Chapter 13
Judicial Rulings with Prospective Effect in Brazilian Law

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Abstract The text summarizes the evolution of the theory of precedent in Brazilian law, examining the innovations incorporated to the 1988 Constitution, the Code of Civil Procedure and the current text of Bill for the new Code of Civil Procedure. Then, the consequences of judicial expansion in Brazilian law are examined, as

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well as the judicial rulings with prospective effect, its situation nowadays, and its perspectives with the Bill for the new Code.

Initial Remarks: Brazilian Law and the Mechanism of Precedent

Brazilian law belongs to the family of Civil Law, formed on the basis of the Roman-Germanic tradition. Unlike what happens under the system of Common Law, based on case law and the principal of *stare decisis*, prevalence is given to the sources of written law, whose provisions tend to be condensed into codes.

Brazilian independency came about in the year 1822,[1] yet only in 1850 did the new country begin to have a law to deal with judiciary organization and the civil proceeding.[2] Prior to that, the Portuguese procedural legislation was in force in Brazil.

On inheriting Portuguese law, the Brazilian system went so far, in its earliest stages, as to hear the so-called "settlements" of the House of Appeals, consisting of interpretative guidelines seeking to overcome doubts of judgment, which the lower-level judges were obliged to follow.[3] However, as they were rarely used in practice, they were abolished at the time of proclamation of the Republic in 1889.

In 1963, the Federal Supreme Court (STF) published its first statements, recording the unanimous or majority interpretation adopted in analogous cases in relation to a given legal issue. This was a groundbreaking move in the consolidation of case law, even though its normative statements took on merely moral or persuasive force. In 1988, the new Brazilian Federal Constitution provided for the creation of another court at national level, the Higher Court of Justice (STJ), which was allocated competence to judge cases discussing non-constitutional issues.

There was, thus, a sharing of responsibility for ensuring compliance with the rules throughout the entire country and the standardization of national case law between the STF (constitutional cases) and the STJ (infra-constitutional cases).

Subsequent reforms, from the 1990s onwards, conferred even greater effectiveness on precedents, by developing various mechanisms that allow speeding-up the proceeding, through the preliminary rejection of the plea[4]; the impediment of

[1] Since 1808, however, with the arrival of the Portuguese court in Brazil, seeking to flee the Napoleonic invasions, the colony already enjoyed great political importance.

[2] Regulation 737/1850.

[3] The settlements were laid down in Portuguese Law, in the Manueline Orders of 1512, Book V, Title 58, 1st Paragraph. The mechanism remained in Brazilian law even after the proclamation of independence, by virtue of the Decree of October 20 1823.

[4] Art. 285-A, inserted by Law 11,277, of February 07 2006.

appeals,[5] and their judgment by the reporting judge alone, when there is a statement or reiterated stance from the court.

Meanwhile the first precedents with binding effect, since the distant Portuguese settlements, were born in the field of controlling constitutionality. The structure established a mixed system, allying diffused control (granting competency to any organ of the Judiciary Branch to hear the issue of unconstitutionality) to the concentrated model.

This latter attributed to the STF the function of deciding, by means of a direct action, on the constitutionality or unconstitutionality of a law, producing precedents with effectiveness *erga omnes* and binding effects in relation to the organs of the Judiciary Branch and the federal, state and local Public Administration.[6]

Finally, in 2004, Constitutional Amendment No. 45[7] instituted the possibility of the STF issuing statements with binding effects, while maintaining the persuasive effectiveness of those already published, also limiting the examination of appeals by the constitutional court to those displaying "*general repercussion*".[8]

Along these lines, case law is not acknowledged as a formal source of law, given that it does not possess the force of law. In general, precedents are attributed a complementary value, as they express, in a subsidiary manner, the content of the rules and principles that make up the Brazilian legal system.

In other words, judges do not have a functional duty to follow, in successive cases, previous decisions handed down in analogous situations. However, the Higher Court of Justice, whose primordial function is to strive for the uniformity of interpretation of the federal legislation, has already asserted the importance of respect for precedents.

On the other hand, we find a clear trend of evolution towards granting ever-greater important to case law, just as happens in the countries of the continental European system. The force conferred on precedents is really quite convenient in the case of a country with continental dimensions, in which the large number of state and federal courts imposes greater care for the uniformity of the law.

The phenomenon of granting greater efficacy to court decisions can be identified in the numerous changes that have been made to Brazilian procedural legislation in recent decades. The upshot of these consecutive changes is that our current

[5] Art. 518, 1st paragraph, introduced by Law 11,276, of February 07 2006.

[6] The 1964 Federal Constitution, with wording given by Constitutional Amendment No. 16, dated November 26 1965, originally provided for a direct action to the STF, whose breadth was expanded in subsequent constitutional reforms, until reaching the present-day outlines, laid down in the Federal Constitution of 1988 (with wording given by Constitutional Amendment No. 3, of March 03 1993, with the direct action of unconstitutionality and the declaratory action of constitutionality. These procedures were only regulated, though, by Law No. 9,868, of November 10 1999.

[7] Constitutional Amendment n. 45/2004 changed the wording of art. 102, 2nd paragraph, and introduced art. 103-B into the Brazilian Constitution.

[8] In the plenary session of May 30 2007, the STF issued the first three statements with binding effects in Brazilian experience.

system contains precedents with efficacy at different levels, namely, persuasive, those preventing appeals and, at the highest level, binding precedents.

There is also the expectation that a new procedural code will be adopted, this currently before the legislature, which will change deeply the theory of precedents, incorporating the idea of standardization and stability of case law, obliging judges to follow it.

Hypotheses Addressed in the Federal Constitution

Identification of the system of precedents in the Constitution of the Federative Republic of Brazil depends on the search in the constitutional text for rules that give treatment to court decisions on merit that may serve as a reference for the hearing and judgment of future court cases, linked to the legal issue already decided on.

The first three hypotheses of precedents within the scope of the Federal Constitution derive from decisions on merit on issues of law handed down in objective judgments of constitutionality of legal rules made by the Federal Supreme Court in relation to (1st) direct actions of unconstitutionality (ADIn) of a law or federal or state normative rule, (2nd) declaratory actions of constitutionality (ADC) of a law or federal normative rule, stated in article 102, sub-item I, letter "a" of the CRFB (Constitution of the Federative Republic of Brazil) and the (3rd) actions of Asserting Non-compliance with a Fundamental Precept (ADPF), as set forth in article 102, 1st paragraph, of the CRFB.

Decisions rendered in an ADIn, ADC and ADPF constitute legal precedents in relation to a question of merit in matters of control of constitutionality[9] and control of non-compliance with a fundamental precept, with the application of the two former as legal precedents arising from the express provision stated in article 102, 2nd paragraph, of the CRFB/1988.

The 4th (fourth) hypothesis of a precedent occurs in the sphere of actions of a subjective nature, in relation to the judgment of extraordinary appeals in situations of appellate competency, with the demonstration of general repercussion, pursuant to article 102, sub-item III and 3rd paragraph of the CRFB, with the decision on the issue of merit of a constitutional nature amounting to a precedent, or rather, an issue of merit resolved in a situation of general repercussion will constitute a legal precedent.

Also within the realm of the Federal Supreme Court, the 5th (fifth) hypothesis of a precedent refers to the binding statement, addressed in article 103-D of the CRFB, along the lines proposed by Constitutional Amendment No. 45, where a legal statement formulated by the Constitutional Court will be held to be a precedent.

[9] "*Art. 102. (. . .) 2nd Paragraph. Definitive decisions on merit rendered by the Federal Supreme Court in direct actions of unconstitutionality and declaratory actions of constitutionality will produce efficacy against all and binding effect in relation to the other organs of the Judiciary Branch and the direct and indirect public administration, at the federal, state and local level (Wording given by Constitutional Amendment No. 45, of 2004)*".

The 6th (sixth) hypothesis of a precedent occurs in the realm of the Higher Court of Justice, in relation to decisions on merit on a question of law in a special appeal (article 105, sub-item III, CRFB).

We may thus conclude for the existence of 6 (six) hypotheses of constitutional rules that regulate the mechanism of precedents in the Brazilian Federal Constitution. However, we shall now focus on the two most important: the binding statement and general repercussion of the extraordinary appeal.

Addressed in article 103-A of the Federal Constitution, the binding statement was introduced into the Brazilian legal system, seeking to endow judgments with predictability, to ensure legal security in relations, while also allowing citizens equal treatment in identical situations handled by the Judiciary.[10]

The binding statement may be defined as a generic statement, with a normative standard, drafted by the Federal Supreme Court after reiterated judgments whose controversy is current and may lead to the multiplication of identical cases, adopting a determined legal position that is to be applied in similar cases within the scope of the Judiciary and the other Branches.[11]

This mechanism of binding precedents seeks to establish the interpretation of the Federal Supreme Court as being the correct one, in this way avoiding divergence of understanding within the Judiciary Branch itself, which might lead to the weakening and discredit of the Branch before society.[12]

In the opinion of doctrine, the origin of the binding statement lays in the Portuguese settlements, which consisted of doctrine with obligatory force established by the courts as a source of law for similar cases.[13]

In Brazil, Law No. 11.417/2006, in its turn, regulated the binding statement, establishing the form to be taken in the procedure for drafting the statement. The law states the parties enjoying legitimacy to propose the issue, review or cancellation of the statement, the quorum of 2/3 for approval, the possibility of manifestations by third parties, the efficiency of the statement over time, that is to say, it addresses the procedural aspects of preparation of the statement.

Besides the legal provision, the Internal Regulations of the Federal Supreme Court establish rules of internal effectiveness for issuing a binding statement. It

[10] "*Art. 103-A. The Federal Supreme Court may, ex officio or when urged, through a decision by two-thirds of its members, after reiterated decisions on a constitutional issue, approve a statement which, as from its publication in the official press, will have a binding effect in relation to the other organs of the Judiciary Branch and the direct and indirect public administration, at the federal, state and local levels, and also to proceed to its review or cancellation, as laid down in law.*"

[11] "*The binding statement, unlike precedents in the United States, is valid for its generic assertion and not for the grounds that underpinned a given decision at some Court.*" See ABBOUD, Georges, Súmula Vinculante versus precedentes: notas para evitar alguns enganos. *Revista de Processo.* Year 33, No. 165, Nov. 2008. p. 220.

[12] Cf. WAMBIER, Teresa Arruda Alvim. *Súmula vinculante: figura do common law?* Available at www.revistadoutrina.trf4.jus.br, Access on Sep. 09 2013.

[13] The settlements were revoked in Portugal by the Constitutional Court in CA 743/96. ABBOUD. Op. cit. p. 227.

should be noted that article 354-G of the Internal Regulations states that handing the proposal for the issue, review or cancellation of a binding statement will be by electronic means, and the citizens will have access to the corresponding information at the site of the Court.

Considering that the development of Law is healthy, a change in the understanding of the Federal Supreme Court was provided for by the Constitution in article 103-A, 2nd paragraph, in stating that the review or cancellation of a binding statement may be brought about by those who may file a direct action of unconstitutionality.

General repercussion may also be considered as a mechanism of binding a precedent, with the legal nature of a condition for the admissibility of an extraordinary appeal.

Introduced into the Federal Constitution in 2004, art. 102, 3rd paragraph, states that "*in the extraordinary appeal the appellant shall demonstrate the general repercussion of the constitutional issues discussed in the case, in the terms of the law, for the Court to examine admission of the appeal, and may only refuse it through a manifestation by two-thirds of its members*".

General repercussion is also addressed in the Internal Regulations of the Federal Supreme Court, since the publication of Amendment No. 21/2007.

Law No. 11,418/2006 disciplines the issue, establishing, besides the new mechanism for handling extraordinary appeals, the multiplying effect of the decision to acknowledge general repercussion. It may thus be said that general repercussion involves a filter for appeals, precisely a means of containing the case, which establishes what issues the Federal Supreme Court is to judge.[14] It falls to general repercussion to speed up the cases under way before the Higher Court, and also the other courts, given its multiplier effect.

It should be stressed that the existence of general repercussion is presumed, taking into account that only with the vote of eight judges will the constitutional issue be set aside.

Precedents and the Code of Civil Procedure

As already stated, the figure of the judicial precedent consists of a mechanism foreign to Brazilian legal culture, traditionally affiliated to civil law. However, it is precisely the logic of the doctrine of *stare decisis* that inspires the greater part of the procedural mechanisms introduced into the Brazilian Code of Civil Procedure by the legislative reforms carried out since the 1990s.

[14]FERRAZ, Taís Schilling. *Repercussão Geral – muito mais que um pressuposto de admissibilidade*. In: PAULSEN, Leandro. Repercussão Geral no Recurso Extraordinário, estudos em homenagem à Ministra Ellen Gracie, Porto Alegre: Livraria do Advogado Editora, 2011, p. 77.

These reforms had the clear aim of strengthening case law, through institution of the above-mentioned binding statements, and also preliminary judgments, mechanisms for filtering appeals and judgments by sampling.

Notwithstanding its classical submission to the primacy of the law, considered as a primary source of Law, the Brazilian system has been progressively incorporating the notion of legal precedents endowed with binding, and not merely persuasive, effectiveness, to decisions following those rendered in identical or analogous cases.

The first stage of the legislative reform in question was implemented by Laws Nos. 8038/90, 9139/95 and 9756/98, which changed the wording of art. 557 of the CPC (Code of Civil Procedure) to allow the reporter to summarily dismiss an appeal when it is patently inadmissible, groundless, impaired or contrary to the contents of a statement or dominant case law at the respective court, either the STF or a Higher Court, while also allowing its provisional acceptance, if the decision appealed is in patent conflict with a statement or dominant case law at the STF or a higher court.

A similar line was taken by Law No. 11,276/2006, in changing provisions of the Code of Civil Procedure, adding to article 518 the 1st paragraph,[15] which contemplates the faculty of the judge to refuse to hear an appeal lodged against a sentence which is in line with the understanding materialized in a statement from the STJ or STF.

In allowing the refusal to hear an appeal that challenges a sentence that is conformant with the statements of the STJ or STF, this mechanism, referred to by Brazilian doctrine as "*a statement preventing appeals*" stands out, without the slightest doubt, as one more step by the Brazilian lawmaker towards the search for the greater standardization and binding effect of case law.[16]

Law No. 11,277/2006, in its turn, in adding article 285-A to the Code of Civil Procedure, instituted a procedural mechanism known as "*preliminary rejection of the plea*" *or* "*preliminary sentence of groundlessness*", which allows the judge, in cases discussing issues of law exclusively, to reproduce a sentence rendered in a previous identical case, with no need to even cite the defendant.

The Higher Court of Justice recently established the understanding that preliminary sentences of groundlessness based on this provision may only be rendered if the understanding set out in them lines up with that of dominant case law at the higher courts, particularly the STJ itself or the STF, and thus the existence of a precedent at the same entity of judgment intending to apply article 285-A is not sufficient.[17] In spite of setting aside the literal nature of the provision in question, this interpretation

[15]"1st Paragraph. *The judge will not hear an appeal when the sentence is conformant with a statement from the Higher Court of Justice or the Federal Supreme Court."*

[16]THEODORO JÚNIOR, Humberto. *As novas reformas do Código de Processo Civil*. Rio de Janeiro: Forense, 2007, pp. 11–12.

[17]STJ. Special Appeal 1,109,398-MS, Reporting Justice Luis Felipe Salomão, judged on June 16 2011. Information Bulletin 477.

confers on the mechanism the function of standardizing case law, lining it up with the other mechanisms that pursue this objective.[18]

Judgment "*by sampling*" of repetitive extraordinary and special appeals, on the other hand, disciplined by articles 543-B and 543-C of the CPC, instituted, respectively, by Laws Nos. 11,418/2006 and 11,672/2008, consists of instruments *par excellence* for standardizing case law.[19]

Just a few cases are chosen which, given their characteristics, represent in the fullest and most reliable way possible the question of law involved. Thus, the understanding established by the STF or STJ at the time of their judgment(s) would then be applied by the lower courts in all other similar appeals that were suspended, awaiting the decision on the paradigm appeal(s).

With specific regard for the handling of repetitive extraordinary appeals, article 543-B inaugurated the new methodology, in instituting a prior incident of assessment of the existence of general repercussion by sampling. This incidence consists of an objective procedure, which goes beyond the original interest of the parties and whose outcome is equivalent to the creation of a general legal rule by the Federal Supreme Court.[20]

The Bill of the New Code of Civil Procedure

In procedural matters, the great event of 2010 was submittal to the National Congress of the bill for a new Code of Civil Procedure (Legislative Bill No. 166/2010, on the initiative of the presidency of the Federal Senate).[21] Voting has been concluded in the Senate, with approval of substitution made by the Reporter, Senator Valter Pereira, and the bill is currently before the House of Representatives under the No. 8,046/2010.

Besides conserving all the instruments focused on rationalizing the treatment of much-repeated cases, the Bill devotes a new chapter to regulating the Legal Precedent, imposing on the courts the duty to standardize and keep their case law stable, with the issuance of pronouncements equivalent to the statement of their dominant case law (art. 520).

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[18]RODRIGUES, Roberto de Aragão Ribeiro. *Ações Repetitivas*: o novo perfil da tutela dos direitos individuais homogêneos. Curitiba: Juruá, 2013, pp. 138–139.

[19]MANCUSO, Rodolfo de Camargo. *Recurso extraordinário e recurso especial*. 11. ed. Revised, updated and expanded according to laws 11.417/2006, 11.418/2006, 11.672/2008 and amendments to the regulations of the STF and STJ. São Paulo: Editora Revista dos Tribunais, 2010, pp. 356–357.

[20]DIDIER JR. Fredie; CUNHA, Leonardo José Carneiro. *Curso de Direito Processual Civil*. Meios de impugnação às decisões judiciais e processo nos tribunais. 9th ed. Bahia: JusPodium, v. 3, p. 338.

[21]The bill is the fruit of the work of a commission of jurists chaired by Federal Supreme Court Justice Luiz Fux.

To put into effect this express guideline, which asserts its harmony with the principles of legality, legal security, reasonable duration of the case, the protection of trust and isonomy, the Bill imposes observance of the parameters[22] set out in art. 521.

The new Code also admits and regulates, in the same provision, the procedure required to overcome the legal precedent (overruling), allowing the possibility of modulating the effects (prospective overruling), in considering the protection due to legal security, trust and isonomy.

There is also authorization for the judge to set aside application of the precedent to the case in point, provided there is a demonstration, clearly and properly supported, of the existence of a distinction in the case being judged (distinguishing) or superseding the understanding (overruling).[23,24]

Quite clearly, the regime of strengthening Precedents makes the admissibility of the case or the preliminary rejection of the plaintiff's plea conditional, in this latter case without the defendant's being cited.

In cases that dispense with the phase of proof, the preliminary decision for rejection is authorized in the Bill, when the case does not comply with a statement or ruling rendered in repetitive appeals by the Federal Supreme Court or Higher Court

[22] "*Art. 521. To put into effect the provisions of art. 520 and the principles of legality, legal security, reasonable duration of the case, the protection of trust and isonomy, the following provisions shall be observed:*

I – judges and courts shall follow the decisions and precedents from the Federal Supreme Court in concentrated control of constitutionality;

II – judges and courts shall follow the pronouncements of a binding statement, rulings and precedents in an incident of assumption of competency or the resolution of repetitive cases and in the judgment of repetitive extraordinary and special appeals;

III – judges and courts shall follow the pronouncements of the statements from the Federal Supreme Court in constitutional affairs, of the Higher Court of Justice in infra-constitutional matters, and the courts to which they are tied, in this order;

IV – if there is no pronouncement of a statement of dominant case law, judges and courts shall follow precedents:

a) from the plenary session of the Federal Supreme Court, in constitutional matters;

b) from the Special Court or the Sections of the Higher Court, in this order, in infra-constitutional matters;

V – in the absence of a precedent from the Federal Supreme Court or the Higher Court of Justice, judges and organs that make up an appellate court or regional federal court shall follow the precedents from the respective plenary session or special body, in this order;

VI – judges and organs that make up an appellate court shall follow, in matters of local law, the precedents from the respective plenary session or special body, in this order."

[23] Art. 499, 1st paragraph, of the Bill considers groundless any decision that goes no further than invoking a precedent without indicating its *ratio decidendi*, nor demonstrating that the case being judged is suited to it.

[24] For an understanding of the discipline of the duty to justify court decisions as an instrument of control of the application of precedents in the new Code of Civil Procedure, ROQUE, Andre Vasconcelos. Dever de motivação das decisões judiciais e controle da jurisprudência no novo CPC. *In:* FREIRE, Alexandre *et al. Novas tendências do processo civil*. Salvador: Juspodivm, 2013, pp. 247–263.

of Justice, or contrary to the understanding established in the incident of resolution of repetitive cases, or the assumption of competency or, also, when contrary to the pronouncement of a statement from an appellate court on local law (art. 333).

In the area of appeals, the Bill preserves the power of the reporter to reject out of hand acceptance of an appeal contrary to the guidance of the legal precedent (art. 945). One of the principal innovations of the new Code lays in creation of the so-called incident of resolution of repetitive cases, provided, given the asserted risk of an offense to isonomy and legal security, for the unified solution of serial cases containing a controversy on one selfsame issue of law (art. 988).

Regulated in such a way as to allow the full participation of the parties and others interested (*amicus curiae*), the incident allows the reporter, following the judgment of admissibility, to determine the suspension of pending cases, either individual or collective, under way in the state or region (arts. 989–994).

Once the incident is judged, "*the legal thesis will be applied to all individual or collective cases that address an identical question of law or under way in the area of jurisdiction of the respective court*", this also affecting future cases (art. 995), although a complaint is fitting against decisions that do not observe it (art. 1,000). The incident is also subject to the procedures for overruling a precedent and modulating the effects of that decision, reported above.

The Bill leaves unchanged, in essence, the procedure for the judgment of repetitive special and extraordinary appeals, applicable whenever "*there is a multiplicity of appeals based on an identical issue of law*" (art. 1,049-1,053), reported in the previous item.

Closing this brief summary, the new Code considers as "*judgment of repetitive cases*" both the decision rendered in an incident of resolution of repetitive cases, and also that arising from the judgment of repetitive special and extraordinary appeals, which may involve an issue of material or procedural law (art. 522) and authorize non-observance of the chronological order of judgment foreseen, also a ground-breaking feature, in its art. 12, 2nd paragraph.

The paramount aim of the Bill, on this point, lays in "*avoiding the inconvenience of conflicting decisions*", leading to "*huge procedural economy*, *as dozens, hundreds and even thousands of like cases may be resolved practically at one fell swoop.*"[25]

In spite of the applause from wide sectors of doctrine and the institutional support of the higher courts for the trend of strengthening precedents from case law, which was accepted by the bill for the new Code of Civil Procedure, this guidance has not been devoid of criticisms.

In this regard, it has already been pointed out that the strengthening of precedents in Brazil arose as a pragmatic response to the numerical crisis of the Judiciary Branch, attacked for its effects, not for its actual causes (the Judiciary's lack of funds, human resources and financial autonomy, inefficient management of resources, little respect for decisions at first instance, exaggerated formalism of

[25]THEODORO JÚNIOR, Humberto. Curso de direito processual civil. vol. I. 53ª ed. revised and updated. Rio Janeiro: Forense, 2012. p. XXXIII.

some procedural rules, inoperative nature of regulatory agencies with effective powers to inspect and punish, inefficient regulation of collective cases; the explosion of litigation following the 1988 Constitution, undue use of the Judiciary Branch as an instrument of moratorium of the public debt, among others).[26]

For this reason, the critics ponder, attacking only the causes of the crisis will produce transitory and partial results, which will lead, in a short time, to a new numerical crisis of cases before the Brazilian Judiciary Branch, possibly compromising the quality of court decisions.

Moreover, it has already been noted that all the benefits pursued by the proposal to strengthen precedents from case law – predictability, isonomy, procedural economic and discouragement of vexatious litigation, will only become reality if the formation and application of precedents is done properly.

This premise, though, is not always observed in the Brazilian courts. It is sought to strengthen precedents in Brazil in just a few years. Its justification lays not in a gradual evolution of the legal system, as occurred in Common Law, but in an urgent solution for the numerical crisis of cases.

The risks involved are obvious: without proper techniques of operating with precedents, there is the risk not only of their being formed unsuitably (without a proper deepening of debate and consideration of all the pertinent arguments), but also of their being applied automatically to cases that are not sufficiently similar.

Thus it is that, in an educational effort to transmit to the professionals of the law the proper techniques of operating with precedents in a country without this tradition, the latest versions of the bill for a new Code of Civil Procedure have incorporated provisions that detail their practical use.

Prospective Overruling in Brazilian Law

Another recent influence of common law (in particular of the United States procedural system) on Brazilian procedural law comes to light in the so-called Prospective Effects or Modulation of Effects over Time of decisions that revoke precedents.

If, on the one hand, the stability and predictability of court decisions in interpretation of the law are important for a democratic decision, as they allow the citizen to know and be able to trust in his own rights[27] set out in the legislative texts, on the other, it is important and vital for the system to modify its precedents when faced with a change to the social or legislative scene.

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[26]ROQUE, Andre Vasconcelos. A luta contra o tempo nos processos judiciais: um problema ainda à busca de uma solução. *Revista Eletrônica de Direito Processual*, v. VII, pp. 237–263, Jan./Jul. 2011, available at www.redp.com.br (accessed on Sep. 01 2013).

[27]MARINONI, Luiz Guilherme. Segurança dos atos jurisdicionais (princípio da ?). *Processos Coletivos*, Porto Alegre, vol. 2, n. 2, Apr.01 2011. Available at: http://www.processoscoletivos.net/doutrina/24-volume-2-numero-2-trimestre-01-04-2011-a-30-06-2011/122-seguranca-dos-atos-jurisdicionais-principio-da – Accessed on Sep. 072013.

The inspiration for seeking a procedural instrument to modulate the effects of a court decision, with a view to balancing legal security with the need to change legal understanding, lays in the Prospective Overruling of U.S. law.

Doctrine developed in the United States defines overruling as the change of a precedent by means of an express decision that it must no longer be the applicable law (or Controlling Law). This change has retrospective effects, limited only to a Statute of Limitations, a settlement between the parties (Accord and Satisfaction) or, obviously, through the occurrence of *res judicata*).[28] In this way, overruling a precedent ends up affecting others cases being judged.

Prospective overruling or Sunbursting,[29] in its turn, is a technique of judgment that has been much used in U.S. common law, principally as from the second half of the twentieth century, by virtue of the pressure of social needs to change the law, without putting at risk its stability, encapsulated in the rule of *stare decisis*.[30]

Prospective Overruling must be understood as the postponement of production of effects of a new legal rule. It is, in actual fact, an exceptional limitation of the retrospective effect of overruling.

In Brazil, if we consider the increase in the importance of case law in recent decades as a Precedent to be followed by judges and by the courts, the Prospective Overruling of Common Law finds similarity with what has been adopted and understood as the application of prospective effects of court decisions or, as denominated by doctrine, the "*modulation over time of the effects*" of decisions.

Modulation of effects consists of a procedural technique of decision that authorizes the Court to limit, in time, the effects of its decisions based on the principle of legal security and the public interest of exceptional importance.[31] Thus, a court decision whose effects, as a rule, would be *ex tunc*, has its limits in time modified, coming into effect at the time of publication of the decision (*ex nunc*) or at another subsequent moment (*pro futuro*).

The court that has most used modulation of the effects of its decisions in Brazil is the Federal Supreme Court (STF), not least due to its importance within the Brazilian Judiciary.

Historically, it falls to the STF to protect the Federal Constitution (art. 102, main section, of the 1988 Federal Constitution), and thus it is there that the control of

[28]FAIRCHILD, Thomas E. *Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or Sunbursting*. Marquette Law Review: 1968. v. 51. p. 254. Available at: http://scholarship.law.marquette.edu/mulr/vol51/iss3/3.

[29]Sunbursting is a term little used these days. It arose in the Sunburst case (Great Northern Railway v. Sunburst Oil & Refining Company, 287 U.S. 358 [1932]) by the U.S. Supreme Court in 1932, in which the Sunburst company sued the Great Northern in the state of Montana, based on a judgment by the Supreme Court of that state. When the Supreme Court of Montana judged the case in 1921, it modified the precedent, but limited its effects to future cases only, and thus the new rule was announced for other cases yet to be filed, although the old rule was applied, for the last time, in favor of Sunburst.

[30]FAIRCHILD, Thomas E. *Op. cit.*

[31]MENDES et al. *Curso de Direito Constitucional.* 4. ed. São Paulo: Saraiva, 2009. p. 1319.

constitutionality takes place, this both concentrated (under the historic inspiration of the lessons of Hans Kelsen and the structure of the Austrian Constitutional Court – *Verfassungsgerichtshof*, where the constitutionality of a law is analyzed *in abstracto*, by means of an objective process) and also diffused (under the clear inspiration, during the genesis of the Brazilian republican system, of the U.S. Supreme Court, where the *quaestio juris* as to the constitutionality of a given legal rule reaches the Supreme Court, in the final instance of appeals, by means of an *extraordinary appeal* lodged by one of the parties in litigation).

While performing the *concentrated control* of constitutionality of the laws, a situation in which the judgments of the STF enjoy efficacy *erga omnes*, and binding on all the other federal and state courts, the STF has modulated the effects of its decisions on the basis of the rule laid down in art. 27 of Federal Law No. 9.868/1999.[32]

According to this rule,[33] in situations in which confirmation of the constitutionality or unconstitutionality of the legal rule may cause a serious shock to legal security or the national interest, the STF, by a majority of two-thirds of its Judges, may "restrict the effects of that declaration or decide that it will only come into effect upon becoming *rem judicatum* or at some other moment to be set."

Please note that, unlike some countries, such as Austria, where the application of a law can only be done "*for a period no greater than eighteen months*",[34] the Brazilian rule does not set a maximum period, allowing the Court discretion to, reasonably, weigh up what the maximum period for application of a law would be, setting the moment *pro futuro* in which its effectiveness would be contained by the grounds of the decision that revokes the prior precedent.

There have been various cases in which the STF made use of this procedural technique of judgment. For example, in *Declaratory Action of Constitutionality (ADC) No. 29,* judged by the Plenary Session on February 16 2012, the STF judged the constitutionality of a law (Complementary Law No. 135/2010) which raised new hypotheses of ineligibility for Brazilian Electoral Law, seeking to preserve the so-called "party loyalty" of the candidate to his/her party. The hypotheses of

[32] "*Art. 27. In declaring the unconstitutionality of a law or normative act, and taking into account reasons of legal security or exceptional social interest, the Federal Supreme Court may, by a majority of two-thirds of its members, restrict the effects of that declaration or decide that it will only come into effect upon becoming rem judicatum or at some other moment to be set"*. As this rule is in a law which regulates "the proceeding and judgment of the direct action of unconstitutionality and declaratory action of constitutionality before the Federal Supreme Court", the STF was the first Brazilian court to adopt the procedural instrument of modulation over time of the effects of its decisions and later, by analogy, the STF began to adopt it in the judgment of other cases and appeals, just as other lower courts began to adopt it, likewise by analogy.

[33] Which, according to BRUNO VINICIUS DA RÓS BODART; (*in* Embargos de declaração como meio processual adequado a suscitar a modulação dos efeitos temporais do controle de constitucionalidade. *Revista de Processo.* v. 198. ago. 2011. p. 389); and GILMAR FERREIRA MENDES *et al* (*Op. cit* p. 1319) has as its inspiration art. 282 (4) of the Portuguese Constitution.

[34] MENDES, Gilmar Ferreira. *Jurisdição Constitucional.* São Paulo: Saraiva, 2004. pp. 364–365.

ineligibility instituted were judged constitutional, but for a reason of legal security, the STF modulated *pro futuro* the effects of its decision to suit it to the constitutional rule, making such hypotheses inapplicable to previous elections, including the national elections held in 2010, and also to the political mandates still in progress.

Another example was judgment of *Direct Action of Unconstitutionality* (ADI) No. 4,029, judged on March 08 2012. This action questioned the constitutionality of Federal Law No. 11,515/07, the outcome of conversion into law of a Provisional Measure of the President of the Republic, which created the Chico Mendes Institute for Conservation of Biodiversity, with powers similar to a regulatory agency for the environment.

In judging this action, the STF ruled that there had in fact been a formal unconstitutionality in the law, as there was a failure to respect the constitutional limits for issuing provisional measures by the President of the Republic, who may only do so in cases of urgency and great importance, however, the STF could not overlook reality: it was a law that set up an autarky for the protection of the environment (a fundamental right also stated in the Constitution) which had since 2007 been operative, with several administrative and normative acts already practiced.

In this case the court adopted modulation of effects in the modality denominated, in Common Law, "*pure prospectivity*", and thus "*the effects of the decision were postponed, pursuant to art. 27 of Law [No.] 9,868/99, to preserve the validity and efficacy of all Provisional Measures converted into a Law to date, and also those at present in progress in the Legislature*".

We note, thus, that in Brazil the technique of modulation over time of legal effects is used, in the majority, in cases of mere interpretation of rules as to their constitutionality or not, either material or formal, as we see in the system of concentrated control of constitutionality of the laws entrusted to the STF.

The following words from the vote of Justice AYRES BRITO, in Conflict of Competency (CC) No. 7,204-1 (judged on June 29 2005) make it clear that the STF may make use of the modulation over time of effects, also, when it is merely interpreting the constitutional text, without amending it, so as to avoid surprises for those under its jurisdiction, *verbatim*: "*The Federal Supreme Court, supreme watchdog of the Republican Constitution, can and must, for the sake of legal security, attribute prospective effectiveness to its decisions, with the precise delimitation of changes in case law that occur without a formal change to the text of the Constitution.*"

As a matter of fact, we note quite clearly that in Brazil the technique of the prospective effects of court decisions was created, precisely, from the theory of the nullity of unconstitutional acts.

However, these days, the STF has also applied the technique of prospective effects in the system of diffused control of constitutionality, when it renders decisions in appeals coming from other Courts in which the constitutionality of laws is challenged.

When an extraordinary appeal is judged at the STF, the effects of its judgment, as a rule, will be only *intra partes*, that is to say, limited to those litigants.

Exceptionally, given the importance of the issue, judgments of appeals in diffused control at the STF may have binding effects, and thus the result is *erga omnes*, and may be asserted against all.

In both situations, the STF may also modulate over time the effects of its decision, conferring upon it prospective effects.

The first application by the STF of this technique provided for in art. 27 of Federal Law No. 9,868/1999 in a case of diffused control of constitutionality came about in the judgment of Extraordinary Appeal ("RE") No. 197,917, on June 06 2002, which challenged a law in a certain municipality which set the number of its town councilors in conflict with the rules of the Federal Constitution.

In spite of the unconstitutionality of the law, the STF understood that, if the unconstitutionality were declared *ex tunc*, a situation of grave legal insecurity would be created, as the validity of the decisions taken by that Town Council while the law was in force would be compromised, since the make-up of the Council would be different.

Therefore, to avoid this situation of legal insecurity, the STF modulated the effects of the decision only until the end of the municipal legislature.

A more interesting example is found in the two judgments of *RE No. 500,171*, in which some students of a public federal university questioned the unconstitutionality of charging a registration fee they had had to pay. In the first judgment, on August 13 2008, the STF judged the merit of the appeal, for the unconstitutionality of charging the registration fee. This judgment, as a matter of fact, served as a precedent for the issuance of Binding Statement No. 12. However, the university appealed, alleging, for the first time in the proceeding, the need to modulate the effects of the decision, as it would not be able to return to all the students the fees which had for decades been charged, prior to the decision.

In the judgment of the Appeal for Clarification in Extraordinary Appeal ("RE" No. 500,171-ED), on March 16 2011, the STF states that it will hear, exceptionally, the university's appeal seeking clarification, despite the prior absence of this plea in the case through the university's inertia, as the modulation of effects of a court decision is a matter of public policy, and may be heard *ex officio* by the Court. In that case, if there had been no modulation of the effects "*as from the issuance of Binding Statement 12, safeguarding the right of those who had already brought lawsuits with the same legal subject*", the decision itself might be deprived of effectiveness, given the well-known fact that many public institutions of higher education in the country are in parlous economic circumstances.

However, on analyzing this and other similar judgments, we note a pernicious trend at the STF, in allowing the tardy plea to modulate the effects of the court decision only when politically convenient.

In CC No. 7,204-1, the Federal Supreme Court modified its understanding as to competency for the judgment of cases seeking indemnity for material and moral damages arising from a workplace accident, transferring this from the Ordinary Courts (i.e. the States) to the Labor Courts. However, out of respect for the security and administration of justice, it defined that the new understanding would come into effect as of Constitutional Amendment No. 45, of 2004, which changed the

constitutional rule of competency for such cases. Cases under way before the State Courts, in which a sentence on merit had already been rendered, would stay there. On the other hand, cases not yet judged on merit would be transferred to the Labor Courts, while maintaining the procedural acts practiced so far.

Another court, the Higher Court of Justice (STJ), responsible for standardizing case law in infra-constitutional cases, has displayed a certain resistance against applying prospective effects to the change in a position in case law, understanding that art. 27 of Federal Law No. 9,868/1999 authorized the modulation of effects by the Federal Supreme Court alone. In the judgment of Regulatory Appeal in Special Appeal No. 1,202,151, the 4th Bench of the STJ asserted that "*faced with the absence of legal authorization and the patent distinction between the techniques of judgment of a direct action of unconstitutionality and the jurisdictional activity constitutionally attributed to the STJ, we hold the modulation of effects of a decision performed by the Private Law Section unfitting, albeit in the case of an appeal representing controversy*".[35]

However, we find that the Higher Court of Justice has in some judgments already applied prospective effects to decisions that revoke precedents. In Habeas Corpus 28,598/MG,[36] the Higher Court of Justice understood that its new position; – that intimation of the Public Prosecutor's Office takes place upon the case records arriving at the institution and not with the prosecutor's statement of awareness, should be applied with future effects only, so as to safeguard legal security and trust.

As to the Regional Federal Courts, courts at 2nd Instance among the Brazilian Federal Courts, their case law shows that they themselves only modulate the effect of their decisions if the STF has already modulated effects in a judgment that is similar to what is being judged by those Courts.

As we saw in the introduction to this work, besides court decisions, the Statements, and in particular the recent Binding Statements, also perform the role of precedent in the Brazilian legal system.

However, given the peculiar formatting of the statements, pronouncements of case law consisting of reiterated judgments at the STF or STJ on a determined issue, as a rule we do not identify a specific form of prospective modulation of their effects when a statement is revoked or modified.

Some examples, though, can be found in the Brazilian system.

On the other hand, in the case of modification of a statement with binding effects (the exclusive competency of the Federal Supreme Court) either revising it or cancelling it pursuant to art. 103-A, main section and 2nd Paragraph of the Federal Constitution (which has not yet happened in the Brazilian system), anyone enjoying

[35]Higher Court of Justice. Regulatory Appeal in Special Appeal 1202151/RS. Reporting Justice MARCO BUZZI, FOURTH BENCH, judged on Oct. 16 2012. Court Gazette of Nov. 12 2012.

[36]Higher Court of Justice. 5th Bench. HC 28.598/MG. Reporting Justice Laurita Vaz. Court Gazette of Aug. 01 2005.

legitimacy to file a direct action of unconstitutionality may request its amendment or cancellation, so as to adapt it, after a careful discussion of the matter, to needs both legal and social.

However, the STF has already issued and promulgated a Binding Statement with prospective effects. In 2008, in the judgment of Extraordinary Appeal No. 556,664, which proposed the issuance of Binding Statement No. 8, the Court ruled, by majority, for partial modulation of the effects of the new Binding Statement, "taking into account the repercussion and legal insecurity that may occur in the case". This involved a judgment for the unconstitutionality of articles of certain laws that addressed the rules for lapse and limitation of tax credits, which were widely understood as being 10 years and, after the judgment, had their limitation of 5 years confirmed.

Now, if the judgment of this appeal, and also issuance of a binding statement arising from it, had effects *ex nunc*, this would generate great legal insecurity and serious harm to the public coffers, and thus the Judges of the STF saw fit to modulate the effects of the Statement "*so as to rule out the possibility of sums collected in these conditions being repeatedly held undue, with the exception of lawsuits filed before conclusion of the judgment*."[37]

The attribution of prospective effectiveness to the new precedent is permeated by debates surrounding issues of different kinds, at times recommending while at others forbidding its application, which demonstrates just how complex and up-to-date the issue is.

Among the principal advantages attributed to prospective effectiveness, we may list:

(i) It allows remedying an interpretation in case law considered obsolete[38];

Court decisions must harmonize with the current social and political values, so as to do justice and in this way also legitimizing the jurisdictional function. Thus, when significant social and political changes occur, which make the precedent obsolete and outdated, unfit to reflect the current state of things, it would generate dissatisfaction on the part of the citizens and compromise the substantial isonomy among them, since new legal situations, unleashed in the light of the new-socio-political scenario, would be judged in the previous framework, causing a feeling of unfairness and mistrust. Thus, the attribution of prospective effects to the new precedent would affect only new legal situations, occurring once the new

[37]STF, Special Appeal 556664, Reporting Justice Gilmar Mendes. Plenary Session, judged on June 12 2008, GENERAL REPERCUSSION – MERIT. Court Gazette 216 – DISCLOSED Nov. 13 2008, PUBLISHED Nov. 14 2008. See also the decision, taking the same line, in Special Appeal 559.943 (Reporting Justice Carmen Lucia. Plenary Session. Published Court Gazette of Sep. 26 2008): "Declaration of unconstitutionality with effect "ex nunc" except for lawsuits filed up to June 11 2008, on which date the Federal Supreme Court declared the unconstitutionality of articles 45 and 46 of Law No. 8212/1991."

[38]GASCÓ, Francisco de P. Blasco. *La norma jurisprudencial*. Valencia: Tirant lo blanch. 2000. p. 100.

precedent was established. On the other hand, application of the new precedent to past situations (full retroactive application),[39] prior to the new social and political configuration, would also prove unfair, for two reasons.

Firstly, given its apparition in the setting of the past socio-political scenario, in relation to which the previous precedent proved to be suited.

In second place, the attribution of prospective effect safeguards the legitimate trust of citizens in the system of precedents, to the extent that they preordain their behavior and relations in the light of the precedent in effect. There are thus cases in which the attribution of retroactive effects would amount to a surprise factor, surprising the citizens who had already set up relations in conformance with the precedent in force at the time, and shaking their trust.[40]

(ii) Safeguards the legal security and trust deposited by the citizens in a given line of case law:

The system of precedents arouses in the citizens legitimate trust, in that they can base their behavior and relations according to the parameters outlined in the current understanding of case law. It is asserted that this trust arises, to a great extent, from the stability of precedents, that is to say, from the propensity to maintain them over time.

However, it must be added that, as analyzed in the previous item, there are situations in which maintaining the precedent may generate a violation of the values of fairness and isonomy, forcing its revision. If the reasons that justify revision of the precedent are relevant, its overrule will be advisable, which will represent, per se, undermining stability. Alongside stability, predictability must be considered as factors fundamental for legal security. Thus, the attribution of prospective effects to the precedent, to have this applied to future cases only, strengthens the citizens' trust in the system, protecting those who based their relations on the parameters set by the precedent in force at the time.

[39] At this point there should be a distinction between the different modalities of efficacy attributed to precedents. Full retroactive application: application of the new precedent to all past and future cases, including those already *rem judicatum*. Partial retroactive application: the new doctrine regulates all new cases, except those whose judgment has already been finally concluded or whose reexamination is limited by other normative rules. Full prospective application: the new rule will only fall upon situations configured after the date of its affirmation or a certain future event, not affecting even the parts of the case that led to its formulation, the case in judgment and events that occurred previously will still be governed by the previous understanding. Partial prospective application: the new precedent must be applied to the case in judgment and to facts occurring subsequently, but not those previous. Prospective prospectivity: application of the new precedent as from a given moment in the future. MELLO, Patrícia Perrone Campos. *Precedentes. O desenvolvimento judicial do Direito no constitucionalismo contemporâneo.* Rio de Janeiro: Renovar, 2008, p. 261. ROSITO, Francisco. *Teoria dos Precedentes Judiciais. Racionalidade a Tutela Jurisdicional.* Curitiba: Juruá, 2012. p. 335.

[40] MELLO, Patrícia Perrone Campos. *Op. cit*, p. 265.

At times, the precedent revoked enjoys credibility among society, and so far the courts have given no signs as to the possibility of its modification (signaling).[41]

And there may be a situation consolidated on the basis of the previous normative interpretation, which would impede the application of retroactive effects. In this regard, in the judgment of Direct Action of Unconstitutionality (ADI) 2240,[42] the Federal Supreme Court declared the unconstitutionality of Law 7,619 from the State of Bahia, which had created a new municipality, although without decreeing its nullity, keeping it in effect for a period of 24 months. That is to say, the Brazilian Constitutional Court opted to set a milestone in the future as of when the new law would be null and void. Until then, the legal situations established on the basis of the unconstitutional law are protected.

On the other hand, application of the new understanding even to sentences that have become *rem judicatum* (full retroactive application) would compromise the administration of justice, as it would boost the trend to litigation, with the reopening of cases judged definitively, and would discourage the lower courts from applying precedents, as these could always be changed, affecting previous decisions that applied them regularly, while in effect. Consequently, prospective overruling can be an instrument in favor of security and trust in the system of precedents.

(iii) The implementation of a new public policy is projected precisely onto the future, and frequently there is no need to give it retroactive effects.

Quite often, the formation of a new understanding of a certain matter refers to the implementation of a new public policy, to be applied in future. On this point, there would be no need at all to attribute retroactive efficacy to the legal precedent, and it proves more suitable to apply prospective efficacy.

On the other hand, critics of prospective overruling point out the following disadvantages:

(i) A judicial resolution with merely prospective efficacy would be no more than an *obiter dictum*[43]:

The prospective overruling is criticized, more precisely full prospective application, in which the new precedent is not applied to the case in which the new understanding was applied, but to future cases only. It is argued that this would be more like an *obiter dictum*, or rather, like remarks made during judgment of the case, but which bear no influence on its outcome. It is understood that this stance discourages citizens from presenting new arguments and seeking a revision of the precedent, given that they themselves would not benefit from their arguments being accepted. The citizens' inertia would in the long run contribute to crystalizing

[41] MARINONI, Luiz Guilherme. *Precedentes obrigatórios*. São Paulo: Revista dos Tribunais. 2010. p. 421.

[42] Federal Supreme Court. Plenary Session. ADIn 2,240, Reporting Justice Eros Grau. Court Gazette Aug. 03 2007.

[43] GASCÓ, Francisco de P. Blasco. *Op. cit*. p. 101.

the precedent in effect and, as a consequence, to their becoming obsolete, which would compromise the citizens' trust in the system of precedents, increasing the feeling of unfairness.[44]

On the other hand, in favor of prospective overruling is the assertion that so-called partial prospective application is possible, in which the new precedent is applied to the concrete case in which it was established and also to future cases, which would get around the criticism above.

It should be stated that the choice between adopting totally or partially prospective effects depends on a prudent appraisal by the organ of judgment, weighing up, on the one hand, preservation of the stability and predictability of precedents, which would forbid their immediate application to the case in point, and on the other, benefiting the litigants with the new understanding set on the basis of their arguments. It should be borne in mind that, in a court dispute, there are counterpoised interests, and it is likely that adoption of the new understanding in the case in point will meet the interests of just one of the litigants, taking by surprise the other, who had taken his basis on the prior precedent.

(ii) The function of case law is focused above all on the production of retroactive decisions:

The action of the jurisdictional organs is focused mainly on deciding on situations that have already occurred, and thus retroactive efficacy would be inherent to them. The application of prospective effects to court decisions would be contrary to the very essence of the function of case law, bringing it closer to the specific function of the Legislative Branch, in the enactment of laws, with effects projected into the future.

However, there arises the counter-argument that the role of the Constitutional Courts is not only to judge the case in point, but also to strive for the integrity of the constitutional system.

The application of retroactive effect to certain precedents may compromise the legitimate trust of the citizens and predictability, as already clarified, and it is the role of the Judiciary Branch to be alert to such circumstances, so as to perform its role properly and act with fairness.

Lastly, it may be added that full retroactive application allows the new precedent to affect, also, sentences that have become *rem judicatum*, which undermines the unity of jurisdiction and is much criticized in doctrine.[45]

[44]Guilherme Nogueira highlights that the ideal of unifying case law cannot lead to its paralysis. There must be a focus on unification *in space*, so that the same interpretation is adopted by all the courts, but not its unification *in time*, preventing the adoption of a new interpretation, in harmony with the new political and social parameters. NOGUEIRA, Gustavo. *Stare decisis et non quieta movere: a vinculação aos precedentes no direito comparado e brasileiro*. Rio de Janeiro: Lumen Juris. 2011. p. 188.

[45]GRECO, Leonardo. A declaração de constitucionalidade da lei pelo STF em controle concentrado e a coisa julgada anterior – análise do Parecer 492 da Procuradoria Geral da Fazenda

Case law, as seen at the beginning of this report, even though not recognized among the sources of law, must today be considered as if it were, not least due to its growing importance in the Brazilian Proceeding.

When interpreting legal rules, particularly when these confer prospective effects on the new understanding formed, the Court create the law. Its denial may be considered a "*fiction*" by doctrine. Every time the court amends the understanding established in case law on a certain issue, there is the unquestionable presence of a "*normative effect*",[46] with both direct and indirect reflexes on the legal community and society as a whole.

Denying the creative power of case law and raising it as an insurmountable obstacle may end up stopping the courts from reviewing mistaken or obsolete interpretations, forcing them to condone and perpetuate injustices and, in consequence, not perform their function. Through the interpretation of rules and the formation of case law, the courts can enhance the legal system.

However, it is not a case of transforming the courts into organs of judgment without limits, not least because the Legislative Branch is not deprived of the power to enact new rules, even if contrary to the understanding formed in case law on the law revoked.

The law (and in particular, the Federal Constitution), constitutes the limit on the interpretative activity of the courts, and thus there is no incompatibility, but rather complementarity between the legislative and jurisdictional functions. Interpretation by the courts has been harmonizing and integrating to the law created by the lawmakers.

Therefore, the application of prospective effects to the interpretative function of the courts is due to a prudent weighing-up of the values involved, respecting the legitimate trust of the citizens, predictability and legal security, which are indispensable to the Democratic State of Law.

The blind and unconditional application of retroactive effects might, in certain specific cases, cause losses, not only to the citizens directly subject to application of the respective rule, but to the very legitimacy of the Judiciary Branch and the legal system in force.

Final Remarks

The new constitutional order, based on making principles positive, placing value on argumentative activity[47] and legal rationality, with the application of legal

Nacional. *In Revista Eletrônica de Direito Processual,* v. IX, ano 6. Jan-Jun 2012. www.redp.com.br.

[46]MOLFESSIS, Nicolas. *Les revirements de jurisprudence*. Paris: Lexis Nexis Litec. 2005, p. 12.

[47]FIGUEROA, Alfonso García. Princípios e direitos fundamentais. In: SOUZA NETO, Cláudio Pereira; SARMENTO, Daniel. (Coord.). *A constitucionalização do direito*: fundamentos teóricos e aplicações específicas. Rio de Janeiro: Lumen Juris, 2007, p. 16.

hermeneutics,[48] has changed the appearance of our legal system, entailing consequences such as the judicialization of politics and legal activism.[49]

Thus, the power formerly concentrated on the democratic lawmaker is now also wielded by the Judiciary Branch,[50] through the interpretation and application of the rules, and also the constitutional control exercised over legislative acts, creating a new pragmatic dimension, especially in the form of interaction between these two Branches.[51]

As a result of the increase in power of the jurisdictional organ, the responsibility of the judge has increased; he also finds himself pressed to increase his extra-dogmatic knowledge, in the philosophy of law, public policies and economics, for example.[52]

The increase in the judge's powers is a reality in various legal systems, as a form of enhancing the quality of justice,[53] and takes on various external forms, such as the use of procedural techniques[54] that allow greater management and adaptation of the proceeding, assuring the citizens of protection more egalitarian, fair and timely. This has strengthened the role of case law, which through brave and groundbreaking decisions has often allowed justice to be actually achieved, without prejudice to

[48] *"The law, rather than a rule or institution, is a work of hermeneutics, a discourse articulated between the rule and the fact, letter and spirit, order and disorder, force and justice."* CAMBI, Eduardo. *Neoconstitucionalismo e neoprocessualismo*: direitos fundamentais, políticas públicas e protagonismo judiciário. São Paulo: Revista dos Tribunais, 2009, p. 87.

[49] *"The idea of legal activism is linked to a broader and more intensive participation by the Judiciary in materializing the constitutional values and ends, with greater interference in the space of action of the other two Branches. The activist stance expresses itself by means of different conducts, which include: (i) direct application of the Constitution to situations not expressly contemplated in its text and regardless of a statement from the ordinary legislature; (ii) the declaration of unconstitutionality of normative acts issued by the lawmaker, based on criteria less strict that those of blatant and ostensive violation of the constitution; (iii) the imposition of conducts or abstentions on the public power, particularly in the realm of public policies."* (BARROSO, Luís Roberto. Judicialização, ativismo judicial e legitimidade democrática. RDE. *Revista de Direito do Estado*, v. 13, 2009. p. 77).

[50] On the crisis of representativeness of the Legislative Branch to justify judicial activism, particularly in the protection of fundamental rights, see: SARMENTO, Daniel. O neoconstitucionalismo no Brasil: riscos e possibilidades. In: QUARESMA, Regina; OLIVEIRA, Maria Lúcia de Paula; OLIVEIRA, Farlei Martins Riccio de. (Coord.). *Neoconstitucionalismo*. 1. ed. Rio de Janeiro: Forense, 2009, p. 293).

[51] On the subject, see: CABRAL, Trícia Navarro Xavier. Filosofia do direito, neoconstitucionalismo e processo contemporâneo. *Revista Ajuris*, v.123, pp. 297–335, 2011.

[52] MAIA, Antonio Cavalcanti. *Jürgen Habermas:* filósofo do direito. Rio de Janeiro: Renovar, 2008, p. 27.

[53] On the new trends around the world, see: CHASE, Oscar G.; HERSHKOFF, Helen (eds.), *Civil litigation in comparative context*. St. Paul: Thomson/West, 2007, pp. 241–260.

[54] On some of these techniques, consult: CABRAL, Trícia Navarro Xavier. Flexibilização procedimental. REDP – *Revista eletrônica de direito processual*, v.VI, pp. 135–164, 2010.

the important contribution of doctrine to the enhancement and sophistication of procedural law.[55]

This judicial activity, allied to the exponential growth of the Brazilian population,[56] and the appearance of new rights,[57] has paradoxically resulted in huge troubles for the very provision of jurisdiction, which reveals itself to be falling short, bureaucratic and, particularly, extremely slow, while the national authorities[58] have made countless attempts to achieve the reasonable duration of the case.[59]

Thus, new laws have been enacted,[60] justice is penetrating the backwoods,[61] and new methods of management of the justice secretariats have been implemented.[62] In spite of this, there is, in the words of Kazuo Watanabe,[63] a "*pent-up trend to litigation*", which, spurred on by the 1988 Constitution and the new profile of the judge, mentioned above, fills up the already overloaded in-trays of the Judiciary Branch.

At the Higher Courts, the situation is even more serious; according to official data from December 2012, at just the STF[64] and STJ,[65] there were 66,945 and 317,232 cases in the file, and an annual distribution, in 2012, of 46,392 and 289,524, respectively.

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[55]Cf.: CABRAL, Trícia Navarro Xavier. Segurança jurídica e confiança legítima: reflexos e expectativas processuais. In: FUX, Luiz (Coord.) *Processo Constitucional*. Rio de Janeiro: Forense, 2013, pp. 847–895.

[56]According to official data, in the last twenty years the Brazilian population has leapt from less than 147 million in 1990, to 200 million people in 2012, in increase of 36 % (www.ibge.giv.br, access on Sep. 11 2013).

[57]See, for example, the consolidation of the *Consumer Defense Code* (federal law 8,078/90), the *Statute of the Elderly* (federal law 10,741/2003), the *Statute of the Soccer Fan* (law 10,671/2003) and, more recently, the *Statute of Youth* (federal law 12,852/2013).

[58]The powers of the Republic have made "pacts" seeking, among other things, to improve the provision of jurisdictional services. See: http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=165751, Access on Sep. 11 2013.

[59]On the question of the time of the proceeding, consult: http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=165751, acesso em 11 set. 2013.

[60]Just the CPC, which dates from 1973, has already been reformed over twenty times.

[61]See, for example, the march inland of the federal courts, based on the creation of 183 courts throughout the entire country (federal law 10,772/2003).

[62]In this context, we must mention the work of the National Council of Justice (CNJ), which has set *targets* for the entire Judiciary Branch: http://www.cnj.jus.br/gestao-e-planejamento/metas, access on Sep. 11 2013.

[63]WATANABE, Kazuo. Filosofia e características básicas do Juizado Especial de Pequenas Causas, *in Juizado Especial de Pequenas Causas* . WATANABE, Kazuo (coord). São Paulo: RT , 1985, p. 2.

[64]http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=REAIProcessoDistribuido, access on Sep. 11 2013.

[65]http://www.stj.jus.br/webstj/Processo/Boletim/verpagina.asp?vPag=0&vSeq=185, access on Sep. 11 2013.

In the light of all the foregoing, an *alternative* used for containment of cases, particularly at the phases of appeals, has been "*defensive case law*",[66] a reiterated practice of searching for tiny formal flaws and/or gaps in interpretation to cut down, at admissibility, thousands of intents to appeal.[67] In this regard, as pointed out by José Carlos Barbosa Moreira,[68] various illegitimate filters have been used routinely in Brazil, such as not admitting an appeal if the rubber stamp of its filing is illegible (which would apparently prevent proof of its timeliness) or the impossibility of overcoming a flaw of representation in exceptional routes, for supposed "*appellate non-existence*".

There is, thus, a patent intent to inhibit intentions to lodge appeals, identified in tens of thousands of decisions of inadmissibility. To have a more precise notion of the strength of this practice, suffice to note that even at the STF, a court that does not enjoy competency to analyze eminently procedural issues, according to data from the Getulio Vargas Foundation business school, of the ten decisions most-repeated at that Court, 9 (nine) concern questions of inadmissibility.[69]

Another way out has been the widespread use of judgments by sampling, supported by legal[70]/regulatory[71] changes, in which the Judiciary rules on only one or a few cases on a given matter, with the subsequent reproduction, almost infinite, of the same decision for the thousands of cases held up or already duly separated, by piles or lists, by the most varied assistants.

This measure, while apparently favoring isonomy (given that, in thesis, like cases will have like results), has triggered severe criticisms in doctrine, since, for example, due care or rigor is not always employed in the choice of the pilot case, or that representative of the controversy, that is to say, that which the judges will actually examine thoroughly so that, once the precedent has been established, such decision will be replicated for all those cases based on an identical legal issue.

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[66]Defensive case law, in the words of Justice Humberto Gomes de Barros, at the time of his taking office as President of the STJ, is a practice *"consisting of the creation of hindrances and pretexts to stop the appeals addressed to him from being received and heard"*. See: http://www.stj.gov.br/portal_stj/publicacao/engine.wsp?tmp.area=551&tmp.texto=87057, access on Sep. 09 2013.

[67]On the issue: O novo Código de Processo Civil vs. A jurisprudência defensiva. *Revista de Processo*, v. 210. São Paulo: RT, 2012, pp. 262–302. O formalismo exacerbado quanto ao preenchimento de guias de preparo: ainda a jurisprudência defensiva dos Tribunais Superiores. *Revista de Processo*, v. 193. São Paulo: RT, 2011, pp. 231–253; O acesso à justiça e a jurisprudência defensiva dos tribunais superiores. *Revista do Instituto dos Advogados de Minas Gerais*, v. 16. Belo Horizonte: IAMG, 2010, pp. 371–388.

[68]BARBOSA MOREIRA, José Carlos. Restrições ilegítimas ao conhecimento dos recursos, *in Temas de Direito Processual. Nona Série.* São Paulo: Saraiva, 2007, pp. 267–297.

[69]In this regard, please see: http://supremoemnumeros.fgv.br/relatorios/relatorio-1-o-multiplo-supremo e http://www.conjur.com.br/2011-jul-06/justica-dar-conta-demanda-judiciario-legislativo, both with access on Sep. 11 2013.

[70]See arts. 543-B and 543-C, CPC, added, respectively, by laws 11,418/06 and 11,672/08.

[71]STF Internal Regulations, arts. 321–329, amended by regulatory amendments 21/2007 and 23/2008; and STJ Internal Regulations, arts. 255–257, complemented by Resolution No. 08/2008.

At times, the matter is not even reasonably debated along the ordinary routes, with various gaps and doubts concerning a given matter, and even so it is presented to the scrutiny of the judges for discussion and subsequent standardization; in other cases, the occurrence of a virtual judgment (as happens, for example, at the STF, when handling general repercussion[72]) hinders (or even prevents) all those interested from actually intervening and influencing that judgment, with the upshot that the future precedent, in actual fact, has a low rate of legitimacy, and consequently of acceptance among the legal community.

Lastly, it is not unusual, regrettably, for one selfsame issue that has been affected by a given judge has also been by another, a situation which, if not corrected in good time, will generate, at times at the very same higher court, two different precedents on the same issue.

In this regard, there are quite often cases in which lawsuits with the same legal grounds, and at times signed by the same counsel, are judged by means of quite different procedures, in a kind of random case law, as well defined by Eduardo Cambi.[73,74]

As if that were not enough, another artifice used to overcome the crisis of effectivity faced by the Judiciary Branch has been the repeated practice of disrespect for legal security, at the time of a change of course in case law on a certain issue.

Thus, for instance, the STF decided, in a clear violation of legal security, that the decision taken in RE-QO AI No. 715.423, which defined the relevant day for the

[72]The "Virtual Plenary Session" of the STF, for the judgment of General Repercussion, may be consulted at: http://www.stf.jus.br/portal/jurisprudenciaRepercussao/listarProcesso.asp?situacao=EJ, access on Sep. 11 2013.

[73]"(. . .) The idea of *random case law* falls precisely within this context, that is to say, when the same legal issue is judged in two or more different ways. Thus, if the party is lucky enough to have the case distributed to a given judge, with a favorable understanding of the legal issue involved, he obtains the jurisdictional measure; otherwise, the decision does not recognize the right he pursues." (CAMBI, Eduardo. Jurisprudência Lotérica, *Revista dos Tribunais*, São Paulo: RT, year 90, v.786, Apr. 2001, p. 111).

[74]We shall explain: imagine that a given appeal was distributed to the 1st Civil Chamber of a certain Appellate Court, which had, by coincidence, a position established on the legal thesis addressed therein; in this case, the reporting judge, finding support in art. 557, main section, CPC, may *refuse to hear* the appeal, if the guidance produced by the sentence *coincides* with that of the Appellate Court; however, it may be that if that same appeal had been distributed to the 2nd Civil Chamber of the same court, which is made up of judges who do not agree with the *dominant thesis* at the court, in this case, it is quite likely that this appeal will be heard and judged on its merit, by the bench as a whole, in a procedure quite different from what would have happened had the appeal been *drawn by lots* to the 1st Chamber. Please note: a matter of *luck* defined the procedure of the appeal, something which, obviously, cannot be tolerated by a legal system that respects the constitutional procedural guarantees.

incidence of general repercussion in the extraordinary appeal, could also be applied to cases in progress,[75] in patent offense to a procedural acquired right.[76]

At the time, it was understood as possible to apply the novel procedure of repetitive appeals described in art. 543-B of the CPC, with efficacy ex tunc, given the fact of, among other reasons, "*easing the works and speeding up the judgment of the matter*", as per an excerpt taken from the vote of Justice Menezes Direito in RE-QO 540.410,[77] a measure that in practice entailed, as the most sensitive consequence, the return of thousands of cases to the courts of origin, alleviating the workload of the STF, yet with manifest harm to those awaiting jurisdiction.[78]

We thus conclude this study by affirming that the adoption of the mechanism of the precedent in Brazilian law, and as a consequence, the manifestations of prospective overruling, call for greater institutional maturity, to avoid its violating either the target-principle of Legal Security and also the rendering of decisions with the paramount aim of reducing the number of cases or avoiding new appeals being lodged.

References

Abboud, Georges. 2008. Súmula Vinculante versus precedentes: notas para evitar alguns enganos. *Revista de Processo* 33(165): 220.

Barbosa Moreira, José Carlos. 2007. Restrições ilegítimas ao conhecimento dos recursos. In *Temas de Direito Processual. Nona Série*, 267–297. São Paulo: Saraiva.

[75]Previous and subsequent extraordinary appeals, when multiple, are subject to suspension, withdrawal and recognition of loss, and may be returned to their origin, if already pending at the STF, whenever they address issues with general repercussion recognized by the STF (art. 543-B, 1st and 3rd paragraphs, RE-QO AI 715.423, Justice Gilmar Mendes; RE-QO 540410, Reporting Justice Cezar Peluso, taken from www.stf.jus.br, item "general repercussion", access on Sep. 11 2013).

[76]This expression. was recently adopted by LACERDA, but had long been mentioned by MAXIMILIANO: "(. . .) The postulates in force on the date of the sentence establish the procedural rules, and its efficacy and executive force. (. . .) *The postulates reigning on the date of the sentence resolve its unimpugnability, remedies against the judgment, the admissibility of any appeal, as this constitutes a procedural acquired right"*. (MAXIMILIANO, Carlos. *Direito intertemporal*. 2. ed. São Paulo: Freitas Bastos, 1955, pp. 274 & 278. Similarly, LACERDA, Galeno. *O novo direito processual civil e os feitos pendentes. 2. ed.* Rio de Janeiro: Forense, 2006, p. 3; emphasis added).

[77]Page 1147 of RE-QO 540.410, whose entire content is available at http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=555757, access on Sep. 11 2013.

[78]This was the assertion by Justice Marco Aurelio, in his defeated vote (page 1146 of RE-QO 540.410): "(. . .) relegating the proceedings, whose appeals were lodged on a date prior to the regulation, to their origin, may imply a consequence appropriate to general repercussion, and a most serious one, which is the court of origin declaring impaired the extraordinary appeal already admitted or, in the case of a point of view different from the Court in the case in which general repercussion was established, coming to modify the ruling formalized, a consequence, as I said, of the greater gradation of general repercussion, without the situation being supported by the repercussion (. . .)". (Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=555757, access on Sep. 11 2013).

Barroso, Luís Roberto. 2009. Judicialização, ativismo judicial e legitimidade democrática. *RDE – Revista de Direito do Estado* 13: 77.

Cabral, Trícia Navarro Xavier. 2010. Flexibilização procedimental. *REDP – Revista eletrônica de direito processual* VI: 135–164.

Cabral, Trícia Navarro Xavier. 2011. Filosofia do direito, neoconstitucionalismo e processo contemporâneo. *Revista Ajuris* 123: 297–335.

Cabral, Trícia Navarro Xavier. 2013. Segurança jurídica e confiança legítima: reflexos e expectativas processuais. In *Processo Constitucional*, ed. Fux, Luiz, 847–895. Rio de Janeiro: Forense.

Cambi, Eduardo. 2001. Jurisprudência Lotérica. *Revista dos Tribunais* 786(90): 111, São Paulo: RT.

Cambi, Eduardo. 2009. *Neoconstitucionalismo e neoprocessualismo: direitos fundamentais, políticas públicas e protagonismo judiciário*, 87. São Paulo: Revista dos Tribunais.

Chase, Oscar G., and Helen Hershkoff (eds.). 2007. *Civil litigation in comparative context*, 241–260. St. Paul: Thomson/West.

Fairchild, Thomas E. 1968. Limitation of new judge-made law to prospective effect only: "Prospective Overruling" or Sunbursting. *Marquette Law Review* 51: 254. Available at: http://scholarship.law.marquette.edu/mulr/vol51/iss3/3

Faria, Márcio Carvalho. 2009. A jurisprudência defensiva dos Tribunais Superiores e a ratificação necessária (?) de alguns recursos excepcionais. *Revista de Processo* 167: 250–269. São Paulo: RT.

Faria, Márcio Carvalho. 2010. A duração razoável dos feitos: uma tentativa de sistematização na busca de soluções à crise do processo. *REDP – Revista Eletrônica de Direito Processual* VI: 475–496.

Ferraz, Taís Schilling. 2011. Repercussão Geral – muito mais que um pressuposto de admissibilidade. In *Repercussão Geral no Recurso Extraordinário, estudos em homenagem à Ministra Ellen Gracie*, ed. Leandro Paulsen, 77. Porto Alegre: Livraria do Advogado Editora.

Gasco, Francisco de P. Blasco. 2000. *La norma jurisprudencial*, 100. Valencia: Tirant lo blanch.

Greco, Leonardo. 2012. A declaração de constitucionalidade da lei pelo STF em controle concentrado e a coisa julgada anterior – analysis of Legal Opinion 492, from the Attorney-General's Department of the National Treasury. *Revista Eletrônica de Direito Processual* IX(6). www.redp.com.br

Mancuso, Rodolfo de Camargo. 2010. *Recurso extraordinário e recurso especial*. 11. ed. revised, updated and expanded in accordance with laws 11.417/2006, 11.418/2006, 11.672/2008 and amendments to the regulations at the STF and STJ, 356–357. São Paulo: Editora Revista dos Tribunais.

Marinoni, Luiz Guilherme. 2010. *Precedentes obrigatórios*. São Paulo: Revista dos Tribunais.

Marinoni, Luiz Guilherme. 2011. Eficácia temporal da revogação da jurisprudência consolidada dos Tribunais Superiores. *Revista dos Tribunais* 906: 255. Abr.

Marinoni, Luiz Guilherme. 2011. Segurança dos atos jurisdicionais (princípio da ?). *Processos Coletivos*, Porto Alegre 2(2): 22.

Mello, Patrícia Perrone Campos. 2008. *Precedentes. O desenvolvimento judicial do Direito no constitucionalismo contemporâneo*, 261. Rio de Janeiro: Renovar.

Mendes, Gilmar Ferreira. 2004. *Jurisdição Constitucional*, 364–365. São Paulo: Saraiva.

Mitidiero, Daniel. 2012. Fundamentação e precedente – dois discursos a partir da decisão judicial. *Revista de Processo* 206: 61. Abr. DTR\2012\2708.

Molfessis, Nicolas. 2005. *Les revirements de jurisprudence*, 10. Paris: Lexis Nexis Litec.

Nogueira, Gustavo. 2011. *Stare decisis et non quieta movere: a vinculação aos precedentes no direito comparado e brasileiro*, 188. Rio de Janeiro: Lumen Juris.

Pinho, Humberto Dalla Bernardina de. 2010. *Os Princípios e as Garantias Fundamentais no Projeto de Código de Processo Civil: breves considerações acerca dos artigos 1° a 13 do PL n° 166/10", in* Revista Eletrônica de Direito Processual, at http://www.redp.com.br, VI: 49/92.

Pinho, Humberto Dalla Bernardina de. 2013. *Direito Processual Civil Contemporâneo.* 5ª edição. Rio de Janeiro: Lumen Juris.

Raatz, Igor. 2011. Considerações históricas sobre as diferenças entre Common Law e Civil Law. Reflexões iniciais para o debate sobre adoção de precedentes no direito brasileiro. *Revista de Processo* 199: 159. DTR\2011\2451.

Reis, Mauricio Martins. 2013. Precedentalismo judiciário: precedentes obrigatórios ou persuasivos? A força argumentativa dos julgados do STF. *Revista dos Tribunais* 932: 389. DTR\2013\3150.

Requião, Maurício. 2013. O caráter normativo do precedente. *Revista de Processo* 223: 333. DTR\2013\7490.

Rodrigues, Roberto de Aragão Ribeiro. 2013. *Ações Repetitivas*: o novo perfil da tutela dos direitos individuais homogêneos, 138–139. Curitiba: Juruá.

Sarmento, Daniel. 2008. O neoconstitucionalismo no Brasil: riscos e possibilidades. texto disponível em http://www.editoraforum.com.br/sist/conteudo/lista_conteudo.asp?FIDT_CONTEUDO=56993

Theodoro Júnior, Humberto. 2007. *As novas reformas do Código de Processo Civil*, 11–12. Rio de Janeiro: Forense.

Tushnet, Mark. 2013. (Traduzido por Flavio Portinho Sirangelo): Os precedentes judiciais nos Estados Unidos. *Revista de Processo* 218: 99. Abr. DTR\2013\253.

Wambier, Teresa Arruda Alvim. 2013. *Súmula vinculante: figura do common law?* Available at www.revistadoutrina.trf4.jus.br. Accessed 09 Sep 2013.