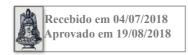


BINDING PRECEDENTS IN BRAZIL:

HOW COMMON LAW TRADITION CAN HELP BRING STABILITY AND COHERENCE.

PRECEDENTES VINCULANTES NO BRASIL: COMO A TRADIÇÃO DO COMMON LAW PODE AJUDAR A DAR ESTABILIDADE E COERÊNCIA



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ABSTRACT: This article was written for the Berger International Speakers lecture given at Cornell University Law School on March 2018. It addresses – for an audience of American and international law students, as well as American law scholars – Brazil's current state regarding binding judicial precedents, the new Civil Procedure Code, as well as other interesting characteristics of its legal system. Alongside its description of Brazil's current state regarding binding precedents, the article addresses the country's abusive use of judicial dockets and other rule-like formulations and criticizes court-made rules in general. The article concludes by pointing out how some common law traditions can help Brazil to better implement a system of binding judicial precedents.

KEYWORDS: Binding precedents. Common law and Brazil. Stability.

RESUMO: O presente artigo foi escrito para a palestra proferida em Março de 2018 pelo autor, como convidado da Berger International Speakers Series, na Cornell University Law School. O artigo descreve – para uma audiência formada por alunos e professores americanos e de outras nacionalidades – o sistema de precedentes vinculantes no Brasil, o Novo Código de Processo Civil Brasileiro, bem como outras características do sistema jurídico brasileiro. Além disso, o artigo aborda o uso abusivo de súmulas e outros standards judiciais pelas Cortes brasileiras, e critica o uso de normas judiciais em geral pelos Tribunais. Ao final, o artigo apresenta como um estudo da tradição do common law pode ajudar a dar coerência e integridade e a melhor implementar o sistema de precedentes vinculantes brasileiro.

PALAVRAS-CHAVES: Precedentes vinculantes. Common Law e o Brasil. Estabilidade.

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1 INTRODUCTION

Judicial decision-making has been the focus of my research for about 5 years and the particular matter of how Courts deal with precedents has concerned me for the better part of the last 3 years and continues to be the center of my academic work. There are several, really intriguing questions surrounding precedents such as:

- i. What is the role of judicial precedents in democratic countries and modern (or contemporary) legal systems?
 - ii. Are precedents formal or material sources of law, and should they be?
 - iii. Do precedents make good law?

As appealing as these questions are, I will not directly address them at this time, because each one of them deserve a lecture of their own, and frankly can be bypassed on this specific lecture. On the other hand, before tackling the specific point of binding precedents in Brazil, there is one important question that we have to address:

iv. Is there still a strong difference between the way common law legal systems and civil law legal system view and apply precedents on a daily basis?

Anyone who wishes to answer this question has to refer to Cornell's Emeritus Professor Robert S. Summers and the comparative study he coordinated with Professor Neil McCormick, published in 1997, "Interpreting precedents: a comparative study" (MACCORMICK and SUMMERS 1997) which brought together the most renown scholars from 10 different countries such as Michele Taruffo (Italy) and Robert Alexy (Germany). The conclusion of this grand study was that, although there are some differences in dealing with precedents in common law and civil law countries, they are more formal than material, not representing an "all or nothing" duality but more of a continuum of more or less binding force for precedents in different jurisdictions.

This is important to keep in mind today as we talk about the current situation in Brazil, where a legislative reform of the Civil Procedure Code, enacted in 2015, is trying to give





binding force to precedents by means of formal rules. I will address this issue in 3 parts: (i) context about Brasil that affects precedent based decision-making; (ii) historical account on the binding force of precedents in Brazil, and, (iii) Legislative reform (CPC/2015) and what can be gained with a (strong) doctrine of precedents.

2 CONTEXT ABOUT BRAZIL THAT AFFECTS PRECEDENT-BASED DECISION-MAKING

Many different factors are affecting precedent-based decision-making in Brazil. As many of you know, Brazil is a civil law tradition country mostly influenced by Italian, French and German legal systems, with Portuguese legal traditions inherited along its history. As in most civil law legal systems, the primary source of law is statutory, with judicial decision (in general) occupying a second tier of sources of law, alongside social practices and legal doctrine.

This leads to a practice in Brazil that everything has to be written down as a statute even if the person issuing the statute doesn't have the power to do so. For example, States and Municipalities will commonly edit laws about subjects that aren't in their power, Government Agencies surpass their powers when regulating a law, etc.

Brazil's Constitution is an example of what the doctrine calls an analytic constitution, with 320 articles and over 100 amendments, as opposed to syntactic constitutions such as the United States Constitution (with 7 original articles and 27 amendments to this date). In addition, all 27 States have their own Constitution, and, in some matters (such as tax law), the Federal Government, the 27 States and all 5,570 Municipalities have power to legislate. Between October of 1988 (when the current Constitution was enacted) and September of



2016, it is estimated that there have been almost 5.5 million new laws (or statutes) in Brazil (around 535 new statutes a day)³.

As a general rule, the Judiciary branch can be said to have 4 levels, with first level singular judges (more than 17 thousand), state and federal appeal courts, a Superior Court in charge of federal law and a Supreme Court in charge of constitutional matters. It is relatively cheap to file a civil lawsuit and the Constitution guarantees access to the judiciary, even if you can't afford it. This results in around 30 million new lawsuits each year, where less than 28 million are resolved, accumulating over 70 million lawsuits pending final judgment⁴.

Virtually all decisions are made public in Brazil and in appeal and superior Courts the votes of all members of the panels are made public as well, so on one hand the Brazilian lawyer does not have to rely on 3rd party reports and, in the other, it can be quite difficult to discover which is the "controlling" precedent in a specific case.

Talking about lawyers, they are also identified as a factor making precedent-based decision-making hard in Brazil. It is estimated that Brazil has 1,100 law schools (about 50% of all law schools in the word) (KRAVCHYCHYN 2010), with more than 1.3 million lawyers registered in the National Bar Association and 3 million law degree holders who could not pass the Bar exam. The analogical form of arguing a case based on precedents is different (and maybe more sophisticated) than simply laying out formal rules that allegedly applies to your case (syllogistic form or argumentation), and the poor quality of lawyers is reflected on cases which are poorly argued and ultimately results in poor precedents.

Judges are also identified as a main cause of fragile adherence to precedents in Brazil. There is a long-lasting idea that judges can ultimately decide cases based on their "free and personal conviction (or understanding)", or what is called "livre convencimento" in Portuguese. This idea was born from a particular rule judges follow when analyzing evidence in criminal cases, which basically tells judges that there is no formal hierarchy of evidence (a confession is worth, in theory, the same thing as a photograph, and the prevailing evidence is

⁴Data from 2015, full research available at: http://www.cnj.jus.br/programas-e-acoes/pj-justica-em-numeros (p. 43).



³Full research available (in Portuguese) at: https://ibpt.com.br/noticia/2626/Excesso-de-legislacao-provoca-conflito-entre-os-poderes-nos-29-anos-da-Constituicao-de-1988-afirma-IBPT



only determinable when analyzing the present case). In this sense, judges are "free" to give more or less weight to evidence depending on the present case under analysis.

The problem is that this idea spread to include all legal decisions, to the point that judges don't feel obligated to justify their decisions with more than a simple "based on my conviction this is the best outcome" (for an extensive critic see STRECK 2015). This represents a true paradox between the analytical type of Constitution and the extensive statute body in effect in Brazil, which in theory would leave very little space for "personal convictions" of judges, and it got worse when it came to precedents, because sometimes judges would actually acknowledge the existence of a prior decision of a higher court on a specific subject, but would decide the present case in a different form and justify it by saying he had a different opinion on the matter.

All of these factors contributed to a traditional lack of binding force of precedents in Brazil and, accordantly, successive attempts to give precedents more weight and binding force along the years, culminating in the new Civil Procedure Code of 2015.

3 HISTORICAL ACCOUNT OF BINDING FORCE OF PRECEDENTS IN BRAZIL

The Judiciary branch in Brazil has a historical characteristic of using "dockets" as a way to consolidate its case law, persuade, and even bind other Courts. This is an inheritance from the Portuguese legal system that started to issue a similar form of "docket" as a means to bring legal certainty in a time when it was thought there were too many conflicting decisions in its high courts (SANTOS 2014). The Portuguese dockets (called "Assentos da Casa da Suplicação") actually were in force in Brazil for a period of time after its independence in 1822.

Although different in many ways, the Brazilian and Portuguese dockets share the fact that they are (supposedly) a standardized rule-form condensation of the *ratio decidendi* of





previous decisions a Court has issued, and are used to clarify said Courts position on a specific matter and to make the judgment of similar cases more effective.

Rule-making is a problematic process in general, as it involves generalizations that are always under- and over-inclusive (SCHAUER 1991). Rules are generic and, alongside the indeterminacy of human language, form a central piece of the law's problem. That is why the formulation of rules must be the function of the legislative branch, with its unique quality of democratic representation, access to information, and overall specialized agents with the sole job of making rules.

The Judiciary, on the contrary, lacks democratic representation, is only called upon to resolve individual controversies – which inevitably influences the rule formulation (SCHAUER 2006. For a subtle critic on this position, see SHERWIN 2006) -, and doesn't have the intrinsic ability to hear experts on every matter. In the end, the injustices arising from rules formulated by a Parliament can be solved by the Judiciary, but rules formulated and applied by the Judiciary are unlikely to get revisited (due to the function of lawgiver of the Judiciary, as defined by HART 2009). Thus, rules arising from the Judiciary have all the downsides of legislated rules plus the vices of concrete case influence.

This is a problem for another time, but what is important to us is that the use of dockets in general isn't such a good idea when aiming to achieve legal certainty, and its massive use in Brazil can be identified as a main reason for the lack of coherence in the case law.

Modern dockets in Brazil were created in 1963, by an administrative act from the Supreme Court. These were persuasive dockets meant to orientate lower courts on how to decide recurrent matters. An example is Docket No. 1: "The expulsion of a foreigner married to a Brazilian woman, or having a Brazilian child, dependent on the paternal economy, is forbidden"⁵.

As you can see, even in this really simple case, the docket leaves out the reasoning behind the decision, so you can't tell for sure important things, for instance, the level of

⁵Freely translated from: "É vedada a expulsão de estrangeiro casado com Brasileira, ou que tenha filho Brasileiro, dependente da economia paterna" (1963).





economical dependency needed, if "Brazilian woman" refers only to native Brazilian (or to acquired citizenship), among other questions that could have possibly been addressed in the decision or decisions that lead to the docket.

In 1973 the Civil Procedure Code extended the use of persuasive dockets to all Superior and Appellate Courts, giving them a "soft binding" force, as a Court could deny an appeal by simply referring to a docket. Again, the objective was to settle recurring cases and reduce the time spent on similar cases.

In 1993 a Constitutional amendment gave the Supreme Court power to give its decisions *erga omnes* effects and in 1999 federal law regulates the so called "direct constitutional actions" which allow cases to be filed directly before the Supreme Court and concentrate the discussion and decision of potentially thousands of cases.

The Constitutional Amendment No. 45 of 2004 creates a "binding docket" for the Supreme Court. This special type of docket is harder to approve and has binding effects both on lower courts and on the Executive branch. A failure to comply with them gives rise to a direct action to the Supreme Court (the petitioner doesn't have to go through all ordinary levels of the Judiciary branch).

From 2006 to 2008 a series of federal laws extend the soft binding powers of certain decisions issued by the Supreme Court and the Superior Court. This soft binding effect is similar to the dockets, and could be used to deny an appeal.

These were all measures brought to try to reduce the number of cases dealing with repetitive demands, and none of them sought to give greater coherence or integrity to the system. As a result, it is common to find formally binding precedents from the same Court that conflict directly with each other.

Another problem is the overruling of binding precedents within only a few months, the so called "banana boat" case law. In tropical beaches around the world it is common to see tourists engaged in a peculiar kind of entertainment, where a small speedboat or even a jet-ski is conducted near the shore, towing an unpowered, large, inflatable, and yellow boat, on top of which four to ten people sit grasping on handles. The objective of the conductor of the





speedboat is to cut through the water making sharp turns, eventually knocking down the passengers. This is typically called the "banana boat" because of the obvious similarity between the yellow shaped inflatable boat and the tropical fruit. In 2004, a Justice from Brazil's Superior Court, reviewing a case, called the Courts tax case-law a "banana boat jurisprudence", comparing the judges to the conductors of the speedboat and the citizens to the passengers, waiting to be knocked down.

This is the setting for Brazil's new Civil Procedure Code, enacted in 2015 in effect from 2016, that brings in its core an ambitious objective to make jurisprudence (case law) in Brazil more stable, coherent and integral, by means of giving formal binding force for precedents issued from almost all of its appeal courts⁷.

4 LEGISLATIVE REFORM (CPC/2015) AND WHAT CAN BE GAINED WITH A (STRONG) DOCTRINE OF PRECEDENTS

As stated above, the New Civil Procedure Code of 2015 (the "CPC") was probably the first legislative reform that aimed not only to reduce the amount of cases heard by the Courts, but also to make case law in Brazil more stable, increasing legal certainty.

Throughout the CPC there are several articles that pursue the objective to make precedents formally binding in Brazil, such as §927, which specifically tells judges and courts to regard certain types of decisions as binding precedents, and although a lot of attention has been giving to the new forms of mass-resolution of repetitive cases, I think the most significant changes are the eradication of the term "free understanding / conviction" (*livre convencimento*, in Portuguese), and §926, which I will address later on.

⁷ Brazilian Federal Law No. 13.105/2015 – "Civil Procedure Code".



⁶ Brazilian Superior Court. Special Appeal No. 382.736/SC.



The eradication of the term *livre convencimento* is important to make judges justify their decisions based on controllable/testable reasons. There isn't, of course, an effective way to control the reasons behind a judicial decision, as American legal realists have pointed out – judges make *reference* to rules that in sometimes they have really no *reverence* to. But to not make even this reference to the rules used to decide a case is to make it impossible to formally control the coherence (internal and external) of case law.

In line with this is §489 (paragraph 1st) which brings an extensive list of situations that will be considered as characterizing a judicial decision as null and void because of lack of justification. In other words, the CPC requires judges to make explicit the reasons behind the decisions, as a way to control coherence.

The § 926 prescribes that "the Courts must make their case law uniform and keep it stable, integral and coherent" 8. We can break this article up in 3 different aspects. The first one deals with an obligation to Courts to make their case law *uniform*, in a kind of retrospective view, in a way that more or less was already available to them (there are, for instance, specific kinds of appeals for that), but with renewed efforts. The second aspect is the order to keep its case law stable, which can be read as a soft *stare decisis* rule, avoiding the "banana boat" cases described above.

The third aspect is the prescription to make the case law *integral and coherent*. *Integral* isn't the best word to describe this prescription of §926, because, in English language there is not an adjective form for the word "integrity" as there is in Portuguese (*integra*). But it was meant to internalize the notion of "law as integrity" as claimed by Ronald Dworkin9, at least in a sense that case law has to be coherent with all the other constitutional rules, federal laws and the like. *Coherent* means that judicial decisions can't contradict themselves internally and externally.

⁹ §926 of the New Brazilian CPC was modified to include a reference to coherence and integrity after intense critic by Lenio Luiz Streck, a Brazilian scholar who is self-proclaimed a Dworkin follower, see: STRECK 2013.



⁸ Freely translated from the original: Art. 926. Os tribunais devem uniformizar sua jurisprudência e mantê-la estável, íntegra e coerente



This is, in my opinion, the most important article in the CPC, for it is a clear message to judges and Courts to improve the quality of their decisions, while allowing decisions to be challenged based on lack of internal and external coherence.

If the above are in my view the "good changes" brought by the new Civil Procedure Code, I have to criticize the increase use of "dockets" and rule-like decisions as a "bad change", for the reasons I believe I have made clear some pages above. The difference now is that every binding decision has to be accompanied by what is called the "theses" or what can be described as explicitly dictating "the rule of the case" to be applied by lower courts. This is in my opinion even worse than the traditional "dockets" because they are most of the time based on the specific case brought to trial.

This is made worse by some aspects that the CPC didn't change in Brazilian civil procedure, such as the form of choosing the case that will serve as a binding precedent prior to its actual judgment. The reporting judge chooses one or more cases and publicly announces that it will be decided and, afterwards apply to all other cases identified as similar (these other cases remain suspended until the leading case is decided), in a procedure inspired by German and Italian similar procedures for mass-resolution of repetitive cases (CAVALCANTI 2014).

The fact that there is no control over which case is chosen to be the leading case and that it is already decided thinking about all the thousands of other cases suspended (consequentialist view), is in my view a downside. The upside of this procedure is that it opens the possibility for 3rd parties to be heard and gives total publicity to the citizens regarding the binding precedent for a specific matter, at least in theory.

Having said all of this, I am confident that if the actors that deal with the CPC/2015 on a daily basis limit themselves to understand the code as only a new formal rule to bind judges and courts to prior decisions, it will fail as the prior attempts to do so have. We must seize the opportunity to take precedents seriously and demand that Courts issue their decisions with coherence and integrity, while maintaining stability in that process.

More than trying to import a system of binding precedents from a common law tradition country, and impose it by means of legislative reform, Brazil has to look at this



enterprise as aiming to form a tradition of following precedents, in which judges will feel obligated to give good reasons to follow or to depart from prior decisions.

This involves legal scholarship criticizing and identifying by name the Courts and judges who lack adherence to precedents, lawyers technically and intensively arguing in appeals the obligation to follow precedents and, most importantly, Courts taking their role seriously when it comes to following their previous decisions and to demand that other Courts and judges abide to precedents. With that in place, legal certainty¹⁰ and the reduction of mass litigation will surely follow.

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¹⁰ For an account on how decision-making can increase legal certainty see: TAVARES 2018.





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