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The impeachment process and party loyalty

Processo de impeachment e fidelidade partidária

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RESUMO

O presente trabalho visa trazer à baila a pesquisa sobre o tema da fidelidade partidária, sob o enfoque do exercício dos parlamentares de seu voto no processo de impeachment. Primeiramente analisaremos o instituto da fidelidade partidária, sob o enfoque de seu tratamento no ordenamento jurídico pátrio. Além disso, iremos estudar o que seria o “fechamento de questão” e como ele funcionaria – de forma genérica – nos partidos brasileiros. Ainda iremos estudar o processo de impeachment e a atuação dos parlamentares (Deputados e Senadores) e sua função dentro da teoria de *checks and balances*, no referido procedimento. Por fim, traremos um estudo de caso referente ao “fechamento de questão” pelo Partido Democrático Trabalhista – PDT, no processo de impeachment da ex-presidente Dilma Rousseff. Para atingimento dos objetivos científicos traçados, procederemos a uma abordagem de estudo qualitativa do tipo exploratória, tendo como base o levantamento bibliográfico da literatura jurídica a fim de melhor compreender os institutos jurídicos envolvidos e efetivar a contraposição dos posicionamentos existentes na atualidade sobre os temas acima descritos, almejando compreender qual o melhor posicionamento acerca dos temas por meio do desenvolvimento argumentativo das teorias atuais.

PALAVRAS-CHAVE

Fidelidade Partidária. “Fechamento de Questão”. Impeachment. Separação de Poderes. Mandato Legislativo.

SUMÁRIO

ABSTRACT

The present work aims to shed light to the research on the theme of party loyalty, under the focus on the exercise of the parliamentarians' vote during the process of impeachment. First, we will analyze the institution of party loyalty, under the focus of its treatment on the country's legal order. In addition, we will study what would be the "fixation of matter" and how it would function – in a generic way – inside Brazilian political parties. We will then study the process of impeachment and the performance of parliamentarians (Deputies and Senators) and their function within the theory of checks and balances, in the previously mentioned procedure. Finally, we will bring a case study on the "fixation of matter" by the Democratic Labor Party - PDT, during the impeachment process of former Brazilian President Dilma Rousseff. In order to reach the scientific objectives outlined above, we will proceed to an exploratory qualitative study based on a bibliographical legal literature research in order to better understand the legal institutions involved in it as well as turning effective the counter parts of already existing positions on the topics described above, intending to understand the best positioning on the themes through the argumentative development of current theories.

KEYWORDS

Party Loyalty. "Fixation of Matter". Impeachment. Separation of Powers. Legislative Mandate.

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Introduction. 1. Case study. 2. Coalition Presidentialism. 3. Party Loyalty. 3.1. The Party Loyalty. 3.2. Operation of the “Fixation of Matter”. 4. The impeachment Process. 5. The impossibility of the “fixation of matter” in the impeachment process. Conclusion. Referências.

INTRODUCTION

The impeachment process occurs whenever there is suspicion that the Chief of Executive has committed a crime. As dealing with the calculation of the responsibility crime, the parliamentarians occupy a featured position, as they are delegated to the same reckoning and judgement as the Chief of Executive. In that way, parliamentarians – Deputies and Senators – are put in the position of judges, executing a typical function of Judicial Power and therefore acting in an atypical manner as members of the Legislative Power¹.

The study of the attitude of these parliamentarian members becomes then relevant as the development of the impeachment process occurs, especially as concerning their subordination to their related parties, once that in our [Brazilian] representative democracy, the party membership is mandatory to the exercise of the mandate.

There are several questions to be made thenceforth. Firstly, the possibility of a party to shape the way its members should vote during the impeachment process is questioned. Secondly, there should be an imperious analysis if, in being in a certain way, the parliamentarians are being determined to act that way only associated to that party’s commandment. Developing that investigation, in the case of noncompliance to that party premises, could there be punishment because of party betrayal? Finally, can the parliamentarian have its mandate revoked by the

party for not having obeyed a fixed guideline as voting during the impeachment process?

All these questions are extremely important, since depending on the responses found, we should have the possibility of a parliamentarian elected by direct means, i.e., through the popular vote, to lose his mandate because of a counter positioning to the bounded party. That is one of the reasons why that subject deserves to have its studies deepened.

1 CASE STUDY

In a brief study about the impeachment process of former President Dilma Rousseff in the Brazilian parliament, we will evaluate the application and practical consequences of the topic proposed for the debate.

In chronological order: in December 2015, the then President of the Deputies Assembly – Eduardo Cunha – received the accusation against the President Dilma Rousseff, with the final judgement by the Senate, by its turn under the presidency of the then President of the Federal Supreme Court, Ricardo Lewandoswki.

In front of the opening of the referred process, several parties – from the base or opposition – started to deliberate, some of them “fixating the matter” under what should be the adopted position of their member congressmen during the judgement of the presidential impeachment.

One of those parties was the PDT² – Democratic Labor Party –, party that compounded the governing base of President Dilma, having in

¹ For a better understanding of judicial terms issued at hand one should study the Brazilian political system. (Translator’s note)

² Partido Democrático Trabalhista.





01/22/2016 gathered the National Directory³ of the referred party, which has decided to “fix the matter”, meaning the positioning against the President Dilma Rousseff’s impeachment.

Adding the concerned decision, in the eminence of voting by the Chamber of Deputies (occurred in 04/17/2016), in 04/15/2016 the National Executive from PDT has gathered, aiming to institute penalties to the parliamentarians that wouldn’t obey the “fixation of matter” put by the Directory in January, as it can be read in its minute:

[...] The President Carlos Lupi did brief analysis of the political conjuncture of the country, especially about the impeachment process of the President Dilma Rousseff, alerting about the approved proposal by unanimity of the members of the National Executive and addressed for approval by the National Directory of PDT on January, the 22th of this year, which also ratified, in an unanimous manner, the indicative of National Executive **by the contrary vote for the President Dilma Rousseff’s impeachment.** [...] The president determined the prompt installation of the National Ethic Commission, in order to analyze **processes of expulsion with the devolution of their respective mandates** of all the parliamentarians that **vote against the determination of the National Directory of PDT**, observing the due process and warrantee of broad defense right to the accused, following what is determined by the party Statute in its articles 10, 14, 61, 62, 63 and 68, and in their corresponding paragraphs, that foresee **the loss of parliamentarian mandate**, in addition to immediate intervention of State Direction, in the

cases in which the parliamentarian exercises the presidency. [...] (we marked)⁴

Well, in the nominative day for voting on the impeachment process at the Chamber, from the original 19 members of the bench of the referred party, six deputies voted in favor of impeachment, going against the mentioned party determination.

Against this fact, a disciplinary process has been opened against this six deputies and, in the end of this process, the National Directory has decided for applying the following punishments: expulsion of Giovani Cherini (RS) and suspension for 40 days to other five deputies: Sérgio Vidigal (ES), Flávia Morais (GO), Mário Heringer (MG), Subtenente Gonzaga (MG) and Hissa Abrahão (AM). Flávia Morais and Vidigal have also been pulled away from the command of the state directories from Goiás and Espírito Santo⁵.

This case shows us clearly how all the study we seek to develop materializes, and how serious its consequences can be. A deputy was effectively expelled from the party for which he was elected, because this party took a side in the process of impeachment and thereby sought to compel its members to follow this determination through the “Fixation of Matter”. questions remain: and their constituents? And the vows he represented there? And what use has the party

³ Diretório Nacional.

⁴ DEMOCRATIC WORK PARTY. Minutes of the Meeting of the National Executive with the national ethics committee held at the national headquarters of the PDT. 1st Registration Office for Legal Entities. Brasília DF. Number 00133105 and 00133106 from book number A-06 on 04/19/2016.

From the original: “[...] O Presidente Carlos Lupi fez breve análise da conjuntura política do país, especialmente sobre o processo de impeachment da Presidenta Dilma Rousseff, alertando sobre a proposta aprovada pela unanimidade dos membros da Executiva Nacional e encaminhada para aprovação do Diretório Nacional do PDT no dia vinte e dois de janeiro deste ano, que ratificou, também de forma unânime, o indicativo da Executiva Nacional **pelo voto contrário ao impeachment da Presidenta Dilma**

Rousseff. [...] O presidente determinou a imediata instalação da Comissão de Ética Nacional, a fim de analisar **processos de expulsão com a devolução dos respectivos mandatos** de todos os parlamentares que **votarem contra a determinação do Diretório Nacional do PDT**, observando o devido processo legal e garantida ampla defesa ao acusado, seguindo o que determina o Estatuto partidário em seus artigos 10, 14, 61, 62, 63 e 68, e, seus parágrafos correspondentes, que prevêm **a perda do mandato parlamentar**, além de imediata intervenção na Direção Estadual, nos casos em que o parlamentar exercer a presidência. [...] (destacamos)”.

⁵ Abbreviations for the names of Brazilian states: RS (Rio Grande do Sul), MG (Minas Gerais), GO (Goiás), ES (Espírito Santo) and AM (Amazonas).





made of his chair up to that point? Is non-compliance with a "closed question" by the party a reason for expulsion? Can, in the process of impeachment, the party compel the parliamentarian to decide in advance, one side?

They are not easy debates but we will try to answer some of these questions in the present work.

2 COALITION PRESIDENTIALISM

In Brazil we live the so called "coalition presidentialism", a term coined by Sérgio Henrique Abranches in 1988, during the Constituent Assembly⁶. One must begin by analysing the presidentialist form of government stressing that between parliamentarianism and presidentialism, the later was always preferred in relation to the previous every time Brazilian's public opinion has been requested⁷.

In parliamentarianism, there is a tendency to homogeneity between the Executive and Legislative Powers, once the nomination of the Prime Minister is decided inside the Parliament, it is, in a straight trustworthy relationship between these powers. In that way it is hoped that, in Parliamentarianism, the Legislative defines the Prime Minister through a process that leads to a "relatively steady political commitment"⁸, in which the governability is presupposed by the own process of choosing of Chief of Executive.

Differently, in Presidentialism, both the Parliament and the Chief of Executive are elected

by the people, making possible that the political position of the Chief of Executive to be diverse of the majority of the Parliament, once they are automatically elected.

Then, one might ask oneself: what about the coalition, its sense and necessity in Brazilian political context? After Paulo Ricardo Scheier, for a better understanding of this question, we should divide this approach in two main assumptions: the first, historical-sociological, denotes that Brazil is an uneven country, with a heterogeneous and plural formation, with continental dimensions and regional and completely diverse demands; and a second one – with institutional analysis – evaluating the existing conjunction of presidentialism, multi-party system, federalism and electoral system of open list⁹.

Bearing in mind the juncture of all the above mentioned factors, it is necessary to make a macro analysis of Brazil's governance framework and also its division into instituted powers. The first of the two relates to the fact that, in the parliamentarian elections "even though the plead is realized simultaneously in all country, the calculation of votes and the electoral basis are local"¹⁰, making that the parliamentarians – Deputies and Senators – have their electoral basis regionalized and, therefore, the demands they lead to the National Congress are those with a more local specific range of interests.

Aligned to that, Brazil exerts a multi-party system¹¹ and a proportional system of open list, in which the electors vote in the person of the candidate (and not in a specific party, which has

⁶ ABRANCHES, Sérgio Henrique Hudson de. *Presidencialismo de coalizão: o dilema institucional brasileiro*. *Dados – revista de Ciências Sociais*. Rio de Janeiro, v.31, n.1, p.5-34, 1988.

⁷ KORNIS, Mônica Almeida. *Parlamentarismo, sim ou não?* Disponível em: <http://cpdoc.fgv.br/produção/dossies/Jango/artigos/NaPresidenciaRepublica/Parlamentarismo_sim_ou_não>. Acesso em: 10/05/2018.

⁸ SANTOS, Fabiano. *Escolhas institucionais e transição por transação: sistemas políticos de Brasil e Espanha em*

perspectiva comparada. *Dados*. Rio de Janeiro, v. 23, n.04, 2000.

⁹ SCHIER, Paulo Ricardo. *Presidencialismo de coalizão: contexto, formação e elementos na democracia brasileira*. Curitiba: Juruá, 2017. P. 71.

¹⁰ *Idem*, p.99. In Portuguese: "embora o pleito seja realizado simultaneamente em todo país, o cômputo dos votos e a base eleitoral são locais." (Translator's Note)

¹¹ Cf footnote nº 09.





its closed list of candidates) and have their votes counted to constitute the party coefficient that shall determine the number of seats of each party in Parliament¹². One must realize that this junction of factors creates a scenario, in which the plurality of regional interests has a higher probability of being represented in Parliament, what brings as a consequence the fragmentation of the parliamentary representation¹³.

In short, the scenario that is shown is: a multi-party system parliament, with representatives of more than 20 different parties¹⁴, heterogeneous and plural that, seen from inside the electoral process, seeks to comply with its regional interests (its electoral basis), without a significant commitment with national agendas while, conversely, the Executive is elected directly from the people of the entire country, requiring for its turn the observance to (all) national agendas and that hasn't, necessarily, identification of its administration plans with those of the majority of Parliament, once the elections to both are direct and autonomous.

All things considered, the exercise of the government by the President must pass through

negotiation of its interest's agendas and approval by the Parliament. What one glimpses is an exchange of interests – almost always using the parliamentary amendments as bargaining chips¹⁵.

Once the budget is limited (finit), there is no way to negotiate every agenda individually with all Deputies and Senators straightly trading approval from each's amendments; hence promoting the need to form a support basis for the ruling administration, using as a currency trade – in the most part of the time – the designations to important positions and functions in the Government¹⁶, providing the loyal (to the base) parties with visibility and influence. As Limongi e Figueiredo stresses:

[...] the distribution of rights and resources is extremely favorable to the party leaders. The President of the Chamber and the party leaders exert a rigid control upon the legislative process. They are responsible for the determination of the legislative agenda. [...] Besides that, the leaders have the right to represent the benches of the parties: they can sign petitions in the name of every member of the party benches to approval of several procedures inside the Legislative Power.¹⁷

¹² CORDEIRO, Rodrigo Aiache. *Sistemas partidários e sistemas eleitorais*. Disponível em: <http://www.ambito-juridico.com.br/site/index.php_n_link=revista_artigos_leitura&arigo_id=6357>. Acesso em: 10/05/18.

¹³ MAINWARING, Scott. *Democracia Presidencialista multipartidária: o caso do Brasil*. *Lua Nova*. São Paulo, n. 28-29, p. 21-74, abr. 1993. Disponível em: <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-64451993000100003&Ing=en&nrm=iso>. Acesso em: 10/05/2018.

¹⁴ Disponível em: <<http://www2.camara.leg.br/deputados/pesquisa/bancadas/bancada-atual>> Acesso em: 08/05/2018.

¹⁵ After the submission of the budget by the Executive Power to the National Congress there is a possibility of production of amendments by Parliamentarians to that budget – individual or collectively – through which one seeks to present specific investments to one's electoral base region, aiming the safeguard of one's good relationship with the respective electorate, as well as the accomplishment of his political campaign promises.

¹⁶ VICTOR, Sérgio Antônio Ferreira. *Presidencialismo de coalizão: exame do atual sistema de governo brasileiro*. São Paulo: Saraiva, 2015. p. 121-123: The author stresses

that the process of formation of the Cabinet of Ministers is one of the most crucial moments for the coalition presidentialism, once its distribution has the role of bargaining votes of every Congressmen from the Parliamentarian's party. Therefore, it follows the logic of giving the best ministries to the leaders of the most represented parties.

¹⁷ LIMONGI, Fernando; FIGUEIREDO, Argelina. *Instituições políticas e governabilidade: desempenho do governo e apoio legislativo na democracia brasileira*. In: RANULFO, Carlos (org). *A Democracia Brasileira: Balanço e Perspectivas para o Século 21*. Belo Horizonte: Editora da UFMG, 2007. P. 25-32. From the original: “a distribuição de direitos e recursos parlamentares é extremamente favorável aos líderes partidários. O presidente da Câmara e os líderes partidários exercem um controle rígido sobre o processo legislativo. Eles são responsáveis pela determinação da pauta legislativa. [...] Além disso os líderes têm o direito de representar as bancadas dos partidos: eles podem assinar petições em nome de todos os membros das bancadas partidárias para a provação de vários procedimentos no interior do Poder Legislativo.”





This is the Coalition Presidentialism, in which the Chief of Executive has, in order to have governability, to form a support basis in Parliament, so he can articulate governmental agendas and get approval for his projects.

Nevertheless, as Paulo Ricardo Schier puts:

The functioning of this coalition model demands a party discipline. If the political party and the leaderships take on the commitment to compose the coalition, it shall then exist an institutional guarantee that assures a minimum loyalty. And in that matter the institutional arrangement once more acts as a warrantor from coalitions. The Brazilian Legislation visits the party infidelity with the affiliation, what, as a consequence, means the mandate's loss, once the parliamentarian seat belongs to the parties and not to the candidates themselves.¹⁸

At this point we meet the theme studied in the present work. The coalition presidentialism demands, for its success, that the Parliamentarians of the governmental basis vote in accordance with the governmental agendas; and, among the instruments utilized for that we find the "fixation of matter". Once again, it is the practice through which the party determines by means of a (previous) meeting the way their Deputies and Senators must vote, under the penalty of being punished under accusation of party infidelity and, in last instance, also susceptible of being expelled from their parties as a charge for noncompliance on the fixation of matter.

The questions that returns now is whether, in the specific case of the vote of the Parliamentarians during the impeachment process, these votes should be attached to a *possible* "fixation of matter" determined by the

party before the trial takes place on Parliament and, in case of noncompliance to the party rule, if there should be a punishment against those who voted misaligned to the party.

3 PARTY LOYALTY

3.1 The Party Loyalty

The [Brazilian] word for Loyalty or Fidelity, *fidelidade*, is one of those words that carries an affective meaning in a bigger or lesser degree, depending on the interlocutor, at the same time that it brings the desire of respect, loyalty and righteousness. In that way, to determine if a subject is worth of faith – faith(full) – in relation to whatever it is, there shall be a careful analysis, once the conclusion to the (in)fidelity will always bring effects (either positive or negative) into the World.

That being said, we go from the assumption that, in Brazil, there is an electoral system formed by a proportional representation exercised by an open list. That is, despite of a mandatory membership from the candidate to a political party to concur in an election, the voters will vote directly in its candidate (and not in a closed college list). In that way, even knowing that there is the party's quotient and that the seats are distributed accordingly to the proportion obtained by the sum of votes of the candidates of the party – we are not aiming to unravel the complex Brazilian electoral system here –, it is important to say that the open list system not only gives incentives to the candidate's autonomy, but that it also makes one bonded to one's electoral basis, in a much robust way than to one's own party – in a greater amount.

¹⁸ SCHIER, Paulo Ricardo. *Presidencialismo de coalizão: contexto, formação e elementos na democracia brasileira*. Curitiba: Juruá, 2017. p. 116. From the original in Portuguese: "O funcionamento desse modelo de coalizão demanda disciplina partidária. Se o partido político e as lideranças assumem o compromisso de integrar a coalizão,

deve então existir uma garantia institucional que assegure o mínimo de fidelidade. E neste quesito o arranjo institucional mais uma vez atua como fiador das coalizões. A legislação brasileira pune a infidelidade partidária com a desfiliação o que, por consequência, significa perda do mandato, já que a vaga parlamentar é dos partidos e não dos candidatos."





With that on mind, according to the hierarchical order of the Juridical System, we shall begin the analysis of the institution of Party Loyalty by studying what is disposed on the Brazilian Federal Constitution of 1988¹⁹ (henceforth BFC/88) on the matter. In that way it was determined under the text of Article 17, 1st paragraph that the political parties are free to establish in its regular statutes disciplinary and loyalty norms.

Starting with the analysis of the Magna Carta, it is important to emphasize that there is no definition, contour or specification of what would be the so called party loyalty and, unlike the previous Brazilian Constitution (Article 152 of the Constitutional Amendment of 1969)²⁰, there is no prediction of mandate loss in function of party betrayal in the current Constitution.

In that way, we begin analyzing the infraconstitutional laws on the matter, more specifically the Law 9.096/95 – The Law of Political Parties – that disposes about party loyalty:

Art. 23. The responsibility for party duty violation should be accurate and punished by the competent authority, in conformity to what has been disposed by each party's statute.

§ 1º Memberships must not suffer disciplinary measure or punishment for a conduct that has not been typified by the political party statute.

§ 2º To the accused is assured broad right of defense.

Art. 24. At the Legislative House, the member of each party's bench must subordinate its parliamentary act to the doctrinal and programmatic principles and to the party's established guidelines in the statute's form.

Art. 25. The party's statute should establish beyond the basic disciplinary party measures, norms about penalties, including those with temporary disconnection of the bench, suspension of the vote in internal meetings or loss of all its prerogatives, place and functions that it exerts in consequence of its representation and party proportion, in the respective Legislative House, to the parliamentarian that opposes, by attitude or vote, to the legitimate established party authority's guidelines.

Art. 26. One loses automatically one's function or place exerted in the respective Legislative House in virtue of the party proportion, if the parliamentarian leaves the party by which it may have been elected.²¹

As one can notice, the previously mentioned norm directs the details about the party loyalty rules to each political party's statutes. Therefore, if we want to know what each party understands by party loyalty, it is necessary to analyze casuistically each of the founding party's Law for delimitating its contours – what escapes from the proposal of the present study. We aim, yes, to discuss the contours of the party loyalty in a *lato* sense, without the need to particularize what every Brazilian party (second Superior

¹⁹ BRAZIL. Federal Constitution (1988). Constitution of the Federative Republic of Brazil. Brasília: Senado, 1988. Disponível em:

<http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.html>. Acesso em: 19/05/2017.

²⁰ BRAZIL. Constitutional Amendment No. 1, of October 17, 1969. Official Journal. Brasília. Disponível em: <http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc_anterior1988/emc01-69.htm> Acesso em: 20/09/2017.

²¹ From the original: “Art. 23. A responsabilidade por violação dos deveres partidários deve ser apurada e punida pelo competente órgão, na conformidade do que disponha o estatuto de cada partido.

§ 1º Filiado algum pode sofrer medida disciplinar ou punição por conduta que não esteja tipificada no estatuto do partido político.

§ 2º Ao acusado é assegurado amplo direito de defesa.

Art. 24. Na Casa Legislativa, o integrante da bancada de partido deve subordinar sua ação parlamentar aos princípios doutrinários e programáticos e às diretrizes estabelecidas pelos órgãos de direção partidários, na forma do estatuto.

Art. 25. O estatuto do partido poderá estabelecer, além das medidas disciplinares básicas de caráter partidário, normas sobre penalidades, inclusive com desligamento temporário da bancada, suspensão do direito de voto nas reuniões internas ou perda de todas as prerrogativas, cargos e funções que exerça em decorrência da representação e da proporção partidária, na respectiva Casa Legislativa, ao parlamentar que se opuser, pela atitude ou pelo voto, às diretrizes legitimamente estabelecidas pelos órgãos partidários.

Art. 26. Perde automaticamente a função ou cargo que exerça, na respectiva Casa Legislativa, em virtude da proporção partidária, o parlamentar que deixar o partido sob cuja legenda tenha sido eleito.”





Electoral Court, are currently 35²²) would understand by party betrayal and its respective penalties.

The party loyalty institution has as a first goal to bind the parliamentarian act to the party ticket program²³ to which it has been affiliated, objecting cohesion between its members in what concerns to questions connected to the guidelines set by the party's statute.

The existence of a party loyalty norm is necessary to bring this cohesion to the parties, because it avoids that each elected politician starts to act solo, disrespecting their guidelines, what would make them to lose their indispensability, and what would consequently cause a democracy's ideological deterioration, in such a way that we would only have individuals without the binding to any "ensigns", acting aimlessly or without a basis of beliefs to support them. In that manner, party loyalty is what, in fact, makes possible the connection between the party and the elector, whereas the conducting wire is the elected parliamentarian.

Notwithstanding its [extreme] need to the development of the representative democracy, party loyalty can't suppress the parliamentarian itself, as Professor Clève well put it:

One cannot tolerate the institution's denaturalization, as to allow the emergency of a party dictatorship or the dominance of political oligopoly. Nor can, in addition, transform the parliamentarian in a mere automaton, as an unwilling mouth, destined only to express, violating the consciousness and the liberty of

conviction, any deliberation taken by a party authority, not always democratically constituted and, in furthermore, by mandate's headlines conferred by the electorate itself.

[...] In that case, as Marcel Waline stresses, it would be the "equivalent to say that each party constitutes a state inside the state. It could suppress the parliamentarian and give to each party a corresponding coefficient to the percentage of its vote in the country."²⁴

The constitutionalist starts shedding light on the theme as clarifying that the party loyalty cannot be taken to the point to transform the parliamentarian into mere "party's mouth" – as the Judge is not (or it should not be) the *bouche de la loi*, as put by Montesquieu²⁵ –, removing the most fundamental rights of the Republic like the liberty of consciousness, belief, philosophical and political believes.

Well, any ordinary citizen has the above portrayed rights assured, so one cannot expect less from those that have been elected exactly to represent them. It would be an enormous contradiction to elect representatives that had their rights to express taken from them precisely from their political parties.

As one can verify, the line in which the party loyalty stands is thin and fickle, and should it hang too much for the parliamentarian's liberality side – in relation to their parties –, we would certainly be in front of the debauchery from the primordial ideology of parties; or in the other case, the line could incline too much for the obligatoriness of the parliamentarians to vote in a recurrent and same way, and one would notice the

²² BRAZIL. Superior Electoral Court. Disponível em: <<http://www.tse.jus.br/partidos-politicos/registrados-no-tse>> Acesso em: 04 de maio de 2018.

²³ Programa de legenda partidária.

²⁴ CLÈVE, Clèmerson Merlin. *Fidelidade Partidária e Impeachment – Estudo de Caso*. 2. ed. Curitiba: Juruá Editora, 2012, p. 28.

From the original: "Não se pode tolerar a desnaturação do instituto, de tal modo a permitir a emergência de ditadura partidária ou do domínio dos oligopólios políticos. Nem pode, ademais, transformar o parlamentar em mero autômato, em boca sem vontade, destinado apenas a expressar, violentando a consciência e a liberdade de

convicção, qualquer deliberação tomada por órgão partidário, nem sempre constituído democraticamente e, ademais, por titulares de mandatos conferidos pelo eleitorado. [...] Neste caso, como salienta Marcel Waline, seria o "equivalente a dizer que cada partido constitui um estado dentro do estado. Poder-se-ia suprimir o parlamento e atribuir a cada partido um coeficiente correspondente à percentagem de seus votos no país".

²⁵ MONTESQUIEU, Charles Louis de Secondat, Baron de la. *Do espírito das leis*. São Paulo: Abril Cultural, 1979, *passim*.





denaturalization of the representative democracy, once the voted candidate would not express his position – and from the parcel of the population that saw in him their representative – only repeating what has been ordered from them by the party, which would be then the State of Parties (the *Parteienstaat* to the Germans or the *partitocrazia* to Italians).

In that sense, the balance on the use of the party loyalty is imperious, under the penalty of transforming the “people’s representative” into the “party’s representative”, fitting here the small addendum in the sense that the national executives, the management and other bodies of the political parties, i.e., those that define what would be treated as a voting mandatory theme by the parliamentarians through the party loyalty would not be elected democratically, being formed internally by the party without any popular participation.

3.2 Operation of the “Fixation of Matter”

The institution of party loyalty is necessary – as glimpsed above – and the instrument used by the political party to attach its parliamentarians, in the cases in which there is desire to direct their votes in a specific manner, is the “fixation of matter”. In other words, when the political party (in the foreseen way in its Statute – be it via General Assembly, National Executive, Ethics Council, etc.) determines that all their congressmen must place themselves in unison about a certain matter that will be debated in Parliament.

Therefore, at the moment in which there is the “fixation of matter” the party puts the thesis to be followed, subjecting to those that fail the

referred order to the penalties provided by the Code of Ethics and by the Statute – mostly there is prevision of the party’s expulsion and mandate loss (among the surveyed).

Nevertheless, that is a matter that shall be treated with precaution, as we did to the party loyalty. The use of the instrument of the “fixation of matter”, as well said by Bastos:

However, the fixation of the matter, surrounding determined points, as fixing guidelines to be compulsorily accomplished, must be used with moderation, that is to say, only in those cases in which there is discussion about the frequent programmatic ideas, obviously, the instrument of foundation of the party, as well as the full public knowledge. (...) The use of this institution brings, thus, frequently the serious menace of an internal dictatorship of the party.²⁶

That is, the party should only use the studied instrument in the moments in which there has been in debate norms capable of affecting the basis and founding guidelines of it, what makes every sense, since the elector, besides choosing its candidate, believes in the ideological base to which one has been affiliated and, in case that the parliamentarian should vote in discordance to the referred norm, one would clearly be breaking the trust bond firmed between the elector and the political party. As an example, if a party has as its first base the defense of workers, it makes plausible the “fixation of matter” firming an opposed position to a project or law enforcement to be voted that would limit worker’s rights.

However, as well put by Bastos²⁷, the fixation of matter shouldn’t be used in an indiscriminate form, forcing the parliamentarians through the use of the norm’s coercivity (which foresees penalties) to positioning in matters that haven’t been correlated to the party’s guidelines

²⁶ BASTOS, Celso Ribeiro de. *Comentários à Constituição do Brasil*. São Paulo: Saraiva, 1988, p. 614.

From the original: “No entanto, o fechamento da questão, em torno de determinados pontos, pela fixação de diretrizes, a serem compulsoriamente cumpridos, deve ser utilizada com muita moderação, é dizer, somente naqueles casos em

que estejam em discussão idéias programáticas constantes, obviamente, dos instrumentos de fundação do partido, mas também como de pleno conhecimento público. [...] A utilização, portanto, frequente desse instituto traz consigo a séria ameaça de uma ditadura interna no partido.”

²⁷ *Ibidem*, p. 614/615.





or in issues eminently programmatic, constant in the Statute and party's founding norms, and of complete public knowledge.

The determinations poured by the themes originating from the "fixation of matter" cannot aspire to transform the nature of the mandate, since the representative mandate cannot be mistaken for the imperative mandate (in which the representative was obliged to repeat the determination of its electors under penalty of destitution), transforming it in a party imperativeness.

In so being, the institution of party loyalty, by restricting the full exercise of the political representation, and for affronting the liberty of consciousness of the parliamentarian, which has a ground in an Eternity Clause, can only be used when its need cannot be argued, only aiming the maintenance of the party guidelines.

In the year of 1984, looking for inspiration in the oral opinion of the General Electoral Prosecutor, along by the Supreme Electoral Court²⁸, in a case named Representation 6.963, have so requested:

On merit, if by chance surpassed the formal order obstacles that our opinion has put in sight, is worth noting that the institution of party loyalty constitutes restriction to the liberty to the mandate's exercise, almost would say a twin brother of the imperative prescript mandate, that the legislation of cultured people that has long left us, backed up the modern concepts of

political representation that Public Law and Political Science has provided us.

The exception, then, to the general rule during the mandate's exercise, is that the duty of party loyalty must be interpreted strictly according to the lesson that has being taught in all hermeneutical judicial manuals.²⁹

The *parquet*, during the Civil Military Dictatorship, was already positioned to protect the mandates conquered through the popular vote – maximum democracy's exercise – from the moorings put by the party loyalty, whereas this, even though if coated with legality, didn't restrain the parliamentarian's own rights.

4 THE IMPEACHMENT PROCESS

The impeachment process finds prediction in the BFC/88 under the nomenclature of position loss, which the infraconstitutional regulation is stipulated by the Law 1.079/50³⁰. We do not aim here to diminish the concatenation of all the impeachment process, doing only a general summary on it, to get to the subject of study itself.

First of all, we must stress that any citizen has the power of lodging a complaint against the Chief of Executive for responsibility crime, fundamentally and with the suitable proof (or statement that it cannot be made), to the President of the Chamber of Deputies³¹, who may or may not accept it.

²⁸ Tribunal Superior Eleitoral. BRAZIL. Superior Electoral Court. Representation nº 6.963. Rapporteur: Min. Décio Meirelles De Miranda. Journal of Justice. March 14, 1985. Disponível em: <<http://inter03.tse.jus.br/sjur-pesquisa/pesquisa/actionBRSSearch.do?toc=true&docIndex=0&httpSessionName=brsstateSJUT1474318923§ionServer=TSE&grupoTotalizacao=2>> Acesso em: 17 de junho de 2017.

From the original: No mérito, se acaso ultrapassados os obstáculos de ordem formal que nosso parecer pôs em relevo, vale ressaltar que o instituto da fidelidade partidária constitui restrição à liberdade do exercício do mandato, quase diria um irmão gêmeo do proscrito mandato imperativo, que a legislação dos povos cultos de há muito

abandonou, respaldada nos modernos conceitos de representação política que nos ministram o Direito Público e a Ciência Política.

Exceção, que é, assim, à regra geral da liberdade no exercício do mandato, o dever da fidelidade partidária há de ser interpretado restritivamente, consoante lição que se aprende em todos os manuais de hermenêutica jurídica.

³⁰ BRAZIL. Law No. 1,079 of April 10, 1950. Defines the crimes of responsibility and regulates the respective process of judgment. Official diary. Brasília, April 12, 1950. Disponível em:

<http://www.planalto.gov.br/ccivil_03/leis/L1079.htm. Acesso em: 19/05/2017>.

³¹ Câmara dos Deputados.





In case the President of the Chamber accepts the pressed charge, it starts effectively the impeachment process with the formation of a Commission specially designed to that deliberation, which will elaborate an opinion (exercising the contradictory and broad defense right by the denounced) about the precedency or not of that accusation.

The opinion issued by the Special Commission will then be submitted to the opinion of the Plenary of the Chamber, which, through nominal vote, will have a say on the agreement about the opinion showed. In case there is a voting to the acceptance of the complaint (uncommitted to the fact that this opinion will come along or not with the charge) for at least 2/3 of totality of Deputies, the accusation will be adjudged by the Chamber of Deputies. In case there isn't this qualified *quorum*, the process should be archived.

After the decree of the accusation, it goes to the judgement phase itself. This phase occurs at the Brazilian Federal Senate³², being the House held by the President of the Federal Supreme Court, in a truthful exercise of the system of checks and balances, in which all the powers find themselves closed in the same room – the Executive being judged, the Judiciary presiding the judgement and the Legislative being the judge that will determine the existence or not of a crime.

In that manner, at the Federal Senate, there will be again the designation of a commission that will elaborate the accusatory *libelo* and, after instauration of the process in the referred House, the Chief of Executive will be suspended of his functions by the maximum term of 180 days. In case there should not be a conclusion on the process on the Senate after the mentioned days, the President of the Republic will retake his position and resume his mandate.

During all process is assured the exercise of the right of broad defense and contradictory by the denounced. In the end of debates, the

President of the Federal Supreme Court³³ must elaborate a report with a summary of the accusation, of the proofs of defense and accusation, submitting it finally to the nominal voting of Senators, whom shall give an opinion whether the responsibility crime has been committed or not by the Chief of Executive.

Having a poll of 2/3 of Senators on the agreement that there was a responsibility crime, there will be the dismissal of the Chief of Executive of his position and (after the Constitution, Article 52, single paragraph) his disabling to the exercise of any public function for the next 08 years (what haven't happened in Dilma Rousseff's process, once the Trial of the responsibility crime and the dismissal have been dismantled, as having the first being condemned and the second absolved).

This brief summary only brings a superficial notion of the form through which the process of impeachment occurs, remembering that we do not aim to stretch ourselves upon it, nor analyze the Law 1.079/50 – in which there are several gaps. The core of the present study is to show that parliamentarians, in the referred request, analyze the proofs of the impeachment process, they listen and evaluate their arguments – brought by the witnesses of defense and accusation - and, by formulating ways of convincing the Jury, they decide by the existence or not of the responsibility crime.

During the impeachment process the parliamentarian doesn't legislate, doesn't create anything that will be going to be integrated to the judicial order. He judges, exercising his atypical role in the power division, going forward upon the Judiciary wearing his coat and becoming judge of the case, a judge of a wide collegiate organ that will decide on the commitment or non-commitment of a responsibility crime when the suspect is the Chief of Executive.

³² Senado Federal.

³³ Supremo Tribunal Federal.





The behavior of the members of the Jury Court³⁴ works in a very similar. The jury is foreseen in the Federal Constitution and works in the trials of intentional crimes against life. In this trial, ordinary people form a popular collegiate – the jurors. These jurors do not necessarily have legal training and it is they who claim, after appreciating the evidences (of prosecution and defense) of the suit, whether the crime has occurred and whether the defendant is guilty or not guilty. In these cases, the magistrate only validates the popular will, setting the penalty, in case of conviction.

Similarly, during the impeachment process the same principle is exerted, as the pairs of the Chief of Executive are politicians like himself. They then apprise the presented proof, with warrantee of contradictory and broad defense right, and they vote by the existence or not of the crime.

In both cases, there won't be a graduation in Law needed, not even judicial knowledge for them to be embedded in the function of juries of the set issue. The parliamentarian is nothing more than a jury and, as such, shouldn't suffer any external influence, any previous determination of how to vote, once the principle of free convincing should be applied to the non-career jury themselves.

It would be an absurd; a composition of a jury that already had the determination, beforehand, of what decision should be made. Likewise, it puts the “fixation of matter” in the impeachment process. Well, how can a judge/jury go to the pre-trial and trial phases of a process already with a decided vote?

5 THE IMPOSSIBILITY OF THE “FIXATION OF MATTER” IN THE IMPEACHMENT PROCESS

After analyzing the institutions of the party loyalty and of the “fixation of matter”, as well as the operation of the impeachment process, we will reach the key point of our study: the inapplicability of punishment by party betrayal, to the parliamentarian that votes against the “fixation of matter” of a political party, in the case of the judgement of the impeachment process.

That is because, in the case of voting in the impeachment process (may it be for the denunciation decree – by the Chamber of Deputies – or by the commitment or not of a crime – by the Federal Senate), the parliamentarian stop exercising its typical legislative function, starting to exercise his atypical function as a judge.

That fact coordinates with the ways of how powering control consubstantiated in the checks and balances system and, in that way, it would be completely contradictory from that of having to judge, being obliged to follow a previously imposed positioning from whoever it is, what would turn all the process of appreciation of proof into a mere theater, once the parliamentarians couldn't use its free convincing act in the judgment.

In so being, we understand that as the parliamentarian is to exercise his function of judge, there is no space to establishing a party guideline, or even making it capable of leading to the expulsion for party betrayal, since the political field agency does not relies clearly in the party's exercise of influence, while it is judging the Chief of Executive for the responsibility crime, as a maximal instance of popular representation.

The liberty of conviction is intrinsic to the judging activity and, in practice, in the moment of the judgment of the Chief of Executive by the responsibility crime, the parliamentarian converts himself into Tribunal, exercising the judicial function.

The 5th Article of the BFC/88 that rules upon the fundamental rights and warrantees

³⁴ Tribunal do Júri.





determines us some dispositions that, warranted for the common citizen, cannot be taken of any person, especially from the Chief of Executive, as in trial. We can think as an example the 5th Article, subsections XXXVII, LIII, LIV, LV, from Brazilian Magna Carta.

In that way, in case of admission of the “fixation of matter”, with pronouncing of a party guideline in the cases of judgement of an impeachment process, obviously, it would cease the existing judgement in the determined terms by the BFC/88 and the procedure disposed by Law 1.079/50³⁵, happening to exist an exception judgement, in which the party’ summits would substitute the jury foreseen in the Magna Carta (provided with power that flows from the people to political representation) and that, even before the analysis of the proofs and reports of the process, would determine the way of judging, offending, clearly, to the proper legal process, to the contradictory and broad defense right of the Chief of Executive.

As an example, that would be as if the National Council of Justice³⁶, previously to the judgement of any case, obliged, under penalty of punishment, that certain Appellate Judge³⁷ of a Court to vote in a predetermined way, even before the proof analysis from the case-file³⁸ and presentation of defense.

As previously elucidated, the “fixation of matter” should occur only to the defense of the political party basis, and clearly the positioning of the parliamentarian in the impeachment process could never have been included as a constant matter in the party program, in the pragmatic norms or statutory in any political partisan association.

The “fixation of matter” wouldn’t be, therefore, used as an instrument of coalition of the parliamentarian action in relation to the party doctrine, but as a halter of the partisan leadership to the exercise of the (parlia)mentarian³⁹ function of the elected mandataries, taking from them the essence of the existence of – the speech – in a clear objective deviation.

In addition to that, the appreciation of occurrence or not of a responsibility crime is a debatable matter and, in having technical defenders with a good reputation in both sides, there is no possibility for the party to unify the understanding of its members, once they would be removing their ability to judge, to self-determination, offending the imperative of consciousness and personal political conviction and, *ultima ratio*, the representative power of a part of the population.

The parliamentarians are inviolable, during the mandate’s exercise, by their opinions, words and votes, and the possibility of exclusion of the party exactly by doing one of these prerogatives consists in a manifest antinomy.

In that sense, in analyzing an analogous case (in state level), Clève stresses:

[...] To comprehend as possible the definition of a party guideline in that Field, the judgement or decree of the offered accusation against the Governor would unhand the formation of the Tribunal’s competence, shaped by state deputies (for initiation of proceedings) and by deputies and *Appellate Judges* (for the Trial), being, before, held, as put by Miguel Reale, apropos of a party guideline binding to the parliamentarian members of the old Electoral College, through successive nexus, and against the fixation of matter for association, by the party leadership itself. The process, the contradictory and the broad defense right, wouldn’t be more than ornamental pieces removed from functionality.

³⁵ Cf footnote nº 17.

³⁶ Conselho Nacional de Justiça.

³⁷ In Brazilian Portuguese, Desembargadores. As the political and judicial regimes in Brazil work differently as in other countries, we decided by this translation, which brings an idea of what it is about.

³⁸ In Brazilian Portuguese, autos [do processo].

³⁹ From the original: (parla)mentar. The parentheses seem to address to the etymology of the vocable, the latin word *parabōla*, that means to talk, to discuss, to argue.





May it be agreed that a similar interpretation is not compatible with the judging function, and that is the reason why the deputies can and should decide not in accordance with an eventual party guideline (that, in that matter, will always be null), but yes following the applicable law, to the constant proof of the pieces and the formed conviction.

With this background, once more, it is concluded that the parliamentarians are immunized against the application of sanction for having abstained to vote as determined by the guideline, by the executive commission of the party. More than abstention, the parliamentarians could have voted against the accusation and not even this way they could, in exercising the judging function, be accused by practice of deviant conduct for betrayal of the party.

[...] any punishment would be applicable to the parliamentarians by the simple fact that any guideline can reach them in the exercise of the judging function, under penalty of aggression to (i) conviction freedom, to the (ii) principle of natural judge (with the guideline, in a reflex or indirect way, who decide are the party leaders and not the Assembly, in the case of decree of accusation) and (iii) to the principle of due process (that implies impartial decision with sustenance of the applicable law and on the basis of the evidence produced in the course of process).

As one can see, there is no ground for application, by the political party, of penalties to

the parliamentarian, in consequence of examined representation [...] ⁴⁰

For all that has been said, in our understanding it is impossible to measure – and to charge – the party (loyal)ty ⁴¹ during the impeachment process, that, for its peculiarities, escapes to the possibility of “fixation of matter”, consubstantiating itself in the practice of the judicial function by the parliamentarian in an atypical way, emptying the possibility of his punishment by the party, for not having followed the party commandment – “fixation of matter” – that shouldn’t even be firmed in the first place.

CONCLUSION

During the impeachment process we have the Chief of Executive being judged – in theory – by the responsibility crime. However, in this case, the trial takes place in the National Congress and not in some random Court. Similarly, the judges in this trial are the Parliamentarians and not Law Judges.

⁴⁰ CLÈVE, Clèmerson Merlin. *Fidelidade Partidária e Impeachment – Estudo de Caso*. 2. ed. Curitiba: Juruá Editora, 2012, p. 56, 59.

From the original: [...] A compreender-se como possível a definição de diretriz partidária neste sítio, o julgamento ou a decretação da denúncia oferecida contra o Governador deixaria de constituir competência do tribunal formado pelos deputados estaduais (para a instauração do processo) e pelos deputados e desembargadores (para o julgamento), sendo, antes, exercida, como disse Miguel Reale a propósito de diretriz partidária vinculante do voto dos parlamentares integrantes do antigo Colégio Eleitoral, através de sucessivos elos, e diante do fechamento de questão pela agremiação, pela própria direção partidária. O processo, o contraditório, a ampla defesa, não passariam, na hipótese, de peças ornamentais despidas de funcionalidade. Concorde-se que semelhante interpretação não é compatível com a função de julgar, daí por que podem e devem os deputados decidir, não de acordo com eventual diretriz partidária (que, neste particular, será sempre nula), mas sim, conforme o direito aplicável, as provas constantes dos autos e a convicção formada.

Com este fundamento, mais uma vez, conclui-se estarem os parlamentares imunizados contra a aplicação de sanção por

terem se absterido de votar conforme determinado, em diretriz, pela comissão executiva do partido. Mais do que a abstenção, poderiam os parlamentares votar contra a acusação e nem assim poderiam, exercendo função de julgar, sofrer acusação de prática de conduta desviante por deslealdade ao partido.

[...] nenhuma punição seria aplicável aos parlamentares pelo simples fato de que diretriz alguma pode alcançá-los no exercício da função de julgar, sob pena de agressão à (i) liberdade de convicção, ao (ii) princípio do juiz natural (com a diretriz, de modo reflexo ou indireto, quem decide são os dirigentes partidários e não a Assembléia, no caso de decretação da acusação) e (iii) ao princípio do devido processo legal (que implica decisão imparcial com sustentação no direito aplicável e a partir dos elementos probatórios produzidos no curso do processo). Como se vê, não há fundamento para a aplicação, pelo partido político, de penalidade aos parlamentares, em decorrência da representação examinada [...].

⁴¹ The parentheses highlight the etymology of the word, demonstrating that loyalty comes from loyal.





This judgment occurs, yet, in the context of Brazilian Presidentialism, which conjugates the Federalist State, divided in 26 Member-states and a Federal District, and the proportional electoral open list system, in which the elections are national, even though its bases are regional. Adding these facts to the existence of a multi-party system that turns the Congress into an extremely heterogeneous environment, as well as the fact that the directly elected (by the people) President hasn't necessarily the support of the majority of Parliament, one meets the need of alliance formation between the Executive and the Legislative Powers.

The elected President needs the Congress to rule and to approve the projects of its national development agenda, whilst the Parliamentarians aim mostly their regional development, so they have this positive plea in their reelection. All that being put, one can better understand the concept of the so called Coalition Presidentialism.

Furthermore, in the context of coalition presidentialism, it has emerged the urgency (the call) for the formation of a support base in the Congress, which should be capable of approving the necessary agenda to the governability of the Executive. Nevertheless, in order for this base to be effectively solid and trustworthy, it is imperious that one creates a (better) tool to make the Parliamentarians loyal to the guidelines as put by their parties on the relevant questions to government (and equally, as a way of defying the opposition parties).

This tool received the name of "Fixation of Matter" as the party, before any poll, deliberates about the theme to be debated on the Congress and determines – beforehand – the way in which its members should vote in their respective houses in the Parliament, under penalty of punishment (and expulsion).

This method of party loyalty, however, should be faced carefully, under the risk of

making a dictatorship out of the party or a "State from Parties" (*Parteienstaat* to the Germans or *partitocrazia* to Italians), with marionette-Congressmen forming their parties.

At the level of legal-political relations, the institute of "fixation of matter", tool used to maintenance of the party loyalty, could never be used by political parties to determine the way of voting of its members during the impeachment process, once the discussed theme is not, in any case, about the founding bases and guidelines of a political party.

On the contrary, if the parliamentarian – after appreciation of proofs of the process – understands that a responsibility crime occurred, and, even so, votes against the impeachment, then yes, there would be a denaturalization of the party bases, in which the majority brings principles such as honesty, ethics, morals, etc.

Therefore, the "fixation of matter" cannot be used as an instrument of party loyalty during the impeachment process, because the tool here finds itself as a hammer aiming to screw a bolt, it is, that hasn't been made to the referred goal, not meeting a given role with efficiency and that still creates a number of cracks in the structure.





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