NÚMEROS DE PROBLEMA

VARIATIONS ON JUDICIAL PRECEDENT. THE CHILEAN LEGAL SYSTEM PERSPECTIVE*[1]

VARIACIONES SOBRE EL PRECEDENTE JUDICIAL. UNA MIRADA DESDE EL SISTEMA JURÍDICO CHILENO

Flavia CARBONELL BELLOLIO**

DOI: 10.22201/iij.24487937e.2022.16.5.17577

Abstract:

This paper is the result of my participation in a discussion event of *Problema. Anuario de filosofía y teoría del derecho* entitled "The Construction of Precedent in Civil Law: Debates, Concepts and Challenges". Several colleagues with a vast knowledge on the subject of judicial precedent participated in this seminar, which also delved into the widely debated aspects of judicial precedent focused on the case of Chile. The entire discussion aimed at proposing solutions, as well as shedding some light on some of its important aspects.

Starting from such transcendental concepts as, rationality and argumentative use, it is possible to find certain problems arising from the improper use of the above concepts, which in turn leads us to stare decisis, a term that if used incorrectly may result in an act against the internal independence of judges.

Keywords:

Judicial Precedent, Statute of Limitations, Self-Precedent, Reasonableness, Stare Decisis

Resumen:

El presente trabajo es el resultado de mi participación en el evento de discusión de la revista Problema. Anuario de Filosofía y Teoría del Derecho, que llevó por nombre "La construcción del precedente en el Civil Law: debates, conceptos y desafíos", en el cual participaron varios colegas con un amplio conocimiento en el tema del precedente judicial; de igual forma, ahonda en los temas de mayor debate dentro de lo referente al precedente judicial, enfocado al caso chileno. Todo ello, con la finalidad de proponer algunas soluciones al respecto, así como dilucidar ciertos aspectos importantes dentro del precedente.

Partiendo de conceptos tan trascendentes como la prescriptibilidad, la racionalidad y el uso argumentativo, se logra llegar a ciertas problemáticas provocadas por el mal uso de los conceptos previamente mencionados, que a su

vez nos conduce al stare decisis*, término que mal utilizado puede resultar en un acto contrario a la independencia interna de la cual gozan los jueces*.

Palabras clave:

Precedente judicial, prescriptibilidad, autoprecedente, racionalidad, stare decisis

I. INTRODUCTION

It is commonly held that the *summa divisio* between civil law systems ('statutory law') and common law systems ('customary law') is primarily, but not exclusively, based on the fact that the latter are "systems of precedent," and the former are not. In Chile, it is often claimed that Article 3, Paragraph 2, of the Civil Code precludes assigning "precedential value" to judicial decisions or excludes "case law" from the "formal sources of law" insofar as this provision states that "[j]udicial judgments have binding force only for the cases in which they are currently pronounced". To put it colloquially, in the Chilean legal system, this clause would act as a protective shield against the temptations that might exist to introduce a rule of "binding precedent".[2]

Based on further examples from the Chilean legal system, it can be seen that: a) there are no constitutional or legal provisions that establish rules empowering certain courts (Constitutional Court or Supreme Court, hereinafter, CC and SC, respectively) to issue "precedents" or rules that establish the obligation of certain courts, judges or judges other than the CC and SC[3] to follow the "precedent" these courts;[4] b) there are rules in the Chilean Code of Civil Procedure (hereinafter, CCP) referring to the effects of given judgment in a different proceeding (Arts.178, 179 and 180 CPC), as well as another provision referring to the possibility for the parties to request that a cassation appeal be "heard and decided by the plenary of the Court" (the general rule is for it to be heard by a chamber of the SC), based "on the fact that the Supreme Court, in diverse rulings, has upheld different interpretations on the matter of law object of the appeal" (Art. 780 CCP); (c) there is a so-called "unification of case law" remedy for labor proceedings;[5] (d) the law of criminal procedure grants the Supreme Court jurisdiction to hear an appeal for annulment of a judgment "which has made an erroneous application of the law that has substantially influenced the outcome of the judgment" when "different interpretations are reached in various rulings issued by higher courts on the point of law which is the subject of the appeal" (Arts. 373 (b) and 376 (3) of the Code of Criminal Procedure); e) legislative provisions have been proposed in a bill establishing a new Code of Civil Procedure that would introduce substantial amendments to the cassation appeal in favor of a "case law-unifying" SC model.[6]

As can be seen, the expressions in quotation marks in the foregoing paragraphs highlight some of the most important conceptual problems when it comes to speaking of precedent. The practice of making explicit theoretical-conceptual assumptions has been, with some exceptions, rather absent from the Chilean dogmatic debate on precedent. Nor has there been any clarity on the concept in jurisdictional venues where, despite having some "unifying" powers, the SC has not been able to apply them coherently and the collective discourse of some judges seems to resist "following the case law" of higher courts, arguing that it restricts their independence.[7]

Over the last few years, very valuable collective and monographic works have addressed these conceptual questions in great depth.[8] Drawing on these contributions, I would like to focus on self-precedent, binding precedent and the argumentative use of precedent, concepts which I believe should remain distinct but interconnected. I will do so, primarily, by examining a set of Chilean cases on the same subject, which are described below and provide a view of certain challenges and shortcomings in Chilean legislation and judicial practice.

II. The Prescriptibility or Imprescriptibility of Civil Actions Stemming from Crimes Against Humanity

For many years in Chile, civil actions for compensation for human rights violations committed during the dictatorship reached the SC in one of two ways: through a cassation appeal filed on criminal merits (provided for in Articles 546, *et seq*. of the former Code of Criminal Procedure) when civil action was brought as part of the criminal proceeding, or through a cassation appeal filed on the civil merits against Court of Appeals judgments on compensatory action brought directly as part of a civil proceeding. Civil suits filed under criminal proceeding were heard by the second chamber of the SC; civil suits of compensation for damages were heard, until 2014, by the Third Chamber of the SC.[9]

During this period, there were two different Court Opinions on civil action: on the one hand, the Second Chamber rejected the thesis on the prescriptibility of civil actions stemming from crimes against humanity (whose criminal action is imprescriptible in accordance with international treaties ratified by Chile and in effect, e.g., Art.7 of the Statute of the International Criminal Court) committed during the dictators hip; on the other hand, the Third Chamber accepted the thesis on the prescriptibility of civil action, establishing the arrival of democracy in the country as the *dies a quo*. This discrepancy in decisions was particularly important as it reflected "a serious attack on transitional justice mechanisms and on the rights of the affected parties." If civil action for compensation of damages was filed along with a criminal trial, significant sums of money were obtained. If the civil action was filed independently of the criminal proceedings, no compensation was obtained (Raúl Letelier, 2011, p. 164).[10]

In fact, the cases were similar: relatives of disappeared detainees or of people tortured by State agents during the military dictatorship sought compensation for the moral damage

suffered. Legally, the dispute mainly consisted of the applicable rules. In favor of prescriptibility, it was argued that the rules of domestic positive law should be applied, specifically those on the statute of limitations for civil actions arising from a crime (Article 2332 of the Civil Code, which establishes a four-year statute of limitation as of the perpetration of the act, and Article 2497, which provides that "The rules relating to the prescriptibility apply equally for and against the State").[11] In favor of imprescriptibility, it was argued that it was the duty of the courts to apply the rules and principles of international human rights law[12] (Mandated by Article 5, Paragraph 2, of the Constitution) which enshrine a fundamental right to full reparation and would not be limited, therefore, to the exercise of criminal action.[13] Counterbalancing this fundamental right[14] is the State's obligation to answer for crimes against humanity and the actions to enforce it should not be subject to any statute of limitations.

These Court opinions could also be construed as constituting anomalies —the confirmation of which would however require further clarification and justification— since two sets of rules would regulate the same factual situation or conditions (civil action arising from a crime against humanity) by ascribing incompatible legal effects (a 4-year statute of limitations and the non-applicability of a statute of limitation, respectively).

However, from the standpoint of the judicial enforcement system, of the administration of justice system users and/or of a legal scholar analyzing these decisions adopted by the "same" court at the apex of the judicial organization, the value judgment would be more drastic. From the point of view of the system itself, it could well be understood that one of the decisions is wrong, albeit definitive (since, in this case, there is no possibility of appeal because it is handed down by the SC); it could be understood that both Court opinions are possible and plausible solutions in the Chilean legal system and their coexistence could be admitted. The administration of justice system users would simply note an inexplicable injustice, an unjustified inequality of treatment by the SC, considered the one and the same court. A dogmatic approach would probably describe this case as one of judicial schizophrenia or explain it by highlighting the political tendencies and/or ideologies on the judicial application of law (Jerzy Wróblewski, 1989, pp. 67-84) underlying decisions in one sense or the other.

This already difficult scenario is exacerbated by the *González Galeno case involving the Chilean Tax Authorities*. In this case, the plenary of the SC was requested to hear the appeal in cassation appeal on the merits of a decision handed down by the Santiago Court of Appeals.[15] In addition to upholding the criminal conviction, the contested judgment "accepted the claim for compensation of damages, sentencing the defendant the Chilean Tax Authorities (*Fisco*) to pay the plaintiff the amount of $ 50,000,000 for non-pecuniary damages." The petition was based "on the fact that the Supreme Court, in various rulings, has held different interpretations on the subject matter of the appeal" (Art. 780 CPC); in the case in question, on having had different interpretations on the prescriptibility or imprescriptibility of the civil action arising from a crime against humanity. In a divided decision (9 votes against 7) and adopting the arguments of the Third Chamber, the SC ruled that civil action is prescriptible.

Thus, the Court of Appeals judgment was in breach of the law, thereby substantially influencing the operative part of the judgment, and was therefore overturned. Paragraph 3 of the judgment recognizes that "legal theory and case law differ regarding the possibility of extending the status of imprescriptibility inherent to criminal proceedings in the case of crimes against humanity to actions aimed at obtaining reparations of a civil nature for the same acts." To support its decision, it is argued that 1) international instruments refer exclusively to the imprescriptibility of criminal proceedings arising from crimes against humanity and nothing is said about civil action; 2) "prescriptibility is a general principle of law designed to ensure legal certainty, and as such it is found across the entire spectrum of different legal systems, unless otherwise determined by law or in view of the nature of the matter, i.e., the imprescriptibility of actions" (Par. 5).

The decision overturning the appealed judgment consists of 70 pages, 57 of which correspond to the dissenting or minority vote, citing Constitutional Court judgments (for example, on the "existence of general principles of law", Judgment of December 21, 1987, Case No. 46, Recital 21, and on the validity of international human rights treaties) and explains that it is supported by the "established case law from this Court" regarding the interruption of civil action (which, in fact, corresponds to "case law upheld by the Second Criminal Chamber of this Court in judgments dated September 27, 2000, in Case No. 4,367-1999, and September 27, 2001, in Case No. 3,574-2000, among other"). It also points out that Inter-American Court of Human Rights case law and comparative case law would lend support to the minority vote, making vague mentions of "the evolution of case law" and "consolidated case law." In the Court of Appeals decision under appeal, reference is also made to "numerous case law handed down by the Inter-American Court -...- whose rulings have accepted requests for compensation, considering them as part of the State's obligation of redress in cases of serious violations of international human rights law" (Rec. 13), without further details.

Less than six months after SC's decision, the Second Chamber of the SC issued another ruling on a similar case, declaring the imprescriptibility of the civil action and awarding compensation for moral damage to the relatives of a victim who disappeared during the dictatorship.[16] However, this judgment makes no mention of the SC's ruling which would have "unified the case law", nor of previous Second Chamber decisions or any other case law. Although the judgment contravenes that of the SC plenary, it should be noted that Second Chamber justices act in a manner consistent with the Court opinion in favor of the imprescriptibility that the chamber had upheld and continued to uphold in the minority vote in the plenary decision.

Subsequent cases brought before the Second Chamber were decided contrary to the plenary decision, while those brought before the Third Chamber were decided in favor of the plenary decision. This scattered case law prevailed for two more years. The issue was ultimately settled by means of an administrative decision of the SC plenary that reassigned the matters to be heard by each chamber. Thus, Act 233-2014, enacted on December 26,

2014 and published on January 16, 2015, administratively assigned the Second Chamber or criminal chamber, both ordinarily and extraordinarily, the jurisdiction "1º.- Of the ordinary and extraordinary appeals brought before the Supreme Court in criminal, tax and civil matters related to a *current case under the former criminal procedure system.*"[17] With this Act and the Inter-American Court of Human Rights ruling on the *Case of Órdenes Guerra et al. v. Chile* (judgment of November 29, 2018), the criterion of the imprescriptibility of the civil action was consolidated. However, this is a fragile and unstable consolidation since it could very well change if, for instance, an act was passed transferring these cases to another SC chamber or if the composition of the second Chamber were to change completely.

This set of cases serves as a precursor to, first, adopt definitions of what self-precedent is, what binding precedent is and what the argumentative use of precedent is, as three distinct but related concepts; second, to explain the bases of each of them; third, to examine, in the light of these concepts, the behavior of SC in the cases described above; and, fourth, to raise the question of possible ways of rationalizing the practice of judicial application of the law.[18] I will address these questions below.

III. Self-Precedent and Rationality in the Application of the Law

Marina Gascón defines the *self-precedent* as that which "comes from previous decisions adopted by the same judge or court that must now decide" and defines the *rule of judicial self-precedent* as one that "binds the judicial bodies to their own precedents". In the latter definition *precedent* means "the *criterion, principle or legal reason,* on which a previous decision is based, used as a source to be adopted in future decisions" (i.e., precedent in the strict sense, *ratio decidendi* or basis of the decision) (Marina Gascón, 2011, p. 134, italics in the original). In summary and following this author's conceptual clarifications, self-precedent is a rule that obliges the court or judge who issued a previous decision to incorporate the same legal reasons used therein when deciding a similar case in the future.

The question, then, is what the rationale for such a rule is and what kind of rule it would be. Gascón's answer is that self-precedent is "a rule of rationality whose only grounds lie in that demand for formal justice which is required by universalization" (Marina Gascón, 1993a, p. 38). This requirement of universalization applies especially when a judge is called upon to choose between different options, promotes rationality in the application of the law and constitutes a "guarantee against arbitrariness" (Marina Gascón, 2011, p. 136).[19]

Following MacCormick's lead, Gascón argues that Kantian universalization or universality plays an important role in the judicial application of the law. This Kantian maxim could be formulated as "adopt the decision which, because you deem it the right one, you are willing to adhere to in future cases that are? essentially the same." This forward-looking approach, however, does not prevent the precedent from being dismissed, i.e., it does not petrify the decision, but simply places the burden of the argument on whoever wishes to deviate from it.

This discarding or *overruling* of the self-precedent can be based either on the incorrectness of the previous decision or on its subsequent inadequacy (Marina Gascón, 2011, pp. 136-139).[20]

MacCormick referred to universalization in addressing the demand for formal justice as an idea closely related to that of justification (Neil MacCormick, 1978, pp. 73-99), and more specifically, to deductive justification, going beyond Perelmanian "conservatism" given by the principle of inertia that would favor the *status quo.*[21] The requirement of formal justice implies a willingness to uphold the same reasons for the decision in future cases or situations with similar features in the same way as the decision of the current case takes previous precedents into account. This requirement is both *backward-looking* and *forward-looking* and its observance constitutes a minimum requirement of rationality both in the task of administering justice and in the concept of *justice according to law*. This forward-looking approach, i.e., willingness to uphold the same reasons when deciding on similar cases in the future, has a stronger binding effect on the judge since the link to a backward-looking case tends to be weaker since there may possibly be a conflict between the precedent and the "material justice" of the case in question (Neil MacCormick, 1978, pp. 74 et seq.; Neil MacCormick, 1976, p. 109). Thus, one of the requirements for a decision to be justified, a logical requirement according to MacCormick, is precisely that it must be based on a universalizable norm.[22] In this sense, the justification of a decision is a matter of universals and not of particulars (Neil MacCormick, 1976, pp. 103-104).

From an argumentation point of view, self-precedent is a rule of rationality that mandates the universalization of reasons to reach the ideal of formal justice. From a legal point of view, self-precedent is considered a rule based on the obligation of judges to justify judicial decisions and the obligation to comply with the principle of equality and non- discrimination in the exercise of judicial duties.

Going back to the cases described above, the first question that arises is how to explain the fact that different chambers within the same court uphold different legal positions and conflicting interpretative criteria for the same legal issue. There are two possible explanations. On the one hand, each chamber can be considered an autonomous body or court and as such, upholding the grounds the decision in favor of prescriptibility (Third Chamber) and imprescriptibility (Second Chamber) reveals that each chamber is committed to universalizing the *ratio decidendi* to similar cases in the future, thus meeting the forward-looking approach of rationality. This position, however, undermines the citizen's guarantee of equality in the application of the law, which is especially significant in the case of chambers belonging to the hierarchically superior court of the Chilean judicial system. On the other hand, each chamber can be considered nothing more than an entity of the same court and that the continued presence of contradictory decisions, such as those described above, is a lapse of rationality and manifest arbitrariness towards those affected by the administration of justice.

Given this risk of contradictory decisions issued by different chambers of the same judicial body, lawmakers themselves have established a mechanism for unifying case law,

even if Chile's domestic legal culture does not regard it as such. Article 780 of the CPC allows the SC plenary to hear a case when contradictory rulings have been issued by SC chambers. What would be the justification for this rule if not to empower the SC plenary to decide on the institutionally correct interpretation, thus eliminating contradiction in the specific case and standardizing future decisions?

However, the reticent attitude of the criminal chamber which breaks away from the decision of the SC plenary reveals that, on the one hand, the chamber sees itself as an autonomous body and, on the other hand, it does not recognize the binding nature of the plenary's decision. Is this because there is no express rule of the *stare decisis*? Should Article 780 not be considered specifically as an express rule of *stare decisis*? For this, a second rule would be necessary, as discussed in the following section, in order to establish the existence of a binding precedent, which is the one defining whether to follow or not follow the precedent and attributing some legal consequence to it.

Examining these cases also requires some thought as to what institutional design is best suited to encourage adherence to self-precedent and, consequently, to produce the rationalization of the application of the law sought by said rule. Since it is impossible to address this complex issue here, I shall limit myself to two points. An SC model that works in specialized chambers and in the plenary should, on the one hand, clearly allocate the responsibilities among the chambers and, on the other hand, take care to harmonize the decisions taken by the chambers with those of the plenary. For example, it should establish a more precise distinction between the legally significant cases to be heard by one or the other chamber, even though this may not prevent dubious *a priori* cases in which the jurisdiction corresponds to two chambers. A CS model that works only with the plenary seems more likely to comply with the rule of self-precedent. The second point pertains to the grounds and reasons for adopting collective judicial decisions, as well as how such decisions are made within collegiate bodies. In the case of an SC acting as a chamber and as a plenary, the question arises as to whether adherence to plenary decisions can be linked, in any way, to the adherence to the decisions of the majority.

IV. Binding Precedent and Equality

The *rule of precedent* or rule of *stare decisis* consists of one or more rules stating that certain jurisdictional decisions count as precedents (Álvaro Núñez, 2021).[23] As Arriagada argues, the existence of binding precedents depends on the existence of two legal rules: one rule establishing the binding nature of the precedent; and another rule regulating when precedents are to be followed or not. These two rules constitute a set of legal relationships between three intervening parties: 1) the courts whose precedents must be followed; (2) the courts that must follow them; 3) individuals whose legal situations changed in following or not following these precedents (María Beatriz Arriagada, 2021).

Given the ambiguity, heterogeneity and inconsistent use of the word “precedent” in legal contexts, as discussed above, this author specifically defines “precedents” as “rules used in judicial rulings for deciding specific cases with *certain relevance* for deciding similar specific cases” (María Beatriz Arriagada, 2021, p. 368). This definition follows the same line as the one proposed by Gascón and Núñez (2021): in all cases, reference is made to the rule that constitutes the grounds of the decision, i.e., its *ratio decidendi*. By “binding precedents”, Arriagada refers to “those that, according to current positive law*, must be followed* by certain courts when deciding specific cases similar to the specific case that was solved by the judgment containing the precedent” (María Beatriz Arriagada, 2021, p. 369).

Unlike Núñez and adopting a narrower view, Arriagada limits her analysis “to normative, formally or institutionally binding precedents, that is, those whose binding nature is established and regulated by the rules of positive law in force” (María Beatriz Arriagada, 2021, p. 369). To put it simply, if there is no legal consequence for not following precedent, the author says, there can be no talk of binding precedent. In my opinion, this statement, which underlies the idea that adopting binding precedent is a conceptual priority over the other meanings or uses of the word “precedent”, seems accurate and prevents possible confusion over the configuration and legal effects of precedent.[24]

Arriagada's thesis about the physiognomy of binding precedent is built up using a remarkable and original idea of Núñez, which is that the existence of a system of precedents within a given legal system requires the existence of constitutive rules and not, as has been commonly claimed, the existence of regulatory rules (Álvaro Núñez, 2018).[25] In this sense, the existence of binding precedents depends “necessarily on the existence of two different legal rules: (i) one rule declaring that the rules generated by Court X constitute precedents for Court Y, by establishing a legal relationship of competence-subjection between Court X [the one that generates the precedent] and Court Y [the one bound by the precedent], and (ii) another rule governing Court Y’s following or not following said precedents” (María Beatriz Arriagada, 2021, p. 382). Thus, as mentioned before, the first is a binding rule of precedent, while the second is the rule on following or not following precedents.

Taking a closer look at these rules, it is observed that the first rule, the rule of binding precedent, is a rule of competence [of those conferring competence on certain subjects] that establishes a *relationship of competence-subjection* between Courts X and Y. Subjection to or being bound to precedent means that Court Y must follow the precedents set by Court X or, inversely, Court X modifies Court Y’s legal situation every time it exercises the precedent-setting competence granted to it.[26]

The second rule, the one that establishing when to follow or not follow precedents, can be one of two types: a) a regulatory rule that obliges Court Y to follow the precedent set by Court X (or that prohibits Court Y from not following the precedents of Court X) and that establishes a sanction for not complying with that obligation (failure to act) on the judge or judge(s) who deliver a ruling that does not follow the precedent;[27] and b) a rule of competence of those that

limit the content of decisions (individual rules) that Court Y is competent to rule in solving specific cases. And they limit it in the sense that they render it "*incompetent* to solve cases that are similar to those that have been solved through precedents issued by Court X by means of rules of content differing from that which has been predetermined by such precedents." This incompetence implies, in turn, "an *immunity* (non-subjection) to individuals who are parties to a judicial process" against decisions with a content different from that determined by such precedents. Such decisions are in effect *invalid* since they have been issued outside the competence of Court Y (María Beatriz Arriagada, 2021, pp. 393 y 394).

With this theoretically precise and impeccable structure, Arriagada highlights the facets that constitute binding precedent: the two sides of the first rule of subjection to precedent (Court X's competence and Court Y's subjection) and the two sides of the rules qualifying not following precedent (sanction to Court Y, the invalidity of Court Y's decision), together with the legal relationships to which they give rise.

The grounds for equality in the right to apply the rule of binding precedent are well known. The concept of jurisdiction already implies that settling legally significant disputes by applying the abstract and general law to the specific and particular case[28] does not lead to unequal treatment. Equality in the application of the law may be more difficult to achieve when carried out by this public entity[29] which in procedural models is more susceptible to having a judge's or a court's decision challenged and reviewed by higher courts.

The rule of precedent and the rule of self-precedent share the basis of equality, although the former adopts the point of view of the system of administration of justice (the way all judges and courts collectively decide similar legal disputes) while the latter focuses on the decisions of a judge, a chamber or a court.

Other values that justify the existence of a binding rule of precedent, as the literature amply asserts, are the *legal certainty* and *stability of the law* it seeks to promote. This "means that citizens can foresee or anticipate the response their case will most likely receive; i.e., they can make decisions in the confidence that the legal rules used by earlier judges will be applied to them as well." In addition, like self-precedent, it encourages *formal* equality, i.e., equal treatment for equals and unequal for unequals; no further justification is needed, and time is consequently saved (Marina Gascón, 2011, pp. 134 y 135).

In view of the non-uniformity of courts' response to similar legal problems, citizens reasonably wonder how a legal rule, which is intended to guide action, can give rise to two different responses or interpretations by courts of law given the same factual situation. Or how it is that two judges with the equivalent or comparable training arrive at different conclusions on the basis of the "same law."[30] The answer, from a certain concept of law and a theory of interpretation that rejects the one-right-answer thesis,[31] would be that it is impossible "for the legal system to always be able to offer the interpreter one and only one right answer to resolve a legal conflict" (Marina Gascón 1993b, p. 213). In other words, given

the at least partially indeterminate nature of the law, a certain margin of case law dispersion[32] is inevitable or, in other words, the coexistence of different interpretations within those that are linguistically possible and legally plausible in different courts is unavoidable. This fragmentation can lead to unequal treatment of the administration of justice system, which is difficult to justify (as in the case of those who receive financial compensation for crimes committed under the dictatorship and those who do not).

To avoid this disparity of treatment, procedural systems incorporate unification mechanisms at some point in judicial proceedings, whose decision is usually entrusted to some court at the highest level of the system.[33] Although the effect of a judgment issued by the SC plenary in exercise of its powers granted by Art. 780 CPC is under discussion in Chile, it is based on the need to standardize the interpretation of the law, despite the absence of the counterpart of the rule of binding precedent that regulates the effects of other SC chambers or other hierarchically lower courts following precedent or not. In the case of decisions issued on matters that fall within the competence of only one chamber, based on the above concepts, the answer is that there is no rule of binding precedent for the chambers given that the two rules necessary for its existence are missing: a rule of binding precedent and a rule governing whether to follow the precedent or not.

In any case, it seems that one way to rationalize a judicial practice promoting values of equality and legal certainty would be to positively incorporate a rule of binding precedent by the highest court, either within jurisdiction in chambers or in plenary session. In addition to its incorporation, it would be necessary to ensure that the courts could communicate the *ratio decidendi* of the decision clearly and precisely, which requires changes in the internal legal culture. In short, the dangers described in the literature is that a rule of binding precedent could transform the SC into a legislative or quasi-legislative body.

V. Argumentative Use of Precedent

The citation, use or mention[34] of past judicial decisions is frequent in litigation and judicial decisions. In the latter case, the argumentative use assumes there is no rule of binding precedent since, in such a case, the court bound by a precedent issued by the competent court must simply decide in accordance with the *ratio decidendi* applicable to the case.

As a reason or argument, these citations or references to past judicial decisions are used to support or justify assigning meaning to regulatory texts. As a type of interpretative argument, it can be said that it is part of the interpretative rules or customs followed (used and accepted) by a given legal culture.[35]

Generally speaking and to highlight its use in argumentation, the relevance of which may vary from system to system,[36] it is called “persuasive precedent”:[37] the judge is not obliged to respect the *ratio decidendi* of a past decision, but does so because of “the authority of the one who issued it, in the sense of the authority’s reputation or recognition,” recognition that may

be justified, presumed or even strategically attributed (Juan Antonio García Amado, 2016 p. 120).[38] As García Amado explains, however, the effectiveness or success of an argument will depend, especially, on whether the one to be persuaded to adopt the decision in the present using said argument recognizes the expertise or authority, understood as that special "competence, capacity or knowledge" of the one who adopted that decision in the past.

Within the catalog of interpretative arguments, this use of precedent in argumentation is situated within the authoritative or *ab exemplo* argument, defined by Tarello as "the one by which a normative statement [legal text] is given the meaning that someone had already attributed to it, and solely because of this. It is an argument that calls for adhering to applications-product or interpretations-product precedent, i.e., to practice of applying it based on the result of the official or judicial interpretation, or to the interpretation of legal theory" (Giovanni Tarello, 2018, p. 334).

The authoritative argument, in Atienza's words, is one of the most traditional arguments in rhetoric (as found in Aristotle's *Rhetoric* and studied by Perelman). In the legal field, it is used when precedent is not a source of law in the formal sense. Atienza goes on to show how the *ad hominem* argument in the strict sense and the argument of authority belong to the same genre, although they are opposite argumentative tactics, in that both "take the opinion of particular individuals as a reliable source of knowledge (or guide for action) [...] In one case, [the] *ad hominem* argument [is used] to destroy or undermine a person's credibility; in another, [the] argument of authority is used to support a claim based on the opinion of an authority or an expert in the field" (Manuel Atienza, 2013, pp. 420, 417).

Following Summers' distinction, Atienza includes the arguments of authority within formal or authoritative reasons, giving an account of their importance for both the shaping of the normative premise (which resorts to the interpretation of the normative statements made by the practicing authorities such as those who decide on courses of action) and the shaping of the factual premise (which resorts to theoretical authorities or expert knowledge) (Manuel Atienza, 2015, p. 1443).

With a somewhat diverging perspective, Coloma describes the argument of authority as follows: "if, before any audience, the argumentative force of Statement P is different depending on whether it has been formulated by Subject X or Subject Y, we will find ourselves with an AA [argument of authority]" (Rodrigo Coloma, 2021, p. 213).[39] An AA, Coloma argues, "makes it possible to operate with a higher level of argumentative inertia than when interacting with subjects who are not recognized as highly credible, sharp or wise [...] it allows the division of labor since it saves us from having to investigate and analyze everything, if the aim is to create or modify beliefs" (Rodrigo Coloma, 2012, p. 214).[40] He then warns about the dangers that may arise from its use, including either the premature relinquishment of the deliberative exercise that allows beliefs or decisions to be modified, or, I would add, the abdication of taking seriously the practice of justifying the grounds of the judicial decision. In other words,

misusing precedent in argumentation as an argument of authority may lead to "tension with the claims of rationality control".[41]

An analysis of the cases studied shows that the argumentative use of precedent is inconsistent, vague and poorly grounded. For example, SC Second Chamber judges claim their own previous decisions on a matter as settled case law of the Court, even when six months later they disregard any value given to the plenary decision, without even mentioning that their departure from it. In the same decision, they mention case law from the Chilean Constitutional Court, holding it to be "authoritative" when the vast majority of the decisions of SC chambers simply disavow any authority to this court.[42] Clearly, the reported "*cherry picking*" or opportunistic use of arguments (by the litigants and the courts) is also presented in this group of cases, along with vague references to "settled case law" that do not indicate precisely the recitals where the reason now used to decide would be. It is not difficult to see these as unhealthy practices for an administration of justice system that aspires to certain rationality.

VI. Final Thoughts

Taking a Chilean case as a starting point, this article aims to illustrate some flaws in rationality caused by a series of factors: a) overlapping competences in two SC chambers; b) the lack of a complete rule of *stare decisis*; c) a practice that misuses the argument based on precedent; d) judges and courts who do not feel bound by their own decisions in similar future cases (and even less by those of higher courts) or who are not willing to follow the rationale of a decision issued by invoking a mechanism whose purpose is to avoid contradictory interpretations issued by the SC. Any proposed solution for most of these problems requires asking first about the desirability of the values that self-precedent and precedent foster and, second, about the regulatory changes that must be made to achieve this, considering the possible resistance that may exist in Chilean legal culture. Among the possible regulatory changes, I believe it is fundamental to redefine the main functions of the SC,[43] to include rules that establish binding precedent and to create a mechanism for the Court itself to identify its own self-precedent.

Conceptually and in line with recent theoretical developments, I find it important to differentiate between self-precedent, binding precedent and the argument of precedent, given that each fulfills a different function in a system of administration of justice. Respect for self-precedent, as a commitment to the universal application of the decision to similar future cases, serves, as Gascón says, as a guarantee against arbitrariness while allowing the diachronic rationality of the judge or court to be evaluated when applying the law. The existence of a binding rule of precedent would make it possible to introduce greater rationality in the procedural system and the exercise of jurisdiction, to provide greater legal certainty and to ensure formal equality in the judicial application of the law. In the absence of a rule of *stare decisis*, better use should be made of the argument of precedent -especially by judges and

courts- to adequately individualize the previous decision and justify why the *ratio decidendi* of that decision should be applied in this case, preventing this use from circumventing or diminishing the requirement of the duty to state the corresponding reasons to do so.

VII. References

Accatino, Daniela (2002). El precedente judicial en la cultura jurídica chilena, *Anuario de Filosofía Jurídica y Social*, *20*, 559-582.

Alexy, Robert (1989). *Teoría de la argumentación jurídica. La teoría del discurso racional como teoría de la fundamentación jurídica* [1978]. Centro de Estudios Constitucionales.

Arriagada, María Beatriz (2018). Fundamentalidad, interdefinibilidad y circularidad. *Revus*, *35*. http://journals.openedition.org/revus/4095

Arriagada, María Beatriz (2021). Las dos caras del precedente vinculante. In A. Núñez, M. B. Arriagada and I. Hunter (Coords.), *Teoría y práctica del precedente en Chile y Latinoamérica* (pp. 281-310). Tirant lo Blanch,.

Atienza, Manuel (2013). *Curso de argumentación jurídica*. Trotta.

Atienza, Manuel (2015). Razonamiento jurídico, *Enciclopedia de Filosofía y Teoría del Derecho* (pp. 1419-1452), Vol. 2, Chapter 39. Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas.

Atria, Fernando (2016). *La forma del derecho*. Marcial Pons.

Chiassoni, Pierluigi (2011a). ¿Los precedentes son vinculantes? In *Desencantos para abogados realistas* (pp. 211-266). Universidad Externado de Colombia.

Chiassoni, Pierluigi (2011b). *Técnicas de interpretación jurídica. Breviario para juristas*. Marcial Pons.

Coloma, Rodrigo (2012). "La caída del argumento de autoridad y el ascenso de la sana crítica". *Revista de derecho (Valdivia), 25*(2), 207-228.

Correa, Rodrigo (2020). "Función y deformación del recurso de unificación de jurisprudencia". *Revista de Derecho, 33*(2), 253-274.

Dworkin, Ronald (1963). Judicial Discretion. *The Journal of Philosophy*, *60*(21), 624-638.

Dworkin, Ronald (1967). The Model of Rules. *University of Chicago Law Review*, *35*, 14-46.

Dworkin, Ronald (1978). No Right Answer? *New York University Law Review*, *53*(1), 1-32.

Ezquiaga, Francisco Javier (1994). Argumentos interpretativos y el postulado del legislador racional. *Isonomía*, (1), 69-98.

García Amado, Juan Antonio (2012). Sobre el precedente judicial como argumento y como norma. In P. Bonorino (Ed.), *Modelos argumentativos en la aplicación judicial del derecho* (115-124). Bubok Publishing.

García Amado, Juan Antonio, (1986). Del método jurídico a las teorías de la argumentación. *Anuario de Filosofía del Derecho*, *III*, 151-182.

Gascón, Marina (1993a). *La técnica del precedente y la argumentación racional*. Tecnos.

Gascón, Marina (1993b). Igualdad y respeto al precedente. *Derechos y libertades*, *I*(2), 211-228.

Gascón, Marina (2011). Racionalidad y (auto) precedente. Breves consideraciones sobre el fundamento e implicaciones de la regla del autoprecedente. *Teoría y Derecho: Revista de Pensamiento Jurídico*, (10), 132-148.

Gascón, Marina (2020). Motivación de las sentencias y jurisprudencia. ¿Cumple nuestra jurisprudencia su función? In M. Gascón and A. Núñez (Eds.). *La práctica del precedente en el Civil Law* (pp.165-189). Atelier.

Gómora Juárez, Sandra (2019). *Un análisis conceptual del precedente judicial*. UNAM, Instituto de Investigaciones Jurídicas.

Guastini, Riccardo (2011). *Interpretare e Argomentare.* Giuffré.

Iturralde, Victoria (2019). La igualdad en la aplicación de la ley: análisis de algunas objeciones iusfilosóficas. *DOXA*, (42), 131-148.

Letelier, Raúl (2011). El Instituto Nacional de Derechos Humanos y la gestión de su auctoritas. *Anuario de Derecho Público*, 152-166.

Lira, Elizabeth (2006). The Reparations Policy for Human Rights Violations in Chile. In P. de Greiff (ed.). *The Handbook of Reparations* (pp. 55-101). Oxford University Press.

MacCormick, Neil (1976). Formal Justice and the form of Legal Arguments", Ch.Perelman (Ed.). *Études de logique juridique* (pp. 103-118). Bruylant.

MacCormick, Neil (1978). *Legal Reasoning and Legal Theory*, Oxford, Clarendon.

Núñez, Álvaro (2016). Sin precedentes: una mirada escéptica a la regla del *stare decisis*, *Doxa*, (39), 127-156.

Núñez, Álvaro (2018). Precedente en materia de hechos. *Revista de Derecho* (Valdivia), *XXXI*(1), 51-78.

Núñez, Álvaro (2020). ¿Violan los precedentes la independencia judicial? *Revista de Derecho PUCP*, (84), 303-336.

Núñez, Álvaro (2021). ¿Son obligatorios los precedentes? La regla del precedente como norma(s) constitutiva(s). I n A. Núñez, M. B. Arriagada and I. Hunter (Coords.), *Teoría y práctica del precedente en Chile y Latinoamérica* (pp. 333-363). Tirant lo Blanch.

Peña, Diego de la (2019). "Comportamiento judicial de la Corte Suprema sobre delitos de lesa humanidad cometidos durante el periodo de la dictadura militar (1973-1990): el giro interpretativo con la radicación exclusiva de la segunda sala penal". http://repositorio.uchile.cl/bitstream/handle/2250/177997/Comportamiento-judicial-de-la-Corte-Suprema-sobre-delitos-de-lesa-humanidad-cometidos-durante-el-periodo-de-la-dictadura-militar-1973-1990.pdf?sequence=1

Perelman, Chaïm (1964). *De la Justicia*. Universidad Nacional Autónoma de México.

Perelman, Chaïm (1977). The Rule of Justice. In *The Idea of Justice and the Problem of Argument* (pp. 79-87). Routledge & Kegan Paul.

Pritchett, C. Herman (1941). Divisions of Opinion among Justices of the U.S. Supreme Court. *American Political Science* Review, *35*(5), 890-898.

Pulido, Fabio (2018). *Jueces y reglas. La autoridad del precedente judicial*. Universidad de la Sabana.

Romero, Alejandro (2020). El recurso de casación en el proyecto de Código Procesal Civil y los desafíos para la práctica del precedente. In A. Núñez, M. B. Arriagada and I. Hunter (Coords.), *Teoría y práctica del precedente en Chile y Latinoamérica* (pp. 27-55). Tirant lo Blanch.

Tarello, Giovanni (2018). *La interpretación de la ley* [1980]. Palestra.

Taruffo, Michele (2006). *El vértice ambiguo. Ensayos sobre la Casación civil*. Palestra.

Taruffo, Michele (2016). Consideraciones sobre el precedente". *Ius et veritas*, (53), 330-342.

Vio, Juan (2020). La práctica de citar sentencias pasadas como modelo de precedentes en Chile. In A. Núñez, M. B. Arriagada and I. Hunter (Coords.), *Teoría y práctica del precedente en Chile y Latinoamérica* (pp. 279-302). Tirant lo Blanch.

Wróblewski, Jerzy (1989). *The Judicial Application of Law,* Springer Science & Business

---

Notes

*Article submitted on October 30, 2021 and accepted for publication on December 12, 2021.
**Doctor of Law, Universidad Carlos III de Madrid;Professor, School of Law, Universidad de Chile, fcarbonell@derecho.uchile.cl Orcid: 0000-0001-6834-043X
1 I would like to express my gratitude for the valuable comments received at the September 30, 2021 seminar, and especially to Marina Gascón Abellán, for her insightful and valuable observations, which I hope, at least in part, to have been able to incorporate.
2This provision has also been used to support the thesis that incorporating an explicit rule or creating an implicit rule stipulating the obligation to follow precedent, especially from hierarchically superior courts in the Chilean case, would go against the internal independence that judges should enjoy as a necessary framework to enable the exercise of its jurisdictional role.
3 I use the expression "court" herein to refer to judges who act as part of a collegiate body, and I reserve the word "judge" for those who act as individuals.
4 The law that establishes the organization and powers of the courts is the 1943 Organic Code of Courts; the law regulating the organization and powers of the TC is the 1981 Organic Law of the Constitutional Court, which was amended in 2005 and in 2010.
5 Law 20,260 of March 2008 introduces amendments to the Labor Code establishing, *inter alia*, a new labor procedure which contemplates the motion to unify the case law in Articles 483 to 483-C of this Code. This motion aims to unify the interpretations of labor provisions in the event of contradictory interpretations on a given matter, to which end the Fourth Chamber of the Supreme Court chooses to support one or the other. See Correa 2020.
6 Draft Code of Civil Procedure of 2012 (Bulletin No. 8197-07); with a change in 2014 and the latest executive orders of May 2021. See also Romero 2021. The discussion on the functions the Supreme Court should discharge, or which model of Supreme Court should be encouraged, has also been taking place in Chile within and outside the Constitutional Convention, a process underway at the time of writing this article.
7 This point has been addressed by Nuñez 2021a, who unravels this misunderstanding.
8 I will focus on scientific production, especially from Latin America and Spain, which is where, in my opinion, more recent and novel publications can be found: Álvaro Núñez (2021); Marina Gascón (2020); Sandra Gómora (2019); Fabio Pulido (2018); Álvaro Núñez (2016), Álvaro Núñez (2016).
9 The Second Chamber is the Criminal Chamber; the Third Chamber is the Constitutional and Administrative Law Chamber. Article 767 of the CPC regulates civil cassation appeals, defining the types of judgments and the grounds for appeal, which consists of "having been issued in violation of the law and that this violation has substantially influenced the outcome of the judgment". Reference is made to Article 546, final paragraph, of the former Code of Criminal Procedure, later replaced by the 2000 Code of Criminal Procedure, regarding cassation appeals against the civil decision of the judgment.
10 Therefore, according to some, equal pecuniary reparation policies should be prioritized by establishing general public policies (laws, regulations). Or to put it even more clearly, the result of allowing new claims for reparation has led to unequal access to such reparations and has weakened transitional justice programs (Elizabeth Lira, 2006).
11 There were, of course, other arguments, including that the lack of statutes of limitation needed express regulation, given the value of legal certainty underlying this concept. Another important claim is that the State had implemented administrative reparation laws aimed at repairing property and moral damage to the victims' next of kin (primarily, Laws 19,123, 19,980 and 19,992). A full account of the arguments can be found Diego de la Peña's 2019 undergraduate thesis.
12 Under Article 5, paragraph 2, of the Political Constitution of the Republic of Chile still in force: "The limitation on the exercise of sovereignty is the respect for the essential rights that emanate from human nature. It is the duty of the organs of the State to respect and promote such rights, guaranteed by this Constitution, as well as by the international treaties ratified by Chile and which are in force."
13 Art.131 of III. Geneva Convention relative to the Treatment of Prisoners of War, 1949; Art. 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.
14 In Hohfeldian terms, this would correspond to legal positions "right" and "duty": "To say that X, vis-à-vis Y, has the right for Y to do Z is equivalent to saying that Y, vis-à-vis X, has the duty to do Z because the position of right is passive, and the position of duty is active. The position of law is passive because it is not defined by a reference to the right holder's conduct but by a reference to the conduct of the person performing the corresponding duty" (María Beatriz Arriagada, 2018). (https://plato.stanford.edu/entries/rights/#FormRighHohfAnalSyst)
15 Judgment of the Court of Appeals of Santiago (Sixth Chamber), Case No. 682-2.010, August 19, 2011.
16 SC Sentence Case No. 519-2013, July 18, 2013.
17 Emphasis added. The act was adopted under the presidency of Justice Sergio Muñoz, a dissident in the Third Chamber decisions and in favor of the Court opinion of the imprescriptibility of civil action.
18 I would like to thank María Beatriz Arriagada for her comments on the importance of clearly differentiating these aspects in the text.
19 In other words, the author understands precedent as an instrument of interdiction of arbitrariness or prohibition of unthinking or arbitrary change (Marina Gascon. 1993b, p. 225).
The concept of rationality as opposed to arbitrariness is also used by argumentation theories. Nevertheless, as García Amado points out, there is no single criterion of argumentative rationality, but several, which are usually incorporated into specific theoretical or regulatory proposals: a) rationality as justification; b) rationality as an explanation of valuations (and for that to allow control over them); c) rationality as a logical soundness of argumentation; d) rationality as precedence among arguments and as weighing consequences; e) consensus as a criterion of rationality (e.g., appeals to intersubjectively shared values or values that would be acceptable in a given group); f) systematic rationality; g) procedural rationality (as a result of a procedure). (Juan Antonio García Amado, 1986, pp. 167 et seq).
In this sense, for example, some of these criteria of rationality are interwoven in an analytical model of proper justification, like Chiassoni's, "[a] *court ruling* is properly justified if, and only if, each of the judicial decisions (individual provisions, legal judgments, individual judicial rules) contained therein

is *rational* or *rationally* justified" and is understood to be rational or rationally justified if it meets the conditions of internal and external justification. The internal or logical-deductive justification is a condition of *formal rationality* which reflects the principle of non-contradiction; external justification may be regulatory or evidentiary depending on the type of premises to which it refers and is a condition of *substantive rationality* which reflects the principle of sufficient reason. Rationality, in this model, is synonymous with internal and external justification. Chiassoni (2011a): 18 et seq.; 56. 20 As a rule of argumentation, Alexy puts it as follows: "(J. 14) Whoever wishes to depart from a precedent carries the burden of argument" (Robert Alexy, 1989, p. 287)

21 According to Perelman, the relationship between the rule of justice and the principle of inertia is both conceptual and empirical, with the balance tipping towards the latter. Inertia is a concept that comes from physics, intended to express the tendency of bodies to remain in the state in which they are (movement at constant speed, rest, etc.) if there are no external forces acting on it. Applied to the field of argumentation, the principle of inertia consists in the tendency to treat similar beings, cases or situations alike if there are no good reasons to justify a change in treatment. In Perelman's words, it is a "tendency, natural to the human mind, to regard as normal and rational, and so as requiring no supplementary justification, a course of behaviour in conformity with precedent." He goes on to say "*Per contra* every deviation, every change, will have to be justified. This situation, which results from the application of the principle of inertia in the life of the mind, 2 explains the role played by tradition. It is tradition that is taken as a starting-point, it is tradition that is criticised and it is tradition that is maintained in so far as no reason is seen for departing from it" (Chaïm Perelman, 1977, p. 86). The principle of inertia implies stability, a characteristic pursued by social systems, particularly by the legal one. In Alexy's words, "an opinion or *praxis* that has once been accepted cannot be abandoned without a reason to do so" (Robert Alexy, 1989, p. 191).

22 The author explains the difference between 'universal' as a logical requirement —attributable, therefore, to the greater premise of a syllogism— and 'general' as a term that refers to differences of degree (more or less general). There may be, for example, more or less general rules (depending on the scope of individuals or situations covered), but in both cases they are universal rules, i.e., applicable to all individuals or situations. MacCormick uses the terms 'generic' and 'universal' indistinctly to refer to this requirement of logic, distinguishing them, accordingly, from the term 'general' (Neil MacCormick, 1978, pp.78-79).

23 "The rule that binds judicial bodies to the vertical precedent is known as *stare decisis et quieta non movere* and means that precedents have authority and must be followed" (Marina Gascon, 2011, p. 134). Elsewhere *stare decisis* systems are described as those "whose foundation rests on the demand for uniform justice – i.e., on the ideal of a single judge presiding over any judicial system that wants to guarantee the security, equality and unity of law" (Marina Gascón, 1993b, p. 212).

24 As I will later point out, "precedent" could simply be used to refer to binding precedent, thus discarding the use of "persuasive precedent" and replacing it with the use of rulings or case law as an argument.

25 In a recent text, Núñez deconstructs the opinion by which the rule of precedent is a prescriptive rule, showing that it is neither a rule of obligation nor a permissive rule, but constitutive rules (specifically, rules of competence) that is conceptually necessary or contingent to instituting a system of precedent. Núñez, 2021.

26 Competence is "the power to produce valid legal rules or to participate in their creation, constituted or determined by legal rules that are commonly called rules of competence or on legal production" (María Beatriz Arriagada, 2021, p. 380).

27 The obligation may be absolute or indirect (without a correlative right) or relational or direct (with a correlative right that allows the entitled party to sue for non-compliance).

28 This is Atria's understanding of jurisdiction (Fernando Atria, 2016, p. 216).

29 As Iturralde argues, ascertaining whether or not there is equality in the judicial application of the law requires a period of comparison or a (diachronic) analysis of one or more decisions over time. Iturralde describes the two elements that make up the principle of equality in application of the law: "A material element, which provides the justifying condition, i.e., the criterion of justice in favor of dealing with a category of subjects in a certain way (e.g., merit, necessity or a legal rule). In the case of the law, this criterion is first given by lawmakers in establishing the significant differences (between adults and minors, between different types of workers, between citizens and parliamentarians, etc.); and secondly, by the judges in deciding cases in a certain way within a margin of discretion. The formal element involves generalizing the conditions of the material element to subsequent cases" (Victoria Iturralde, 2019, p. 140).

30 These are the questions US political scientist Herman Pritchett asked himself in 1941 when describing an increasing practice of dissent within the U.S. Supreme Court (C. Herman Pritchett, 1941).

31 Dworkin uses the expression "*one-right answer*" to denote a judicial decision consisting of the interpretation that best reconstructs the legal practice and political morality of the community. There are, however, several versions of this thesis which will not be analyzed herein. See Ronald Dworkin, 1963, 1967, 1978.

32 On the distinction between the indeterminacy of the legal system in abstract interpretation (equivocal texts) and the indeterminacy of the rule in its specific interpretation, see (Riccardo Guastini, 2011, pp. 39 et seq).

33 The expression "vertex" comes from the famous book (Michele Taruffo, 2006). As (Michele Taruffo, 2016, p. 34) states, "uniformity in the interpretation and application of the law is pursued through various techniques." (Marina Gascón, 2011).

34 Vio 2021 explains that the use of a past sentence consists of mentioning its content and identifies different ways of making such mentions.

35 On the concept of "interpretative arguments", see (Giovanni Tarello, 2018, pp. 309 et seq.); (Francisco Javier Ezquiaga, 1994).

36 See the distinctions between very weak, weak and strong argumentative importance that (Chiassoni describes 2011b).

37 As Gascón says, persuasive precedents are those that "*do not have to be followed* but there are *good reasons* for them to be." (Marina Gascon, 2011 p.134).

38 Similarly, Accatino points out that in judicial argumentation "reference to case law predominantly assumes the form of an argument of authority – an argument whose justifying force is based solely on the issuer's status or prestige." (Daniela Accatino, 2002, p. 574).

39 Coloma refers to this argument to analyze the transition from a system of legal or appraised evidence valuation (in which what is established by the legislative authority is contested) to a system of sound criticism.

40 In a similar sense, Manuel Atienza, 2015.

41 Coloma says, "Sometimes, it may even operate as an *ad hoc* approach that allows the subject who is recognized as an authority to gradually adapt to their intuitions or preferences, depending on the case at hand. This is not what we expect from judges. The problem will then be when the arguments are based on the expertise of those who formulate them are reasonable and when they are fallacious." This may contribute to strengthen ascribing "value to any argument that enhances the belief that the subjectivity of a judge has no influence on whether a certain dispute has been resolved in one way or another (hopefully "the facts speak for themselves") (Rodrigo Coloma, 2012, p. 214).

42 A recent emblematic case, which I will not discuss herein, is one of the Third Chamber of the SC which, although it dismisses the appeal for protection sought against a judgment declaring the non-applicability on the grounds of unconstitutionality concerning two provisions of the Labor Code, notes that it has powers to control unlawful actions of the CC (unlawful actions committed through their judgments, although it does not accept it in specific cases). SCS Case 21.027-2019, ruling delivered on October 7, 2019.

43 It is now known that it handles a seriously overwhelming the number of cases per year, in addition to all the non-jurisdictional functions it performs. Such redistribution will depend on the future constitution, the drafting of which was entrusted to a constitutional convention, as well as on a reform to the civil process under discussion in Congress since 2012.