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THE ROLE OF PRECEDENTS AS A FILTER FOR ARGUMENTATION

O PAPEL DOS PRECEDENTES COMO FILTRO ARGUMENTATIVO

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ABSTRACT: This essay examines the role and the limits of a theory of precedent in promoting the values of legal certainty, equality, legitimacy, and efficiency of the courts. It demonstrates, further, that precedents have another major role: they serve as a filter for legal argumentation, guiding litigants and judges on the issues to be discussed and considered in the decision of a case. With this objective, section I clarifies the relationship between the use of precedents and the values mentioned above. Section II demonstrates the manner in which precedents are applied. Section III analyses the subjective and institutional elements that also influence judicial behavior. Finally, section IV presents the conclusion, highlighting the importance of precedents for legal reasoning. The essay uses the North American theory of precedent as a starting point for its analysis.

KEYWORDS: Precedents. Ratio Decidendi. Obiter Dictum. Leading and Hard Cases. Overruling.

RESUMO: Este artigo examina o papel e os limites de uma teoria de precedentes na promoção dos valores de segurança jurídica, igualdade, legitimidade e eficiência das cortes. Demonstra, ademais, que os precedentes têm um outro importante papel: servem como um filtro para a argumentação jurídica, guiando litigantes e juízes nas questões a serem discutidas e consideradas na decisão de um caso. Com esse objetivo, a Seção I esclarece a relação entre o uso de precedentes e os valores acima mencionados. A Seção II demonstra a maneira como os precedentes são aplicados. A seção III analisa os elementos subjetivos e institucionais que também influenciam o comportamento judicial. Finalmente, a Seção IV apresenta a conclusão, destacando a importância dos precedentes para o raciocínio jurídico. O artigo utiliza a teoria dos precedentes norte-americana como ponto de partida para a sua análise.

PALAVRAS-CHAVE: Precedentes. Ratio decidendi. Obiter Dictum. Casos Paradigmas e Difíceis. Superação.

INTRODUCTION

This essay examines the role and the limits of a theory of precedent in promoting the values of legal certainty, equality, legitimacy, and efficiency of the courts. It demonstrates, further, that precedents have another major role: they serve as a filter for legal argumentation, guiding litigants and judges on the issues to be discussed and considered in the decision of a case. With this objective, section I clarifies the relationship between the use of precedents and the values mentioned above. Section II demonstrates the manner in which precedents are applied. Section III analyses the subjective and institutional elements that also influence judicial behavior. Finally, section IV presents the conclusion, highlighting the importance of precedents for legal reasoning.

A) REASONS FOR ADOPTING BINDING PRECEDENTS

Imagine that the eldest daughter of a couple has asked her father to go out, on a weeknight, during the academic term, in order to attend her best friend's birthday party, and that her father has consented. The following week, her younger brother also asked their father to go to a party with a friend, but had the request denied. The father then explained to the son that, in the first case, the occasion for going out was exceptional: the birthday celebration of a person very dear to his sister. He explained further, that, unlike the son, his sister was doing well in school and, therefore, the father could make an exception to the general rule that forbade his children from going out on weeknights during the academic term. A week later yet, the son asked for permission to go to a classmate's house, to complete a group project for school. His father consented on the grounds that it was an exceptional case and had academic purposes.

These precedents indicate the parents' criteria regarding weeknight outings during the academic term. The general rule is that they are prohibited. The purpose for the said rule is to maintain an orderly life, as a way of promoting the children's health and academic performance. The first exception holds that weeknight outings are allowed if they are extraordinary, provided that the child is doing well in school. The basis for the exception is that, under such conditions, weeknight outings do not compromise the purpose of the general rule. The second exception stipulates that weeknight outings are allowed when they are extraordinary and required for school work. In this case, as well as in the previous one, going out at night does not compromise good health because it is exceptional. And it is not detrimental to academic performance because it is necessary for completing a group project for school.

Thus, the analysis of the three precedents reveals that behind the rule and its two exceptions lies a basic principle: the promotion of good health and academic performance. The exceptions are justified because they are in harmony with said principle. If the children fully understand the precedents as well as the reason underlying these precedents, they will be able to predict situations in which their father will allow them to go out at night, and situations when he will not. They will notice that the same criterion applies to each and all of them. They will understand that such criterion has a rational basis and they will be capable of adjusting their conduct without having to consult their father.

The *raison d'être* for binding precedents and the reasoning one formulates based on them can be understood from examples of daily life, the logic of which is reproduced in the process of judicial decision making. First of all, imposing upon judges the obligation of following past decisions concerning a certain matter ensures the predictability, stability, and continuity of the law, as the decision applied to one dispute will determine the outcome of similar claims. Binding precedents are tools to guide peoples' conduct on certain matters. They are, to this extent, an element of legal certainty.

Furthermore, the universe of judicial decision making, different from the example above, does not rely on a single decision maker with just one well-established criterion for deciding cases. On the contrary, it is composed of a multiplicity of judges who may have divergent views on similar cases. To this extent, the adoption of binding precedents preserves equal treatment among litigants. All those who find themselves in the same situation will (or should) obtain the same legal response. This argument again harbors the notion of legal certainty and also of justice as equality: even if a certain ruling is not the best, it is fair because it is the same for all. The equality imperative determines that, when analyzing a dispute, judges must take into account not only the legal response to be given to the case at hand, but also to all the other disputes that are similar. It requires, thus, the search for an objective legal basis.

> Under the principle of objectivity, courts are obliged to reason from propositions that are universal, that is, propositions the courts are ready to apply not merely to the parties to the immediate dispute, but to all similarly situated disputants who may come before them in the future. Stare decisis gives effect to this concept too. Under stare decisis, a court is on notice that if it chooses to apply a given proposition to resolve a dispute between these litigants today, it may be obliged to apply the same

> proposition to all similarly situated disputants in the future. Thus stare decisis discourages a court from deciding cases on the basis of propositions it would be unwilling to apply to all similarly situated disputants.[1]

Due to such claim of equality, normative precedents *limit the power and the discretion* of judges, confining them to the conclusions already arrived at. Therefore, normative precedents narrow judicial activity to the traditional notion that said activity consists of deciding cases, with objectivity and neutrality, based on pre-existing norms. Even if such is not an accurate description of the decision-making process, it corresponds, to some extent, to the layman's expectations and views on judicial activity. Moreover, the litigants' perception that judges decide based on logical, fair, and established criteria that predate the appreciation of their case preserves *the legitimacy and the credibility of the courts*, contributing to their institutional stability.

Finally, the use of binding precedents may render the legal system more efficient. In the domestic example above, precedents would make it unnecessary for children to ask for their father's permission to go out every time they were invited to, because, in most cases, they will be capable of predicting their father's response, sparing him from new requests and reiterated explanations about the matter. The same occurs in the judicial context. The application of binding precedents saves time and resources because it renders unnecessary new considerations about matters that are already decided. It also dissuades potential claimants from bringing frivolous claims, since they already know how such actions would end.[2] It avoids the issuance of conflicting rulings and, to some extent, judicial errors. Therefore, in synthesis, the values that justify the adoption of a system of binding precedents are: *legal certainty, equality and the promotion of legitimacy, and efficiency of the judicial process.*[3]

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1 EISENBERG, Melvin Aron. The Nature of the Common Law. Harvard University Press: Cambridge, 1988. p. 47-48. Also: TRIBE, Laurence. *American Constitutional Law*. 3. ed. v. 1, Foundation Press: New York, 2000. at 82; CARDOZO, Benjamin N. *The Nature of the judicial Process*. Dover Publications: New York, 2005. p. 17.

2 MALTZ, Earl. 'The Nature of Precedent'. 1988, 66. *North Carolina Law Review*, 367-392, at 371 ff; HANSFORD, Thomas; SPRIGGS II, James. *The Nature and Timing of the U. S. Supreme Court's Interpretation of Precedent*. Available at: <http://www.bsos.umd.edu/gvpt/CITE-IT/Documents/Hansford%20etal%202002%20Nature%20and%20Timing%20of%20t%20US%20Supreme%20Court.pdf>. Accessed on: jan. 29, 2011, p. 6ff; The Politics of Precedent on the U.S. Supreme Court. Available at: <http://psfaculty.ucdavis.edu/spriggs/The_Politics_of_Precedent_FINAL.pdf>. Accessed on: Sept. 20, 2005, p. 163ff.

3 This assertion is generally valid for common law as well as for civil law countries. It is true that binding precedents are the main source of law in common law jurisdictions. In contrast, precedents usually

B) DEALING WITH BINDING PRECEDENTS

1 DEFINING THE NORM THAT WILL GOVERN FUTURE CASES

Legal reasoning based on precedents is grounded in certain essencial concepts: the notions of *holding*, justification, and *obiter dictum*.[4] The *holding* (or *ratio decidendi*) is the norm extracted from the case that binds inferior courts. It corresponds precisely to the legal thesis, that is, the premise that justifies the court's conclusion. The notion of *holding* is one of the most important concepts for the application of binding precedents; however, its identification may not be as simple as it appears. The interpreter shall examine the decision, with special attention to its justification.[5] He shall seek to identify which *facts* the court considered to be important, the *legal issues* discussed and, finally, the *court's understanding* of these facts and

have a mere persuasive efficacy in civil law countries, where the primary source of law is statute law. However, many civil law jurisdictions tend to adopt binding precedents, especially in constitutional matters (but not necessarily restricted to them). Constitutional law employs rules/principles with abstract and potentially conflicting meanings for the protection of fundamental rights (e.g.: the right to privacy vs. right to freedom of expression and press). Several civil law countries have attributed to the Judiciary the task of defining the reach of these rules/principles when deciding disputes. The notion of constitutional supremacy and the need to preserve the Constitution's normative force have justified the granting of binding force to the decisions about constitutional matters. This is currently happening, to a greater or lesser extent, in Germany, Italy, Spain. lt is also a tendency in Brazil, Argentina and Colombia (cf. ALEXY, Robert; DREIER, Ralf. *Precedent in the Federal Republic of Germany*; TARUFFO Michelle; LA TORRE, Massimo. *Precedent in Italy*; MIGUEL, Alfonso Ruiz; LAPORTA, Francisco. 'Precedent in Spain'. In: N. MacCormick and R. Summers (eds.) *Interpreting Precedents:* A Comparative Study. (Ashgate: Dartmouth, 1997), 26-27, 154-155 and 272; DAVID, René. Os Grandes Sistemas do Direito Contemporâneo. Martins Fontes: São Paulo, 2002. p. 160-161; (2005) 240, *Revista de Direito Administrativo*, 1-42, at 9-10).

4 The mentioned concepts are useful tools for a legal reasoning based on binding precedents despite the differences in legal systems.

5 MONAGHAN, Henry Paul. 'Stare Decisis and Constitutional Adjudication' (1988) 88. *Columbia Law Review 4*, 723-773, at 763-767; Larry Alexander, 'Constrained by Precedent' (1989) 63 Southern California Law, 1-64, at 9-10; Charles Cole, 'Stare Decisis na Cultura Jurídica dos Estados Unidos. O Sistema de Precedente Vinculante do Common Law', trans. Maria Cristina Zucchi (1998) 87 *Revista dos Tribunais*, n. 752, 11-21; Maltz, 'The Nature of Precedent' (n. 2), 372-383; Geoffrey Marshall, 'What is Binding in a Precedent', in: Interpreting Precedents: A Comparative Study (n. 3), 503-518; Edward D. RE, 'Stare Decisis' (1994) 73 *Revista de Processo*, 47-54; Robert Surnmers, 'Precedent in the United States (New York State)', in: Interpreting Precedents: A Comparative Study (n. 3), 355-406; Isabelle Rorive, 'La Rupture de la House of Lords avec un Strict Principe du Stare Decisis dans le Contexte d'une Réflexion sur l'Accélération du Temps Juridique', in: L'Accélération du Temps Juridique, ed. Philippe Gerard, François Ost; and Michel Van De Kerchove, Michel (Facultés Universitaires Saint-Louis: Brussels, 2000), 801-836, at 807; Arthur L. Good hart, 'Deterrnining the Ratio Decidendi of a Case' (1959) 22 *Modem Law Review*, 117-124, at 162; ALBUQUERQUE SILVA, Celso de. *Do Efeito Vinculante:* sua Legitimação e Aplicação. Rio de Janeiro: Lumen Juris, 2005. p. 182-183.

issues.[6] There are cases when the court raises more than one question of law or more than one reason for deciding. In these circumstances, if the reasons for adopting certain solutions are cumulative, they will generate a single binding rule. If they are independent from each other, and capable of autonomously leading to the same result, each one of them may be considered a concurrent holding. Finally, if one of the reasons is not a determinant factor for the decision of the case, it will not constitute a holding and, therefore, will not bind future claims.[7]

Back to the example mentioned above, when the father denied authorization for his son to go out at night with a friend, the father mentioned that, his daughter had been allowed to attend her best friend's birthday party because, in that case, going out was exceptional as the birthday party would only happen that night. But, still, he added that, differently from the son, his daughter was doing well in school. This last statement could generate questions about the meaning of the rule that arises from the decision. If the reasons for the father's decision were cumulative, the holding would be: going out on a weeknight during the academic term is only allowed when the occasion is exceptional and the child has good academic performance. If the reasons were independent from each other, the norm would be: going out on a weeknight during the academic term is allowed when the occasion is exceptional or when the child has good academic performance. However, if the statement about school performance is considered a mere criticism, and not a determinant factor to the father's decision, the precedent would hold that: going out on a weeknight during the academic term is only allowed when the occasion is exceptional. In this case, school performance would not determine future decisions.

Despite the fact that the holding definition rests largely on the decision's justification, these concepts are not coincident. The justification includes all the arguments and questions of law mentioned by the court.

6 There is some controversy about the methods for identifying the holding, which sometimes emphasize the facts raised by the case and, other times, the importance of the decision justification for this purpose. On the subject: cf. Henry Paul Monaghan, 'Stare Decisis and Constitutional Adjudication' (n. 5), 763-766; Larry Alexander, 'Constrained by Precedent' (n. 5), 10 ff; Ronald Dworkin, Uma Questão de Princípio, trans. Luis Carlos Borges (Martins Fontes: São Paulo, 2005), 453 ff; Laurence Tribe and Michael Dorf, On Reading the Constitution (Harvard University Press, Cambridge, 1991), 114-117; Frederick Schauer, 'Precedent' (1987) 39 Stanford Law Review, 571-606; Frederick Schauer, 'Rules, the Rule of Law, and the Constitution' in: (1989) 6 Constitutional Commentary, 69-85; Earl Maltz. 'The Nature of Precedent' (n. 2), 367 ff; MARHSALL, 'What is Binding in a Precedent'. In: *Interpreting Precedents:* A Comparative Study (n. 3), 503-518; Summers, 'Precedent in the United States (New York State)' in Interpreting Precedents: A Comparative Study (n. 3), 355-406.

7 MARSHALL, 'What is Biding in a Precedent'. In: *Interpreting Precedents:* A Comparative Study (n. 3), 515.

Part of such arguments and questions may not have been determinant to the decision, being a mere *obiter dictum*.[8] *Obiter dicta* are precisely those remarks that were not necessary to the decision of the case at hand. For example, arguments put forth by a judge of a collegiate court that were not taken into account by his fellow judges, or remarks about related matters that do not refer directly to the issue at hand (e.g: the son's performance in school) do not constitute the holding.

Obiter dicta are not binding because judge-made law derives its rules from concrete cases. If certain remarks are not necessary to reach the decision, they do not concern the claim presented before the court. Yet, they derive from hypothetical formulations, whose particularities the Judiciary would be unable to consider in the abstract sphere, given that it is not the role of the courts to do so, but rather to resolve the dispute at hand. Notwithstanding, *dicta* have an argumentative role. In a case that poses, at the same time, various questions of law, a certain statement by the court, perceived as an *obiter dictum*, ultimately may become an alternative holding. Further, the lower courts may confer to the *obiter dictum* a considerable weight when there is evidence that it resulted from an attentive scrutiny by the higher court, even though such level of scrutiny was unnecessary for the decision.[9]

It should be noted that, upon defining the legal thesis that governed the solution of a case, there still remains the question of the level of generality of the language employed to announce the thesis. In order to illustrate the issue, legal literature usually refers to *Donoghue v. Stevenson* [1932] A. C. 562. In this famous case, decided by the House of Lords, Mrs. Donoghue's friend purchased a bottle of ginger beer. After ingesting part of the content of the opaque bottle, Mrs. Donoghue noticed the remains of a snail in the drink, which later caused her gastroenteritis. She sued the beverage producer, asking for indemnification, on the basis of an existing (extra-contractual) duty of care in avoiding his products from inflicting harm to final consumers. In its decision, the House of Lords recognized

8 Precisely because of this, Julius Stone proposes a distinction between descriptive ratio decidendi and prescriptive or binding ratio decidendi, the first corresponding to the argumentative process by which a concrete decision has been reached and the second to the content that will bind courts in subsequent cases, i.e., the holding. STONE, Julius. 'The Ratio of the Ratio Decidendi' (1959) *22 Modem Law Review*, 600-601).

9 Summers, 'Precedent in the United States (New York State)' in Interpreting Precedents: A Comparative Study (n. 3); MARSHALL, 'What is Binding in a Precedent' in Interpreting Precedents: A Comparative Study (n. 3), 515.

there was such a duty, and remarked that the producer could foresee that the lack of care in such circumstances may cause harm. [10]

The rule that emerges from the case could be described in narrow or broad terms. One could argue that the precedent determines that beverage producers who cause harm to the health of final consumers must indemnify them, as long as the product is purchased in circumstances that prevent the consumers from discovering any defect (opaque bottle) and there is reasonable knowledge that the absence of care may cause harm. Litigants could also allege that the decision establishes that any producers or service providers who cause harm to final consumers for negligence should have the duty to indemnify, or, yet, that any person who causes damage to another for negligence should also have this duty. The definition of the holding and its reach rests upon an evaluation of the relevant facts, the justification of the decision, how broad the language employed in the ruling was, and also, eventually, the treatment that the ruling received in subsequent cases. Subsequent decisions help define the normative content of past cases to the extent that the confrontation of the latter with new situations clarifies the standard or principle the court employed in its first decision.

2 DECIDING WHETHER TO APPLY (OR NOT TO APPLY) THE NORM TO NEW CASES

The application of the ruling established in a precedent to a new dispute depends upon a comparison between the essential elements of the precedent to those of the new case. The interpreter confronts the relevant facts in each dispute; the values they refer to; and the question of law to be resolved by the court. He/she also will examine the basis of the first decision. The existing similarities or differences will be debated. In the end, the interpreter decides whether the new dispute is identical or not, and, therefore, if it must be governed by the precedent. The application

10 The case heard by the House of Lords concerned simply whether there was a case to be tried. The question was whether the beverage manufacturer, who was not in a contractual relationship with Mrs. Donoghue, had an extra-contractual duty to indemnify her, considering that his defective product was sold to a third party, not to Mrs. Donoghue. The Court decided there was a case to be tried, since the producer could be liable in the mentioned circumstances, despite the non existence of a contract, because: "a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form of which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products is likely to result in injury to the consumers life or property owes a duty to the consumer to take that reasonable care".

of the precedent to new cases will serve to confirm the holding and its reach, increasing the force of the ruling and its level of determination. [11]

On the other hand, if the court considers that the new case presents factual particularities that evoke a substantially different question of law, it will not apply the precedent, distinguishing the second case from the first. This distinction is a consequence of the criteria that guide the application of precedents, according to which: *"the rule follows where its reason leads"*; *"where the reason stops, there stops the rule"*.[12] Thus, if for the sake of fairness and integrity similar cases shall receive the same treatment, for the very same reasons, different situations must also be treated differently.[13]

In the domestic example, if the father had to authorize a nightly outing for a reason other than attending an exceptional event, and his son was doing poorly in academics, but was on vacation from school, it is likely that the father's decision would be different. In this situation, a relevant fact, present in all of the other scenarios, would be absent: the circumstance that the nightly outings would take place on weeknights *during the academic term.* This factual difference would render inapplicable the principle that guided the *previous* decisions. Thus, the reasoning based on precedents permanently produces new opportunities for deciding:

> [B]y maintaining at the centre of' the rule of stare decisis' a notion of the *ratio decidendi* of a case which is almost a perfect medium for the creation of multiple and competing references. While thus leaving room for the play of contemporary insight and wisdom, however, the notion also directs the attention of the later court to the contexts of earlier cases, and to the views of logical consistency, experience and values displayed by judges in the earlier contexts.[14]

11 Karl Llewellyn, 'The Case Law System in Arnerica' (1988) 88 Columbia Law Review, 989-1020, at 1006-1007.

12 Statements attributed to Karl Llewelyn (apud Summers, 'Precedents in United States (New York State)' in Interpreting Precedents: A Comparative Study (n. 3) 390).

13 Tribe and Dorf, On Reading the Constitution (n. 7), 71 ff; Karl Llewelyn, The Common Law Tradition: Deciding Appeals (Little, Brown and Company: Boston, 1960), 77 ff; Goodhart, 'Determining the Ratio Decidendi of a Case' (n. 5), 166; Ronald Dworkin, O Império do Direito, trans. Jefferson Luiz Camargo (Martins Fontes: São Paulo, 2003), 300 ff; Summers, 'Precedent in the United States (New York State)' in Interpreting Precedents: A Comparative Study (n. 3), 390-394; Schauer, 'Precedent' (n. 6), 571-605; Schauer, 'Rules, the Ruie of Law, and the Constitution' (n. 6), 69-85.

14 Stone, 'The Ratio of the Ratio Decidendi' (n. 8), 619.

The possibility of modifying the holding in light of new situations brought before the court is one of the essential characteristics of the common law. The tension between applying or distinguishing from among precedents in subsequent disputes is permanent in that legal system. A party's claim to benefit from an understanding in his/her favor will be opposed by the other party's argument for distinguishing, and, from this confrontation, judge-made law will evolve.[15] Dealing with precedents is not a mechanical process. It is markedly argumentative and value dependent. Despite being justified on reasons of, among others, promotion of legal certainty, predictability, and stability of the law, the application of precedents faces constraints in limiting the power and discretion of judges.

3 LEADING AND HARD CASES[16]

The influence a precedent exerts over the ruling of a subsequent case is not confined to its holding. Certainly, the holding will embody the norm that will govern similar cases in the future, and only them. However, even if only the holding has binding effects, the underlying principle behind it has a justifying force capable of influencing the judgment of other cases. The general principle of law that serves as basis to the rule created by the precedent engenders a kind of gravitational force capable of interfering in the decision of future cases. In Dworkin's words:

> [...] when a precedent does have enactment force, its influence on later cases is not taken to be limited to that force. Judges and lawyers do not think that the force of precedents is exhausted, as a statute would be, by the linguistic limits of some particular phrase [...]. He would urge that the earlier decision exerts a gravitational force on later decisions even when these later decisions lie outside its particular orbit. [...] In adjudication, unlike chess, the argument for a particular rule may be more important than the argument from that rule to the particular case.[17]

15 LLEWELLYN, Gewirtz and ANSALDI, 'The Case Law System in America', 989-1020.

16 The first decision that faces a certain legal issue is called a leading case. Leading cases are good candidates for hard cases, cases of difficult solution in which there are references to principles that could result in divergent conclusions.

17 DWORKIN, Ronald. *Taking Rights Seriously*. Harvard University Press: Carnbridge, MA, 1977, 111-112. According to Dworkin, the meaning of norms may change to the extent the comprehension of the values on which they are based advances. Even if one could argue that real life judges cannot be compared to judge Hercules, the above cited passage describes a form of argumentation that lawyers often use, and that, therefore, is in some measure reflected in judicial decisions (in constitutional matters this is evident, as subsequent examples will show). Through argumentation, one seeks to extend the incidence of the principle that served as basis for the holding of a previous case to new cases that are not identical, but that are related to similar values, hoping to guide the court to decide in harmony with its previous

Imagine that Parliament passed a law prohibiting the use of contraceptives by married couples, and that, after examining such law, the Constitutional Court found it to be unconstitutional, affirming that the decision about whether or not to have children is a matter confined to every citizen's realm of privacy, in which the State cannot interfere. The holding extracted from such a case could be worded as follows: "The State cannot intervene in a couple's decision to use contraceptives, in order to avoid having children, because their decision is protected by the right to privacy". The principle that served as basis to the holding, in its turn, would state that: "Citizens have a sphere of privacy, concerning intimate choices and personal projects, in which the State cannot intervene, at the risk of violating the right to privacy." Since only the holding would bind judges when deciding subsequent cases, the ruling would only govern cases about the right of couples to use contraceptives to avoid having children.

Suppose then that the court examined a law that criminalized sexual intercourse between people of the same gender. This new case could not be decided by applying the holding of the previous case, nor of any other, and, for this reason, it would constitute a leading case on the subject. Nonetheless, in arguing the unconstitutionality of the mentioned law, it would be possible to evoke the principle that served as basis for the holding in the claim about contraceptives, because in the new case, as in that of contraceptives, the law interferes in people's intimate and personal choices as well as their sex lives, thus violating the right to privacy.[18] A similar argument could be used to challenge the constitutionality of a law regulating marriage and marital property regime between individuals of different genders, if said law failed to award similar status to homosexual couples. One could argue that the law adopts an illegitimate criterion of discrimination, as it is incompatible with the principle according to which people's sex lives are a private matter immune from State interference.

A law prohibiting abortion could be challenged with basis in similar reasons. Litigants could allege that such law should be declared unconstitutional because it is not compatible with the principle that the Court upheld in deciding the previous cases, as it interferes in a pregnant woman's right to make decisions about her own body and personal projects. This argument could be contested on the grounds that, in this latter case, the element "intrauterine life in gestation" would engender the incidence

decisions. Cf., and: TRIBE, and DORF, On Reading the Constitution (n. 6), p. 109-110; DWORKIN, O Império do Direito (n. 5), 123-125.

18 TRIBE and DORF, On Reading the Constitution (n. 6) 78-79.

of yet another constitutional right: the foetus' right to life. In deciding, the Court would need to address both allegations, issuing its opinion on the conflict between the two rights and deciding which of them should prevail, and to what extent, in the case at hand.

In leading and hard cases, in which courts face, for the first time, questions they have never considered before, principles and values that served as a basis for previous rulings will provide elements for the new decision. To this extent, precedents may serve as important argumentative marks in leading cases, although one must inevitably recognize that these cases entail a broad space for judicial discretion, for which a theory of precedent is unable to offer other solutions. In Justice Cardozo's words:

> Finally there remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, some times much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power. [...]. In a sense it is true of many of them that they might be decided either way. By that I mean that reasons plausible and fairly persuasive might be found for one conclusion as for another. Here come into play that balancing of judgment, that testing and sorting of considerations of analogy and logic and utility and fairness, which I have been trying to describe. Here it is that the judge assumes the function of a lawgiver. I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. [...]. As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served the day expire, and new principles are born.[19]

In such instances, the decision making process is based on pragmatic considerations regarding the various values at stake, customs, benefits and disadvantages of a certain decision and its consequences. In the same author's words: *"My analysis of the judicial process comes then to this and little*

19 CARDOZO, The Nature of the Judicial Process (n. 1), 161-163.

more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are forces which singly or in combination shape the progress of the law".[20]

In hard cases, courts will make choices concerning values, in deciding whether or not to infer a fundamental right from a constellation of precedents.[21] Despite all of the law's efforts to promote legal certainty, and despite this being one of the essential roles of a theory of precedent, it is unable to eliminate the wide space left for judicial discretion. Such space results from the imprecision of language, the vagueness and abstraction of certain essential legal concepts, the complexity of real life and the law's inability to foresee and regulate every possible dispute of interests. This space may also be generated by the dynamism of legal systems, which are constantly in change, in what concerns both the comprehension of the content of existing norms and also the way in which such norms should be interpreted in light of new situations of real life. In this latter case, new decisions may depart from existing precedents, creating new spaces for judicial discretion.

4 OVERRULING

A precedent is overruled when the binding court, which established a certain holding, changes its understanding regarding the matter, thus deciding to rule it in a different way. Overruling results from the perception that a decision is incompatible with the other legal norms and principles that govern the subject or with certain social standards related to the values at stake.[22] Nevertheless, the decision about overruling a precedent shall still consider reasons of legal certainty, equality, legitimacy, and efficiency that could recommend its maintenance. [23]

This is so because the change of the rules usually applied to certain situations may surprise the citizens. It is detrimental to the predictability of the law and results in unequal treatment to similar cases. It suggests that other discussions can be reopened, thus fomenting new disputes before courts. Overruling also lends uncertainty to the criteria used by the court in

20 CARDOZO, The Nature of the Judicial Process (n. 1), 108.

21 TRIBE and DORF, On Reading the Constitution (n. 6), 116; CARDOZO, The Nature of the Judicial Process (n. 1), 23-26.

22 LLEWELLYN, GEWIRTZ, and ANSALDI, 'The Case Law System in America' (n. 11), 1012-1014.

23 The understanding that a holding is not correct does not necessarily imply the decision to revoke it, at least not in any system of binding precedents. EISENBERG, *The Nature of the Common Law* (n.1), 104ff.

deciding, and may cause losses to their credibility. There are subject matters that are specifically sensitive to changes of understanding, such as property rights and tax law. If peoples' conduct and their fundamental choices concerning these matters are informed by previous judicial decisions, grave consequences and damages can arise from overruling them. In those cases, courts will analyze whether the benefits of correcting the precedent justify the burdens imposed to the mentioned values. [24]

There are a number of situations that may lead to the overruling of a precedent, as, for example: a) decisions that are unenforceable in practice, because the rule is inoperable, obscure in meaning, or has been undermined by arbitrary distinctions; b) the recognition that an interpretation was mistaken from the very beginning; c) the current understanding that a doctrine is unjust by virtue of cultural, political, social, economic, or technological changes; and d) the obsolescence of a decision caused by the evolution of applicable legal principles.[25]

When the holding does not offer a precise guideline, as when a tribunal formulates a binding rule by employing vague concepts, the precedent is not able to ensure safe and equal treatment to all litigants. The same happens when a certain ruling established by the binding court is disfigured by arbitrary distinctions made by the bound judges, as a form of tacit insubordination against its application (normally for perceiving it as unfair or mistaken).[26] In these situations, the burdens of revoking the precedent tend to be small, as it already constitutes a fragile reference for judges and citizens alike.

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24 The rigor with which the courts will consider whether to overrule or not precedents that are incorrect or outdated, balancing the decision with reasons of legal certainty and equality, will vary according to the legal system. In those in which prospective overruling is admitted, overcoming an understanding tends to be easier because this technique allows the mitigation of part of its burden.

25 Cf. Planned Parenthood of Southeastern PA. v. Casey, 500 U.S. 833 (1992); TRIBE, American Constitutional Law (n. 1), 236 ff; RORIVE, 'La Rupture de la House of Lords avec un Strict Príncipe du Stare Decisis dans le Contexte d'une Réflexion sur l'Accélération du Temps Juridique' (n. 5), 816 ff; Monaghan, 'Stare Decisis and Constitutional Adjudication' (n. 5), 758 ff; SUMMERS, 'Precedent in the United States (New York State)' (n. 3), 374 ff; EISENBERG, The Nature of the Common Law (n, 1), 104 ff; Cardozo, The Nature of the Judicial Process (n. 1), 147; COLE, Stare Decisis na Cultura Jurídica dos Estados Unidos. O Sistema de Precedente Vinculante do Common Law (n. 5), 18; ALEXANDER, 'Constrained by Precedent' (n. 5), 1-64; HANSFORD, Spriggs II, 'The Policies of Precedent on the U.S. Supreme Court' (n. 2), 19; SILVA, *Do Efeito Vinculante:* sua Legitimação e Aplicação (n. 5), 262-284.

26 The distinction between cases will be arbitrary when it leads to the non application of the precedent by invoking facts and arguments that do not justify a differentiation. Not all factual differences are legally relevant. SCHAUER, Rules, the Rule of Law, and the Constitution (n. 6), 69; CARDOZO, The Nature of the Judicial Process (n. 1), 19.

In the three last situations - recognition that a ruling was mistaken from the beginning, obsolescence of the decision due to the evolution of the applicable legal principles, and social changes - the arguments and benefits that favor the modification of an understanding shall be weighed against other reasons and burdens that recommend its maintenance. If arguments of legal certainty and/or equality advise against the overruling of the precedent, the court may appeal to intermediary forms of decision, as a technique for optimizing the efficacy of all the values at stake and minimizing the sacrifice of each of them.

An intermediary form of decision, in the sense mentioned above, is the prospective overruling, through which, despite the application of the old precedent to the case at hand, the court announces that it will no longer be applicable from that day onwards or from a certain future date stipulated in the decision. Another intermediary form of decision consists in the signaling technique, whereby the binding court applies the old precedent to the new case, but signals to the legal community its intention of changing that precedent, what discards, as of such notice, the justified belief in its application, opening a track for its revocation.[27]

Overruling precedents is essential to the development of law and to the preservation of legal authority. The law seeks to regulate a changing reality. If a theory of precedent is not able to provide mechanisms that allow it to evolve along with the society it regulates, the law itself would become outdated. This way, as it would not be able to coordinate responses to the various conflicts of interests, it would eventually be overtaken by reality. Some time ago, racial segregation in schools was not regarded as a violation to the right to equality. Women and men did not enjoy the same basic rights. It was impossible to know with certainty the paternity of a child before the existence of the DNA test. There was no way of verifying that a foetus in the womb would not be viable, due to malformation of a vital organ. One could not even imagine that the world would be interconnected through the internet and that new types of crimes would be committed with this tool. These are relevant social changes that may interfere with the content of the law.

In deciding to overrule a precedent, a court shall justify its reasons surpassing the arguments for its adoption in the past. The court may also demonstrate that the modification of the law brings more benefits than burdens. To this extent, the previous precedent will impose a kind

27 EISENBERG, The Nature of the Common Law (n, 1), 122.

of argumentation that restricts the reasoning of the court in its decision to overrule. It is necessary to acknowledge, however, that a considerable space for discretion remains, one that is difficult to control and that, like the decisions in leading and hard cases, is prone to the interference of subjective and institutional factors.

5 PRACTICAL REASONING AND CONCERN WITH CONSEQUENCES

For all the above, dealing with precedents implies a practical reflection focused on the problem and on the issues raised by the case. Past holdings are applied considering the principles and purposes that justified their adoption, and, therefore, the law is redefined in every new case at hand, according to the solution that best achieves the objectives of the norm. Courts will identify such solution based on considerations regarding the Court's experience, arguments raised by the parties, values and social interests to be served, moral patterns of the community, analogy, custom, tradition, historical and teleological concerns, integrity and harmony of the legal system, social standards of conduct, and the perception of the most adequate and fair decision.[28] A pre-defined script does not exist. Those elements are tested and balanced. In some circumstances, the legal system will have a relatively ready answer for the situation. In others, the final result will consist of a truly judicial creation.

The consequences of adopting a certain position are also considered in the decision making process. The very idea of a system of binding precedents requires the judge to reflect on the outcome of rulings for new disputes, since he will be setting a norm that will govern similar claims in the future. In deciding a leading case, the decision to adopt a given solution will take into account the principles already af firmed by the court in previous decisions, but also the practical results of such a solution. In overruling a precedent, the court will assess its incorrectness or obsolescence, but also the impact that the change will produce on other important values, such as legal certainty and fairness.

If the court concludes that a change of understanding will bring about more burden than benefit, it is possible that it will refrain from overruling its precedent or it will alter the precedent with prospective effect only. Thus, judicial decisions are taken with an eye to the past and

28 CARDOZO, The Nature of the Judicial Process (n. 1), 39.

another to the future.[29] On the other hand, the consequences, as well as the facts, are not important in themselves. To identify the ones that must be taken into account in a decision and their weight, as well as to reflect on the various elements described above, the judge has, inevitably, to resort to cultural, moral and historical, references, reopening the space for choices.

C) THE OTHER FACTORS THAT INTERFERE ON THE DECISION MAKING PROCESS

Dealing with precedents is an activity that involves various levels of indetermination. As already mentioned, precedents may provide incomplete answers or simply not provide an adequate response to the decision of a given case. On these occasions, the judicial decision making process becomes more vulnerable to two kinds of factors which, in addition to the orthodox legal materials[30], may interfere in the judicial rulings: a) *subjective factors* and b) *institutional factors*. The *subjective factors* include judges' psychological make-up, specific groups with which they identify themselves, and their ideological preferences. The *institutional factors* are related to any and all considerations a judge takes into account in forming his/her conviction, based on the awareness of being a member of a tribunal and/or on the concern to preserve the court as an institution. These considerations encompass the relationship among the judges of the same panel, as well as the relationship of the appeal court with the other lower ranking courts, the branches of government (Executive and Legislative) and the public opinion.[31]

1 SUBJECTIVE FACTORS WHICH INTERFERE IN THE DECISION MAKING PROCESS

Judicial decisions are issued by human beings, based on perceptions and knowledge acquired throughout their lives, which are not purely technical or legal, and that interfere, in an unconscious manner, in their comprehension of the problems and in the solutions they propose for them.

29 POSNER, Richard. How judges Think (Harvard University Press: Cambridge, 2008), 119, 197-198, 230, 243-245; The Problems of Jurisprudence (Harvard University Press: Cambridge, 1990), 454-469.

30 The term "orthodox legal materials" refers to a set of precedents, other rules (laws, decrees, regulations) and interpretive theories recognized by the law.

31 Legal literature offers several theories that try to explain the decision making process. They will not be addressed because they are beyond the scope of this work. What is important here is to demonstrate that subjective and institutional factors may be equally involved in this process, as well as to clarify the role that a theory of precedent plays in such circumstances, to the extent that the interference of same factors can compromise the values that justify its adoption.

Differences in gender, culture, education, religion, social environment, and professional experiences are determinant factors in how a judge assesses certain situations brought to trial. Human perceptions are the product of an interaction between impressions produced by the impact of the external world on the senses, and a mental classificatory apparatus that springs from each person's own background. This apparatus is responsible for unconscious preconceptions that interfere with the cognition and the judging ability of every person.[32]

Precisely because the pre-understandings are unconscious, even when the judge believes he is acting objectively and with neutrality, he will, to some extent, be projecting his own subjectivity onto the solution of the problem. *"We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own."*[33] Therefore, the judge's background is a powerful influence on the formation of his conviction. A person who lives in a highly dangerous city, in constant fear, and believes that criminal conduct, as a rule, goes unpunished, will tend to view criminal laws that restrict the rights of the accused differently from a person who does not live in such conditions or who has been, him/herself, unfairly criminally prosecuted. A judge who has served as State Attorney will probably see certain matters involving the Treasury Department with different perspectives than others without that same experience. The religious beliefs of a magistrate possibly may influence his assessment on certain moral issues that are brought before him for trial.

The understanding of the influence that a judge's background exerts on his cognitive capacity finds a good parallel in the way the elderly tend to analyze problems and propose workable solutions to them. Their experiences, though forgotten, are accessible sources of knowledge. New situations are in some ways similar to past experiences. The unconscious accumulation of these experiences enables them to intuitively know how to act in new situations. In a similar manner, judges' experiences feed their

32 POSNER, Howjudges Think (n. 29), 67-70; Lawrence Baum, The Supreme Court. 9. ed. (CQPress: Washington, 2007), 120-121; Luís Roberto Barroso, 'Fundamentos Teóricos e Filosóficos do Novo Direito Constitucional Brasileiro (Pós-Modernidade, Teoria Crítica e Pós-Positivismo)', in: Temas de Direito Constitucional (Renovar: Rio de Janeiro, 2003), t. II, 9; and Luís Roberto Barroso, 'Constituição, Democracia e Supremacia Judicial: Direito e Política no Brasil Contemporâneo' Available at <http://www.lrbarroso.com.br/pt/noticias/constituicao_democracia_e_supremaciajudicial_ll032010.pdf>. Accessed on Jan 29, 2011.

33 CARDOZO, The Nature of Judicial Process (n. 1), 13.

intuition and, over time, constitute a practical subjective framework with its own "normative force" on their judicial behavior. [34]

Moreover, people worry about the opinion that others may have of them and, thus, such opinions can interfere with their attitudes. The idea one has of himself does not develop in isolation from other individuals. It develops from the interaction with them. Therefore, one's identification with a group shapes his thoughts and attitudes.[35] The general community is just one of the many groups judges care about. There are others: his fellows from court, other judges, social, political and professional groups, close friends, and family. These smaller and partial groups may be even more influential on the decision of a judge than the general public because of the importance of their esteem. Relationships with advocacy groups for women's rights or against racial segregation, for example, can play an important role in the decision of some disputes. [36]

There are also those circumstances in which the judge consciously projects his own political preferences when deciding a case. This decision model is often explored by American legal scholars, who have labeled it *attitudinal model.*[37] Its scholars argue that the very way of selecting judges in the U.S. constitutes an institutional factor that allows permeability between ideological convictions and judicial rulings. Many State judges are elected.[38] Federal judges, including those who sit on the Supreme Court, are appointed by the President and approved by the Senate, after eventful hearings. The President's selection of the candidate considers the professional's ideological convergence with his political party and the perspectives of the candidate's approval by the Senate, which tends to be an ideologically more heterogeneous group.[39]

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34 POSNER, How judges Think (n. 29), 107; Baum, The Supreme Court (n. 32), 120-121.

35 BAUM, Lawrence. *Judges and Their Audiences:* A Perspective on Judicial Behavior (Princeton University Press: Princetown, 2006), 26-28.

36 Ibid, 60-63, 118-123; Baum, The Supreme Court (n. 32), 142-149.

37 POSNER, How judges Think (n. 29), 19-29; Baum, The Supreme Court, (n. 32), 120-132; Judges and Their Audiences: A Perspective on judicial Behavior (n. 35), 5-8; Cass Sunstein, David Schkade, Lisa Ellman and Andres Sawicki, Are Judges Political? An Empirical Analysis of the Federal judiciary (Brookings Institution Press: Washington, 2006), 17-45; Saul Brenner and Joseph Whitmeyer, 'Strategy on the United States Supreme Court' (Cambridge University Press: New York, 2009), 11-18.

38 According to Posner, the concern with reelection may interfere with the judgment of such state judges, reducing their independence and making them more vulnerable to public opinion or to the opinion of certain interest groups that support them. (Posner, How Judges Think (n. 29), 134-139).

39 POSNER, How Judges Think (n. 29), 57-59, 134-135.

In such conditions, in which the very way of selecting judges attracts those professionals whose performance combine political and legal elements, it is claimed that one cannot expect that, in performing their activities, judges would be politically unbiased. If they were politically neutral, they would not have been selected in a process that is eminently political. The aforementioned scholars prove their point by analyzing the way in which judges vote on certain matters and comparing it to the orientation of the political party of the President that has nominated them. They demonstrate that judges appointed by Democratic presidents tend to have a voting posture that is markedly more liberal, whereas judges appointed by Republican presidents tend to be more conservative.[40]

Statistical surveys evidence the existence of legal matters that are highly susceptible to ideological voting, especially in constitutional claims, such as, for example, cases of sexual discrimination, sexual harassment, racial segregation, pornography, and abortion.[41] This is so because constitutional decisions touch on fundamental moral and political issues, which provoke intense emotions and subjective reactions, even among the interpreters of the law. Constitutional norms, in turn, are vague, open to antagonistic interpretation and, therefore, may provide uncertain orientation to courts. The relevance of some issues and the lack of objective guidance leave space for the interference of subjective factors in the decision making process.

2 INSTITUTIONAL FACTORS

The judges' ideological tendencies can be intensified or mitigated according to the composition of the court in question because of three characteristics of collegiate deliberations: a) *ideological polarization* in politically homogeneous groups; b) *ideological neutralization of a dissenting judge*; and c) *ideological moderation of the majority*, the latter two in politically heterogeneous bodies, as a consequence of the phenomenon known as

40 SUNSTEIN; SCHKADE; ELLMAN; SAWICKI. *Are judges Political?* An Empirical Analysis of the Federal judiciary (n. 37), 8. Although this ideological structure is indigeneous to the North American political culture, the argument itself, about the projection of political preferences in the decision of morally relevant cases, especially where the legal orthodox references are uncertain, is plausible in several other legal systems.

41 SUNSTEIN; SCHKADE; ELLMAN; SAWICKI. *Are judges Political?* An Empirical Analysis of the Federal judiciary (n. 37), 8-61. This list of subject matters is based on U.S. law. Obviously, the most controversial issues may vary from one community to another since they relate to cultural moral disagreement.

dissent aversion.[42] Panels entirely composed of judges with the same ideological profile tend to produce *ideological polarization* and, thus, decisions that are more liberal or conservative than those rendered by bodies with a heterogeneous composition. The union of homogeneous minds may lead to extremes. Ideologically heterogeneous bodies, in turn, are known to produce more moderate decisions. In the mentioned bodies, the dissenting judge acts as an antidote against the radicalism of the majority, either because he plays the role of the spokesman for different arguments, capable of moderating the understanding of his fellows, or by the majority's interest in avoiding dissent, and, consequently, by its willfulness to adjust its understanding in order to accommodate some of the dissenting judges' concerns.

On the other hand, due to an aversion to dissent, the dissenting judge who sits in a heterogeneous court is usually ideologically neutralized, abstaining from directly manifesting his divergence. This attitude stems from several factors. First, many magistrates become upset when a fellow judge dissents from their decisions. The need to preserve a good relationship among colleagues who sit together in court for years may render them less prone to dissent, especially if said divergence does not interfere with the outcome of the case. And dissenting is demanding insofar it requires the elaboration of a vote combating the position of the majority. The judge who abstains from dissenting in such circumstances makes a cost-benefit analysis and only dissents in disputes where his belief is sufficiently strong to compensate for the attrition with the other judges as well as the increased workload. On the other hand, in dissenting with self-restraint, a judge hopes for reciprocal behavior on part of his fellows.

There are cases, however, where ideological voting does not suffer the interference of other members of the panel, possibly because the intimate belief of the judge is sufficiently strong to bar external influences.[43] Thus, depending on the issue, the vote of a judge may be evaluated exclusively on the basis of his ideological preferences or on the basis of the interaction of such preferences with those held by the other members of the court where he sits. These remarks apply more effectively to bodies composed

42 SUNSTEIN; SCHKADE; ELLMAN; SAWICKI. *Are judges Political?* An Empirical Analysis of the Federal Judiciary (n. 37), 8-9; Posner, How Judges Think (n. 29) 31-35. Brenner, Whitmeyer, 'Strategy on the United States Supreme Court' (n. 37), 53-58.

43 The formation of conviction with intensity to justify dissent is the result of a number of other variables that interfere on decision making, as psychological (emotional and personality) aspects and the background of the judges. SUNSTEIN; SCHKADE; ELLMAN; SAWICKI. *Are Judges Political?* An Empirical Analysis of the Federal Judiciary (n. 37), p. 10-13.

of few members. As the number of judges in the group increases, the bargaining power of the dissenting judge decreases,[44] and the effects of the collegiate decision become more difficult to identify, since they require an understanding of the dynamics of the interactions among several judges, as it is the case, in general, of a Supreme Court.[45] Despite this, the interference of group dynamics in the decision making process of an individual judge of a Constitutional Court should not be neglected either.

The courts are also sensitive to situations that could either undermine the courts' stability or compromise the courts' ability to perform their roles.[46] Therefore, courts will avoid issuing decisions that they believe the Executive and Legislative branches manifestly will abstain from enforcing. The classic example of this type of situation is found in *West Coast Hotel Co. v. Parrish*. In that case, the U.S Supreme Court overruled the judicial interpretation consolidated in *Lochner v. New York*.[47] In *Lochner*, the Court had invalidated a law of the State of New York, which limited the number of working hours for bakers, on the basis that such law would constitute an undue restriction on the freedom of contract, initiating a period that was known as the Lochner Era, during which the Supreme Court annulled successive laws enacted in order to regulate labor relations.

In order to address the negative effects of the Great Depression of 1929, which peaked in the United States in 1933, U.S. President Franklin Roosevelt approved a series of measures, known as the *New Deal*, which aimed at regulating and recovering the economy. However, the doctrine the Supreme Court established in *Lochner* stood in the way of such measures, as it was responsible for the declaration of unconstitutionality of important statutes enacted for such purposes. In reaction to these decisions, President Roosevelt proposed, in 1937, a federal judicial reform plan, which became known as the *Court-Packing Plan*, allowing himself to nominate six new

44 POSNER, How Judges Think (n. 29), 57.

45 Ibid, 57. Furthermore, the dissent aversion tends to be lower in a Constitutional Court, what is justified by the following benefits of dissenting: a) it provides visibility; b) it addresses the concern of the Justices to present a coherent judicial philosophy; c) it is more likely to influence the development of law, because of the greater instability of Supreme Court precedents. (SUNSTEIN; SCHKADE; ELLMAN; SAWICKI. *Are judges Political?* An Empirical Analysis of the Federal Judiciary (n. 37), 43-45).

46 Brenner, Whitmeyer, 'Strategy on the United States Supreme Court' (n. 37), 128-135; BAUM, Judges and Their Audiences: A Perspective on Judicial Behavior (n. 35),50-87; SUNSTEIN, Cass R. A Constitution of Many Minds (Princeton University Press: Princetown, 2009), 125-164; BARROSO, Luís Roberto. *Constituição, Democracia e Supremacia Judicial:* Direito e Política no Brasil Contemporâneo (n. 32), 33-46.

47 198 US 45 (1905).

Justices to the Supreme Court (who, obviously, would be chosen according to their ideological convergence with the measures the President intended to implement). In the same year, the Court ruled *West Coast Hotel Co. v. Parrish*, in which, by a narrow margin, it changed its former position on freedom to contract in an episode that became known as *"the switch in time that saved nine"*.[48]

Public opinion also constitutes a relevant element in the consideration of different points of view. It is capable of interfering with the institutional stability of the courts, with their power to politically influence the law, and also with the effectiveness of their decisions. The Judiciary is subject to the constraints of the political game. There is a limit up to which judges are willing to confront unpopular decisions. The acute and realistic risk of destabilization and demoralization could motivate a judge to bow to the public opinion, at the expense of his own convictions.[49]

In these cases, the courts tend to adopt a passive stance, under the following attitudes: a) dismissing the claim, where possible, b) adopting a posture of deference towards the Legislative, expressing the view that the matter should be decided by the democratic process, or c) deciding the dispute in a minimalist fashion, issuing a very particular ruling, bound to the case at hand, so that its impact is minimized.[50]

On the other hand, the support of public opinion and its alignment with the tendencies fostered by the courts enhances jurisprudential shifts. According to Sunstein, many of the innovations of the U.S. Supreme Court were based on social verdicts that had been established before or that were already in process of emerging, therefore, the conduct of the Court has

48 Available at: <http://www.boston.com/news/globe/ideas/articles/2005/12/04/supreme_switchl>. Accessed on: jan. 29, 2011.

49 However, it is believed that such cases are very rare, because: a) a popular reaction able to interfere with the judicial conduct of the Court would need to be a negative reaction of great intensity; b) it can be difficult for judges to anticipate that a reaction of such magnitude will occur, as a result of their decision; c) even if there is a negative reaction, it will not necessarily generate a weakening of the Court's position before the public opinion, especially if one considers the long term; d) even if such weakening occurs, it will not necessarily signify loss of effectiveness of the decision, unless compliance depends on public opinion or the public opinion is able to influence an action of the Executive or Legislative; e) it is more likely that a Judge worries about legal issues and political goals than about a potential damage to the Court, that he does not even know if will actually occur; f) the difficulty to anticipate and valuate the consequences may lead the Court to disregard them; g) the Judiciary must be independent from the public opinion (Brenner, Whitmeyer, 'Strategy on the United States Supreme Court' (n. 37), 128-129; Baum, Judges and Their Audiences: A Perspective on judicial Behavior (n. 35), 63-66).

50 SUNSTEIN. *A Constitution of Many Minds* (n. 46), 129, 135.

reflected such changes instead of promoting them. The author illustrates his point of view listing understandings shifts regarding freedom of contract, racial segregation, and women's rights, among others.[51]

Judges also can craft their opinion in a strategic way, in terms that allow them to achieve, as best as possible, the decision they consider to be adequate for the case at hand, and generate the least possible resistance to it. In acting strategically, a judge or a court can issue opinions that do not correspond to their real convictions, or to the decision they consider to be ideal.[52] To issue a decision upholding certain constitutional values to the largest possible extent, the judge has to consider the reaction that decision will produce, for example, on the other members of the court, the Legislature, or the general public. The need to influence others may lead a judge to deliver his opinion grounded on basis that are different from those that actually inform his conviction by using, for example, a legalistic argument in order to conceal his political orientation. If a judge's goal is to influence the evolution of the law in a particular subject, he may have to moderate his decision so as not to provoke a reaction from the Legislative, either by the enactment of a constitutional amendment, or by the alteration of the composition of the Court. A similar situation may occur with respect to public opinion, if the issue at hand is able to mobilize it.[53]

D) JUDICIAL PRECEDENTS AS A FILTER FOR ARGUMENTATION

The above considerations show that, although the adoption of a theory of precedent is justified as a way of promoting values that are important to the law, such as legal certainty, equality, legitimacy, and efficiency, it faces significant limitations in preserving these values. In fact, if one examines the reasoning of a decision, with the aim of identifying its *holding*, one finds a space of conformity with a considerable level of uncertainty. The same occurs in the definition of the holding's reach, when its scope can either be reduced or enlarged, thus extending or reducing the holding's impact on the development of the law.

The decision whether or not to apply a precedent in a subsequent case can also be influenced by the judge's subjectivity. The discussion

51 SUNSTEIN. *A Constitution of Many Minds* (n. 46), 140; Brenner, Whitmeyer, 'Strategy on the United States Supreme Court' (n. 37), 128-129; Baum, Judges and Their Audiences: A Perspective on judicial Behavior (n. 35),134-135.

52 BAUM. *Judges and Their Audiences:* A Perspective on Judicial Behavior (n. 35), 7; Posner, How judges Think (n. 29), 29-30.

53 BAUM. *Judges and Their Audiences:* A Perspective on Judicial Behavior (n. 35), 77-81.

and comparison of the relevant facts of both claims, the debate about the circumstances that could give rise to a different treatment may engender value judgments that lack safe guidelines. As already noted, a judge's assessment of the facts and their relevance can be influenced by personal experiences. Finally, the decisions in leading cases and the overruling of precedents allow judges ample room in which to exercise their judgment. In the first case, judges unequivocally create law, voicing their opinion on new issues. In the second case, judges change the law, as expressed in previous decision, and also may determine the point in time when the new understanding will begin to produce effects.

Such limitations do not weaken the value of a theory of precedent. As noted by Benjamin Cardozo in a passage quoted above, uncertainty is inevitable; it is inherent to the limits of language and to the impossibility to standardize all the facts of life in detail.[54] Instead, a theory of precedent, further to contributing, to the extent possible, to the reduction of uncertainty, promotion of equality, legitimacy, and efficiency of the courts, plays another very important role: it operates as an *argumentative filter, by offering guidelines for the selection of the issues that will be subject to debate.*

If the understanding of a particular legal issue has already been established, this circumstance will guide the parties to discuss the holding's reach or to attempt to demonstrate its inapplicability to the case at hand because of its peculiarities. The parties will know that they will not succeed in discussing the ruling itself, which has already been determined, unless their arguments meet the requirements necessary to evidence that the precedent should be overruled. In the last situation, litigants will have the burden to explain why the previous standard is inadequate and shall demonstrate the reasons why other solutions are better. They shall discuss the positive and negative consequences of abandoning the old understanding and, lastly, shall demonstrate that the former outnumber the latter.

In *leading cases* and absent other normative references, litigants shall try to: a) argue from principles that served as basis for previous *holdings*; b) challenge other principles that could possibly have some bearing on the case and that could produce negative outcomes; c) present an analysis focused on the problem, in its relevant facts; and d) draw on practical considerations of the values involved, customs, accepted social standards, and the consequences of the different solutions that could be applied to the dispute.

54 CARDOZO. *The Nature of the Judicial Process* (n. 1) 161-163.

In extreme situations, as when previous precedents are lacking, when they are overruled, or when the court makes inconsistent and arbitrary distinctions - in short, in any occasion when the principles previously stated by a court do not serve as basis for its decisions; and, additionally, when the judges fail to articulate other reasons to justify their conclusions, a theory of precedent will serve to evidence that the decision is possibly motivated by other factors, which are alien to the orthodox legal material.

This finding will enable a critical assessment of the works of the court, as well as the elaboration of a theory describing the decision making process, in which the elements that bear influence in its conviction are effectively represented, even though one understands that, from a prescriptive point of view, such process should be improved. The adequate description of the way the court operates is, once again, crucial to guide the litigants' argumentation. If subjective and institutional aspects play a role in the decision rendered to some cases, the litigants should consider these factors in deciding whether to bring (or not) a dispute before a court and how best to argue their claims.

Thus, binding precedents constitute a powerful mechanism in guiding the argumentation brought forth by litigants. They entail the exclusion of discussions on issues already settled, direct the debate to issues that remain open, indicate the type of argument that litigants may raise, depending either on the existence or on the absence of precedents, or, yet, on the need to have them overruled. They may also evidence subjective and institutional elements capable of interfering in the judicial behavior, enabling the development of a descriptive model of the decision making process and, most of all, providing litigants with sound references with which to uphold their arguments.

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