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The nameless framework: legal mythologies of judicial choice. Weighing, consequences, and automation in post-industrial constitutionalism.

The nameless frame: legal mythologies of judicial choice. Balancing, consequences, and automation in post-industrial constitutionalism

The landmark without name: legal mythologies of judicial election. Consideration, consequences and automation in postindustrial constitutionalism

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Abstract: Contemporary constitutional theory rejects Hans Kelsen's thesis that, within the framework of the norm, the applying body chooses by an act of will between possibilities of equal legal value. This rejection, however, did not eliminate the indeterminacy that underpinned the thesis.
This study examines the hypothesis that three characteristic devices of recent Brazilian constitutionalism —the balancing of principles, the argument from practical consequences, and decision automation— can operate, in certain uses, as legal mythologies in the sense of Roland Barthes: they convert a choice between legally open alternatives into an appearance of necessity and, with this, restore the freedom of the framework without the name Kelsen gave it. The disorientation of post-industrial society, described by Domenico De Masi, offers the context in which this conversion becomes plausible and desirable. In contrast, supported by Paul Ricoeur, Luigi Ferrajoli, and Jürgen Habermas, it is argued that deciding cannot be an undeclared personal choice nor one detached from antecedent criteria, but a legally ordered path, whose presence is verified in the very justification: declaration of alternatives, antecedent criterion, indication of the bifurcation point, and contestability. The research is theoretical, of a critical-constructive orientation, with normative and jurisprudential illustration.

Keywords: judicial decision; discretion; Kelsen; Barthes; balancing; consequentialism; artificial intelligence.

Abstract: Contemporary constitutional theory rejects Hans Kelsen's thesis that, within the framework of the norm, the law-applying organ chooses by an act of will among possibilities of equal legal value. The rejection, however, did not remove the indeterminacy on which the thesis rested. The hypothesis examined is that three devices typical of recent Brazilian constitutionalism — the balancing of principles, the argument from practical consequences and decisional automation — may operate, in certain uses, as legal mythologies in Roland Barthes's sense: they turn a choice among legally open alternatives into an appearance of necessity and thereby restore the freedom of the frame without the name Kelsen gave it. The disorientation of post-industrial society, as described by Domenico De Masi, provides the context in which this conversion becomes plausible and desired. Drawing on Paul Ricoeur, Luigi Ferrajoli and Jürgen Habermas, it is argued that deciding cannot be an undeclared personal choice detached from antecedent criteria, but a legally ordered path whose presence can be verified in the reasoning itself: statement of the alternatives, antecedent criterion, indication of the point of divergence, and contestability. The research is theoretical and critical-constructive, with normative and case-law illustration.

Keywords: judicial decision; discretion; Kelsen; Barthes; balancing; consequentialism; artificial intelligence.

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Abstract: Contemporary constitutional theory rejects Hans Kelsen's thesis according to which, within the framework of the norm, the applying body chooses through an act of will between possibilities of equal legal value. The rejection, however, did not eliminate the indeterminacy that supported the thesis. The hypothesis is examined that three characteristic devices of recent Brazilian constitutionalism — the consideration of principles, the argument of practical consequences and automated decision-making — can operate, in certain uses, as legal mythologies in the sense of Roland Barthes: converting an election between legally open alternatives in the guise of need, with him, to restore the freedom of the landmark without the name that Kelsen gave him. The disorientation of postindustrial society, described by Domenico De Masi, offers the context in which this conversion becomes plausible and desired. In contrast, with the support of Paul Ricoeur, Luigi Ferrajoli and Jürgen Habermas, it is believed that deciding cannot be a personal election not declared or subject to previous criteria, but rather a legally ordered course whose presence is verified on its own grounds: declaration of alternatives, previous criteria, indication of the point of bifurcation and the possibility of objection. The investigation is theoretical, of critical-constructive orientation, with normative and jurisprudential illustration.

Keywords: judicial decision; discretionality; Kelsen; Barthes; consideration; consequentialism; artificial intelligence.

1. Introduction

In March 2008, the Supreme Federal Court concluded the trial of a law...
Paraná, which required liquefied gas distributors to weigh the cylinders in full view of the customer.
consumer. The question of whether the measure was proportionate was being debated. Minister Eros Grau expressed the
fear that, by this approach, the court would fail to examine whether the law was constitutional for
to examine whether it was good or bad. Cezar Peluso replied that no one invokes proportionality.
"Randomly, just to discuss theorems, but to resolve conflicts between constitutional values." Carlos Britto added: "It's
a matter of balancing." And Eros Grau concluded the...
exchange: “That’s not written in the Constitution. Excuse me” (BRAZIL, 2008, apud VIEIRA, 2017,
p. 238).

The dialogue, brief and almost informal, contains the entire problem. Peluso and Britto speak.
as if describing a necessary operation: there are conflicting values, and the conflict is resolved.
weighing them. Eros Grau suspects that the operation, presented as necessary, is covering up a
a choice that no text authorizes. None of the three states that the judge decides according to his own...
preference. Everyone, on the contrary, assumes that the decision should derive from something other than preference.
The will of the decision-maker matters. The disagreement lies in where this derivation actually takes place.
— and regarding the suspicion that, in certain cases, it doesn't happen anywhere.

Hans Kelsen had answered this question in a disconcerting way. The general norm
It forms a framework within which various decisions, equally in accordance with the law, can fit;

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The choice between them is not an act of knowledge, but of will; and the question of which one is
The "correct" belongs to the politics of law, not to its theory (KELSEN, 1998, pp. 247-249). Few
The theses of 20th-century legal theory were so fiercely contested. The tradition that became conventional
Calling someone a post-positivist or neo-constitutionalist has largely built its identity against that ideology.
She: principles endowed with normative force, rational argumentation, integrity, coherence,
Intersubjective control of justification. In Brazil, the most persistent criticism of survival.
The Kelsenian discretion in new guises is that of Lenio Streck, for whom the
Discretion, inherited from the eighth chapter of the Pure Theory, is "the power conferred on
The judge/interpreter has to choose one among several alternatives, and this needs to be overcome, as well as...
the solipsistic subject that sustains it (STRECK, 2011, pp. 20-23).2

Rejected in theory, the choice has not disappeared in practice. The indeterminacy that Kelsen
described — the plurality of meanings of words, the discrepancy between text and intention,
The contradiction between simultaneously valid norms remains where it was. What has changed is...
her way of speaking. The hypothesis is that some of the most characteristic instruments of
Recent Brazilian constitutionalism — the balancing of principles, the argument of
practical consequences enshrined in the Law of Introduction to the Norms of Brazilian Law and the
Decision automation — can function, in certain uses, as what Roland Barthes described.
He called it a myth: a discourse that transforms what has been produced into something given, something that has been chosen.
in something found. When they function like this, they restore the freedom of the frame and remove it.
The name. The choice returns, now without a signature.

The hypothesis has a clear point of contact with Streck's critique, and that is fair.
to recognize it immediately. The target, however, is slightly different. The judge who declares he will decide.
"According to one's conscience" acknowledges the choice; myth, on the contrary, dissolves it. It is of interest.
less the decision that is assumed to be a preference than the decision that is presented as
The inevitable result of a balance, a projection of effects, or a statistical pattern. A
The difference matters because the remedy changes. Against the confessed choice, it is enough to demand reasons;
Against the backdrop of dissolved choice, it is first necessary to make it visible.

The question guiding the investigation can be formulated as follows: if almost no one
It argues that the judge chooses freely within the framework, so why are so many decisions based solely on...
They fail to explain how a choice can be made, and why does this choice rarely appear as such? The answer

[2] The critique is developed more extensively in What is this — I decide according to my conscience? (STRECK, 2010). In the 2011 article, the author also argues that Robert Alexy's theory received a superficial reading in Brazil and that balancing came to be treated as if it were a principle itself, a phenomenon he calls panprincipiologism (STRECK, 2011, pp. 10-12).

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The proposal has three parts. The first is diagnostic: certain uses of weighting, of
The consequences of automation create an appearance of necessity where there is an alternative.
The second point is contextual: the disorientation of a society that ceased to be industrial without
Finding a new reference model, in Domenico De Masi's terms, makes this appearance...
especially desired. The third is normative: deciding cannot be a personal choice.
declared nor subtracted from prior criteria; it must be a legally ordered path.
And the order of this path can be verified in the very foundation.

The thesis is deliberately moderate. It does not claim that there is a single correct answer for every case.
Correct answer, even if all decision-making margin can be eliminated. It states that the margin
The residual should be narrowed by criteria prior to the case and, when it persists, declared as
That's right. He also doesn't accuse the judges of bad faith: in Barthes' language, myth is not a lie, and the
Men do not maintain "real relationships with it, but rather relationships of use" (BARTHES, 2009,
(p. 236). The examination focuses on ways of signifying, not on intentions.

The research is theoretical, with a critical-constructive orientation. It involves reading the texts of Kelsen, Barthes,
De Masi, Ricoeur, Habermas, and Ferrajoli as tools for a specific problem.
not as objects of exegesis. Jurisprudential and normative illustration — decisions of the Supreme Court
Federal Court decisions reported in the literature, the Code of Civil Procedure, the Law of Introduction to
Norms of Brazilian Law and Resolution No. 615/2025 of the National Council of Justice —
It serves to test concepts, not to measure frequencies. No empirical claim about
The amount of mythical decisions that are made or assumed.

2. The frame and the name of the choice

Kelsen's thesis is often remembered in the form of a caricature: the judge as legislator.
Arbitrary, pure theory as a license for decisionism. The text of the eighth chapter of the Theory.
Pure legal theory is more sober and, for that very reason, more unsettling. It begins with an observation.
structural. Between the higher-level norm and the act that applies it there is a relationship of
determination, but this determination “is never, however, complete.” Even the most
Meticulous planning leaves the executor with decisions that the issuer neither foresaw nor could have foreseen, so that
The superior norm always has, in relation to the act that applies it, "the character of a framework or
"framework to be filled by this act" (KELSEN, 1998, p. 246).

Indeterminacy can be intentional, when the legislator deliberately leaves it to the discretion of the legislator.
The enforcer has the choice between a fine and imprisonment, or between sanitary measures appropriate to different situations.
Epidemics. It can also be involuntary, and this is where the analysis becomes interesting. The word of

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The law allows for various meanings; the verbal expression may diverge from the presumed intention of the person.
He edited it; two rules that are intended to be valid at the same time may contradict each other. In all
In these cases, Kelsen concludes, "the law to be applied forms [...] a framework within which there are
There are various possibilities for application, therefore any act that remains in accordance with the law is valid.
within this frame or border, fill this frame in any possible way."
(KELSEN, 1998, p. 247). Cognitive interpretation can establish the framework and understand the
The possibilities it contains; one cannot choose just one of them. The various solutions, "to the extent that
that are only assessed by the applicable law", have "equal value" (KELSEN, 1998, p. 247).

The consequence is directed against the traditional theory of interpretation, which intended
To extract from the law, through a purely intellectual act, the only correct solution. Kelsen calls this...
claim of "contradictory self-deception": if the rule left only one possibility, not
There would be a need to interpret it; if it leaves several, no knowledge of positive law.
one can choose between them (KELSEN, 1998, pp. 248-249). The methods of interpretation lead
always referring to a result that is "only possible, never to a result that is the only correct one"; the
Argument to the contrary and analogy lead to opposite results without any criterion indicating when.
use one or the other (KELSEN, 1998, p. 248).

There is an observation in this passage that later theory rarely mentions, and that
In light of the Brazilian debate, it acquires an unexpected relevance. Kelsen examines the technique that...
In its time, it presented the following solution to the problem of choice: the weighing of
interests. His response is curt. "The principle of so-called consideration of interests is also..."
This is merely a formulation, and not a solution, to the problem at hand. It does not provide...
the objective measure or criterion according to which opposing interests can be reconciled with each other.
"compared" (KELSEN, 1998, p. 248). And he adds that this criterion cannot be removed from
norm, law or overall legal order, because the need for interpretation arises
precisely because the system has not yet made any decision about which of the interests in
The game has greater value (KELSEN, 1998, p. 248).

Kelsen's immediate target was the jurisprudence of German-majority interests, not the
a weighing of principles in the form that Robert Alexy would give it decades later. The parallel, therefore
This is structural, not historical: in both cases, the crucial question is where does it come from?
A common measure that allows one to compare what is placed on the scale. Weighting, therefore, is not...
It arrives at Kelsen's attention as something new to be refuted. It arrives as one of the forms that the theory...
The traditional approach was to fill the frame without admitting that it was filling it. Kelsen did not...
It denies its usefulness; it denies it the status of a legal method capable of transforming a choice into...

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knowledge. What remains, after this refusal, is the frank acknowledgment that the application
The law combines knowledge and will:

> The cognitive interpretation (obtained through an operation of knowledge) of the law to be applied is combined with an act of will in which the body applying the law makes a choice among the possibilities revealed through that same cognitive interpretation (KELSEN, 1998, p. 249).

Obtaining the individual norm, insofar as it fills the framework, is "a function
"voluntary," and the question about the correct solution "is not a problem of legal theory, but
a problem of legal policy" (KELSEN, 1998, p. 249).

Two observations complete the picture. The first concerns the content of that
that enters into the act of will. Insofar as there is still some cognitive activity for
Besides fixing the framework, it does not address positive law, but other norms: "norms
Moral values, norms of justice, social value judgments that we usually refer to as expressions.
currents such as common good, state interest, progress, etc." (KELSEN, 1998, p. 249). From
From the point of view of positive law, nothing can be said about the validity of these determinations;
They can only be characterized negatively, as that which does not result from the law itself.
The second observation is more serious. The interpretation made by the applying body is authentic, that is
Yes, it creates law, and through this means "a norm can be produced that is completely outside of..."
The framework that the applicable rule represents, especially when the decision becomes final and unappealable.
It comes from courts of last resort (KELSEN, 1998, p. 250).

The usual criticism of this chapter maintains that Kelsen would have handed the decision over to...
Arbitrary choice. The accusation is understandable, but it shifts the point. Kelsen does not recommend this choice;
He describes it and gives it a name. And in giving it a name, he separates it from knowledge. The jurist who presents
Considering only a politically preferable interpretation as the only correct one does something that science...
The right must reject it: it falsely presents as scientific truth that which is so-
"Only a political value judgment." The belief in the univocity of norms is, for Kelsen, a
"fiction used by traditional jurisprudence to consolidate the ideal of security"
legal" (KELSEN, 1998, p. 251).

In this rejection of fiction lies an ethics of language that often goes unnoticed.
Kelsen doesn't say that choice should be hidden, nor that it should be celebrated. He says that it exists.
and that it should be called by its name. One can disagree with everything else — with the thesis that nothing of
Legally relevant factors guide the choice of remission based on equivalence between possibilities.
From choice to politics—but it's difficult to disagree with this minimum requirement of truthfulness. The theory
The constitutional reform that followed challenged Kelsen primarily on the first two points. He sought to...

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to show that principles, argumentation, and coherence offer legal criteria where Kelsen saw only will. In many cases, it has shown. But the indeterminacy that Kelsen described is not It was abolished by theoretical decree, and where the new criteria do not apply, the choice remains. The question, then, ceases to be whether the choice exists and becomes how it is presented.

It is at this point that contemporary practice can paradoxically reveal itself to be less Transparent than Kelsen. The choice that Kelsen called an act of will and referred to politics. The term "law" reappears, in certain uses, under names that suggest the opposite: weight, consequence, The vocabulary has shifted. We no longer say "I choose," we say "the scales are tilted," "the "The effects impose," "the system indicates." The language that Kelsen reserved for knowledge becomes... to also cover the act of will, and the act of will disappears beneath it. To understand This shift means that legal theory needs an instrument it doesn't have: a theory of... It speaks of transforming what is produced into data.

3. Myth as a discourse that absolves

Roland Barthes wrote the essays for Mythologies between 1954 and 1956, influenced by... French news: a wrestling match, a detergent commercial, Greta's face. Garbo, a criminal case. The starting point, the author recounts, was “a feeling of impatience with the 'natural' way in which the press, art, and common sense mask continuously a reality that, by virtue of being the one in which we live, does not cease to be so. This is perfectly historical” (BARTHES, 2009, p. 11). The theoretical essay that concludes the book, "The myth, today," draws a definition from this impatience. Myth is a discourse, a system of Second-degree meaning, and its function is precise: "to transform a historical intention into nature, an eventuality in eternity” (BARTHES, 2009, p. 234). In myth, “things They lose the memory of their production” (BARTHES, 2009, p. 234).

Myth does not operate through negation. Barthes insists on this, and this insistence is crucial to the... The intended use of the concept in law. "Myth does not negate things; its function is, On the contrary, speaking of them simply purifies them, exonerates them, and grounds them in nature. and in eternity, it gives them a clarity, not of explanation, but of observation” (BARTHES, 2009, p. 235). What is lost is not the object, but its history: the human act that made it, the alternatives that were dismissed, the person who dismissed them. Hence the formula that defines the myth in bourgeois society: "myth is depoliticized discourse," provided that politics is understood in the sense... profound, as the set of human relationships in their power to construct the world. (BARTHES, 2009, p. 235). Moving from history to nature, myth “abolishes the complexity of

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"Human acts" organizes "a world without contradictions, because it lacks depth," and creates a fortunate clarity in which "things, by themselves, seem to mean something in themselves" (BARTHES, 2009, p. 235).

Barthes' analysis has a precise historical target — the ideology of the French bourgeoisie. from the postwar period — and the intention is not to transpose it entirely into law. What is taken from it is the Semiological mechanism: the conversion of what has been done into something that simply is. The very Barthes authorizes this broader use when he observes that myth “seizes everything: justice, morals, aesthetics, diplomacy” (BARTHES, 2009, p. 241), and when he defines myth not by its It's not the content, but its form. When applied to a judicial decision, the scheme is immediately... recognizable. Decision-making is a quintessential human act: someone, invested with competence, It selects facts, qualifies them, chooses between interpretations, and imposes consequences. A The rationale can narrate this journey, with its bifurcations and points of hesitation, or It can present the result as if it had sprung from the matter itself. In the second case, The decision loses the memory of its creation. It is undeniable that a decision exists—it is there. Signed and published—but it is purified of choice. The result appears with clarity. "Not an explanation, but a statement of fact."

Barthes didn't need to travel to get to the court. One of the essays of The volume, "Dominici or the Triumph of Literature," examines the process in which an old peasant... from the Alps was convicted of murder based on uncertain material evidence and in a The psychological reconstruction of the crime, elaborated by the prosecution, is what interests Barthes. procedure by which the justice system attributed to the accused a psychology that was, in fact, that of The president of the court and the prosecutor. Justice, he writes, is always willing to lend to The defendant is described as having "a spare brain to condemn them without remorse" and paints it "just as it should be." "to be, and not how they are" (BARTHES, 2009, p. 52). This operation depends on a "myth intermediary that the authority always makes great use of, be it the courts of justice or the from literary platforms, which is the transparency and universality of language” (BARTHES, 2009, p. 52). The essay ends with a warning that has not lost its relevance: we are all threatened with “being judged by a power that wants to hear exclusively the language that provides us with”, and “to steal a man’s language in the name of language itself” is “because where all legal murders begin” (BARTHES, 2009, p. 55).

The Dominici case anticipates the type of myth that interests us here. The official language of The court presents itself as that of common sense, transparent and universal; that of the accused, as Picturesque variety. They are, in fact, two particularities that confront each other, but one of them...

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It has honor, law, and force on its side. The universality of judicial language is not false because
The whole thing is selective, and the selection doesn't appear. The same may apply to the more complex instruments.
characteristic of contemporary constitutional decision-making: weight, consequence, and standard.
They present themselves as universal languages, accessible to any reasonable observer, and hide
the particularities of who handles them.

In another text, dedicated to the discourse of historians, Barthes offers a second
instrument, complementary to the first. The classical historian seeks to suppress from his discourse
The signs of the speaker, as if the facts spoke for themselves. This absence is not neutrality;
It is a form of presence. At the level of discourse, objectivity, understood as a lack of...
The speaker's signs, "thus appear as a particular form of the imaginary, the product of
which could be called a referential illusion, since the historian intends to leave the referent behind.
"to speak for itself" (BARTHES, 2004, p. 169). The observation becomes widespread: in any discourse,
“Objectivity, at the level of discourse—a fatal level, let's not forget—is an imaginary construct.”
like any other” (BARTHES, 2004, p. 9). The subject who excludes himself out of concern for
Objectivity does not disappear; it only excludes its "person," and the subject remains, now without
face.

Judicial reasoning thrives on this tension. There are good institutional reasons for this.
The judge should not write in the first person of the desire: the decision must be valid as an act of the State, not
as a confidence. But formal impersonality can slip into referential illusion, in which
The Constitution "demands," the facts "demonstrate," the effects "recommend"—and the person who
Selected, qualified, and chosen, it becomes invisible. The difference between the two situations is not...
Not in grammar, but in the possibility of reconstructing the path. An impersonal foundation.
It can be entirely traceable; a justification full of "I understand" and "I consider" can
to be entirely opaque.

Barthes also proposes an inventory of the rhetorical figures through which the bourgeois myth is constructed.
reproduced. The list is admittedly incomplete and, in some places, outdated, but several of the
The figures serve precisely in the examination of the judicial decision. The vaccine consists of "confessing to
"The accidental evil of a class institution, used to better camouflage its indispensable evil."
(BARTHES, 2009, pp. 242-243). The omission of history presents the object as coming from
eternity and eliminates, at once, "determinism and freedom. Nothing is produced, nothing is
"chosen" (BARTHES, 2009, p. 243); from this stems a concept common to most myths,
“the irresponsibility of man” (BARTHES, 2009, p. 243). Identification reduces the other to
Indeed, and Barthes illustrates this with the court: the accused only achieve social existence if they are

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reduced to mere simulacra of the judge, "since Justice is a weighing operation and the scales
"One can only confront the same with the same" (BARTHES, 2009, p. 244). Tautology defines the
even for the same reason, and protects itself behind an argument from authority — "it is so because it is so."
Thus" (BARTHES, 2009, p. 245). Ninism posits two opposing forces and balances them to reject
both: "reality is initially reduced to analogous terms; these are then weighed", and the
The terms are balanced only because "they have been emptied of their specific weight" (BARTHES,
2009, p. 245). Quantifying quality reduces all quality to a quantity.
(BARTHES, 2009, p. 246). The observation, finally, tends towards the proverb and the maxim: it is
"a counter-explanation, the noble equivalent of tautology," whose foundation is common sense,
"a truth that the arbitrary decision of the one who pronounces it can block" (BARTHES, 2009,
p. 247).

According to Barthes, the figures are grouped into two major signs: the Essences and the
Scales. The ideology he describes transforms the products of history into essential types.
and makes reality computable; and "bourgeois morality is essentially a weighing operation: the
Essences are placed on the scales, whose immobile arm remains man.
"bourgeois" (BARTHES, 2009, p. 247). The image is disturbingly precise for those who...
The constitutional debate continues. The scales are not neutral just because someone is holding them; and whoever
The insurance policy does not appear in the drawing.

It is important to avoid two mistakes when applying these categories. The first would be to take the
Criticism of myth as an accusation of bad faith. Barthes is explicit: myth is not defined by intention.
It's not about deceiving, but about a way of signifying, and people use it according to their needs. The
A second misconception would be to assume that all talk about the decision is mythical. Barthes acknowledges a
Language that is not language: the language of the lumberjack who names the tree he fells, operational language.
linked to its object by work. Whenever man speaks "to transform reality, and not
more to preserve it in image", the metalanguage is referred back to an object-language, "and
"The myth becomes impossible" (BARTHES, 2009, p. 238). This distinction will be revisited later.
because the possibility of a foundation that is not mythical depends on it.

4. Disorientation and need-seeking

Why should judicial choice, precisely now, seek the form of myth? The question does not admit a simple
causal answer, and this is not the intention here. It is possible, however,
Describe the environment in which the appearance of need becomes especially desirable.

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Domenico De Masi dedicated a good part of his later work to this environment and gave it a name: disorientation.

According to De Masi, the transition from industrial to post-industrial society produced an unprecedented level of disorientation. Periods of transition have always known it; ours... She would be the first to experience it “360 degrees,” not in one sphere of life, but in all (DE (MASI, 2019, section “Disorientation and design”). The main cause is not the speed of change, but the absence of a reference point: “our disorientation stems from the lack of a a universal, shared model, aligned with post-industrial society, that allows us to map out the "To coordinate our present and to decide with clarity the routes and destinations of our future." (DE MASI, 2013, Conclusion). The previous model has run its course; the next one does not yet exist. In this The author notes that the need to know, when not met, "increases the interval." disorientation” (DE MASI, 2019, section “Disorientation and design”).

Two aspects of this description are directly relevant to the judicial decision. The first is... Migration of questions. De Masi recalls the case of Eluana Englaro, a young Italian woman who lived seventeen years in a vegetative state and whose artificial feeding was discontinued in 2009, to end of a long dispute that went through the courts of her country.3 The question of whether she was alive. The death of the woman mobilized doctors, philosophers, theologians, and politicians, and showed that even the beginning and the end... of life, "considered certain and punctual throughout all of human history that preceded us," They had moved “from a state of certainty to a state of hypothesis” (DE MASI, 2013, Conclusion). The The same author reminds us that the classical West “was guided by mythology, intelligence and "By law" and that, with ideologies and masters lost, it is no longer known which model to resort to. (DE MASI, 2013, Conclusion). When traditional guidance mechanisms weaken, The questions they answered don't disappear; they seek another place where they can be... decisions. The courts are one of those places, because they have something that few institutions... They retain: the duty to respond.

In Brazil, this migration took on its own institutional form. Oscar Vilhena Vieira describes as supremacracy the unprecedented power attributed to the Supreme Federal Court. to have the final say on decisions made by other branches of government on political and economic issues, moral and social issues, and he attributes it to distrust in politics and the hyper-constitutionalization of life. Brazilian (VIEIRA, 2018, chap. 4). The relevant data for the argument is the observation that comes next:

[3] The interruption was authorized through the courts: the Italian Court of Cassation established, in 2007, the conditions for the suspension of treatment, and the Milan Court of Appeal, in 2008, recognized that they were present in the case (ITALY, 2007; ITALY, 2008).

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> The supremacy of the Supreme Court has also been favored by its broad discretion, resulting from the absence of a consolidated culture of precedents in the country; the difficulty the Court has in establishing interpretative standards; as well as the unwillingness of the Supreme Court to submit only to what has been requested by the parties (VIEIRA, 2018, chap. 4).

The expansion of issues brought before the court and the absence of stable criteria for Deciding on these things goes hand in hand. The result, documented by the same author, is what he calls... "Lottery effect": cases that are very similar legally and politically, such as Luiz's appointments. Inácio Lula da Silva to the Civil House in 2016 and Moreira Franco to the General Secretariat of Presidency in 2017, receive opposing responses according to the minister who reports them (MS 34.070 and MS 34.609, apud VIEIRA, 2018, chap. 4).

The second trait of disorientation is the demand for simplification. De Masi observes that, Faced with a mysterious phenomenon, we first simplify it "in poetic, mythical terms, theological" and only then, methodically, do we simplify it scientifically (DE MASI, 2019, section "Disorientation and design"). And it distinguishes two simplicities: that which results from a complexity resolved and a "childlike, primitive simplicity, which stems from ignorance of phenomena or the will, perhaps unconscious but stubborn, not to see their complexity" (DE MASI, 2019, section "Disorientation and design"). The distinction can be taken into the Courts without violence. A simple decision can be the endpoint of a complex situation. confronted; it can also be the form taken by the refusal to confront it. The legal myth It belongs to the second type: it offers the simplicity of the result without the work that would justify it.

The connection between disorientation and myth should be asserted with caution. It is not sustainable. that post-industrial society causes reflection, consequentialism, or automation, nor that these are symptoms of it. Something more modest is argued: in an environment where the Questions reach the courts without a pre-existing model to organize them, and in which the authority of Judges increasingly rely on non-arbitrary opinions; the usefulness of ways of saying that grows. Present the decision as necessary. Disorientation does not produce the myth, but it provides it. occasion. The judge who needs to answer a question without a ready answer and who cannot say "I choose" finds, in the language of weight, consequence, or standard, an outlet that It simultaneously satisfies the requirement to decide and the requirement not to appear to be choosing.

5. Three mythologies of decision-making

The three instruments examined below are not mythical in nature. Each of them each has its own justification, and each can be employed in a way that makes the decision more, and

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no less, controllable. The question, in each case, is under what conditions the instrument ceases to function.

to order the decision and then proceed to cover it up.

5.1 The balance: weighing principles

The defense of balancing stems from an observation that Kelsen would not dispute: Contemporary constitutions enshrine rights and values that, in specific cases, come into play. tension. Oscar Vilhena Vieira clearly states the consequence. Rights are not neither absolute assumptions nor insurmountable spheres; before they are realized in the practical world, "They will have to be weighed against the interests and values of society, many of which also protected as rights. Only through a weighing of the facts in a specific case can that we will be able to safely glimpse the dimension of a right" (VIEIRA, 2017, p. 23). Before Furthermore, law is a priori reason, a sign that the protected interest should have greater weight in conflict with unprotected interests.

The most elaborate theoretical version of this position, that of Robert Alexy, is not limited to Image of the scale. Structure proportionality in successive adequacy tests. necessity and proportionality in the strict sense, and submits the final assessment to a law. according to which the degree of restriction of a principle should correspond to the importance of satisfaction of the other.4 The Brazilian procedural legislator incorporated part of this requirement: "In In the event of a conflict between norms, the judge must justify the object and the general criteria for balancing. carried out, stating the reasons that authorize the interference in the disregarded norm and the premises. factual circumstances that underpin the conclusion" (BRAZIL, 2015, art. 489, § 2). The weighing thus Regulation is not a license; it's a burden.

The problem, therefore, lies not in weighting as such, but in the use that transforms it from... procedure in formula. Streck himself, a harsh critic of the Brazilian reception of Alexy, He notes that the theory has received "a superficial reading" from a considerable portion of the doctrine and of courts, to the point where balancing is treated as if it were, in itself, a principle. (STRECK, 2011, pp. 10-11). The dialogue in ADI 855 illustrates the passage. When Peluso states that no one invokes proportionality "randomly" and Britto adds "it is a judgment of "Weighing," weighing is invoked as the nature of the operation, not as a A procedure whose steps can be verified. The name of the method takes the place of the method.

[4] See Alexy, 2008. The structure is referred to only in its general outlines, as a rival position; the argument does not depend on any further technical development of the theory.

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Barthes' figures allow us to describe precisely what occurs in these uses. A
First is the balance. Mythical weighting reduces heterogeneous goods — freedom of expression.
and honor, property and dwelling, security and privacy — these are immeasurable greatnesses and, in
Next, weigh them. But commensurability is not in the goods themselves; it is produced by the operation that takes place.
It presents itself as a mere observation of weights. Barthes described this movement almost
Literally: reality “is initially reduced to analogous terms; these are then weighed.”
(BARTHES, 2009, p. 245). The second figure is the quantification of quality. Assigning to a
right to describe a weight as "light," "medium," or "heavy," or to speak of "greater" or "lesser" intensity of
Restriction, it can be a useful instrument of exposition; it becomes mythical when the number or adjective
It is not justified by anything other than the desired outcome. The weight, in this case, does not...
It precedes the conclusion; it is the conclusion written in another way.

The third figure is the most subtle. Barthes called the operation that places two [figures] ninism.
opposites and balances them (BARTHES, 2009, p. 245). In balancing, ninism appears when,
after stating that neither of the principles at stake is absolute and that both deserve
In the context of protection, the decision adopts an "intermediate" or "harmonizing" solution without explaining why.
The line was drawn at that point and not another. The symmetry of the premises gives the result...
an appearance of balance that dispenses with the need to justify the measure. Barthes observes that the
Ninism is magical behavior: it refuses to choose between difficult terms and flees from reality.
reducing it to opposites that balance each other only because they have been emptied of their weight.
specific. Harmonization may be the right solution; what makes it mythical is the absence of
reasons for the exact point at which it stops.

A fourth figure completes the picture: the vaccine. Recognizing the risks of weighing the options —
Subjectivism, insecurity, activism — and warning about the need for caution and
Rigorous reasoning is valuable when recognition is accompanied by
procedure. When it doesn't come, it works like the vaccine described by Barthes, who confesses a
Accidental harm to better protect structural harm (BARTHES, 2009, pp. 242-243). It is admitted
that the assessment "can" be subjective, only to then assert that in that particular case it was not.
without anything in the text allowing one to verify the difference.

Kelsen, as seen, had already stated that the balancing of interests is "merely a
formulation, and not any solution” to the problem of choice (KELSEN, 1998, p. 248). The phrase
It can be read in two ways. Read as a general thesis, it argues that no weighing has
Its own legal content, and in that form it is contestable: § 2 of article 489 of the Code of Civil Procedure.
Civil shows that it is possible to impose a verifiable path on weighting. It is treated as a diagnosis.

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From a usage perspective, it accurately describes the mythical weighing of ideas. When the decision announces the weighing of ideas
Without disclosing the object, the criteria, the reasons for the interference, and the factual premises, the weighing
It's simply the name of the problem, placed where the solution should be.

Luigi Ferrajoli adds an institutional dimension to this diagnosis. Jurisdiction,
For him, it is a guarantee function, a binding power that requires the substantial application of the rules.
superior functions, unlike discretionary government functions, which require only the
with respect to these norms (FERRAJOLI, 2011, p. 532). Therefore, contrasting applicable rules and
principles that are only ponderable "runs the risk of obscuring and weakening the value
binding of seconds, which is even more serious if these are revising the constitutional rank"
(FERRAJOLI, 2011, p. 533). Observation reverses the usual expectation. The weighing
It is often presented as the instrument that gives strength to constitutional principles; used
As a formula, it can have the opposite effect, because it transforms the principle into variable weight, whose
Strength depends on the assessment of the person holding the scale.

5.2 The finding: the argument from practical consequences

The second mechanism arose, in part, as a reaction to the first. Law No. 13.655/2018
introduced into the Law of Introduction to the Norms of Brazilian Law a provision whose purpose
The stated goal was to contain decisions based on vague principles: "In the administrative spheres,
In a controlling and judicial context, decisions will not be made based on abstract legal values without them being...
considering the practical consequences of the decision" (BRAZIL, 2018, art. 20). The sole paragraph
It adds that the justification will demonstrate "the necessity and appropriateness of the measure imposed or
the invalidation of an act, contract, agreement, process, or administrative rule, including in relation to
possible alternatives" (BRAZIL, 2018, art. 20, sole paragraph).

The purpose is anti-mythical, and it is worth recognizing this. The legislator distrusted decisions.
who drew concrete conclusions from abstract values without considering the facts, and demanded that the
The decision-maker looked at the world in which his decision would produce effects. The single paragraph, when
to require proof of necessity and suitability in light of possible alternatives, contains
one of the most valuable pieces of any orderly decision-making process: the obligation to say the
What more could have been done?

The opening paragraph, however, shifts the indeterminacy instead of reducing it. Previously, the opening was...
It's not about value; now, it's also about forecasting. The consequences of a decision are not facts.
available at the time the statement is made; these are projections, which depend on assumptions about
the future behavior of people and institutions, based on data that is almost always incomplete and of

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choices about which effects count and which don't. The federal regulation of the law, edited for the public administration, reveals this with remarkable frankness: in the appointment of In terms of practical consequences, the decision-maker will present "only those practical consequences that, in Through diligent performance of their duties, they may be able to discern, in light of the facts and merits of the case. and legal" (BRAZIL, 2019, art. 3, § 2). The consequence, according to the rule itself, is that that the decision-maker is able to glimpse. The subject that the consequentialist argument seemed to remove. scene reappears in the text that regulates it.

When the projected consequence is presented as a projection — with the data that the They support the assumptions it presupposes and the alternatives it considered—the argument Consequentialism is perfectly compatible with an ordered decision. It becomes mythical. when the projection is presented as a finding. Barthes' figure describes the phenomenon: The observation tends towards the ultimate conclusion, covering a world already made and burying "the trace of that production." under eternal evidence"; its foundation is common sense, "a truth that the decision The arbitrary nature of the one who utters it can block" (BARTHES, 2009, p. 247). Phrases such as "a "Maintaining the measure would generate serious insecurity," "granting it would produce an effect." Statements such as "multiplier" or "the opposite decision would make the service unfeasible" may be true. But, Statements made without the elements that would allow them to be refuted function as observations that No resource can be effective because they offer no premises to attack.

Barthes' second notion completes the diagnosis. The argument from consequences. It produces a realistic effect: the reference to effects in the world gives the decision the appearance of being anchored in facts, and not in the assessment of the decision-maker. It is the referential illusion that Barthes... identified in the classical historian, who "intends to let the referent speak for itself" (BARTHES, 2004, p. 169). The effects do not speak for themselves; someone selects them, designs them, and evaluates them. A The question is which consequences matter — the economic ones, the fiscal ones, the ones that fall on The parties involved, those affecting third parties, short-term or long-term obligations—it is not answered by the facts. It is answered by criteria, and these criteria, when not stated, are merely... The preference of the decision-maker, dressed in reality.

There is an irony here that deserves to be noted. Kelsen said that, in filling out the The framework includes social value judgments that we usually refer to as "common good, interest." "of the State, progress" (KELSEN, 1998, p. 249). The mythical consequentialist argument It reintroduces precisely these notions, now in the form of a prognosis. The "interest of the State" it will now be called "fiscal impact"; "progress", "legal certainty" or "environment of "business"; the "common good," "systemic effects." There is nothing illegitimate in considering these.

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elements. The problem lies in presenting them as data when they are valuations, and in
Therefore, they are exempt from the justification that would be required for an evaluation.

5.3 The standard: decision automation

The third mechanism is the most recent and the one most easily prone to exaggeration, of
Therefore, it is best to begin with what is not being asserted. It is not argued that intelligence systems
Artificial intelligence is now deciding judicial processes in Brazil. Resolution No. 615/2025 of the Council
The National Justice Department assigns an auxiliary and complementary character to these tools, prohibiting their use.
use “as an autonomous instrument for judicial decision-making without due process”
guidance, interpretation, verification and review by the magistrate”, which “will remain
"fully responsible for the decisions taken," and establishes that the system cannot
“to restrict or replace the ultimate authority” of its internal users (COUNCIL)
NATIONAL JUSTICE LAW, 2025, art. 19, § 3, II, and art. 32, sole paragraph). It is also not...
argues that triage tools, case grouping, or text drafting are, in themselves,
undesirable. In a system that experiences the "lottery effect" described by Vilhena, mechanisms
Measures that increase consistency among similar decisions can represent real progress.

The argument focuses on something else: on the form that automation tends to give to...
Assisted decision-making. A system that suggests the classification of a case and points to precedents.
“Similar” or proposes a draft that incorporates choices made both before and after the case —
What data was used to train it, what categories organize this data, what criteria...
Similarity was adopted, and a margin of error was considered acceptable. These choices are not...
illegitimate; they are inevitable. The risk is that they will arrive at the process as a standard, that is, as
something that simply is as it is. Barthes gave this form the name of omission of history: the
The object is presented as if it came from eternity, simultaneously eliminating the
Determinism and freedom, and the result is that "nothing is produced, nothing is chosen."
(BARTHES, 2009, p. 243). From this figure, Barthes notes, another concept common to [them] arises.
Myths: "Man's irresponsibility" (BARTHES, 2009, p. 243).

Brazilian regulation recognizes the problem and seeks to address it. Resolution No.
Regulation 615/2025 requires effective human oversight and prohibits solutions that do not allow for review.
human factors regarding the results, or those that generate absolute dependence on the user and impose mechanisms of
explainability. For solutions classified as high risk, the requirement of
However, explainability comes with a revealing clause: it must be adopted.
“whenever technically possible” (NATIONAL COUNCIL OF JUSTICE, 2025, art. 13,

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VII) The clause is realistic; the impossible cannot be demanded. But it is recorded in the text itself.
Regulatory considerations indicate that there are operations whose trajectory may not be entirely reconstructed. Where
This occurs, the magistrate's formal responsibility remains, but the possibility of explaining
What was chosen, and why, is reduced.

Automation adds a layer to the problem that the other two mechanisms do not.
They have: the dispersion of authorship. In mythical consideration and consequentialist observation, there is...
one less identifiable subject whose choice is hidden. In system-assisted decision-making, the
Relevant choices are distributed among those who designed the system, those who selected the data,
who configured the parameters and who ultimately signed off on the result. Each one can, with
For some reason, to attribute the decision to others. The figure of irresponsibility, which in Barthes was
An effect of language, here it gains a material support.

De Masi, in describing the industrial society we are leaving behind, reminded us that it
It had used "many arms and few brains" and that Taylorism had transformed the worker.
in “an automatic appendix of machines” (DE MASI, 2019, section “Intelligence and
(feelings). The warning has a possible parallel in the jurisdiction. It is not a matter of fearing that the
The idea of a machine replacing a judge is a hypothesis that current law rejects, but it serves to prevent standardization.
Turn the judge's signature into an appendix to a journey he didn't take. A
The consistency produced by a system that faithfully repeats an undeclared choice is
Consistency without order: the cases are decided similarly, but no one can say for sure.
In the end, why should they be?

The three mechanisms therefore share a common structure. In each of them, a
An operation that involves choice — assigning weights, selecting and projecting consequences, defining
patterns — it is presented in a form that suggests necessity. In each of them, the choice
It is not denied, but purified: it loses the memory of its production. And in each of them the
The freedom of the Kelsenian framework returns to operate without the name Kelsen gave it. Kelsen said
"Act of will"; the balance, the verification, and the standard say "result".

6. Deciding is not choosing: the legally ordered path

Critique of myth runs a clear risk: that of ending up with an opposing myth. If the balance,
The observation and the standard obscure a choice; the temptation is to respond that, if well managed, the
This legal interpretation would eliminate all choice and always lead to the correct answer.
The answer, however, would only replace one absolving statement with another. Kelsen had already called it...
The fiction of believing in the univocity of norms (KELSEN, 1998, p. 251), and the warning continues.

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valid. What is sought is not the suppression of choice, but its ordering: a path in which the
The residual margin is narrowed by criteria prior to the case and, when it persists, appears
as such.

6.1 Between dogmatism and skepticism

In his theory of text interpretation, Paul Ricoeur offers the framework that this
The path needs to be defined. The starting point is the semantic autonomy of the written text. Separated from
Regardless of the author's intention, the text can be constructed in various ways, and misunderstanding is possible.
...and even inevitable; to understand is, at first, to conjecture. But conjecture is not the end of...
process. For Ricoeur, “if there are no rules for making good conjectures, there are methods for validating them.”
the conjectures we make” (RICOEUR, 1987, p. 88). Validation is not empirical verification;
It approaches a logic of probability. And, in a step that is of direct interest to law,
Ricoeur defines it as "an argumentative discipline comparable to legal procedures."
used in legal interpretation, a logic of uncertainty and qualitative probability
(RICOEUR, 1987, p. 90).

Ricoeur's conclusion responds, almost word for word, to Kelsen's thesis of "equality."
The value of the possibilities contained within the framework belongs to the validation procedures.
also invalidation procedures, and the role of falsification is played by conflict.
between rival interpretations. “An interpretation must not only be probable, but more probable than
What other interpretation is there? And to conclude:

> While it is true that there is always more than one way to construct a text, it is not true that all interpretations are the same. The text presents a limited field of possible constructions. The logic of validation allows us to navigate between the two limits of dogmatism and skepticism (RICOEUR, 1987, p. 91).

The two theses can be placed side by side. Kelsen and Ricoeur agree that the text
It allows for more than one interpretation; both reject the fiction of a single answer. They disagree on the...
which follows. For Kelsen, possibilities, as determined solely by law, have equal value, and the
The choice between them escapes our understanding. For Ricoeur, possibilities form a field.
limited and can be hierarchized by validation and invalidation arguments; the final choice,
When it remains, it is a choice between what is left after that work. The frame does not
It disappears, but it ceases to be homogeneous. Within it, there are more and less sustainable regions.
And the task of providing a rationale is to show in which category the decision falls and why.

Jürgen Habermas provides this framework with a necessary precision. In the reconstruction that
It proposes a difference between truth and normative correctness, the predicate "correct," unlike

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of the predicate 'true', "exhausts its meaning in 'ideally justified acceptability'"
(HABERMAS, 2004, p. 280). There is no world of objects that confirms correctness.
From the outside; there are reasons, and reasons have the final say. Hence the consequence that matters here:
“There are always better or worse reasons, never the 'only correct one'” (HABERMAS, 2004, p. 308).
Habermas formulates the thesis in relation to practical moral discourse, and not to the application of law.
positive, which has its own institutional assumptions; what remains of it is only the limit that
It imposes a rule against any claim of correctness based on reason. The phrase prevents the exchange of a myth.
On the other hand, the decision is not justified by having found the answer that was already in the system, but
because it offered the best reasons available and presented them in a way that they can be
examined and challenged. It also notes that the model of the neutral judge, who applies a law already...
The existing paradigm has become insufficient for impartial judgment when the very...
Norms began to require justification (HABERMAS, 2004, pp. 297-298). Habermas
The observation is formulated in relation to moral discourse; when applied to the legal system, it suggests that,
When the applied standard is open-ended, impartiality is no longer synonymous with neutrality.
whoever only applies it; it demands an explanation of the reasons that justify its implementation.

6.2 Jurisdiction as a bound power

Ricoeur's hermeneutic structure and Habermas's theory of correction need...
an institutional anchoring, because the judicial decision is not merely an interpretation of text: it is
exercise of power. Ferrajoli provides this anchor by distinguishing between the functions of government and
guarantee functions. The first ones, legislative or executive, are discretionary and are legitimized.
especially politically; it is enough for them to respect the higher norms. The second group, among which
Jurisdiction is the typical example; these are "bound powers" to which application is required.
substantial of the superior norms and whose legitimacy is entirely legal (FERRAJOLI, 2011,
(p. 532). The same distinction appears, in a more political formulation, in the work in which the author
It examines the crisis of Italian democracy: the functions and institutions of guarantee are legitimized by
"subjection to the law, in particular to the universality of constitutionally enshrined fundamental rights"
established”, and not by representation (FERRAJOLI, 2014, p. 68).

The definition has an instructive detail. For Ferrajoli, the trait that distinguishes jurisdiction
of any other decision-making activity is precisely “the verification of what is foreseen by
the norm applied and, based on it, its legal qualification” (FERRAJOLI, 2011, p. 532).
The word is the same one Barthes uses for one of the figures in the myth, and the coincidence helps to...
to separate the two things. The jurisdictional finding, in Ferrajoli's sense, is verifiable: it refers

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A fact is a norm and can be refuted by evidence or interpretation. The mythical finding,
In Barthes' sense, it is the one that offers nothing to refute. From this distinction follows a
A consequence that the critique of myth makes visible. A guarantee function that decides by choice.
An undeclared approach, without confessing it, resembles a governmental function, but without the legitimacy.
The policy that justifies this discretion. The judge was not elected to choose between
policies; it was invested to apply the law. When the choice is necessary, because the
The uncertainty could not be overcome; it needs to be declared and justified with reasons that...
They can be controlled, otherwise the guaranteeing power will lose its distinguishing characteristic. Ferrajoli
In another context, he recalls a lesson he attributes to Montesquieu's "eternal experience": the
Power, in the absence of limits and controls, tends to concentrate and "transmute" itself into...
"Absence of rules, in savage powers" (FERRAJOLI, 2014, p. 15). The author was thinking of
political and economic powers, and the extension to judicial power does not belong to him; it seems, however,
natural: a guarantee power that decides without a verifiable path is not free from limits because
design, but it is free from control by effect.

6.3 Four verifiable requirements

The legally ordered path can be described by four requirements. None.
One of them is new, and almost all of them find support in Brazilian positive law. What is proposed is
Consider them together as a criterion for distinguishing an orderly decision from a disguised choice.

The first step is to state the alternatives. The rationale should name the solutions.
legally available options, not just the chosen one. Without that, it's impossible to even know which one it was.
The decision field. The requirement is in the sole paragraph of article 20 of the LINDB, which asks for
demonstration of the need for and suitability of the measure, including in light of possible
alternatives" (BRAZIL, 2018), and the duty to confront arguments capable of refuting the
conclusion (BRAZIL, 2015, art. 489, § 1, IV). A decision that doesn't say what else it could have said.
What was done doesn't allow us to know what he did.

The second is the antecedent criterion. What separates the alternatives must precede the...
reusable case: the text, the precedent, a rule of argumentative burden, a standard of proof,
an examination order. The criterion that is only formed at the moment of the decision and that would not serve
In no other case is it indistinguishable from preference. The requirement corresponds to the duty of
courts to maintain "stable, consistent and coherent" jurisprudence (BRAZIL, 2015, art. 926) and to
Vilhena's observation that judicial responsiveness cannot result from "a stance
"The voluntarist approach of a court," but it requires "the construction of rational standards for decision-making."

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decisions” (VIEIRA, 2018, chap. 4). In Ricoeurian terms, it is the antecedent criterion that allows
Validation: without it, there's no way to say that one interpretation is more likely than another.

The third is the indication of the bifurcation point. Even after the...
If alternatives are applied and the available criteria are considered, more than one sustainable solution may remain.
This is where the moderate thesis diverges from both Kelsen and his adversaries. Against Kelsen,
It argues that this residue does not necessarily coincide with the entire frame, because the
Validation can narrow the field. Contrary to the fiction of a single answer, it acknowledges that the residual may...
to exist. And it requires that, when it exists, it be indicated: the decision must state at what point it could exist.
It could have been otherwise, and why it wasn't. This requirement is the legal form of truthfulness that Kelsen...
It appealed to the science of law. The choice that could not be eliminated must, at least, be named.

The fourth is contestability. Every step of the reasoning must be able to be challenged.
with an identifiable argument. A decision that offers only weights without justification,
Consequences without data or standards without criteria offer nothing to contest, and therefore do not
It can truly be revised; it can only be replaced by another choice. The myth, he said.
Barthes organizes “a world without contradictions, because it is without depth” (BARTHES, 2009,
(p. 235). The contestable decision is the opposite: it exposes the premises on which it could be wrong.

The four requirements allow us to revisit the three mechanisms examined and say in what way.
Under certain conditions, each ceases to be mythical. The weighing is ordered when it fulfills what is stated in § 2.
Article 489 of the Code of Civil Procedure requires — object, criteria, reasons for the interference,
factual premises — and when the assignment of weights is justified by something beyond the outcome.
A consequentialist argument is ordered when it presents consequences as projections.
with the data and hypotheses that support them, and when it states the criterion that makes them relevant.
Automation is compatible with ordered decision-making when what the system proposes can be...
reconstructed, discussed, and rejected, and when the choice it embodies is treated as a choice.
In all cases, the question is the same: can the route be retraced by someone else?

6.4 Two objections

The first objection comes from Kelsen himself. If indeterminacy is irreducible, then everything
A decision in an open case involves a choice, and to demand that the decision not be a choice would be to reinstate the previous decision.
The fiction of univocity. The objection is valid against a strong thesis, which states that deciding never
It involves choice. The argument presented is different. It admits that the choice can persist after the
Validation and rejection are limited to only two things: undeclared personal choice and choice subtracted from it.
prior criteria. Kelsen thus ceases to be simply the adversary and becomes

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Partial ally. He saw the choice and appointed her; his mistake was assuming that the law has nothing to say about it.
how to narrow it, and that the residue is always the entire frame. Ricoeur's theory shows that
Between the equal value of all possibilities and the single correct answer, there is an intermediate space.
occupied by argumentation that prioritizes competing constructions.

The second objection is more serious and comes from Barthes. If all talk about things can
becoming mythical, the very "legally ordained path" can turn into the next
myth: procedural rationality as a new nature, exhaustive reasoning as
A new way of absolving the decision. The risk is real. A decision can enumerate alternatives and
criteria only to fulfill a form, and the fulfilled form can function as the vaccine of
that Barthes was talking about. The answer lies in the distinction that Barthes himself offers between the
Metalinguistic language that speaks about things and operational language that transforms them. A
The lumberjack's language is not mythical because it is linked to its object by work; always
that which is spoken of in order to transform reality, and not to preserve it as an image, myth “becomes
"impossible" (BARTHES, 2009, p. 238). Ordered reasoning approaches this.
Language not only declares criteria, but puts them into action in plain sight: when each step
It can be revised, and each premise can be challenged. The distinguishing criterion is not the presence of
certain words, but effective contestability. A formal enumeration of alternatives that does not
allows identifying why one of them was preferred; failure in the fourth requirement, and therefore not
The diagnosis is unavoidable. The objection does not destroy the thesis; it forces it to acknowledge that none
The procedure is immune to mythical use, and vigilance over the language of the decision does not...
It ends with the adoption of a method.

7. Final considerations

The initial question was why, if almost no one defends the judge's choice,
Freely within the framework, so many decisions can only be explained as choices, and why.
This choice rarely appears as such. The answer that prevailed is that the rejected choice
Through theory, it has found, in practice, ways of saying that dissolve it. The weighting used as
The formula, the consequentialist argument presented as a finding, and the automation adopted.
As a pattern, they can operate like legal mythologies: they do not negate the decision, but purify it.
of the choice, and in this way they return to the judge the freedom of the Kelsenian framework without the
The name Kelsen gave it. Kelsen spoke of an act of will and the politics of law; the myth
He talks about results.

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The diagnosis has limitations that should be repeated. It does not reach the point of weighing the... consequentialism or automation as such, but specific uses, identifiable by The absence of a verifiable route. It says nothing about the frequency of these uses. And it doesn't... It is intended that the indeterminacy can be eliminated. The normative counterpart is equally... modest: deciding cannot be an undeclared personal choice nor one devoid of criteria. background; it must be a legally ordered path, recognizable by the declaration of alternatives, according to the criterion prior to the case, by indicating the point at which the decision could have It has been another matter, and there is a real possibility of contestation. Ricoeur shows that this path exists. between the dogmatism of a single answer and the skepticism of equal value; Habermas, whom he... legitimate for better reasons, and not for possessing a truth that dispenses with reasons; Ferrajoli, that it is demanded of him by a power that defines itself as a guarantee.

What remains is the aspect that makes the problem more than just a technical issue. A The disorientation described by De Masi is not limited to the courts; it also has repercussions on the... Democratic participation. The proliferation of information does not, in itself, guarantee understanding. public problems, and the insecurity in the face of changes that are difficult to interpret can favoring simplistic answers and authoritarian solutions. In this scenario, the judicial decision What is presented as necessary, when it is a choice, worsens the situation. It removes it from public debate. the perception that there were alternatives and that someone chose between them; it becomes nature What was a decision, and what could be controversial, remained silent. Barthes called myth speech. depoliticized, in the precise sense of a discourse that erases from things the mark of the human act that As he did. A jurisdiction that speaks like that doesn't become more neutral; it becomes less contestable.

The protection of fundamental rights therefore depends on critical education, on pluralism and effective possibilities for participation and challenging power — including the power of the judge. The reasoning behind their choices does not weaken the judicial authority; it gives him the only form of authority compatible with a society that already It does not accept being governed by essences. The judge who says where he could have decided otherwise, And by not doing so, he offers public criticism what myth deprives him of: the possibility of disagreeing with reason. It is perhaps little in the face of the disorientation of an era. But it is the condition. so that the judicial decision is an act that can be understood and challenged, and not just a This is a result that must be accepted.

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