PRECEDENTS: BETWEEN CLOUDS AND CLOCKS

PRECEDENTES: ENTRE NUVENS E RELÓGIOS

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ABSTRACT

The present article aims to test the hypothesis that the precedents, from the perspective of the theory of democratic procedurality and critical rationalism, must being understood as a procedural legal-institute. In this sense, it was found that the precedents cannot match the jurisprudential asylum and the obligatory precedents, which were compared to the cloud and clock scheme studied by Karl Popper, since both systems have weaknesses and aporias. The methodological procedure used was the legal-theoretical, since the notions of critical rationalism, precedents and democratic procedurality were critically analyzed. It was possible to demonstrate that, in the Democratic Rule of Law, the construction and application of the precedents must take place in a dialogic-argumentative procedural space based on the constitutional principles of the process, in order to conclude that the precedents should be subject to revision, interpretation, discussion. and supervision by any of the people.

KEYWORDS: Precedents. Democratic procedurality. Clouds. Clocks. Critical rationalism.

RESUMO

O presente artigo objetiva testar a hipótese de que os precedentes, na perspectiva da teoria da processualidade democrática e do racionalismo crítico, devem ser compreendidos como instituto-jurídico processual. Nesse sentido, verificou-se que os precedentes não podem se equiparar ao manicômio jurisprudencial e aos precedentes obrigatórios, os quais foram comparados ao esquema de nuvens e relógios estudado por Karl Popper, já que ambos sistemas possuem fragilidades e aporias. O procedimento metodológico utilizado foi o jurídico-teórico, já que se analisou criticamente as noções do racionalismo crítico, dos precedentes e da processualidade democrática. Foi possível demonstrar que, no Estado Democrático de Direito, a construção e aplicação dos precedentes deve se dar em espaço processual dialógico-argumentativo a partir dos princípios constitucionais do processo, a fim de concluir que os precedentes devem ser passíveis de revisão, interpretação, discussão e fiscalização por qualquer do povo.

PALAVRAS-CHAVE: *Precedentes. Processualidade democrática. Nuvens. Relógios. Racionalismo crítico.*

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INTRODUCTION

The present work has as its theme the analysis of the scheme studied by Karl Popper about clouds and clocks in comparison to the theory of precedents, which must be marked out and built from the perspective of the theory of democratic procedurality.

In this perspective, Karl Popper's cloud scheme, which represents an unpredictable and chaotic system, was examined in the first part of the work. Then, a comparison was made with the so-called jurisprudential asylum, which represents the same instability of clouds, since it has conflicting, antagonistic, unpredictable decisions and violating of due process.

In the second part, it was analyzed: a comparison between the clock scheme outlined by Popper, which represents a totally predictable, stable and safe system, with the mandatory precedent model - adopted by the 2015 Brazilian Civil Procedure Code (*Código de Processo Civil Brasileiro de 2015*) and mainly by Daniel Mitidiero and Luiz Guilherme Marinoni -, who seek in the interpretation of the higher courts the predictability through the application of precedents (prospective) able to predict the conduct to be taken by the judiciary and by society.

In the third part: criticisms were made of the perspective of the jurisprudential asylum (clouds) and mandatory precedents (clocks) since both systems violate fundamental rights and guarantees, because they prevent the construction of decisions from being carried out in compliance with the constitutional principles of the process and generate an argumentative closure to all procedural subjects. In this sense, it has been shown that mandatory precedents, in addition to being extremely paradoxical, prevent the people from overseeing the construction and the application of such pronouncements, which are elevated to the status of dogmas.

At the end, in the fourth part, Karl Popper's critical rationalism and Rosemiro Pereira Leal's theory of democratic procedurality (neoinstitutionalist) were presented as theoretical frameworks for the conjecture of a *procedural* and *democratic* theory of precedents. Thus, it's concluded that the precedents cannot be clouds or clocks, but, rather, a procedural legal--institute, so that all procedural subjects can participate and supervise its formation and application.

The methodology adopted in this research was the legal-theoretical, since it's intended to demonstrate and criticize the dogmatic aspect given by the traditional doctrine to the precedents in the 2015 Brazilian Civil Procedure Code (*Código de Processo Civil Brasileiro de 2015*). The investigation will be legal-interpretive, through the analytical procedure for decomposition of the research object in its various aspects.

1 OF THE CLOUDS: THE JURISPRUDENTIAL ASYLUM

Karl Raimund Popper, in his work "Objective Knowledge" ("*Conhecimento Objetivo*"), when presenting his conjectures about critical rationalism, performs an analysis about

clouds and clocks, in order to illustrate the problems of the currents of indeterminism[2] and of determinism[3].

In relation to clouds, Popper argues that "my clouds are intended to represent physical systems that, like gases, are highly irregular, disordered and more or less unpredictable" (POPPER, 1999, p. 194). In other words, clouds would be "difficult to accurately" ("*difícil precisão*") (POPPER, 1999, p. 194) as they would represent enormous instability and unpredictability.

Karl Popper will then relate the clouds to the physical indeterminism that consists of "the doctrine that not all events in the physical world are predetermined with absolute precision, in all their infinitesimal details" (POPPER, 1999, p. 203). (Our translation into english)

In this sense, Tereza Calvet teaches:

> This metaphor of clouds and clocks allows Popper to characterize deterministic and indeterministic systems: a cloud is commonly considered to be highly unpredictable and certainly indeterminate - the clouds would then represent highly irregular, disordered and more or less unpredictable physical systems. (CALVET, 1997, p. 02) (Our translation into english)

If we go through Popper's analysis of clouds for the science of procedural law, specifically the question of precedents[4], it can be seen that clouds can be equated with the so-called *jurisprudential asylum*.

Ronaldo Brêtas de Carvalho Dias teaches that the jurisprudential asylum derives from the violation of due constitutional process, at the time when the judges start to decide based on subjective criteria, through the choice of those "points that their intellectually superior gifts or their prodigious mind understand it to be appreciable as if the judging state bodies have a sort of selective privilege of cognition" (BRÊTAS, 2018, p. 192). (Our translation into english)

Likewise, the author also points out the lack of knowledge of the courts about the understandings of the higher courts, as well as the lack of debate among the judges about their votes, as a collegiate body. In addition, he exposes the existence of decisions with presentation of reasons beyond the principle of legality, which has disastrous consequences for stability and the Democratic State of Law. (BRÊTAS, 2018)

Thus, Brêtas mentions that the jurisprudential asylum ends up revealing "more stupid court pronouncements, because its decision-making contents completely hostile the principled configuration of the Democratic State of Law and the fundamental guarantee of the due constitutional process" (BRÊTAS, 2018, p. 194). (Our translation into english)

Alexandre Bahia and Dierle Nunes teach that this jurisprudential asylum is the result of an 'interpretive anarchy' and the so-called 'interpretative ground zero':

2 According to Nicola Abbagnano, indeterminism "denies the determinism of the motives, that is, the determination of human will by motives". (ABBAGNANO, 2012, p. 636) (Our translation into english)

3 Nicola Abbagnano clarifies that determinism is a "doctrine that recognizes the universality of the casual principle and therefore also admits the necessary determination of human actions based on their motives", thus, determinism designates "the recognition and universal scope of causal need, which constitutes a rational order, but not a final one, and therefore doesn't lend itself to being designated by the old name of destiny". (ABBAGNANO, 2012, p. 287) (Our translation into english)

4 In the present work, a study about a possible correlation between the currents of determinism and indeterminism with the study of precedents will not be carried out, which would require further research on this theme. However, mention of such currents is important in order to understand the allusion between clouds and clocks made by Karl Popper.

> However, in the face of the Brazilian assumption that Ministers (and judges) must have freedom of decision, a framework of 'interpretive anarchy' is created in which it's not even possible to respect the institutional history of solving a case within the same court. Each judge and each court body judges from an interpretive 'ground zero', without regard to the integrity and background of analysis of that case; allowing the generation of as many understandings as there are judges. (BAHIA; NUNES, 2010, p. 91) (Our translation into english)

The jurisprudential asylum consists in the fact that the judges and courts decide a particular case in a totally different way from what they had already decided in similar cases, as if they had never made decisions on the subject, according to their free conviction.

This time, it's possible to affirm that the jurisprudential asylum is similar to the scheme traced by Popper in relation to clouds, since it presents unpredictability, instability and inconsistency in decision-making.

The existence of the jurisprudential asylum - which is still present in the current conjuncture of the Brazilian judiciary –, has led to a tendency towards *decision standardization* (*padronização decisória*) since numerous reforms carried out in the 1973 Brazilian Civil Procedure Code (*Código de Processo Civil Brasileiro de 1973 – CPC/1973*), which influenced directly in the drafting of the 2015 Brazilian Civil Procedure Code (*Código de Processo Civil Brasileiro de 2015 – CPC/2015*) based on combating such jurisprudential lottery[5], from the incorporation of *precedents* arising from the *common law*.

In this context, when analyzing the elaboration of *CPC/2015*, Alexandre Rocha (2018) points out that the jurists who were part of the Draft Committee detected a violation of the reasonable duration of the procedure and of the speed, legal security and isonomy, due to the unpredictability generated by conflicting decisions that are outside to the legal system.

Thus, with the assumption of CPC / 2015, with the objective of combating the *jurisprudential cloud*, several techniques and positions were incorporated, so that to the precedents were given *binding force* and, as a consequence, changed from clouds to clocks, as we can see below.

2 OF THE CLOCKS: THE MANDATORY PRECEDENTS

In addition to cloud analysis, Popper also advocates in his scheme the clocks. According to Karl Popper, while clouds represent unpredictability and instability, the clock, which the author represents by a grandfather clock, is "very reliable, a precision clock, with the intention of representing physical systems that are regular, orderly and highly predictable behavior" (POPPER, 1999, p. 194). (Our translation into english)

5 "In the name of legal certainty and effectiveness, in the Explanatory Memorandum of CPC/2015, a deep concern with the unwanted fragmentation of the system is revealed, something that could occur as a result of the jurisprudential fluctuation. In this context, the higher courts assume the function of shaping the legal system through their decisions. However, in addition to the aforementioned objectives, it's expected that the standardization and stabilization of jurisprudence, given not only by the higher courts, but also by the courts of second instance, will be able to reduce the burden of judicial proceedings" (VIANA; NUNES, 2018, p. 201) (Our translation into english).

In this context, "we speak of 'clock accuracy' when we want to describe a highly regular and predictable phenomenon" (POPPER, 1999, p. 194). Thus, Tereza Calvet teaches that, unlike the clouds, "a clock is highly predictable and a good clock, for example, a grandfather clock, can be considered as a paradigm of a mechanical physical system and deterministic" (CALVET, 1997, p. 02). (Our translations into english)

The figure of watches would be linked to physical determinism, as taught by Karl Popper:

> A physical deterministic clock mechanism is, above all, completely self-sufficient: in the perfect deterministic physical world there is simply no place for any outside intervention. Everything that happens in such a world is physically predetermined, including all of our movements and, therefore, all of our actions. Thus, all our thoughts, feelings and efforts may have no practical influence on what happens in the physical world: they are, if not mere illusions, at most by-products ('epiphenomena') of physical events. (POPPER, 1999, p. 201) (Our translation into english)

The comparison that can be made with the procedural law regarding Popper's analysis of clocks, is directly linked to the mandatory precedents and the notion of predictability implied by the authors who defend the decision standardization through the understandings of the national courts, which is done present in *CPC/2015*.

Within this perspective, Daniel Mitidiero and Luiz Guilherme Marinoni are protagonists in the defense that the Superior Courts should act as Supreme Courts for the formation of mandatory precedents, which will shape, order and bring predictability to the legal system and to the conduct of the citizens-jurisdicted.

In order to present such a model, Daniel Mitidiero defends the perspective of the Supreme Courts, whose objective would be to guide the application of the Law based on the "*just interpretation of the legal order*, the specific case being just a pretext for it to set *precedents*" (MITIDIERO, 2014, p. 55). The specific case, then, would be just a mechanism for the Supreme Court to create a precedent for linking society and the judiciary, and to become a source of law. (MITIDIERO, 2014)

In his doctrinal work "Precedents: from persuasion to attachment" ("*Precedentes: da persuasão à vinculação*"), Daniel Mitidiero argues that interpretation isn't pure declaration, nor pure creation, but, rather, "a *reconstruction of the normative meaning*, with what isn't even a declaration of a preexisting norm and nor an *ex nihilo* creation". The norms would have dubious, ambiguous, lacunaous characteristics, which is why it's necessary to recognize "the mythological character of interpretive cognitivism and in the recognition of the double indetermination of the law" (MITIDIERO, 2016, p. 77). (Our translations into english)

In order to face the mere declaration of a preexisting legal norm, the Supreme Courts become a viability factor in the granting of prospective interpretation and of unity to the law, which is why the figure of the binding precedent appears as a solution to this problem of the indeterminacy of the law. Mitidiero will argue, then, that such function of Supreme Courts, the only ones capable of creating mandatory precedents, would be exercised by the Supreme Federal Court (*Supremo Tribunal Federal – STF*) and the Superior Court of Justice (*Superior Tribunal de Justiça – STJ*), with the responsibility of preventing the dispersion of the legal system and guiding the interpretation of judges. (MITIDIERO, 2016)

For Mitidiero, the authority of the precedent would come to be in the sense given to the right by the *STF* and *STJ*, that is, "the authority of the precedent is the own authority of the interpreted right and the authority of the interpreter" (MITIDIERO, 2016, p. 77). (Our translation into english)

In the words of this author:

> The understanding of the theory of interpretation in a logical-argumentative perspective removes the focus exclusively from the law and also places it in the precedent, so that *freedom* and *equality* from that point on must also be considered before the *product of interpretation* and *legal security* before a framework that encompasses both the *interpretative activity* and its *result*. Thus, *the precedent, being the result of the reconstruction of the meaning of the legislation, becomes the ultimate guarantor of freedom, equality and legal security in the Constitutional State*. In this line, the judicial precedent constitutes the primary source of law, whose binding efficacy doesn't arise from *judicial custom* and *doctrine*, nor from the *goodness* and *social congruence* of the reasons invoked and nor from a *constitutional or legal norm* that determines it, but from the *strength institutionalizing* of the jurisdictional interpretation, that is, from the *institutional strength of jurisdiction* as a basic function of the State. (MITIDIERO, 2016, p. 99) (Our translation into english)

In harmony with Mitidiero's proposals, Luiz Guilherme Marinoni defends the mandatory precedents:

> The Supreme Court's decision, when expressing the sense of the law, begins to guide social life and guide the decisions of judges and appellate courts. If the Supreme Courts have the function of developing law alongside the legislature, their decisions must gain the authority that allows them to correspond to the meaning they have in the legal order. It's precisely here that the decisions of the Supreme Courts assume the precedent quality. (MARINONI, 2016, p. 65) (Our translation into english)

In this context, for the author, when the Supreme Court starts to give meaning to the law and to the right, since it has the belief in the dissociation between text and norm, the granting of unity to law through the precedent is allowed. Thus, the interpretation and the meaning given to the law by the precedent would be the function of the Supreme Court, so that it's possible to confer unity to the law/right. Therefore, for Marinoni, the precedent becomes an instrument for the elaboration of the meaning of the norm. (MARINONI, 2016)

Thus, Marinoni defends that the Supreme Courts should complete legislative activity:

> As there is no longer any doubt that the interpreter can, from legitimate and reasonable interpretation activities, remove more than one norm from a single legal text, the need arises, by mere logical consequence, to give the apex Courts the function to define the meaning attributable to the law, without which, moreover, the activity of the legislator would never gain completeness. This function, as is easy to see, is related to the need to have a coherent legal order and with respect for spaces of freedom, the equal distribution of law and legal security. Is that, the law has changed place; it abandoned the legal text - in which, in fact, it never fully accommodated itself - and started to take the place of the decisions of the Supreme Courts. Thus, these, by mere logical consequence, came to represent the criteria for guiding society and for solving conflicting cases, giving rise to what is called precedent. (MARINONI, 2016, p. 94) (Our translation into english)

The perspective of Mitidiero and Marinoni is very similar to the figure of the clocks, since these authors defend that the understandings of the *STJ* and *STF*, through the mandatory precedents, are so predictable that they will shape and predict all possible behaviors, which would bring completeness and stability *ad aeternum* to the juridical/legal system.[6]

In this sense, Gabriela Oliveira Freitas synthesizes well the dogmatic perspective of the mandatory precedents:

> It can be noted the intention to extend the scope of applicability of judicial decisions, making the Judiciary, in the least number of times possible, have to deepen in the analysis of similar issues, becoming more quantitatively efficient through the establishment of standards to be followed in subsequent identical cases, under the argument of preserving isonomy, procedural speed, stability and predictability of jurisdictional provisions. (FREITAS, G., 2019b, p. 156-157) (Our translation into english)

Based on this tendency to standardize decision making through the precedents, *CPC/2015* brings in its text several mechanisms for forming binding judgments, such as the summaries, repetitive appeals, incident of resolution of repetitive demands and incident of assumption of competence.[7]

In addition, article 926 of *CPC/2015* was introduced under the influence of Lenio Streck, who, adhering to Dworkin's theory of integrity, outlined such a proposition. The article 926 provides that the courts must standardize their jurisprudence, in addition to keeping it stable, coherent and complete.[8]

Another important provision for precedents in *CPC/2015* is the article 927, which provides for the obligation of judges and courts to observe: I - the decisions of the Supreme Federal Court (*STF*) in concentrated control of constitutionality; II - the statements of the binding summary (*súmula vinculante*); III - judgments in cases of the assumption of competence or of the resolution of repetitive demands (*acórdãos em incidente de assunção de competência ou de resolução de demandas repetitivas*) and in the judgment of extraordinary and special repetitive appeals (*acórdãos em julgamento de recursos extraordinário e especial repetitivos*); IV - the statements of the summaries of the Supreme Federal Court (*STF*) in constitutional matters and of the Superior Court of Justice (*STJ*) in infraconstitutional matters; V - the orientation of the plenary or the special body to which they are linked.[9]

The *CPC/2015* also brings several (ideological) techniques for applying precedents and decision-making standards in an attempt to bring greater speed, efficiency and predictability, namely: the protection of evidence (art. 311), the preliminary dismissal of requests (art. 332),

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6 This reading can be extracted, for example, when Mitidiero argues that *STF* and *STJ* "should give unity to law from the solution of cases that serve as precedents to guide the future interpretation of the law by the other judges that make up the system in charge of distributing justice in order to avoid the dispersion of the legal system" (MITIDIERO, 2016, p. 93) (our translation into english). In the same way, although Mitidiero isn't expressed as to ad aeternum stability, this conclusion can be inferred at the moment that he defends the expansion of the list of articles 311, 332, 927, 932 and 1.030 of the *CPC/2015* to include any kind of precedent arising from the Courts Superiors, which causes the plastering of the Law due to inadmissibility of resources. (MITIDIERO, 2016, p. 104-115).

7 The analysis of the formation of precedents by these techniques is beyond the scope of this article, which is why we suggest checking the works of the authors: Alexandre Rocha (2018), Ana Paula Pereira da Silva Dinz (2016), Victor Barbosa Dutra (2018) and Gabriela Oliveira Freitas (2019a, p. 39-59), who make a more detailed analysis on this topic.

8 Luís Gustavo Reis Mundim performs an analysis of the elements present in that article, which would be outside of the scope of the present work. For this, see: MUNDIM, 2018, p. 156-166.

9 The article 927 has raised several discussions about its constitutionality and about how it will be the linked, which is why several positions have been adopted by the doctrine. (MUNDIM, 2018, p. 156-166).

the monocratic judgment of appeals (art. 932, items IV and VI), the possibility of provisional compliance with a judgment based on precedents (art. 521, item IV), as well as the provision for the dismissal of special and extraordinary appeals based on repetitive judgments (art. 1030, item I) and the impossibility of appeals to higher courts for "unlocking" of the special and extraordinary appeals (art. 1042).[10]

So, it's clear that, like clocks, mandatory precedents would allow self-sufficiency due to predetermining the decisions and predicting what will be applied in the future, on the grounds of legal certainty and equality. In this sense, it's seen that the defense of mandatory precedents ends up advocating prospective precedents, always focused on the future application of jurisprudential understandings.

In this sense, Gustavo de Castro Faria explains:

> All the fascination unmeasured by the application of a system of precedents in our law, it seems, finds great support in the theories that attribute to the standardized methods of judgment a greater respect for the guarantee of isonomy and legal security, since the guarantee of respect the word of the courts (*stare decisis*) would allow the citizen to foresee the burden of (il) legality that his behavior will be endowed with, making the solution of future disputes predictable and avoiding 'surprises' at the time of judgments. (FARIA, 2012, p. 88) (Our translation into english)

However, as will be seen in the next topic, both the perspective of the jurisprudential asylum (clouds) and that of mandatory precedents (clocks) are harmful to the Democratic State of Law, since they still allow the protagonists of the judges to dictate the normative sense and are incompatible with democratic procedurality.

3 THE CRITICISM TO THE CLOUDS AND TO THE CLOCKS: THE DANGERS OF THE JURISPRUDENTIAL ASYLUM AND OF THE MANDATORY PRECEDENTS

The jurisprudential asylum (jurisprudential clouds) brings several constraints to the construction of the Democratic State of Law, in a non-dogmatic perspective[11]. This is because the *jurisprudential clouds* foster the motivated free conviction of the judges who will decide the law according to their conscience, interests and sense of justice.

In addition, this positioning reinforces the judges' solipsism and generates different interpretations about the same norms. Effectively, the chaos of jurisprudence with conflicting decisions, without reasoning and without observance of the contradictory, of the broad

10 For a detailed analysis of the aforementioned techniques and rituals for applying precedents, check out the works of: Aurélio Viana and Dierle Nunes (2018, p. 261-277), Carlos Henrique Soares (2017), Francisco Rabelo Dourado de Andrade (2017), Luís Gustavo Reis Mundim (2018, p. 202-214) and Vinicius Lott Thibau (2019).

11 Rosemiro Pereira Leal (2017b) coined the term Dogmatic State to designate an autocratic state perspective that, based on dogmatic science of law, completely ignores the implementation of democracy through procedurality. Thus, the Dogmatic State would be antagonistic to the Democratic State of Law. On this perspective, also check the works of André Del Negri (2018) and Luís Gustavo Reis Mundim (2018, p. 29-40).

defense and of the isonomy generate an unpredictability that perpetuates an enormous divergence of understandings.

This warning, made by Maurício Ramires, that "the heart of the problem of judicial arbitrariness in invoking precedents, therefore, rests in the combination of these two factors: the elevation of the judgment to the status of general law and the existence of antagonistic precedents, adaptable to all 'needs'" (RAMIRES, 2010, p. 45) (our translation into english).

It must be pointed out here that: there is no advocacy for an unthinking decision standardization based on mandatory precedents, as will be seen below, as the jurisprudential dissent is important for the formation of decisions that encompass various arguments and theories for an adequate rivalry for the formation of the final decision.[12] What we criticize is that this divergence cannot be aligned with an interpretative anarchy that fosters arbitrariness of the judges and the violation of fundamental rights and guarantees ensured from the plan that instituted the normativity.

In turn, with regard to mandatory precedents (clocks-precedents), there are several criticisms to be made.

The first of them concerns the fact that the defense that the Superior Courts should act as Supreme Courts and create precedents from any decision only increases judicial discretion and the violation of the principle of legality, since precedents would become more important even than the law itself.

In this sense, Lenio Luiz Streck criticizes:

> The attempt to grant binding efficacy to the decisions of the Superior Courts, who would be *responsible for interpreting* and establishing the meaning of the normative texts, with the other judges and courts being obliged to follow (regardless of its content) the supposed 'precedents', to the extent in which its function would be reduced to that of 'applying its', even if its doesn't conform to the law itself and to the Constitution, *it suffers from an indisputable unconstitutionality*. Would the new Civil Procedure Code and, perhaps, the procedural doctrine itself modify the jurisdictional powers of the Courts, which can only be done by amending the Constitution?
>
> In addition, there is more relevance to the 'violation' of the precedent – which could possibly be wrong, without, with this, losing its binding force – than to the law. In other words, a 'mandatory' precedent is better than the law itself! (STRECK, 2018, p. 44-45) (Our translation into english)

What is perceived is the generation of "an argumentative closure so great that it provides *normative violence* that dismantles procedural guarantees and that ends up generating a *jurisprudentialization of the law*" (MUNDIM; VARELA, 2019, p. 310) (our translation into english), since to the other subjects procedural is prohibited to carry out the interpretation of the law because the final word belongs to the higher courts, as well as making it impossible to distinguish or overcome[13] the decision-making standard.

12 In a similar sense, Gustavo de Castro Faria teaches that "concepts such as legal certainty and isonomy – the basis of the *standardization* process of the interpretation of law – are explained in the context of a judicial provision based on the ideal of predictability and stability, labeling itself as undesirable and counterproductive the disagreement between the courts on how to decide the same issue" (FARIA, 2012, p. 50). (Our translation into english)

13 The system of precedents provided for in *CPC/2015*, mainly after the reform carried out by Law nº 13.256/2016, which returned with the double admissibility judgment of special and extraordinary appeals, ended up practically preventing the distinction and overcoming of the precedents. (MUNDIM, 2018, p. 147-156). In this sense, Lenio Luiz Streck's questioning is

This argumentative closure is also criticized by Luís Gustavo Reis Mundim:

> This is because, the defense of the Superior Courts, *STF* and *STJ*, as Supreme Courts, is to bet the cards in a solipsist salvific jurisdiction, focused on the syncretism of the founding and conservative violence of the law (State--Security-Exception), which impose their decisions authoritatively in an *upside-down building*.
>
> The search for a sovereign and unique foundation by the Supreme Courts generates an argumentative closure that completely ignores the premises of interpretive equality (isomeric hermeneutics) that must exist between Citizen and State in democracy, because it puts the latter in a position of advantage that reduces any possibility of exercising scientific criticism by the *medium* of due process.
>
> Thus, this authoritarian discourse due to an irreducible *belief* in the mystical (and mythical) foundations of the authority of the Supreme Courts and the authority of the precedent itself, ends up camouflaging and generating an enormous normative vacuum (naked space – unprocessualized) reigned by *jurisprudential reason* that prevents any discourse of the parties in the construction of binding provisions. (MUNDIM, 2018, p. 187) (Our translation into english)

The perspective of mandatory precedents, taken over by the defense of the Supreme Courts, in addition to being extremely paradoxical[14], is also in line with the Bülowian perspective of process, here is: "there is confidence in the sentiment and in the conscience of the higher courts, as if their judges were recipients and captors of social values and desires, qualified to know what is better or worse for the people". (MUNDIM; VARELA, 2019, p. 309) (our translation into english).

In this sense, Guilherme César Pinheiro draws an important criticism to the perspective that mandatory precedents would be infallible and the interpretation given by the courts (lower and higher) would be the most perfect and correct possible:

> Added to all this, the fact that a decision (from the Supreme Court or any other court) isn't capable of resolving the 'inherent problems' to the legal interpretation, even if it's constitutionally correct.
>
> [...]
>
> In other words, there will always be a need for interpretation, be it decisions or legislative texts. In fact, many times, it's essential to spend an arduous argumentative effort on the part of the procedural subjects, in order to arrive at a constitutionally adequate answer to the problem posed by the judicial demand. (PINHEIRO, 2016, p. 176) (Our translation into english)

What is perceived is that the perfection desired by the *precedentalist* authors prevents the interpretation of the precedent itself from occurring, which allows the courts to act "in a naked space (unprocessualized) typical of the State of Exception", since the "establishment

important: "A simple question: Is it possible that after the 'authority' of the precedent is settled, will be possible to reach to the Court of Precedents? We cannot forget that, along with the doctrine of theses and precedents, comes together a rigid system of recursive filters, preventing the Court of Precedents from being subjected to the epistemological constraint of correcting their own mistakes" (STRECK, 2018, p. 75) (our translation into english).

14 Here, it can be mentioned that the model of the Supreme Courts of Daniel Mitidiero and Luiz Guilherme Marinoni is permeated by aporias that aren't answered by the authors and reflect the Bülow's paradox raised to the plane of precedents (MUNDIM, 2018, p. 177-192; MUNDIM; VARELA, 2019), the paradox of mandatory precedents (VIANA; NUNES, 2018, p. 251-261) and a paradoxical relation with efficiency in the provision of jurisdiction, with the reasonable duration of procedures, with the legal certainty and with the due process (SOARES, 2017).

of a meaning for a law or norm in a solipsist way makes that the Supreme Courts are both inside and outside the normativity, with continuous interdiction and suspension of the legality" (MUNDIM, 2019, p. 328) (our translation into english).

It's worth saying, as Francisco José Borges Motta and Maurício Ramires explain, "the sense of a precedent doesn't end with the meaning that was impressed by the judge who decided it", since it's still possible to make distinctions and overcomes that judgment. (MOTTA; RAMIRES, 2016, p. 106). (Our translation into english)

Another relevant criticism is that: the own constitutional function of the higher courts is distorted by the formation of mandatory precedents. This is because, in Brazil, there are no Supreme Courts, but, yes, appellate courts, as Rosemiro Pereira Leal explains:

> From the above and in emphasizing that Brazil doesn't have 'Supreme Courts', but *appeals courts*, once our *STF* and *STJ* cannot, under the paradigm of Democratic State (Non-Dogmatic State), act for the judicialization of politics as guardians mythical (tutors, mentors) of a very sacred Brazilian *constitutional book*, as their own ministers proclaim in their exquisite and strange nomenclature, the procedural institute of the precedent adopted by § 2º of art. 926 of *CPC/2015* must be dimensioned (semantically demarcated) based on the intrasignificant normative posed by the *caput* of art. 926 and its § 1º to establish the following and new configurative roadmap for the formation and standardization of *jurisprudence* in Brazil in order, by reducing its historical errors and failures, to make it 'stable, integral and coherent' [...]. (LEAL, 2017a, p. 306-307) (Our translation into english)

In addition, it's clear that there is a continuation of a *dogmatic logic* in the formation and application of mandatory precedents, since its argumentative basis "is offered to the legal community as dogma, that is, unquestionably, being possible for the judge and for the interested parties just welcome its application" (FREITAS, G., 2019b, p. 155) (our translation into english).

In other words, it's a "methodology of building dogmas, in which a single statement (dogmatic and universal) is established to be applied in future situations" (FREITAS, G., 2019b, p. 158) (our translation into english).

In turn, the provisions of *CPC/2015*, which deal with the precedents, also present several dangers. This is because, it can be said that the aforementioned legislation is imbued with an efficient core of quantitative bias by the search for speed, maximum productivity, procedural simplification, search for results and achievement of goals.[15]

In this context, the unrestrained search for speed allows the decision standardization to tarnish the quality of the formation of decisions, which empties the dialogical-discursive space, with prejudice to the principle of contradiction and to the democratic process itself (FREITAS, H., 2019, p. 170).

This perspective opens space so that courts can use an unconstitutional *preventive decision standardization*[16] through prospective precedents that prevent divergences of unders-

15 Helena Patrícia Freitas teaches that "giving vent to the judgments of the demands has become imperative for the achievement of the efficiency indexes set by the CNJ", since, based on a neoliberal perspective, "the decision standardization has lent itself to a propaganda effect, as if it could, in fact, leverage the best results in productive terms, through the making wholesale decisions". (FREITAS, H., 2019, p. 170) (Our translation into english)

16 Regarding the preventive decision standardization in the Incident of Resolution of Repetitive Demands (*Incidente de Resolução de Demandas Repetitivas*), Alexandre Varela de Oliveira and Luís Gustavo Reis Mundim teach that "it would be privileging

tanding between courts or within the same court, but that neglect due process in the shared construction of decisions.

As Lorena Ribeiro de Carvalho Sousa teaches, the neoliberal assumption of the search for quantitative and rapid efficiency of jurisdiction makes the courts – and here such reasoning is fully applicable to the model of Mitidiero and Marinoni –, decide theses and don't deals, "abstracting the its specificities", in addition to applying the thesis "mechanically to countless future cases, also disregarding its particularities", which disagrees "with all the constitutional perspective attributed to the process and to the duty to state reasons" (SOUSA, 2019, p. 67-68) (our translation into english).

Thus, what is perceived is that the devices that aim at the rapid application of decision--making standards, precedents and summaries, present in *CPC/2015*, in addition to remaining in a *fundamental dogmatic structure*[17], disregard the real causes of jurisdictional delays, such as dead steps of the procedure and the lack of structure of the judiciary.[18]

Then, Alexandre Rocha's questioning becomes relevant:

> [...] it's quite questionable (to say the least) the idea that the mere creation of techniques for the uniformity of jurisprudence (especially through the attribution of binding effects to certain jurisdictional pronouncements, as will be seen later), without concern for the causes of growth in the number of cases in the country or with the quality of the jurisdictional provision, would be able to generate reduction in the number and in the duration of processes. (ROCHA, 2018, p. 55) (Our translation into english)

In the same way, the fallacious discourse of attribution of legal security, like a clock--precedent that provides for all situations to be applicable, "operates outside the democratic discourse, because if the fundamental rights of the process only conform the instrument of to say the law by the judge, the 'legal certainty' is reduced to the numerical efficiency achieved by the decrease of appeals judged by the *STJ*" (DINIZ, 2016, p. 73) (our translation into english).

Therefore, the jurisprudential asylum and the mandatory precedents are detrimental to the Democratic State of Law, because they preclude the *proceduralized* construction of decisions in a shared way by the procedural subjects, in compliance with constitutional-procedural principles and the equal right of interpretation (isomenic hermeneutics), already which maintains a truculent dogmatic logic.

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the protagonism of the courts, insofar as their decisions would be based on their sensibilities, wills, interests and convenience, which would make it impossible to implement fundamental rights due to a merely quantitative preventive decision standardization. Then, there would be a clear shield to access to jurisdiction and to procedural effectiveness, with the consequent absence of the democratic and systemic legitimacy". (OLIVEIRA; MUNDIM, 2019, p. 41) (Our translation into english)

17 André Cordeiro Leal and Vinicius Lott Thibau teach that the fundamental structure of dogmatic procedural law has "the jurisdiction at the center of the system and process and action to orbit this core determining its direction", which wasn't broken by *CPC/2015*. (LEAL; THIBAU, 2018, p. 33) (Our translation into english)

18 On these causes, check the work of Ronaldo Brêtas de Carvalho Dias (2018). Also important, the criticism of João Carlos Salles de Carvalho: "These discourses of effectiveness, once unmasked, show themselves full of opaque promises, since they say little or nothing about the 'dead stages' of the process, about the paradoxical deadlines improper, on excessive vacations and the obsolete forensic routine, on the decisions being made by interns inside the offices, on symbolic or unattainable goals, on the remarkable discouragement of some civil servants, on the protectionist corporatism of the judiciary, without mentioning here so many other administrative embarrassments that are known to permeate legal practice, but which - for fear or taboo - have become a practically untouchable subject in academic and forensic circles". (CARVALHO, 2018, p. 165) (Our translation into english)

In this sense, clouds and clocks are insufficient for the construction of a procedural theory of precedents, outside of the dogmatism and of the subjectivity, which will only be possible from the theory of democratic procedurality (neoinstitutionalist), which is epistemologically demarcated by the critical rationalism of Karl Popper, as we will see in the next topic.

4 BETWEEN CLOUDS AND CLOCKS: THE PRECEDENT AS A PROCEDURAL LEGAL-INSTITUTE

In the work "Objective Knowledge" ("*Conhecimento Objetivo*"), after Karl Popper made an analysis about clouds and clocks, when he criticizes both determinism and indeterminism, conjectures about critical rationalism are made.

João Carlos Salles de Carvalho teaches that, in Popper, "the break with modern determinism, that is, the denial that all clouds are clocks, doesn't necessarily imply the acceptance of a radical indeterminism, in which all clocks are clouds" (CARVALHO, 2018, p. 46) (our translation into english).

In this sense, Popper will propose his theory as "something of an *intermediate* character between perfect chance and perfect determinism - something intermediate between perfect clouds and perfect clocks" (POPPER, 1999, p. 210) (our translation into english). The Austrian philosopher, from the analysis of clouds and clocks, starts to talk about the four functions of language, namely, expressive, signaling, descriptive and argumentative, the first two being common to the languages of animals and men[19], and the last two exclusive of men[20]. (POPPER, 1999, p. 215-216)

Among these four functions, Karl Popper teaches that the highest is the *argumentative function*, because, in operation, it's disciplined by a critical discussion. The argumentative function is linked "to an argumentative, critical and rational attitude" that has "led to the evolution of science" (POPPER, 1999, p. 217) (our translations into english).

Thus, Popper will relate the argumentative function to the use of *critical arguments*:

> [...] critical arguments are a means of control: they are a mean of eliminating errors, a mean of selection. We solve our problems by proposing experimentally several competing theories and hypotheses, like test balloons, so to speak; it's leading them to critical discussions and empirical theses, in order to eliminate errors.
>
> Thus, the evolution of the higher functions of language, which I have been trying to describe, can be characterized as the evolution of new means of solving problems, by new kinds of experiences and by new methods of error elimination; that is, new methods *to control* the experience. (POPPER, 1999, p. 219-220) (Our translation into english)

In this sense, the superior functions of language, especially argumentative, enable the growth of man, as he can "develop autonomous and refutable *scientific theories* (committed

19 Popper (1999) calls them inferior functions of language.

20 Popper (1999) calls them superior functions of language.

to democracy), able to better control his conduct and better regulate the social life" (CARVALHO, 2018, p. 47) (our translation into english).

Karl Popper, then, wedges the critical-eliminationist method that "is content with the fact that the rationality of a theory rests in choosing it because it's better than its predecessors", since it was subjected to more severe tests, "therefore being able to, get closer to the truth" (ALMEIDA, 2005, p. 25) (our translation into english).

Popper's critical-eliminationist method "starts with problems, namely, both practical and theoretical problems" (POPPER, 2006, p. 14), which is why "the science starts with problems and ends with problems" (POPPER, 1977, p. 141) (our translation into english).

Thus, Popper's critical method can be summarized in the following formula: P1 -> TT -> EE -> P2, where: P1 is the problem to be solved, TT is the theorized testification of the problem, EE the elimination of errors, and P2 the problem generated by the elimination of the error, which is always less than the first problem.

Thus, the method of scientific knowledge "*is the critical method*: the method of searching for errors and eliminating errors in the service of the search for truth, in the service of truth" (POPPER, 2006, p. 15). Therefore, in Popper, the knowledge or the scientific knowledge is conjectural, hypothetical knowledge, since a more resistant theory can always appear and replace the previous theory, with the objective of "avoiding the dogmatic; it's always a critical posture, even before itself" (POPPER, 1994, p. 53) (our translations into english).

It's with this Popperian epistemological axis that Rosemiro Pereira Leal (2013) conjectures the neoinstitutionalist theory of the process – theory of democratic procedurality – for the construction of a non-dogmatic law and, therefore, effectively democratic.

In this sense, João Carlos Salles de Carvalho points out that democratic law must "abandon the myth of knowledge by the subject-authority", in order to inaugurate "a rationality that is known to be fallible, based on the evolution of knowledge by critical rationalism" (CARVALHO, 2018, p. 49-50) (our translation into english).

Rosemiro Pereira Leal teaches that, in democratic procedurality, the process is a constitutionalized legal-linguistic institution that will govern the procedures, so that the state decisions (legislative, judicial or administrative) are the result of sharing the procedural dialogue in the Constitutionalized Legal Community, which, through contradictory, broad defense and equality, will serve as a prerequisite for the creation, transformation, postulation, recognition and extinction of rights:

> The *due process*, as a constitutionalized institution, is, therefore, defined as a conjunction of principles-institutes (contradictory, isonomy, broad defense, right to lawyer and procedural gratuity), which is the legal-discursive referent of procedurality even though this, in its specific legal models, doesn't take place expressly and necessarily in contradictory terms. The *process*, by constitutional concretization, is conceived here as a governing institution and as an presumption of the legitimacy of all creation, transformation, postulation and recognition of rights by legislative, judicial and administrative provisions. (LEAL, 2016, p. 157) (Our translation into english)

Once, then, that one of the axes of democratic procedurality is found in popular sovereignty and in the enjoyment of fundamental rights (VARELA, 2019), the process in the neoinstitutionalist theory generates a "legal-discursive space of broad inspection" (*"espaço*

jurídico-discursivo de fiscalidade ampla") (DEL NEGRI, 2019, p. 14) by citizens (constitutional subjects), who will participate and recognize themselves as authors and co-authors of the decision-making pronouncements.[21]

That is why André Del Negri teaches that, in the State of Democratic Law, the process is seen as a logical-legal referent that "through the broad contradiction and equal right of interpretation for all, has the objective of offering a set of theories for clarify the contentes" obscure, which "distance us from the enjoyment of the fundamental rights", in addition to enabling the testification of "decisions and criteria that aren't attributed as to being democratic and objective in the exercise of State functions" (DEL NEGRI, 2019, p. 15) (our translation into english).

In other words, according to Leal, to everyone in the people must be guaranteed the possibility of supervising the construction of decisions that, through theorized testification of the legal system, will be given *democratic legitimacy* by eliminating errors that may prevent the enjoyment of fundamental rights (LEAL, 2016, p. 126). That is why the neoinstitutionalist theory moves away from the "jurisdictional action in concepts and personalist judgments of common sense, of convenience or of discretion of the judge" (LEAL, 2016, p. 63) (our translation into english).

This is what André Del Negri teaches:

> [...] in the speech that is intended to be democratic, in order not to depend on the clairvoyance of decision-making authorities, that the *problems* be faced through *theories* and *critical* notes in *due process*, such as *metalanguage*, so that *objective knowledge* is the spinal cord for the making *decisions*. When talking about *theory*, certainly, we aren't talking here about interpretive methods that seek the meaning of the law. (DEL NEGRI, 2019, p. 109-110) (Our translation into english)

That is why a *procedural* theory of precedents must be demarcated by Popper's critical rationalism and by the theory of democratic procedurality (neoinstitutionalist) by Rosemiro Pereira Leal.

The precedents cannot be clouds or clocks, but something in between/intermediate, since cannot conceive a jurisprudential anarchy, which assumes free convincing motivated as a theoretical foundation, nor a mandatory precedent, due to the argumentative closure, the petrification of law and impossibility of testifying and monitoring decisions by any of the people.

The precedent, in the theory of democratic procedurality, must be a legal procedural institute[22] without the primacy of jurisdiction prevailing over due process, as Rosemiro Pereira Leal teaches:

> What is relevant to the understanding of the precedent institute is the departure from the primacy of the jurisdiction that characterizes the Dogmatic State (Liberal and Social of Law) to, in its place, institute due process as the

21 Rosemary Cipriano da Silva teaches, based on the teachings of Rosemiro Leal, that "In the paradigm of democratic law, the axis of decisions isn't found in the immediate and prescriptive reason of the judge, but is built in the procedural space of discursive reason. In this sense, the arguments for the justification of the law that legitimize the claims of validity are found in the theory of the process that is conceived by the equality between producers and recipients of legal rules, thus allowing the recipients of the rules to recognize themselves as authors of its". (SILVA, 2012, p. 92-93) (Our translation into english)

22 Institute, in neoinstitutionalist theory, is the "grouping of principles that keep unity or affinities of logical-legal contents in the legal discourse". (LEAL, 2016, p. 393) (Our translation into english)

> center of the legal system of the Democratic State, always demanding, to the jurisprudential formation by chain of precedents, to be standardized, in the construction of the decisions, the constructive sieve of the due legal process, that is the set of procedures proceduralized to the consolidation of the 'legal security, freedom and equality' (so requested by the jurisdictionalists!) as a fundamental right constitutionalized in Brazil (art. 5º, LIV and LV, of *CF/88*). In Democratic States, it is not the jurisdictional activity per se that will promote the longed-for unity of law on the basis of *secundum conscientiam* (interpretive cognitivism of the logical positivism), but a solid foundation of the *objective cognitiveness* of the logical-discursive structures of proceduralized procedurality that legitimizes the constructivity of precedents within the scope of a legal decision-(of division), no more than an instrumental judicial decision based on a performative reason of the jurisdictional knowledge. (LEAL, 2017a, p. 305) (Our translation into english)

A procedural theory of precedents (democratic), doesn't allow that the establishment of the normative meaning to be given by a Supreme Court, in order to provide legal certainty to the law, but advocates the democratic legitimacy of binding provisions, based on its construction shared by the subjects through due process, as a logical referent of the legal system. (MUNDIM, 2018)

That is, it's also necessary to allow the participation of those interested in the construction of the decision, as taught by Gabriela Oliveira Freitas:

> In view of the current procedural conjuncture, it isn't only possible, it's also necessary, that precedents be used in order to seek the uniformity of jurisprudence since the search for the referred uniformity on the interpretation of the law is built by the widely participation of the interested parties and not by a solitary and solipsist act of the judges, as currently occurs in Brazilian law.
>
> It's perceived, therefore, that the interested parties must be guaranteed participation in the construction of the uniform jurisdictional provision of the norm to be applied in the case in which they are parties. (FREITAS, G., 2014, p. 110) (Our translation into english)

It's important, at this moment, to realize a differentiate between democratic procedurality and Ronald Dworkin's theory of integrity. This is because, the precedent as a procedural institute and a middle ground between clouds and clocks, doesn't mean demarcating coherence, integrity, stability and uniformity of decisions from the Dworkin.

The integrity theory still allows the judge's solipsism, despite his attempt to break it, as the elements of coherence and integrity are the maintainers of autocratic past decisions, which hurt the due process:

> Still, it's relevant to mention that the observance of past decisions to dictate the present and the future also ends up reifying and reiterating authoritarian practices already present in history.
>
> [...]
>
> This institutional history of society and of judicial decisions, as Dworkin presupposes, is derived from common sense, customs and practices that exclude and hinder due process as an interpretative activity through the exercise of contradictory, broad defense and isonomy behold they are riddled with ends merely dominating and imposing fo power. (MUNDIM, 2018, p. 88-89) (Our translation into english)

Furthermore, Dworkin didn't advocate how the *procedural parties* would participate in the construction of the decision[23] (DEL NEGRI, 2019, p. 397). Thus, as Vinicius Lott Thibau teaches, what democratic procedurality seeks is the *integrality* of those legitimized to the process (people) in decision-making and not the *integrity* in the Dworkinian molds:

> What is relevant for the operationalization of non-dogmatic law is that the interpretation ceases to be understood as a discretionary activity of fixing the valid meaning of the laws by the judge and starts to be conjectured as an activity accessible to the integrality of the members of the legal community of the legitimized to the process. In order to the interpretation of the law not to be considered an activity exclusive to the jurisdiction, however, it's essential to assimilate that the 'hermeneutics, in democracies, is given on the popular constructive basis of the law. (THIBAU, 2018, p. 228) (Our translation into english)

In this sense, in order to make a democratic theory of precedents viable, it's necessary to enable *incessant inspection and control* in the scope of formation and application of the precedents (MUNDIM, 2018) to allow the broad p proceduralized participation of procedural subjects and the revisiting of decision standards through possible overruns and distinctions.[24]

For this reason, the formation of precedents must take place from the connection of the cause of asking (cause of the action) and request, "since they are *logical antecedents* that are part of the *constructive nucleus* of precedents" (MUNDIM, 2018, p. 237) (our translation into english). In this sense, Rosemiro Pereira Leal teaches that the precedent as a legal institute must be attached to the cause of askink (cause of the action) and request, as it will allow the debate to be processed by the parties and other procedural subjects:

> By reading the art. 926 of the *NCPC*, the precedent institute built by the logical-legal conjunction of the *causa petendi* and the *petitum* is connected to the formation of the *dominant jurisprudence* not equivalent to a mere consectarian of an interdital decision of an authority, without investigating which theory of procedural *procedurality* gave support for the construction of the *precedent* that isn't, in itself, a procedure, but a short description of the characteristics of the *procedural elements* (art. 330, § 1º, I) that composed the structure of the procedure established according to previous compliance with the presuppositions of admissibility (art. 485, IV and VI), collimating into a proceduralized *merital decision* made by the Democratic State (not Dogmatic). (LEAL, 2017a, p. 309) (Our translation into english)

In other words, from linking the cause of asking and request, it's not allowed that the normative sense set by the precedent be given only and just by a wise authority, as Mitidiero and Marinoni intend, but, rather, by the construction, in a broad contradictory and equal right of interpretation, by the parties and procedural subjects.

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23 Rosemiro Pereira Leal teaches that: "The parties, as subjects of the judicial process, in these circumstances, are, for the decision maker, prima facie members of a political society ex-ante of their entry into court, and the case brought to court can be judged by principles not legalized, being, in many cases, irrelevant to the legality strict to the solution of the controversy. Due legal process dispenses with previous structural models of full or summary ordinaryity (fundamentals of cognitio) to ensure contradictory or broad defense, since such rights are, in law as integrity, guaranteed by the judge as tutelage that the authority confers to the parties dosing them the convenience whose amplitude is placed by their fairness judgments (just decision)". (LEAL, 2017b, p. 127-128) (Our translation into english)

24 Here are interesting the proposals for the diffuse control of jurisprudentiality by Gabriela Oliveira Freitas (2019a), the creation of reviewing chambers of jurisprudence by Gustavo Castro Faria (2012, p.113-136) and the constitutional procedure for revising binding precedents by Luís Gustavo Reis Mundim (2018, p. 252-256). This three proposals are based on the theoretical framework of democratic procedurality.

Specifically to the application of precedents, this must be carried out by means of a knowledge procedure demarcated by logical phases, in order to avoid the suppression of phases by the rapid application of precedents without the contradictory, broad defense and isonomy (MUNDIM, 2018, p. 243-352).

Here, the technique to remedy and organize the procedure[25] can serve as a procedural framework so that the debate about the application or not of the precedent to the dispute is set as an issue to be resolved in the final decision, which would allow the procedural debate by the parties in a procedural space, without the use of procedural acceleration techniques in favor of an efficient bias.

In this sense, it can be inferred that the construction of a theory of precedents must go through the process in its centrality, as it deviates from the mistake made by the *precedentalists* that the jurisdiction is the center of the legal system. What is perceived, then, is that only democratic procedurality prevents that the construction and application of precedents taking place in a dogmatic way, since it allows the parties and other procedural subjects to construct and review binding decisions in contradictory, broad defense and isonomy, for the equal right to argue critically and interpret the legal sense.

It concludes that precedents must be between clouds and clocks, since, as a legal procedural institute, they allow the effective legitimate and democratic construction of decisions by all of the people.

5 CONCLUSION

The cloud scheme, which is characterized by intense unpredictability and instability, can be compared with the so-called *jurisprudential asylum*, in which the free conviction of the judges as a decision-making basis prevails. Said asylum generates unpredictable and conflicting decisions that completely ignore the due process in its construction.

In turn, the clock scheme represents a highly accurate, predictable and stable system, which can be compared to the defense of mandatory precedents. The mandatory precedents and the model of the Supreme Courts advocate that the precedents can be predictable, stable and can arise from any decision issued by the STF and STJ, which are the only ones able to establish the normative meaning so that the citizen can predict his conduct.

However, both perspectives are incompatible with the Democratic State of Law and with democratic procedurality, as they relegate the construction of precedents to the solipsism of judges and national courts. The jurisprudential asylum for not bringing any systemic stability, while the mandatory precedents seek an *ad aeternum* stability that closes the possibility of construction, interpretation and inspection of the binding pronouncements to be formed in the courts.

25 Alexandre Varela de Oliveira teaches that the delimitation of the object of the cognition procedure "will be linked to the issues defined in the decision on sanitation and organization, which must be mandatorily observed by the magistrate, so that the jurisdictional pronouncement doesn't fail to appreciate issues of fact or of law previously pointed out by the parties". (VARELA, 2019, p. 113) (Our translation into english)

Thus, based on Karl Popper's critical rationalism and Rosemiro Pereira Leal's theory of democratic (neoinstitutionalist) procedurality, one can conjecture and conclude that precedents in democracy must be *between clouds and clocks*, as they must be understood as procedural legal-institute, so that all of the people and all procedural subjects participate and supervise the construction of binding provisions, as well as can debate and interpret the application of such pronouncements, because only then will there be decision-making legitimacy.

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