

The Legitimation by Procedure and Concretion of General Clauses in Private Law: An Examination through the Lens of Niklas Luhmann's Theory and the Dilemmas Surrounding Transparent Decision-Making in the Pursuit of Communicative Coherence

Mayckerson Alexandre Franco Santos¹ , Cássius Guimarães Chai² ,
José Alberto Lucas Medeiros Guimarães¹ 

¹Law Department, Graduate Law Program, Federal University of Maranhão, São Luís, Brazil

²Department of Law, Federal University of Maranhão, São Luís, Brazil

Email: mayckerson@gmail.com, cassius.chai@ufma.br, jose.almg@discente.ufma.br

How to cite this paper: Santos, M. A. F., Chai, C. G., & Guimarães, J. A. L. M. (2024). The Legitimation by Procedure and Concretion of General Clauses in Private Law: An Examination through the Lens of Niklas Luhmann's Theory and the Dilemmas Surrounding Transparent Decision-Making in the Pursuit of Communicative Coherence. *Beijing Law Review*, 15, 148-164. <https://doi.org/10.4236/blr.2024.151010>

Received: December 28, 2023

Accepted: February 26, 2024

Published: February 29, 2024

Copyright © 2024 by author(s) and Scientific Research Publishing Inc.

This work is licensed under the Creative Commons Attribution International License (CC BY 4.0).

<http://creativecommons.org/licenses/by/4.0/>



Open Access

Abstract

The present study problematizes the process of concretizing general clauses, taken as “blank checks” delivered to the decision-maker, the authentic interpreter, in the sphere of institutionality of the jurisdiction of private law and its contribution to the legitimation of the Judiciary within society, the light of Niklas Luhmann's theory of legitimation by procedure. As a hypothesis, it is assumed that a process of implementing general clauses that are transparent and coherent with the legal system can reduce the insecurity of social relations, providing legitimacy from the procedure for creating the law in the specific case, observing criteria of communicative coherence, such as non-ambiguity, cohesion, thematic continuity, intentionality, mutual acceptability, and situationality. As a general objective, we analyze the process of implementing general clauses by judges who are considered models of behavior and valuation guidelines not described in the general clause. However, they are interrelated with the legitimacy of the Judiciary and the SDGs/UN, particularly SDG16, subitem 16.6 whose goal is “to develop effective, responsible and transparent systems for the administration of justice.” The research is developed along the lines of Semiology and Institutions of the Justice System, with bibliographic and documentary reviews being adopted as methodological procedures, with content analysis and critical propositions. The expected results highlight the importance of the quality decision-making process for

the implementation of general clauses and the legitimization of the Judiciary, subject to adequate justification, and the participation of the parties, which contribute to the trust and stability of the legal system.

Keywords

Concretization, General Clauses, Legitimation, Procedure, Decision-Making Process

1. Introduction

The legitimacy of the Judiciary is a fundamental pillar for the proper functioning of any democratic society (O'Donnell, 2000; Hilbink & Prillaman, 2002), and citizens must trust the legal system and the decisions made by magistrates (Barroso, 2012; Hough et al., 2013). In this context, general clauses have proven to be highly relevant legal tools by granting the authentic interpreter—the decision-maker—a margin of discretion in the application of Law, but also a source of severe criticism in the face of the mistrust they produce by fueling judicial activism. founded on the free conviction of the judge, unsuitable for a Constitutional Democracy (Chai, 2007).

This article's central objective is to problematize implementing general clauses, often compared to “blank checks” delivered to judges. The premise is that when this process is transparent and coherent with the legal system, it significantly legitimizes the Judiciary before society.

Nevertheless, it is appropriate to advocate. the legitimacy of the judiciary depends on various factors, such as the independence, impartiality, accountability, transparency, competence, and efficiency of judges and courts; these factors affect the public perception and acceptance of judicial decisions and the respect for the rule of law and human rights.

The research is based on Luhmann's Theory of Legitimation by Procedure, which highlights the importance of the procedure in building the legitimacy of institutions. From this theoretical perspective, we seek to understand how the implementation of general clauses can influence the perception of the legitimacy of the Judiciary. This theoretical approach is mainly due to the understanding that Luhmann's Procedural Legitimation Theory is a sociological approach that explains how the acceptance of political decisions is ensured by using formal procedures rather than by substantive criteria of justice or morality. According to Luhmann's Procedural Legitimation Theory, a sociological approach using formal procedures rather than substantive standards of justice or morality ensures the acceptance of political decisions. According to Luhmann, procedures reduce complexity and uncertainty and generate trust and legitimacy (Luhmann, 2017). He distinguishes between three types of procedures: input-oriented procedures, which rely on the participation and representation of the people, such as elections and referenda. Output-oriented procedures focus on the effective-

ness and efficiency of decisions, such as cost-benefit analysis and performance evaluation. Throughput-oriented procedures emphasize the fairness and rationality of the decision-making process, such as judicial and administrative procedures (Philippopoulos-Mihalopoulos, 2009). However, a detailed counterexample of these mechanisms can be seen in authoritarian regimes where elections and referenda are held but need more genuine participation and representation of the people. These procedures may give a semblance of legitimacy but serve to consolidate power and suppress dissent. Additionally, in corrupt systems, judicial and administrative procedures may claim to emphasize fairness and rationality but are often manipulated to serve the interests of those in power rather than the overall well-being of society.

To this end, the hypothesis is assumed that implementing general clauses that are clear, transparent, and coherent with the legal system can reduce insecurity in social relations, thus providing intrinsic legitimacy to the procedure for creating Law itself. in specific cases. This hypothesis will be evaluated using communicative coherence criteria, such as non-ambiguity, cohesion, thematic continuity, intentionality, mutual acceptability, and situationality.

Furthermore, the study finds social relevance when relating to the Sustainable Development Goals (SDGs) of the United Nations (UN), especially SDG16, whose subitem 16.6 aims to develop effective, responsible, and transparent systems for the administration of Justice. In this sense, we will seek to understand how implementing general clauses can contribute to achieving this objective, strengthening citizens' trust in the Justice system.

Throughout the article, the process of implementing general clauses by judges will be analyzed, considering the different approaches adopted in their behaviors and valuation guidelines. The aim is also to investigate how these elements interrelate with the legitimization of the Judiciary and with the search for achieving the SDGs established by the UN.

The interrelationships between the process of implementing general clauses in Private Law, the legitimization of the Judiciary, and the impact of noise in the decision-making context will also be explored. As for how the process of implementing general clauses, which involves attributing meaning and content to open standards, can be affected by noise, leading to divergent results in similar cases. Analyzing how the presence of noise can compromise the legitimacy of the Judiciary and the perception of justice, as inconsistent and unpredictable decisions could undermine society's trust in the institution.

The research is developed in the line of Semiology and Institutions of the Justice System, adopting the technique of bibliographic and documentary reviews as part of the methodological procedures. Content analysis and critical propositions are tools used to extract insights and reach expected results, emphasizing the importance of the quality decision-making process in implementing general clauses and legitimizing the Judiciary.

Furthermore, the work aims to highlight how adequate reasoning for decisions and the parties' active participation contribute to the legal system's trust

and stability (Chai, 2007).

By bringing these reflections to light, it is believed that the study will be able to provide valuable information to improve the justice system, strengthening the democratic pillars and citizens' trust in judicial institutions. In this way, we contribute to the continuous development of a fairer, more equitable society supported by a Judiciary legitimized by procedure and communicative coherence in its decisions.

2. General Clauses in Private Law and the Process of Completion

General clauses have occupied a prominent place within the scope of Private Law, representing a normative category of great importance for the interpretation and application of the legal system. The concept of general clauses adopted in the present study is found in Martins-Costa's theory, according to which they are:

[...] prescriptive species endowed with a double indeterminacy: in the hypothesis and in the consequence. For this reason, through a general clause, part of the task reserved for the legislator is transferred to the interpreter, who is delegated to make choices and implement solutions that the legislator did not want or cannot exercise. (Martins-Costa, 2013: p. 999)

From the perspective of legislative technique, the general clause is a norm that uses purposefully open, fluid, or vague language, expanding its semantic field. This provision is directed to the judge, giving him a mandate or competence to create, complement, or develop legal norms by referring to elements external to the system. These elements, although external, support the decision and, with the ratio decidendi, are incorporated into the legal system (Martins-Costa, 1998).

Although the general clause allows greater dynamism of the law in social life, its disadvantage lies in the uncertainty regarding its limits until the jurisprudence is consolidated. Thus, a code cannot be formulated exclusively with general clauses, as this would result in a low degree of legal certainty. Often, case-by-case regulation is combined with general clauses, and "degrees" of case-by-case and vagueness may coexist in the same provision, same provision (Martins-Costa, 1998: pp. 135-139).

Following this same understanding, according to Martins-Costa (2018: pp. 112-113):

General clauses constitute the appropriate legislative instruments for this reaction insofar as they legitimize the judge to produce norms whose validity extends beyond the case in which the decision will be made. The process by which this valuation adaptation takes place is slow and complex. This is being carried out little by little, through partly casuistic work, partly generalizing casuistry, constituted by the judicial synthesis of past cases, taken, however, not as limits to the interpretation and application of the law but as

support points for compatibility between the system and new realities and circumstances. However, it is worth highlighting the risk of transforming an argument—referenced to a specific case—into a thesis and, subsequently, a legal proposition.

In the law of obligations, which represents the core of civil law and legal discipline, one should not adopt a dichotomous approach between general clauses or not, but rather consider the concomitance between both, due to the peculiar characteristics and the flexibility provided by the general clauses (Martins-Costa, 1998).

By way of example, within the theoretical framework proposed by Martins-Costa (2018), good faith is conceived as a general clause, not containing all the elements necessary for its specific application in each case. The rule of good faith requires that the parties to a legal relationship act in a loyal, honest, and cooperative manner, respecting the duties of loyalty and probity during negotiations and in the fulfillment of contracts.

The openness and indeterminacy of general clauses, such as good faith, represent a challenge for the process of implementing private law. The attribution of meaning and content to these norms demands from the interpreter a careful analysis of the factual context, social values and the specific circumstances of each case. In this sense, Chai and Arouche Júnior (2021) state that: “procedural legislation uses open clauses that allow the judge a broad possibility of adjusting the procedural instrument to the objective of the specific case”.

Implementing general clauses requires a robust argumentative construction, where the judge or authentic interpreter must establish criteria and parameters for applying these norms in a coherent and compatible manner with the current legal system (Martins-Costa, 2018).

In this context, the interpreter is called upon to fill in the gaps in general clauses with adequate legal content, based on principles, values and the normative system. The discretion given to the interpreter to implement these norms allows for a flexible adaptation of the law to constant social changes and the specific needs of specific cases.

However, discretion in implementing general clauses can also generate uncertainty and legal uncertainty since different interpreters can reach different conclusions about the content and scope of these norms in similar situations.

For this reason, the work of Martins-Costa (2018) highlights the need for solid and transparent reasoning on the part of authentic judges and interpreters when implementing general clauses, to ensure the coherence and consistency of judicial decisions. Adequate reasoning is essential to avoid arbitrary decisions and ensure that the application of these standards is guided by objective criteria and in accordance with the principles and values of the legal system.

General clauses have a multifaceted and multifunctional structure, being divided into three main types: restrictive, which delimit the scope of singular permissions in relation to a legal principle, such as the social function of the con-

tract restricting contractual freedom; regulatory, which serve to deal with situations not provided for by law based on principles, such as civil liability for fault; and extensive, which expand legal regulation by allowing the incorporation of principles and rules from other normative texts (Martins-Costa, 1998, 2018).

These clauses perform several functions. Firstly, they allow the judge to create legal rules with general scope, being the “mouth of the law” by reiterating cases and clarifying the meaning of the general clause over time. Furthermore, they act as directive norms, enabling the formation of legal institutions to deal with new facts and correcting strict laws. They also function as a reference point for the justification of judicial decisions, facilitating the formation of catalogs of precedents and the integration between different parts of the Civil Code, the Constitution, and special laws (Martins-Costa, 1998, 2018).

The current relevance of general clauses lies in their ability to allow the migration of concepts and values between different normative bodies, avoiding legislative inflation and providing an understanding of the contemporary concept of a legal system, flexible, open, and structured in staggered degrees of privatism and publicism. These clauses enable the considered inflection of constitutional principles in the private order, recognizing that the spheres of public law and private law are complementary and reversible (Martins-Costa, 1998, 2018).

In this context, it is crucial to bring up Dworkin’s thinking that the correct answer in legal cases is not simply a matter of applying existing rules, but instead of identifying the best interpretation of available norms and principles.

The robust argumentative construction and the discretion given to the interpreter in the implementation of general clauses resonate with Dworkin’s perspective on the correct construction of the response, where judges must develop a response that is coherent and consistent with the underlying principles of the legal system, in rather than just selecting an answer that is formally correct based on specific rules.

The need for solid and transparent reasoning is related to the importance of integrity in the decision-making process, where a correct answer is not only one that follows the existing rules but one that is coherently integrated into the body of principles and values of the legal system, where the functions of general clauses are in line with the idea that legal principles provide guidelines for decisions under challenging cases not foreseen by existing rules (Dworkin, 2007).

In short, the approach to general clauses in Private Law resonates with Dworkin’s ontological perspective, highlighting the importance of correctly constructing the answer to the detriment of a vision strictly focused on the correct answer based on formal rules. The interpreter’s discretion, the need for solid foundations, and the guiding function of general clauses converge to the Dworkinian vision of a judicial process that seeks the fairest and most coherent interpretation within the broader normative context. The discretion granted to the interpreter makes this process challenging but, at the same time, allows for a fairer application adapted to constantly changing social realities. However, au-

thentic judges and interpreters must provide a solid basis for their decisions, ensuring the coherence and legitimacy of the process of implementing general clauses in Private Law.

3. Judith Martins-Costa's Reference Technique in the Authentic Interpretation of General Clauses

Authentic interpretation plays a significant role in implementing general clauses in Private Law. This concept refers to attributing meaning and content to standards by a decision-maker with the authority to do so (Barroso, 2009).

In general clauses, the decision-maker, also known as the authentic interpreter, plays a fundamental role in defining the meaning of these norms since they do not contain all ready-made answers to the problems they cover. In this sense, the decision-maker will fill in the details of the standard's content, adapting it to the specific cases that arise.

The role of the authentic interpreter in the decision-making process is of great importance for implementing legal norms, especially general clauses. Authentic interpretation is an act of judicial creativity, but not arbitrariness, as it must be anchored in the foundations and principles of the legal system in force (Barroso, 2009).

In this context, Martins-Costa's resubmission technique is handy for the decision-maker when interpreting general clauses. This technique consists of looking at the legal system as a whole and looking for normative and argumentative references that help to implement the open norm. Martins-Costa argues that the decision-maker must seek integration between the normative text, the principles and values of the legal system and social reality (Martins-Costa, 2018).

Martins-Costa (2013) states that:

[...] even if its veracity or falsity cannot be proven and even if the prior determination of the ways and cases in which the norm must be applied is not indicated, it is clear that the norm must still be applied. The fact that it contains vague expressions or terms does not mean it is a statement devoid of the essential qualities of legal norms, such as the possibility of incidence, coercion, and obligation. For this to occur, however, application criteria must be found, which leads to determining which criteria govern the application of general clauses.

The general good faith clause is a relevant example in the context of general clauses in Private Law. Its application requires the decision-maker to conduct an in-depth analysis of the factual circumstances and values permeating the legal relationship. The authentic interpreter can use the resubmission technique to seek support from other legal provisions, jurisprudence, doctrine, and general principles of law that help to define the scope of good faith in that specific case.

General clauses are applied based on two main criteria. First, they complement the mandate or delegation granted by the legislator to the interpreter, allowing him to develop specific legal solutions when analyzing concrete cases.

This may involve considering elements within the legal system, in the traditional case of reference (intersystematicity), and outside it, in the case of reference by direction (extra systematicity). Second, the focus is on the object of targeting. The extra-systematic elements to which the reference directs the judge will serve as the basis for his decision. Therefore, by reiterating these fundamentals over time, it will be possible to resystematize these elements, incorporating them into the legal system consistently (Martins-Costa, 2013).

The process of implementing general clauses in Private Law proposed by Martins-Costa, based on the intra- and extra-systematic resubmission technique, is part of an approach that transcends the traditional Kelsenian perspective. In contrast to Kelsen's strictly positivist view, which restricts the magistrate's role to the mechanical application of pre-established legal norms, Martins-Costa's proposal recognizes the need for the authentic interpreter to incorporate non-legal technical arguments into his decision-making process.

This openness to considering extra-systemic elements, such as principles in force in society and external normative references, represents a break with Kelsenian rigidity, which defends the exclusivity of the legal source to produce Law. By allowing the judge to use non-legal technical arguments, Martins-Costa's proposal expands the range of tools available to the interpreter to deal with the complexities of general clauses.

However, it is crucial to establish a clear distinction between technical arguments and ideological orientations in the context of this approach. While technical arguments can provide solid and objective foundations for decision-making, ideological guidelines, due to their axiological nature, lack the legitimacy to directly produce law, as Luhmann's theory advocates.

Therefore, when incorporating extra-systemic elements, the judge must be aware of the distinction between technical criteria and ideological guidelines, ensuring that his decision is based on arguments that contribute to the coherence and consistency of the legal system. This approach not only enriches the decision-making process but also highlights the importance of a critical and considered analysis in applying general clauses, promoting a more comprehensive integration between law and social reality.

It is worth highlighting that the authentic interpretation of general clauses should not be confused with judicial activism or arbitrariness. On the contrary, it requires a solid and transparent foundation based on the principles and values of the current legal system in order to provide legitimacy and security to the decision (Martins-Costa, 2018).

In summary, authentic interpretation plays a crucial role in implementing general clauses in Private Law, and Martins-Costa's resubmission technique offers a solid and coherent approach for the decision-maker to attribute meaning and content to these open norms. The use of this technique allows the authentic interpreter to seek references in the legal system, ensuring a well-founded interpretation and contributing to the promotion of justice and equity in private relationships.

4. Theory of Legitimation by the Procedure of Niklas Luhmann in the Context of the Judiciary

The Judiciary plays a passive role, responding to situations presented to them. Judges do not have the autonomy to choose their agendas and are subject to limitations arising from how cases reach them and how questions are presented and substantiated. This can lead to an unsystematic and uneven approach to judicial decision-making, which may be ineffective or effective in ways not intended.

Despite this, judicial decisions contribute to the interpretation, clarification, and development of the law. The Judiciary has an active role in the construction of Law, but it also has the function of resolving conflicts under current legislation. The balance between these objectives may vary depending on the type of court and the field of law involved (Gribnau, 2002).

The judiciary's legitimacy must be considered in conjunction with the performance of other legislative institutions. Legislation often fails to deal efficiently with the increasing complexity of society, resulting in a more outstanding transfer of decisions from the legislature to the courts, such as the use of general clauses. This phenomenon, known as the judicialization of politics, means judges are called upon to decide on complex and important issues (Gribnau, 2002).

The Dutch Supreme Court, as in Brazil, has taken a more active role, reinterpreting existing statutes and formulating new rules for unforeseen issues, making the creation of new legislation unnecessary in some situations. Furthermore, in cases where Parliament could not pass laws, the Court produced jurisprudence. This happens especially when legislation is ambiguous or vague, requiring extensive interpretations that open space for the judiciary to play an essential role in controversial issues (Gribnau, 2002).

The more active involvement of the judiciary in protecting citizens' rights has also become more relevant, as the legislator has attributed discretionary powers to the administration, reducing the democratic control of parliament. The diminished authority of other legislative institutions may contribute to the comparatively high legitimacy of the courts, as people may become disenchanted with the political powers of the government (Gribnau, 2002).

In that perspective, Romboli (2022: p. 182) investigates the changing responsibilities of judges and legislators, questioning if judges have begun to acquire legislative functions and whether both jobs now have similar capacities. The conclusion reached is a resounding no, emphasizing the significant distinctions in technique, boundaries, and validity between the two within the legal system. This theoretical perspective supports the concept that judges and lawmakers function in separate realms with unique roles and limits. In conclusion, while there may be times when the lines between judicial interpretation and legislative action look blurred, the system's architecture clearly defines the roles and responsibilities of judges and legislators. Nonetheless, we will accept that there is no ontological distinction between the binding functionality arising from deci-

sion making and legislative lawmaking (Chai, 2007).

From this context, it is necessary to delve into the Theory of Legitimation by Procedure, proposed by the German sociologist Niklas Luhmann, which is a relevant theoretical approach to understanding the legitimization of the Judiciary within society. This theory highlights the importance of the procedures and processes used to make decisions and apply the law as a central element in building the legitimacy of institutions.

Luhmann (1980) argues that legitimation does not reside in the content of the decisions themselves but rather in the process by which these decisions are reached. In other words, how standards are created and applied is fundamental to the acceptance and recognition of the authority of institutions by the public.

In the context of the Judiciary, the Theory of Legitimation by Procedure can be applied to analyze how judicial decisions are made, especially concerning the implementation of general clauses in Private Law. According to Milanese (2015), the motivation behind judgments justifies accountability for the exercise of authority, and the absence of this motivation might result in arbitrary judicial action. Therefore, every individual, public opinion, and the State can check if the judge has behaved arbitrarily by examining the motivation.

Social expectations refer to the preconceived ideas and norms shared by members of society about how the legal system should function and how decisions should be made. The conformity of judicial decisions with these expectations plays a crucial role in the acceptance and validation of these decisions (Luhmann, 1980).

If judicial decisions are aligned with social expectations, they are more likely to be perceived as fair and legitimate. On the other hand, decisions that strongly contradict social expectations may face resistance and distrust. Therefore, the legal system is challenged to balance the application of the law with society's fundamental norms and values to maintain its legitimacy.

Furthermore, communication plays a crucial role in legitimizing judicial decisions. Effective communication in the legal system is vital to establishing and maintaining public trust. This involves not only communication between legal professionals, but also communication with the general public. Transparency in the judicial process, comprehensibility of decisions and open communication about the functioning of the legal system contribute to building trust. When citizens understand the process by which decisions are made and perceive that process to be fair and impartial, they are more likely to trust judicial institutions (Luhmann, 1980).

Together, social expectations and effective communication form a complex interaction. Social expectations influence demands for transparency and justification, while effective communication responds to these expectations, contributing to building and maintaining public trust in the judicial system. The balance between these elements is essential to ensure the continued legitimacy of judicial decisions in society.

Thus, the quality of the decision-making process plays an essential role in legitimizing the Judiciary. Reasoned decisions based on objective criteria and consistent with the legal system are more likely to be recognized as legitimate by society. In this sense, [Luhmann \(1980\)](#) highlights the importance of coherent and transparent communication as a determining factor in constructing legitimacy.

Applying the Theory of Legitimation by Procedure to the Judiciary is also related to the participation of the parties involved in the process. Participation and respect for the principles of contradictory and broad defense contribute to society's trust in judicial decisions. Communicative interaction between the parties and the Judiciary is fundamental for citizens to perceive the decision-making process as fair and legitimate ([Luhmann, 1980](#)).

Furthermore, the Theory of Legitimation by Procedure can be applied to analyzing the communicative coherence of judicial decisions. Decisions that are clear, cohesive, consistent, and well-founded tend to be more easily understood and accepted by society. Communicative coherence is essential to transmit the rationality of the decision-making process and for judicial decisions to be perceived as fair and legitimate ([Luhmann, 1980](#)).

[Luhmann \(1980\)](#) also defends the autonomy of the legal system as a crucial factor in the legitimacy of judicial decisions. This autonomy means that the legal system has its own internal rules, logic and operations, independent of external influences such as political or economic. Separation of the legal system is essential to ensure that decisions are based on legal principles rather than external considerations. By maintaining this autonomy, the legal system can be perceived as impartial and objective. This contributes to the social acceptance of decisions, as it demonstrates that the judiciary is not subject to external pressures that could compromise its integrity. Autonomy also emphasizes the importance of judges making decisions based on laws and jurisprudence, reinforcing the idea that decisions are guided by established legal principles.

Through academic diletantism, we approach, even if sideways, Habermas' ideas regarding the importance of communication and participation in building social legitimation. In this sense, the thoughts of Luhmann and Habermas converge, but through different means. At the same time, the first defends the use of clear and transparent procedures with limits determined by the system itself based on the idea of autopoiesis. The second defends deliberative democracy as a bridge to legitimation, where ethical and legal limits must be external to the system to prevent a tyranny of the majority from being installed ([Luhmann, 1980](#); [Habermas, 1997](#)).

In this way, Luhmann's Theory of Legitimation by Procedure offers a rich and relevant perspective to understand the legitimation of the Judiciary. In the context of Private Law, especially in the implementation of general clauses, the application of this theory highlights the importance of the quality of the decision-making process, adequate reasoning, and the participation of the parties as crucial elements for building the legitimacy of the Judiciary within society.

5. Relationship between the Process of Concreting General Clauses and the Legitimation of the Judiciary Power

The relationship between the process of implementing general clauses in Private Law and the legitimization of the Judiciary is highly relevant to understanding how society perceives and accepts judicial decisions. Implementing general clauses is a complex task, which demands a careful and well-founded analysis from the decision-maker to attribute meaning and content to open and indeterminate norms.

In this context, the legitimization of the Judiciary is closely linked to the quality of the decision-making process adopted by judges when dealing with general clauses in Private Law. Decisions that are well-founded, coherent, transparent, and follow the principles and values of the legal system are more likely to be accepted and recognized as legitimate by society.

As discussed in sections 2 and 3, solid reasoning is an essential element for the implementation of general clauses in Private Law, through which the rationality of the decision-making process can be demonstrated, providing transparency and coherence to the result achieved, removing, and mitigating the mentality and the practice of free conviction of the judge. Therefore, the legitimacy of judicial decisions is closely related to the decision-maker's ability to communicate clearly and understandably the reasons that justify their decision.

Relating these themes to section 4, how norms are applied is fundamental to constructing the legitimacy of institutions. In the context of the Judiciary, implementing general clauses is a concrete expression of this theory since the legitimization of the Judiciary is constructed through the procedure adopted to make decisions. Furthermore, on that behalf, the improvement of the legitimacy of the judiciary, although there would not be a definite answer to this question, indeed can be upheld by: 1) the strengthening of the independence and accountability of judges and courts by ensuring their protection from external interference, enhancing their professional standards and ethics, and establishing effective mechanisms of oversight and review; 2) increasing the transparency and accessibility of the judicial system, by providing precise and timely information, facilitating public participation and consultation, and ensuring the availability and affordability of legal services and remedies; and, 3) promoting the quality and consistency of judicial decisions by improving the training and education of judges and lawyers, fostering the development and application of legal principles and precedents, and encouraging the use of alternative dispute resolution methods.

In this context, the motivation for the decision is fundamental to verify the judge's impartiality, demand responsibility, and control the judge's adherence to the current legal system, with the judge's interpretative activity subject to review by higher judicial bodies. Thus, reasoning is an essential mechanism to ensure that judicial decisions are within the limits established by the legal system. It is considered an instrument for rationalizing justice, guaranteeing fairness in decisions, and legitimizing the judge's role in society, which requires reason and not

just appeals to authority. The legitimacy of the Judiciary is achieved through judicial independence and the submission of judges to the law. However, this legitimacy is only complete if two requirements are met: the correct and justified motivation for the decision and obtaining a fair decision or solution. In short, the motivation for judicial decisions is crucial to the legitimacy and control of the Judiciary (Chai, 2007; Milanese, 2015).

In this way, the transparent and coherent implementation of general clauses can contribute to achieving this objective, as it strengthens society's trust in the legal system. In this context, the judiciary's legitimacy is related to the ability to provide decisions that are perceived as fair, impartial, and appropriate to the demands of society.

Based on the premises mentioned earlier, it is observed that they can significantly contribute to the Sustainable Development Goals (SDGs) established by the United Nations (UN) that aim to address global challenges, including issues related to justice and the construction of peace and inclusion. SDG16 highlights the importance of developing practical, responsible, and transparent justice administration systems among the Sustainable Development Goals.

In this sense, implementing general clauses is in line with SDG16 since a clear and coherent action by magistrates contributes to constructing a more transparent and reliable justice system, reflecting positively on the legitimization of the Judiciary before society.

By adding these theoretical elements, it is understood how the implementation of general clauses can contribute to strengthening the legitimacy of the Judiciary and, consequently, promoting a fairer society aligned with the values and goals of the established Sustainable Development Goals. by the United Nations.

Given this situation, the relationship between implementing general clauses and the legitimization of the Judiciary is intrinsic and complex. The quality of the decision-making process, adequate justification, participation of the parties, and communicative coherence are essential elements for building the legitimacy of the Judiciary within society, strengthening bonds of trust and commitment to justice and equity.

6. Noise, General Clauses Concretion Process and Legitimation of the Judicial Power: An Interrelated Analysis

The book "Noise: A Failure in Human Judgment," written by Cass Sunstein, Daniel Kahneman, and Olivier Sibony, offers central insights into how noise, understood as variability in the decision-making process, can affect several areas of human life, including the legal scope. In this chapter, we explore the interrelationships between the previously discussed themes: the process of implementing general clauses in Private Law, legitimizing the Judiciary, and the impact of noise in the decision-making context.

The concept of general clauses in Private Law involves open and indeterminate norms, which require the attribution of meaning and content through con-

cretization. However, noise can play a significant role in this process, as variability in interpreting general clauses can lead to divergent results in similar cases.

Noise can arise from several sources, such as cognitive biases, discrepancies in the evaluation of evidence, and personal interpretations of judges. This variability can generate legal uncertainty since the parties involved in a legal relationship may receive different treatments due to the noise in the decision-making process (Kaheman et al., 2021).

The legitimacy of the Judiciary is closely linked to the perception of impartiality, justice, and coherence in judicial decisions. However, noise in implementing general clauses can undermine this legitimacy since inconsistent and unpredictable decisions undermine society's trust in the institution.

The work of Kaheman et al. (2021) highlights that the perception of justice is directly related to the equitable treatment of the parties involved in a dispute. The presence of noise in the decision-making process can lead to discrepant decisions in similar factual contexts, compromising the legitimacy of the Judiciary in society.

Considering the negative impacts of noise on the process of implementing general clauses and on the legitimacy of the Judiciary, it is essential to adopt measures that seek to reduce this variability in judicial decisions.

According to Kaheman et al. (2021), a possible strategy is decision hygiene, which, when applied to the judicial system, highlights the need to establish clear and objective criteria to guide decisions. Setting transparent standards provides a more systematic approach, minimizing subjectivity and variability in judicial choices. In addition to raising the possibility of automation in the judicial context whenever possible. Automating specific decision-making processes can help eliminate irrelevant and idiosyncratic influences, contributing to more hygienic decision-making.

An efficient approach is adopting objective criteria and solid foundations in implementing general clauses, as defended by Martins-Costa (2018). Adequate reasoning is a central element in the search for more coherent and transparent decisions, providing legitimacy to the decision-making process.

In the same sense, Luhmann's Procedural Legitimation Theory (1980) offers an exciting perspective by highlighting that how decisions are reached is crucial for constructing the legitimacy of institutions. Therefore, implementing general clauses in Private Law must be guided by procedures that promote the coherence and rationality of decisions, avoiding harmful interference from noise.

The interrelationship between the process of implementing general clauses in Private Law, the legitimization of the Judiciary, and the noise in the decision-making context highlights the importance of a careful and well-founded approach to making legal decisions. The presence of noise can compromise the consistency and predictability of the decision-making process, affecting society's trust in the Judiciary.

Therefore, the search for a more coherent, transparent, and well-founded implementation process is essential to strengthen the legitimacy of the Judiciary,

contributing to the construction of a fairer, more equitable, and reliable legal system.

7. Conclusion

The present study aimed to problematize the process of implementing general clauses in private law and its contribution to legitimizing the Judiciary within society, considering the theory of legitimation through Luhmann's procedure.

The hypothesis raised argued that implementing general clauses that are transparent and coherent with the legal system reduces insecurity in social relations, providing legitimacy from the procedure for creating the law in the specific case and observing criteria of communicative coherence.

Throughout the research, the theory of general clauses in private law, authentic interpretation as the decision-maker attribution, and the theory of legitimation through Luhmann's procedure were explored, relating them to the Organization's Sustainable Development Goals (SDGs): the United Nations, especially SDG16.

The relevance of the process of implementing general clauses by magistrates was identified as a determining factor for the legitimacy of the Judiciary and society's trust in the justice system, in line with Dworkin's view on the importance of maintaining the integrity of the Law during the decision-making process.

Through bibliographic and documentary reviews, it was possible to analyze different perspectives and approaches regarding implementing general clauses and their impact on the legitimization of the Judiciary. It was observed that judges act as models of behavior and adopt extra-systemic elements when interpreting and applying general clauses, influencing acceptance and confidence in judicial decisions, breaking with Kelsen's positivist idea.

The relationship between the process of implementing general clauses and SDG16 highlighted the importance of effective, responsible, and transparent justice administration systems for the sustainable development of society. Highlighting that the quality of the magistrates' decision-making procedure can significantly contribute to achieving this objective, promoting the construction of a fairer, more equitable society per democratic values.

It's worth noting that a judge's personal and professional background can greatly affect how they interpret and apply legal clauses that allow for flexibility and discretion, such as phrases like "reasonable", "fair", or "in the public interest". Factors including a judge's gender, race, age, religion, education, experience, political affiliation, judicial philosophy, and legal culture can all play a role in shaping their decision-making process regarding these clauses, as well as their interactions with other legal players. Moreover, a judge's background can impact how their rulings are viewed by the public and other government branches.

The interrelated analysis of the process of implementing general clauses in Private Law, the legitimacy of the Judiciary, and the noise in the decision-making context emphasizes the importance of careful and well-founded approaches in

making legal decisions. The noise can generate legal uncertainty, negatively impacting society's trust in institutions and damaging the perception of justice. To strengthen the legitimacy of the Judiciary, it is essential to adopt measures that seek to reduce variability in decisions, such as using objective criteria and solid foundations in implementing general clauses. Further exploration of possible solutions for reducing noise in the decision-making process is warranted in future work.

In short, the results emphasize the importance of the quality decision-making process in implementing general clauses and legitimizing the Judiciary. Adequate reasoning for decisions and the parties' participation improves standards of transparency and integrity and contributes to the trust and stability of the legal system, strengthening the democratic pillars and the harmonious relationship between justice and society.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

References

- Barroso, L. R. (2009). *Interpretation and Application of the Constitution: Foundations of a Transformative Constitutional Dogmatics*. Saraiva.
- Barroso, L. R. (2012). Judicialization, Judicial Activism and Democratic Legitimacy. *(Syn)Thesis*, 5, 23-32. <https://www.e-publicacoes.uerj.br/synthesis/article/view/7433>
- Chai, C. G., & Arouche Júnior, D. d. A. (2021). Structural Disputes and the General Enforcement Clause within the Scope of Constitutional Jurisdiction. In C. R. Gonçalves et al. (Eds.), *Proceedings of the 1st International Congress on Interpretation and Judicial Decision, Fortaleza, Mucuripe*.
- Chai, C. G. (2007). *Concrete Constitutional Jurisdiction in a Risky Democracy*. Association of the Public Ministry of the State of Maranhao.
- Dworkin, R. (2007). *Taking Rights Seriously* (Trans. Jefferson Luiz Camargo). Martins Fontes.
- Gribnau, H. (2002). Legitimacy of the Judiciary. In E. Hondius, & C. Joustra (Eds.), *Netherlands Reports to the Sixteenth International Congress of Comparative Law* (pp. 25-45). Intersentia.
- Habermas, J. (1997). *Law and Democracy: Between Facticity and Validity* (Trans. Flávio Beno Siebeneichler). Tempo Brasileiro.
- Hilbink, E., & Prillaman, W. C. (2002). The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law. *Latin American Politics and Society*, 44, 169.
- Hough, M. & Jackson, J., & Bradford, B. (2013). Legitimacy, Trust, and Compliance: An Empirical Test of Procedural Justice Theory Using the European Social Survey. In J. Tankebe, & A. Liebling (Eds.), *Legitimacy and Criminal Justice: An International Exploration*. Oxford University Press. <https://doi.org/10.2139/ssrn.2234339>
- Kaheman, D. et al. (2021). *Noise: A Flaw in Human Judgment*. Hachette.
- Luhmann, N. (2017). *Trust and Power*. Wiley. <https://www.perlego.com/book/1536420/trust-and-power-pdf>

- Luhmann, N. (1980). *Legitimation by Procedure*. University of Brasília.
- Martins-Costa, J. (1998). Private Law as a “System under Construction” (The General Clauses in the Brazilian Civil Code Project), Rio Grande do Sul. *Revista da Faculdade de Direito da UFRGS, No. 15*, 129-154.
<https://www.seer.ufrgs.br/revfacdir/article/download/70391/39899/291766>
- Martins-Costa, J. (2013). General Clauses: A Qualifying Essay. In J. A. F. Costa et al. (Eds.), *Law: Theory and Experience—Studies in Honor of Eros Roberto Grau, São Paulo, Malheiros* (v. 2, pp. 993-1021).
- Martins-Costa, J. (2018). *Good Faith in Private Law* (2nd ed.). Revista dos Tribunais.
- Milanese, Á. C. C. (2015). *Alternatives for the Legitimation of Judicial Power in the Jurisdictional Application of Indeterminate Legal Concepts, Seville*. Doctoral Thesis, Universidad Pablo de Olavide.
<https://rio.upo.es/rest/api/core/bitstreams/b538e50d-2852-4c40-ba5d-43ec4939fa1b/content>
- O'Donnell, G. A. (2000). The Judiciary and the Rule of Law. *Journal of Democracy, 11*, 25-31. <https://doi.org/10.1353/jod.2000.0021>
- Philippopoulos-Mihalopoulos, A. (2009, September 10). *Niklas Luhmann: Law, Justice, Society*. Routledge. <https://doi.org/10.4324/9780203872086>
http://books.google.ie/books?id=p22LAgAAQBAJ&printsec=frontcover&dq=niklas+luhmann&hl=&cd=6&source=gbs_api