Judicial precedents: the role of hermeneutics and non-textual elements of the legal norm for the unity of the Law and legal security*.

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*The article was published at *Revista Argentina de Justicia Constitucional* [Argentine Journal of Constitutional Justice]. Buenos Aires, n.04, out. 2017.

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Abstract: This work addresses what we believe to be the most important and central debate to challenge everyone who somehow contributes to the creation of Law in Brazil: binding. It analyses the centrality of the role of hermeneutics in the creation of Law, the importance of taking into account the interpretation and its result in the promotion of unity and uniformity of Law, addressing the recurrent fallacies in the daily understanding of the concept of precedent, its definition and dynamics and its role in the tutelage of justice through the Judiciary. The methodology used is based on research on relevant doctrine, jurisprudence on the subject, analysis of interviews, recordings of trials and newspaper articles in an attempt to demonstrate that the understanding of the concept of precedents and its role in the process of formation of our democracy founded on the values of equality, freedom and legal security, among others, is still in its infancy and deserves deep attention, as demonstrated in the recent impeachment trial of former president Dilma Rousseff.

Keywords: precedents, binding, hermeneutic coherence, impeachment, legal security.

Resumo: Este trabalho aborda o que cremos ser o debate mais importante e central a desafiar todos que de alguma forma contribuem para a criação do Direito no Brasil: a vinculação. Analisa-se a centralidade do papel da hermenêutica na criação do Direito, a importância de se levar em consideração a interpretação e seu resultado na promoção da unidade e uniformidade do Direito, abordar as falácias recorrentes no entendimento cotidiano do conceito de precedente, sua definição e dinâmica e seu papel na tutela da justiça por meio do Poder Judiciário. A metodologia utilizada tem por base pesquisa de doutrina relevante, jurisprudência sobre o tema, análise de entrevistas, de gravações de julgamentos e de artigos de jornais na tentativa de demonstrar que o entendimento do conceito de precedentes e de seu papel no processo de formação de nossa democracia fundada nos valores da igualdade, liberdade e segurança jurídica, dentre outros, é ainda incipiente e merecedor de profunda atenção como demonstrado no julgamento do recente impeachment da ex-presidente Dilma Rousseff.

Palavras-chave: precedentes, vinculação, coerência hermenêutica, impeachment, segurança jurídica.

INTRODUCTION

> *"[...] To interpret is not merely to state a preceding rule or to extract its meaning; rather, it is to assign meaning to the text and non-textual elements of the legal order*."
>
> Daniel Mittidiero[2]

In the controversial outcome of the trial of former President Dilma Rousseff, the president of the Federal Supreme Court (STF), and also president of the trial of the impeachment process in the Brazilian Federal Senate by constitutional determination, urged by senators of the governing coalition of the then President and defendant, decided monocratically that, based on the **precedent** of the impeachment trial of former President, now Senator Fernando Collor de Melo, that the penalties established in the sole paragraph of Article 52 of the Brazilian Federal Constitution of 1988 would be autonomous penalties and, therefore, the request of governing coalition of senators to "slice up" the voting of penalties to be imposed would be legitimate. Thus, the impeachment constitutional sanctions were allowed to be voted separately in the name of legal security and **precedent**, as stated by the President of the Federal Supreme Court, Minister Lewandowski, in his speech when he presided over the trial and explained why he made such a decision, just before opening the session to vote on the defendant's ineligibility or inability to hold public office, in a context of unorthodox exegesis, but not uncommon in Brazilian courts.

The subsequent days were consumed by heated disputes that were extensively publicised by the national media. Once again, the words of the day were **precedent** and jurisprudence. However, it is questionable whether one really stood before a precedent in that controversial trial. Was Minister Lewandowski's use of the term non-technical? As this is an issue of the utmost importance and has been brought back to the forefront of legal debates by the New Civil Procedure Code of 2015 (CPC/2015), one wonders if so many judges and legal scholars, from the highest courts to the most remote corners of the country, are not using the term in its lay meaning, *lato sensu*, in a confusion between precedent and decision, thereby jeopardising precisely what they intend to guarantee: legal security.

This study addresses the precedent issue, its meaning and role in the Brazilian legal framework, particularly after March 18, 2016, when the 2015 Civil Procedure Code came into

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[2] MITIDIERO, Daniel. **Precedentes: da Persuasão à Vinculação** [**Precedents: from persuasive to binding].** São Paulo: *Revista dos Tribunais* (Courts Magazine), 2016, p. 15.

effect, and it also questions whether in the case at hand, a) were we indeed confronted with a precedent? b) if so, would it be persuasive or binding? b) what are its guiding principles? d) was there adequate reasoning, logical and argumentative coherence, in the attempt to rule out or apply the alleged precedent in the fundaments presented by the senator-judges and the president of the STF?

One cannot underestimate the role of linguistics and semiotics in the hermeneutic process of giving life to a precedent, born of a legal legislative text that is often of a broad nature, in its confrontation with factual reality. How can one fail to recall Luis Alberto Warat's[3] classic example of the text of the hypothetical legal rule "it is forbidden to wear bikini". A *prima facie* argument could be made that the text is clear. Nevertheless, depending on the context, the exact same text can point in completely opposite directions. Imagine such a legal provision on a sign posted in the social and formal areas of a building's lobby, decorated with expensive carpets and pieces of art, right next to the recreational area. In this context, the interpretation will ban the use of scant clothing, which is permitted exclusively in the pool area, for instance. Alternatively, if its interpretation is carried out in the context of the famous nudist beach of Tambaba, in the south of the Brazilian state of Paraíba, we are confronted with an absolutely distinct rule, commanding bathers not to wear any clothing, as Orlando Luiz Zanon Junior pointed out about the same hypothetical example.[4].

One of the first texts that this author read at the outset of his legal education was the remarkable *Lições Preliminares de Direito* (Preliminary Legal Lessons), by Miguel Reale.[5]. What a shock it was to discover in the very first pages of the book the author's lamentation that law protection was not always synonymous with justice or even necessarily accompanied by morality. This was inconceivable at the time, as the author, although still a student, associated law with justice in a direct manner.

The problem of enforcing the law in a just legal order and, accordingly, the promotion of legal certainty, the protection of liberty, and the observance of equality haunts us from the start. After decades in which it appears that we have become accustomed to seeing similar and contemporary cases being treated distinctly, in separate rooms, in the same corridor of the same court, it remains evident that something is severely wrong with our sense of justice.

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[3] WARAT, Luis Alberto. **O direito e sua linguagem [The law and its language]**. 2 ed. Porto Alegre: Sérgio Fabris, 1995. p. 67.
[4] ZANON JUNIOR, Orlando Luiz. "Produção Jurídica: Positivação e Aplicação" ["Legal Production: Positivation and Application"]. Available at: http://www.ambito-juridico.co"m.br/site/?n_link=revista_artigos_leitura&artigo_id=13179. Accessed on: 17/09/2016 às 15:50.
[5] REALE, Miguel**. *Lições Preliminares de Direito*** [Preliminary Lessons in Law]. 27 ed. São Paulo: Saraiva, 2010. P.44 et seq.

With the entry into force in March 2016 of the New Civil Procedure Code, we are confronted with new paradigms. Those who believe this to be a straightforward revision of the old code are mistaken. With the new code, the question of precedent and binding nature of the law returns to the limelight.

In this new normative context, this paper seeks to comprehend what a precedent actually is, to illustrate how its concept has been (mis)understood, and, most importantly, to highlight its role in the face of the most fundamental question confronting all agents of the law: the binding nature of the law as the central problem of the Brazilian legal system. In order to accomplish this, we conduct a brief diachronic and comparative analysis of the question of binding as a problem not only of the Brazilian legal system. To this end, it is emphasised here a) the fundamental role that hermeneutics plays in the creation of the law; b) that the law goes far beyond the legislative text as many stubbornly insist on affirming; and c) it is concluded that there will be no justice in the broad or strict, lay or technical sense if the role of interpretation in the courts is not taken into consideration, by constructing the law in a collaborative manner with the legislative and the doctrine towards the unity of the law.

In the conclusion, the proposed questions are answered based on the fundamentals listed throughout the work, with the intention of providing a viewpoint on a contentious issue, but always with the goal of fostering some conciliation through reasoned opinion and debate.

2. JUDICIAL PRECEDENT

2.1. Binding as the central problem of any legal system

There is no Law without legal security. And this is not an obvious or generic assertion. It is dense, historically intricate, and multidimensional.

From a diachronic perspective, the aversion to the arbitrariness of rulers is reflected in the manner in which the law is employed to domesticate the exercise of power. Nevertheless, the exercise of power is not subject to the Law if it is unclear how it is bound by the Law. As a corollary to this line of inquiry, we face the dual issue, fundamental to the establishment of any legal order, of comprehending both the process by which judicial decisions are constructed and the content with which they are issued.

Thus, as Daniel Mitidiero states[6],

> [...] In order for the law to be able to establish a society that is free, just, and egalitarian (Art. 1, II, 3, I, and 5, *caput,* I and II, CF), it must find a solution to the fundamental issue of how power should

[6] 2016, p.21

> be bound to the legal order. *These objectives, however, are only achievable in a society governed by legal security.* Therefore, the promotion of legal security is a central and perennial issue in any legal system. Without a legal framework able to provide legal security, it is impossible to conceive of a space where legally oriented decisions can be made. Without a secure legal environment, it is similarly impossible to identify which legislation is in effect and should be administered uniformly to everyone. Hence the reason why l*egal security is typically regarded as one of the prerequisites by which law becomes possible—that is to say, "a condition for the very existence of Law to be conceived."* (emphasis added).

From a didactic standpoint, we can divide the concept of legal security into four fundamental elements: cognoscibility, stability, reliability, and effectiveness of the legal order[7]. In this way, the Law should be known in advance, and we should have access to what is forced upon us in the face of the broad array of scenarios we experience daily. Moreover, it is of near-consequential importance that this Law should be stable, that it does not change unexpectedly and without apparent reason. It must also be an order in which it is reasonable to believe that out-of-the-ordinary circumstances will be dealt with in a reasonably expected manner. And finally, there is no legal security without cogency. Law must be able to impose and enforce itself on situations that threaten to violate it.

The above is didactically perfect in a hermetic manner. The primary issue of the debate, however, is not merely to state that law should be safe. None of these matters if one cannot not grasp what really should be considered law.

Two strands, based on the declarative belief of the jurisdiction, arose as a remedy during the development of the foundations of contemporary Western law: security by the judge and security by the legislator. Both solutions proved fallacious since they were based on distinct but similar obsessions, since they were founded on "black boxes", on myths, whatever they might be, either that of judges in the English tradition as "living oracles"[8] or in the post-revolutionary French tradition as "*êtres inânimes*"[9].

The interesting thing about these two seemingly antagonistic traditions is that they are both based on myths. English law saw in the decisions of judges living proofs extracted from a supernatural and mythological entity called Common Law[10]. The French, on the other hand, still under strong aversion to the arbitrariness of their freshly guillotined nobility and believed that all potential human interactions could be codified, with judges only declaring a norm that already existed. Both notions require a leap of faith by the citizen over an abyss, in a belief that

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[7] ÁVILA, Humberto. **Segurança Jurídica** [Legal Security]. São Paulo: Malheiros, 2011, p.250-256.

[8] Expression coined by William Blackstone (1723-1780), *Comentaries on the Law of England* (1765-1769). Chicago: The University of Chicago Press, 1979. Pa. 69, vol. I.

[9] Classic term created by Montesquieu (1689-1775), *De LÉsprit des Lois* (1748). Paris: Garnier, 1869. P.149.

[10] For more on th subject, we refer to the didactic Daniel Mitidiero, 2016.

their wishes, rights and expectations will be protected by a pre-existing, cohesive, stable, reliable, and effective set of rules. This was the “black box” of Commom Law, this was the codifying and centralising obsession from Louis XIV (Code Louis of 1667) to Napoleon (Code Napoléon of 1804) to the revolutionary France (1789)[11].

Luiz Guilherme Marinoni contends that the two traditions are rooted in a declaratory philosophy, which ironically has served both "*to lend and deny binding power to the decisions of the judges in these various traditions*[12].

It is appropriate to dispel a myth here. Precedent is associated almost synonymously with English law. Nonetheless, the precedent as it is currently understood and immediately connected with Commom Law is a 19th-century development that was consolidated only in the 20th century[13]. This tradition's route to today's binding precedent has been lengthy and winding, but three major stages can be identified: illustrative, persuasive, and binding.

Invoking precedent has long been a regular practise among English judges, from the mediaeval period to the present day. What changes, and this is of significance to us, is the definition of precedent. Herein lies the root of the issue.

2.2. Decision, precedent, and *ratio decidendi*

What exactly is a legal precedent? We present here the lesson of a scholar whom this author reveres for his academic calibre, but primarily for the way in which he manages to strip the classic legal discourse of its flippancy and petulance without removing the density of its concepts, thereby making it accessible to a broader range of listeners and readers without trivialising it.

During a lecture at the *Fundação Getúlio Vargas* (FGV) in Rio de Janeiro[14], Fredie Didier Jr. aimed to explain what a precedent was to an attentive audience of LL.M in Litigation students, including this author. He had flown from Bahia specifically to introduce the Civil Procedure module of the programme at a time when the Brazilian legal community’s attention had turned to civil procedure specialists in anticipation of the implementation of the new Civil Procedure Code.

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[11] MITIDIERO, 2016, p. 45.

[12] Luiz Guilherme Marinoni, **Precedentes Obrigatórios** [Compulsory Precedents]. São Paulo: Ed. RT, 2010, p. 52 et seq.

[13] For more on the subject, see Arthur Hogue, Origins of the Common Law (1996). Indianapolis: Liberty Fund, 1986, p. 200/203.

[14] DIDIER JR., Fredie. **Aula Inaugural – Processo Civil [Introductory Class - Civil Procedure].** Rio de Janeiro: FGV, 2015. (Oral communication).

Fredie Didier Jr. began his lecture by claiming that he would not leave the classroom until he was confident that everyone had grasped the nature of the elusive and misunderstood institution known as precedent. As he is accustomed to doing, he provided us with an illuminating personal example, which we would like to share with the reader because it is indeed enlightening. Once, a law student at the Federal University of Bahia was unable to continue taking her module's final examination, being suddenly struck ill shortly after reading the questions. She handed in her exam and requested a resit.

The point here is that there was no provision for a final exams resit in the regulations of the institution's legal department. Then, Fredie Didier Jr., as head of department at that time, gathered his board of directors so that they could make a decision in a collegiate manner. A colleague argued that there was no provision for such a request and that the case should be closed. Fredie Didier Jr. argued that the absence of the legal norm was insufficient justification for not at least analysing the situation. Thus, the supporting documentation for the request was viewed. There was only one medical report, compiled by a physician on duty at a health centre, which stated that the student in question had been seen by a doctor on duty and claimed to be ill. Due to the lack of solid evidence, the department unanimously rejected the application.

At the end of the following semester, another student was suddenly struck by a debilitating illness that rendered him unable to complete his final exam after the questions had been read and requested a resit under identical circumstances to those described in the preceding paragraph. The case was brought before the collegiate once more by the same department head, who remained in command of the legal department.

The judgement panel had remained unchanged for the beauty of the example. One professor argued that the request could not be granted because there was already a precedent in the case. Fredie Didier Jr. interjected to state that there was no precedent, but that there was a *res judicata*, a previous ruling on the same matter.

In a very illustrative exercise, Fredie Didier Jr. used the case in his introductory class to illustrate a distinction which is fundamental to the present work, namely, the clear understanding that the magistrate, the judge, the jurisdictional organ, at the moment of confrontation of the concrete case with the text of the legal norm, ends up constructing two legal norms:

> It is essential to understand that the grounds for a judicial decision give rise to two discourses: the first, for the solution of a specific concrete case, directed to the subjects of the legal relationship in

> question; and the second of an institutional nature, directed to society, necessarily with *erga omnes* efficacy, to present a model solution for similar cases.[15]

Therefore, what would be the general rule of precedent in this case? It had not been decided that the final exam could never be retaken. In the first decision taken by the collegiate, the general rule that could be extracted would be something like:

If a person who feels ill asks for a retest, and fails to provide proof of illness, he/she is not entitled to a second opportunity.

The law department's collegiate body then proceeded to the collegial trial of the second request. As in this case the student had submitted paperwork indicating that he was genuinely ill, and the request was granted unanimously.

This straightforward instance illustrates the essence of precedent: "*a general rule issued by a court organ on the basis of a single (individual) case, which may serve as a guideline for similar claims.*"[16].

Here we have, albeit briefly, the essential distinction between a decision and its reasons, or *ratio decidendi*. The first gives the command its *inter partes* effectiveness, while the second, the general rule, is separated from the specific situation, yet never loses sight of its context, and can be applied to future concrete cases that are comparable to the original.

It is important here to emphasise that the decision's fundamentals are not to be mistaken with the *ratio decidendi*, which it is contained within it. In the process of substantiating his judgement, the judge may insert comments that are not necessarily directly relevant to the *ratio decidendi*; these comments are known as *obter dictum*.[17]. In this case,

> This is an additional legal opinion, parallel to and not necessary for the grounds and conclusion of the decision. It is mentioned by the judge "incidentally" or "by the way", but may represent a support, although not essential and indispensable for establishing the motivation behind the rationale presented.[18]

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[15] MITIDIERO, Daniel. "Fundamentação e precedente – dois discursos a partir da decisão judicial" ["Reasoning and precedent - two discourses from judicial decision"]. Revista de Processo. São Paulo: RT, 2013, p. 61-69. In: BRAGA, Paula; DIDIER JR., Fredie; OLIVEIRA, Rafael Alexandra de. **Curso de Direito Processual Civil: Teoria da Prova, Direito Probatório, Decisão, Precedente, Coisa Julgada e Tutela Provisória [Course on Civil Procedural Law: Theory of Evidence, Law of Evidence, Decision, Precedent, Res judicata and Interim Protection]**.10. ed. Vol. 2. Salvador: Jus Podivum, 2015, p.444.

[16] Ibdem, p. 443.

[17] Here, we direct the reader to enunciation 318 of the *Forum Permanente de Processualistas Civis* (Permanent Forum of Civil Proceduralists): "even if present therein, such grounds which are necessary for the achievement of the result set out in the operative part of the decision (*obter dicta*), do not have the effect of binding precedent.". Available at: http://portalprocessual.com/enunciados-do-forum-permanente-de-processualistas-civis-2016/. Accessed on 29/09/2016 at 11:26 a.m.

[18] BRAGA, Paula; DIDIER JR., Fredie; OLIVEIRA, Rafael Alexandra de. **Curso de Direito Processual Civil: Teoria da Prova, Direito Probatório, Decisão, Precedente, Coisa Julgada e Tutela Provisória [Course on Civil Procedural Law: Theory of Evidence, Law of Evidence, Decision, Precedent, Res judicata and Interim Protection]**.10. ed. Vol. 2. Salvador: Jus Podivum, 2015, p.444.

After defining and differentiating decision from precedent, separating the foundational concepts of *ratio decidendi*, outlining the distinction between *ratio decidendi* and *obter dictum*, and illustrating the contours of precedent, we will proceed to the techniques of precedent management and then address the initial challenges.

2.3. Confrontation, interpretation, application and overruling of precedent

"*The right to distinguishing is a corollary of the principle of equality*."[19]

Fredie Didier Jr. *et al*.

We have said it before and we reinforce it here once again: one cannot accept different solutions for analogous cases, contemporary and immersed in equivalent cultural and social contexts within the same legal order. There is nothing more unjust, Kafkaesque, or just distant from what this author believes Western law in the 21st century should be in democracy that deserves to be named so.

Consequently, if bound by precedents, and we agree with Daniel Mitidiero's assertion that "precedents emanate exclusively from Supreme Courts and are always binding[20]," the judge, here understood in a metonymic way, when confronted with a case that appears to be similar, must first determine whether the objective characteristics of the cases are comparable. The second step is to determine if the pillars that support the legal thesis drawn from the paradigm case are present in the *sub judice* case or if there are similarities between the two.

There are now only two potential paths, each of which leads to two other paths. In the first instance, the judge may determine that there is a distinction between the cases and make a reasoned judgement not to apply the precedent, establishing an alternative means of resolving the case brought before them. Within this same path of distinguishing, the court may also determine that, although the instances have unique characteristics, they share essential factual, social, and cultural parallels that justify the partial application of the precedent (ampliative distinguishing).

However, the magistrate may choose to follow the second path and decide that the cases are objectively analogous and that the factual circumstances of the new situation can be accommodated in a just manner under the umbrella of the legal thesis of the paradigm case. If this is the situation, the magistrate should always apply the precedent in a reasoned manner.

[19] BRAGA, Paula; DIDIER JR., Fredie; OLIVEIRA, Rafael Alexandra de. 2015, p. 491.

[20] MITIDIERO, 2016, p. 97.

However, the court may decide that, despite the similarity of the cases, the law has changed, society has developed, and that this solution no longer enjoys the same level of support throughout the community, and then choose to invalidate the precedent using the techniques of overruling and overriding.

In the first instance, overruling, the court may discard the precedent it has established simply by deciding that its interpretation has changed for this or that reason. In situations when there is no explicit substitution of one precedent for another, but rather an implicit substitute, overruling may be tacit. The possibility of implicit overruling is prevented by the Brazilian legal system, which requires an engagement with the precedent to be overcome in order to process its overruling (Article 927, paragraph 4, CPC (Code of Civil Procedure)/2015). And here, the values that underpin such prohibition are expressed in the article: legal security, protection of *bona fide* and isonomy, values that are also dear to this author and that prompted the selection of this topic for this work in the light of the decisions made during the impeachment that we will analyse in the conclusion.

In a simplified yet sufficient manner, this is the dynamic of precedent. Due to space constraints and objective coherence, we decided not to discuss diffuse and concentrated overruling, the overruling reasoning process, the temporal effectiveness of the precedent's overturning, and the modulation of the impacts of overruling a precedent. To meet the proposed challenges, the above provides us with the appropriate tools.

3. FINAL CONSIDERATIONS

> *"Precedent embodies a legal norm properly understood in the light of the facts, but it is never about a "fact""*[21].
>
> José Rogério Cruz e Tucci.

The sensation of the extraordinary, bizarre, and unorthodox is initially breathtaking. Once the hypnotic effect of the final and crucial moments of the impeachment process are overcome, the focus of our attention naturally moves on to attempt to comprehend or even seek out the legal rationale that underlies its final decision. And here we ask the reader to temporarily set aside his political leanings and the passion that naturally accompanies such landmark historical moments, and for the next three brief final pages of this work, to face the challenge of applying the above to the decision on how to decide the trial and the dosimetry of the

[21] CRUZ E TUCCI, José Rogério. "Parâmetros de Eficácia e Critérios de Interpretação do Precedente Judicial" ["Parameters of Effectiveness and Criteria for the Interpretation of Judicial Precedent"]. São Paulo: Ed. RT, 2012. 123.

conviction orchestrated by the experienced baton of the then president of the Brazilian Federal Supreme Court (STF) and chairman of the trial of the impeachment process of the then-president Dilma Rousseff. We restate the questions posed in the introduction to this paper:

A) Were we really faced with a precedent?

b) If so, would it be persuasive or binding?

c) If so, what would be its general legal norm?

d) In the arguments offered by the senator-judges and the president of the STF, was there sufficient reasoning, logical consistency, and argumentative coherence in an effort to apply the alleged precedent?

The answer to the question posed in letter (a) appears to be affirmative. Yes, if we assume that i) a precedent is the result of the hermeneutic-cooperative process developed by the Courts of Precedents, in the Brazilian case, the Superior Court of Justice (STJ) and the Federal Supreme Court (STF), in dialogue with the legislative text in view of the concrete case; and ii) the Federal Senate, presided over by the president of the STF, functionally assumes the role of a superior court, from a functional standpoint, we believe it is reasonable to affirm that we are facing a precedent.

Let us see, then, whether we would be facing a persuasive or binding precedent - letter (b).

In light of the possible parallel between the Federal Senate, presided over by the president of the STF in the impeachment process of a president of the Republic and a higher court, we believe that we would be facing a binding precedent.

Nonetheless, "mandatory" does not mean that it must be observed at all costs. Regarding the principles of equality, legal security, and the Rule of Law, binding means that the judging body must employ the basic techniques of the dynamics of precedents, namely confrontation, interpretation, application, differentiation, and overturning. The citizen being trialled has the right to equality in the face of judicial rulings.[22]

In our view, this is a case of **distinguishing.**

Our agreement with the then president of the STF ends here in the fact that, yes, there was a precedent related to the impeachment trial of former President Collor. We then turn to the question under letter (c), which concerns the precedent's general legal norm.

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[22] MARINONI, Luiz Guilherme. “O precedente na dimensão da igualdade.” ["The precedent in the dimension of equality."]. *A força dos precedentes*. Luiz Guilherme Marinoni (coord.). Salvador: Editora Jus Podivm, 2010, p. 228-233.

From a practical standpoint, it is essential to recognise that a precedent is always entwined with the factual-legal circumstances of the case. This is not to suggest that the instances must be identical, but we should seek an essential identity between the context of the paradigm case and that of the *sub judice* to determine if the qualitative part of the precedent — the grounds stated — is likewise met.

Therefore, the question is whether the impeachment proceedings of former President Collor and former President Dilma Rousseff were sufficiently similar for the precedent to be at least partially applicable in the event of dissent utilising the Ampliative Distinguishing technique. During the trial of the Process of Impeachment of the then-President of the Republic, Fernando Collor de Melo, it is well-known that the President sent his resignation letter while the trial was already underway to force the dismissal of the case due to loss of its object. When requested to decide whether to continue the trial, the then-president of the trial, Minister Sidney Sanches, determined that the Senate would decide, and that any judgement made by the Senator-judges would be legitimate. It was determined that the process would continue and that the inability of the President of the Republic to hold public office, who could no longer be removed from office because he had resigned, would be judged. A rather peculiar situation.

What would the legal norm of this precedent be? We would take a chance on something like this:

In the trial of the process of impeachment of the president of the Republic, in case of resignation by the defendant on the course of the impeachment procedure already authorized by the Senate, the Senate will continue with the procedure and decide on the imposition of the punishment of ineligibility to hold public office.

In the case under consideration, the defendant, Dilma Rousseff, did not resign. This factual-legal context cannot be dismissed without permanently damaging the precedent and its *ratio decidendi*. We are facing an absolutely different situation. The fact that both cases are cases of impeachment of the President of the Republic does not make them essentially similar. Quite the contrary, in this case, renunciation makes them factually distinct and unequivocally places us before a case of distinguishing. **Decision was confused with precedent.**

And last, how was the precedent applied? What were the grounds for starting from such a profoundly distinct case and concluding that it could be guiding a constitutional sanction split? (letter d)

The bench of one of the parties that supported the defendant proposed a split vote, which appeared to follow the Senate of the Republic's procedures. This was reinforced by a legal opinion from the House, giving the president of the STF a justification to approve the "slicing" of the impeachment vote.

However, it turns out that the split vote was not made in connection to a bill or proposition being voted on, which is why such an institute exists, allowing the major section of a bill being debated in parliament to be approved while voting separately on the parts in disagreement. A vote split was actually made in reference to the Constitution. How could that be accepted? What is the legal basis for that? None!

The existence of the supposed doctrinal minority theory that the sole paragraph of Article 52 of the Magna Carta bore autonomous sanctions would be the second argument. Now, the implication of this is that one can be applied without the other. If such a premise were valid, the defendant may be disqualified from holding public office and the court could choose not to remove her from office. Such an assertion does not require argument to demonstrate its absurdity.

The conclusion could not be otherwise: the constitutional sanction is one and thus inviolable; and what was claimed to be a precedent as grounds for the decision to split the constitutional sanction was a decision that became *res judicata* in a case that was completely different from the factual-legal perspective of the case in question and that could not have been applied to the case if the most basic precedent management techniques had been observed. The split vote mechanism certainly does not apply to the constitutional text, which had already been voted on by constituents in 1988 and was not being voted on as a mere bill.

This author was not surprised by the remark made by another STF member, Minister Gilmar Mendes, who, when asked by journalists the day after the unfortunate trial's conclusion to comment on the separation of sentences imposed on separate ballots, stated that Minister Lewandoswisk's rationale "would not pass the kindergarten of constitutional law."[23]. From the standpoint of procedural law, it was unquestionably a major error that can only be comprehended from a political and not a legal perspective, especially when conducted by a jurist and scholar of Minister Lewandowisk's calibre.

Here, it is difficult not to consider Tomas's "theory of judicial shamanism," according to which "the basis of court decisions is nothing more than a form of contemporary shamanism," and that:

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[23] Available at: https://www.youtube.com/watch?v=3oejjQk19Qc. Accessed on: 10/01/2016 at 03:51 p.m.

> [...] judicial decisions, when they annul or modify a law or administrative act on the pretext that they do not correspond to what would be the "true" "spirit of the law" or "the constitution", are in fact a pure and simple way of imposing the will of the judge themselves, or the class they represent (legal elite), over the legislative option, concealing it under the logical appearance of legal discourse.
>
> This activity can be as arbitrary (albeit the result of deep conviction) as the interpretations of shamans in primitive societies. [...]. In the shamanistic rituals (process), the shamans (judges) claim to hear a spiritual battle between "the spirits" (legal principles), who fight among themselves, and then the shamans inform the society of the victorious. It is evident that judges' exercise of authority is legitimated by rational discourse and finds its true foundation in social approval. By utilising arguments, however, practitioners of the religion of “legal dogmatics" are able to exert a sort of power that favours their own interests and privileges, the interests and privileges of a class that arrogates to the rhetorically effective use of arguments for its own purposes.

There is much to be debated in order to comprehend the true role of hermeneutics in the construction of law and the role of its main tool at present placed at the service of citizenship, equality, legal certainty, and the cohesion in the Brazilian legal system and justice: the judicial precedent.

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