revealing those values (2011, p. 48), so as to install moralism and legitimize decisions according to the conscience of the one who judges (Ramos, 2010, p. 88). If the interpretive model itself is based on discretion and the invocation of values, it becomes almost impossible to control judicial decisions.

North American Judicial Activism

The cradle of judicial activism, the United States of America, should be analysed. In that country, the discussion of the role of judges and courts in the political system is deep and long-standing, and is even intertwined with American constitutionalism itself. Judicial activism in the Supreme Court developed in an intense ideological, political, social, and cultural environment, which is why it has acquired a singular didactic usefulness (Campos, 2013, p. 96).

The American system operates according to the dictates of the common law. In this system, the judicial decision settles the dispute and at the same time has the value of a precedent, so that it occupies the position of principal source of law: decisions, besides giving effect to rights, convey legal norms intended to regulate conduct (Ramos, 2010, p. 105). The common law designates a family of law, as opposed to the Romano-Germanic family, the civil law, to which Brazilian law belongs (Soares, 1999, p. 31).

Farnsworth (*apud* Soares, 1999, p. 41) lists the qualities that sustain this system: *equality*, the possibility that similar future cases will receive the same decisions; *predictability*, the expectation that future cases will be decided in accordance with those already decided; *economy*, since, where matters are already settled, new cases will be decided more quickly; and *respect*,

since the publicity of decisions tends to generate obedience to what has already been decided. In the common law, therefore, the basis of the system lies in the idea that law is directed at resolving practical questions, posed case by case; legal scholarship is extremely weak, rarely serving as a basis for decisions[6] (Soares, 1999, p. 53).

The civil law family, on the other hand, is based on the compilation and codification of Roman law, which gradually established rational solutions and transformed law into a system of grouped precepts (Soares, 1999, p. 27). This system, however, displays a certain logical rigidity brought by the legislation in force, from which arose stances seeking to reduce it. The mechanism initially used was equity, with the aim of tempering the rigour of the law and the formalism of logic, since it falls to the Judiciary to realize the values of justice (*suum cuique tribuere*). From this derives the supposed legitimation for the judge to go beyond the limits imposed by the legal order, forgetting the typical function of the branch to which he belongs and usurping the functions of other branches.

It so happens that the system adopted in Brazil is that of the civil law, in which case law is not a source of law.[7] Judicial decisions are endowed with minimal normativity: they may regulate situations, provided that such regulation is limited to the normative acts previously enacted. Hence judges are not authorized to expand, exclude, or reduce normative content previously established by the competent legislative body (Ramos, 2010, p. 107). When the Judiciary exceeds this limit, it acts in an activist manner and creates, extinguishes, or modifies law, usurping a function belonging to others. In a legal order of Romano-Germanic origin, activism is linked to a dysfunction in the exercise of jurisdictional power, for it breaks the limits democratically established by the branch to which the Constitution assigned the legislative function (Ramos, 2010, p. 107).

In Brazil, the role of the Federal Supreme Court was greatly enlarged by the 1988 Constitution and, consequently, this Court underwent a profound quantitative and qualitative change in the national socio-political scene. In resolving cases, the Supreme Court has used decision techniques that often result in activism, for they make it possible to expand the Court's own procedural powers, to alter and intensify the effects of its decisions, and to interfere with the legal capacity of other branches (Campos, 2013, p. 95). Activism is present at every level of jurisdiction, but it acquires greater repercussion when it appears in the supreme Court.

The interference of the Judiciary is not limited to the sphere of the Legislature, inasmuch as the Executive has been having its function as executor of public policies usurped by judges. The substantialist theory, defended by Dworkin (1999, p. 305–306), authorizes the Judiciary to secure the realization of fundamental rights, raising it to the status of a transforming agent. This theoretical authorization encounters an obstacle, however, in the democratic principle, since judges, unlike legislators and those who govern, are not endowed with legitimacy to represent the people. The proceduralist theory is adopted here, which criticizes the invasion of politics and

society by judges, termed the gigantism of the Judiciary (Habermas *apud* Streck; Morais, 2000, p. 40).

The Theoretical Common Sense *in Terrae Brasilis*

Legal dogmatics is filled with values, beliefs, and justifications supplied by specific disciplines, whose legitimation derives from institutionalized entities such as parliament, courts, and law schools. Warat (1994, p. 57) calls this the theoretical common sense of jurists, which expresses the accumulation of institutional legal practices, culminating in a tangle of functional representations derived from moral, theological, metaphysical, aesthetic, political, scientific, professional, and family knowledge, which legal practitioners accept daily as truth. Consequently, this common sense gives rise to a kind of *habitus*, resulting in a set of practices concealed by the *communis opinio doctorum*, which entail an uncritical and comfortable knowledge of legal categories: legal activity becomes routinized and trivialized, and the legal professional becomes a mere receptacle of symbolic capital, that is, a combination of knowledge, prestige, reputation, authority, and academic degree (Bourdieu *apud* Faria, 1991, p. 91).

This common sense operates through four functions: the normative, which is limited to attributing content to legal texts; the ideological, which homogenizes social and legal values; the rhetorical, which gives effect to the ideological function by providing a complex of arguments and conditions of rhetorical meaning; and the political, which reasserts the power relations directed at the ends pursued by the State (Warat, 1994, p. 91). It follows that the daily life of legal practitioners does not contain the faculty of knowing based on factual, logical, ethical, scientific, and epistemological standards, for the theoretical common sense implies knowledge of values without, however, explaining it—resulting in the conformism of legal practitioners and their difficulty in overcoming everyday vices.

The preceding subsections set out the remnants of exegetical and normativist positivism, Alexy's theory of argumentation, the jurisprudence of values, and North American judicial activism, with the purpose of synthesizing the theoretical common sense present in most judicial decisions handed down in Brazil. Although this cannot be observed expressly and directly, this common sense is permeated by these theories, so that the actions of legal professionals are guided by them, consciously or not. Understanding and detecting this dominant context is the task of the critique of law, which directly attacks the basis of legal dogmatics by denying the assumptions on which the conformist process of legal professionals begins and is maintained. To that end, it must be borne in mind that law is more than words: it also consists of behaviours, symbols, and knowledge expressed through language (Streck, 2004, p. 239–241).

THE CRITICISMS FORMULATED BY LENIO LUIZ STRECK

Preliminary Questions

The Democratic Rule of Law

Streck (2011, p. 486) proposes that any current discussion of Brazilian law must take into account the parameters of the Democratic Rule of Law, since this kind of State is responsible for overcoming the authoritarianisms and totalitarianisms that arose in the twentieth century.

The Democratic Rule of Law has a much broader content than the Liberal and Social Rule of Law, chiefly because it aims to transform reality—the Social State was limited to a continuous adaptation of the social conditions of existence (Streck; Morais, 2012, p. 97). Its essence goes beyond the mere pursuit of a dignified life, so that it qualifies as a promoter of public participation (Streck; Morais, 2012, p. 98), understood as the act of every citizen helping to build and rebuild the society of which he is part. It operates according to the principles of constitutionality, the democratic organization of society, the system of fundamental rights and guarantees, social justice as a corrective of inequality, substantive equality, the separation of powers, legality as a means of excluding arbitrariness, and legal certainty (Streck; Morais, 2012, p. 98–99).

Whereas the liberal model need only limit State action by means of general and abstract law, and the Social State requires positive action from those who govern, the Democratic State has the aim of concrete equality: its target is the transformation of the *status quo* through popular participation (Streck; Morais, 2012, p. 100). Thus the will to power of one or of a few must not replace the democratic production of law, so that the subjectivist character must be rejected in favour of the democratic principle. In a single sentence: "[…] the paradigm of the Democratic Rule of Law rests on intersubjectivity" (Streck, 2011, p. 264).

Contemporary Constitutionalism

The term neoconstitutionalism is frequently used by Brazilian jurists, but it leads to errors related to mistaken receptions. It served well, initially, to affirm the normative force of the Constitution; in Brazil, however, it has been encouraging legal practitioners to receive uncritically the jurisprudence of values, Alexyan balancing, North American judicial activism and, even if unconsciously, Kelsenian normativism (Streck, 2011, p. 35).

To remove such theoretical ambiguities, Streck (2011, p. 36) formulated the concept of contemporary constitutionalism. At the present stage of Brazilian constitutional dogmatics, the democratic-normative question and the integrity of adjudication are clearly settled thanks to the 1988 Constitution, so that the term neoconstitutionalism serves only to generate contradiction and to encourage mistaken receptions. This idea gives rise to the conclusion that the earlier constitutionalism was overcome; what occurred, however, was the continuation of the movement with new achievements (Streck, 2011, p. 37).

Those authors were mistaken according to whom neoconstitutionalism represents the overcoming of positivism—authors who, on the ground of the need to overcome the letter of the law, became value-oriented theorists. One also notes a wager on the term as the hope for the realization of law, which would be carried out through judges (Streck, 2011, p. 36); hence the emergence of judicial protagonism. Contemporary constitutionalism means, on the contrary, a

rupture with the positivisms, since its characteristics are opposed to positivist dictates (Streck, 2011, p. 65).

Legal Hermeneutics in Crisis

The Constitution is not given effect because of the paradigm crisis that obstructs its taking place, so that the objectives of social justice, equality, and the social function of property become mere promises (Streck, 2004, p. 294). The crisis responsible for this is confined to two points: the subject-object scheme and the philosophy of consciousness, both based on the liberal-individualist conception of law.

The subject-object scheme is characterized by the belief in the existence of a first meaning, into which the facts will later be fitted. The legal practitioner would be the messenger of a previously existing message, without needing to go to it (Streck, 2004, p. 297)—knowledge would lie in the subject itself. The messenger, however, must already come with the message and, before that, go to it, so that there is nothing previously posited and separate from interpretation and language (Heidegger *apud* Streck, 2004, p. 297). Language is that through which the object is interpreted and through which knowledge is subsequently reached, which is why it must serve as the basis for present-day hermeneutics.

Although the liberal-individualist model was overcome in Brazil with the 1988 Constitution, legal practitioners continue to use the techniques of former times, no longer compatible with what the new centre of the legal order determines (Streck, 2004, p. 294). The practitioner looks at the new with the eyes of the old and forgets that the Constitution is sufficient reason to abandon the old stances. Nor may he place the knowing subject above the object to be known, culminating in the prevalence of the will of one over that of the others (Streck, 2004, p. 295)—and it is precisely on this that the philosophy of consciousness is based, which considers the subject the central point of knowledge. Besides being anti-democratic, this current is no longer sustainable in the face of the philosophy of language, which transfers philosophical problems to the sphere of language, in which the world is discovered and understood (Streck, 2010, p. 14).

Breaking with this scheme will entail the loss, on the part of the legal practitioner, of the power to say the world; he will come to use language without attributing values and fixing moral aspects, that is, he will no longer act as protagonist and will be a democratic practitioner of law, properly applying the norms erected by the people, without dictating his own (Streck, 2004, p. 295). The problem is that this frightens some legal practitioners, who do not want to lose that power.

The Criticisms

Exegetical and Kelsenian Positivism

Exegetical positivism was overcome long ago, inasmuch as the judge is not conceived as a mere reproducer of legal texts, like a computer operating a rigid system in a limited way. Certain remnants nonetheless still have repercussions, for legal practitioners at one moment flee from the law and at another cling to it, always with the purpose of ensuring that their conscience prevails, as if the law were a liquid that could fit any container, according to the will of the thirsty.[8]

There is, accordingly, a theoretical mixture of exegetical and normativist positivism and the neopositivisms. Legal practitioners, although they do not notice it, use the three strands mentioned as the basis of their reasoning and, in effect, produce legal uncertainty and, often, arbitrariness masked as discretion. Streck (2011, p. 33) does not seek to criticize the structure of the PTL; he directs his criticisms at the problem posed by Kelsen, related to the idea of the interpreter's discretion (the frame of the norm), which survives in the unconscious of legal practitioners in Brazil. Kelsen himself states that the deviation entailed by subjectivisms at the moment of interpretation cannot be corrected.

For Streck (2011, p. 34), Kelsen did not deal with the main problem of law, which is the application of the norm (concrete interpretation), and his thesis was profoundly affected by this. With regard both to exegetical and to normativist positivism, it is not admitted today that the legal practitioner be guided by anti-democratic arguments grounded in the wish to overcome the literal wording of the legal text (Streck, 2011, p. 35). Hence the positivisms, or their refinements bearing the prefix "neo", no longer stand in the face of the democratic principle and of the present stage of legal science and philosophy.

Streck (2011, p. 261) observes that positivist currents in general became petrified, so as to turn into institutions and guide the legal practitioner's way of being: they are part of legal provisions and function as means of resistance to the new. The author cites as an example the Law of Introduction to the Civil Code (now the Law of Introduction to the Norms of Brazilian Law), whose Article 4—together with Article 126 of the Code of Civil Procedure—functions as a closure of the Brazilian legal system by providing that the judge, where the law is silent, shall decide the case in accordance with analogy, custom, and the general principles of law. These provisions are manifestly contrary to a present-day hermeneutic reading of the legal order and unconstitutional for violating the Democratic Rule of Law (Streck, 2011, p. 262). Hence the need for a theory of sources and of norms, alongside the already mentioned need for a theory of judicial decision.

The Mistaken Receptions

Robert Alexy's Theory of Argumentation and the Jurisprudence of Values

A short-sighted reception of this theoretical apparatus can be observed, inasmuch as legal practitioners in Brazil combined Alexyan balancing with the jurisprudence of values, above all because they make use of the idea that the Constitution is an order of values. This idea, which

served as the basis for the jurisprudence of values, also serves in Brazil for Alexyan balancing, so that the rationalization advocated by this theoretical current has become unattainable (Streck, 2011, p. 48). In other words, the assumptions of Alexyan balancing are disregarded, since there is a return to the grounding strategies of the jurisprudence of values (Streck, 2011, p. 49), according to which the rigidity of the norm must be reduced by means of valuations and moralizations carried out by the interpreter.

Constitutional scholars were seduced by Alexy's theory in the form in which it was mistakenly received in Brazil, so that this complex theory was reduced to a simple operation in which two principles are placed on a scale to see which of them will weigh more in the case being judged. Alexy's theory, however, does not authorize direct choice in the balancing process; on the contrary, it seeks to lead the interpreter to the formation of a rule which, as in Kelsen, will be applied to the case by subsumption. The main problem of its indiscriminate use is the full backing it gives to the judge's discretion, who is given an open door to decide according to his conscience and to ground such a decision in the Alexyan panacea, whose assumptions have nothing to do with what Alexy proposed in the original formula (Streck, 2011, p. 50).

Streck (2011, p. 50) supports the irrationality of the balancing method with the existence of divergent votes in a single judgment, despite all the judges having conducted their discourses on the basis of the same premises. Cases of public and supplementary health care may be cited, in which the judge routinely places on one side of the scale the right to health and on the other the amount needed to pay for a medicine or procedure, so as, by simple personal choice, to make the right to health prevail over any opposing argument.

North American Judicial Activism

Judicial activism was received and has been applied in Brazil in a *tabula rasa* manner, that is, as if it were a blank sheet to be filled in. What is clearly observed is the tendency to legitimize activist stances responsible for breaking the normative text, above all the constitutional one (Streck, 2011, p. 51–54).

The elementary distinction between judicialization and activism must be stressed. To judicialize implies submitting a certain matter to the Judiciary's analysis (judicialization of politics, of health, etc.); whereas being activist consists in placing oneself above the Democratic Rule of Law and violating the separation of powers, inasmuch as this conduct entails replacing the legislator, who is elected and represents the citizen's interest (Streck, 2013a, p. 1–3). For Streck (2013b, p. 1–6), judicialization is contingent and does not represent an evil in itself; the problem is activism as a behaviour, which supports and institutionalizes the already criticized judicial discretion, for the legal practitioner exceeds democratic limits and ends up creating law, as if he were a legislator.

In the case of the Supreme Court, the question is more complex, for, by virtue of the *erga omnes* effect and the binding effect of some of its decisions, the rule laid down will hold for the

whole public administration and for the other branches and organs of the judiciary below the Court. The institutionalization of activism worries Streck (2013b, p. 5), because it reveals judiciocracy and the politicization of judicial decisions; violation of the Constitution by the Judiciary is, after all, the worst kind of offence, since the Judiciary is its principal guardian.

Streck (2013b, p. 6) gives the example of Article 212 of the Code of Criminal Procedure, which establishes the order of questioning at hearings of evidence and judgment: the article is constantly violated, and this offence is accepted by the Superior Court of Justice and by the Federal Supreme Court, which deny the provision its force. He also cites the case of the Municipality of São Paulo, where the spending of the State Health Department on medicines as a result of activist judicial orders reached R$ 515 million in 2011, almost R$ 90 million beyond what was provided for in that year's budget (Streck, 2013b, p. 7)—one has, therefore, the Judiciary intervening in public health policies.

Three Harmful Consequences

The Indiscriminate Use of Principles (Pan-principiologism)

The theoretical common sense is formed, among other factors, by the mistaken receptions and, in this context, presents the problem of pan-principiologism, which consists in the belief that values have been made positive law and transformed into principles capable of resolving hard cases or of correcting the uncertainties of language (Streck, 2011, p. 518). Principles have become the hermeneutic panacea, creating an environment favourable to the introduction of the judge's morality and opinion into the resolution of cases.

Streck (2011, p. 519–534) lists more than forty supposed principles used daily by legal practitioners and shows that they are nothing more than interpretive standards, which have a pragmatic character at first and, at a second stage, acquire the status of universalization. The author (2011, p. 538) explains that the proliferation of principles weakens law, offends its autonomy, and devalues the Constitution and the Democratic State, since the supposed principles are endowed with corrective content, in the sense of enabling the legal practitioner to overcome the limits of the normative text. Moreover, the phenomenon revives the so-called completeness that characterized nineteenth-century positivism, according to which, where laws are absent or inappropriate, the interpreter must resort to general principles or even create them (Streck, 2011, p. 539).

For most authors, principles are legal norms and, consequently, endowed with normative character. Yet, Streck asks (2012, p. 1), what is the normative meaning of the principle of trust in the trial judge? Of the principle of procedural cooperation? Of affectivity? Of happiness? These pseudo-principles are nothing but alibis for judging according to the judge's conscience, since there is no normativity present in them.

Arbitrariness

Losano (*apud* Streck, 2011, p. 38) explains that in the twentieth century reason was replaced by the will of the judge, so that the laws of logic were abandoned. Streck (2011, p. 38) states that, from the Free Law School, through the jurisprudence of interests, Kelsenian normativism, Hart's moderate positivism and, later, argumentation theorists such as Alexy, there is a constant: the belief that at the moment of decision there will always be a free space to be filled by the judge, who will proceed according to his will. In this context, there would be no means of eliminating that free space (judicial discretion), for the law would never fully foresee social facts.

Hence Streck (2011, p. 38) maintains that discretion and will are two faces of the same problem. The author understands discretion as the arbitrary power delegated to the judge to fill the free spaces of legislation—spaces that result from a process of qualification, for what is free is whatever the judge understands as such, so that the interpreter himself can enlarge the zone in which he will act freely (Streck, 2011, p. 39). Streck concludes that, at the level of language, discretion and arbitrariness are synonyms and have nothing to do with the simplistic separation made by administrative law between bound and discretionary acts. What is really under discussion is the degree of freedom conferred on the legal practitioner in a Democratic State.

Hart (*apud* Streck, 2011, p. 40), in confronting the problem of the application of the legal rule, put forward the thesis that law has an open texture, and in doing so brought to light a glaring difference between administrative and judicial discretion. The administrator is free to choose the means necessary to achieve the ends established by law, always observing the principle of legality; judicial discretion, by contrast, gives rise to the creation of a new regulation for the case under analysis, which had until then found no precedent or legal support. Consequently, what is nowadays called judicial discretion is nothing more than an excuse for implicitly legitimizing arbitrariness, now perpetrated by the Judiciary (Streck, 2011, p. 42).

The judge is not a mere reproducer of legal texts, nor a computer through which previously formatted programs run; yet the *status quo* in which he decides freely whenever he considers himself to be facing a legal gap or a supposedly hard case cannot be accepted as adequate. Arbitrariness, masked as discretion, takes over the courts, above all the higher courts. Consider as examples the growing admissibility requirements of the special appeal: is there a divergence between courts? Has the matter been pre-raised? Is the judgment appealed against in accordance with the Court's dominant case law? These are questions answered according to the conscience of whoever examines them. Not infrequently, two appeals with the same questions on the merits and filed in the same form have different outcomes, depending on who was assigned to judge them.

Non-compliance with the Law

A law enacted according to the dictates of a democracy may be set aside only in strict and exceptional situations: a) where the law is unconstitutional; b) where interpretation in conformity with the Constitution is applied; c) where partial nullity without reduction of the text is declared;

d) where partial nullity with reduction of the text is declared; e) in the case of resolving antinomies; and f) where there is a conflict between a rule and a principle, bearing in mind the reservations concerning pan-principiologism. Outside these situations, the abandonment of the law will culminate in activism, judicial protagonism, and arbitrariness (Streck, 2013d, p. 1).

Most judges seek to rectify the imperfections of the legislative process, since the (mistaken) reputation currently prevails that legislative drafting lacks technique and follows only the dictates of politics. In this scenario, the judge abdicates his function of recovering the historicity of the facts and judging impartially, above all because he issues moral judgements about right and wrong, just and unjust, and takes sides.[9]

Streck (2013d, p. 2) states that strict compliance with the law is often an advance, given that for years there was a struggle for its enactment, and warns that the legal text must be taken seriously, above all in the Democratic State. It makes no sense for democratically constructed legislation to be—on the day after its enactment—disregarded on the basis of decisions that simply do not wish to follow it (Streck, 2013d, p. 4); as a rule, the implicit ground finds an echo in protagonism, arbitrariness, pan-principiologism, and pseudo-balancing.

THE NEED FOR A THEORY OF JUDICIAL DECISION AND ITS CRITERIA

The Reserve of Consistency as a Means of Measuring the Judge's Political Responsibility

The judge is bound by what precedes him, as well as by the dictates of the society of which he is part. To this scenario Dworkin (*apud* Passari, 2010, p. 103) gives the metaphorical name of the chain novel, in which each judge will write a new chapter (will decide) and which, although different, will make up the same story, from which the coherence and integrity of the legal system must result. Thus arises the judge's political responsibility, which is precisely the obligation to be coherent with, and to keep the integrity of, this chain novel. It is acceptable for the judge to decide differently from before, that is, to break with the line of decisions, but he must justify by argument the difference between the case at hand and the earlier ones, that is, he must always keep in view the general sense of the novel (Passari, 2010, p. 103).

In parallel, the reserve of consistency is put forward as a means of measuring and enlarging this responsibility: besides being coherent and keeping integrity with the legal system, the judge must be consistent when writing a new chapter. The reserve of consistency is a requirement addressed to the judge, with the purpose of imposing on him the need to ground his decisions convincingly, taking into account arguments in general (and not only legal ones), as well as concrete evidence and the assistance of other sciences, which would result in the expansion of the evidentiary phase and the avoidance of arbitrary decisions (Rocha, 2011, p. 165).

Américo Bedê Freire Júnior (*apud* Rocha, 2011, p. 165) holds that the reserve of consistency coincides with the need to state the grounds of judicial decisions, so as to assert that a decision grounded in legal terms will always be consistent. This author, however, is mistaken:

merely legal reasons—although they meet the requirements of the legal order regarding the statement of grounds—are not sufficient to resolve certain cases, whose treatment requires the assistance of non-legal sciences.

Taking the example of decisions dealing with the fundamental right to health, they must necessarily draw on elements supplied by medical science (expert reports, technical information provided by specialists, etc.), and the judge himself must seek such information and judge taking it into account (Rocha, 2011, p. 166). There are, admittedly, cases in which further information foreign to the legal world is dispensed with; but these are exceptions and must be justifiable in the light of their factual and legal circumstances (Rocha, 2011, p. 166).

One may thus infer the close relationship between the judge's political responsibility and the reserve of consistency, both reinforcing the duties of transparency, statement of grounds, clarity, and democratic character at the moment of handing down the decision. Political responsibility is, more precisely, measured by means of the reserve of consistency, which brings into the decision data and information foreign to legal science (but which reinforce it significantly), resulting in robust grounds and, consequently, greater ease in measuring how the new chapter of the chain novel will be written.

The Need for a Theory of Judicial Decision to Limit the Interventions of the Judiciary

Warning has already been given about the mistaken receptions and their harmful consequences, and the theoretical common sense detrimental to the Democratic Rule of Law has been brought to light. It remains to deal, in broad outline, with other arguments that corroborate the need for a theory of judicial decision.

The judicial decision is the product of judges and courts; it contains an operative part that declares, condemns, or constitutes, and it may follow the most varied lines of reasoning, according to the decision paradigms chosen and external influences.[10] In this scenario, the problems pointed out by Lorenzetti (2010, p. 44–68) arise: the legislative big bang, *ad hoc* law, and the feudalization of law.

The exorbitant growth of scattered statutes and the resolution of legal questions on the basis of them received the name of legislative big bang: the Code lost its centrality, since the legislative explosion produced a fragmentation of the order, and legislative equality and the coherence and integrity of the legal system became a distant dream (Lorenzetti, 2010, p. 44).

Ad hoc law, in turn, consists in the autonomous production of rules, whose interest is to escape posited law and to create—an intention today implicit in Alexyan balancing, in the pursuit of the ideal of justice or of material truth (Lorenzetti, 2010, p. 52). In view of this, imperativeness, the basic quality of law, has been growing weak and forgotten, resulting in law as mere advice and in feudalized law, since the fiefs move away from the national State and are governed by their own rules (Lorenzetti, 2010, p. 54). These are, in broad outline, the problems that make up the

status quo of daily forensic life in Brazil, and the theory of judicial decision suited to the Constitution aims to eliminate them or, at least, to reduce them.

Paradigms are conceptualized as decision models prior to rules and conditioning judicial decisions (Lorenzetti, 2010, p. 227). Their choice is not the object of this work; the intention here is merely to set out the subject and demonstrate the need to debate it, with a view to constructing or choosing, in the future, a theory of judicial decision suited to the Constitution. As for the criteria, it should be borne in mind that they are mandatory requirements that the judge must follow along the path that leads to the decision, obeying objective and inescapable rules applicable to all cases, which would, in theory, result in the elimination of discretion/arbitrariness, of non-compliance with the law, and of pan-principiologism.

Nor is the aim here to define them; the aim is merely to foster interest in constructing or choosing them, since objective and previously established criteria will break with the current *status quo*, whose negative side lies in allowing arbitrary decisions guided by the conscience of the one who judges.

Within the Democratic State, the criteria will be defined on the basis of the participation or representation of the citizen and will be laid down in legal norms. The theory of judicial decision that takes them into account will serve as the basis for the judge to travel along—and not to establish—the path of legal discourse, on pain of violating democracy and legality.

The judge who decides according to his moral understanding or on the basis of false legal principles neglects the basic assumptions of democracy, of the civil law system of which he is part, and of the present stage of legal dogmatics; more than that, he creates the path he himself will travel, so as to become, in reality, a legislator. Paradigms and criteria together—the former establishing the path and the latter the criteria used along the way—will provide the judge with a field suited to the Constitution.

As for the interventions of the Judiciary, they are necessary, but their form and their limits deserve thorough correction, for they have been revealing judicial protagonism—something reprehensible in a democracy. Intervention consists in the act by which public or private legal relations are extinguished, constituted, or modified, so that there is no correction to be made to the natural need to intervene, since society seeks such actions on the part of the State. It may be concluded, therefore, that a theory of judicial decision is indispensable for the Constitution to be duly respected and for the interventions of the Judiciary to be limited to constitutional dictates. The decision criteria mentioned must not be forgotten, for they serve as an instrument for measuring the way in which the judge decided, that is, whether his decision conformed to the Constitution.

The Need for a Theory of Judicial Decision to Establish Parameters in the Application of Precedents

Attention was drawn, at the beginning of this work, to the fact that judges increasingly decide on the basis of precedents. The intention was to raise doubt as to the criteria used at the moment of this abstract decision, for the judge does not dwell on the minutiae of the concrete case, which, in his understanding, is of no relevance to the resolution of the disputed question. As was said, the trend is towards the comparative analysis of cases, and the central point lies in the absence of democratic criteria for this comparison.

One of the repercussions of abstraction in judicial decisions is the transformation of the judge into a "postmodern Charlie",[11] whose only function is to produce. The mere mention of precedents at the moment of decision does not confer legitimacy and consistency on it; on the contrary, it turns it into a mere repetition of texts, detached from the particularities of the concrete case on which it is handed down.

On the other hand, the settling of case law in favour of legal certainty is regarded as necessary—which does not mean the repetition of texts without the slightest degree of parameterization. It consequently becomes indispensable to fix comparative criteria for the purposes of applying precedents, for only thus will means be obtained to measure the legitimacy of judicial decisions.[12] Alongside this, the reserve of consistency must be kept in mind as a means of measuring the judge's political responsibility.

For the purposes of this work, precedents are earlier judicial decisions which, by force of their arguments, are taken into account in the future in similar cases. The point is to know what is similar and how that earlier decision will be applied to the present case, without prejudice to the adversarial principle and the right to a full defence. The parameters advocated for this application are not, strictly speaking, the object of this work; the aim here is to bring out the need to create them, in order to avoid the arbitrariness pointed out above and the indirect denial of justice.

A transformation of Brazilian law into common law is not advocated here. What is sought is the integrity and coherence necessary for legal certainty through the judicious application of precedents, which are instruments of speed and should be widely used, provided that there are objective and clear criteria regulating their application. In this way, the negative consequences of their implementation are avoided, such as superficial analysis of the nuances of the concrete case, application of a precedent unconnected with the case *sub judice*, violation of the right to a full defence and of the adversarial principle, and prior disregard of a party's arguments.

FINAL CONSIDERATIONS

The problem formulated in this work consists in knowing whether there is a need for a theory of judicial decision and for criteria, alongside the reserve of consistency, to measure the judge's political responsibility and to limit the interventions of the Judiciary.

To answer this question, exegetical positivism and Hans Kelsen's pure theory of law were first discussed, with the aim of presenting the decision problems arising from the repercussion of these theories in the Brazilian legal sphere, inasmuch as the dominant consensus in Brazil seeks,

even if unconsciously, its foundation in them—theories that, as has been shown, are no longer admissible today, above all in the face of the Democratic Rule of Law and of the present state of legal science.

The mistaken receptions in Brazilian law—Robert Alexy's theory of argumentation, the jurisprudence of values, and North American judicial activism—were then addressed, in order to expose the consensus *in terrae brasilis* with regard to judicial decisions.

The consensus having been demonstrated, the questions preliminary to the criticisms were dealt with, that is, the Democratic Rule of Law, contemporary constitutionalism, and present-day hermeneutics in crisis. The criticisms formulated by Lenio Luiz Streck were then set out—among them pan-principiologism, arbitrariness, and non-compliance with the law—so that the need was proven for a theory of judicial decision and for criteria, alongside the reserve of consistency, in order to overcome the established consensus, limit the interventions of the Judiciary, and establish democratic parameters for applying precedents.

The conclusion is that the general objective has been achieved: the need for a theory of judicial decision and for criteria, alongside the reserve of consistency, to measure the judge's political responsibility and limit the interventions of the Judiciary has been duly presented. In other words, constructive criticisms of the prevailing consensus were put forward and, consequently, a change of stance on the part of judges was encouraged. Finally, it should be made clear that this work did not intend to create or choose a theory of judicial decision, since that is a matter proper to a Master's dissertation and a doctoral thesis.

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NOTES

1 With this term, Streck seeks to reveal the paradigm of consciousness, according to which law is what judges say it is. The protagonism of the judge is the means by which a subjective activity—often arbitrary—is concealed, anchored in the outdated philosophy of consciousness (Streck, 2010, p. 20).

2 “An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility, only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in the hypothetical circumstances” (Dworkin, 2002, p. 138).

3 The term designates a set of abstract criteria, democratically chosen, intended to ground and guide the judge at the moment of decision, with the aim of making that act legitimate and in keeping with the opinion of the majority. The subjectivism of the judge is thereby brought to an end.

4 “The reserve of consistency requires the judge, when giving effect to a constitutional norm, to ground his decision convincingly, using not only legal arguments but also concrete evidence, often made available by other sciences, which allows the evidentiary phase to be expanded, with a view to avoiding arbitrary decisions” (Rocha, 2011, p. 165).

5 Post-positivist theories set out to refine the question of the discretion afforded by the PTL (Streck, 2011, p. 31), each in its own way. The criticisms made here are also directed at those theories, which, however, are not presented because they figure as an offshoot of the theoretical substratum represented by the common sense in Brazil.

6 A similar movement can be observed in Brazil, since some judges hold to the full freedom of the Judiciary, almost to the point of asserting that law is what they say it is. Consider this excerpt from a decision of the STJ: “[…] I do not care what legal scholars think. As long as I am a Justice of the Superior Court of Justice, I assume the authority of my jurisdiction. […] I decide, however, according to my conscience” (Brasil. Superior Tribunal de Justiça, 2002).

7 It might be argued, mistakenly, that because of the binding precedential statements (*súmulas vinculantes*) and the STF’s decisions with binding effect and *erga omnes* efficacy, case law would figure among the sources of law in Brazil. However, binding precedential statements are, in the final analysis, laws enacted by the Judiciary (authorized by the Constitution), and decisions in concentrated review have binding force by reason of what the Constitution provides. The source of law, in both situations, is the Constitution.

8 “[…] I) judgment of the Court of Justice of the State of Paraná: ‘The legal norm affords the judge (…) means to complete his conviction and thus to decide with a tranquil conscience, realizing the ideal of the true judge’; II) judgment of the Court of Justice of the State of Minas Gerais: ‘It is for the Judge, as the addressee of the evidence, and for him alone, in the light of his conscience, in order to hand down a decision, to order a new expert examination’” (Streck, 2010, p. 27).

9 “One of the provisions that symbolizes this is Article 212 of the Code of Criminal Procedure. There it is clearly written that the judge may only ask complementary questions when witnesses are heard. The accusatory system is inscribed there. The judge does not produce evidence. The parties do. […] The result, however, is that the Judiciary, for the most part, backed by mistaken readings by the STJ and the STF itself, tore up the legal text” (Streck, 2013d, p. 1).

10 “The current system opens a broad field for the interpreter, who must ‘reconstruct’ the law of the case through a process of selecting statutes, customs, administrative norms, constitutional norms, principles, and values. The problem is how he should do so, which leads us to the study of judicial decision and legal argumentation” (Lorenzetti, 2010, p. 35).

11 In the film *Modern Times*, Charlie Chaplin played Charlie, a factory worker.

12 Although it is not directly the object of this work, it is worth pointing out the problem of carelessness represented by the almost complete transcription of earlier decisions in new cases. It is true that case law serves to settle matters in the legal sphere, but this does not make room for superficial analyses of claims. The judge has political responsibility

in the sense of convincing those subject to his jurisdiction of the correctness of the decisions handed down, even where the question is settled from the standpoint of case law.