

Legal Pragmatism and the Overcoming of Formalism: Abduction, Precedents and Contextualization in the Judicial Decision

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Abstract

This article examines how legal pragmatism, grounded in Charles Sanders Peirce's abductive reasoning and Oliver Wendell Holmes Jr.'s consequentialist perspective, offers an anti-essentialist alternative to formalist models of judicial decision-making. It seeks to show how pragmatism redefines the relationship between norm, fact, and context, and elevates precedent to a dynamic source of law. The article adopts a normative-theoretical design, based on comparative doctrinal analysis of Brazilian civil law traditions and common law pragmatist thought. The article aims to analyze the adaptive role of precedents as hermeneutic tools rather than static links to the past, to verify if, by adopting a pragmatist approach, courts can maintain legal certainty while ensuring adaptability, thereby promoting a legal system that is more responsive to social complexity and capable of overcoming the limits of formalism.

Keywords

Abduction, Legal Pragmatism, Consequentialism, Precedents, Charles Sanders Peirce

1. Introduction

Contemporary legal thought in Brazil, marked by its Romano-Germanic heritage, is still largely influenced by a formalist approach, which treats the law as an absolute element and detached from contextual factors. In this traditional model, the legal decision is seen as the result of a strict deductive syllogism, in which the abstract norm is applied directly to the concrete case, seeking a single logical and unquestionable solution. Although such an approach is often associated with predictability and legal certainty, it disregards the complexity of social conflicts and

the practical demands of the ever-evolving legal system.

In opposition to this essentialist paradigm, legal pragmatism offers a more dynamic and contextualized view of the judicial decision. Based on the abductive reasoning of Charles Sanders Peirce, pragmatism recognizes that the interpretation of law is not limited to the mechanical application of norms, but involves the creation of solutions that consider the practical consequences and particularities of each case. This approach rejects the idea that judicial decision is purely deductive or based on a priori concepts, proposing instead a model that prioritizes conceptual likelihood and adaptability.

Oliver Wendell Holmes Jr., one of the main exponents of this current, argues that law should be understood as a historical and social manifestation, deeply rooted in the context in which it is applied. He criticizes formalism for its inability to deal with the demands of a society in constant transformation, highlighting that the judicial process must take into account the practical implications of judicial decisions and not just their theoretical coherence. Thus, Holmes emphasizes that law is not only an exact science, but also an adaptive practice, sensitive to the needs and pressures of the social context.

This pragmatist perspective, by incorporating elements such as abduction, interpretive creativity, and a focus on consequences, proposes an anti-essentialist approach to judicial decision-making. In this model, the judge is seen as a creative and adaptor agent, whose function goes beyond the simple application of the norm. The magistrate must contextualize his decisions, establishing precedents that reflect not only the principles of the legal system, but also the practical realities of the moment in which they are handed down. In doing so, legal pragmatism redefines the role of the interpreter, emphasizing the need for a balance between legal certainty and adaptability, between tradition and innovation.

The present work is conceived as a normative-theoretical essay based on comparative doctrinal analysis, examining the intersection between Brazilian formalist legal traditions and pragmatist theories of adjudication. It seeks to explore this anti-essentialist approach to legal decision-making, highlighting how legal pragmatism transforms the understanding of the decision-making process and the relationship between norm, fact and context. Through an analysis of the theoretical contributions of Peirce, Holmes, and other thinkers, the article proposes a decision model that recognizes both the importance of precedents and their flexibility, ensuring that the law remains relevant, effective, and aligned with the demands of an ever-evolving society.

2. The Legal Decision as an Anti-Essentialist Manifestation

The model that is still very predominant in contemporary Brazilian legal dogmatics is characterized by a formalism that treats the law as an abstract and absolute foundation for legal discourse and obliges the interpreter of the law to render decisions based exclusively on this model, which comes from a Roman-Germanic legal system, which seeks, above all, the subsumption of the norm in the abstract

to the concrete case through a classic deductive syllogism characterized by the major premise as the legal norm, the smallest as the concrete case and the conclusion that is drawn from the relationship between the premises.

In this context, in which the law is treated as an end in itself, what is expected of the law enforcer is to arrive at a single legal solution considered valid for the case under analysis. This essentialist approach distances the interpreter from the exercise of jurisdiction and establishes the norm as the main source of law.

In contrast, legal pragmatism, led and grounded by the abductive reasoning of Charles Sanders Peirce, emphasizes consideration of the context and practical consequences of legal concepts. In this rereading of the application of the law, “*the law never completely binds the ordinary legislator. Hence, ‘the norm of the upper echelon cannot bind in all directions (in all aspects) the act through which it is applied’*” (Catão, 2007: pp. 45-46).

In the same sense, Richard Posner explains that the legal framework, formed by legislation and judicial precedents, does not impose a rigid binding on the interpreter. By rejecting the formalism that treats legal norms as essential and immutable concepts, the interpreter has the freedom to create solutions that, considering the particularities of the specific case, are the most appropriate and legally applicable in the temporal context in which they are inserted (Posner, 2007).

Legal pragmatism is an interpretative approach that understands the judicial decision as the result of a logical construction that rejects reasoning based on a priori concepts or aimed at the search for an abstract theoretical certainty through the unrestricted application of the rule. Instead, practice and context are privileged based on a judgment of verisimilitude on legal facts, analyzed based on the practical consequences of their application (Nóbrega, 2006).

This is exemplified, for instance, by the Brazilian Supreme Court’s ruling in Direct Action of Unconstitutionality (ADI) No. 4645, in which the Court explicitly rejected purely formalist reasoning and grounded its decision on pragmatic and contextual considerations. The Court emphasized that judicial intervention in the domain of the Legislative and Executive Branches requires more than rhetorical allegations or abstract reasoning; otherwise, the Judiciary risks unduly narrowing the discretion, innovation, and experimentalism inherent to political decision-making.

Moreover, the Court highlighted that when reviewing the constitutionality of congressional decisions affecting public policy, so long as these decisions do not plainly conflict with the constitutional text, it must take into account the practical consequences of its rulings. In doing so, the Court underscored the need to resist theoretical approaches detached from the institutional and administrative realities of Brazilian governance.

This interpretive posture was expressly aligned with Article 20 of the Brazilian Law of Introduction to the Rules of Law (LINDB), which codifies a pragmatic-consequentialist directive by requiring that “*in the administrative, controlling, and judicial spheres, no decision shall be rendered based on abstract legal values*

without considering the practical consequences thereof.” In short, [ADI 4645](#) illustrates how the Supreme Court consciously adopted an abductive, consequence-oriented mode of reasoning, thereby privileging context and functionality over rigid formalism.

Thus, legal pragmatism proposes to overcome the essentialist approach, which treats decisions as fixed, universal, and immutable. Pragmatism adopts a method of applying the law guided by contextual experience, subjecting the norms and interpretations to new application tests and continuously evaluating their practical effects, ensuring that the law remains dynamic, adaptable and aligned with the concrete demands of society.

Oliver Wendell Holmes Jr. introduces to legal interpretation a perspective focused on these practical consequences of jurisdictional provision, in contrast to traditional deductive formalism. In other words, the author argues that the classic model of subsumption of the fact to the norm proves to be insufficient to offer adequate solutions to the challenges of an increasingly complex society, so that, in order to meet these demands, it becomes essential to adopt a type of reasoning that enables the introduction of new arguments in the inferential process—abduction.

Holmes understands that the interpretation of the law necessary for the judicial provision is not a rigid and inevitable conclusion, resulting from the mere subsumption of the fact to the norm with no room for variation. On the contrary, it is the product of a historical and theoretical manifestation that takes place in a specific context. For Holmes, law is not only a logical construction, but a contextualization of the legal fact, being socially predictable, although not logically determinable. In this sense, by treating law as a predictable discourse, Holmes argues that it is up to the interpreter of law to dispel abstract speculations that try to reduce it to a purely logical operation in search of absolute certainties. Instead, he proposes the development of probabilistic reasoning, aimed at analyzing the trends and practical manifestations of the courts, as a means of understanding and anticipating legal decisions¹ (Holmes Jr., 1967).

Thus, pragmatism understands that normative instruments should act as integral factors in the construction of the judicial decision, and not as abstract param-

¹“The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.” (Holmes Jr., 1967: p. 1)

eters intended to support it through a deductive syllogism established a priori that the interpreter has the scope of only discovering.

This is because it is impossible to exhaustively predict all the practical consequences of a decision, as well as to guarantee that its future application will be irreproachable in different contexts. Holmes thus values the contextual practical adequacy and adaptability of legal interpretation, rather than its supposed logical perfection or abstract universality.

Therefore, this philosophical model defended by Holmes is based on the historical evolution of law, based on empirical considerations, which distinguishes itself by adopting a methodology that recognizes the political-social context as an essential and determining element for the construction of the meaning of normative instruments. For Holmes, law is not limited to an abstract structure, but is intrinsically linked to the reality in which it is inserted, rigorously seeking to meet the public interests and the demands of the social stratum for which it is intended.

Jurisdictional activity, in this perspective, goes beyond traditional rationalist formalism by rejecting the idea that the judicial decision is merely a logical deduction from an abstract normative instrument. In its place, a model that prioritizes contextual adequacy is proposed, focusing on a reasoning of conceptual verisimilitude, rather than absolute certainties.

With this, theoretical foundationalism is replaced by the pragmatic perspective, in which the interpreter is responsible for promoting the integration between norm and reality through creative action, and the law, in a broad sense, would function as a guiding parameter for the logical structuring of the legal discourse that underlies the judicial decision. Thus, the inescapable need for a subjective action of the judge in the concrete case is recognized, which involves a political-social exercise under his own responsibility, going beyond the normative text affirmed.

In this model, the jurisdictional provision has as its central concern the practical consequences of the judicial decision, relativizing abstract criteria of uniformity and coherence of the law. The idea of normative systematicity is now guided by the practical implications of the application of conceptual definitions, overcoming the ideal of a stereotyped and abstract law. In its place, a model aimed at the contextual adequacy of legal interpretation is adopted, which favors the interaction between norm, fact and social context.

From this understanding it follows that the main activity of adapting the law to social needs, traditionally attributed to the Legislative Branch through the elaboration of laws, is also a function of the Judiciary. This, in turn, must act in a more dynamic manner to ensure the achievement of the purposes provided for in the legal-political-social arrangement. Thus, the Judiciary not only applies legislation, but also plays a fundamental role in adapting the law to the concrete demands of society, complementing legislative action and ensuring the effectiveness of the legal system as a whole.

For this same reason, Holmes defined law as a set of prophecies about what

judges would do in each concrete case (Holmes Jr., 1897: p. 4). In other words, judicial decisions constitute the reality of law, and this reality is not in abstract texts, but in the history of judicial decisions. Marinoni, when dealing with *stare decisis*, complements the importance that the judge had in the consolidation of the common law system, recognizing their role as originators of a source of law² (Marinoni, 2009).

This approach does not imply a total disregard of the legislation, but rather its resignification in the decision-making process. In other words, a commitment to balance is demonstrated by weighing the practical consequences of the application of legal concepts in concrete cases. The creative interpretation carried out by the Judiciary does not ignore the normative paradigm established in legislation and precedents, but submits them to continuous tests of adequacy, seeking to ensure the rational and contextualized application of the law (Catão, 2011).

Thus, in the jurisdictional provision, the judge is assigned significant creative space to resolve conflicts, in such a way that the interpretative activity is not limited by abstract norms, but attributes to them an application that enables contextual adequacy of the decision itself.

Judicial activity often uses the method of free decision as an instrument to address the issues pertinent to each historical moment in the social paradigm. This method seeks to fill gaps in the legal system, going beyond what is provided for by the legislator, and establishes the parameters that define the meaning attributed to the right. In this process, principles are distinguished that, through repeated tests of applicability in concrete situations, generate legal precedents, constantly submitted to compatibility and adequacy checks.

Given the complexity of the socio-legal system, precedents become the starting point of judicial activity, and, not rarely, the central instrument in the resolution of conflicts, since the judge analyzes the applicability and adequacy of the precept contained in the precedent to the specific context of the case under examination. The law, in a broad sense, ceases to be the only source of law, and the relevance of the magistrate's performance is recognized, which creatively promotes the contextualization of the jurisprudential tradition established through precedents.

In this way, the judicial precedent is elevated to the condition of a source of law. It is not configured as a mere historical link of past legal principles to contemporary social conflicts, but as a contextual construction. The *ratio decidendi*, that is, the essential reasoning of the judicial decision from which a generalizable legal rule is derived for application to other cases involving the same material facts (Alvim & Monnerat, 2023); the *ratio decidendi* must not be confused with *obiter dictum*, consisting of judicial observations that are not essential to the decision reasoning, is articulated argumentatively, distancing the idea of absolute certainty in

²“The English judge played a fundamental role in the consolidation of the common law, hence the expression judge-make law. Nevertheless, the judge's power was that of affirming the common law, which prevailed over the Legislature, whose role was therefore limited to acting in a way that complemented it.” (Marinoni, 2009)

law and introducing a scope of verisimilitude of the premises used in legal discourse.

3. Legal Decision and Binding on Precedents

The interpreter of the law uses precedent as an essential element to guide the legal discourse. By identifying the principle contained in the previous decision—the *ratio decidendi*—the interpreter applies this principle to concrete cases, promoting its development through constant checks of its practical adequacy. The *ratio decidendi*, therefore, is not a rigid and absolute concept, but a dynamic starting point for the construction of legal discourse in the jurisdictional provision.

Thus, more than an institute linked to a specific legal tradition, precedent presents itself as a hermeneutic manifestation within the jurisdictional activity, which is expressed through decisions focused on concrete cases, but with the ability to establish parameters for the resolution of similar situations, based on its foundations (Didier Jr. et al., 2011).

With this, precedent is interpreted and adapted not as a static link to the past, but as a flexible and practical tool for solving problems in the present, ensuring that legal decisions remain relevant, effective and aligned with contemporary demands, contributing to the evolution and rational application of the law.

On the other hand, legal certainty is a basic need of a system of law, as it guarantees predictability, stability and confidence in the country's legal system. However, legal certainty must be developed without ignoring the creativity of the interpreter in the exercise of judicial provision, especially the contextual and consequentialist aspects that must be considered when making decisions.

From a pragmatist perspective, predictability and legal certainty must also be interpreted from the perspective of fallibility, so that the observance of previous decisions does not prevent legal concepts from being properly refuted when their adequacy to the demands of real and current problems requires a reinterpretation based on the particularities of the contemporary context.

Judicial precedent, therefore, must be able to establish these parameters for similar cases based on their essential foundations, but it should not be limited only to the prescriptions of positive law, and should therefore be considered as an inherent element of any legal system.

Thus, the decision-making process, especially with regard to the establishment of precedents from the establishment of the *ratio decidendi*, has an inferential and hypothetical character, according to Peirce's abductive reasoning. This model is based on a logic of conceptual investigation based on empirically conceivable consequences, developing in the context of discovery, in an essentially creative hermeneutic environment (Nóbrega, 2013).

The *ratio decidendi* then performs a double function: internal and external. The internal function is expressed as a reference for the formulation of the individual legal norm inserted in the provision of the decision in question. The external function, in turn, allows the legal principle contained in the *ratio decidendi* to trans-

pend the concrete case and serve as a parameter for other similar cases.

The external function of the *ratio decidendi* is the core of the precedent, especially when handed down by the higher courts, in the Brazilian context, the Federal Supreme Court and the Superior Court of Justice, whose primary mission is the consolidation of precedents. These courts, when issuing decisions, confer binding force to the *ratio decidendi* in the cases provided for by positive law, as established in article 927 of the Code of Civil Procedure, which defines the cases in which precedents must be observed.

It is important to highlight, that, although inspired by the doctrine of *stare decisis*, the Brazilian system of precedents does not replicate it in full. As said, article 927 of the Code of Civil Procedure establishes specific situations in which precedents issued by higher courts must be observed, thereby creating a binding framework, unlike common-law jurisdictions, where judicial precedents acquire binding force through the organic development of case law and the doctrine of horizontal and vertical *stare decisis*. The Brazilian model adopts a statutory approach where only the decisions expressly listed by the legislator are binding.

That said, in both systematics, the analysis of the precedent, although essential, does not exhaust the interpreter's activity. The directive force of precedent is conditioned to constant adequacy tests, whose objective is to ensure the promotion of justice. In this sense, the role of the judge in dealing with precedents involves two fundamental operations: 1) Identify the *ratio decidendi*, that is, the principle underlying the precedent; 2) To test the adequacy of this principle in relation to the legal system as a whole, evaluating its development trends and the limits of its applicability, in order to maintain the dynamism of the hermeneutic activity.

Therefore, precedent is the starting point for the construction of solutions for concrete cases, but its application requires flexibility and continuous review, ensuring that the interpretative activity evolves in a manner consistent with the values of justice and adaptability of the law.

It is observed that the application of precedents is an inexorably contextual activity, having as a touchstone a process of weighing the adequacy of the *ratio decidendi* of the paradigm decision to subsequent processes, and it is necessary to overcome the conception that promotes the identification between precedents and uniform jurisprudence with precedents, given the flagrant distinction between their concepts and establish a logical model of inference that is intended to be anti-foundationalist and anti-essentialist, which considers sociocultural contingencies and contextually ponders on the use of legal hypotheses that suit the concrete case beyond the idea of certainty, but in line with a model of verisimilitude of concepts.

Considered the starting point of legal discourse, the precedent, when no longer contextually adequate to social needs, uses, customs, traditions, in short, to the cultural paradigm of a time, must be set aside as useless to the desideratum of achieving justice and replaced by another by the drawing up of the Judiciary in the face of a concrete case that is presented to it, dispensing with the movement

of the legislative machine or the complete revision of the law with each inflection or readjustment promoted in society.

It is incumbent upon the Judiciary to promote, even as an inescapable corollary of science, the constant revalidation of precedents through constant tests of their adequacy to social reality, including removing those that no longer correspond to the needs and permanent increases in complexity of society.

4. Abduction and the Construction of the Ratio Decidendi: A Contextual Analysis

As stated above, the legal decision, when analyzed from a pragmatist perspective, breaks with the traditional view that associates it exclusively with a solution logically deduced from abstract norms. Instead, it stands out as a contingent, fallible, and contextual process that recognizes the complexity of law in interaction with social demands. Charles Sanders Peirce, introducing abductive reasoning, provides an essential theoretical framework for understanding the construction of legal decision in the context of discovery, emphasizing creativity and plausibility rather than theoretical certainties.

Abduction, as distinct from deduction and induction, is a synthetic explanatory judgment that is characterized by the formulation of credible hypotheses, an acceptable intuitive judgment about the knowing object, taking into account the practical consequences of its application (Peirce, 1878). It is in this context that the ratio decidendi, the determining basis of a judicial decision, emerges. More than a deductive formality, the ratio decidendi is the result of a creative process in which the interpreter, influenced by psychological, ethical-social and cultural elements, seeks to answer a genuine doubt and offer an appropriate solution to the specific case.

The logic of the judicial decision, therefore, is composed of two distinct moments: the context of discovery and the context of justification. In the first, the creative process of formulating the legal solution occurs. This moment, largely subconscious and influenced by the cultural context, involves the analysis of the facts and the creation of a theory to explain them. Abduction, in this scenario, works as the engine that drives the construction of plausible hypotheses, guiding the interpreter to conceive solutions that meet the needs of the concrete case and its practical implications.

According to Danilo Mayriquês, *utens* abductive logic corresponds to the practical reasoning lawyers employ to resolve concrete legal problems. This form of reasoning allows lawyers to navigate uncertainties, ambiguities, vagueness, contradictions, and novel circumstances that may affect the premises of their reasoning, such as new facts, legal provisions, information, perceptions, evidence, values, policies, or principles. In this sense, abductive *utens* logic, or practical abduction, guides lawyers in formulating explanatory hypotheses about the legal system and its application to specific cases (Mayriquês, 2024).

In the judicial sphere, abductive reasoning seems to be the standard pattern in

cases where courts justify their decisions on the basis that the best hypothesis is not the one that offers a literal explanation of the statutory text, but rather the one that interprets the provision in light of its underlying purpose. On this view, a statutory list is only apparently exhaustive, since in practice its teleological rationale justifies the admission of exceptions. In such situations, abduction generates explanatory hypotheses precisely where purely deductive reasoning proves dysfunctional in the interpretation of legal texts, leading to absurd, unjust, or contradictory outcomes (Mayriquês, 2024).

In this scenario, in its joint decision in Appeals to the Superior Court of Justice No. 1,696,396/MT (REsp n. 1.696.396/MT) and 1,704,520/MT (REsp n. 1.704.520/MT) (STJ, Theme 988) rendered by the Superior Court of Justice's Special Court on December 5, 2018, the Court was confronted with a pressing interpretive dilemma concerning Article 1015 of the 2015 Brazilian Code of Civil Procedure. The provision contains a list of interlocutory rulings subject to immediate review by interlocutory appeal. The controversy revolved around whether this list should be read as exhaustive or merely illustrative. A strictly literal interpretation (the "taxative" view) would bar interlocutory appeals outside the enumerated cases, while the opposite view (the "exemplificative" reading) would authorize broad recourse to interlocutory appeals by analogy, thereby reinstating, contrary to legislative intent, the regime of the 1973 Code.

Rejecting both extremes, the Court resorted to abductive reasoning. Neither a rigid taxative reading nor an open exemplificative approach adequately explained the functioning of the system: the first excluded urgent scenarios requiring immediate relief, while the second nullified the legislative choice to restrict interlocutory appeals. The Court, therefore, formulated a third, intermediary hypothesis: the concept of "taxatividade mitigada" ("mitigated taxativity"). Under this construction, interlocutory appeals may be admitted in exceptional situations where postponing review to the appeal stage would render the decision ineffective.

This abductive move illustrates how Brazilian courts sometimes generate new legal categories when neither of the prevailing literal interpretations suffices. Rather than deriving its conclusion by deduction from the statutory text or induction from case patterns, the Court inferred the "best explanation" for reconciling the wording of Article 1,015 with the underlying legislative purpose of ensuring both efficiency and fairness in procedural timing. In other words, the underlying purpose of the provision, abductively inferred, guided the STJ's interpretation and decision-making, with Justice Nancy Andrichi expressly emphasizing the need to "*interpret the provision in conformity with the legislator's will, which is embedded in the legal norm itself*". In this sense, the provision had to be construed in conformity with the legislator's implicit will, oriented by the principle that legal interpretation should serve the functional coherence of the procedural system. The notion of "taxatividade mitigada" exemplifies abductive reasoning at work in judicial decision-making: a pragmatic inference to the most plausible explanation, forged to avoid absurd, unjust, or contradictory outcomes.

The context of justification, according to Peirce, is marked by the formalization of deductive reasoning. At this point, the ratio decidendi is presented as a logical syllogism, structured from a major premise (the general rule), a minor premise (the concrete case) and the conclusion (the judicial decision). However, this a posteriori inferential structure does not reflect the creative and speculative process that effectively guided the construction of the decision, which takes place in the context of discovery (Nóbrega, 2013).

The ratio decidendi, as the argumentative core of a judicial decision, is not limited to a static link between norm and concrete case. Instead, it takes on a dynamic and contextual character, moving away from metaphysical manifestations that seek universal and immutable solutions.

This flexibility is particularly evident in so-called “hard cases”, in which consolidated legal knowledge does not offer satisfactory answers. The interpreter, when faced with these cases, uses abduction to formulate hypotheses and innovate conceptually, consolidating precedents capable of guiding future decisions. This creative process recognizes the relevance of positive law but also emphasizes the need to consider the practical consequences and particularities of the concrete case.

Precedent, as a hermeneutic paradigm, is not a mere reproduction of past decisions, but an instrument subject to constant reevaluation and adaptation. Techniques such as distinguishing, which seek to differentiate a current case from a previous precedent, or overruling, which overcomes an inadequate precedent, reflect the dynamic and pragmatic nature of law.

While legal pragmatism emphasizes creativity and context in decision-making, it does not imply abandoning rationality or coherence. On the contrary, legal interpretation must observe the rights established by legislative tradition and consolidated precedents, ensuring that the judicial decision remains anchored in coherent and constant principles.

5. Abduction and Pragmatism in Judicial Decision-Making: Potentials and Limits

Although legal pragmatism and abductive reasoning have clear virtues, particularly their capacity to avoid rigid formalism and to generate flexible, context-sensitive solutions, they are not without risks. The very flexibility that enables abductive reasoning to overcome the dysfunctions of strict deductivism and resolve interpretive dilemmas may also expose judicial decisions to a degree of subjectivity that undermines legal certainty. In other words, pragmatism’s openness to context and consequences, while valuable, raises the specter of inconsistency and unpredictability in adjudication.

As highlighted by Teresa Arruda Alvim, “*arguments driven by consequentialism can help break interpretive ties, but they cannot become the sole basis of judicial decisions, lest they supplant the legal text or undermine legal constraints*” (Alvim, 2020). While consequentialist reasoning serves a functional role by ad-

dressing real-world implications, judges must restrain such reasoning through empirical evidence and respect for legal limits. This discipline is vital to prevent decisions based solely on fiscal or policy concerns from overshadowing legislative authority (Alvim, 2020).

Moreover, a system reliant on pragmatic judicial creativity may gradually shift from adjudication toward policymaking, assuming roles that constitutionally belong to the political branches. This erosion of separation of powers undermines democratic legitimacy. Excessive reliance on abductive and consequentialist reasoning may also undercut the binding force of precedent, as subsequent courts struggle to delimit the scope of doctrinal innovations like mitigated taxativity.

In short, while pragmatism and abduction empower courts to respond effectively to complex legal realities, they must be skillfully constrained. The challenge lies in embracing purposive, consequence-aware interpretation as an interpretive tool, not as a license for open-ended judicial policy-making, and thereby preserving legal coherence, foreseeability, and institutional balance.

6. Conclusion

The legal decision, from the pragmatist perspective, emerges as a manifestation that transcends traditional formalism and its logical-deductive limitations. As opposed to the essentialist approach, which treats legal norms as rigid and abstract concepts, pragmatism emphasizes the need to consider the context and practical consequences of judicial decisions. This approach, based on the abductive reasoning of Charles Sanders Peirce and the legal philosophy of Oliver Wendell Holmes Jr., recognizes the fallibility and adaptability of law, offering a dynamic interpretative model, sensitive to social demands and capable of responding to the complexity of contemporary conflicts.

Legal pragmatism redefines the role of the interpreter, who ceases to be a mere enforcer of rules to become a creative and contextualizing agent. In this model, the judge uses the norm as a starting point, but builds his decision from a speculative and consequentialist process, in which hypotheses are formulated and tested in relation to the concrete demands of the case. This dynamic allows the law not only to keep up with social transformations, but also to actively contribute to shaping reality, promoting legal solutions that are more appropriate and aligned with the historical moment.

In addition, legal pragmatism offers a rereading of the notion of precedents. Far from being static links to the past, precedents are treated as dynamic hermeneutical tools, subject to constant re-evaluations through techniques such as distinguishing, overriding, and overruling. This approach reinforces the need for a legal system that is both predictable and adaptable, ensuring legal certainty without compromising innovation and contextual justice.

Thus, the legal decision, conceived as an anti-essentialist manifestation, re-signifies the relationship between norm, fact and context. By recognizing the relevance of the political-social context and the practical consequences, legal pragma-

tism ensures that law remains a living practice, in constant interaction with reality. This perspective not only strengthens the legitimacy of the legal system but also reaffirms the commitment of the Judiciary to effectiveness, justice, and the continuous evolution of the law.

By proposing a model that balances tradition and innovation, security and adaptability, legal pragmatism presents itself as a robust response to the demands of a society in constant transformation. In this way, it offers a solid basis for reevaluating and overcoming the limits of formalism, promoting a more humane, dynamic law aligned with the concrete needs of its time.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

- ADI 4645, Relator: LUIZ FUX, Tribunal Pleno, julgado em 12-09-2023, PROCESSO ELETRÔNICO DJe-s/n DIVULG 20-10-2023 PUBLIC 23-10-2023.
- Alvim, T. A. (2020). *Consequencialismo e decisões judiciais*. Migalhas. <https://www.migalhas.com.br/depeso/330959/consequencialismo-e-decisoes-judiciais>
- Alvim, T. A., & Monnerat, F. V. da F. (2023). *Ainda, sobre a tese e a ratio*. Migalhas de Peso. <https://www.migalhas.com.br/depeso/395497/ainda-sobre-a-tese-e-a-ratio>
- Catão, A. de L. (2007). *Decisão jurídica e racionalidade*. EDUFAL.
- Catão, A. de L. (2011). Law and Economics, Consequentialism and Legal Pragmatism: The Influence of Oliver Holmes Jr. In *25th IVR World Congress Law Science and Technology*. Frankfurt.
- Didier Jr., F., Braga, P. S., & Oliveira, R. (2011). *Curso de Direito Processual Civil: Teoria da Prova, Direito Probatório, Teoria do Precedente, Decisão Judicial, Coisa Julgada e Antecipação dos Efeitos da Tutela* (6th ed.). JusPODIVM.
- Holmes Jr., O. W. (1967). *The Common Law*. Harvard University.
- Holmes Jr., O. W. (1897). *The Path of the Law*. Harvard Law Review.
- Marinoni, L. G. (2009). Aproximação crítica entre as jurisdições de civil law e de common law e a necessidade de respeito aos precedentes no brasil. *Revista da Faculdade de Direito UFPR*, 49, 11-58. <https://doi.org/10.5380/rfdupr.v49i0.17031>
- Mayriquês, D. (2024) *Raciocínio abduutivo na interpretação jurídica*. Tese (Doutorado), Faculdade de Direito, Universidade de São Paulo.
- Nóbrega, F. F. B. (2006). O fenômeno da nulidade compreendido a partir do referencial pragmatista: Clarificando e superando obscuridades conceituais. In *XIV Congresso Nacional do CONPEDI, 2005, Fortaleza. Anais do XIV Congresso Nacional do CONPEDI* (pp. 1-20). Fundação Boiteux. <http://www.publicadireito.com.br/conpedi/manaus/arquivos/anais/XIVCongresso/173.pdf>
- Nóbrega, F. F. B. (2013). *Um método para a investigação das consequências: A lógica pragmática da abdução de C. S. Peirce aplicada ao direito*. Ideia.
- Peirce, C. S. (1878). *Deducción, inducción e hipótesis (Deduction, Induction and Hypothesis)*. *Collected Papers II*, 619-644. Tradução castelhana de Juan Martín Ruiz-Werner. <http://www.unav.es/gep/DeducInducHipotesis.html>
- Posner, R. A. (2007). *Problemas de filosofia do direito (The Problems of Jurisprudence)*.

Tradução de Jefferson Luiz Camargo. Revisão técnica e tradução de Mariana Mota Prado. Martins Fontes.

REsp n. 1.696.396/MT, relatora Ministra Nancy Andrighi, Corte Especial, julgado em 20/2/2018, DJe de 28/2/2018.

REsp n. 1.704.520/MT, relatora Ministra Nancy Andrighi, Corte Especial, julgado em 5/12/2018, DJe de 19/12/2018.