CHAPTER V

HOW TO READ A JUDGMENT[1]

1. Knowing How to Read

IN the legal field, knowing how to read is a version of MICHELANGELO's *Sapere vedere*. When we read, there are certain classic, widely acknowledged circumstances in which we must take particular care and others in which we need not to the same degree.

Before discussing how to read a judgment - a task that is more complex than it seems - we will start by taking a look at other common situations in which, when reading, we need to pay particular attention.

1.1. Knowing How to Read the Beginning

We all think we are capable of reading a legal text well, but, all too often, this is not the case. Therefore, before dealing with the reading of a legal judgment, it is useful to point out some simple reading rules, which, because of their very simplicity, are commonly forgotten. Essentially, we must discern what the crux of what we are reading is, and, in light of those focal points, understand what mistakes we frequently make so as to prevent making them again in the future.

Where to find those focal points is not at all predetermined, and varies from one text to another: They can be at the end of a text, at the beginning,

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[1] NIETO, ALEJANDRO, *El arbitrio judicial*, Barcelona, Ariel, 2000, is a fundamental work that also refers to a large bibliography. For our part, we have reflected on the method of creation oriented towards legal writing, in *El método en derecho. Aprender, enseñar, escribir, crear, hacer*, Madrid, Civitas, 1988 and 4th reprint 2001. He has kindly allowed me to add some notes to his recent *Los límites del conocimiento jurídico*, Madrid, Trotta, 2003 (in preparation), which I also suggest for further reading on this Chapter.

or in the middle; they can be emphasized or downplayed; they can be addressed along with themes that are important or of little interest.

Of course, if the goal is to be didactic, the author of a legal text should aim to highlight such points. Towards this end, the drafting committee of the decree-law 19.549/72 put the most important part of the decree at its beginning, at the behest of the then Attorney of the Treasury of the Argentine Republic, Dr. ADALBERTO COZZI[2]. It is usually forgotten - unfairly, at that - that the major contribution to the final text of the decree was from legal practitioners, like Dr. COZZI, and not from legal theorists. Although this makes for a less elegant redaction, it undoubtedly helps with the comprehension of the decree-law: Its first sections are a summary of the undisputed and generally accepted principles of Argentine public law[3].

1.2. Knowing How to Read the End

One of the most frequent mistakes I make when reading is that, without realizing it, I stop reading one or two lines before the end of a text, whether it be a contract, a legal act, a law, or my country's Constitution. As a self-control mechanism, I now start by reading at the end in order to be sure that I will not miss anything.

1.3. The Illegible Small Print

Another common error is not reading the "small print" very carefully. The term "small print" likely comes from the fact that provisions of preprinted contracts that are *adverse* to the purchaser are so small that they cannot be read. Similarly, when manufacturers are legally obliged to provide descriptions of their products, those descriptions are usually written in the smallest size possible. (For example, the paper inserts enclosed with medicines that describe their indications and side-effects are often, if not always, illegible.) As the years go by and our eyesight fades, it becomes increasingly difficult to read all this small print without the help of a magnifying glass. Yet young people, who can read it without difficulty, are not interested in doing so; they will eventually realize - perhaps after continually being mistaken - that they have to read the small print, and that they will have to do so with even more care than with the normal size.

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[2] A similar solution was adopted in 2001 by Perú, Law 27.444, Article IV.

[3] And not, as some contend, of public law that has come out of nowhere.

In fact, because of all this, consumer protection rules usually demand a minimum print size, and warnings on harmful products, such as tobacco, are usually written in a size determined by laws or regulations.

1.4. The Hidden Print

"Small print" can also be considered as such not because of its physical size, but rather because of the difficulty in finding it. An old lawyerly trick is to write boring, useless, repetitive things that have no immediate or apparent practical sense, and which almost *invite* being skipped over, and to incorporate in between provisions adverse to the interests of the opposing party.

1.5. Knowing How to Read What is Evident

A sophisticated way of hiding something is to put it in an obvious place. That might work or not, but it is necessary to be aware of it. Indeed, things can sometimes be so evident that we cannot see them[4].

1.6. Knowing How to Read What has Not Been Written

This is the real nightmare: to "read between the lines," to imagine what it is that has not been said, and not to make too many mistakes.

When we speak, for example, many misunderstandings stem from saying something one way and being understood another way. The usual sincere, but weak, explanation for such errors is "but I thought you meant..." and they result in psychologists earning their living by attempting to interpret what a person "really" *wanted* to say and not what he in fact said.

In our legal and administrative procedures, while everything is carried out in writing, it is nonetheless usual to speak to public officers over the course of the process. However, there is not usually a written record of all such discussions. Any person not involved in the proceedings who, at a later date, reads the verdict, the act or the judgment, may therefore be at a disadvantage in the interpretation of the documents, for not knowing what has been said between the previous officials and the other part. For this

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[4] The technique, BORGES said, was thought up by EDGAR ALLAN POE in *The Stolen Letter*. POE's readers wonder at BORGE's reading of that novel. If you do not find it in POE, just trust BORGES' idea.

reason, it has been said that our proceedings are neither spoken nor written, but rather "talked about."[5] CARRIÓ says that they are, to a certain extent, proceedings carried out during conversations. That is a criticism, but also a statement of fact.

2. Putting Knowing How to Read into Practice…

2.1. … Upon Reading a Law

When reading a law, we must pay attention to the political, social and economic context in which the law developed, as well as the period during which it evolved. We need to search for the real reasons behind the law, and not content ourselves with the apparent reasons of the day. Similarly, once we have started to read a law, we must look for the points of the text that resolve concrete questions, instead of getting hung up in those sections that are merely conceptual or definitional. In fact, it is out of the question to pay excessive attention to such sections, because if most of the Articles of a law specifically articulate a legal regime, those Articles will, in turn, displace any broad concepts and definitions. As an example, see Confidentiality Law 24.766: The breadth of its first Article is entirely limited by later Articles that refer to extremely specific situations within the national pharmaceutical industry.

2.2. … Upon Reading a Contract: See the Facts

A contract must be analyzed looking not only at its text, but also at its *facts*. By facts, we mean the attendant circumstances surrounding a contract before it entered into force and during its execution. The relationship between the text and the facts requires that we study the behavior of the parties in regard to their contract - to the full extent the law permits - to understand the true content of a contract.

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[5] Refer to CARRIÓ, ALEJANDRO et al., *En defensa de los derechos civiles*, Buenos Aires, Abeledo-Perrot, 2000, p. 79, note 5. In respect to what was said at the beginning of the preceding paragraph of our text, see, as a specific case, KILLMEATE, ATILIO, Los discapacitados motrices y el transporte público, *in*: CARRIÓ et al., *op. cit.*, pp. 78, 79, 80 (sixth paragraph, second phrase).

2.3. … Upon Reading Books

The products of legal academia, such as books and law review articles, are helpful in understanding and interpreting the law, but cannot serve as binding authority in a specific case. The real weight of these works is, of course, not because of who authored them, but because of the quality of their arguments.

We, as lawyers, know this. However, for the purposes of a rhetorical style, we often leverage such works to function as a primary authority, even though it is a fallacy of legal reasoning to do so. Reasoning improperly in this way is not so bad in and of itself; what is bad, however, is believing that reasoning in such a way is actually correct.

3. The Legal Decision

There is no difference between the decision-making process of a magistrate in a trial, the lawyer in a case, or a civil servant in a given proceeding. All bureaucratic organizations, big or small, function similarly all over the world.

There is no difference, either, between the worst mistake a lawyer could make with his client, or a physician with his patient: that is, to underestimate the capacity of the client or patient to cut to the heart of his own case and understand the case's "reality." In this way, everything is always reduced to the same issue: properly perceiving that reality in order to determine how to categorize it theoretically.

The system of law or the world of medicine serve no purpose if he who applies those schemas does not succeed in initially identifying that fundamental reality. That is the first, and perhaps the only, *diagnosis*[6] to make. As our capacity to perceive reality is limited and we are always confronted with unlimited data (LEIBNIZ), such a diagnosis is not bestowed with the absolute character of *Truth*. We, human beings, do not have that gift, only God does. God knows the Truth of the facts, we *diagnose* (conjecture) based on what the "truth" seems to be for us within what we can limitedly see that happened in a case. We do not *know* now, and will never know such a perfect Truth, although we must decide regardless and, necessarily, we do so.

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[6] They do not state the truth: They decide upon hypothesis or supposition, always temporary, always exposed to refutation.

3.1. The Formation of the Initial Hypothesis

In the first decision-making stage, factors come to bear that sometimes are not later mentioned in the judgment or supported by forensic evidence, and, as such, are known or surmised only by those closely involved at this point of the proceedings. For those not involved, or only very indirectly involved, this stage is the most troublesome, because they must adduce or even guess what those factors were by asking the parties, listening to the court, or by reading the newspapers' coverage of initial debates. However, external parties may also adduce those factors via their *own direct reading of reality*, trying to piece together what, at a certain moment, could have been the very process used internally by the court.

Of course, there are a few generous magistrates who let factors important to them be known, which lawyers might miss for their lack of legal grounding. For example, LORD DENNING, in the first chapter of his book, *The Discipline of Law*[7], specified the best way to stand and speak in front of a court. In a similar vein, Judge JACKSON, who ordered the division of Microsoft, asserted publicly that the way BILL GATES testified in a video influenced his decision[8]. More generally, in discrimination cases, "perceptions" may be represented by the percentages by which judges pronounce a sentence in favor of or against a certain minority[9], or by which lawyers accept certain cases.

3.2. The Grounding Process

The common perception is that judges make decisions and then ask assistants to write them, whether the assistants prepare first drafts that the

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[7] London, Butterworths, 1979. Absolutely no lawyer should ignore the deep wisdom contained in LORD DENNING's original words, to which I would further suggest going. Reading it and really practising it is a must for any attorney worth his salt. However, do not expect to find there any abstruse reasoning: they are nothing more and nothing less than very simple and very practical advice, given by a most experienced judge. Do pay attention to it.

[8] That resulted in a useful and colorful argument, but perhaps not a decisive one, for the annulment of his decision.

[9] We refer to our *Tratado de derecho administrativo*, vol. 1, *Parte general*, Buenos Aires, FDA, reprint 2000, 5th ed., chapter VIII, § 15, "Procesamiento estadístico."

judges later correct, or prepare alternative drafts between which the magistrates choose the best one.

While it is probable that more than once this has been the case, those alternatives do not necessarily constitute a rule. It is true, however, that there have been extreme cases where tribunals, overloaded with work, have had to resort to heroic measures. For example, a provincial criminal judge of first instance told us twenty-five years ago that his court was receiving eight thousand cases yearly. With such a docket, his alternatives were to resign, to work until he got sick and died, or to delegate his workload. His decision: to choose for himself those cases dealing with drug trafficking, the worst homicides, etc., and for the rest, to let the employees of his chambers carry out the best justice they possibly could. (Similar stories come out of some law firms and are also normal in any administration, public or private.)

In the end, when this judge was promoted to a higher court, the situation he had left behind remained the same after he left. No one has been able to change that state of affairs. That judge in his new capabilities continued and still continues to be a serious, honest, responsible, and capable magistrate answering rationally the problem facing him - and facing any other person in his position - that was not otherwise possible to solve using classical means. He had the explicit power to send people to prison, and the implied or secret power to decide that someone else could do that same job. However, he did not have the power to change the relationship between the number of man-hours he had available as a judge and the amount of cases to be decided in his court.

Similarly, in the Supreme Court of Justice of Argentina, there are almost two hundred legal clerks and assistant clerks, whose hierarchical and professional levels are equivalent to a judge of first instance or an appellate judge. Called the "young Court,"[10] its number and professional excellence clearly show that the clerks' real functions go beyond research[11]. Here we suggest that the reader "fill in the blanks" as to what those functions are[12].

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[10] For example CARRIÓ, ALEJANDRO, *La Corte Suprema y su independencia*, Buenos Aires, Abeledo-Perrot, 1996, p. 12.

[11] The situation is repeated wherever we look, with different forms of resolving the same kind of problem. We have seen senior governors signing dossiers without reading them, sometimes without even looking at them. Whatever their assistant told them was enough for them. In one case, we were present at the signing of an executive order, carried out under the same conditions: Neither the minister nor the president read it. We were also told about certain presidents who had somebody

3.3. The Explanation of the Decision

Usually, what is written in a judgment does not necessarily reflect all that the deciding court took into consideration. For one thing, the more experience the magistrate has, the more basic the grounds[13] he uses to decide cases, as he has learned the value of silence and the perils of verbosity[14]. Of course, this is an empirical criterion for which no written rule exists, but which is no less real and no less old[15].

Lawyers, to the contrary, may err on the side of verbosity, since their aim is to convince the court. For that, they may feel that they need to argue successfully a case for their client in many different concurring ways.

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sign their signatures on their behalf, and about some law firms where assistants or clerks sign as lawyers. There are also cases of computer-digitized signatures. Further details in *Tratado de derecho administrativo*, vol. 2, *La defensa del usuario y del administrado*, Buenos Aires, FDA, 2000, 4th ed., chapter XIV. Sometimes, but not always, signing on behalf of another person is equivalent to deciding on behalf of that other person. This phenomenon is known as *délégation de signature*.

[12] Even academic *élites* acknowledge this fact within the mysteries and secrets of the Supreme Court: "There was a lot of delegating from the judges to the clerks. Let us not fool ourselves, there is still a lot of delegating. I offend no one by speaking the truth." VANOSSI, JORGE REINALDO, La extensión jurisprudencial del control de constitucionalidad por obra de la Corte de la Argentina (Balance de una década de 'certiorari' criollo), separata-preview of *Anales de la Academia Nacional de Derecho y Ciencias Sociales de Buenos Aires* (year XLV, 2nd period, n° 38), Buenos Aires, La Ley, 2000, p. 31.

[13] At the same time, it is clear that, at the beginning, the judge must not decide, just discern what is necessary. See SUNSTEIN, CASS, *One Case at a Time. Judicial Minimalism on the Supreme Court*, Cambridge and London, Harvard University Press, 1999.

[14] Which is not so if it is clear that a wide range of arguments leads to the same conclusion. It remains, as is the case in law, the sound uncertainty of which was the convincing argument instead of the false certainty of the formal ground chosen by the court. That is the reason why the writings of CICERO survive and not the grounds of the tribunal. The same happens in legal decisions written on the back of a judicial brief (*endorsed on the bill*). MARTINEZ-TORRÓN, JAVIER, *Derecho anglonorteamericano y derecho canónico. Las raíces canónicas de la "common law"*, Madrid, Civitas, 1991, p. 78.

[15] See NIETO, *op. cit.*, pp. 142-153. In medicine, there are things spoken by doctors that are not told to patients, known as the "secrets of the operating room".

Lawyers try to argue and prove their theses from the different angles that the judge could potentially use upon rendering a decision[16].

However, the court, when engaged in written proceedings, sometimes finds a solution by reading only the facts and the *petitum* of the parties' submissions[17] (which is, in fact, the way we should read decisions the first time through.) In this sense, the *trait d'union* - the legal link of arguments - can be provided as much by the judge as by the parties. While providing the legal link is easy, it is difficult to decide what the reality of the case is to which that law must be applied.

In terms of determining that reality, the magistrate, in his judgment, only has to think about the arguments he *must*[18] show so that he satisfies the parties and that a court of appeals does not overturn his decision for want of sufficient argumentation. For this reason, the "best courts," speaking of those whose judgments are not normally appealed with success, frequently elaborate less on their argumentation. The fundamental point, then, becomes the facts or elements of the case that the magistrate considers decisive or determinative: These, he should always describe in his judgment[19], although that does not always happen.

Because of this, it frequently happens that the arguments that really militate in favor of the decision adopted are not made explicit in the judgment. Indeed, in order to streamline the judgment, these arguments wind up being deleted by the court, even though they had initially been included or were part of the real arguments within the court. This goes to show, it seems, that the paper draft is still one of the best aides for organizing our thoughts and imagining those of others in a similar predicament[20].

Other arguments that obviously cannot be written do not need to be deleted, but judges will keep them in mind when rendering their decision, as

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[16] In oral hearings at American courts, judges ask lawyers argumentative questions.

[17] For this reason, we should make courtesy visits and 'chat', if allowed to, with extreme care and circumspection. This is really an art form in some countries such as mine. In others it is forbidden, yet exceptionally management does try to draw a line now and then.

[18] Judge CHARLES BREITEL put forth the fewest arguments and, with those, worked very carefully. Yet his brief judgments were not for a "quick read." The same went for LORD DENNING, *The Discipline of Law*, *op. cit.*, p. 7.

[19] But all are not always there. See the preceding pages.

[20] As we have explained in *El método en derecho. Aprender, enseñar, escribir, crear, hacer*, *op. cit.*

in the examples of LORD DENNING and JACKSON, mentioned above. These are both very respectable and respected magistrates, who took into consideration the attitude and composure of the parties and lawyers before them. Applying LORD DENNING and JACKSON in a different context, one can uncover the real explanation behind *Marbury v. Madison*[21].

3.4. The Legal Policy behind the Decision and its Explanation

Courts adopt various legal policies to address similar problems[22]. As an example, when a court decides to annul an act of the administration (due to some reason that caused it to find the act illegitimate in the first place) it has two different, seemingly opposing ways to go about doing so. One way is for the court to base its decision on some "vice," if you will, of the administration that, when acted upon, does not draw the attention of the general public[23]. Another way is for the court to leverage the multiplicity of the breaches of the legal order by the administration[24]. The first method seems to suggest a court that is more secure, in that it can annul an act for a seemingly small reason without causing political friction. The second method seems to suggest a court that feels it must fully demonstrate to society that there was no other alternative than to annul the administration's decision, that it was imperfect to the point of no salvation.

There are also those cases in which the court does not consider that it has to put an end to an act, but neither does it want to appear as agreeing politically with a decision of the Executive or any other branch. Under such circumstances, the court can act in several ways. It can consider the

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[21] As MILLER, JONATHAN et al., explain in *Constitución y poder político. Jurisprudencia de la Corte Suprema y técnicas para su interpretación*, Buenos Aires, Astrea, 1987.

[22] There is also a temporary policy regarding when to decide certain things, as shown by, among others, the French *Conseil d'Etat*. See *Problema del control de la administración pública en América Latina*, Madrid, Civitas, 1982, p. 57; LONG, M. / WEIL, P. / BRAIBANT, G., *Les grands arrêts de la jurisprudence administrative*, Paris, 1978, 7th ed., pp. 221-222.

[23] Also, the Greek *Conseil d'Etat*: PETROULIAS, DEMOSTHENE, Note sur la motivation des actes administratif en droit hellénique, *in*: DUPUIS, GEORGES (dir.), *Sur la forme et la procédure de l'acte administratif*, Paris, Economica, 1979, pp. 31 et seq., p. 40, note 1.

[24] This is the Argentine court system, as explained in the *Tratado de derecho administrativo*, vol. 3, *El acto administrativo*, Buenos Aires, FDA, 2000, 5th ed., chapter IX, § 4.7, "Efecto sinérgico de los vicios", p. 15.

issue non-justiciable[25] and not even start considering the action; it can declare itself incompetent; it can determine that administrative remedies were not yet exhausted; or it may use any other procedural excuses or arguments that would disallow it from entering into the substance of a question. In this way, the court can communicate that it may not find a particular action invalid, but that it does not want to pay the political cost of saying so expressly. It prefers therefore to keep out of the debate by using the many procedural subterfuges that exist to that end from time immemorial.

3.5. Reading a Judgment

The first thing to do when reading a judgment is to surmise what the arguments might have been that did not find their way into its text; in other words, what the "first stage" arguments were. Towards this end, it is important to be attentive to what is going on in the real world, to follow the news, to pay attention to the journalists' coverage of the internal deliberations of the court, etc. It is equally important not to get caught up in deep-thought reading the grounds of a judgment, to the extent that the "musings" of the litigants should not surpass the court's key "decision-making words"[26] in importance.

In order to recreate in our minds what the scenario could have been at that first stage, we must proceed in reverse. We need to isolate not *all* of the judgment, but rather only *what the problem before the court was, and how the judgment decided it*, and from there try to surmise what could have been the pattern of reasoning that might have led the court through the arguments of the first stage. We are not looking at what is written in the judgment, which could be incomplete or not entirely reliable. (Or could even be inexact, in the sense that often the grounds that are given are not the real ones that the decision was based on.)[27] Instead, we try to recreate in our minds, as closely as possible, the reality in which the judgment was handed down. As we pointed out before, sometimes the arguments

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[25] The "false political matters" recalled by MAIRAL, HÉCTOR A., *Control judicial de la administración pública*, vol. I, Buenos Aires, Depalma, 1984, § 305, pp. 511-513.

[26] According to the wise words of the Royal Judicial Notice of 1768, *infra*, § 6.1.

[27] They are the *ex post* motivations explained by NIETO.

contained in the submissions of the successful party[28] remain, but not the judicial decision that supported them. One can work all the same, from hypothesis to hypothesis, with a certain degree of proximity to the real thing, not the written one.

So, the arguments delineated in a judgment should encourage us to think about the other reasonings not present there. We should not take the grounds of the judgment as "authority" frozen in time. It is the decision that counts, not its wording or argument. Much less its words, no matter how much we may use them for eloquence, emphasis, grace or wisdom.

4. The Difficulty in Finding the Object of the Judgment (What the Judge Decides, What he Does)

Some judgments are so lengthy that we get really lost in them. Others are so bare-boned that we might skip over them or ignore them for being so concise, as if they were less important for being shorter. However, we must take precautions against both of these possible attitudes before judgments that are too long or too short. We can find two-line judgments that are fundamental, and hundred-page judgments of little interest.

The importance of a judgment does not depend on its breadth or its theoretical attraction, but rather on what it *decides*. Long legal musings, an abundance of quotations, or arduous discussions offered by individual magistrates or judicial panels do not make a judgment important. What the judgment *decides* does.

5. What to Look For: What the Judgment Is or Decides

In order to read cases so that they are useful for building our knowledge and experience, it is important to keep clear that, above all, a judgment is a judicial *decision made in the face of a certain factual situation.* Towards this end, we must try first to determine *what the factual situation is* that the judgment refers to, what the problem presented is, and just generally what the case is about. Further, we must turn our attention to what decision the court adopted, whether it admitted or denied the claim, or whether it rendered a judgment for the plaintiff or the defendant.

Yet as we are looking for this information, we must keep in mind that how the court said what it did, which legal arguments it gave, or what doc-

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[28] The most distinguished, CICERO.

trine it elaborated upon are not so important, but rather *what was decided in the face of a certain problem*.

If a judgment is clear and tidy, at the beginning of the judgment there will be a description of the conflict and, at the end, just before the signatures, of how it was decided.

If the judgment is not clear and tidy - and there are many that are not - it will be necessary to skim the judgment in order to determine what its facts are, and, starting from the end and working backwards, to read the case to understand what was decided.

It is fundamental not to get sidetracked by the way the decision was argued. If a case is important to us, an understanding of these points will come later, once we have understood the court's approach vis-à-vis the case's reality.

It can be that the facts of a case are multifaceted, or it can be that the decision itself is complex and contains many variables. The latter usually occurs if a decision is favorable, *i.e.* the court chooses to enter into the substance of a case[29]. An unfavorable decision, on the other hand, may be summed up as follows: at the trial court level, "the claim is dismissed"; later, at the appellate level, "the judgment is affirmed" or "the appeal is denied." Indeed, judgments adverse to the plaintiff are easily identified: We understand the word "no" from the very beginning and, in light of whatever the claim is, we have a clear idea of what was decided.

6. Discovering the Judgment

Within the legal decision there are, then, two distinct moments. One is when the judge is shaping a provisional hypothesis as to how to decide the case, and the other is when the judge is shaping the basis of the final decision. Over the course of that two-step process, the judge is adjusting, revising, and eventually correcting the initial hypothesis.

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[29] In *Ángel Estrada*, out of three votes, the first opinion is dissenting and the second and third are concurring. They formed part of the majority by indicating that the Ente Nacional Regulador de la Electricidad [The National Electricity Regulation Authority] must decide again, but now "bearing in mind what is set forth in this resolution": CNFed. CA, Chamber I, *LL*, *SAdm*., 6-X-00, p. 34.

6.1. Knowing How to Read

Let us reiterate that there are two classic ways to analyze a given judgment: the first, is to pay attention to what the judgment decided vis-à-vis a certain problem; the second, is to pay special attention to the arguments the judgment employed, without taking into account first and foremost what is decided or what the problem actually is.

The latter is the method used exclusively in preparing case summaries, and it is also the way in which many law students, lawyers and law professors read judgments.

These methods are so basic yet disparate that, more than two centuries ago, a king considered it necessary to prohibit the spread of the second method. The Spanish Royal Judicial Notice of June 25, 1768, stated: "In order to avoid the prejudice arising from the practice observed in the Appellate Court of Majorca of motivating its judgments, giving place to the musings of the litigants [...] I order the cessation of said practice and to pay attention to decision-making words."[30]

It is important not to focus on what a judgment *says,* but rather on having an adequate understanding of the *case or the problem of fact* the judge was facing and what he *decided*.

Likewise, the judge, when reading the parties' written submissions, must focus on what facts they allege (even though they may conflict with his own perception of the evidence) and, on the basis of those facts, the judge must target what the parties are asking. Indeed, it is always necessary to understand first and foremost what is being dealt with: in a written submission, to know what the *object* and *petition* are (which must coincide with each other)[31]; and in a judgment, what was decided in each approach.

6.2. Description and Factual and Legal Reasoning

When we have an interesting selection of judgments whose holdings seem useful, we can read them more closely. But do we have to take into account mainly the case's legal arguments or its description of the facts?

It is a given that the facts are of utmost importance in the law, and if we make a mistake of fact, everything else comes apart. Indeed, the facts de-

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[30] NIETO, *op. cit*., pp. 137 and 143-145.

[31] GENARO R. CARRIÓ pointed out that these are the fundamental parts of a legal writing, to which the lawyer must pay the highest attention and care. *Mutatis mutandis*, it is the same method used by BREITEL in his judgments.

termine whether a solution is fair or unfair, whether a certain behavior is abusive of the law or not, whether someone acted in good or bad faith, whether malpractice was committed or not, etc. In this sense, good legal work can be differentiated from bad legal work not so much by normative or conceptual arguments, but by the depth in which it scrutinizes facts to properly identify the issues in play.

While facts are the most important thing in a case, the most interesting thing in a judgment is how those facts are perceived, reasoned, and argued. However, we must not assume that a case's description of the facts is necessarily complete and appropriate: this, because reality never truly enters into a judgment[32].

One thing that can occur, though, is that certain questions of fact influence a decision, but are not explained in the judgment. As a consequence, the reader does not realize that such questions came to bear on a particular decision. However, those questions do not play any less of a role in solving the problem presented.

7. What the Judgment Says "More" or "Less"

If readers delve into the "aimless ruminations" mentioned by the Spanish Royal Judicial Notice of 1768, it would seem that it is worse the judgment that says too much, as opposed to too little. This is because *what is lacking at least makes the reader think about what could be the real grounds of the judgment*. The presence of too many arguments - particularly when they are not central - creates an obstacle for discovering a judgment's grounds, because superfluous arguments wind up leading the reader to dead ends. At other times, both things happen at once: the judgment omits its fundamental grounds and instead gives reasons that did not lead to the decision, but these latter reasons can nonetheless be grounded "objectively," albeit in the abstract.

The final writing of a judgment is not done with the same care as making the decision on which it is based. It is possible that in that final version, many arguments slip through the cracks, both when the court is saying too much and too little. When the court is saying too much, arguments "slip by" because it is almost a sport in our profession to come up with and look for different angles. If we can add a good argument to the judgment, we add it, even if it is an argument that did not play an important role in rendering the decision. In this way, instrumental arguments multiply

[32] Because judges have the same human problem which LEIBNIZ remarked.

within a judgment, even though they played absolutely no role in the decision-making process. Academic writings that comment on judgments will add even more arguments, maybe as irrelevant - but less dangerous - as the ones the judgment itself adds.

There are also arguments that, as a matter of good taste, are better left unwritten. For example, while damages have to be taken into account, nobody wants to condemn the State to an amount that it cannot pay, because, as it was harshly said, "When there is no money, there is no law."[33] State responsibility thus diminishes in times of crisis and increases in times of well-being. Similarly, in a civil sentence, the magistrate will take into account the situation of the victim or the tortfeasor, or of both - for instance when setting a sum for redress, whether it be equal or superior to the profit the responsible obtained by committing the injury. Sometimes the judge makes this explicit[34], sometimes he does not[35].

If it is a question of convicting the State to pay damages, no judgment would include a consideration of how much there is in the public coffers. Yet, it would be wrong to think that this argument has not been carefully weighed.

We will consider two famous and two lesser known cases to illustrate how judges saying too much or too little can set back our analysis. It would not be the case's fault, but rather ours, if we were to misunderstand the judges. As will be seen, though, this has already happened in the past.

7.1. Chocobar[36]

The Supreme Court was backlogged with more than seventy thousand cases regarding retirement pensions, and at the same time was considering a case that would either extend or curtail social security rights. This must have been very difficult, indeed, as courts have always been sensitive to this issue due to the fact that such payments can literally feed the popula-

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[33] Of course, we have talked about countries going through insolvency periods.

[34] The CSJN [The Supreme Court of Justice of the Argentine Republic], in *Ekmekdjian,* aroused an interest in this and other aspects; GONZÁLEZ PÉREZ, JESÚS, *La degradación del derecho al honor (honor y libertad de información)*, Madrid, Civitas, 1993, p. 45.

[35] Sometimes rules impose it. In Finland, fines for traffic violations depend on the financial situation of the offender. In this way, a member of the *nouveau riche* might have to pay almost $100,000 just for changing lanes illegally.

[36] 1996, *LL*, 1997-B, 247.

tion receiving them, and because of the stage of life in which the claimants are. Social security laws find applicability at times when pensioners face death rather closely for comfort, and who claim for payments they think the law determines for them. That said, if the Court let its docket backlog by seventy thousand cases, it is because the Court considered these cases as one, taking into account the economic weight on the public coffers of such a global decision[37].

When the delay became unsustainable due to the appearance of the Argentine Ombudsman before the Inter-American Commission of Human Rights[38], it became public in the newspapers of the day (as well as via members of the tribunal) that, out of nine votes, there were two groups of four votes. Newspapers[39] reported that the ninth vote would decide between signing the vote establishing the highest percentage increase of government payments, or trying to force the other group to increase the percentage that it recognized. The newspapers proceeded to point out the total amount that the decisions would represent for the national treasury[40]. It was said that when, as of the first vote, members of the second group were challenged to be in majority, they stated that if they were to be a majority then their judgment would be different. While we do not have proof of this, we do know what the newspapers reported: that is, that the pivotal

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[37] Which was certainly not mentioned in the judgment.

[38] Which was public and notorious, but not recorded in the judgment.

[39] The judgment did not say as much, although much happened "behind the scenes." *Horse trading*, as it is known in the United States, is a common practice worldwide in three-judge tribunals. It is the search for an in-between agreement among all the magistrates, in which each of them resigns a bit of his position in order to reach a common decision. Although *horse trading* is a natural part of consensus building within a group of magistrates, it cannot be reflected in the judgment lest it lack style. Nonetheless, we cannot forget to analyze how an agreement was reached. Even in the individual courts we can find an exchange of ideas between the judge and his clerks or other officers or employees of the court, because, logically, they influence each other. Even though ideas that led to a decision are not explained by a judgment, that does not mean that a person who ignores that process will be reading a judgment well.

[40] The same kind of strategy was presented in 1986 in *In re Zappa*. The headlines in newspapers were "Impossible to Pay 82 Percent"; "It Is a Blind Alley." See OTEIZA, EDUARDO, *La Corte Suprema. Entre la justicia sin política y la política sin justicia*, La Plata, LEP, 1994, p. 158 and its references of p. 157. There, the decision was "legal" but unreal: It was impossible to comply with the judgment and it was not complied with, as OTEIZA explains, *op. loc. cit.*

ninth vote obtained a small increase from the first group, and in the end joined it to become a majority.

On what can we base this case? With the bitter saying "When there is no money, there is no law"? Whatever we choose, we can do so very briefly. Yet the final judgment contained hundreds of legal considerations, and while this is not, in and of itself, reprehensible, if somebody refers to them for legal precedent or persuasive authority, he is victim to a serious misperception. For this reason, we should not pay special attention to the text, but should pay *a lot of attention* to the court's actual decision-making process in the case.

7.2. Peralta[41]

One Monday, a decree of necessity and urgency was issued that turned all fixed-term deposits in the financial system into long-term bonds. While much has been written on this case, there is a piece of information regarding the reality of the bonds that solves the subject.

The Friday of the long weekend previous to the decree, there was a sharp and extreme financial overheating in the market. Because of this overheating, at closing time, the overnight or "call" bank deposits of that day for the weekend were contracted with more than 900% annual[42], almost four digits of interest. That single piece of information shows without argument that it was necessary and urgent to cool down immediately such an absurd overheating in the economy. No one has ever found it necessary to read the ensuing legal proclamation, because the solution is so self-evident. Anything more said would simply be extraneous.

7.3. Allevato

Sometimes I read a case *very* carefully, which is when I probably make a mistake. As proof of this, I always bear in mind one comment I wrote, in which I found everything wrong with the judgment's reasoning[43]. True

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[41] CSJN [The Supreme Court of Justice of the Argentine Republic], *in re Peralta*, *Fallos* [*Judgments*], 313: 153.

[42] Fifty times more than a highly worrying banking rate, in *call*, of 15 or 16% at present.

[43] See our book *Después de la reforma del Estado*, Buenos Aires, FDA, 1996, 1st ed., annex of chapter X, pp. 56-60. It is appropriate to highlight that it is an

enough, the way in which the judgment was written was far from perfect and it was replete with mistakes of fact and faulty legal reasoning. This wrongly encouraged me. I commented on the case's arguments and stated my firm discrepancy. I pointed out all of the *factual* errors, and "logically" proceeded to propose the opposite *legal* solution.

Big mistake. I had not noticed a factual peculiarity that was not in the judgment, but was in the background of the problem; a peculiarity that, by application of a different line of reasoning - whether it had been mine or the court's -, would have allowed me to reach the same conclusion as the court. Although I was thinking (and think) that the pronouncement did not possess the appropriate grounds of fact and law, its perception of reality and its decision were correct. My perception of reality was wrong, although my arguments were "good." Obviously, good arguments are worthless when they are applied incorrectly.

Let me reiterate, the judgment contained the suitable solution, even though for *other reasons and using another description of the facts in the same case*.

It is clearly preferable to give a good solution and explain it badly, than give a bad solution and explain it "well." The latter is a fallacy, because if the solution is *wrong*, we cannot say that, legally speaking, it is good. In such a scenario, the concepts that present themselves would be like those of SAVIGNY, which are potentially good *in vitro*, but do not pertain to the problem to be solved. These concepts are, inasmuch, bad in concrete cases, where a faulty application of the law results from attempting to do so with a premise that does not fit within the framework of normative reasoning.

Law is not an abstract exercise, it is the solution to specific problems. If the law decides problems wrongly, it is not good law.

7.4. Pereyra

We have previously commented[44] on this judgment exclusively to show its analytical process. We have not included expressly our hypothesis that

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excellent tribunal that has handed down magnificent judgments. One of them serves as an example of factual analysis: *The Scotch Whisky Association Ltd.*, CNFed. Civ. y Com., Chamber II, 2000, *LL*, 2000-C, 696, whose legal analysis was good, but whose description of the facts was so clear that there was no other option than a fair solution.

[44] El método en un caso de derecho: hechos, valoración, normas, *RAP*, 234-91, Buenos Aires, 1998.

provides the foundation to our analysis in order to leave it open to the reader. In any event, we do not have information that would allow us to support or misrepresent our premise. We think that is a question of sympathy or antipathy towards the categories of people (not even the specific people involved in the lawsuit) that comprise the two central groups in the case. One group was made up of Jehovah's Witnesses, one of whom, because of his religion, refused to defer to his country's emblems, *e.g.* the flag[45]. The other group was made up of the military establishment, and among them, the military courts that convicted him of insubordination.

In this case, there were many values at stake, such as freedom of worship, personal freedoms, and religious discrimination, as well as the judgment of the values present during the period in which those military sentences were given. On the flip side, the essence of the national being, order, and authority were at stake, as well as the national defense, the flag's defense, and our Western and Christian way of life, the latter taking into consideration the fact that the detention was "benevolent" and there was no mistreatment[46], etc.

We use this case as a barometer of the feelings and value judgments predominant in our culture. Those who analyze this case in our many postgraduate courses usually agree with the judgment against the Jehovah's Witness. Such was, likewise, the legal solution, including on the part of the Supreme Court of Justice of the Argentine Republic. It seems that we, as a society, neither give preference to nor favor diversity: We prefer uniformity, homogeneity[47].

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[45] The sincerity of his beliefs was never in doubt.

[46] Third parties led us to believe that those last arguments came to bear on making the decision. They were not explained in the text of the jurisdictional pronouncement.

[47] We started with the symmetric arrangement of desks in classrooms and with the democratizing white school coat. Private schools, though, introduced elegant and nice uniforms, so the white school coat became a discriminatory factor. We still have the uniform, but do not allow freedom or individuality. The same can be said of the way students are taught to greet the flag. This practice is unknown in the United States, where, without needing a martial line-up, nobody would deny honoring and respecting their flag. In this way, we keep on rewarding what is the same and pestering what is different.

8. The Interest in the Subject or in the Judgment

There are subjects that are excitingly new and current, that, when brought before a court, nonetheless receive an adverse sentence, because the court did not share the same enthusiasm as the party concerned.

Let us suppose that, upon denying the action, the judgment *explains the interests of the complaint and also the motives* by which the judge denies the claim.

In that instance, the sentence is not of interest *as such*, but only as regards the instrumental vehicle of the subject at hand that could even, potentially, be contained in an article of a review, in a chapter of a book, etc.

The complaint was original, but the judge understood with good reasons that it should not be received. Is there any legal news in that?

Strictly speaking, no, because the law has not changed with that judgment. Let us say that it is a piece of information that can be useful to have, if someone thinks about presenting the same complaint before the same court, or in order to enrich its legal culture if the situation that had to be solved with it was not clear. But no more than that.

The principle that should serve as our point of departure for the analysis of judgments, thus, is that a judgment is not *reading material* as if it were an article taken from a law review, a monograph, or a thesis.

The resolution of a problem is what is important in the judgment, and the resolution is that which is attractive for a particular reason. If it is an interesting decision, analyzing how the judge explains that decision will be also of interest. If it is not innovative - maybe because it is obvious - the interest of its content is not different from any other publication unrelated to the judgment.

This clarification is important, precisely because many judges are law professors; as they publish articles and books, they frequently include in their judgments the theories they have developed in such works. There are no legal, ethical, or social impediments for using judgments as a vehicle for developing ideas for class lectures, but it is important to point out that the fact that these ideas are embodied in case law or other legal writings does not transform them into a source of law.

Its value depends on its intrinsic persuasive power, or the power of the authority that inspired the judgment's author, but it cannot be said that a judgment was citing strictly a jurisdictional pronouncement.

8.1. Dictum and Holding

That question is similar to the distinction between what is called *dictum* and *holding* of a judgment. The *holding* is what specifically resolves the issues in question and thus provides the reasons given for that approach. *Dictum* comprises all that is said about the issues in question, including collaterally or unrelated to the *thema decidendum*, and which, therefore, is not judicial precedent.

8.2. Form vs. Substance

Sometimes how a judgment is framed is interesting, even when it is adverse to substantive law, not for what it says, but for what it decides regarding form over substance. As an example, we can procedurally allow a citizen to contest a certain State activity if he has standing, but we can dismiss his complaint substantively if he contests a legally permitted activity. The first point is interesting and the second is not, because, presuming the activity is lawful, we gain no empirical knowledge of what the court found determinative.

9. The Excess of Information

We have said many times that we have not read the arguments or the legal reasoning of a particular judgment. Some people may think that a bit irresponsible or not serious enough, but there are certain reasons that put this problem in another perspective.

For one thing, it is better to realize that in the time dedicated to acquiring useless information, we could have learned something useful, or, at a minimum, we could have been resting. If we are short of time, we must manage it greedily. When somebody wonders how we read so many judgments and how we remember them, there is only one answer: that I do not always read them completely[48] but only the description of the problem and the decision adopted to address it. My colleagues may note that when I act as a lawyer for a claimant or respondent, I cite too many legal articles

[48] It is a "catch 22": the more carefully we read a judgment, the fewer judgments we read and the more we loose sight of the whole. That is the reason why the group analysis is important, as in chapters 4 and 5 of OTEIZA, *op. cit.*

and books[49], but that I do not cite many cases. When I can, I do so briefly[50].

A second reason that has led me to read cases in the way described above was the need to read a large volume of them, in order to select those that would be published in the "Administrative Law Case-Law Supplement" of the newspaper *La Ley*: the more judgments read, the better the selection[51]. However, the need to read many cases does not only stem from being in charge of a publication, as I have been for many years for that Supplement: it stems from the contemporary problem that everybody dedicated to the law has, that is, an excess of available information, specifically, and excess of case law. Let us stop a moment to examine this problem.

9.1. The Official Collections of Case Law

Every official collection adds many volumes every year, and that represents only a part of the actual total of new case law[52]. If we include the judgments of provincial or foreign courts, the total obviously exceeds a person's normal reading capacity.

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[49] Not in my arguments before a court, as the court knows its body of case law better than I do. If I do put an obstacle in the way of the court's work, stylistic reasons would force it to look for and quote other precedents than the ones I have mentioned. A different practice occurs at international tribunals, as I explain in Statutory Limitations of Administrative Tribunals, soon to be published by the Inter-American Development Bank Administrative Tribunal *XX Anniversary*, Washington, 2003.

[50] *Cien notas de Agustín. Notas asistemáticas de un lustro de jurisprudencia en derecho administrativo*, Buenos Aires, Fundación de Derecho Administrativo, 1999.

[51] The method has stayed with me, while the motives have not. In effect, I had the privilege of later receiving many judgments through friends and acquaintances as soon as they appeared. Some computing networks of public interest provide a similar service. For example, the one of the University of Palermo called Red DIP [DIP Network], or Red de Derecho de Interés Público [Law Network of Public Interest]: *red.dip@palermo.edu.ar*. Enrollment is free.

[52] Let alone the court itself. According to unofficial information, for example, the CSJN [The Supreme Court of Justice of the Argentine Republic] does not publish all its judgments, but "selects" the ones of highest interest - that is, of course, according to he who classifies them.

Let us suppose I have to research cases for a particular subject. Obviously, there is a first thematic selection in which we are going to be guided by the kind of tribunal and case we are looking for. At the same time, we can find guidance in the glossaries and indices of the casebooks we will be perusing. Once this main first selection is done, there are still more judgments left than time I have to read them.

If from the very beginning we try to read them *all* in depth, our investment of time will be so high that we will not be able to read the range of cases we must. It may occur that among the ones we did not look at there could have been some cases of interest. So, in order not to miss potentially important judgments, we must read quickly and well. We must be able to maintain a global vision of our research, without affecting our ability to take notes. Otherwise, we could get lost or confused in the research.

9.2. Selecting by Book: Its Limitations

One way of doing research can be to trust in the research already done by the author of a particular book. While this is not bad as a starting point, the problem is that books do not usually address the exact problem we want to investigate. A book can provide a general orientation, but not specific sources to the specific issue we are looking for. The same happens with review articles, monographs, theses and treatises. As every case is individual, such approximations orient, but do not settle, the problem. In this first stage, it is important to find out if there are judgments that settled in any way the *thema decidendum* in question. This is because you have to know where you are in order to start.

9.3. The Selection by Means of Review Summaries

Another possibility is to search in summaries of law reviews and CDs compiling such summaries. Many young lawyers usually read *no more* than the summary of the review publishing the judgment, but that poses an initial problem, which is that the summaries may not necessarily represent a good reading of the judgments. If the other party realizes that one has quoted summaries from a CD, they are likely to reply with a real judgment and scoff at the “academic” summaries.

9.4. The Personal Selection: Its Problems

If we want to select pronouncements that contribute to a certain point of view or address a certain matter, we are left with no choice but to flip through a huge number of judgments and to search rapidly for what interests us. If we do not have much time, it is of no use to read the cases in detail, because, in the end, it may be of no interest. Moreover, reading closely serves no purpose, since only what was decided is important, and that is found at the end.

In fact, before proceeding, we first must determine if we are even interested in the decision. If we skim in order to save time, we may skip over an important judgment or get caught up in one that is not important at all. However, if we are not able to "speed read" - which is faster even than skimming - we will be able to read fewer judgments and the quality of our information will be limited by a reduced reference field. Perhaps other people who know how to search better will be able to find judgments that we could not find, so we must achieve a speed in reading specifically in order to find at least the precedents regarding the matter we must analyze.

9.4.1. Being Informed on a Daily Basis

Another possibility is reading legal newspapers every day, something that, of course, a lawyer should do. The problem is, though, once again, that we have a lot of information, and either time does not allow for a deep reading or the subject might not be of interest to us. Obviously, we need to resort to an initial thematic selection due to the great number of subjects, *e.g.* are we interested in civil or criminal law, commercial or administrative law, etc. Within those subjects, there are other subjects that may attract our attention and others that may not, but once that selection is made, *a priori* there are still too many judgments to read in order to be updated. As when we are searching for something in particular, here, too, we face the problem of juggling with time and quality of selection.

Daily reading has other difficulties. One is the need to keep a distance from the object, in that information gathered should not be taken for specific data of the current law, but rather as a legal hypothesis. This is because quick daily reading means reading with inadequate reflection, and it does no good to overwhelm ourselves with information that is destined to change. What is more, daily reading does not even prepare us sufficiently for those changes.

Finally, we have to average out the number of hours we spend on reflecting with the time we use in receiving information. The suggested technique for reading judgments prevents us from relying on the existing answers and, instead, contributes to creativity and to keeping our minds alert. Indeed, the technique prepares us for the changes to come, and it engenders reflection rather than amassing information[53].

[53] BIELSA said: "Some people study for five hours but think for only one. It is the other way round: We have to study for one hour and think for five."