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The hidden side of the legal decision and duty of justification

O lado oculto da decisão jurídica e o dever de fundamentação

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Abstract

The key premise is that the contexts of choice and reasoning are reciprocally adjustable, without denying the existence of the gap between the legal decision and the indication of the factual and legal reasons. The legal basis requires investigation that sheds light on the internal phase of decision making. It is imperative to elucidate, with the support of the behavioral and communicational sciences, the conscious and unconscious factors that weigh in the legal choices and tend to influence them. The decision-making exercise requires the contemporary justification of choice, rather than retrofactual grounds, which are intended to confirm previous inclinations without overcoming biases. Here, evidence-based justification is advocated to account for the entire process of assumption of premises, aware that the rhetorical invocation of arguments of mere confirmation is unreasonable. In fact, a new understanding of the justification in a legal decision is necessary to avoid common mistakes that can arise from the decision-making. Evaluating impacts, considering all the direct and indirect costs and benefits of the decision-making, is crucial to carry out the duty of justification.

Keywords: justification, legal decisions, internal phase, evaluating impacts, contexts of choice and reasoning.

Resumo

A premissa principal é que os contextos de escolha e de raciocínio são mutuamente ajustáveis, sem negar a existência do hiato entre a decisão jurídica e a indicação das razões de fato e de direito. A fundamentação jurídica requer uma investigação que coloque luz sobre a fase interna de tomada de decisão. É imperativo elucidar, com o apoio das ciências comportamentais e comunicacionais, os fatores conscientes e inconscientes que pesam nas escolhas jurídicas e tendem a influenciá-las. O exercício de tomada de decisão requer a justificativa contemporânea de escolha, em vez de

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motivos retrofactuais, que se destinam a confirmar as inclinações anteriores sem superar os vieses. Aqui, a justificativa baseada em evidências é defendida para explicar todo o processo de assunção de premissa, consciente de que a invocação retórica de argumentos de mera confirmação não é razoável. De fato, é necessário um novo entendimento acerca da fundamentação em uma decisão jurídica para evitar erros comuns que possam surgir da tomada de decisões. Avaliar os impactos, considerando todos os custos e benefícios diretos e indiretos da tomada de decisão, é crucial para cumprir o dever de fundamentação.

Palavras-chave: Fundamentação, Decisões jurídicas, Fase interna, Avaliação de impactos, Contextos de escolha e raciocínio.

Introduction

The hidden side of the legal decision needs to be scientifically enlightened. With this purpose, the decision and justification require an unprecedented joint research in order to assess the internal phase of the decision-making. In fact, it is imperative to uncover, with the support of the behavioral sciences, the cognitive and non-cognitive, conscious and unconscious factors that impact the legal choices.

Indeed, the exercise of the decision requires a justification contemporary to the choice. Therefore, it is necessary to have a legal justification that unveils all premises, aware that it is not enough to invoke abstract and rhetorical arguments in a simply confirming way[2].

It is based on the idea that the contexts of choice and justification are mutually adjustable[3]. Certainly, there is a gap between the decision and the indication of legal and factual motives, but what is attempted is to encourage a two-way approach. In other words, by justification, the decision can be modulated and revised, in the sowing of better systemic results (Endicott, 2015, p. 199). In deciding, justifications can serve as restraints to inappropriate, stereotyped and non-universalizable impulses.

This way, the justification performs noble purposes, among which the one to favor the debiasing which enables the impartiality, arouses trust and predictability, protects legitimate expectations, and projects decision effects in time, with the preventive emphasis and above myopic formalisms.

Thus, the legal justification removes the decision-making from the Platonic cave, by making explicit the arguments which conduct to the choice of multidimensional net benefits[4]. It broadens the controls (judicial, social, external and internal), in order to scrutinize the decision itself and anticipate the corresponding effects.

Justification and choice, from this perspective, are encapsulated in a holistic cycle (endo and extraprocedural) of mutual constitution, which key-aim is the crossing from the decisionism chaos to the acceptable legal order. In other words, the justification cannot be isolationist and candidly disattached to the underlying motivations. The late justification cannot be isolationist and candidly denier of the underlying reasons.

The point is that the justification frequently appears too late, disregarding the biases (automatic predispositions) and decisioning noises (inconsistent variabilities) (Kahneman *et al.*, 2016, p. 36-43).

In fact, it is impossible to deny that, in the real world, the intuition[5] primarily elected the premises. In the follow-up, these premises tend to be kept off the radar, like if they inhabited a deregulated and zero control zone. Using this instrument, there is little to do: the mere "technical" job to back up the premises with enunciation, with simple "ex post" arguments.

To illustrate, judges animated by opposing preconceptions in capital matters, such as Stephen Breyer and Antonin Scalia, tended to fix, in hard cases, completely antagonistic choices of premises[6]. Nevertheless, the supervenient justification convinced, with easiness, the respective sympathizers of the supposed correctness of the options made.

As can be seen, the superficial justification, while persuasive to those who are prone to conformity, clari-

[2] See, about the confirmation bias, Holyoake and Morrison (2012, p. 720). See also Cipriano and Gruca (2015).
[3] See, about the contexts of discovery and justification, Reichenbach (1938). See also MacLean (2012).
[4] See, in the perspective of the sufficient motivation in the Administrative Law, incorporating the "ex ante" evaluation of impacts, Freitas (2014, Chapter 3).
[5] See, about intuitions that come before, and, next, strategic reasons, Haidt (2012).
[6] See, to illustrate the axiological mismatches between the cited judges, Stephen Breyer (2011).

fies almost nothing about the quality, the coherence and the righteousness of the premises themselves. In contrast, it is defended a justification of other kind, which uses tools that permit to transcend the normative linguistic-textual apparatus and enter the domain of pre-comprehensions.

The sincere decision-maker admits, without hesitation, that the cognitive and not cognitive predispositions operate as gravitational lines of the decisions, subjecting it to the unconscious influx (Libet, 1985, p. 529-566), most notably when the timely debiasing filtering is not perfected.

There are pronounced dangers, because the most significant moment of the decision-making process remains hidden, eclipsed and closed to controls and self-controls, due to the excess of deference to the inaugural choices, erroneously considered immutable. It is no accident that there is a serious misalignment between original intentions and results[7].

It is vital that the justification happens earlier to show the boldness of scrutinizing the factors that are, at first sight, "strangers" (Danziger *et al.*, 2010). From then on, within the limits of the knowable and despite the blind spots (Bazerman and Tenbrunsel, 2011), it is imperative to operate, with innovative parameters, the topical-systematic scrutiny of the juridical decision, leaving aside the sterile posterior justification, a crepuscular part of the deception and self-deception.

This is the central theme of these reflections, intend to perfect the dialectic process of choice and its respective justification.

Hidden side of the legal decision and duty of justification: Estimative of impacts as source of improvement of the election of decisory premises

Illusionisms aside, it is unsustainable the traditional project to isolate the plan of the pre-understandings from the legal decision. It is also vain the attempt to promote detachment between contexts of choice and justification. Vain, frustrating, simplifying and mutilating of the reality: it encapsulates the false assumption that intelligence would judge better without consciousness (as if algorithms, for example, could be perfect) (Dormehl, 2014).

Regrettably, this justification model refractory to the rediscovery prevails in the legal arena, with all of the implications of the bounded rationality[8]. It insists on the rigid separation and, in the extreme, impractical separation between discovery and justification[9]. In such a narrow way, decision and justification simply do not dialogue. Practicing such a reductionist pattern, the justification has very low potential to contain the systematic failures of judgment.

Precisely because of this, it is necessary to construct a robust and realistic hermeneutic dam against the eruption of influences[10], which are probably incoherent.[11] Therefore, with the firm intention of improving, structurally and functionally, the legal decision-making, it is recommended to institutionalize a previous evaluation of impacts, backed by a comprehensive estimate of direct and indirect costs and benefits.

Due to its predictive value, this evaluation has the power to reveal hidden motivations[12] and stimulate

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[7] See, about "outcome bias" and the mismatch between the original intentions and results, Sezer *et al.* (2016, p. 13-26). It is observed, with righteousness, at page 14: "a long stream of research has shown that people consistently overweigh outcome information in their evaluations of decision quality". It is said, in a precise way, at page 25: "Investigating the effects of different modes of evaluation on the outcome bias when the decision maker's intentions are known, the present research shows that joint evaluation can exacerbate this bias. These findings offer a new perspective on the distinction between joint and separate evaluation and the conditions under which each improves decision making".

[8] See, about limited rationality, Simon (1959, p. 272): "The classical theory is a theory of a man choosing among fixed and known alternatives, to each of which is attached known consequences. But when perception and cognition intervene between the decision-maker and his objective environment, this model no longer proves adequate. We need a description of the choice process that recognizes that alternatives are not given but must be sought".

[9] See, to highlight the problematic characteristic, Anderson (1996).

[10] See Sisk *et al.* (1998, p. 1377-1500). They observe, about this, at page 1500: "Legal concepts, lines of precedent, and doctrinal themes may not be sufficient for understanding judicial decision making, but they are surely essential. Legal analysis, as a distinct method of human reasoning, cannot be reduced to any methodology borrowed from another discipline. The judge brings to bear 'not only a range of personal and political preferences, but also a specialized cultural competence-his knowledge of and experience in 'the law.' Backgrounds will vary, attitudes will differ, environments will change, but the law remains the alpha and omega of judicial decision making".

[11] See Sunstein *et al.* (2001, p. 52-53): "people's judgments are insistently category-bound. They do not naturally seek coherence across categories. Their assessment of problems, taken in isolation, are often different from their judgments about problems, taken in the context of cases from other categories. This is largely because any judgment, in isolation, is made against a background of a "natural" comparison set, consisting of problems from the same basic category. Much of the time, people will look at problems from other categories only when forced to do so. When a problem from a different category is introduced, the isolated judgment is unsettled, and people's judgments will shift, sometimes quite dramatically. The reason is that the introduction of the new problem alters the set of comparison cases, and shifts in judgment are a common consequence of that alteration [...] Coherence is important; it seems to be a minimum requirement of rationality. But coherence is not a trumping value, and a system displaying incoherence may well be better than one that is coherent but pervasively unjust. An incoherent system in which penalties fit together, but are three times as high, or one-third as high, as they ought to be. Nonetheless, we think that any domain of law should aspire to coherence, at least as a presumption, in order to prevent the kinds of arbitrariness and injustice that we have found in both experimental and real-world settings. At the very least, efforts should be made to correct the most conspicuous anomalies – a goal that can be obtained without thinking that it is easy or even possible for people to agree on what full coherence actually requires".

[12] See, about the most powerful motivation of connection with others, Ariely (2016, p. 101).

the scrutiny of congruence and temporal consistency. It can provide access, at least obliquely, to decision-making intimacy[13] and reveal not only the omnipresence of emotions[14], but also cognitive and emotional biases[15]. It brings to light phenomena like asymmetric dominances ("decoy effect")[16], intense evocation of the first information ("recency effect")[17], polarization[18], anchorage (Kahneman, 2012, p. 119-128), and so on.

What is advocated is the insertion of controls in the decisional materialization antechamber, in other words, at the dawn of the election of premises, the stage in which "shorcuts"[19] of all genres appear. With this, the justification must go back to the instants in which the domain of conditioning erupts, waiting for the indispensable debiasing (Dickerson, 2016).

Such an inflection is central to the proposed approach. Deciding is knowing how to choose impacts. It is recommended to evaluate the impacts[20] as a part of justification, except in the decisions of mere expedient and self-decipherable by its simplicity. That means that the justification has to be reoriented, from the beginning, to the consequential plane, without any pragmatic absolutism that obscures linguistic and systemic arguments in a normative sense[21].

It is a preordered strategy in order to clarify the scope and elucidate the assumptions of the decision; support choices based on empirical evidence; ensure that, among suitable alternatives, the final option rests on the most topical and systematically advisable; teleologically endorse the measure, with express reference to the purposes of the legal system; to establish proper correlation of means and ends; achieve the distributive justice of charges and facilitate the monitoring ("in itinere") of intertemporal results.

To illustrate, in the administrative process (article 50, of the Brazilian Law n. 9.784/99), the impact assessment, seen as a mandatory component of "explicit, clear and congruent" motivation, favors scrutiny of the axiological antecedents of all judgments that affect rights and interests. It unveils, almost with a solar clearance, the "inner phase" that precedes, for example, the opening of a bidding or a expropriation procedure, phase in which the greatest finalistic deviations are observed.

In fact, the behavioral sciences show that preconceptions and mental habits (for good or evil) preside over choices, sometimes with astonishing velocity, through the force of intuitions[22].

In other words, everything that inhabits the mind, before the choice, truly decides. It matters nothing that narrative systems[23] insist on propagating the reverse. Pure elusive movement.

Due to the incorporation of impact assessment, however, the legal basis empowers itself to weigh the consequences, stimulating the self-control of those who decide. Hence the neuralgic aspect of, in due time, unveil the fissures of the initial premises and, when necessary, eliminate them (Ellenberg, 2014), with open impartiality (Sen, 2011, p. 154-183).

Still to illustrate: in the area of the legal process, although it is meritorious to consider the nullity of a sentence that does not examine all the arguments "capable of, in theory, invalidate the conclusion adopted by the judge" (Brazilian Code of Civil Procedure, art. 489, § 1), as well as vituperate against hollow formulas and paraphrases, none of that solves the problem. The fact remains that everything that comes before the traditional justification still out of the traditional scrutiny: the real factors of the choice of premises, along with fast automatisms[24] and lazy rationalities[25].

However, a reflexive and debiased legal justification supports, first of all, an explanation of the starting axiological criteria, rather than pretending that they do not exist. Secondly, it detects the fragility of classical approaches (trapped by the illusion of the incommunicable sequence between choice and justification). Thirdly,

[13] See, about the inevitability of the architecture of choices, Sunstein (2015, p. 420-422).
[14] See, in the perspective of not committing the mistake of not ignoring the emotions, Fisher and Shapiro (2005).
[15] See, about the cognitive and motivational biases (these last ones influence the judgment considering certain consequences to be or not desired), Montibeller and Winterfeldt (2015, p. 1230-1251).
[16] See, about asymmetric dominance, Bateman *et al.* (2008, p. 115-127).
[17] See, about this bias, Furnamin (1986, p. 351-357).
[18] See, about the hyperpolarization of politics, Pildes (2011, p. 273-333).
[19] See, about the process of associations and the ethical employment of "smart shortcuts", Cialdini (2016, p. 97-223).
[20] See, about the understanding of the world as "constructive", the role of the inferences, and the unconscious mind, the dependence on heuristics and the importance of experts, despite all, Nisbett (2015).
[21] See, about the legal consequences and the interpretive arguments – linguistic, systemic and teleological-evaluative –, MacCormick (2008, p. 139-189).
[22] See, in a different theory, Gigerenzer (2008).
[23] See Gazzaniga (2011, p. 938): "Years of research have confirmed that there is a system that builds a narrative in each of us about why we do things we do, even though our behaviors are the product of a highly modularized and automatic brain working at several different layers of function".
[24] See, about dangers of automatism and the framing bias, Kern and Chugh (2009).
[25] See, about "the lazy controller", Kahneman (2012, p. 39-49).

it seeks to change indefensible preconceptions, a "sine qua non" condition to inhibit anachronistic, obscurantist and self-contradictory choices, which do not fit into any logic, even the paraconsistent one (Costa *et al.*, 1999).

In sum, the justified decision demands full vigilance against cognitive and non-cognitive biases, which predispose to the denial of the fundamental duty to universalize the net benefits of each choice. It also requires caution to replace negative discriminatory automatisms for equal, inclusive and sustainable preconceptions.

In everything that one thinks and believes, Law is transformed. Despite the otherness of the normative text[26], it makes no sense to acknowledge that cognitive biases (such as excessive optimism, Sharot, 2011, and aversion to loss, Zamir, 2015) and non-cognitive biases (such as implicit stereotypes) preponderate, even though they do not appear much in the conventional justification and against the legitimate proportionality, as dreamed by Mark Elliot[27].

It is hard to admit: the decision is often made by magical arts of occult predispositions, and, only in a second moment the rational consciousness of the choice made arises, as Benjamin Libet has abundantly shown[28]. In this late moment, the control of legality experiences remote chances of vetoing the reckless or timorous impulses, injurious to crystalline priorities.

In other words, the rationality applied to the external moment of decision-making has a very modest utility to restrain harmful solutions[29] and to give effectiveness (positive and negative) to fundamental rights. It lends itself to the seal of impulses, falsifications of preferences[30] and the placement of speeches that say nothing about fundamental reasons (or absence of them).

On the other hand, thanks to the suggested justification accompanied by an "ex-ante" evaluation of the impact of the legal decision, a promising record of transparency and reflection[31] is introduced, leaving the digital registry of choice consigned in its earliest records.

Here, however, one must be careful. There are ways and ways to operate this assessment. If it is limited to economic cost-benefit analysis, it will be a possibility for specific actions and omissions. It is essential to provide social, economic and environmental impacts, embracing the non-monetizable values, related to the ever-priceless dignity, which is not translated, by definition, by the cold numbers of economic exchanges.

In this perspective, rational guidelines on predictions, as suggested by Philip Tetlock, represent technical contributions[32] to overcome the arbitrary distinction between the contexts of choice and justification.

In addition, it is important not to fall into the psychological traps, accurately listed by John Hammon, Raph Keeney and Howard Raiffa, like the one to work on the wrong problem; to fail to identify key objectives; to sin for not developing the variety of alternatives; to neglect the crucial consequences; to think inappropriately about trade-offs; to disregard crucial consequences; to disregard uncertainty; to not take into account risk tolerance and fail to plan the decisions connected in time[33].

Of course, by inserting the question on impacts within the legal justification, its scope is not reduced. Instead, the scope is enriched and extended to put into check the inconsequential automatisms that disregard preferences and avoid priorities. That is why it is important to use the recommended tool.

Entering the inner phase of the decision implies the recognition of the (more or less harmonious) coexistence of automatic and reflexive systems of judgment[34]. It also implies enacting the end of the account of unlimited rationality, a presumption that denies biases and heuristics[35].

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[26] See, about the otherness of the normative text, Gadamer (1998, p. 631).

[27] See Elliot (2011, p. 253): "(i) Does the measure impinge upon a highly-regarded interest (eg a human right)? (ii) Does the measure pursue a legitimate objective? (iii) Is the measure capable of securing that objective? (iv) Is the adoption of the measure necessary in order to secure that objective? (v) Does the measure strike a fair balance in the sense that the losses inflicted by it [...] are justified, or outweighed, by the gains which it purchases [...]?".

[28] See Libet (1999, p. 54): "The role of conscious free will would be, then, not to initiate a voluntary act, but rather to control whether the act takes place. We may view the unconscious initiatives for voluntary actions as 'bubbling up' in the brain. The conscious-will then selects which of these initiatives may go forward to an action or which ones to veto and abort, with no act appearing".

[29] See, about the tendency to overestimate the consciousness and overestimate the limits, Chugh and Bazerman (2007, p. 1-18).

[30] See, about falsification of preferences, Kuran (1997).

[31] See, about the distinction between the algorithm mind and the reflexive mind, Stanovitch (2011, p. 29-42).

[32] See, about guidelines to the secure prediction, such as thinking in probabilistic terms, Tetlock and Gardner (2015).

[33] See, about the main psychological traps, Hammon *et al.* (1999, p. 185 and ss.).

[34] See Stanovich and West (2000, p. 645-726). They observe at page 658: "System 1 is characterized as automatic, largely unconscious, and relatively undemanding of computational capacity. Thus, it conjoins properties of automaticity and heuristic processing as these constructs have been variously discussed in the literature. These properties characterize what Levinson (1995) has termed interactional intelligence – a system composed of the mechanisms that support a Gricean theory of communication that relies on intention-attribution. This system has as its goal the ability to model other minds in order to read intention and to make rapid interactional moves based on those modeled intentions. System 2 conjoins the various characteristics that have been viewed as typifying controlled processing. System 2 encompasses the processes of analytic intelligence that have traditionally been studied by information processing theorists trying to uncover the computational components underlying intelligence".

[35] See, about biases and heuristics, Tversky and Kahneman (1974, p. 1124-1131).

With support in the empirical evidences, the dissimulatory rationalization of implicit associations is abandoned and the weight of influences[36] is used in the decision-making. It pays attention to blind and invisible forces, rather than the strict epidermal compliance with the original legal order[37], designed to the feature of Procrustean bed. It is criticized the bizarre assumption that "homo sapiens" (Thaler, 2000, p. 33-141) would act as the algorithm programmed to apply heteronymous norms. Not that algorithms are disposable in process management. The major mistake consists in considering it the genesis of decision, to consider it inscrutable and to ignore the risks of pathological discrimination[38].

The legal justification, carried out with the focus on consequences, is urged to undertake strong debiasing[39] and to practice the correction of congruence and consistency deficits, rejecting the consolatory task of monitoring consummate adverse effects.

In the minds of those who decide (Guthrie *et al.*, 2001, p. 777-830), it is inevitable the presence of false memories and systematic mistakes of monocratic or collegiate judgment, linked to volitional and/or cognitive weaknesses. It comes across, liking it or not, with the mishaps of incommensurability (absence of the common denominator between competing legal principles)[40].

Therefore, before crystallizing the legal justification, it is necessary to filter predispositions, as a mandatory provision[41]. It is essential, in the present century, to syndicate in advanced terms, in the light of scientific findings on decision-making (Sunstein, 2013, p. 50-74). It is not laudable to insist on the easy, incantatory and trivial discourse of "true reasons" (of the law, the judge, the administrator, or the legislator) to deny cognitive and non-cognitive deviations. In most cases, the impulses ("primes") guide and decide[42].

It is imperative, in the face of this observation, to justify in a way to enlarge the resistance to the impulsive, arbitrary and not thought decisions, which open exceptions when it should not and do not open when it should. On the other hand, re-dimensioning the justification presupposes checking the motivated attendance of constitutional priorities, before even dealing with aspects related to adequacy, necessity and proportionality in the strict sense.

There is no postulation of justification which merely confirms original estimates, or – which is an equally gross error – that operates as a pretext. With the practical sense, it is prescribed the use of metrics that link, model, condition the choices and favor firm vetoes to harmful nefarious impulses (Lorenz *et al.*, 2011)

In addition, the "ex ante" impact assessment generates authentic "feedforward"[43], with the unprecedented widening of horizons (Achen and Bartels, 2016) of intersubjective control, especially if it is accompanied by complementary instruments, such as threshold tests[44] and cost-effectiveness analyzes.

As a result, syndicability has a more important role: it looks into the future, into the prediction, into the reflexive containment of impulses and deliberate reduction of hyperbolic discount. In addition, it scrutinizes the specific decisory omission as part of the causal chain of intra and intergenerational damages.

Conceived in this way, the legal justification goes beyond the fierce opposition between self-restraint and protagonism. It determines degrees of variable discretion in each context. It effects pre-decision evaluation with diligence and zeal, promoting the choice guided by the appropriate appraisal of constitutional priorities, rather than the precarious belief that the task of the applicator of Law would exist simply to carry the norm from the past to the present.

In other words, without denying the coexistence of rationality with intricate webs of feelings[45], the legal justification, assimilating the insights of the behavioral sciences, promotes informed choice about the unconscious process. It leaves the perspective that the interpreter/applicator would be able to remain indifferent to "external justifications" that determine the choice of premises, to evoke Jerzy Wroblewski[46].

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[36] See, about the influence of "defaults", Johnson and Goldstein (2003, p. 1338-1339).
[37] See, in an attempt to overcome the strict and unsustainable originalism, Balkin (2011, p. 277-340).
[38] See, about discrimination caused by algorithms, Fishman and Luca (2016, p. 72): "The discrimination caused by algorithms occurs in many ways that we would probably avoid".
[39] See, about debiasing, Morewedge *et al.* (2015, p. 129-140).
[40] See, about the theme of incommensurability and the attempt of solution, Barak (2012, p. 482-484). See, about the proposal of refuting the objection of incommensurability, Klatt and Meister (2015, p. 30-70).
[41] See, about how to deal with the main biases, Freitas (2013, 2014).
[42] See Kahneman (2012, p. 55-58). See, to illustrate, about the monetary impulses and its individualistic effects, Vohs *et al.* (2006, p. 1154-1156).
[43] See, about "feedforward", which aims at the future, in place of the feedback which is fixed at the past and it is difficult to assimilate, Goldsmith and Reiter (2008, p. 174).
[44] See, about the threshold test and "cost-effectiveness analysis", Salgado and Borges (2010, p. 15-16).
[45] See, about reason and "feelings," both defensible tools for specific duties and the importance to open the "black box" of the human brain, Lehrer (2009, p. 243-259).
[46] See, about external justification, concerning to the election of premises, the formulation of Wróblewski (1971, p. 412): "External justification of legal decision tests not only the validity of inferences, but also the soundness of premises. The wide scope of external justification is required especially by the paradigmatic judicial decision because of the highest standards imposed on it".

It refutes, in line with advanced field research[47], the chimerical pretensions of hiding the intuitive moment of the election of premises[48].

When the justification proves itself to be capable of joining the prolegomena of the decision, it reveals the origin of the choices and the respective links. It operates as "prospective hindsight"[49]. It exorcises "villains" such as the "narrow framing", "confirming bias", "short-term emotion", and the "overconfidence"[50] in relation to the future.

The legal decision maker does not have the right to ignore these phenomena. It is about realizing the justification of the choices outside the platonic cave (Platão, 1965, p. 107) Such justification rejects corroboration errors (Sunstein, 2009, p. 23- 26) and learns to deal with the influences of familiarity (Jacobs *et al.*, 1989, p. 326-338); beliefs that precede ideas (Gilbert, 1991); the effects of "framing effects"[51]; the assignments based on facial prints (Todorov *et al.*, 2015); heuristic questions that replace complex questions[52]; difficulties in forming affective connections with victims[53]; the precariousness of the automatic system in the treatment of ambiguities (Kahneman, 2012, p. 110-115); the propensity to judge the frequency of events by availability in the evocation (Kahneman, 2012, p. 129-136); retrospective perception and based on results (Fischhoff, 2003); the fallacies of planning[54] and lost costs (Kahneman, 2012, p. 345-346); the inversions of preferences (Slovic and Lichtenstein, 1983); the conflicts between the self of memory and the self of experience (Kahneman, 2012, p. 408-415) and, finally, the tendency to confuse the shadows with the real motives, deplorable confusion perpetuated in the runaway of the solar unveiling of those who judge.

Without undue exaggeration, the traditional legal justification is strictly inept to stanch the irrational character of countless ruinous decisions, for example, the US Supreme Court, whose historical balance has been problematic, to say the least, as Erwin Chemerinsky lucidly warns[55].

The decision/justification cannot remain attached to the faulty superficial and "ex tunc" rationalization, hostage of the belief system, highlighted by Douglas North and John Droback[56]. That is, legal justification must cut blind spots and route deviations[57], despite adverse cultural pressure. In fact, the biased narratives are almost omnipresent and imply dysfunctional meanings to the legal system, which is why the responsible manipulation is imposed: by the fruits, the decisory tree is known.

In summary, the legal decision conquers legitimacy if and only if it generates long lasting net benefits, by means of legal justification[58], in a troubled scenario of biases and risks[59]. To justify, it is essential to deal with the cognitive and emotional predispositions[60] of factious interests, adapted to dishonesty[61].

Once this point is reached, the linking of justification to the quality of results emerges as a guideline that crosses the archaic boundaries between deontologists and consequentialists, as long as both are imbued with producing antidotes against decisions disattached of the concrete sense of universalization.

Having that said, it is imperative to have a justification of another type, enabled to restrain, from birth, the bundle of unthought, mechanical and inertial choices. It seems crystalline that the Democratic State cannot coexist with arbitrary and capricious options, arising from the erratic and rationalized in a "ex post" criteria.

Undeniably, a serious contemporary justification for the decision is not limited to expose the motives for applying the given law. Nothing more improper: by justifying in this way, the decision-making sphere remains indomitable, jungle, opaque and unintelligible.

A legitimate[62] (consistent with fundamental principles), adequate (with a correlation between means and ends), necessary (less burdensome between valid alternatives) and proportional "stricto sensu"

[47] See Haidt (2012), observing that the intuitions come first and automatically, and the strategic reasoning comes later.
[48] See, about the unconscious, Wilson (2002).
[49] See, about the "prospective hindsight", Soll *et al.* (2015, p. 64-71).
[50] See, about such "villains", Heat and Heath (2013, p. 9-31).
[51] See Kahneman (2012, p. 88): "Different ways of presenting the same information often evoke different emotions".
[52] See, about heuristics as consequences of "mental shotgun", Kahneman (2012, p. 98).
[53] See, about the difficulty of forming affective connections with victims, Slovic (2007, p. 79-95).
[54] See, about the planning fallacy and how to mitigate it in the external perspective, Kahneman (2012, p. 249-254).
[55] See, about historic mistakes in the North American Supreme Court, Chemerinsky (2014).
[56] See Drobak and North (2008, p. 138-139): "[...] the belief systems of judges are part of the hidden aspects of judging. Many judges openly admit the impact their belief systems have on their decisions, often in an unconscious and unexplainable way".
[57] See, about deviations and the importance of questioning the emotional temperature, Gino (2013, p. 227).
[58] See, about biases and balancing, Boutang and Lara (2016, p. 123-142).
[59] See, about how to deal with risks, Gigerenzer (2014).
[60] See, about cognitive and emotional biasement, Frenkel and Stark (2015).
[61] See, about brain risks of getting used to dishonesty, Garret *et al.* (2016, p. 1727-1732).
[62] See, about the criteria of legitimacy, in the scrutiny of proportionality, Elliot (2011, p. 252-266).

(acceptable in the net benefits plan, where there are uncertainties and risks)[63] result from the intentional performance of control of the predispositions is essential. The rest is accessory.

Of course, the "ideologies" remain, in a (apparently) irrepressible way, as Paul Ricouer (2011, p. 79) imagined. However, it is important to study the complex spectrum of preferences and nuances of psychological style. Additional argument for an inflection that unmasks the false consciousness[64] and dissolves the toxicity of the particularistic and insidious opinions, usurper of the reasoned and epistemically secure judgment.

In parallel, by admitting that the subject and the object are reciprocally involved, in rejection of the Cartesian model (Ribeiro, 2015, p. 6), it is necessary to make the hermeneutic circle virtuous, not the unfolding of obscure narratives (MacKillop and Vidmar, 2015). That is, it is important to bridge the current gap between contexts of choice and justification, as well as between impulsive and reflexive systems, avoiding the tedious multiplication of inverse controls that are dedicated to the parade of motives that claim the least attention and neglect the core: the universe shaped of beliefs, moral emotions[65] and pre-comprehensions.

The "ex post" justification is fragmentary, shallow and too fragile. In one word: insufficient. In contrast, the proposed model of justification, far from betting on the coldness of Dr. Spock, assumes a probabilistic assessment of scenarios and engenders controllability[66] tilted by the behavioral contributions (Dhami *et al.*, 2015).

This is the legal basis that does not go so far as to expose, in the same way as the chaplinian running machine, efficient justifications of fact and law, since it is willing to examine the whole cycle of legal decision, using transparent and plausible considerations regarding hidden motives and attempted effects.

In this view, the fulfillment of the duty to offer reasons[67] causes the resolute abandonment of the formal subsumption, which sabotages wise choices. And it goes beyond. It anticipates, throwing the justification to the postscenium of the axiological elections. All with the unshakable urge to invest in the exercise of open rationality that is not identified with the obscure "ad hoc" rationalizations.

Conclusions

Of what was explained, it follows especially that:

(a) The legal justification, contemporaneous with the decision, requires an "ex ante" evaluation of the impacts of the choice. Otherwise, it can be too late.

(b) Choosing well is knowing how to evaluate impacts. It is entirely plausible to think of a justification that questions the decision itself, unveiling the intimacy of the decision-making process.

(c) The later rationalization of the choice of axiological premises is a fragile piece that does not lend itself to the effective protection against irrational voluntarism, not universalizable by definition.

(d) The exercise of legal justification, as proposed, by incorporating "insights" and lessons of behavioral sciences, brings together unprecedented conditions of control and self-control of bias, which are present in the decision-making process. The rest is... noise.

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[63] See, about inconsistency risks, the controversial approach of Buchak (2013, p. 148-169).

[64] See Ricouer (2011, p. 151): "The critique of false consciousness can thus become an integral part of hermeneutics [...]".

[65] See, about families of emotions involved in moral judgments, Haidt (2003, p. 852-870).

[66] See, about the controllability and the obligatoriness of motivation, Taruffo (2011).

[67] See Elliot (2011, p. 412): "Giving reasons should be treated as a central part if procedural fairness in administrative law [...] for practical reasons [...] and for normative reasons [...] promotes a trust [...]".

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