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Collective choice and dissenting opinions in Multimember Courts. Elements for Assessing Judicial reasoning in Courts of Constitutional decision making in South America

Decisión colectiva y opiniones disidentes en Tribunales Colegiados. Elementos para evaluar el razonamiento judicial de los Tribunales de decisión Constitucional en Suramérica

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Abstract: Collegial decisions are exposed to peculiarities that individual judges do not face, such as deliberations, leading judges as case managers, group thinking, and peer effects, among others. Nevertheless, when analyzing judicial outcomes of Constitutional Courts, most of the legal community in South America does not consider those features. In this paper, we describe some of them and focus on dissents as a variable that provides fertile ground for assessing the reasoning of the tribunals. The scope of the work is limited to a descriptive and normative sphere, and uses a qualitative methodology.[3]

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3 The paper is in a phase before the 'explanation' of the phenomenon as the objective of ambitious comparative research Hirschl (2014), p. 226. The study has a smaller scope according to Lieblich's classification in: Lieblich (2021), p. 3. For methodological analysis models with both approaches, see Jakab, András *et al.* (2017).

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Keywords: Group-thinking, Panel effect, Audiences, Dissenting opinions, Dissent aversion.

Resumen: Los fallos de jueces colegiados están expuestos a peculiaridades que no enfrentan los jueces individuales como las deliberaciones, jueces que administran el caso, el pensamiento de grupo, los efectos de pares, entre otros. Sin embargo, al analizar las sentencias de los Tribunales de Decisión Constitucional, la mayor parte de la comunidad jurídica de Sudamérica no advierte esas características. En este artículo describimos algunas de ellas y nos enfocamos en las disidencias como variable que brinda un terreno fértil para evaluar el razonamiento de los Tribunales. El alcance del trabajo se circunscribe a un ámbito descriptivo, en tanto se utiliza una metodología cualitativa.

Palabras claves: Pensamiento grupal, efecto panel, audiencias, opiniones disidentes, aversión al disenso.

> "In a constitutional regime with judicial review, public reason is the reason of its Supreme Court"
>
> John Rawls[4]

1. Introduction

A significant weakness of constitutional reasoning literature is being poorly informed by empirical research[5]. Most theories in the region are prescriptive and based on intuitive assertions made by scholars about how judges decide and how they should be instructed to do so. In contrast, empirical methodology begins with research into human behavior and decision-making processes, which is used to infer how judges *actually* decide based on data[6]. This paper is part of a broader research framework that aims at providing a tool for assessing the reasoning behind judicial judgments made by Constitutional decision-making Courts in South America by bringing together normative and empirical perspectives. However, the approach is limited in scope because it only provides elements to assess rulings, and further research is needed to implement it in every country. Therefore, it lacks a time frame for full implementation.

4 Rawls (1993), p. 231.

5 Dyevre and Jakab (2013), p. 1014.

6 See Dyevre and Jakab (2013); Jakab (2013); Jakab *et al.* (2017).

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

The research utilized the causal inference method of examing systematically a few cases (small-N)[7]. This approach has several principles, of which we chose to follow 'The most similar cases' to analyze the design of Courts, which explains the absence of Suriname and Guyana. The features will be incorporated into a tool to assess judicial decisions made by the Constitutional Courts[8] of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela.

The research question addressed in this paper is how to evaluate the rationality of judicial decisions made by Constitutional Courts in South America, with a particular emphasis on dissents. The objective is to describe and provide elements that can be incorporated into a tool for assessing these decisions, considering factors that influence judicial behavior and case outcomes.

Normative theories informed by a legalistic vision which judging is considered an objective activity can be depicted in John Roberts' Senate confirmation hearing. He said "that the role of a Supreme Court Justice, which he promised to faithfully inhabit, was comparable to a baseball umpire. The umpire calls balls and strikes but does not pitch, bat or field"[9]. This understanding of the judicial decision-making process is naive, not to say utopian because it seems clear that constitutional courts are, to some degree, political actors. Kelsen himself acknowledged the fact that law is political since constitutional courts have the 'authority to interpret and therefore to make the constitutional law [they] perform a political function'[10], as a matter of fact, "No matter how they are conceived, constitutional courts are not neutral"[11].

But our approach in this excerpt is less pretentious because we do not intend to discuss philosophical or political arguments about the nature of the judicial function or have an exclusively normative perspective; on the contrary, we explore several circumstances that influence

7 Hirschl (2014), p. 244.

8 The term "Constitutional Courts" is used generically in the research. Still, the tribunals in the region vary from autonomous courts in 50 percent of the countries to Supreme Courts or Courts of Justice in countries like Argentina, Brazil, Uruguay, Paraguay, and Venezuela, which have been assigned judicial review powers. Among these last countries, Paraguay and Venezuela have established independent chambers for internal constitutional matters. Some courts were established simultaneously with their current Constitution, such as in the cases of Argentina, Colombia, Ecuador, Venezuela, and Peru. The institution was created in Brazil, Bolivia, Chile, Paraguay, and Uruguay before promulgating their last Constitution. However, some courts took time to begin operating after their regulatory creation: the Supreme Court of Justice of the Argentine Nation took ten years, the Plurinational Court of Bolivia took five years, and the Constitutional Court of Peru took three years.

9 Epstein *et al.* (2013), p. 51.

10 Stone (2000), p. 135.

11 Harding *et al.* (2009), p. 15. Notwithstanding, adjudication is inherently political in judicial review matters; in South America, the mainstream judiciary and scholars ignore that fact and continue perpetuating the mythology: judges' task is "to apply the law, not make it" as Dyevre asserts (Dyevre [2010], p. 299).

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

the outcome of multimember courts. These features escape from the traditional legalistic outlook method used in the region. The relevance of our work lies on the unique possibility of comparing the reasoning based on them. This is an attempt to contribute to empirical research that closes the gap with prescriptive theories. This paper is divided into four sections. The first section describes features of multimember courts, including their decision-making processes and the roles of individual judges. The second section focuses on the peculiarities of collective decisions, such as the dynamics of reaching a consensus and the impact of external factors. The third section examines dissenting opinions, including their functions, types, and potential impact on judicial decision-making. Finally, the fourth section describes some characteristics of Constitutional Courts in South America.

2. Reasoning in Collegial Courts: Portraying collegial courts

Empirical legal researchers[12] have classified courts and adjudication into Macro, Meso, and Micro dimensions of analysis. The Macro approach is located at the institutional level focusing on types of tribunals and their rulings. The middle range or Meso perspective examines courts as organizations constituted by various interdependent occupational groups which intersect with the community[13]. The matter in this sphere is the daily practices of the judiciary. At the same time, in the Micro degree, "empirical research focuses on the judicial officer and investigates trial judges' perceptions of their roles and activities, attitudes to their work, and approaches to adjudication"[14]. The tool proposed in further research will allow the measurement of every dimension.

The rationale supporting collegial courts is that "we can synthesize collective wisdom from individual ignorance. Although any individual judge has a certain chance of getting things wrong, several judges have a better chance of getting things right together."[15] That is what De Condorcet considered[16] in his jury theorem. Even so, he first assumes that every judge just votes, ignoring the deliberation and efforts to persuade the rest of the court members. The approach could theoretically work if the outcome is the sum of individual decisions. The only model that shapes it is the separate style or *seriatim* proper of English historical tradition; under this, "each judge writes and publishes his own opinion disposing of the case before the

12 See Dyevre (2010), p. 326. The corresponding model for the Macro-Level analysis is the Institutional Externalist. At the same time, the Externalist and the Internalist are the related models for the Meso-Level. Finally, the attitudinal is the model for the Micro-Level. Each of them has diverse variables.

13 Roach and Mack (2012), p. 546.

14 Roach and Mack (2012), p. 546.

15 Friedman *et al.* (2020), p. 535.

16 De Condorcet (2014).

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

court"[17]. But collective decisions made by judges require deliberation as a condition of their rationality[18]. However, there are also different forms to deliberate[19] and render decisions.

In the ex-ante model, a reporting judge manages the case and their "main task is to propose a disposition and draft an opinion before the oral argument and conference meeting"[20]. That is why the other sitting judges concentrate on deciding whether to endorse or not an entirely written opinion known beforehand, "in other words, cases are decided before being decided"[21].

On the contrary, in the ex-post model, cases are decided after being decided, that is to say judges determine their opinions when oral arguments and conference meetings are carried out. Then, one or various justices are assigned to write the court's decision following discussions between them. If every judge is required to read and study the briefs and prepare the case before the oral argument. This method avoids the bias resulting from an already-formed notion given by a reporting judge. It also assures that the responsibility for drafting the decision rests upon all the tribunal members[22].

However, reality shows that it is only feasible to render a hot and ex-post model if the court picks few cases to hear[23]. Therefore, the heavy workload[24], the lack of time and resources courts face make impossible to engage in collective deliberation beyond the most critical issues.[25] That is why the reporting or leading judge emerges as a central figure in the drafting and final decision, having much better insight into the case than their fellow judges. "From the point of view of cost-efficiency, it is tempting to let the lead judge also act as the case-ma-

17 Friedman *et al*. (2020), p. 572.

18 While other branches of government rely on majoritarian politics; the judiciary does on the rationality of its rulings. Deliberation is, therefore, an essential feature to guarantee it due to their lack of democratic legitimacy. Dieter Grimm, on the relevance of the deliberation process, stated:
"I have seen tremendous changes by deliberation. I have seen them with myself and I have seen others convinced. I've seen cases where the judge rapporteur who makes a proposal how to decide the case said after deliberation that he didn't give enough weight to this or that argument so he would rather say we go the other way around" in (Grimm [2001]; [2003]).

19 Nearly every court deliberates secretly. A remarkable exception is the Swiss Supreme Court, in which the intra-court debates lack confidentiality. See: Stadelmann (2020).

20 Cohen (2014), p. 954.

21 Cohen (2014), p. 954.

22 This is known as a "HOT" court. See: Cohen (2014), p. 980.
On the contrary, in "COLD" courts, most judges lack the opportunity to familiarize themselves with the briefs and records before the case is argued because each case is pre-assigned to one judge, as Cohen affirms.

23 Mathilde Cohen describes US Supreme Court as 'warm' because of certiorari.

24 Cohen uses the *Cour de cassation* as an example. Truly, in 2012 the court delivered 11,983 judgments on the merits (it counts with 163 judges at the time that the *Conseil D'état* averages 300).

25 Cohen (2014), p. 999. For an approach of the Brazilian Supreme Court and its lack of exchange arguments see: Da Silva (2013).

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

nager, in control of all paperwork including the ultimate copy-editing of the judgement"[26].

The framing effect that the reporting judge in the ex-ante and cold courts models has over the other judges is a characteristic that must be considered a variable in assessing judicial decisions. A possibility to diminish the excessive influence of the *rapporteur,* as it is known in the French *Cour de cassation*, is the designation of another member of the panel to manage the case jointly. In France, the *doyen*[27] "of each chamber is co-responsible"[28] for it.

Another aspect that should be acknowledged is the output of a multi-member court. Three types at least can be identified: (a) The "Per Curiam"[29], a model in which the court issues just one authoritative opinion, "such opinions are typically unsigned and impersonal, as they speak not for any individual judge but for the court as an institution"[30]. Although, there is dissent within the panel, the disagreements are not published, and the strategic decision to render this kind of ruling rests on the idea of showing a unified court speaking in one voice. While a Tribunal of this kind can be characterized as faceless, some have argued that its members become discernible through academic publications, their roles in Court, and their interventions during public hearings[31]. This mode of delivering decisions would not fit in the proposed assessment scheme, despite some dissents can also be signed[32]. Secondly, (b) the Seriatim[33] model that was formerly mentioned as a collection of opinions from each judge without an opinion of the court as a whole[34]. This system of announcing the rulings has advantages like increasing "transparency and le[ading] to more accountability"[35], but this is not the most efficient method to solve high amounts of cases. Finally, (c) most decisions with different votes, dissents and concurrences[36] is widely used in courts in South America and support the methodology of focusing on divided cases. Additionally, some researchers and politicians have proposed replacing simple majority

26 Hâcker and Ernst (2020), p. 6.

27 The elder judge of each chamber.

28 Hâcker and Ernst (2020), p. 6.

29 Which means "by the court." It is the current practice in countries such as Germany and France. The Court of Justice of the European Union follows this pattern as well. Furthermore, the US Supreme Court and the Supreme Court of Canada sometimes deliver this kind of decision.

30 Friedman *et al*. (2020), p. 582.

31 Gragl (2023).

32 Thomas Jefferson objected that "To the extent that judging imposes personal responsibility on judges, unsigned institutional opinions might seem like an abdication of duty." Friedman *et al.* (2020), p. 582.

33 Some Commonwealth countries still use this approach to announce the decisions.

34 Henderson (2007), p. 289.

35 Jefferson praised the system also because: "(2) it showed that each judge had considered and understood the case; (3) it gave more or less weight to a precedent based on the vote of the judges; (4) and it allowed judges in the future to overrule bad law based on the reasoning of their predecessors." See: Henderson (2007), p. 299.

36 Differences between them will be mentioned later.

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

rule with supermajority rules to declare unconstitutional some acts[37]. Simple or bare majorities enact many laws, so, as Waldron assures, "why is bare majority decision […] an appropriate principle to use in an institution that is supposed to be curing or mitigating the defects of majoritarianism? Majorities, everywhere you look"[38]. The lack of democratic legitimacy depicted by the counter-majoritarian difficulty concept grounds the objection[39]. A possible solution is a two-thirds[40] requisite to overturn determined acts as constitutional amendments[41].

3. Thinking and voting together

As Austen-Smith and Banks' investigation suggests, more minds making a judicial decision may not be better. In fact, "majority voting can easily do worse than any individual acting alone"[42]. By exposing oneself to other's people views, the individual may believe the group is correct and then abandon the own contrary views and ignore new evidence that struggles with the group consensus[43]. This phenomenon is a kind of information cascade called *group thinking*; the concept coined by Irvis Janis[44] claims that deliberation would have the opposite effect of its purpose. It often occurs in highly cohesive groups where individual members fail to identify and explore alternative decisions that could be more rational or effective to avoid disrupting group cohesion, angering other members, or the possibility of embarrassment for voicing an unacceptable opinion[45]. This leads to the spread and the amplification of cognitive errors[46].

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37 Caviedes (2022), p. 1162. Nevertheless, the author departs from some assumptions to hold that thesis. Namely: (i) there are substantive standards for assessing the constitutionality of legislation; (ii) given reasonable disagreement, statutes should be presumed constitutional; (iii) my claims only apply to some constitutional adjudication systems; and (iv) my claims only apply to "well-functioning democracies".

38 Waldron (2014), p. 1694.

39 The objection rests in the assumption that power that doesn't come from *the people* is anti-democratic. As Bickel explains, it is the "power to make decisions that do not derive from a prior legislative decision and that do not, therefore, represent the sovereign will […] as it should be". In: Bickel (1986), p. 151. For a contemporary perspective, see the work of Jeremy Waldron.

40 Handelsman (2003).

41 The rejected Chilean project of Constitution considered a majority of 3/5 of the Court members to declare a legal rule unconstitutional. Article 381.1.b.

42 Austen-Smith and Banks (1996), p. 43.

43 Friedman *et al.* (2020), p. 542. About the deliberation effect see Kornhauser and Sager (1986), p. 101: "Deliberation could affect the behavior of any given judge in at least three different ways […] Third, the communal pressures of deliberation may induce in a given judge a conscious or unconscious impulse to conform her judgment to a range of results that her colleagues treat as acceptable".

44 Janis (1972) defined it as: "A mode of thinking that people engage in when they are deeply involved in a cohesive in group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action".

45 Devins (2008), p. 1429.

46 Sunstein (2005), p. 1048. This failure of the will was called *Akrasia* by Aristotle. Regarding this matter See Kornhauser and Sager (2004), p. 250.

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

The *corroboration effect* is one of the consequences of group thinking. Through this, "group members tend to become far more confident of their judgments after they speak with one another."[47]Some other problems that group thinking has been *polarization*[48] and *cascade effects*: e.g., those "related to who spoke first and the joint opinion of the next 2 […]. Then the rest will join them"[49]. Another feature of group thinking is the *common knowledge effect*, which means that "information held by all group members has more influence on group judgments than information held by only a few members"[50]. Besides, in contexts of cohesive courts, justices would a) tend to pursue their shared ideological agenda[51], b) would be more likely to defer their views to the opinion writer, and c) as they belong to voting blocks, they would lean on opinions they don't entirely agree because their disagreement is not strong enough to consolidate a dissenting coalition[52].

Based on empirical evidence, researchers have demonstrated that although individual judges decide cases consistently when they reach collegial courts, they will not necessarily achieve coherent results[53]. To do so, the panel must satisfy two conditions: each judge must offer a decision they believe coherent with the court's prior rulings as opposed to their view in previous cases, and the panel must have a shared conception of coherence[54].

Collegial decisions are exposed to other peculiarities not faced by individual judges, such as the *doctrinal paradox* and *Arrow's impossibility theorem.* A doctrinal paradox occurs when a particular case must decide on two or more issues. In this scenario, two possible paths can be taken: sum up the individual vote of each judge over the general result of the case or sum up the votes of each one over each of the issues at stake. The outcome can differ depending on the methodology adopted, which can create undesirable questioning over the rationality of the decision and the court's legitimacy[55]. To show the phenomenon, the following example will be used:

47 Sunstein (2005), p. 981.

48 "The basic idea is that when people speak with one another, they often end up at a more extreme point in line with their original inclinations." Kahneman *et al.* (2021), p. 103.

49 Kahneman *et al.* (2021), p. 100. Authors assert that groups amplify "noise".

50 Sunstein (2005), p. 994.

51 About agenda setting see Bonneau *et al.* (2007).

52 Devins (2008), p. 1414.

53 Kornhauser and Sager (1986), p. 82. In the research, they classify group decision-making into different categories to refer to accuracy, authenticity, and reliability.

54 Kornhauser and Sager (1986), p. 117. As the authors accept "The condition that the panel share a conception of coherence is deeply problematic for theories of adjudication that seem to tolerate or even encourage conceptual disparity among judges".

55 About the concept see: Kornhauser and Sager (1993).

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

	Harm done?	Duty of care?	Defendant liable?
Judge A	Yes	No	No
Judge B	No	Yes	No
Judge C	Yes	Yes	Yes
Majority	Yes	Yes	No

Source: Christian List & Philip Pettit[56]

This doctrinal paradox deals with the concept of integrity as exposed by Dworkin[57]. In light of it, should courts speak with "one voice, and act with one mind?"[58] I am not aiming at answering this complex question, but whatever the response is, this issue must be considered in collegial decision analysis. On the other hand, Arrow`s impossibility theorem is related to consistency expectation: Nobel Prize Kenneth Arrow proposed in his Ph. D. work Social Choice and Individual Values[59] that the following five conditions cannot be reached in collective decisions:

1. Unanimity: If all people entitled to a say in the decision prefer one option to another, that option prevails.
2. Nondictatorship: No person's views can control the outcome in every case.
3. Range: The system must allow every ranking of admissible choices, and there must be at least three acceptable choices, with no other institution to declare choices or rankings out of bounds at the start.
4. Independence of Irrelevant Alternatives: The choice between options *A* and *B* solely depends on comparing those two.
5. Transitivity: If the collective decision selects *A* over *B* and *B* over *C,* it must also choose *A* over *C.* This is the requirement of logical consistency[60].

After his proposal, many have tried to contend against it. Nowadays, it is still has been proven that those five circumstances cannot be reached together in a group decision-based, so we must be aware of that. Now we turn briefly to the problem of the content of the decision and how the outcome is drafted. Scholars have discussed three main approaches: the first one

56 List and Pettit (2005), p. 378.

57 Dworkin (1986).

58 List and Pettit (2005), p. 377.

59 Arrow (2012).

60 Easterbrook (1982).

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

is the *opinion-author*. By it, the reporting or leading judge exerts meaningful influence over the location of the opinion as an agenda setter. "Opinion-author theories imagine a "closed" system in which changing or amending a proposed opinion is almost impossible or very difficult"[61]. Conversely, *median-justice* theories assume an open system and predict that in divided cases, "the majority opinion will be written at the ideal point of the median justice, to neutralize the threat that the median justice will defect to the other side and transform what was once a dissent into a new majority"[62]. Although, this is the most accepted view among the mainstream, some have challenged this because of the need for time, intellectual energy, and the loss of leisure time that would dissuade judges and juries[63] from suggesting amendments to the initial draft[64]. Finally, the *median member of the majority coalition* theory claims that the decision, at least in highly divided cases, will follow the position of the median member of the signing group[65].

Another issue of relevance in collegial courts is the panel's composition because it could affect the final judicial decision depending on "social identity and social diversity"[66] of judges. This peer effect "refers to a phenomenon whereby judges vote differently depending on the identity of their co-panelists"[67]. At least three influences have been explored: the impact of women, racial diversity, and partisan preferences of the judges. In fact, research has shown that in sexual harassment cases, "panels with at least one female judge decided cases for the plaintiff more than twice as often as did all-male panels"[68]. In the same line, in sex discrimination cases, "the presence of a female on a panel actually causes male judges to vote in a way they otherwise would not: in favor of plaintiffs"[69].

In racial matters regarding affirmative action, results suggest that non-black judges join their black mates in liberal decisions due to their presence[70]. Finally, the belonging of the judge to a particular party or her ideology also impacts the outcome[71] to the extent of gene-

61 Friedman *et al.* (2020), p. 602.

62 Friedman *et al.* (2020), p. 603.

63 Kahneman *et al.* (2021), p. 105: "Deliberating juries experienced a shift toward greater leniency (when the median member was lenient) and a shift toward greater severity (when the median member was severe)".

64 Dyevre and Jakab (2013), p. 997.

65 This approach was explored in Supreme Court of the United States cases by researchers. See Carrubba *et al.* (2012).

66 Epstein and Knight (2022), p. 899. By "social identity", they understand: gender, race, nationality, and so on. On the other hand, the "social diversity" of collegial courts (those on which judges sit in panels or in banc) suggests that greater heterogeneity can produce benefits in the form of better decisions.

67 Friedman *et al.* (2020), p. 636.

68 Peresie (2005), p. 1787.

69 Boyd *et al.* (2010), p. 406.

70 Kastellec (2013).

71 Revesz (1997).

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

rating a "whistleblower effect, by which a single judge of a different party from the court's majority can have a moderating effect on a judicial panel"[72]. Notwithstanding, some findings suggest that collegiality "is not associated with ideological homogeneity and is more likely to be found in published opinions"[73]. Two reflections can be made at this point: the first one is the lack of empirical research in South America that allows us to contend or contrast these findings. The second one is how understanding panel effects becomes essential for considering courts' design and policy influence. "If panel effects tend to moderate the influence of ideology, should they be encouraged? And if so, what institutional changes might increase this moderating effect?"[74]. Questions like these should be addressed through further experimental research in the region.

An additional element that deserves to be outlined is the audience to which judges speak. Judges aren't like *Mr. Spock*; they do not act "without emotion or self-interest in order to advance the general good"[75]. Judges calculate the consequences of their choices and forestall the reaction of other Government's branches, the risk of noncompliance[76], and the political community[77]. But members of courts do not respond to the same mix of influences. Some are prone to the impact of social and professional groups, others to their court peers, policy groups, the media, and lower-court judges, among others, as audience judges want to win esteem. Empirical research in South American courts is required to understand how a judge's concern with the approval from those audiences is likely to affect their behavior.

Given this wide variety of audiences to which judges speak, some game theories have been proposed to analyze and graph the behavior of judges in the adjudication process and their relations with their audiences. These theories assume that people "(1) make choices to achieve certain goals, (2) [...] act strategically in the sense that their choices depend on their expectations about the choices of other actors; and (3) these choices are structured by the institutional setting in which they are made"[78]. One example of those approaches is the so-called case-space model, which "highlights legal cases as the vehicles for policy making"[79]. The model graphs the conceivable set of case scenarios departing from the hypothesis that appellate courts try to establish rules for deciding future cases. Another approximation is the

72 Sunstein *et al.* (2006), p. 148.

73 Nash (2022), p. 1562.

74 Kim (2009), p. 1374.

75 Baum (2006), p. 18.

76 A strategic position could be to craft vague decisions to mitigate this risk. That's the position of Staton and Vanberg (2008).

77 In constitutional decisions, the audience is narrow due to the expert knowledge needed to understand constitutional reasoning. See Jakab (2013), p. 1218.

78 Epstein and Knight (2000), p. 626.

79 Lax (2011), p. 133.

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

one introduced by Cameron and Kornhauser in the paper Modelling Collegial Courts (4). The authors explore the relationship between "disputes" within the tribunals and "policies" made by those and their preferences "about both of these products"[80]. Vanberg's model, on the other hand, works over the interactions between constitutional courts and legislative majorities, considering variables such as political environment (specifically, transparency) and public support, among others[81]. Epstein and Shvetsova's approach analyzes the influence of Chief Justices involving "heresthetical"[82] understanding as manipulation[83]. Finally, some have proposed models in which the court's behavior depends under certain circumstances "on how other judicial actors position themselves on the issue at hand"[84].

To summarise, many causes impact the multimember outcome; some have been described here. Others demand broader analysis in terms of court size, the selection process, the case management procedures, the secrecy or transparency of debates, the biographical background of the judges, among others[85].

4. Judicial Dissent

A dissenting opinion[86] is a separate one that differs from the majority[87]. They can be clas-

80 Cameron and Kornhauser (2010), p. 37.

81 Vanberg (2001), p. 358.
The JUDICON research project compared the strength of the decisions of the constitutional courts in seven European countries to assess how they constrain the legislatures. In the same light, the JUDICON-EU comparative project aims to map the diversity and measure the strength of judicial decisions and explain judicial behavior *vis-á-vis* the legislative branch in Europe. For more information, see: [https://judicon.tk.hu/en/project-description] and [https://judiconeu.uni-nke.hu/about].

82 Epstein and Shvetsova (2002), p. 93.

83 William H. Riker coined the term to describe the art of political manipulation.

84 Dyevre (2013), p. 8. For a game theoretical model tested in the setting of the German Federal Constitutional Court (GFCC) see Engst (2021).

85 Ernst *et al.* (2020), p. 342.

86 As Kelemen affirms, several terms are used to refer to it: *voto particular* in Spain, *Minderheitsvotum* in Germany, *opinion individuelle* in the European Court of Human Rights, *votum separatum* in Polish civil procedure, *voto di scissure* in Italy and *voto de vencido* in Portugal. Kelemen (2018), p. 6.
In Argentina they are called *disidencia*, in Bolivia *voto disidente*, in Ecuador *voto salvado* and in Colombia *salvamento de voto.*
The Venice Commission recommended in 2018 that separate opinions should be considered only as an *ultima ratio* solution. It also proposed that "separate opinions should focus on explaining that the matter could be dealt with differently, perhaps, in a better way, but not that the solution chosen by the majority was of poor quality". Venice Commission. *Report on separate opinions of constitutional courts, adopted by the Venice Commission at its 117th Plenary Session*, Venice, 14-15 December 2018.
This kind of code of conduct or ethics would be consistent with the disallowance of explicit vote trading. In: Caminker (1999).

87 In this respect is essential to point out the difference between decision and opinion. The decision makes precedent, while the opinion "has no authority as a precedent beyond the point or points actually and necessarily decided" in Black (2018).

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

sified as "concurring"[88] and dissenting in a strict sense. The former indicates that the judge coincides with the decision but points out different reasons for reaching such a conclusion[89]. The second one means that the judge disagreed with the outcome and underlying grounds. In the research methodology proposal, we focus on the latter.

Courts' legitimacy relies on the consistency of its decisions (speaking in one voice)[90] based on the rule of law and the deliberation process to reach them. Therefore, dissent is a critical task in the constitutional commitment to democracy. "Dissenting opinions manifest and constitute the deliberative interaction among Justices"[91], and as Cappelletti notes, they "may be considered a sign of democracy and freedom, and a way of making the system of collegiality fruitful and lively"[92]. Dissenting opinions also serve as a mean to "improve the quality of judicial output by requiring majority judgments to confront the dissenting judgments' reasoning"[93]. This could mean that although a ruling is intended to represent the opinion of everyone, it may end up expressing the idea of no one fully[94]. That is why a Court can be seen as a paradox, the entity and its members at once[95], balancing individual goals and collective reputation.[96] Recent evidence in the United States indicates that "collegiality is less likely to be found on courts with large complements of judges, and on courts with chambers spread across more courthouses"[97], while "courts with fewer judges, and judges housed in fewer courthouses, are more likely to be collegial courts"[98].

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88 Concurring opinions can also be classified as "two cents" or "general" concurrence and "special concurrence". With the first type, the judge offers supplemental analysis. Nevertheless, she agreed with the majority's judgment and its reasoning. On the other hand, a special concurrence is written by a judge who disagrees with the underlying reason, although she agrees with the outcome. See: Friedman *et al.* (2020), p. 561.

89 Kelemen (2018), p. 5.

90 Kelsen believed that the rational interpretation of a statute could lead to several decisions "of equal value, though only one of them in the action of the law-applying organ (especially the court) becomes positive law. The fact that a judicial decision is based on a statute actually means only that it keeps inside the frame represented by the statute". In Kelsen (1967), p. 351.

91 Stack (1996).
As Henderson affirms: "Separate opinions not only show society that the process of decision making is legitimate, but also allow those who oppose a particular result to take comfort that the result may someday be reversed and written in a law that they would support". In Henderson (2007), p. 326.
The trend of publishing dissents might be due to the need for "transparency" as a means for constitutional courts' legitimacy. See Kelemen (2013).

92 Cappelletti (1962).

93 Rogers (2022), p. 300.

94 Alder (2000), p. 242.
A usual dissenting court can lead to congressional scrutiny and congressional overruling of the rule or principle announced in the decision. Epstein *et al.* (2013), p. 256.

95 Brennan (1986), p. 432.

96 Garoupa and Santos (2022), p. 5. On the other hand, Dunoff and Pollack (2022), p. 340. Found that "the presence of dissents has little systematic impact on legitimacy" of courts.

97 Nash (2022), p. 1562.

98 Nash (2022), p. 1562.

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

Some theories have been portrayed to explain the reasons judges' dissent[99]. In the work, we assume the economic model.[100] It is true that "dissents create extra work for everyone"[101], so judges balance the costs and benefits of acting accordingly. The only reason why a judge will dissent is the anticipation of a benefit that offsets the cost[102]. Incentives for issuing a dissent or refraining from it include heterogeneity among judges[103], size and ideological composition of the court[104], the likelihood that the dissent will influence the future course of the law[105], the degree to which the court adheres to precedent[106], the possibility of affecting the job satisfaction, the closeness among judges[107], and the importance of the case[108]. These and

99 See Garoupa and Santos (2022), pp. 5-12. In the paper, they relate three positive theories: cost-benefit analysis, political economy accounts, and explanations based on legal culture.
Alternatively, Mistry (2023) introduced the "Performative Theory of Judicial Dissent" in his recent paper, challenging the conventional approach to minority opinions, which can be grouped into three categories: dissents "as transparency", "as opposition", and "as conscience".

100 For a comprehensive exposition of models that explain judicial behavior and dissenting, see: Epstein and Weinshall (2021), p. 2.

101 Friedman *et al.* (2020), p. 640.
As Garoupa and Santos Botelho assert: "it demands additional effort from the majority to acknowledge and respond to the dissenter's arguments (either in terms of revising the original opinion to accommodate the dissenter's viewpoint or in replying to her objections). Garoupa and Santos (2022), p. 6.
Conversely, "The effort involved in these revisions, and resentment at criticism by the dissenting judge, may impose a collegiality cost on him by making him less well liked by his colleagues, which may make it harder for him to persuade other judges to join his majority opinions in future cases". Epstein *et al.* (2013), p. 261.

102 Epstein *et al.* (2013), p. 256.

103 "The greater the difference among judges along such dimensions as education, religion, race, gender, social class, and career before judging- the less likely the judges are to think alike, to understand and trust each other, to have similar priors, and in short to be predisposed to agree". In Epstein *et al.* (2013), p. 257.
Bricker's results suggest that "higher rates of dissent occur among those judges who have past experience in both the judicial and academic worlds". In Bricker (2017).

104 "Obviously a key factor influencing the likelihood of a dissent is differences among panel members in intensity of preference for a particular outcome, as proxied by the ideological distance between the dissenting judge and his majority colleagues with respect to the particular case -the greater the distance, the likelier a dissent". Epstein *et al.* (2013), p. 273.
[…] Although ideology influence judicial decisions at all levels, "it is not of uniform […] it diminishes as one moves down the judicial hierarchy". Epstein *et al.* (2013), p. 385.

105 Research has shown that the influence of the dissenting opinion would be the main benefit of dissenting. See Epstein *et al.* (2013), p. 256.

106 Deciding a case on the basis of precedent reduces the effort cost of judicial decision-making and also reduces caseload by making the law more predictable. In Epstein *et al.* (2013), p. 263.

107 Hazelton and Hinkle (2017).

108 Dissenting in important cases is costlier because it requires long and complex reasoned dissents. On the other hand, dissenting in less critical issues has a lower cost because the judge will file something like a mere template. Judges would also perceive higher individual benefits from dissenting in important cases than in less critical ones (The first kind has external visibility while the second has a shorter scope on the law or legal and political debates). See Garoupa and Santos (2022), p. 11.
Evidence found in Constitutional Courts in Europe supports this claim: "legal complexity—specifically the number of issues to be decided within a given case—also contributes to a higher likelihood of dissent". In Bricker (2017), p. 187.
Although results in Argentina's Supreme Court showed that more important cases had a lower likelihood of carrying a dissenting opinion, when analyzing the category of "reasoned dissents", they found that majority decisions carrying dissents tend to be longer and those were allocated in important cases. In Muro *et al.* (2020).

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

more circumstances cause what some scholars have called "dissent aversion"[109]. This concept describes the situation of a judge who does not dissent even when there' is a disagreement with the majority opinion[110].

One of the most documented incentives impacting the dissent propensity is leisure, which directly correlates with the workload. The effort cost of writing a dissent will tend to be more significant as the court's caseload grows heavier[111]. Baum refers to one way to measure it "by the array of extracurricular activities in which they engage during court terms, activities that range from law school speeches to duck-hunting expeditions"[112].

Another circumstance that has deserved attention from scholars is ego. Personal recognition is a motivating force behind the trend of dissenting opinions[113], to the extent that some judges exhibit a pathological and narcissistic attraction to dissent in order to distinguish themselves from their colleagues[114]. This celebrity status surpasses the appearance of "just applying the law"[115].

Scholars have upheld that minority opinions "carry the seeds of wisdom for the future"[116]. In contrast, based on empirical input, others contend that there is "little evidence that today's dissents shape the basis for future majority rulings,"[117] at least in the context of International Courts[118].

5. Characterizing Constitutional decision-making Courts of South America

The subcontinent has a range of constitutional courts, including autonomous ones (found in 50 per cent of the countries) and supreme courts or courts of justice (found in Argentina,

109 A species of effort aversion. Epstein *et al.* (2013), p. 256.

110 Epstein *et al.* (2011), p. 132.

111 Epstein *et al.* (2013), p. 261.
Leisure and norms of mutual deference among judges can partially explain the "agenda control model". See Bonneau *et al.* (2007), p. 903.

112 Baum (2006), p. 13.

113 Henderson (2007), p. 323.

114 Garoupa and Santos (2022), p. 5.

115 Epstein *et al.* (2013), p. 385.

116 Satvinder (2022), p. 142.

117 Dunoff and Pollack (2022), p. 340.

118 Recent research conducted by Maučec and Dothan (2022) insinuates that judges at the International Criminal Court (ICC) with criminal law backgrounds and prior experience as professional judges are more likely to dissent compared to their peers with expertise in international public law, diplomacy, and academia who tend to be more willing to discuss and negotiate. These findings are consistent with the "social diversity" approach mentioned earlier.

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

Brazil, Uruguay, Paraguay, and Venezuela) with assigned judicial review powers. Paraguay and Venezuela both establish independent chambers for internal constitutional matters. The Supreme Federal Court of Brazil, established in 1890, follows Argentina in seniority from a naming perspective. In some cases, courts were established simultaneously with the current constitution, such as in Argentina, Colombia, Ecuador, Venezuela, and Peru. In Brazil, Bolivia, Chile, Paraguay, and Uruguay, however, the institution was created prior to the promulgation of the last constitution. Some courts took time to start operating after their regulatory creation, with the Supreme Court of Justice of the Argentine Nation taking ten years, the Plurinational Court of Bolivia five years, and the Constitutional Court of Peru three years.

5.1 Structure

The number of judges in the Constitutional Courts in South America varies from three to eleven, with odd formulas of homogeneous design, except for Chile, which formed its Constitutional Court with ten ministers. Paraguay has the fewest members, with three linked to the Constitutional Chamber of the Supreme Court of Justice. Argentina and Uruguay have five judges in the Supreme Court of Justice of the Nation and the Supreme Court of Justice, respectively, while Brazil's Federal Supreme Court has eleven judges, the most significant number of officials among all countries. Venezuela, Peru, and Bolivia have seven magistrates in their respective Constitutional Courts, while Ecuador and Colombia have nine judges each. In some countries like Brazil, Chile, Ecuador, Paraguay, Peru, and Uruguay the Constitution establishes the number of judges, while in others, this determination is delegated to the legislator that is the case for Argentina, Bolivia, Colombia, and Venezuela.

The 'term in office' and 'minimum age' requirements to access and retire from the Court should be examined together for a more comprehensive description of the Courts. Only Brazil, Argentina, and Paraguay contemplate life-long terms for judges, but with differential features: while Brazil establishes it for all judges up to the age of 70, Argentina does so for members of the closing court up to 75, with the possibility of extension for five-year or indefinite periods through new appointments. Meanwhile, Paraguay distributes the term into two phases, the first of five years and the second, after confirmation for two subsequent periods, until the forced retirement age of 75. This unique trait of the Paraguayan legal system may allow more significant interference by the executive in the decisions of ministers who aspire to the remaining confirmations to serve for life, which is inappropriate as a counterweight to be exercised by the judicial power. The longest non-life-long term of office is provided in Venezuela (12), followed by Uruguay (10), Ecuador, and Chile (9). The shortest is reported in Peru (5) and Bolivia (6).

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

Some legal systems in South America directly regulate the minimum age required to enter the Court, such as Argentina, Brazil, Bolivia, Paraguay, Peru, and Uruguay. The earliest age requirement in the region is in Argentina, which sets the minimum age at 30, while the highest requirement is found in Peru, which sets the minimum age at 45. In other cases, an indirect regulation is preferred by requiring completion of a minimum period of office, with 15 years being a standard term for Chile, Venezuela, and Colombia. It should be noted that some countries also have minimum requirements for practicing the legal profession.

Brazil's formula for entry into the Court is unique, as it is the only country with a maximum age limit for entry, which is set at 65 years old. Some countries do not establish a limit for forced retirement in their Constitutions, such as Bolivia, Ecuador, Peru, Venezuela, and Colombia. The ages for forced retirement range between 70 years old in the cases of Colombia, which is stablished by a statutory regulation, Brazil, and Uruguay, and 75 years old in Chile, Paraguay, and Argentina, with the exception made above for Paraguay.

South America's Constitutional Courts do not require a specific number of vacancies to be filled by professionals of the judicial branch. However, some countries give preference to those who have held positions in specific sectors. In Peru, being a Superior Court magistrate or prosecutor for ten years is enough for nomination, while lawyers or university professors require a 15-year career. Uruguay has a similar system where lawyers require ten years of experience compared to the eight years required for those who have served in the judiciary in the Public Prosecutor's Office or Public Ministry. This indicates that it may be easier for those with a specific career path to access the Court.

In all countries, with the exception of Brazil, minimum experience is required to hold these judicial positions: the lower limit is eight years for Argentina, Bolivia, and Uruguay in the positions referred to above, while the maximum is 15 for Colombia, Chile, Peru, and Venezuela. Ecuador and Paraguay, for their part, request ten. Besides, most countries require birth or natural nationality to access the magistracy except Argentina, Bolivia, Chile, and Ecuador. Nonetheless, Argentina does require a minimum exercise of citizenship of six years. Another aspect that allows comparing Constitutional Courts in South America is the re-election of judges in Colombia, Chile, and Venezuela, however, thisis not possible in Brazil because the position is for life,. It is viable but not immediately in Ecuador, Bolivia, Peru, and Uruguay (five years after termination). In Paraguay, it is possible through confirmation to hold the position for life, and while Argentina provides a commission-for-life model, re-election is possible once the age of forced retirement is exceeded.

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

5.2 Powers: Scope and limits

Argentina follows a diffuse constitutionality model that is typical of the North American system. Accessing to the Supreme Court is possible through party allegations in a specific case or by a merely declaratory action of a constitutional nature (Art. 322 CPCCN) (since Gomer case).119 In some decisions, the possibility of material judicial review has been admitted (Provincia de Entre Ríos c/ Estado Nacional and Camuzzi Gas del Sur c/ Provincia de Río Negro)120. Finally, there is the so-called extraordinary federal appeal against judgments of the superior courts (Law 48), which guarantees constitutional supremacy (Article 31).

In Bolivia, there are both abstract and concrete controls, and the Court can be accessed directly through an action filed by qualified subjects or by referral from judges, administrative authorities, or a party's request[121], while in Brazil the type of control is mixed. In abstract terms, there are direct actions of unconstitutionality (ADIs), declaratory actions of constitutionality (ADCs), direct actions of unconstitutionality by omission (ADO - Article 103.2), and the arguments of breach of fundamental precepts (ADPFs) requiring the intervention of the Attorney General of the Republic to defend the norm. Only qualified subjects can file ADIs and ADCs and regarding specific control, the Court can be accessed by an extraordinary appeal (Article 102.3).

Colombia also enjoys a mixed system to access the Constitutional Court since there is the public action of unconstitutionality and the review of sentences for actions to enforce constitutional rights. For abstract issues, legal standing in the cause to sue falls to any citizen (Art. 242.1), while for concrete ones, it is determined by the automatic submission of enforceable protection sentences. Chile also provides the possibility to access the Court both for abstract and concrete matters, depending on the type of action: through qualified subjects or directly in any action of unconstitutionality regarding rules declared inapplicable (Art. 93.7), by any person who is a party to trial or affected in cases of agreed orders issued by the Supreme Court, Courts of Appeals and Qualifying Court of Elections (Art. 93.2) and at the request of a party or by referral of the judge of the case in the event of inapplicability (Art. 93.6). Ecuador implements abstract (Art. 436) and concrete (Art. 428) controls, which means the access is direct for abstract through protection and public actions of unconstitutionality and for concrete through referral by the judge, ex officio, or at the request of a party (Art. 428). Legal standing in the cause to sue will fall to any citizen, individually or collectively (Art. 437 and 439). In Paraguay, both occur, the abstract regulated by Art. 550 *et seq.* of the Civil Procedure Code and the concrete at the request of a party through an exception of unconsti-

119 Perugini (2010).

120 Berra (2010).

121 Law 254/12 - Constitutional Procedural Code.

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

tutionality (Art. 538 *et seq.* Civil Procedure Code). In both modalities, the citizen has direct access to the Court (Art. 260).

In the case of Peru, the control is equally mixed Since the access to the Court is achieved abstractly through two actions: unconstitutionality and popular. In the first action, legal standing falls only to qualified subjects, while in the popular action, it falls to any person. (Art. 84 CPC 28237). Uruguay also contemplates both models, by way of an action before the Supreme Court of Justice or exception in opposition to judges' judicial and ex officio procedures. In this case, legal standing falls to anyone who considers a direct, legitimate, and personal interest injured, as well as, ex officio by judges. (Art. 258). Lastly, in Venezuela, both procedures are available: either by popular action of unconstitutionality (Art. 32 LOTSJ) or by consultation on diffuse control by Courts or chambers of the Supreme Court. Legal standing is broad in abstract control since it is available to anyone regardless of their interest or capacity.

Regarding the normative population, on which the abstract judicial review can fall, it can be affirmed that the broadest ones extend to regulations and administrative acts in Argentina, non-judicial ordinances and resolutions in Bolivia, and regulatory acts of a general nature issued by state authorities in the case of Ecuador. In Peru, regulations, administrative rules, and general resolutions that violate the Constitution or the Law are reviewed under popular action. In Colombia, Chile, and Uruguay, the powers to control national rules are maintained.

6. Conclusion

In this paper, we provided and theoretically described some essential characteristics required for assessing the reasoning behind the decisions made by Constitutional Courts in South America from an empirical perspective assuming the economic model approach and with a particular emphasis on judicial behavior, especially in dissents. Collegial decisions in courts can lead to unique challenges and dynamics that individual judges do not face when making decisions alone. Some of these challenges include group thinking, where judges may be influenced by the opinions of their colleagues, propagating and amplifying cognitive errors, as well as, panel effects, where the social identity and diversity of peer judges will influence the decisions of others. Additionally, leading judges may take on the role of case managers, guiding the deliberations and discussions among the group in "hot" and ex-post model of Courts that prevails in South America, influencing the outcome through the framing effect. Further, judges are not purely rational actors and are subject to emotions, ego, and self-interest. They also consider the potential consequences of their opinions on other branches of power and their own audiences, such as the general public and the legal community.

ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

The Condorcet Jury Theorem of collective wisdom is based on the seriatim decision-making model. In contrast, Constitutional Courts in South America use the majority decision model with different types of votes. Focusing on divided cases is grounded on the assumption that dissenting opinions suggest that (a) the outcome was at least at some point controversial, (b) there were good reasons to step aside from the majority opinion, (c) and the dissenting judges made an effort to highlight the flaws in the majority's decision. Therefore, they are fertile ground to analyze the reasoning of courts. Even so, many circumstances, such as leisure and caseload, can make judges less likely to dissent.

The paper also details some features of the institutional structure of constitutional decision-making courts in South America based on comparative law methods according to several variables such as the number of justices, term of service, age requirements, ways to access the tribunals, and competencies.

However, the scope of our effort is limited, and additional research is required to fully evaluate the decisions made by those tribunals. This will enable a more comprehensive and accurate description of how judges make decisions.

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ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

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ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

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ISSN 0718-0195 · Vol. 21 · Núm. 1 · 2023 · pp. 142-168 · DOI: 10.4067/S0718-52002023000100142

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