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**Sacredness of the constitutional text and interpretative heresy:
The Brazilian Supreme Court Decision on Same-sex Civil Unions**

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Abstract: The paper provides a close lecture of the arguments and methods of legal construction, employed in the extensive individual opinions written by the Justices of the Brazilian Supreme Court in the case which authorized the same sex civil union. After tracing an outline of the legal problem and his possible solutions, we analyze the individual opinions, showing their methodological syncretism, the use of legal methods and arguments in a contradictory way as well the deficiencies in the reasoning. The Justices use legal arguments, but do not meet the requirements of rationality in the decision-making. We have a rhetorical attempt that aims to satisfy the public opinion than to offer a comprehensive and coherent solution according the normative elements of the Brazilian Federal Constitution of 1988.

Keywords: Brazilian constitution; Justification of judicial decisions; Legal argumentation; Legal construction; Rhetoric.

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1 The Brazilian Supreme Court at the center stage

In order to understand the role of the Supreme Court in Brazil (*Supremo Tribunal Federal*), we should first present its social role nowadays. The Court has grown in popularity over recent years since it decided to have a more prominent role in the media. *TV Justiça*, a public TV channel, exhibits live hearings of the Supreme Court Justices sitting *en banc*, as well as reviews on the opinions, interviews and special programs about the hearings.³ The Justices are always making headlines and giving interviews on television and in newspapers. On the positive side there is more transparency, because the arguments are exposed, and anyone may have access to the opinions, including the heated discussions between Justices, jokes, ironies... The media exposure makes Justices increasingly known and popular. For example, there was a 116% increase of quotes on the Supreme Court in the Brazilian media in 2012 and also a 75% increase in the number of Twitter “followers” of the Court’s account.⁴

The Supreme Court becomes increasingly closer to the people, assuming a social role and materializing the idea of the “open society of constitutional interpreters”.⁵ The trial of the so-called “Mensalão” (“Big Monthly Allowance case”) since the second half of 2012 can be seen as a symbolically important part of this process. This lawsuit stirred up public opinion, due to charges of corruption and misuse of public money by prominent politicians. The trial had continuous and intense media coverage, becoming a part of the daily news and flooding social networks with comments.

The rapporteur of the case, Justice Joaquim Barbosa, imposed harsh sentences onto the main defendants, and was followed by the majority of the Court. Such stance was praised by public opinion and widely covered by the media, and Justice Barbosa became a celebrity. He is greeted and cheered on the streets and one of the best selling costumes during the 2013 carnival was one with his mask and robe.⁶

³ Since August 11th, 2002, *TV Justiça* broadcasts, besides news about the judiciary, the program *Direto do Plenário* (*Live from the bench*), which can be seen online: <<http://www.tvjustica.jus.br/index/ver-detalhe-programa/idPrograma/212866>>.

⁴ In January 2012 the Supreme Court had about 180,000 followers on Twitter; in December 2012 the number of followers increased to 316 000. The Supreme Court was mentioned in the written media 170,000 times in 2012, an increase from the 78,000 times in 2011, according to newspaper **Folha de S.Paulo** (Jan. 13, 2013, p. A10).

⁵ Häberle, 1975.

⁶ **O Estado de S. Paulo**, Jan. 9, 2013. <<http://www.estadao.com.br/noticias/geral,comeca-a-faltar-mascara-de-joaquim-barbosa-no-rio,982325,0.htm>>; <<http://veja.abril.com.br/blog/ricardo-setti/politica-cia/fabricante-de-mascaras-de-borracha-diz-o-joaquim-barbosa-e-o-batman>>.

Such limelight creates the risk of the Supreme Court yielding to the demands of public opinion, incorporating sentimental-rhetorical arguments in its opinions and even deciding according to the wishes of the public opinion.⁷ There is a double pressure:

On the one hand, the pressure of the legal community for the Supreme Court to submit convincing and consistent technical legal arguments, otherwise there might be negative criticism from scholars and legal questioning of the decisions before national and international Courts.

Moreover, the public opinion asks for “praiseworthy” opinions. This may explain the difference in the type of argument of the Justices, which has many arguments with popular appeal, when compared with the Supreme Court of the USA or the European constitutional courts, desirous of formulating technical and legal arguments for jurists.⁸

The stated limelight and its risks make it necessary to study the forms of reasoning used by the Court.

2 Goals and methods of this paper

Our study makes a detailed survey of the arguments employed in the individual opinions of the Justices in the case that granted the request to same-sex⁹ civil union in 2011.¹⁰

Our goal is to identify the patterns of argument accepted by the members of the Supreme Court, showing how they understand the constitutional obligation to justify the opinions. Furthermore, we intend to verify if technical-legal arguments are used or if the Justices resort to populism, given their yearning for large audiences.

Our assessment on quality is based on the following criteria:

- a) *Internal consistency* (absence of contradictions in the opinion);

⁷ Justice Ricardo Lewandowski said that during the “Mensalão” Trial the Justices began to use vocabulary that could be understood by non-specialists (newspaper **Folha de S.Paulo**, Jan. 13, 2013, p. A10).

⁸ See Rodriguez (2013).

⁹ It is common to describe such unions in Brazil as “gay marriage” (*casamento gay*) or “homo-affective union” (*união homoafetiva*). However, neither the Brazilian Constitution nor the legislation mentions sexual orientation or preference as a relevant criterion for Family unity. Only biological sex is mentioned. Therefore, it is legally correct to call such unions same-sex unions.

¹⁰ Ação direta de inconstitucionalidade (“Direct action of unconstitutionality”) nr. 4277 and Arguição de descumprimento de preceito fundamental (“Claim of Breach of Fundamental Rule”) nr. 132. Full version available at: <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628635>>. We quote the opinions stating the name of the Justice and the page of the official publication.

- b) *Compliance level of the arguments to relevant normative data* (solutions recommended by jurists and court precedents; consistency with textual elements of the legislation).
- c) *Quality of the evidence*: were the claims of the opinion founded on satisfactorily proven facts or trends or do they remain rhetorical?
- d) *Systematic interpretation*: does the opinion interpret the law in a systematic manner or does it merely point to rules that favor certain opinion, choosing to ignore others?
- e) *Quality of the legal syllogism*: did the legal conclusion stem accurately from legal premises or is it a false subsumption? The “false subsumption” typically occurs when the Court deduces a concrete consequence from abstract principles or moral evaluations.¹¹

We chose the same-sex civil union case because it has three interesting features:

- It rules a issue with strong social and political controversies about the rights of sexual minorities and has led to a vast collection of scholarly literature in Brazil;¹²
- The Supreme Court decision went against the wording of the Constitution;
- The Court granted the request unanimously.

The first two features show that the opinions have been carefully prepared to convince public opinion about the subject. Any argumentative deficiencies regarding the argumentation cannot be explained by social and legal irrelevance of the case or due to the pressure of time.

The unanimity, something rare whenever the brazilian Supreme Court is sitting *en banc* discussing controversial issues, makes the study of argumentative strategies easier and creates an agreement expectation on both the methods and arguments employed. We will see that this did not occur, though, and there were significant differences in the argumentation presented by the Justices. This is typical of the way the Supreme Court makes its rulings: they may differ in the reasoning presented even when they agree in the result.

¹¹ A full assessment on the argumentative quality of rulings should also examine the following aspects:
Competence: formal verification normative elements that justify the role of a judge.

Use of sources: does the ruling mention jurists' opinions and court precedents in a complete and reasonable manner or does it rely only on elements that support his thesis? Do we have a reasoned debate based on arguments or simple demonstrations of erudition?

¹² See the following studies: RIOS (2001, 2002, 2007, 2008); BARROSO (2008); SARMENTO (2008); SÉGUIN (2009); DIAS (2011). Commentaries on the Supreme Court decision in: LOPES (2012); TRIVISONNO (2012); VIEIRA (2012); RINCK; YAKABI (2012); SIRENA (2012); DIMOULIS; LUNARDI (2013A); ALBUQUERQUE (2013); LEITE (2013); VECCHIATTI (2013, 2013a).

In this case, Justices were unanimous in granting the request.¹³ However, there are strong differences on the reasoning given by the Justices. Three Justices included the theory of legal differentiation for same-sex unions in the Syllabus of the opinion: “Justices Ricardo Lewandowski, Gilmar Mendes and Cezar Peluso converged in the peculiar understanding of the impossibility of orthodox framing of same-sex unions for the already existing families. Nevertheless, they recognized the same-sex civil union as a new form of family entity”.¹⁴ Justice Fux considered that there should be no public displays on the recognition of same-sex civil unions because of the fear that many homosexual couples may be discriminated against if they disclose their relationship.¹⁵

Justice Barbosa held that article 226 of the Federal Constitution does not protect same-sex unions, but that such protection stems from constitutional principles. The Justice did not indicate whether there would be an equivalence of same-sex unions to those between men and women and what rules govern same-sex unions.¹⁶

Therefore, only four out of the nine Justices who issued an opinion¹⁷ agreed on the thesis of equal and direct constitutional protection of civil unions regardless of the biological sex (Justices Britto, Rocha, MA Mello, C Mello).

We will identify the arguments used by the Justices, and will later suggest an assessment. Our analytical approach is based on the studies of Giovanni Damele¹⁸ and those of other scholars about the argumentation in constitutional courts.¹⁹ But it follows its own path, for it uses a classification of arguments and interpretation methods prepared by the authors of this study.

The study of a single decision does not guarantee, of course, the representativeness of the findings. But since it is an opinion with heavy argumentative pressure, it seems to us that it offers important clues about the quality standards established by the Brazilian Supreme Court.

We left out of scope of analysis the arguments of the Justices who were not related to the case²⁰ or those that showed mere emotional appeal.²¹ Despite the fact that these arguments

¹³ Official publication, p. 880.

¹⁴ Official publication, p. 614.

¹⁵ Official publication, p. 681-682.

¹⁶ Official publication, p. 726.

¹⁷ The Brazilian Supreme Court has eleven Justices; Justice Tofoli recused himself from the case and Justice Northfleet was absent.

¹⁸ DAMELE (2011); DAMELE et al. (2011).

¹⁹ Bibliography in PUCEIRO (2003).

²⁰ For example: Justice Fux gave a long explanation on the “objective dimension” of constitutional rights (p. 661-665).

are symptomatic for the style of thinking and deciding of the Court, they do not affect the argumentative quality of the opinion.

3 The legal problem of unconstitutionality and decision-making alternatives

The main request of the same-sex union case was that article 1723 of the Brazilian Civil Code should be interpreted according to the Federal Constitution and understood as a rule that recognizes civil unions of same-sex couples.

Article 1723 of the Civil Code states: “*It is recognized as a family entity the civil union between a man and a woman*, who enter a public, committed and continuous relationship with the purpose of constituting a family.”

Article 226, paragraph 3 of the Federal Constitution provides: “For purposes of protection by the State, *the civil union between a man and a woman is recognized as a family entity*, and the statutes shall facilitate the conversion of such entity into marriage.”

This shows that there is absolute similarity of the Civil Code with the Federal Constitution. The legislator virtually reproduced paragraph 3 of article 226, reversing the word order and adding requirements for the recognition of a civil union. We should note that paragraph 5 of article 226 of the Federal Constitution also defines marriage as heterosexual: “*The rights and duties of the conjugal society shall be exercised equally by men and women.*”

Due to the literalness with which the Civil Code reproduces the constitutional rule, the Supreme Court was faced with a dilemma: they could make a plain meaning interpretation, declaring the constitutionality of the Civil Code rule, with the risk of being labeled a conservative court; or they could adopt a politically liberal stance, accepting the request, but at the risk of being criticized as an activist Court for going against clear constitutional rules.²² Indeed, by applying the so called method of “interpretation according to the Constitution”, the Court shows, among several possible interpretations of the norm, those compatible with the Constitution. It is not allowed to modify statutes or to add something to them.²³

This situation gives us the following possibilities of decision on the request in the same-sex marriage case:

²¹ Examples: a transcript of a “poem allegedly automatically written by a prestigious Brazilian medium, Chico Xavier” (Justice Britto, p. 650). “Got too important to let go the voice of the heart” (Justice Fux, p. 683).

²² TRIVISONNO, 2012, p. 203.

²³ DIMOULIS; LUNARDI, 2013, p. 271.

1. Denial of the claim in view of textual identity between the Constitution and the Civil code. This would be the solution closer to the text, but it would cause strong disappointment among sexual minorities and liberal public opinion.
2. Denial of the claim by stating a legal gap that could not represent an unconstitutional omission. The Supreme Court could make an appeal to legislators to regulate same-sex civil unions. They could also grant the request, *ultra petita*, declaring such legislative omission unconstitutional and forcing legislators to regulate the issue, with the possibility of analogous application of the rules on civil unions between men and women until legislators fulfill their regulatory duty.²⁴
3. Grant the request, declaring both article 1723 of the Civil Code and article 226, paragraph 3 of the Federal Constitution unconstitutional, when interpreting them in the light of certain constitutional rules (equality, human dignity, etc.). This solution would introduce the theory of the hierarchy of constitutional rules and the consequent possibility of unconstitutionality of some constitutional rules, a possibility that the Supreme Court has always rejected.²⁵
4. Grant the request, considering that certain constitutional rules demand the legal recognition of same-sex unions as something different than the unions between “man and woman” of article 226 paragraph 3 of the Federal Constitution. The systematic interpretation (statutory construction considering the context and harmonizing different norms) of the Constitution would authorize this solution, and the rules on same-sex unions could be established by analogous application of legal rules, until legislators meet their regulatory duty.

The Brazilian Supreme Court adopted the third alternative in a peculiar way. They decided that the Civil Code rule on civil unions would only be constitutional if it authorized also same-sex unions, but the Justices interpreted did not modify article 226, paragraph 3 of the Constitution. As we have seen above, three Justices adopted the fourth alternative, but did not record formally their disagreement, so that the Court granted the request unanimously.

²⁴ On the possible consequences of an unconstitutional legislative omission in the Brazilian Law, see DIMOULIS; LUNARDI, 2013, p. 134-137.

²⁵ Court precedents in Dimoulis and Lunardi (2013, p. 110).

4 Arguments presented by the Justices

4.1 Arguments of legal-constitutional interpretation theory

In this category we grouped the arguments based on Friedrich Carl von Savigny four “elements” or “methods” of interpretation,²⁶ which are widely accepted by jurists and court precedents in Brazil and in many other countries as means of constitutional interpretation.²⁷

4.1.1 Teleological arguments grounded on social changes

One of the most frequent arguments is the one of “reality”. According this argument, what actually takes place in society must be the basis to guide the ruling of the Court. When both the Brazilian Constitution and the Brazilian Civil Code specify that civil unions should be between a man and a woman, they ignore the minority of same-sex couples who live together.

- The non-recognition of the same-sex civil union is engendered by the social conservatism that rejects homosexuality. Justice Britto, p. 627.

- Sexuality is an existential element. It expresses the identity and dignity of the human being and should be valued regardless of sexual orientation. Justice Britto, p. 636-637.

- Family is a “cultural and spiritual” fact, regardless of the biological sex of those involved. Justice Britto, p. 644.

- The existence of homosexuality and gay couples “is a fact of life”, statistically proven by the Brazilian Institute of Geography and Statistics (IBGE) and that needs to be legally recognized. Justice Fux, p. 666-667. Justice Lewandowski, p. 717-718.

- The legal system must keep up with social evolution by taking into account same-sex civil unions, something that is ever more socially accepted. Justice Fux, p. 668 and 678.

- The Law must keep up with social evolution by recognizing that same-sex civil unions are a part of social reality, but Brazilian Law has failed to do so. Justice Barbosa, p. 723.

²⁶ SAVIGNY (2004).

²⁷ Further analyses and references in PAWLOWSKI (1999); MACCORMICK; SUMMERS (1991); SIECKMANN (2005).

4.1.2 Text-based arguments (plain meaning)

This line of reasoning is crucial in this case because of the substantial textual identity between the Constitution and the Civil Code. The Justices who recognized the existence of a legal gap used the plain meaning argument to justify their opinions.²⁸

- “The constitutional rule (...) is clear in stating, explicitly, that the civil union can only occur between a man and a woman, also taking into account its possible conversion to marriage.” Justice Lewandowski, p. 713.²⁹

- A grammatical interpretation indicates that same-sex civil union is not the civil union described in Article 226 Paragraph 3, but something different that can be apprehended from a systematic reading of the constitutional text. So there is a gap here that must be filled by interpretation. Justice Lewandowski, p. 712.

4.1.3 Systematic arguments

The systematic reasoning was used both to justify the existence of a legal gap, as well as to deny the need for statutory regulation, stating that the constitutional rules were sufficient for the recognition of the same-sex civil union. This line of reasoning holds that the Constitution already (implicitly) recognizes same-sex civil unions through its set of rules. The Justices justified their votes as follows³⁰:

- Gender-based discrimination is forbidden regarding the State duty to promote the well being of everyone (Article 3 of the Brazilian Constitution). Justice Britto, p. 631; Justice Rocha, p. 701.

- The Constitution is silent on the sexual orientations and activities of individuals and one can assume that same-sex orientation and activity are allowed. Justice Britto, p. 634, 638; Justice Fux, p. 667; Justice Barbosa, p. 724-725.

- There is no constitutional rule stating the prohibition of same-sex family and civil union. Justice Britto, p. 655; Justice Fux, p. 667.

²⁸ The plain meaning argument is also mentioned in the opinions of the Justices who deny the legal gap, but it is dismissed in favor of other arguments.

²⁹ Justice Mendes shares this line of thought (p. 732).

³⁰ Analytically, the sub-arguments that underlie the systematic reading would be: sub-argument of dignity, sub-argument of freedom, sub-argument of intimacy, sub-argument of non-discrimination on grounds of sexual orientation, sub-argument of family protection and the protection of the new family concept. This assessment was proposed by Trivisonno (2012, p. 208-209).

- Sexual preferences are a matter of human dignity and therefore are protected by the Constitution (Article 1, Paragraph III). Individuals' life projects should be respected and recognized as free and autonomous. Justice Britto, p. 638; Justice Fux, p. 674-675; Justice Rocha, p. 699.

- Sexual preferences and activities are protected as a matter of privacy (Article 5 of the Constitution). Justice Britto, p. 639; Justice Rocha, p. 700, 703.

- Equality among couples with different sexual preferences can only be achieved if "the individual's personal right to constitute an autonomous family" is recognized. Justice Britto, p. 649.

- Ontologically, the affection and willingness to lasting and interdependent coexistence that characterizes a family can be found in couples regardless of their sexual preference. If all families are ontologically equal, the Constitution cannot tell them apart. This is enforced by the principle of equality, which implies treating substantially identical cases the same way. Justice Fux, p. 671-672.

- The non-recognition of same-sex civil unions has a direct harmful effect on legal certainty, for it hinders the possibility of individuals from managing their estate with predictable legal consequences. Justice Fux, p. 678.

- A series of constitutional principles, notably the ones of dignity, equality, freedom and intimacy demand the recognition of same-sex civil union as something different than the civil union described in Article 226 of the Constitution, used for heterosexual couples. Therefore, in order to fill this gap, it is necessary to treat them analogically, based on the rules of heterosexual civil unions. Justice Lewandowski, p. 713-714, 719; Justice Mendes, p. 745; Justice Peluso, p. 874.

- A series of constitutional principles – especially the ones of dignity and equality – compel the recognition of the same-sex civil union, but not based on Article 226, which makes clear reference to heterosexual civil unions. Justice Barbosa, p. 726.³¹

- A series of constitutional principles – notably the ones of dignity, equality, freedom and privacy – compel the recognition of the same-sex civil union by means of a systematic interpretation based on principles and "surpassing the wording". There is not a gap to be filled. Justice Britto, p. 746; Justice MA Mello, p. 820-821; Justice C Mello, p. 841, 844-845.

- The Brazilian Law grants individuals "the pursuit of happiness as a constitutional right." It stems from human dignity and therefore justifies the free development of everyone

³¹ The argument does not indicate which rule should be used to regulate same-sex civil unions in order to fill the legal gap.

and compels, among other things, to recognize same-sex civil unions. Justice C Mello, p. 844-845, 856-861.

Justices use the systematic interpretation to introduce constitutional principles to their reasoning in order to neutralize the “man-and-woman” clause of Article 226 Paragraph 3 and therefore to justify their interpretation “according to the Constitution”. One should note that this method should have led to the declaration of unconstitutionality of Article 226 Paragraph 3 itself, as the logical conclusion of the prevalence of certain principles over explicit rules.³² But the Justices did not take this step, preferring to decide inconsistently.

4.1.4 Argument of the will of the framers (legislative intent)

During the Constitutional Convention of 1987-1988 who elaborates the Federal Constitution, an evangelical bishop was responsible for the final draft of the rule regarding “family” and he made sure that the wording of such article excluded same-sex unions. Nobody at the constitutional convention has questioning his position. The proposition of the bishop was unanimously approved.³³ Justice Lewandowski registered such original intention in his opinion.

- The debates in the constitutional convention leave no doubt that there was an intention of preventing same-sex unions, with the wording “between a man and a woman”, following the suggestion of an evangelical bishop. Justice Lewandowski, p. 711-713.

Some Justices have used the historical argument in the opposite direction.

- The wording of the civil union “between a man and a woman” in article 226 does not aim to exclude same-sex unions, but only encourage the equivalence of heterosexual civil unions to marriage. Justice Britto, p. 652; Justice Fux, p. 681; Justice Barbosa, p. 726; Justice Mendes, p. 738.

³² See TRIVISONNO, 2012, p. 233.

³³ Excerpt of the Acts of the Constitutional Convention, included in the opinion of Justice Lewandowski, pp. 711-712: “Mr. Gastone Righi states: - Finally the amendment of the framer Mr. Roberto Augusto. It is article 225, paragraph 3. This paragraph provides: “*For purposes of protection by the State, the civil union between man and woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage*”. Such paragraph has been causing a lot of controversy in the press and on television and some gay groups have been talking about it for people are say that due to the absence of the feminine and masculine article that such union could take place even between people of the same sex. They have been saying on the news, on Sunday TV programs, in magazines and newspapers. Bishop Roberto Augusto, the author of this paragraph, took care to make it very clear, and has asked us to add two articles to paragraph 3: “*For purposes of protection by the State, the civil union between a man and a woman is recognized as a family entity, and the law shall facilitate the conversion of such entity into marriage*”. Clearly it was never the idea of our House of Representatives to cause such confusion, so, in order to avoid any mean interpretation of such righteous constitutional text, allow me to at least approve an amendment”.

- “Maybe” the framers did not mention same-sex unions because they considered it to be unnecessary on the principles of freedom and equality. Justice Fux, p. 691.

4.2 Arguments of legal theory

In this category we grouped the arguments that stem from theories about the structure of the legal system and its forms of application.

The Justices did not explicitly adopt a specific legal theory. But rather most of the legal theory arguments employed in this decision (as well as most recent Supreme Court decisions) stem from the moralistic view, rejecting legal positivism and exalting judicial activism and the practical relevance of abstract principles as a means to modify or defeat legal rules. In the Brazilian debate this view is known as “post-positivism” or “neo-constitutionalism”, with a vast technical literature.³⁴

Based on the final purpose, the legal theory arguments aim to justify a certain interpretation over others. Therefore, they may be considered as meta-arguments or second-level arguments.³⁵ Arguments of legal theory are also used as rhetorical tools, for example, evoking the “fair” character of a claim without explaining the criteria and the reasons therefore. In some cases, they are even devoid of content, for example, when they say that it should be decided according to the “spirit of the Constitution”, but without forgetting the constitutional “wording”.

We found the following arguments of legal theory.

4.2.1 “Post-positivist” arguments

- “Fraternal constitutionalism” is a theoretical option who demands the inclusion of minorities based on a pluralistic vision of living with diversity. Justice Britto, p. 632.

- It is impossible to establish criteria of “justice” and “fairness”. Still, cases such as this one demand finding the fair solution. Justice Fux, p. 685.

- The post-positivist approach identifies a constitutional “new principle”, which consists of the state’s duty to protect discriminated minorities. Justice Fux, p. 689.

³⁴ Brazilian references: LOIS (2006); SARMENTO (2007, 2009); BARROSO (2007); BELLO (2007); MOREIRA (2008); AGRA (2008); STRECK (2008, p. 285-286); MAIA (2009); CAMBI (2009); KIM (2009). Criticism in DIMOULIS; LUNARDI (2008); ÁVILA (2009); DIMOULIS (2011).

³⁵ See DAMELE, 2011, p. 92.

- “The breadth of the fundamental principles” requires interpreting exclusionary rules in a way that allows to protect the rights of everyone (“understanding of the constitutional rule in a broader manner”). Justice Rocha, p. 698.

- The constitutional rules should be interpreted taking into account, besides the wording, “the spirit of the system.” Justice Rocha, p. 699.

- The wording of article 226 of the Constitution cannot “kill its spirit,” by discriminating gays. Justice Britto, p. 653.

- The violation of constitutional principles is more serious than the violation of specific rules. Therefore, the principles must give way to circumvent specific rules and pass over “the plain meaning obstacle.” Justice MA Mello, p. 821.

- A “certain creativity of the judges” is allowed, particularly when there are gaps and in order to adjust the rules to social changes. But this cannot happen against the meaning of the texts. Justice Lewandowski, p. 712-713.

- We cannot allow the interpretation of a rule “according to the Constitution” when the result is contrary to the wording of this rule. Therefore, we cannot interpret article 1723 of the Civil Code “according to the Constitution” in order to recognize same-sex civil unions. Justice Mendes, p. 706.

4.2.2 Argument of precedents

The Justices evoke court precedents in order to maintain the coherence of decisions and also to allow the predictability of future opinions. It is an argument of legal theory that presents a high risk, because conflicting precedents are frequent.³⁶

This argument is widely used in the decision concerning same-sex unions. The Justices say that Brazilian courts have already attributed legal effects to same-sex civil unions, recognizing several of its aspects. Justice Fux, p. 681; Justice Rocha, p. 704; Justice Barbosa, p. 726; Justice Mendes, p. 784-786. Justice C Mello, p. 839-840; Justice Peluso, p. 875.

³⁶ “There isn’t an organized system of precedents in Brazil. Whenever these cases are mentioned, there does not seem to be a reconstruction of a relevant pattern fit to the case in question. The cases are mentioned as only to strengthen the authority of the judge” (RODRIGUEZ, 2013).

4.3 Argument based on the theory of judicial review (institutional role of the Constitutional Court)

One of the reasoning methods in this decision is to call upon the role of the Brazilian Supreme Court as a key element of judicial review. Its function is seen as to define the meaning and eventually the unconstitutionality of laws. We can see the use of this argument in the following references:

- It is up to the Supreme Court to decide in a counter-majoritarian direction and guarantee rights of oppressed minorities and victims of discriminations. Justice Fux, p. 668; Justice Barbosa, p. 724; Justice Mendes, p. 778; Justice C Mello, p. 845-850.

- It is up to the Supreme Court to be the “guardian of the Constitution” and to preserve constitutional rights that are violated either by the State or by individuals. Justice Fux, p. 668; Justice C Mello, p. 852.

- It is up to the Supreme Court to consider the social changes as the highest interpreter of the law, whose decisions are generally binding. Justice Fux, p. 692.

- It is up to the Supreme Court to act in some cases as “positive legislator”. Justice Mendes, p. 729; Justice Lewandowski, p. 746. Justice C Mello, p. 868³⁷.

- It is up to the Supreme Court to represent citizens in parallel to political representation by the other Departments. Justice Mendes, p. 749.

- The Supreme Court holds “the last word privilege” on constitutional issues. Justice C Mello, p. 870.

This way of justifying the decisions of the Court is clearly rhetorical, and aims to strengthen the legitimacy of the opinion based on the summoning of the theory of judicial review, thus justifying any controversial interpretations or those contrary to textual evidence.

5 Results

Sacredness and Heresy in the Brazilian Supreme Court. We observe a paradox. The Supreme Court Justices comprehend the constitutional text as supreme and somehow sacred, something sacred, whose custody rests with the Justices themselves as higher representatives of the Judiciary. But at the same time, the Constitution is seen as an obstacle to reach

³⁷ Justice C Mello makes a reference to legitimate “practices of judicial activism”, p. 868.

satisfactory solutions, and they state that some rules can “kill” the spirit of the Constitution.³⁸ Many Justices question the will of a small group of people who drafted the Constitution. Was this group able to represent the will of the “constituent power” itself? The Supreme Court seems to doubt it, adopting free and “alternative” interpretations instead. They are “heretical” interpretations when compared with the constitutional text. This paradox turns judges into faithful guardians of the original text and as well as heretics.

The function of rhetorical arguments. Many of the arguments presented by the Justices seem to justify the decisions to the public opinion. This is clear in the “post-positivist” arguments with its references to “justice”, the “spirit of the text” or to “fraternal constitutionalism”. The same applies to the role of the Court as “guardian of the Constitution”, aiming to justify judicial activism. Justices abandon legal accuracy and argue before a non-specialist audience, using rhetorical arguments to meet popular aspirations.

Methodological syncretism. Syncretism can be defined as the combining of different theories, approaches and practices. Justices use arguments built on various and often contradictory legal methods, and do not bother to follow a pattern. Syncretism in this case indicates the lack of concern with the accuracy of legal reasoning.

Contradictions among Justices using the same argument. We clearly noted that in the use of the argument of legislative intent (“historical argument”). The Justices attribute to the framers both the intention to recognize civil unions, regardless of the text they have written, as well as the intent to exclude same-sex unions based on debates during the constitutional convention. Similar contradiction lies in the fact arguments. Some Justices call upon the reality of heterosexual unions to criticize that the legislator did not recognize them and others to consider that this fact forces the judiciary to provide legal recognition to same-sex couples.

The same occurs with the systematic arguments used both to support the constitutional protection of same-sex unions, as well as the exact opposite. In general, arguments for equality do not offer conclusive answers. In many cases the constitution discriminates certain categories, despite the ontological equality of their position or function. For example, the domestic worker has fewer rights than the workers of companies (article 7 single paragraph of the Federal Constitution), although there is no ontological difference between the work of

³⁸ The wording of article 226 cannot “kill its spirit” by discriminating gays. Justice Britto, p. 653.

those who clean hotels and those who take care of private residences. The generic endorsements do not prove that the Brazilian Constitution recognizes equally all family unions.

Conflicting agreement. We have already shown that there were different opinions on the constitutional treatment of same-sex unions. But these differences did not prevent the Court from reaching a unanimous decision. This means that the constitutional reasoning and argumentative accuracy yielded to the search of a result, something seen as satisfactory from the political point of view.

Most Justices used the “interpretation according to the Constitution”, but did not discuss the limits of this technique of judicial review. How does one interpret article 1723 of the Civil Code in a manner contrary to its wording that is virtually identical to article 226 paragraph 3 of the Constitution and claim that this is a “interpretation according to the Constitution”? That would only be possible if one assumed that, first, the interpretation may change as the wording of the laws interpreted and, secondly, that some constitutional rules are superior to others. With the exception of the reference of the superiority of constitutional principles by Justice MA Mello, Justices avoided referring to these theoretical assumptions of their opinions.

Quantum and quality of evidence. The argument that same-sex unions are a “social reality” is used as if it were a notorious fact, and no evidence needed to be presented. With the exception of a statistic reference, the references are not based on evidence. This proof would be necessary not only to assess the concrete forms, the social function, the length and other data on same-sex unions, comparing them to heterosexual unions, as well as to check the position of society on homosexuality. If, for example, empirical research would prove that same-sex unions are often kept in (relative) secrecy and the majority of society disapproves of them, this would invalidate the argument of teleological interpretation based on “social evolution”.³⁹ Without solid empirical basis it is not possible to evaluate most constitutional rights issues.

³⁹ According to a 2013 public opinion research in Brazil, 49,5% of people are against gay marriage (available at: http://www.reportermt.com.br/index/noticias/id-29824/pesquisa_da_cnt_aponta_que_maioria_e_contra_casamento_gay).

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