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Cogent but Untested: Evaluating Argumentation in a Seriatim Constitutional Court

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Abstract

In constitutional courts that decide *seriatim*, each judge delivers an individual opinion and the ruling results from their aggregation. This article argues that, under this design, the critical discussion that would justify a collegial decision is structurally displaced: the difference of opinion is settled by vote rather than resolved on the merits, and argumentation addresses two audiences. Distinguishing the cogency of arguments from their critical testing in discussion, it shows that a decision may rest on cogent arguments that were never so tested. It proposes a three-layer multimethod instrument — structural analysis adapted from Manuel Atienza, evaluation drawn from informal logic, and a rhetorical analysis of the oral delivery of opinions in terms of strategic manoeuvring — and applies it to the ruling in which the Brazilian Supreme Federal Court equated homotransphobia with racism (ADO 26, decided in 2019). The results show scant dialectical interaction, untested central arguments and a predominance of *ethos* in oral delivery. The instrument can be applied to any court that decides by aggregating individual opinions.

Keywords: legal argumentation; *seriatim* deliberation; pragma-dialectics; strategic manoeuvring; Brazilian Supreme Court

1 Introduction

A significant part of argumentation theory acknowledges that legal argumentation cannot be described as the cooperative exchange of information presupposed by Herbert Paul Grice's conversational maxims (Grice 2013, p. 47 ff). In court, the parties compete: they select reasons, anticipate objections and tailor their presentation to the judge, following strategies proper to an adversarial setting. There is, however, a space of legal discourse in which the expectation is, in principle, different. Among the judges of a collegial bench, no one defends a party's interest; reasons are expected to be exchanged, objections to be considered, and each judge to be willing to be persuaded by the others. Judicial deliberation is, ideally, a cooperative enterprise.

This expectation faces a severe test in courts that decide according to the *seriatim* model. At the Brazilian Supreme Federal Court (*Supremo Tribunal Federal*, STF), the Justices bring opinions already written to the sessions, read them in sequence and publish

them together, with no opinion of the court to unify the reasoning. The image of the "eleven islands", used to describe this practice, captures the problem: eleven parallel justifications, rarely brought into contact.[1] Moreover, since 2002 the sessions have been broadcast live on TV Justiça, the judiciary's public television channel, so that argumentation addresses, at the same time, fellow Justices and an external audience of parties, *amici curiae*, the media and public opinion. Cooperative in principle, deliberation becomes competitive in practice.

This article argues that, under this design, the critical discussion that would justify a collegial decision is structurally displaced. The difference of opinion is settled by the aggregation of votes and *not resolved on the merits* (van Eemeren and Grootendorst 2004), and arguments that prove decisive for the outcome may never be exposed to the critical testing that deliberation would presuppose. This deficit, however, is not visible on the surface of the judgment: long, learned and well-grounded opinions may coexist with practically no argumentative interaction. Making it visible requires an instrument capable of reconstructing the structure of each opinion, evaluating the cogency of its reasons and capturing what oral delivery adds to the written opinion.

The article makes three interrelated contributions. The central one is conceptual: distinguishing the evaluation of the argument from the evaluation of the discussion, which makes it possible to show that a decision may rest on cogent arguments and still suffer from a procedural fallacy — the waiver of critical testing precisely for the reasons that support it. The second is methodological: to make this distinction operational, the article proposes a three-layer instrument of analysis and evaluation that adapts Manuel Atienza's model to the decision-making practice of a *seriatim* court, incorporates cogency criteria from informal logic — reinterpreted as critical questions of practical reasoning — and adds a rhetorical layer, read in the light of the notion of strategic manoeuvring (van Eemeren and Houtlosser 1999). The third is empirical: the application of the instrument to the ruling in Direct Action of Unconstitutionality by Omission No. 26 (ADO 26), in which the STF, in 2019, equated homotransphobic conduct with the crime of racism until the National Congress legislates on the matter. The case was chosen because it combines,

[1] In Brazil, the expression "eleven islands" was popularized by Conrado Hübner Mendes (Mendes 2010): the opinions of the eleven Justices tend to function as autonomous justifications rather than as contributions to a common deliberation. Here and throughout, translations from Portuguese and Spanish are the author's own.

to a high degree, the conditions that make the deficit observable: strong social repercussion, lengthy opinions, televised sessions and an issue — the judicial expansion of criminal law — in which the demand for justification is at its highest. The correctness of the decision is not assessed here; what is assessed is the quality of the argumentative process that produced it.

Section 2 characterizes deliberation in *seriatim* courts. Section 3 presents the instrument in its three layers. Section 4 applies it to ADO 26. Section 5 discusses what the case reveals about the scope and limits of pragma-dialectics in courts of this kind, and Section 6 returns to the main thesis.

2 Deliberation in *seriatim* courts: the case of the Brazilian Supreme Federal Court

Deliberation is a subtype of argumentation: a process of submitting reasons to the scrutiny of others, in which the agent remains open to reasons that may change their preferences, beliefs or actions.[2] Deliberating therefore presupposes a genuine exchange of arguments, which is not the same as the mere presentation of arguments. A court in which reasons are adduced only to justify individual votes meets the requirement to give reasons but does not deliberate. Deliberation also presupposes collegiality: a willingness to listen to colleagues, to cooperate in decision-making and, where possible, to speak as an institution rather than as a sum of individuals.[3]

Two requirements follow from this conception. Courts must give public reasons for their decisions and, since they are collegial, those reasons must result from an internal process of deliberation, embodied in a single opinion or in several opinions, depending on each court's rules (Ferejohn and Pasquino 2002, p. 23). The STF has traditionally followed the *seriatim* model: in the most contested cases, the Justices bring opinions already written to the sessions, read them in sequence and publish them together, without a single statement of the grounds for the decision.[4] The process is aggregative — eleven

[2] Deliberation is a type of critical debate carried out collectively within the collegial body, characterized by the intersubjective and interactive development of argumentative discourse among the judges, based on legal or extra-legal reasons involved in the discussion of a given case, in which dialectical and rhetorical discursive aspects stand out. It occurs most markedly in the judgment sessions, but it may also take place on various other occasions on which such argumentative interaction arises within the court (Vale 2015, p. 354).

[3] This is what the literature calls internal deliberation, aimed at mutual persuasion and at justification before the group of judges itself (Silva 2013, 2021; Ferejohn and Pasquino 2004).

[4] Two recent changes have altered this deliberative format: (i) the increasingly widespread practice of issuing binding theses (*teses*), which may to some extent play a role similar to that of the "opinion of the

opinions added together, even when the outcome is unanimous (Silva 2013, pp. 557–584).

This practice reveals two dysfunctions: the difficulty of identifying the binding grounds of the decision, and a lack of transparency in deliberation that prevents public scrutiny of the quality and rationality of the arguments. Since the reasons given by unelected judges are a source of indirect democratic legitimacy — a form of argumentative representation (Alexy 2005, p. 580; Miguel and Bogéa 2020, p. 6) — these dysfunctions are not merely formal. A lack of clarity or coherence, or even the difficulty of locating the *ratio decidendi*, undermines the public function of justification (Vojvodic, Machado and Cardoso 2009). It is this deficit that the instrument proposed below seeks to make analysable.

3 The instrument: analysis, evaluation and the rhetorical layer

The instrument combines three layers, the second and third each designed to make up for a limitation of the one before. The first reconstructs the argumentative structure of each opinion (analysis). The second evaluates the quality of the arguments and the extent to which they were subjected to critical testing (evaluation). The third captures what oral argumentation during the sessions adds to the written opinion (rhetorical layer).[5]

3.1 Analysis: structural reconstruction of the opinions

The starting point is Manuel Atienza's argumentative conception of law, according to which the legal theory relevant to the constitutional state must be built on the requirement to justify decisions (Gama 2023, p. 164). For didactic purposes, Atienza distinguishes the analysis of argumentation — its representation in lines of argument that can be separated and combined — from its evaluation (Atienza 1986, 2005, 2006, 2007, 2017, p. 99). The analysis uses a diagram in which a problem (Pa) unfolds into an interpretive issue (Qb), concerning normative statements, and an evidentiary issue (Qc), concerning the facts (Atienza 2017, p. 104).

court" in the courts of some countries; and (ii) the expansion of the virtual plenary, in which there is even less interaction among the Justices, a different way of setting the agenda and, above all, the complete relaxation of the predefined order in which the Justices speak (Silva 2021).

[5] Statement on the use of artificial intelligence: Claude (Anthropic) was used to support the structural revision of the manuscript and its translation from Portuguese into English. The arguments, analyses and conclusions are the author's own; the author reviewed all content produced with the tool's support and takes full responsibility for the final version of the text.

On the interpretive issue, the diagram records competing suppositions (SPb1, SPb2), the reasons supporting them and the reasons supporting those reasons. The negation of a supposition (Nb1) may become an argument for the competing supposition; the "+" sign marks the weightiest reason; the resulting interpretation (Ab2) entails the solution to the problem (Sa). Two adaptations were needed to apply the diagram to a constitutional court. First, the evidentiary issue (Qc) was set aside, because the STF does not examine facts and evidence in abstract constitutional review; it does so only in other proceedings, such as criminal cases within its original jurisdiction. Second, the diagram was converted into a table, with the symbols in a column of their own, which allows lengthy opinions to be recorded without loss of legibility.

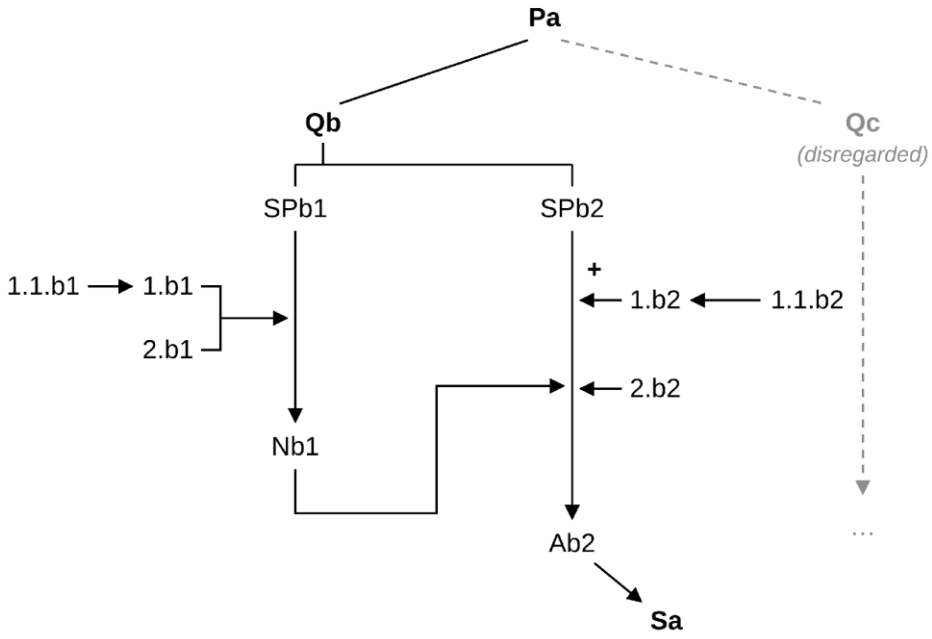


Fig. 1 Analysis diagram adapted from Manuel Atienza

The model, however, has limitations when applied to the object at hand. The distinction between internal (deductive) and external justification (Atienza 2003, pp. 39–40; Lozada Prado and Ricaurte Herrera 2015, p. 44) offers no tools to assess qualitatively the court's interpretive effort, its interface with extra-legal political components, the strategic or performative argumentation that goes beyond subsumption, or the dynamics of mutual concessions among judges. The subsequent layers address these gaps.

Reconstruction begins with a structural reading of each opinion, which provisionally suspends judgement on the validity of the propositions in order to attend only to their concatenation and internal coherence (Macedo Júnior 2007, pp. 34–35). Each main element is numbered, and its supporting reasons receive subordinate numbering (1.1, 1.1.1…). The arguments are then standardized: premises and conclusions are separated from the surrounding commentary (Govier 2012, pp. 22–23). The result is the internal "order of reasons" of the opinion, which does not always coincide with the order in which the arguments were presented.

Each element also receives two classifications, whose letters follow the original Portuguese coding. The *class* records the nature of the reason: doctrinal (C), when it relies on legal scholarship; precedent-based (J), when it relies on the court's own precedents[6]; or legislative (L), when it invokes a domestic or international norm. The *weight* records three types of element. Teleological elements (T) display the minimal structure of an argument — premises supporting a conclusion, open to objections. The term is used in a stipulative sense: it designates not the argument from the purpose of the norm but the presence of this minimal inferential structure. Dialectical elements (D) indicate that the argument was reformulated in response to opposing reasons present in the proceedings. Rational elements (R) indicate that the argument was actually exposed to objections from the other judges and answered them. This is an intersubjective critical test, not a consensus criterion: an argument may be rational and rejected, or accepted without ever having been tested. Because it depends on comparing opinions, R can be assigned only after the other opinions have been examined, not in the isolated reading of each one (Fig. 2).

[6] The precedent-based class presupposes that the decision that established the precedent functions as a justification for the new decision. It is as justifications, MacCormick (2008, p. 192) observes, that judicial opinions acquire normative character and can guide the interpretation of future cases.

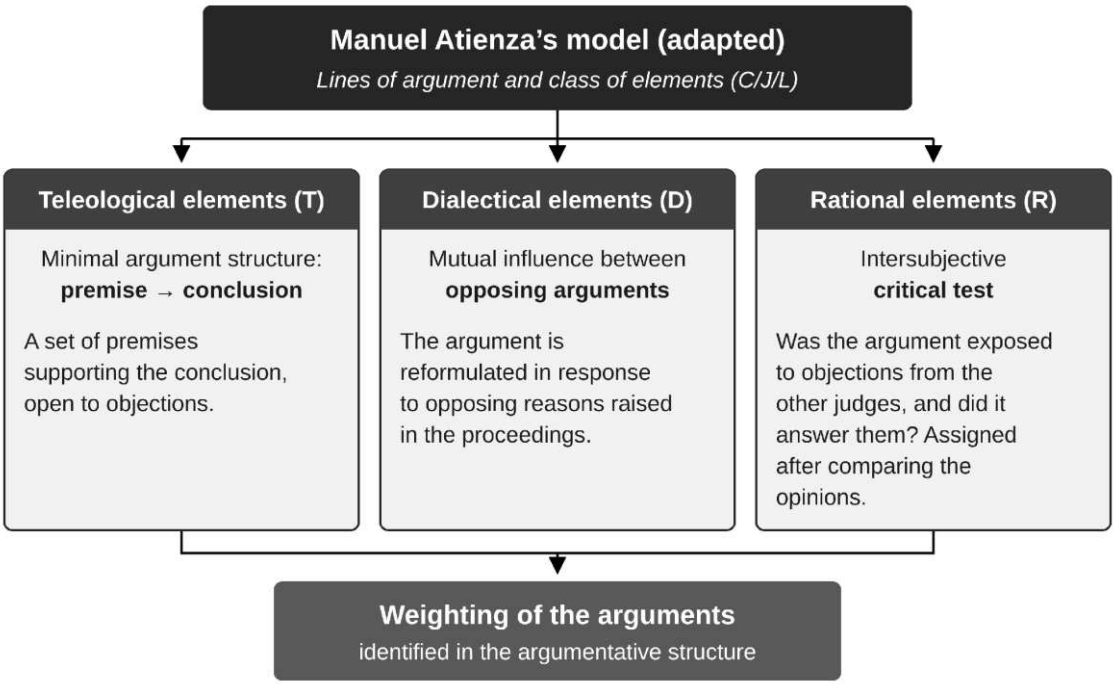


Fig. 2 Analysis model

3.2 Evaluation: cogency and dialectical testing

Evaluation operates at two levels: that of the argument and that of the discussion (Fig. 3).

At the argument level, the criterion is cogency. An argument is cogent when its premises are rationally acceptable and provide adequate support for the conclusion (Govier 2012, p. 87) — a property assessed by the informal-logic criteria of acceptability, relevance and sufficiency (ARS), what Govier calls the ARG conditions, here with sufficiency in place of "good grounds" (Govier 2012, p. 95 ff). Acceptability means that the premises are adequately defended; relevance, that they bear on the conclusion; sufficiency, that they provide enough grounds for it. An argument that fails to meet these criteria is fallacious in the usual sense of the term.

Cogency, however, does not exhaust the evaluation of practical arguments, which require weighing the pros and cons of each proposal for action (Gonçalves-Segundo 2019). For this purpose, the instrument uses six screening criteria: efficacy, feasibility, efficiency, harmlessness, added benefit and (dis)respect for values. These criteria can be read as critical questions of the schemes of practical reasoning and argument from consequences: does the measure achieve the intended goal? Can the decision-maker carry it out? Are there less costly means? Does it produce undesirable side effects? Does it yield additional gains? Does it conflict with the values of the affected group? Argumentation

schemes establish defeasible presumptions, and critical questions indicate the conditions that shift the burden of proof back to whoever put forward the argument (Macagno and Toniolo 2022; see also Walton, Reed and Macagno 2008, p. 7). A cogent argument may thus carry costs or risks that become apparent only when these questions are asked.

At the discussion level, the question is a different one: were the arguments central to the decision subjected to critical testing? In pragma-dialectics, fallacies are not simply invalid arguments but moves that obstruct the resolution of a difference of opinion by violating the rules of critical discussion (van Eemeren 2019, p. 86 ff). Two rules are relevant here. Under the obligation-to-defend rule, a party who advances a standpoint must defend it when it is called into question. Under the argument scheme rule, a standpoint may be regarded as conclusively defended only if the scheme employed is appropriate and correctly applied — which includes answering the relevant critical questions (van Eemeren and Grootendorst 2004).

In a *seriatim* court, the difficulty is that doubt is rarely voiced: each opinion is completed before the others are known. The instrument therefore uses the rapporteur's opinion as a benchmark.[7] The rapporteur is the Justice most closely engaged with the case and the one who, in the Justices' own perception, "sets the frame of the debate"; the rapporteur's opinion very often anticipates the final outcome.[8] An argument advanced by several judges that serves as a ground for the outcome, but finds no resonance in the rapporteur's opinion and is neither taken up, contested nor answered in the other opinions, has been used as if it were conclusive without anyone having raised the critical questions of its scheme. This is what is termed here a *dialectical failure*. When the failure affects a decisive argument, it constitutes a *procedural fallacy*: the defect does not necessarily lie in the content of the argument — which may well be good — but in its use as a decisive reason without the testing that deliberation would require. An argument is considered decisive when it is invoked as a ground by opinions that form the majority. A dialectical failure may also affect presuppositions shared by the winning and the losing sides: in that

[7] The test is not whether the rapporteur responded to what colleagues said afterwards, but whether he addressed the arguments already available in the case file (submissions by the Office of the Prosecutor-General [PGR], the Office of the Attorney General of the Union [AGU] and the *amici curiae*), and whether the subsequent opinions took up or contested one another.

[8] In research on STF decisions, the rapporteur's opinion alone explains almost all the variation in outcomes: since the rapporteur votes first, knowing the direction of that opinion means knowing the final outcome in 99% of cases (Silva 2016; see also Oliveira 2012).

case it does not constitute a procedural fallacy, but it reveals what the deliberation left undiscussed.

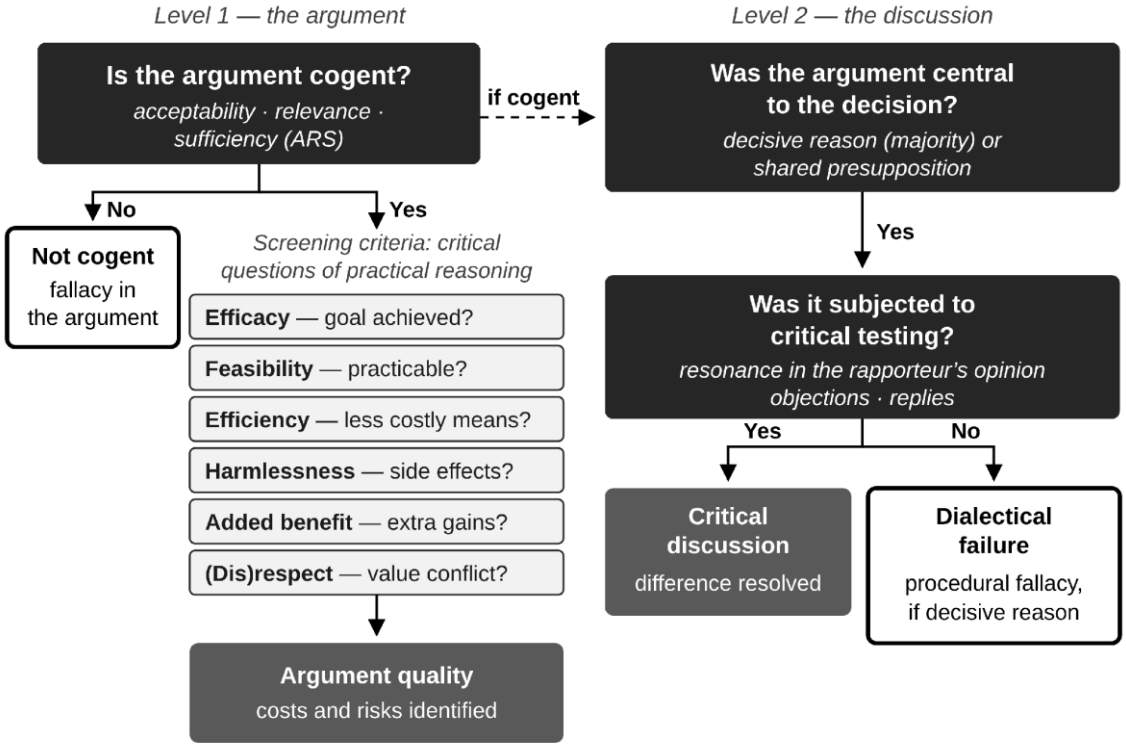


Fig. 3 Two-level evaluation model

3.3 The rhetorical layer: strategic manoeuvring and the dual audience

The written opinion does not exhaust the argumentation of televised proceedings. In the sessions, the Justices add digressions, examples and interventions that do not appear in the published text but may steer the proceedings and preserve the court's credibility before the public. Since the broadcast reaches peers and an external audience at the same time, a judge's oral behaviour tends to vary with the audience addressed. The instrument therefore includes a layer devoted to oral argumentation.

This layer combines two tools. The first is the Aristotelian triad of modes of persuasion, as read by Isaac Reis and João Maurício Adeodato (Reis 2018, p. 138; 2020, p. 192; Adeodato 2008): *ethos* designates the strategies that build the speaker's credibility — personal opinions, arguments from authority, didactic digressions, references to the institution or to the office held; *pathos*, the resources that mobilize the audience's emotions; *logos*, the resources that create an impression of objectivity, coherence and rationality.

The second is the notion of *strategic manoeuvring*: arguers seek to be both reasonable and effective, and they do so by choosing from the topical potential (what to say), adapting to audience demand (to whom to say it) and selecting presentational devices (how to say it) (van Eemeren and Houtlosser 1999, pp. 481–484). Manoeuvring becomes fallacious when the pursuit of effectiveness prevails over the commitment to reasonableness — what the theory calls derailment (van Eemeren 2010). Eveline Feteris has shown that the notion applies to the justification of judicial decisions: the judge seeks to comply with the dialectical norm of reasonableness while adapting the choice of schemes and arguments to the legal audience, and can manoeuvre strategically "by presenting his own decision as unproblematic and as the only justified decision" (Feteris 2008, p. 349).

The link between the two tools is direct. The predominance of *ethos* indicates that adaptation to the audience — rather than the testing of reasons — guides the choice of what is said outside the written opinion. Erving Goffman's notion of *performance* reinforces the point: a judge who appears before an audience implicitly asks that the impression projected be taken seriously (Goffman 1959, p. 10).

Operationally, oral interventions with no counterpart in the written opinion are examined qualitatively according to their predominant dimension (*ethos*, *pathos* or *logos*), their main addressee (peers or the external audience) and the presence or absence of engagement with opposing reasons.

4 Application: the ADO 26 ruling

4.1 The case and the scope of the application

In ADO 26 (STF 2020), decided jointly with Writ of Injunction (*Mandado de Injunção*, MI) No. 4733, the STF recognized the National Congress's default in criminalizing acts against the rights of the LGBTQIAPN+ population[9] and held that, until specific legislation is enacted, homophobic and transphobic conduct, as an expression of racism in its social dimension, falls within the criminal offences of Law No. 7,716/1989 (the Anti-Racism Law). The position of the rapporteur, Justice Celso de Mello, prevailed with eight votes to three; Justices Ricardo Lewandowski and Dias Toffoli held that

[9] LGBTQIAPN+ is the acronym used in Brazil and in the opinions examined.

criminalization required an Act of Congress; Justice Marco Aurélio did not recognize the default.

In this study, the application of the instrument covers: (i) the full coding of the rapporteur's opinion; (ii) the comparison of the other opinions with this leading opinion, in order to assign dialectical and rational elements and identify dialectical failures; and (iii) the analysis of the plenary sessions of February 2019 as broadcast on TV Justiça, in which the rapporteur and Justices Edson Fachin, Alexandre de Moraes and Luís Roberto Barroso voted. The opinions delivered in later sessions, up to the conclusion of the judgment in June 2019, were examined only in their written form. The full tables of the arguments without dialectical testing are provided in Online Resource 1.

4.2 The structure of the rapporteur's opinion

Table 1 reproduces the reconstruction of the rapporteur's opinion.

Table 1 Analysis of the opinion of Justice Celso de Mello (rapporteur)

Category	Elements	Class	Weight
Pa	The STF may criminalize homotransphobia.	**N/A**	**N/A**
Qb	Within the abstract constitutional review exercised by the STF, is it possible to bring homotransphobic practices directly within the concept of racism under Law No. 7,716/1989 without violating the principle of the separation of powers?	**N/A**	**N/A**
SPb1	The STF is barred from criminalizing homotransphobia, on pain of violating the principle of the separation of powers.	**C**	**T**
1.SPb1	In criminal matters, no one can deny the constitutional postulate of the principle of legality, which is also enshrined in public international law.	**L**	**T**
2.SPb1	Any anomalous action by the judiciary as a positive legislator is ruled out, since the judiciary cannot impose its own criteria and set aside factors that, within the constitutional system, can only be validly defined by the legislature.	**C**	**T**
3.SPb1	Setting a deadline for the legislature to remedy the existing default is feasible.	**J**	**D**
Nb1	Setting a deadline for the legislature to remedy the existing default is insufficient.	**J**	**D**
	The hermeneutic procedure carried out by judicial bodies seeks to extract the interpretation of the various statutes that make up the positive normative framework so as to obtain, by virtue of the understanding and exegetical meaning given to them, the elements necessary for the correct application of the law; for that very reason, it is not to be confused with the legislative process.	**C**	**T**
SPb2	Until legislation is enacted by the National Congress to implement the mandates to criminalize set out in items XLI and XLII of Article 5 of the Constitution, homotransphobic conduct falls, by parity of reasoning and by fit with the offence definition, within the primary offence provisions of Law No. 7,716 of 8 January 1989, and also constitutes, in cases of intentional homicide, a qualifying circumstance, as it amounts to a base motive (Criminal Code, Article 121, § 2, I, *in fine*).	**N/A**	**T**
1.SPb2+	The classification adopted by the STF does not involve an analogical (and harsher) application of the criminal provisions of Law No. 7,716/1989, since analogy *in malam partem* is not admissible in criminal matters.	**C, L**	**T**
2.SPb2+	It is not a matter of creating criminal offences or setting criminal penalties.	**N/A**	**T**
3.SPb2+	It is a mere subsumption of homotransphobic conduct under the various primary offence provisions of existing criminal legislation (Law No. 7,716/1989, in this case), insofar as acts of homophobia and transphobia are concrete manifestations of racism, understood in its social dimension: so-called social racism.	**C**	**T**
4.SPb2	In exercising constitutional jurisdiction, the STF performs a countermajoritarian role, aimed at preserving constitutional commands and the inviolability of the rights, interests and values that identify minority groups exposed to situations of vulnerability.	**C**	**T**

Category	Elements	Class	Weigh t
4.1.SPb2	In its hermeneutic activity, the judiciary must make effective the State's response in preventing and punishing acts of prejudice or discrimination against members of vulnerable social groups, in the light of the Yogyakarta Principles (2006).	**L**	**T**
4.2.SPb2	It falls to the STF to safeguard the integrity of the Constitution, thereby preventing governmental pragmatism or indifference, or the mere convenience of groups, institutions or estates, from prevailing and distorting, including through omission, the meaning of the Fundamental Law itself.	**J**	**T**
5.SPb2	The State may not tolerate conduct, or even issue normative prescriptions, that bring about the legal exclusion of groups, whether minorities or not, through their discriminatory content.	**C, L**	**T**
5.1.SPb2	Racism is an ideology, founded on pseudo-scientific criteria, that seeks to justify discrimination and exclusion, reflecting the distorted worldview of those who seek to build, arbitrarily, hierarchies artificially grounded in the alleged supremacy of one group of people over the others in different social formations.	**J, C**	**T**
5.1.1.SPb 2	The prerogative of freedom of expression of thought, however broad its scope must be, is not a means capable of legitimizing the outward expression of criminal purposes.	**J**	**T**
5.1.1.1.SP b2	Religious pronouncements that exceed the limits of the free expression of ideas do not deserve the dignity of the constitutional protection that secures freedom of expression.	**J**	**T**
5.2.SPb2	The international community has chosen the term racism to designate, under a single heading, all forms of discrimination and intolerance that deny the equality and dignity of human beings.	**L, C**	**T**
5.3.SPb2	The prejudice and discrimination arising from aversion to homosexuals and other members of the LGBTQIAPN+ group are themselves a manifestation — cruel, offensive and intolerant — of racism, as they express its other face: social racism.	**C**	**T**
6.SPb2	The LGBTQIAPN+ community in Brazil is repeatedly the victim of the most diverse forms of aggression, motivated solely and exclusively by the sexual orientation and/or gender identity of individuals.	**N/A**	**N/A**
7.SPb2	The Direct Action of Unconstitutionality by Omission is an appropriate instrument for giving effect to constitutional clauses whose efficacy has been frustrated by the unjustifiable inertia of the public authorities.	**C**	**T**
7.1.SPb2	Merely notifying the National Congress of its state of unconstitutional default is insufficient.	**J**	**D**
7.2.SPb2	Since the conceptual notion of "race" in the normative structure of the criminal offences of Law No. 7,716/1989 has received multiple interpretations, the use of interpretation in conformity with the Constitution is justified, especially regarding the concept of "race", for the purposes of Law No. 7,716/1989.	**C**	**T**
8.SPb2	The constitutional obligation of the National Congress to enact legislation criminalizing conduct, whether acts or omissions, whose practice involves discriminatory behaviour that infringes fundamental rights and freedoms (constitutional mandate to criminalize) remains in force.	**C**	**T**
Ab2	Within the abstract constitutional review exercised by the STF, through the technique of interpretation in conformity with the Constitution, it is possible to bring homotransphobic practices directly within the concept of racism under Law No. 7,716/1989, without any violation of the principle of the separation of powers.	**C**	**T**
Sa	The criminalization of homotransphobic conduct by the STF is legitimate.	**N/A**	**N/A**

Three findings stand out. First, doctrinal reasons (C), relying on scholarly categories, predominate, with comparatively less use of precedent (J) and legislation (L). Second, almost all elements are teleological (T): premises well linked to conclusions, but presented as the exposition of a line of reasoning rather than as a response to opposing reasons. Third, dialectical elements (D) appear at only three points — 3.SPb1, Nb1 and 7.1.SPb2 — all concerning the remedy for the default: setting a deadline or merely notifying Congress. The opinion engages dialectically with the discussion about the remedy, but not with the central objection in the case: that the principle of legality in criminal law (*nullum crimen sine lege*) would prevent the court from criminalizing conduct. This objection is recorded (SPb1, 1.SPb1, 2.SPb1) and rejected on doctrinal

grounds (1.SPb2+ to 3.SPb2+), but it is not reworked in the light of the reasons that support it.

4.3 Cogency of shared arguments

The arguments that found resonance between the rapporteur's opinion and the other opinions were subjected to the criteria of *acceptability*, *relevance* and *sufficiency* (ARS) and to the screening criteria. With one exception, all proved cogent. The exception is the separation-of-powers argument, invoked by both the winning and the losing sides. In the majority opinions, the premises about the balance between the branches of government do not support the conclusion the court reached; rather, they are in tension with it. The relevance criterion is therefore not met: the argument is not cogent and, at this level, is fallacious.

Take the argument from the constitutional mandate to criminalize: Article 5, XLI, of the Constitution provides that the law shall punish any discrimination that infringes fundamental rights and freedoms; the legislature has enacted no law covering discrimination based on sexual orientation and gender identity; therefore, there is an unconstitutional omission that calls for a remedy. The premises are acceptable (one is constitutional text; the other, the default acknowledged by the majority itself), relevant (if true, they directly support the conclusion) and sufficient to establish the omission. The argument is cogent. Note, however, that its conclusion is the existence of the omission, not that it falls to the court to remedy it; that step depends on another argument, examined in Section 4.4.

Yet cogency did not guarantee quality on the screening criteria. The two most widely endorsed arguments — the existence of an unconstitutional omission and the reading of Article 5, XLI, of the Constitution as a criminalization mandate — are efficacious for the intended goal (efficacy) and aligned with the ethical commitments of the protected group (respect), but they leave unanswered the critical question of harmlessness: the risk that they might feed into symbolic and law-and-order discourses and weaken strict criminal legality was a foreseeable objection that the opinions did not address.

The criminalization mandate is a telling case. Justice Marco Aurélio objected that the verb form "shall punish" (*punirá*), used in the Constitution, is the genus and "shall criminalize" the species, so that the provision would admit non-criminal sanctions. The

objection corresponds precisely to a critical question of the argument — are there less burdensome means of achieving the goal? — but it was not addressed in the opinions that supported the thesis. Here the doubt was indeed voiced, but in an opinion delivered when the majority had already been formed: the *seriatim* design allowed the objection to exist without there being any occasion to answer it.

4.4 Dialectical failures: proportionality and constitutional hermeneutics

Two arguments, advanced by several Justices, had only minimal resonance in the rapporteur's opinion and were neither taken up nor contested across the opinions (Table 2). They functioned, however, in different ways.

The proportionality argument was invoked exclusively by Justices who formed the majority — Gilmar Mendes, Luiz Fux, Cármen Lúcia, Rosa Weber and Luís Roberto Barroso — as a ground for the outcome; it is, in the sense defined in Section 3.2, a decisive reason.

The constitutional hermeneutics argument, by contrast, cut across majority and minority: it was also developed by Marco Aurélio and Ricardo Lewandowski, who were outvoted, and it operated less as a reason for the outcome than as a shared presupposition about the court's role in protecting minorities. The distinction matters for evaluation: in the first case, the lack of critical testing affects the ground of the decision; in the second, it affects what none of the judges, on either side, was willing to discuss.

Table 2 Arguments without dialectical testing (summary)

Argument	Predominant scheme	Justices	Resonance in the rapporteur's opinion	Unaddressed critical questions
1. Proportionality (prohibition of insufficient protection)	From consequences; practical reasoning	Gilmar Mendes, Luiz Fux, Cármen Lúcia, Rosa Weber, Luís Roberto Barroso	Minimal: mention of precedents, without an argument of its own	Are there less coercive means than criminalization? Does criminalization produce the intended protection? What are the side effects?
2. Constitutional hermeneutics (the court's role in protecting minorities)	Practical reasoning; authority (including the Justice's own academic thesis)	Marco Aurélio (outvoted), Gilmar Mendes, Ricardo Lewandowski (outvoted), Luiz Fux, Rosa Weber, Luís Roberto Barroso	Minimal: countermajoritarian role asserted (4.SPb2), without developing the other aspects	What are the limits of the court's additive action in criminal matters? Was the thesis invoked accepted by the peers? Was there a dialogical alternative with the legislature?

Source: based on Online Resource 1 (Tables S1 and S2)

The proportionality argument, in its dimension as a prohibition of insufficient protection (*Untermaßverbot*), was invoked by five Justices, each with nuances of their own — the distinction between the prohibition of excess and that of insufficiency, the limits imposed on the criminal legislature, legislative default as an indication of deficient

protection — while the rapporteur merely mentioned precedents on the subject, without developing an argument of his own. The thesis, however, was already in the case file before the rapporteur's opinion: the PGR had argued that the absence of criminalization maintained a state of insufficient protection of the legal interest at stake. In terms of schemes, this is an argument from consequences: if current protection is insufficient, criminalization is required. The critical questions of this scheme — are there less coercive means? Would criminalization produce the intended protection? What would its side effects be? — were not raised by any judge. The presumption was treated as conclusive.

The constitutional hermeneutics argument, for its part, concerns the role of courts in protecting minorities. Six Justices developed it along different paths: the responsiveness of courts to the demands of excluded groups, the theory of institutional dialogues, the widening of the boundaries of interpretation in the face of an unconstitutional omission, and the three roles of courts — countermajoritarian, representative and enlightened — Justice Barroso's own academic thesis (Barroso 2018) that the other Justices did not engage with. The outline of a criminal-law hermeneutics for cases of this kind, put forward by Justice Luiz Fux, was likewise not opened to collegial discussion.

Both arguments thus carried the burden of legitimizing the decision: the first by justifying why existing protection was insufficient and criminalization required; the second by justifying, in the majority opinions, why it fell to the court, and not to the legislature, to remedy that insufficiency. They were, for that reason, the arguments most in need of critical testing — and the ones that received the least. This waiver constitutes the dialectical failure defined in Section 3.2: in the first case, regarding a decisive reason, and thus a procedural fallacy; in the second, regarding a shared presupposition.

4.5 The oral layer

The qualitative analysis of the sessions indicates a predominance of *ethos* in the oral interventions that "escaped" the written opinions. The rapporteur, Justice Celso de Mello, drew orally on his own experience in the Public Prosecution Service, invoked precedents in whose formation colleagues present had taken part — including Justice Barroso, then counsel in the same-sex unions case — and addressed other Justices by name (STF 2019a, b, c, d). These are credibility strategies aimed at peers, which reinforce the authority of the opinion without exposing it to objections. Justice Barroso, for his part,

noted in the plenary the formation of a "substantial majority" (STF 2019e, 01:07:20–01:08:10) and recalled his work as counsel, in didactic and self-referential digressions.

In the oral phase, the only moment of genuine dialectical interaction occurred during the opinion of Justice Alexandre de Moraes. After recounting concrete cases of violence raised from the rostrum (STF 2019f, 01:56:58–01:59:41) — an *ethos* strategy also aimed at the *amici curiae* — Moraes was challenged by Marco Aurélio, for whom such cases were already covered by existing criminal law and the court was provisionally creating a criminal offence (STF 2019e, 00:16:45–00:17:10). An exchange with Gilmar Mendes followed, marked by *logos*, on whether interpretation in conformity with the Constitution was admissible in an ADO. This debate, however, had no effect on the sequence of the remaining opinions. In terms of *strategic manoeuvring*, adaptation to the audience guided the choice of what was said outside the written opinion; the moment at which critical discussion actually opened up was not incorporated into the final product.

5 Discussion: scope and limits of pragma-dialectics in *seriatim* courts

The case supports a conclusion of general scope: in a *seriatim* court, the argumentative deficit lies not in a lack of arguments but in a lack of critical testing. The ADO 26 opinions are lengthy, learned and, for the most part, cogent; what they lack is contact. The reasons that weighed most heavily on the outcome were precisely those that circulated least among the judges.

To diagnose this situation, pragma-dialectics proved productive on two counts. The ideal model of critical discussion provides the normative standard that allows the absence of testing to be characterized as a failure rather than as a mere institutional feature. The notion of *strategic manoeuvring*, in turn, explains the oral layer: adaptation to a dual audience guides topical and presentational choices that are not directed at resolving the difference of opinion.

The case also exposes some limits of the theory. The ideal model presupposes a dyad of protagonist and antagonist; a *seriatim* plenary is multi-party, simultaneous, addressed to external audiences and decided by vote. Reconstructing it as a single critical discussion requires analytical decisions — such as taking the rapporteur's opinion as a benchmark — that are not neutral and must be justified case by case. Approaches that treat interaction as a combination of dialogue types (Walton and Krabbe 1995) could, for instance, model the STF plenary as a deliberation dialogue among peers embedded in

persuasion dialogues addressed to the public, and would be a natural extension of this research.

The limits of the study must also be acknowledged. It examines a single case, chosen for its illustrative character rather than its representativeness. The rapporteur's opinion was coded in full, and the others to the extent needed for comparison. The coding was carried out by a single researcher, which calls for inter-coder reliability tests in future applications. The oral analysis relied on the public broadcast of the sessions.

6 Conclusion

Judicial deliberation is, in principle, the cooperative space of legal discourse. In a televised *seriatim* court, this cooperation is structurally displaced: opinions are completed before they meet, the difference of opinion is settled by adding up votes, and argumentation addresses two audiences at once. The article has argued that this displacement can be made visible and assessable by a three-layer multimethod instrument — structural analysis, two-level evaluation and rhetorical analysis — and has shown how it manifests itself in ADO 26: a predominance of doctrinal and teleological reasons, dialectical elements confined to issues peripheral to the central objection, a decisive reason and a shared presupposition used as conclusive without critical testing, and oral delivery guided by *ethos*.

The distinction between the two levels of evaluation is the contribution of widest scope. It makes it possible to claim that a judgment may rest on cogent arguments and still suffer from a procedural fallacy: the waiver of critical testing precisely for the reasons that decided the case. This distinction does not depend on the merits of the decision — which this article has not assessed — and can be applied to any court that decides by aggregating individual opinions.

The instrument opens two lines of research: comparative application to other *seriatim* or mixed-deliberation courts, with inter-coder reliability tests, and the modelling of the plenary as a structure of multiple dialogues. It also points to an institutional agenda, since designs that create a moment of rejoinder between opinions — before they are completed — would directly address the deficit identified here.

References

Adeodato JM (2008) Retórica como metódica para estudo do direito. *Sequência* 29(56):55–82. https://doi.org/10.5007/2177-7055.2008v29n56p55

Alexy R (2005) Balancing, constitutional review, and representation. *International Journal of Constitutional Law* 3(4):572–581. https://doi.org/10.1093/icon/moi040

Atienza M (1986) Sobre la jurisprudencia como técnica social. Respuesta a Roberto J. Vernengo. *Doxa. Cuadernos de Filosofía del Derecho* 3:297–311. https://doi.org/10.14198/doxa1986.3.18

Atienza M (2003) *As razões do direito. Teorias da argumentação jurídica*. Translated by Maria Cristina Guimarães Cupertino, 3rd edn. Landy Editora, São Paulo

Atienza M (2005) Argumentación y legislación. In: Díez Ripollés JL, Prieto AM, Soto S (eds) *La política legislativa penal en Occidente: Una perspectiva comparada*. Tirant lo Blanch, Valencia

Atienza M (2006) *El Derecho como argumentación: concepciones de la argumentación*. Ariel, Barcelona

Atienza M (2007) Argumentación y Constitución. In: Aguiló Regla J, Atienza M, Ruiz Manero J (eds) *Fragmentos para una teoría de la Constitución*. Iustel, Madrid

Atienza M (2017) *Curso de argumentação jurídica*. Translated by Claudia Roesler. Alteridade, Curitiba

Barroso LR (2018) Contramajoritário, representativo e iluminista: os papeis dos tribunais constitucionais nas democracias contemporâneas. *Revista Direito e Práxis* 9(4):2171–2228. https://doi.org/10.1590/2179-8966/2017/30806

Ferejohn J, Pasquino P (2002) Constitutional courts as deliberative institutions: towards an institutional theory of constitutional justice. In: Sadurski W (ed) *Constitutional justice, east and west: democratic legitimacy and constitutional courts in post-communist Europe in a comparative perspective*. Kluwer, The Hague

Ferejohn J, Pasquino P (2004) Constitutional adjudication: lessons from Europe. *Texas Law Review* 82(7):1671–1704

Feteris ET (2008) Strategic maneuvering with the intention of the legislator in the justification of judicial decisions. *Argumentation* 22(3):335–353. https://doi.org/10.1007/s10503-008-9100-4

Gama L (2023) Manuel Atienza, el activismo judicial y el consejo de Circe. *Doxa. Cuadernos de Filosofía del Derecho* 46:161–176. https://doi.org/10.14198/DOXA2023.46.09

Goffman E (1959) *The presentation of self in everyday life*. Anchor Books, Doubleday, New York

Gonçalves-Segundo PR (2019) A configuração funcional da argumentação prática: uma releitura do layout de Fairclough & Fairclough (2012). *Revista Eletrônica de Estudos Integrados em Discurso e Argumentação* 19(2):109–137. https://doi.org/10.17648/eidea-19-v2-2498

Govier T (2012) *A practical study of argument*, 7th edn. Wadsworth, Belmont, CA

Grice HP (2013) Logic and conversation (1967/1975). In: Ezcurdia M, Stainton RJ (eds) *The semantics-pragmatics boundary in philosophy*. Broadview Press, Peterborough

Lozada Prado A, Ricaurte Herrera C (2015) *Manual de argumentación constitucional: propuesta de un método*. Corte Constitucional del Ecuador, Quito

Macagno F, Toniolo A (2022) Introduction to the special issue. Douglas Walton and his contribution to argumentation theory. *Informal Logic* 42(1):1–23. https://doi.org/10.22329/il.v42i1.7210

MacCormick N (2005) *Rhetoric and the rule of law: a theory of legal reasoning*. Oxford University Press, Oxford

MacCormick N (2008) *Retórica e o estado de direito*. Elsevier, São Paulo

Macedo Júnior RP (2007) O método de leitura estrutural. *Cadernos de Direito GV* 4(2):5–41

Mendes CH (2010) Onze ilhas. *Folha de S. Paulo*, 1 February. https://www1.folha.uol.com.br/fsp/opiniao/fz0102201008.htm. Accessed 3 February 2024

Miguel LF, Bogéa D (2020) O juiz constitucional me representa? O Supremo Tribunal Federal e a representação argumentativa. *Revista Brasileira de Ciências Sociais* 35(104):e3510402. https://doi.org/10.1590/3510402/2020

Oliveira FL (2012) Supremo relator. Processo decisório e mudanças na composição do STF nos governos FHC e Lula. *Revista Brasileira de Ciências Sociais* 27(80):89–115

Reis I (2018) Análise empírico-retórica do discurso: fundamentos, objetivos e aplicação. In: Roesler C, Hartmann F, Reis I (orgs) *Retórica e argumentação jurídica: modelos de análise*, vol 2. Alteridade, Curitiba

Reis I (2020) Rhetoric, technological innovation and legal audiences: the case of the Brazilian Supreme Court. In: Meccarelli M, Paixão C, Roesler C (eds) *Innovation and transition in law: experiences and theoretical settings*. Dykinson, Madrid

Silva VA (2013) Deciding without deliberating. *International Journal of Constitutional Law* 11(3):557–584. https://doi.org/10.1093/icon/mot019

Silva VA (2016) "Um voto qualquer"? O papel do ministro relator na deliberação no Supremo Tribunal Federal. *REI – Revista de Estudos Institucionais* 1(1):180–200. https://doi.org/10.21783/rei.v1i1.21

Silva VA (2021) Pauta, público, princípios e precedentes: condicionantes e consequências da prática deliberativa do STF. *Suprema – Revista de Estudos Constitucionais* 1(1):22–56

STF (2019a) Pleno - Decano inicia voto sobre omissão do Congresso Nacional em criminalizar homofobia (1/2). YouTube. https://www.youtube.com/watch?v=-OnSL03Leq8&t=728s. Accessed 15 May 2025

STF (2019b) Pleno - Decano inicia voto sobre omissão do Congresso Nacional em criminalizar homofobia (2/2). YouTube. https://www.youtube.com/watch?v=PZRMtzL-EGY. Accessed 15 May 2025

STF (2019c) Pleno - Decano declara omissão legislativa sobre homofobia (1/2). YouTube. https://www.youtube.com/watch?v=H0crBs4Gqc4. Accessed 15 May 2025

STF (2019d) Pleno - Decano declara omissão legislativa sobre homofobia (2/2). YouTube. https://www.youtube.com/watch?v=fgqcnP4CCLY. Accessed 15 May 2025

STF (2019e) Pleno - Suspenso julgamento sobre omissão legislativa em criminalizar homofobia (2/2). YouTube. https://www.youtube.com/watch?v=zZBpYwxcmcE. Accessed 5 June 2025

STF (2019f) Pleno - Suspenso julgamento sobre omissão legislativa em criminalizar homofobia (1/2). YouTube. https://www.youtube.com/watch?v=o_0dl0ZxZjE. Accessed 19 May 2025

STF (2020) *Ação Direta de Inconstitucionalidade por Omissão 26/DF*. Relator: Min. Celso de Mello, 6 October 2020

Vale AR (2015) *Argumentação constitucional: um estudo sobre a deliberação nos tribunais constitucionais*. Dissertation, Universidade de Brasília

van Eemeren FH (2010) *Strategic maneuvering in argumentative discourse: extending the pragma-dialectical theory of argumentation*. John Benjamins, Amsterdam

van Eemeren FH (2019) *La teoría de la argumentación: Una perspectiva pragmadialéctica*. Palestra Editores, Lima

van Eemeren FH, Grootendorst R (2004) *A systematic theory of argumentation: the pragma-dialectical approach*. Cambridge University Press, Cambridge

van Eemeren FH, Houtlosser P (1999) Strategic manoeuvring in argumentative discourse. *Discourse Studies* 1(4):479–497

Vojvodic AM, Machado AMF, Cardoso ELC (2009) Escrevendo um romance, primeiro capítulo: precedentes e processo decisório no STF. *Revista Direito GV* 5(1):21–44

Walton D, Reed C, Macagno F (2008) *Argumentation schemes*. Cambridge University Press, New York, NY

Walton DN, Krabbe ECW (1995) *Commitment in dialogue: basic concepts of interpersonal reasoning*. State University of New York Press, Albany

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