Scientific Research Publishing

Beijing Law Review, 2024, 15, 406-415
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

Stare Decisis, Modulation of Effects and Legal Certainty in the Brazilian Judicial System

Luana Sbeghen Bonomi, Ananda Arruda Campos Rudi Mortati, Vitor Marques

Law Faculty, Pontifical Catholic University of São Paulo, São Paulo, Brazil
Email: lu.bonomi@outlook.com, ananda_rudi@hotmail.com, vitor@cmmadvogados.adv.br

How to cite this paper: Bonomi, L. S., Mortati, A. A. C. R., & Marques, V. (2024). *Stare Decisis*, Modulation of Effects and Legal Certainty in the Brazilian Judicial System. *Beijing Law Review, 15,* 406-415.
https://doi.org/10.4236/blr.2024.151026

Received: December 28, 2023
Accepted: March 18, 2024
Published: March 21, 2024

Copyright © 2024 by author(s) and Scientific Research Publishing Inc.
This work is licensed under the Creative Commons Attribution International License (CC BY 4.0).
http://creativecommons.org/licenses/by/4.0/

Open Access

Abstract

The main objective of this article is to explore the doctrine *of stare decisis* and its influence on the system of precedents of the Brazilian legal system. In addition, it aims to examine how legal certainty occurs in the case of precedent invalidation, known as *prospective overruling*. From the point of view of the Brazilian legal system, the purpose of modulating effects by establishing new precedents or modifying existing ones is analyzed, in view of the current pragmatic consequentialist thinking of the STF. Finally, it concludes that the doctrine of *stare decisis* presents instability in Brazil, serving mainly the purpose of relieving the Judiciary of repetitive cases instead of ensuring greater predictability and equal treatment between jurisdictions.

Keywords

Stare Decisis, Precedents, Blackstone, Prospective Overruling, Richard Posner, Legal Certainty, Modulation of Effects, Control of Constitutionality, Brazilian Legal System

1. Introduction

The doctrine of *stare decisis*, derived from the common law, influenced Brazil in the creation of the system of precedents, which allowed jurisprudence to achieve an important role as a source of law in the Brazilian system.

The main foundation of the system of precedent is legal certainty, which aims to bring greater predictability and isonomy to those subject to jurisdiction through the application of legal theses established in previous cases with the same material facts. However, according to Richard Posner, a pragmatist jurist, the legal certainty resulting from consistency with precedents can be relativized in certain cases where the decision to be taken is the best possible in consequentialist terms for the present and the future.

With the evolution of the precedent system, Brazil, which does not have a common law culture but a civil law culture, *ended up establishing rules to guide judges in modulating the effects resulting from the creation of precedents or the mutation of existing precedents*, *in order to ensure legal certainty*, *safeguarding good faith and trust* (Alvim, 2019). However, there are those who understand that the Brazilian precedent system distances itself from the doctrine *of stare decisis* because it is unstable and ultimately only aims to reduce the number of lawsuits in the judiciary.

Therefore, this article aims to analyze the influence of the doctrine of *stare decisis* in the Brazilian order and how legal certainty occurs in the case of precedent invalidation, known as *prospective overruling*. Thus, it analyzes how the modulation of effects occurs and what is its purpose when establishing new precedents or modifying existing ones, in view of the current pragmatic consequentialist thinking of the STF.

2. The Doctrine of *Stare Decisis*

The doctrine of *stare decisis* has its roots in *eighteenth-century English common law and states that a court*, *when deciding similar cases*, *must follow the principles*, *rules*, *or standards of its previous decisions* (Historical Background on the *Stare Decisis* Doctrine. at: https://www.law.cornell.edu/constitution-conan/article-3/section-1/historical-background-on-the-stare-decisis-doctrine). Therefore, its main purpose is to respect older decisions that have resolved cases prior to (precedents) to similar cases and involving the same material facts.

According to Blackstone, one of the foremost jurists who wrote doctrines on the *English common law*, a precedent is a kind of permanent rule that cannot be changed or varied according to the private feelings of the judges and must be applied when cases have the same issues in litigation (Blackstone, 1723-1780). In other words, precedents "establish a strong presumption that judges, in order to promote stability in the law, would adhere to previous precedents when the same points are repeated in litigation," (Historical Background on the *Stare Decisis* Doctrine. at: https://www.law.cornell.edu/constitution-conan/article-3/section-1/historical-background-on-the-stare-decisis-doctrine), therefore, according to Blackstone, "precedents and rules must be followed, unless absurd or unjust" (Blackstone, 1723-1780).

It should be noted that there are two types of *stare decisis*, according to Barbosa and Pugliese (2019), namely 1) vertical, which requires the lower courts to follow the decisions of the higher courts; and 2) horizontal, which requires the Court to follow its own precedents. Thus, both vertically and horizontally, precedent binding is coercive in nature, with the aim of forcing judges to adopt a particular line of reasoning when deciding cases with similar facts.

Despite its coercive nature, judges do not necessarily have a legal sanction for

non-compliance—in Brazil, for example, it could even be questioned whether such an obligation would not violate the principle of autonomy and motivated free conviction of judges. Thus, what actually makes a judge follow a precedent ends up being the social and moral disapproval arising from its non-compliance—in countries that adopt the Common Law, the acceptance by judges to follow a given precedent is so great that there are not even comments on the part of the doctrine or courts about it (Barbosa & Pugliese, 2019).

It should be noted that Brazil has always adopted Hans Kelsen's pure theory of law (reducing the law to the law). Perhaps, the common law influences the Brazilian precents system in legislative changes, mainly (Becho, 2021):

1) In 1963, the Internal Regulations of the Brazilian Supreme Court (STF) instituted the Precedent of Jurisprudence (art. 102), in order to demonstrate the persuasive force of the Court's precedents;

2) In 1973, the Code of Civil Procedure provided for the mechanism of standardization of jurisprudence and the issuance of binding precedents (art. 479), evidencing the concern with the isonomic treatment applied in similar cases;

3) In 1979, the Organic Law of the Judiciary authorized that in cases under the jurisdiction of the Federal Court of Appeals, the rapporteur should deny an appeal contrary to the precedent of the court or the Supreme Court (art. 90, §2);

4) In 1990, Law No. 8038 authorized the rapporteur, in the STF and in the STJ, to deny an appeal contrary to the precedent of the respective court; and

5) In 2015, the new Code of Civil Procedure brought greater importance to precedents, amending the legislation in order to emphasize the need for a more predictable, isonomic and secure system.

6) In 2018, the Law of Introduction to the rules of Brazilian Law was amended, inserting rules on legal certainty and efficiency in the creation and application of public law, for example, providing for the modulation of effects in the case of decisions that establish a new interpretation or orientation of rules, imposing a new duty or condition of law (art. 23).

In addition, two judicial decisions that have had great repercussions on the Brazilian legal system stand out, namely:

7) In 2007, the Supreme Court extended the legally regulated right to strike of private workers (governed by the CLT) to that of public servants, provided for by the constitution but never regulated (Writ of Injunction Nos. 670 and 708);

8) In 2011, the Supreme Court recognized same-sex unions in Brazil, equating marriage of people of different sexes (ADI 4277/DF).

However, in spite of such judicial decisions, the binding and coercive force of precedents in Brazil resulted mainly from legislative impositions, which differs from common *law*, which results from the historical, political, legal and philosophical evolution of the community (Takeishi & Arsuffi, 2023). Therefore, despite criticisms about the application or not of the doctrine of *stare decisis*—which requires that judicial precedents be observed—in the Brazilian system, it is clear that such doctrine influenced the creation of the "system of precedents", even if its reason for application is not cultural—as in *common law*—but

rather the reduction in the number of lawsuits and greater predictability, legal certainty and equal treatment among those under jurisdiction (Bueno, 2022).

In fact, the importance of the *doctrine of stare decisis* is such that legal certainty, one of the foundations behind the culture of respect for judicial precedent, is being increasingly brought to the fore by the Brazilian legal community and demanded of the Superior Courts, especially when we talk about their modulation of the effects of a decision.

3. Posner and Prospective Overruling

One point of debate about *stare decisis* and precedents is whether its foundation—legal certainty by virtue of consistency with precedents—can be relativized if the judge needs to declare a new right to make a decision that is best suited to meet the present and future needs of society.

Richard Posner has developed an important empirical theory about judicial behavior which has significant national and international implications. He carried out several studies on economic analysis of law, economics, understood roughly as capitalism, is taken as fundamental to the understanding and application of law. Posner's theory is presented as a further development of the general program, and he studies the irrational decision of the judges and justices (Entemann, 1998).

In his work "The Problem of Moral and Legal Theory", Richard Posner (2012)—an eminent pragmatist jurist—explains that when a Court invalidates one of its decisions by *overruling*, replacing it with another that will only be applied to cases from then on, it ends up acting as a legislative body and creating a norm. The problem is that such *ex nunc* overruling, known as prospective overruling, frightens many positivists because it turns judges into legislators, which could undermine the legal certainty of a given order that results from the coherence of precedents.

However, according to the said Author, if the Courts could not use the *overrruling*, they would end up having many obstacles to re-examine their old decisions, which change according to social evolution. Thus, in order to solve this problem (whether or not judges would be acting as legislators and harming legal certainty), we would need to analyze whether the invalidation *ex nunc* of a precedent would unduly destabilise the right or otherwise of a given society.

It is important to emphasize that, according to Posner, even in the role of creator of norms, the judge is different from the legislator, since he is guided by the objective of making the choice that produces the best results, and he must consult case law, legislation, administrative regulations, constitutions, doctrinal treaties, and other sources of law in order to maintain legal certainty. As long as the legislator does not have to do so, he writes on a blank slate, which results in innumerable gaps and vices.

Thus, the judge, especially the pragmatic judge, would observe legal certainty by aiming to find the decision that best meets present and future needs, without

ignoring the past. The problem, in fact, occurs when judges do not have any organized set of knowledge to which they can draw in making a decision, because in this case, they end up relying on their own intuitions. Or even when judges are in charge of recognizing a new constitutional right, which deals with similar issues and values.

In these cases, Posner argues that judges would have to "put the matter on the back burner" before acting, as the Legislative Branch itself could eventually resolve such an issue. Another option would be to take into account not only the text and precedents, but also political, empirical, institutional and simple prudential issues, such as the receptivity of public opinion to a decision declaring a new right. In view of this, judges, when they decide to create a law using *overruling*, would have to respectfully face the deep beliefs and preferences of the democratic majority of a population in their decisions, since the judiciary is not a mere "debate club" to do what it supposedly believes to be correct, violating legal certainty regardless of its consequences.

In this sense, we can extract, based on this text by Posner, that for him the judge—and here he refers specifically to the pragmatist judge—has no disinterest in the past and precedents, since he uses them as a source of information in his decisions, avoiding bad consequences that could destabilize the law. However, although the judge is not unaware of the legal certainty that derives from precedents, he does not stick to it in order to find the decision that best meets present and future needs, ensuring coherence with the past to the extent that the decision according to precedents is, in fact, the best method for producing the best results for the future.

Consequently, legal certainty—understood here generically as coherence with precedents—would exist, but it could be relativized if the judge, analyzing political, empirical, institutional issues and the receptivity of public opinion, needed to use *overruling* to declare a new right, in order to make the decision that best met present and future needs.

4. The Modulation of Effects in the Brazilian System

The main fundamentals that influenced the respect for the doctrine of *stare decisis* and the culture of judicial precedents are, in addition to the speed and solution of repetitive demands, greater predictability, legal certainty and equal treatment among those under jurisdiction (Posner, 2012). Among these foundations, the great highlight is legal certainty, which is essential for the harmony and maintenance of a coherent and integral legal system, so that the individuals of a given society trust their State (Takeishi & Arsuffi, 2023).

However, according to Richard Posner's understanding highlighted in the chapter above, legal certainty, resulting from consistency with precedents, can be relativized in certain cases when the decision to be taken is the best possible in consequentialist terms for the present and the future.

In view of this, Brazil, with the evolution of the system of precedents, has es-

tablished rules to guide judges in modulating the effects resulting from the creation of precedents or the mutation of existing precedents. According to Alvim (2019), "modulation is, without a doubt, a legal figure whose objective is to create legal certainty, from a subjective point of view, protecting good faith and trust", and is thus embodied in a duty of the judged body, in respect of the principle of protection of trust.

In this sense, judges, in the application of the modulation of effects, must always aim at legal certainty, thinking about the future and the consequences of their decisions. In tax law, for example, the declaration of unconstitutionality of a certain tax can cause serious damage to the public coffers and, consequently, to society, since the State must reimburse all taxpayers who unduly collected the tax. On the other hand, when a Superior Court changes its understanding of the unconstitutionality of a tax, considering it constitutional, the impact on taxpayers can also be serious and harmful, since it can lead companies to bankruptcy, increase the price of goods and services, and generate unemployment.

Well then. Delving a little deeper into the subject from the perspective of the Brazilian legal system, it should be noted that the modulation of effects can occur both in concentrated control and in diffuse control. In the concentrated control of constitutionality (article 27, Law No. 9868/99), the modulation of effects is, as a rule, *ex tunc* (retroactive), but due to legal certainty or exceptional social interest, it may be changed by the STF, to be effective from its final and unappealable decision (*ex nunc)* or at another time fixed by the Superior Court (for the future) (Takeishi & Arsuffi, 2023).

In diffuse control, the modulation of effects is present in cases of alteration of the dominant jurisprudence of the STF and the higher courts, or in the judgment of repetitive cases and the enunciation of precedents, due to legal certainty and social interest, as provided for in article 927 of the current Code of Civil Procedure. It is important to note that, in both cases, modulation can be requested either by the party participating in the proceeding *or ex officio* by the body responsible for creating or changing the judicial precedent (Takeishi & Arsuffi, 2023).

According to Derzi (2009) related to overruling the moment, when the innovative case law comes into force, which changes previous case law, should be the decisive point. All those past acts (because they occurred before the new case law came into force), which were in force under the superseded precedent, must be protected. This is so that the change in case law does not affect facts that have already occurred. Modulation of the effects of the new decision should be the rule, in respect for the principle of non-retroactivity. In other words, given the existence and validity of a well-established precedent, past facts that have already occurred entirely in the past and their respective effects, whether already triggered or yet to be triggered, regardless of their exercise, must be protected against the advent of new, modifying judicial rules.

Thus, it can be observed that in the Brazilian system, which has its roots in *civil law*, *the* system of precedents is still of very recent application and, there-

fore, the positivity of the modulation of effects applied in concrete and diffuse cases has brought greater legal certainty to those affected by the mutation of precedents and the instability of *stare decisis* in such a system. Modulation, therefore, is nothing more than a duty of the Court that applies the override of precedent and must always be applied from the date of the final decision or, in case of its non-application, be duly justified.

5. Pragmatic Consequentialism in the Modulation of Effects in Brazil

As mentioned in the chapter above, Brazil has adopted rules to guide judges in modulating the effects arising from the creation of precedents or the mutation of existing precedents. It so happens that, in such rules, there is a certain freedom for the interpreter—judge—to use arguments based on the consequences caused by his decisions, fixing the effects of the decision in the way he sees fit. In concentrated control, for example, article 27 of Law 9868/99 establishes that the STF may attribute prospective effects to decisions declaring unconstitutionality for reasons of legal certainty or exceptional social interest reasons that may contain indeterminate legal concepts.

In this sense, it should be noted that consequentialism is one of the characteristics of legal pragmatism, and establishes that "knowledge accompanies the dynamism of life" and "turns to the future", based on the consequences of action. According to this characteristic, what guides decision-making are precisely the possible consequences to be foreseen, and not necessarily the commitment to principles and values (Camargo, 2008).

It should be clarified that pragmatic consequentialism can give rise to questions about the legal and social security of decisions, which are countered by Posner, when he clarifies that "the *pragmatist judge*, *by the very fact that he has in view the consequences of his action*, *in practice does not want to disappoint the population*, *which expects guarantee and predictability from his actions*, *in accordance with the law. This leads the judge to seriously consider the laws and precedents*" (Camargo, 2008).

Well then. In Brazil, the pragmatic consequentialist argument has been used by the STF with an economic nature in modulating the effects of judicial decisions, in order to protect state finances, especially in tax cases or those involving public law. As an example, we can cite the case of ADI 2669/DF, which deals with the levy of ICMS on the provision of terrestrial public services (Supreme Court, 2014). In his dissenting vote, Justice Gilmar Mendes defended the reversal of the long time for the collection of ICMS by the Federated States would endanger the public finances of several States, which would be forced to return taxes collected for a significant period, which would imply a real attack on legal certainty (Da Silva, 2020).

A classic example of these arguments in action can be seen by the former Minister Eros Grau of the Brazilian Supreme Court. When dealing with an impor-

tant tax issue regarding a premium credit of IPI, which if decided in favor could represent a liability of 200 billion Reais to the public treasury, Grau confided to a lawyer who approached him to discuss the case: "*Do you think the Supreme Court will rule in your favor for a cause that the Treasury says will cost* 200 *billion Reais*? *Never. The Supreme Court will rule against you*." In the end, the STF ruled that the credit premium had not been accepted by the 1988 Constitution, thus, the exporters could not benefit (Redondo, 2019).

In addition, it is also possible to cite the case of ADI 3106/MG (Supreme Court, 2015), in which Justice Luiz Fux argued that there should be modulation of effects in the case *under judice*, since the decision determining the duty to return contributions already collected by the civil servants of the State of Minas Gerais could cause a negative repercussion on the financial health of the respective State (Da Silva, 2020).

In turn, in ADI 714.139, which declared the unconstitutionality of setting the ICMS rate on electricity supply and telecommunications services at a level higher than that charged on operations in general, Justice Dias Toffoli proposed the modulation of the effects of the decision so that it only becomes effective as of the 2024 financial year, with the exception of lawsuits filed up to the date of commencement of the trial. This is because the application of the reduced rate in the financial year of the judgment would represent an annulment loss of approximately R$ 26.26 billion (Molinari, 2022).

In this sense, it can be observed that pragmatic consequentialism has been applied by the Brazilian judiciary with an extremely economic nature, which has been questioned by Brazilian society, especially by taxpayers. Therefore, from the perspective of the interdisciplinarity of legal pragmatism[1], we must investigate the concrete economic effects of a decision, in order to question to what extent the loss of revenue is, in fact, a sufficient argument to prove the presence of the exceptional social interest to justify the modulation of effects because, otherwise, the judiciary ends up acting as a "second instance of government" and benefiting only one of the parties of the federative pact—the State—the State—the Judiciary Government, the Judiciary Government, the Judiciary Party and bringing great legal uncertainty to the population.

6. Conclusion

After some legislative changes, especially the 2015 edition of the Code of Civil Procedure (CPC/15), judicial precedents have achieved an important role in Brazilian law, even though this country has not adopted *common law* in its legal system. In fact, nowadays a large part of jurists understand that judicial precedents have even evolved as a source of law in Brazil (Becho & Gutierres, 2023) (something that was difficult to defend, especially due to the principle of legality).

[1]According to Magarida Lacombe Camargo, interdisciplinarity establishes that "specialized knowledge, of a scientific nature, has the power to make the effects of action predictable, enabling its better dimensioning" (p. 368).

In this sense, although the binding and coercive force of precedents in Brazil derives mainly from legislative impositions, the doctrine of *stare decisis*—which requires that judicial precedents be observed—influenced the creation of the "system of precedents" provided for in the CPC/2015. And, among the objectives behind *stare decisis*, legal certainty is its main foundation since it is necessary to bring greater predictability and equal treatment among those under jurisdiction (Bueno, 2022).

It so happens that legal certainty is not an absolute value, and can be relativized if the judge, when analyzing political, empirical, institutional issues and the receptivity of public opinion, uses *prospective overruling* to declare a new right, and makes a decision that is best suited to meet present and future needs.

Thus, the modulation of effects was positive in the Brazilian system as a way to ensure greater legal certainty in cases of establishment of new theses or mutation of precedents in concrete or diffuse cases. However, in view of the innovation of the system of precedents, the legal certainty arising from the modulation of effects is much questioned by the Brazilian legal community, and especially demanded of the Superior Courts in cases involving public law (such as tax law), since in these cases, the tendency of magistrates is to have a consequentialist pragmatist thinking with an economic nature, benefiting only the State under the justification of protecting public finances, which brings great legal uncertainty to society.

In addition, the Superior Courts change their understanding quickly, which gives little credibility to decisions and causes judges and parties not to necessarily follow precedent when they go against their interests. Still, the lack of credibility of precedents makes the legal profession, when finding gaps in the decisions, create new legal theses to try to modify what has already been decided.

Thus, it can be concluded that the doctrine *of stare decisis* influenced the creation of the system of Brazilian precedents, but it is not properly respected, which makes the legal certainty resulting from the establishment of precedents—unfortunately—unstable and ends up serving more to "unburden" the judiciary with the reduction of repetitive cases instead of bringing greater predictability and equal treatment among those under jurisdiction.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

References

Alvim, T. A. (2019). *Modulation in the Alteration of Firm Jurisprudence or Binding Precedents*. Thomson Reuters Brazil.

Barbosa, E. M. Q., & Pugliese, W. S. (2019). *Stare decisis* as a Technique for Reducing Litigiousness of Public Entities in Brazil. *Revista de Processo Comparado, 9,* 269-296.

Becho, R. L. (2021). *Legal Activism in Tax Proceedings: Crisis, Theory of Precedents, and Effects of the Departure from Strict Legality*. Thomson Reuters Brazil.

Becho, R. L., & Gutierres, K. L. (2023). The Relevance of Jurisprudence in Tax Law: An Analysis from the Perspective of Brazilian System of Precedents. *Beijing Law Review, 14,* 883-894. https://doi.org/10.4236/blr.2023.142047

Blackstone, W. (1723-1780). *Blackstone's Commentaries on the Laws of England.* https://avalon.law.yale.edu/subject_menus/blackstone.asp

BRAZIL. Supreme Court. ADI n. 3106 ED/MG. Governor: Governor of the State of Minas Gerais. Embargoed: Attorney General of the Republic. Rapporteur: Minister Luiz Fux. Brasilia, May 20, 2015. http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=9116198

BRAZIL. Supreme Court. ADI No. 2669/DF. Applicant: National Transport Confederation (CNT). Subpoenaed: National Congress and President of the Republic. Rapporteur: Minister Nelson Jobim. Brasilia, February 5, 2014. http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=630079

Bueno, C. S. (2022). *Systematized Course of Civil Procedural Law: Common Procedure, Court Proceedings and Appeals* (vol. 2). Editora Saraiva.

Camargo, M. L. (2008). *Pragmatism in the Brazilian Supreme Court.*

Da Silva, M. L. (2020). Pragmatism or Economic Consequentialism and the Temporal Modulation of the Effects of the STF's Judicial Decisions in Tax Matters. *Journal of Contemporary Tax Law, 24,* 225-243.

Derzi, M. A. M. (2009). *Overruling in Tax Law Cases. Protection of Objective Good Faith and Non-Retroactivity as Constitutional Limitations on the Judicial Power to Tax* (pp. 539-541). Noeses.

Entemann, W. F. (1998). Judge Posner's Challenge to the Philosophy of Law. *The Paideia Archive: Twentieth World Congress of Philosophy, 33,* 13-17. https://www.bu.edu/wcp/MainLaw.htm https://doi.org/10.5840/wcp20-paideia199833554

Historical Background on the *Stare Decisis* Doctrine. https://www.law.cornell.edu/constitution-conan/article-3/section-1/historical-background-on-the-stare-decisis-doctrine

Molinari, F. M. (2022). *Tax Pragmatism and the Modulation of Effects in the STF.* https://www.conjur.com.br/2022-jan-03/molinari-pragmatismo-tributario-modulacao-efeitos-stf/

Posner, R. (2012). 4. Pragmatism: The Pragmatic Approach to Law. In W. M. Fonts (Ed.), *The Problematic of Moral and Juridical Theory* (pp. 357-420). Wmf Martins Fontes.

Redondo, F. (2019). *The Eleven: The Supreme Court, Its Backstage and Its Crises* (p. 258). Companhia das Letras.

Takeishi, G. T., & Arsuffi, A. F. (2023). Judicial Precedents and the Modulation of Their Effects by the Courts. *Revista de Processo, 336,* 381-411.