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An Introduction to the Introduction of a System of Judicial Precedents in Brazil: *Stare Decisis Brasiliensis*

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Abstract

From the perspective of a new paradigm—Brazilian Civil Procedure Code of 2015—our legal system needs the maturing of a new system in the Brazilian procedural model. Thus, it has been observed that the duty to neutralize the uncertainties and imprecisions of the legislation to better adapt them to specific cases was directed to judges. However, the judicial activity of producing law has not followed the aspirations of the judicial precedents system, so that the doctrine began to perform a relevant function in directing the work of judges. The present study is developed by the deductive method of approach, associated with the method of procedure in qualitative research, embodied in the technique of direct documentation with documentary research in doctrinal literature, jurisprudence and contemporary procedural legislation in Brazil. This work, thus, aims to analyze, focused on the performance of the Brazilian Higher Courts - Supremo Tribunal Federal (Supreme Court - STF) and Superior Tribunal de Justiça (Superior Court of Justice - STJ), which are the necessary guidelines to enable the scope of maturity in the Brazilian judicial precedents system, hereafter named *stare decisis brasiliensis*.

Keywords

Civil Procedure, Precedent System, Supreme Courts

1. Introduction

An authentic system of judicial precedents requires more than just the comprehension by judges of the logic behind the following of the *ratio decidendi* of

previous decisions. *Stare decisis* is more than just deciding in the same sense as earlier judgments. It requires the understanding of the importance of security to contemporary society and the indispensability of trust in their judges. Confidence that is earned (not bought or conquered) by the belief that the judge in our day in court will decide similar cases in similar fashions, avoiding incongruities and creating predictability that comforts those citizens who know and follow the law.

This present study is based on a research originally entitled **Invitation to the Maturity of the *Stare Decisis Brasiliensis***, which was drafted with the clear objective of exposing both aspects of the disruptive process through which the Brazilian Judiciary is facing. On the one hand, the courageous move of remodeling the Brazilian procedural order through the adoption of a model of judicial precedents with binding effects. On the other hand, the obvious difficulties both judges and lawyers are facing in adapting to this novelty and its peculiar techniques.

The institution of a *stare decisis brasilensis* was a wish for most Brazilian citizens who desire more security and less elusiveness from the Judiciary. But no one said it would be easy...

Even though Brazil is considered a typical country of classical civil law or statutory law origin, Brazilian civil procedural law has been increasingly receptive to institutes that traditionally belong to *common law* systems. The 2015 legislator, when editing the current Brazilian Code of Civil Procedure, introduced a series of mechanisms arising from such alien systems. The appreciation of judicial precedent in the Brazilian legal system has gradually developed the idea of categorizing it as a source of law. In this environment, law enforcers raise the issue of identifying a system of judicial precedents that meets the peculiarities of the legal model adopted in Brazil.

As part of this study, it is of great relevance to analyze the relevant aspects in the identification, application, and overcoming of judicial precedents. This is because scholars and law operators have found it difficult to identify a converging point for the definition of concepts and a structure that allows for solidity to the Brazilian system of judicial precedent, the *stare decisis brasiliensis*.

Therefore, it seeks to unveil the role that will be played by the Supreme Courts in the formation of judicial precedents in the Brazilian system, as well as to identify the functioning of the mechanisms inherent to its engineering. It is also intended to point out the adjustments that must be added to the system of precedents upon incorporation into our legal system. Finally, the aim is to minimize the doubts and shortcomings that permeate the Brazilian doctrinal construction on judicial precedents.

The present study is developed by the deductive method of approach, associated with the method of procedure in qualitative research, embodied in the technique of direct documentation with documentary research in doctrinal literature, jurisprudence and contemporary procedural legislation in Brazil.

So ... on to the introduction of *stare decisis brasiliensis*.

2. Precedents to the Current System of Precedents: The Rise of *Stare Decisis Brasiliensis*

The notion of judicial precedents is not a novelty to the Brazilian Judiciary. Courts in the country have for a very long time aligned their sentencing with abridgments of law called "súmulas", produced through rulings of superior courts that were condensed in short phrases that attempt to concise the essence of the respective sentences. But following these precedents was until recently thought of as an option for the presiding judge, a mere persuasive precedent, by no means binding. Judges could "choose" to follow a precedent, or simple sentence in a different manner according to their own views on the matter.

As recently as 1993, before the 3rd Amendment to the Brazilian Constitution of 1988, any ruling by any court was considered compulsory only to the litigants participating in the case judged. Judges were free of any imposing restriction to follow the previous ruling of another member of the bench, whatever the level within the Judiciary. Be it a local, state, regional, or national (federal) court, there were no binding precedents establishing a mandatory line of sentencing by any singular judge. Even if the applicable abridgment of law was authored by the Brazilian Supreme Court (Supremo Tribunal Federal—STF), a judge in any courthouse in the country could choose to "ignore" the decision in a latter case and go unscathed, invoking his judicial independence and freedom to apply his "version" of the correct interpretation of the law. The personal opinion of one singular judge on the bench, even in a case essentially identical to one that had been ruled over by a court of superior jurisdiction, could simply supplant the judicial reasoning previously sustained despite both the structural ascendence of the higher jurisdiction and the desired security and confidence inspired in society by maintaining the same rational reasoning of past rulings. In a sense, the situation could be described as a "judicial anarchy producing lottery jurisprudence".

The 3rd Amendment, nonetheless, in 1993 inserted in the Brazilian Constitution a new norm that, for the first time, implanted in the procedural system the idea of precedents that were more than just persuasive options, as the second paragraph of Article 102 established that final decisions of merit from the Brazilian Supreme Court (STF) in suits aiming to produce a declaration of unconstitutionality of a law or regulatory act of the government, or in constitutionality declaratory actions with the same target, will have binding effects on all other members of the Judiciary and also the Executive Branch (Brazil, 1993).

For the first time, judges of lower jurisdiction within the Judiciary Branch would be compelled to decide in the same form as was sentenced in a previous ruling, even though within the tight window and exclusive borders of the concentrated control of constitutionality of laws and governmental acts. Although not yet an overall structured model of judicial precedents, at least a seedling of a system of *stare decisis*.

Twenty-one years later, the 45th Amendment to the Brazilian Constitution of 2004, while promoting a so-called Judiciary Reform, amplified the reach of that

specific model of binding precedent within the jurisdiction of concentrated control of constitutionality, by changing the content of the same second paragraph of Article 102 and extending the effects to all levels of the public administration (Brazil, 2004).

The same 45th Amendment, on the other hand, also created a new figure called a binding abridgment of law ("súmula vinculante"), exclusively authored by the Brazilian Supreme Court, through the new Article 103-A of the Brazilian Constitution. This novelty was specifically molded to be the synthesis of a supreme court ruling decided by at least two-thirds of its members after repeated decisions on the same constitutional matter, aiming to define the validity, the interpretation, and the effect of certain norms on which there have been recent controversies between courts and/or government agencies that cause grave legal insecurity and relevant multiplication of cases involving the same matter. This new form of precedent, according to the text of Article 103-A, will have a binding effect in the same manner as the final decision of merit within the jurisdiction of concentrated control constitutionality exercised by the Brazilian Supreme Court (STF), being mandatory to all members and courts in the Judiciary and with the Public Administration in both its direct and indirect dimensions (Brazil, 2004).

Though very bold and interesting, the binding precedents found in Articles 102 and 103-A of the Brazilian Constitution, however, do not represent the consolidation of *stare decisis* within the Brazilian Judiciary. A system of judicial precedents with binding effects, a true *stare decisis brasiliensis*, only recently has been introduced within the procedural model of Brazil. And the credit goes to the federal legislator of 2015.

The National Congress, the Brazilian Legislative Branch of the Federal Government, approved Federal Law number 13.105 of 2015 and made quite a stir within the Judiciary with the presentation of a new Code of Civil Procedure. Besides modifying profoundly the procedural model as a whole, the new Code offered two Articles that established the foundation for an organized system of judicial precedents (Macêdo, 2022).

Article 926 rooted four basic duties that the Judiciary must undertake regarding its jurisprudence: their rulings must be standardized and kept stable, intact and consistente. By setting these judicial obligations, the legislator both compelled and empowered the courts to proceed to uniform judgments every time the general motives that defined earlier rulings in similar settings are considered applicable. Standardizing through judicial precedents thus became a natural attribute of the Judiciary (Brazil, 2015a).

Article 927 of the present Brazilian Civil Procedure Code, on the other side, established the main settings of the new system of judicial precedents. According to the norm, judges and courts shall observe five types of precedents defined by the Legislator: I) Brazilian Supreme Court decisions in the jurisdiction of concentrated control of constitutionality; II) binding abridgments of law authored by the Brazilian Supreme Court (STF); III) court decisions in cases of incidents of

assumption of jurisdiction, incidents of resolution of repetitive multiple claims and in incidents of judgments of repetitive appeals by superior courts; IV) regular (but not binding) abridgments of law authored by Brazilian Supreme Court (STF) in constitutional matters or by the Brazilian Superior Court of Justice (Superior Tribunal de Justiça—STJ) in infraconstitutional matters; and V) guidelines defined by the full bench or a special panel of the court to which they are bound (Brazil, 2015a).

The first two breeds of precedents were already examined earlier when the first seedlings of a system of precedents introduced by Amendments numbers 3 e 45 to the Brazilian Constitution were highlighted above. Both originating from the Brazilian Supreme Court (STF), binding abridgments of the law and decisions in the exercise of jurisdiction of concentrated control of constitutionality produce precedents that have mandatory effects on other courts and judges, compelling them to rule in the same manner when presiding over cases where the same *ratio decidendi* is befitting and associable. Besides the imposing nature of the binding effect established by both the Brazilian Constitution of 1988 (Articles 102 and 103-A) and Article 927 of the Civil Procedure Code of 2015, one other source establishes the compulsory nature of these precedents: the suitability of the reclamation or complaint, a special claim structured through article 988 of the Code that can be used to annul and void a decision by a judge or court of inferior jurisdiction that disrespects the rulings of a superior court, including by simply not applying applicable precedents (Brazil, 2015a).

The precedents that originate from any one of the three incidents mentioned in item III of Article 927 of the Brazilian Procedure Code also defy the complaint if they are not followed by a judge or a lower court, hence having binding effects such as the previous types of precedents examined above. Even though it is worthy to note, in the case of an incident of a judgment of repetitive appeals by courts of superior jurisdiction, the fifth paragraph, item II, of Article 988 demands that there has been the exhausting of lower jurisdiction for the reclamation to be justifiable. These three types of precedents originate from mechanisms created by the 2015 legislator to deal with the repetitive claims that have already been brought to the Judiciary or that aim to prevent multiple cases by establishing a basic thesis beforehand, as occurs in the incident of assumption of jurisdiction (Brazil, 2015a).

The precedents depicted in the last two items (IV and V) of Article 927 of the Brazilian Civil Procedural Code, for their turn, are of a lesser than imperative nature. Although engraved in the same norm, there is no real compulsory nature, as the application of these two forms of precedents is not actually binding. Observing these precedents depends more on the level of reasonability and good sense a judge exercises since eventual judicial disobedience here by not following a precedent corresponding to a regular abridgment of law or the guidelines set by the full bench or special panel does not authorize the use of the "reclamação" as disciplined in Article 988 of the procedural code (Brazil, 2015a).

Contemplating the "list" of precedents as defined by Article 927 of the Brazilian Civil Procedure Code, only those exposed on items I through III demonstrate a substantial binding nature.

A bit confusing ... especially for those not used to certain peculiarities of the Brazilian legal system. A model was introduced and imposed by the Legislative Branch of the Federal Government of Brazil. With both virtues and defects. But a system of judicial precedents nonetheless.

Besides certain structural problems, other difficulties arise when studying the multiple techniques of applying and not applying these precedents to cases brought to the Brazilian courts. As will be discussed next.

3. The Need to Change the Judgment Technique for Proper Setting of Precedents

This topic deserves to be introduced by a fair warning to the reader: even if the final decision of the case is identified—at least in the national legal tradition—as a point of arrival, in the system of judicial precedents, the final decision represents, above all, a starting point. Today's judgment serves as the starting point for, in returning to the past, to find in the reasons for deciding yesterday's decision a parameter to define the result of the contemporary decision. It is, therefore, from this initial milestone that the judges will identify the elements that will guide their decision.

We will start, then, from the idea that all precedents are born from a decision. However, not every decision bears a precedent. This is because, often, decisions only contain statements about the letter of the law, or even limit themselves to fixing an interpretation on a certain point of law. In cases like these, it is not possible to say that that decision created a precedent.

As announced by Marinoni, "there is a simple impossibility to continue thinking about supreme courts of correction". The Brazilian Supreme Court (Supremo Tribunal Federal—STF) and the Brazilian Superior Court of Justice (Superior Tribunal de Justiça—STJ), which are both courts of superior jurisdiction, notably because they are institutional interpreters of, respectfully, the Federal Constitution and federal infra-constitutional legislation—they both must assume the position of courts, not of control, but of interpretation, ensuring the definition, subject to their constitutional powers, of mandatory precedents for the entire judiciary (Marinoni, 2015: pp. 33-39).

In this sense, recognizing the relevant functions that must be performed by the STF and the STJ, Mitidiero mentions:

> (...)The Federal Supreme Court and the Superior Court of Justice cannot be seen as reactive courts and simply controlling the legality of the appealed decisions. This is because such a way of conceiving the function of a vertex court tends to stimulate the court's attention to the appealed case, transforming it into an organ committed to acting in a particular and punctual manner in the Law, thus losing its general and constant dimension. Which should

> guide the interpretation of the Law through the performance of these courts. (...) It is precisely to avoid this particularism and inconsistency that the Federal Supreme Court and the Superior Court of Justice should be seen as proactive courts with adequate interpretation of the Constitution and infra-constitutional legislation (...). As the essence of the Law is its indeterminate nature, it is of radical importance for proper interpretation and application, the existence of courts responsible for defining the sense in which the linguistic statements used by the Constitution and by the federal infra-constitutional legislation must be understood in a given context is of radical importance for the proper interpretation and application (Mitidiero, 2013: pp. 94-95).

The function of the Supreme Court, therefore, is to define the meaning of the law. However, practice reveals that the courts act as correction courts, in other words, as an appeals court ruling over decisions made by courts of inferior jurisdiction, where the fundamentals are not as important, being privileged only the conclusion of the judgment.

Is no dialogue about the issues that can constitute *ratio decidendi*, being common judgments in which the judges simply read the votes that were previously prepared, without any discussions. The prior written justification is a sign of denial of dialogue, o it does not open space for discussion about the correct interpretation that should be given to the texts.

Along the same lines, Nogueira noticed:

> There are STF decisions that constitute truly isolated judgments gathered circumstantially only because of the need to have a collegiate judgment, that is, each Minister votes as he pleases, facing the legal issues he deems pertinent, without concern for the whole. (...) If the Superior Courts want to assume a new role—and it seems that they urgently need it—they also need to assume their share of responsibility, changing the way they judge the cases that are submitted to them. The votes that make up a collegiate judgment cannot have dispersed grounds, it is not enough that the provision is unified because the ratio decidendi of a precedent is not in the decision's provision, which is binding only for the parties to the specific case. If the Court is not concerned with the ratio decidendi it cannot expect that the precedent will be respected in the future, because it has contributed or created this situation of difficulty in interpreting the precedent (Nogueira, 2013: pp. 240-241).

In the wake of what was established, "defining the meaning of the law that will regulate future cases confers greater power and, consequently, greater responsibility for the judge".

Here it is advisable to exemplify: in the judgment, before the Brazilian Supreme Court (STF), of RE No. 590.809/RS, in which the existence of general repercussion was recognized, Minister Dias Toffoli, despite the rapporteur, Minister Marco Aurélio, not even having raised this issue and it even being recognized that the same had not been raised by the parties in the non-conformity, granted the extraordinary

appeal on the understanding that the rescission action was inapplicable because it was filed after the statute of limitations, having not, however, manifested itself on the core of the discussion held in that action: appropriateness, or not, of the rescission of judgment based on current majority jurisprudence, in the STF, and existing at the time of formalization of the rescinding decision, due to an understanding subsequently signed in a different sense by the Supreme Court itself. In the proclamation of the result, however, the vote of Minister Dias Toffoli was considered in the formation of the majority that granted the extraordinary appeal. In other words, there was no concern with the *ratio decidendi*, but only with making up the majority capable of deciding the concrete case in a certain sense, even though the ministers concluded with the same provision on completely different legal grounds.

Therefore, a warning is timely: "There is no way to bring about a ratio when the majority decision is based on autonomous and independent foundations, even though both can lead to the same result" (Marinoni, 2015: p. 80).

In this scenario, upon assuming the functions of Supreme Courts, both the STF and the STJ need to change the way they decide. Before each vote, the issues that must be faced by the collegiate must be highlighted. Indeed, "the prior definition of the object of the judgment is important when a precise *ratio decidendi* is sought, with the consequent removal of paradoxical decisions and *obter dicta*" (Marinoni, 2015: p. 103).

It is essential, therefore, that, before the collegiate judgment, the rapporteur outlines the facts of the case and the grounds that will be discussed. Therefore, the collegiate decision, concerned with the formation of judicial precedent, depends on effective deliberation on the previously selected factual and legal issues and is constructed through the participation of all collegiate members, with an adequate confrontation of the raised arguments. The aim, then, is to establish how the identification of the *ratio* occurs.

4. Identification of *Ratio Decidendi*

The original decision from which the judicial precedent is extracted is composed of two main elements: the *ratio decidendi* and the *obiter dictum*. The latter consists of the arguments exposed only in passing in the motivation for the decision and are of lesser relevance as they encompass a representation about secondary judgments of the judgment. The first is formed by legal grounds that support the decision and reveals a core with high relevance.

Cruz e Tucci states that every precedent is composed of two distinct parts: "a) the actual circumstances underlying the controversy; b) the thesis or legal principle based on the motivation (*ratio decidendi*) of the decision provision" (Cruz e Tucci, 2004: p. 12).

Thus, while the *ratio decidendi* represents the determining reasons for the decision, the element *obiter dictum* is the set of other aspects linked only peripherally to the *ratio*. In the system that assigns mandatory force to precedents, there is

a need to establish adequate means to identify, in the previous decision (in the precedent), which elements will be used for the adequate resolution of future cases. It is, therefore, necessary to establish the *ratio decidendi* to define what will effectively have mandatory effectiveness.

The "*ratio decidendi* constitutes a *generalization of the reasons* adopted as *necessary and sufficient steps* to decide a *case* or the *questions* of a case by the judge". That is, it corresponds to the determining grounds that define the logical-rational itinerary that the judge followed to reach the respective conclusion, the generalizable reasons that led to the outcome of the judgment. However, it is not the same as simple reasoning or judicial reasoning, it is intended to solve the particular case, referring to the unity of law. It is the result of what is found in the reasoning (Mitidiero, 2013: p. 93).

Concerning the methods for defining the *ratio decidendi*, Macêdo, after presenting a broad doctrinal overview, ended up concluding:

> It is not possible, therefore, to establish a method of defining the ratio decidendi (norm of precedent) a superior or correct a priori, its understanding must be guided in light of the circumstances of the concrete case and by the argumentative dimension of Law. The method of defining the ratio becomes less important, with the rational control of the decision that interprets the precedent and implements its norm growing in importance, in perfect parallel to the problem of the definition of the legal norm (Macêdo, 2022: pp. 269-270).

Although there is no safe method for defining the *ratio decidendi*, it is necessary to establish parameters to find the binding element in the precedent. The *ratio decidendi* is the legal thesis arising from the reasoning of the judgment and, precisely because it is general, it can be applied in other similar situations. Thus, it follows that the effectiveness of the precedent is always *erga omnes*. However,

> Although the ratio decidendi is found in the reasoning of the decision, it does not fully correspond to it (...). In fact, it can be elaborated and extracted from a combined reading of such decision-making elements (report, reasoning and device); it is important to know: a) the relevant factual circumstances reported; b) the interpretation given to the normative precepts of that context; c) and the conclusion reached (Didier Jr. et al., 2015: p. 447).

In this context, it is appropriate to note that "the rule of precedent is different from the text of the precedent, and it is wrong to reduce it to the reasoning or any combination of elements of the decision from which it comes—in the same way that the legal rule should not be reduced to the text of the law" (Macêdo, 2022: p. 266).

> The standard only acquires its meaning as identified by the interpreter at the time of application. For this reason, the doctrine speaks of norms as a result, and not the presupposition of interpretive activity. (...) It can no longer be

> denied, in the current stage of legal science and hermeneutics, that texts, no matter what kind, whether constitutional, legal or precedent, are not valid in themselves, do not contain a clarity that without interpretation, because to interpret is to apply and at the same time apply is to interpret (Zaneti Jr., 2015: pp. 142-144).

Peixoto recognizes that "the rule extracted from the precedents is never finished, having a permanently incomplete character, which gradually evolves together with other changes in law and society", as well as that this, however, does not differentiate the rule from the precedent of a legal text, notably because the norm extracted from the text is also in continuous modification (Peixoto, 2022: p. 186).

In this context, it is also opportune to mention that "the facts incorporated by the *ratio decidendi* are not the facts of the cause, but the *factual hypothesis*" (Macêdo, 2015: p. 278).

Recognizing the importance of MacCormick's doctrine for understanding what the *ratio decidendi* is, it seems, Marinoni also recognizes the need for interpretive activity in setting precedent:

> (...) the ratio must not be seen as the law, but rather as what is claimed to be its interpretation (...) the ratio, although it should be sufficient for the achievement of the result, must constitute a particular interpretation or solution to justify the decision of the case. If the ratio were not a particular solution to the case, but a general solution, capable of being applied to the case, it would not be producing, in this case, a ratio, but rather applying a precedent or a ratio already defined in another case (Marinoni, 2015: p. 45).

It is the argumentative density in the decisions that makes the precedent able to be appreciated and applied by the magistrate differently from how it applies the legislated rules. This is the challenge!

We have to recognize that the argumentative density makes it difficult to extract the norm from the precedent, however, it guarantees interpretive flexibility, capable of ensuring substantial equality. As the principle of equality presupposes that people placed in different situations are treated unequally. In this sense, we have the famous doctrinal lesson: "Giving equal treatment to the parties means treating equals equally and unequally unequals, in the exact measure of their inequalities" (Nery Júnior, 1996: p. 42).

The judge, when reconstructing the rule present in the precedent, in order to establish how the new case should be decided, considering the set of facts contained in the precedent, must construct the rule that will be applied to the new case, generalizing from the data that is known through the particular norms contained in the preceding ones. This activity differs from the application of legislated rules, as these are generalizations of hypothetical situations constructed by the legislator.

However, we must be careful, as this conception can create a very large interpretive flexibility of the precedent, given that this is what is intended to be avoided with the recognition of binding effectiveness to the precedents. It is up to the applicator of the law to interpret the precedent and extract from it the binding element (which can be universalized), which will have to be mandatorily considered, even to distinguish or overcome the precedent.

Furthermore, it is important to recognize that, as, in some cases, to resolve the merits it is necessary to consider preliminary or harmful issues (active or passive prescription and legitimacy, for example), and considering that it is relatively common to find a demand in which there is a cumulation of requests, a single decision, insofar o it analyzes the preliminaries, the preliminary rulings and the merits of each of the cumulative requests, can establish more than one *ratio decidendi*. The decision may also not contain *ratio decidendi*, which occurs, for example, when, despite the existence of consensus between the judges regarding the solution of the case, there is disagreement in the reasoning.

In addition, the position of Ataíde Júnior is correct, when he defends the possibility of extracting the *ratio decidendi* in matters resolved in favor of the thesis of one of the parties, but which, in the end, was defeated in the demand, given other arguments sufficient to recognize the right in favor of the *ex adversa* party (de Ataíde Júnior, 2012: p. 79).

Also worthy of attention is the way in which the *ratio decidendi* is extracted from the decisions rendered by the STF in abstract constitutional review, in which there is no concrete case pending. By the theory of the transcendent effectiveness of determining reasons, there is the extension of the binding effects and *erga omnes* to the grounds contained in the court decision, and not just to the provision of the judgment.

Therefore, the extraction of the *ratio decidendi* presupposes the reconstruction of the expressed and implicit reasoning applied to the case/precedent, being imperative to find the universalizable rule, which, nevertheless, must always be contextualized with the facts of the paradigm.

5. Proclamation of Decision and *Ratio Decidendi*

The STF and the STJ must be understood as Courts of Superior Jurisdiction. Given this, the function of these courts should not only be one of control and annulment, it being necessary for them to exercise an interpretive function of the law, with the concern not only for the resolution of the concrete case, but, especially, for the formation of binding/mandatory precedents that guarantee the proper interpretation of legal texts and unity to the law. In this sense, the recent legislative changes that have already been implemented in the Brazilian Civil Procedure Code of 1973, as well as the changes contained in the Brazilian Civil Procedure Code of 2015, allow the STF and the STJ to exercise these roles of interpretation and precedent courts.

The Superior Jurisdiction Courts such as the STF and the STJ should not only

have the objective of regulating concrete conflictual cases, by correcting decisions that apply the constitution and infra-constitutional laws, with the concern focused only on the outcome of the judgment, with the proclamation only of what was decided. There must be also the announcement of the *ratio decidendi*. The statement of the *ratio decidendi* by the courts charged with the formation of binding precedents does not, however, prevent the courts "from interpreting the precedents to conclude whether or not to apply them to the case under trial" (Marinoni, 2015: p. 126).

Precedents and summaries cannot be confused, because:

> What distinguishes them is the fact that they are statements by the court about its decisions, and not a decision that qualifies as a precedent. The summary is part of a language that describes the decisions. In this sense, it is a metalanguage, o it is aimed at enunciating something that is already part of the language of the court decision (Marinoni, 2015: p. 215).

The overviews can be formed by a precedent, however, this does not mean to say that they will always meet the essential characteristics of one.

> Because produced from the concrete case, the text of the ratio decidendi, in the summarized statements, cannot have some characteristics that normally appear in the legislated law. For example there is no reason why, in the wording of the ratio decidendi, terms of vague meaning should be used. The vagueness in the jurisprudential normative proposition is a nonsense: born from the need to give concreteness to the legislated law, the statement of the ratio decidendi, o it has been said, must be formulated with terms of precise meaning, as much as possible, so that it does not create doubts about its application in future cases (Didier et al., 2015: p. 490).

The precedents and the summaries can be distinguished by the functional aspect. While these are only concerned with delimiting a legal statement, those are concerned with guiding the jurisdictional activity in the concrete case.

The terms used in the wording of the *ratio decidendi* (and the summaries, which represent the consolidation of jurisprudence, which, in turn, is formed by the reiteration of the precedent) cannot allow the precedent to be used both to deny and to grant the right vindicated. For this, restrictions are imposed in the sense of legal terms and expressions, giving greater terminological precision to the legal language. The ambiguity of language cannot be such that it will "vary according to convenience" (Adeodato, 2021: p. 186).

It is important to establish a culture of collegiate judgments effectively concerned with the determining grounds of the decision and with the proper interpretation of the law. Thus, in addition to proclaiming the decision, the courts must inform, in a precise and clear way, what the *ratio decidendi* guided the judgment. This activity of proclaiming the *ratio decidendi*, although it is more fruitful if carried out soon after the judgment of the case, which can be considered mandatory/binding precedent, can also be used in the drafting of summary statements.

However, in order to allow the exercise of the activity of proclaiming the ratio decidendi, there is a need, as already mentioned, to change the way in which the judgments of the Supreme Courts take place. They cannot occur through the sum of votes, concerned only with forming/obtaining the result that will be applied to the case: provided or rejected; it is necessary, at the beginning of the judgment, to describe which issues will be the object of consideration, to enable the court to discuss them exhaustively and conclude how, in that particular context, the law should be understood.

This work can also—and should—be done by law operators who work with praxis. Therefore, it cannot do without, in the case of precedent formed in the STF, watching—and reviewing as often as necessary—the debates held during its plenary sessions. Luckily, the judgments of the STF plenary are broadcast live on TV Justiça (http://www.tvjustica.jus.br/), being available for a rerun on the World Wide Web (https://www.youtube.com/user/STF). The transmissions of hearings of the STF, and also of the STJ, especially considering the vastness of Brazil's territory, must be intensified and expanded, in order to guarantee, in the farthest hinterlands, access to information.

6. Application of the Precedent and *Distinguishing*

The technique of confrontation and differentiation between the relevant facts of two concrete cases is called "distinction", a term that, in *common law*, is equivalent to "*distinguishing*". In the technique of applying the foregoing, if the result of the comparison between the cases shows incompatibility between them, the judge will be given the opportunity to use the technique in question. In this activity, when there is a distinction between the case being judged and the precedent/paradigm, the non-application of the precedent is justified. *Distinguishing* (= distinction) can be performed both by the court from which the precedent emanated and by lower judges and courts, linked to the norm of the precedent. Distinctions are usually about facts; however, there may be a distinction in legal treatment.

The fact that the court or magistrate makes the distinction does not determine the conclusion that the precedent no longer has authority. To distinguish simply means that the case is not within the scope of application of the standard, which remains integral. The *distinguishing* method means the "negative application, by exclusion, of a precedent" (Taranto, 2010: p. 280).

However, too much care is required from the judge when performing *distinguishing*, as he will no longer apply a precedent, and therefore cannot use an irrelevant factual situation as a parameter; a substantial distinction is needed.

> Factual differences between cases, therefore, are not always sufficient to conclude that the precedent is inapplicable. Non-fundamental or irrelevant facts do not make cases unequal. To carry out the distinguishing, the judge is not enough to point out different facts, it is up to him to argue to demonstrate that the distinction is material, and that, therefore, there is justification for not applying the precedent. That is, it is not any distinction that justifies

> distinguishing. The factual distinction must reveal a convincing justification, capable of allowing the isolation of the case under trial from the precedent (Marinoni, 2011: p. 328).

Although it is appropriate—and necessary, as mentioned—for the Brazilian system to proclaim the *ratio decidendi* soon after the judgment of the case, the judges of subsequent cases will continue to be important.

The confrontation of the factual support of the precedent with that of the action in judgment may lead to the application of the precedent in the particular case when any dissimilarities are not considered relevant enough to move away from the paradigm decision (*ampliative distinguishing*). The decision, in this case, extends the factual hypothesis of the *ratio decidendi*, encompassing facts that, from the reading of the precedent, would not be covered therein.

On the other hand, the confrontation may prevent the application of the precedent in which a very comprehensive categorization of facts was foreseen, through the perception that the facts of the case do not fit that *ratio decidendi* (restrictive distinguishing). It so happens that the excessive reiteration of reductive distinctions reduces the mandatory force of the precedent and can determine the corrosion of the precedent's norm, which will point to the need to overcome it.

It should also be mentioned that situations may occur in which, instead of making a distinction, the magistrate or court simply ignores a mandatory precedent, resulting in what is called a *per incuriam* decision. It should be noted, however, that if the magistrate disregards a precedent with binding/mandatory effectiveness, but reaches the identical conclusion that would be reached by applying the precedent, there will be no decision *per incuriam*.

Well then. In the case of a *per incuriam* decision, if the precedent ignored is of a higher hierarchy, the decision will contain an *error* in proceeding or *error judiciandi*. If the *per incuriam* decision is taken by a body that integrates the court that issued the binding/mandatory precedent, there will be a violation of the duty of self-reference and non-observance of the legal certainty arising from the recognition of the mandatory form to the precedents.

In this case, we believe that, in the final analysis, it is not possible to adapt to the precedent that should have been applied by using the appeal structure—or in the event that the appeal has not been exercised—the use of the termination action (Article 966, V, of the Brazilian Code of Civil Procedure of 2015), especially when the precedent is the source of the ordering and, therefore, it constitutes a legal norm.

From this perspective, the distinction is also capable of harmonizing antagonistic tendencies: "the tendency to standardize judicial decisions (...), and the individualizing tendency, extractable from the right of access to a fair legal order" (Barreiros, 2015: p. 208).

> It is possible, therefore, to discern, in the context of the theory of precedents in Brazilian law and in light of the implementation of the due constitutional process for the production of the judicial decision, a true subjective right to

> distinction, of an installment nature, securitized by the party and having as passive subject the judging body (Barreiros, 2015: p. 207).

The doctrine of precedents necessarily involves the application of a comparative method or technique, once the decision on using a precedent implies the consideration of a previous rational upon a new problem with identical or similar context and the absence of peculiar elements that could otherwise autorize the withdrawal of same precedent. As Nunes and Horta realized:

> To reason by precedents is, essentially, to reason by comparisons. Situations, facts, hypotheses, qualities and attributes are compared and, when comparisons are made, analogies and counter-analogies are drawn up so that it can be concluded whether such comparisons are strong enough for different things to be treated equally, or if they are weak enough that different things are not treated unequally—in fact, however complex and controversial the notion of "justice" may be, it will hardly be possible to rehearse some well-founded conceptualization without facing the issue of equality and difference (Nunes & Horta, 2015: p. 311).

Therefore, *distinguishing* can—understood as a subjective right—harmonize equality and difference, a matter of unique importance in our Brazilian society, which is so unequal in all aspects.

7. Overcoming the Precedent (*Overruling*)

Overruling happens when the court, when judging a specific case, realizes that its jurisprudence deserves to be revisited. This need for change may occur due to some change in the legal system, through, for example, the supervenience of a new law incompatible with the preceding one, or because there was a factual evolution in society. Applying the foregoing in such cases may lead to an inconsistent result.

Systemic inconsistencies tend to generate antagonistic judgments for similar situations, which affect legal certainty, the principle of equality and the protection of the trust that citizens place in the Judiciary, disfiguring the precedent. In this context, overruling represents an important instrument to promote the harmony of the system, its flexibility and evolution.

However, it is of crucial importance to be extremely careful when applying the aforementioned institute, under penalty of weakening the system of mandatory/binding precedents. Well understood: the application of *overruling* can only occur when there is a well-founded justification for it, under penalty of having a disharmonious and discredited system, due to the overcoming of precedents that are still in line with the social reality of the time. Therefore, reasonableness is required at the time of applying the institute.

It should be noted that "lower courts cannot overcome precedents of higher courts" (Peixoto, 2022: p. 546), this is because, just as the Judiciary Branch cannot fail to apply legislation for disagreeing on its merits (unless it is unconstitutional), "the lower Courts do not have the competence to question the merits of the

precedents of the higher Courts through overcoming" (Peixoto, 2022: p. 546).

8. The Existing Disagreements Until the Formation of the Precedent

The recognition that the judge has the role of creating the norm presupposes the potential equivocation of legal texts. In this context, it is necessary to recognize the possible existence of an interpretative disagreement as an indelible mark of the period that precedes the definition of precedent by the competent court. As Mitidiero asserts:

> (...) in a theoretical framework that rejects normative univocity of the text and a purely declaratory-descriptive function of jurisdiction, it is not possible to assume that the norm has always existed and that, in this way, the consolidation of the winning judicial interpretation in the Supreme Court and the Superior Court of Justice must be imposed in all cases without distinction (Mitidiero, 2013: p. 114).

In effect, we are not dealing with the temporal efficacy of the precedent and the consequences arising from its overcoming. The intention is to verify how the cases in which the res judicata was formed before the proclamation of the ratio (= formation of precedent) by the competent court should be treated. Should they be preserved or can they be modified by termination action? Mitidiero positions himself this way:

> (...) at a time of instability in the legal order in general terms, due to the absence of precedent that more precisely defines the meaning of the legislative statements and the factual-legal context in which they apply, legal certainty in individual terms, whose protection is guaranteed by the res judicata. This is objective protection, which depends solely on the formation of res judicata prior to the pacification of the judicial interpretation by the Federal Supreme Court and the Superior Court of Justice. Equality is achieved thereby the equal treatment granted to all who are in the same situation: those who have the protection of res judicata, have their legal spheres protected against the supervening precedent; those who do not have the protection of res judicata are subject to the force of precedent (Mitidiero, 2013: p. 114).

The issue demands analysis of the position adopted by the Supreme Court. On the subject, Abridgment n° 343 of the STF provides: "There is no suit for rescission due to an offense against the literal provision of law when the decision is rescinded based on a legal text of disputed interpretation in the courts".

The said abridgment, however, in the case of a constitutional matter, was not applied in multiple cases by the STF. The non-application is due to the fact that the maintaining decisions of the ordinary instances diverging from the interpretation adopted by the STF proves to be an affront to the normative force of the Constitution and the principle of maximum effectiveness of the constitutional rule.

It so happens that the issue was once again examined by the Plenary of the STF in the judgment of Extraordinary Appeal No. 590.809/RS (Brazil, 2014), submitted to the regime of general repercussion, whose judgment was closed on October 22, 2014. In the vote of Minister Rosa Weber, it remained settled:

> Specifically with regard to the obstacle of Precedent 343, in the session in which the oral arguments were given, a precedent of my work was invoked, which I remember. In it, in the summary, I recorded that the jurisprudence of this Court was consolidated in the sense of the inapplicability of Precedent 343, when the matter covered in the records was of a constitutional nature, even if the decision object of the rescission had been based on a controversial interpretation or prior to the established guidance by the Supreme Court. But I understand—I do the same reading as the eminent Rapporteur—that we are not here to discuss or appreciate the matter when the jurisprudence belongs to the Federal Supreme Court itself. And, with all due respect, in line with what was also mentioned by Minister Fux, we must, in my view, privilege the principles of legal certainty and predictability. More than ever, in our law, we are about to adopt the theory of judicial precedents. They are fundamental.

The appropriate ratio decidendi of the precedent (RE 590.809/RS) was enunciated in a subsequent decision (Brazil, 2015b), whose digest is now transcribed:

> (...) 1. When judging, under a general repercussion regime, RE 590.809/RS, (Min. MARCO AURÉLIO, DJe of 11/24/2014), the Plenary did not, properly, effect a substantial modification of its jurisprudence on the non-application of Precedent 343 in a rescission action based on an offense against the Constitution. What the Court decided, at the time, was another matter: in view of the controversy, stated as a matter of general repercussion, regarding the appropriateness or not of the "response of judgment based on current majority jurisprudence existing at the time of formalization of the judgment terminating, in reason for understanding later signed by the Supreme", the Court replied in the negative, considering that the rescission action is not an instrument to standardize its jurisprudence. 2. More specifically, the Court stated that the supervening modification of its jurisprudence (which previously recognized and later denied the right to IPI credit in transactions with exempt goods or at a zero rate) does not authorize, on this basis, the filing of rescission action to undo the judgment that had applied the firm jurisprudence hitherto in force in the STF itself (...).

It should be noted that this position adopted by the Federal Supreme Court is already reverberating in the Superior Court of Justice (STJ). In view of the explicit position, based on what we defend in terms of legal certainty, as well as considering only the diffuse control of constitutionality, taking into account the possibility of disagreements until the ruling of the precedent by the constitutionally competent court to do so, we can extract the following four basic deductions. First of all,

the STF and the STJ are the institutional interpreters of the Federal Constitution and federal infra-constitutional legislation, and their precedents must be observed by the entire Judiciary Branch.

As a second reasoning, the effectiveness of the precedent is not subject to the formation of res judicata, depending only on publication—the institution of precedent, aimed at the protection of law in a general dimension, cannot be confused with that of *res judicata*, which protects the law in a dimension private.

As a third diagnosis, there is no suit for rescission of judgment based on current majority jurisprudence existing at the time of formalization of the judgment terminating in the competent higher court, even if this understanding is later consolidated in the opposite direction, in which case Precedent No. 343 of the STF is applicable.

And finally a forth deduction, a rescission action is possible for an offense to the literal federal constitutional or infra-constitutional provision, when the rescinding decision was based on a disputed interpretation in the intermediary instances, with the STF or the STJ, respectively, having subsequently signed a contrary direction, respecting its constitutional powers, as well as the statute of limitations for handling the termination action.

9. Conclusion: Perspectives for the Today and Tomorrow of *Stare Decisis Brasiliensis*

From the standpoint of the formation of judicial precedents, there is the main conclusion that the function of the Supreme Courts, or courts of Superior Jurisdiction such as the STF and the STJ in Brazil is to define the meaning of the law. However, "defining the meaning of the law" means projecting the effects in future cases, in order to intensify the burden of responsibility of the judge.

In this environment, the STF and the STJ, as they play the relevant role of the Supreme Courts, need to change the way they decide. This is because, in the formation of a system of precedents, the issues to be faced by the collegiate must be permeated by dialogue between those who will exercise the judging activity. It is essential, therefore, that, before the collegiate judgment, the rapporteur outlines the facts of the case and the grounds that will be discussed.

Thus, it contributes to the formation of a *ratio decidendi* that serves to identify which elements served as the basis for the resolution of that case. Based on the perception that, when deciding, the magistrate creates/reconstructs two legal norms, the *ratio decidendi* is the legal thesis arising from the reasoning of the judgment and, precisely because it is general, it can be applied in other similar situations.

The present essay also concluded that the presented techniques of application and overcoming of the precedents are fundamental for the flexibility of the system, without the legal certainty and reliability of the decisions needing to be removed.

Given the above, the context in which the system of precedents in Brazil is immersed can be seen. Still clamoring for the necessary adaptations, it will be

required of the doctrine and of the applicators of the law to equalize the uncertainties about the identification, application and overcoming of the precedents.

Furthermore, it proposes the recommendable balance between legal certainty and legal flexibility to accompany the dynamics of social life, whose complexity increases in exponential proportions. With such a more mature stance on the structure, functioning and practical applicability of judicial precedents, the courts can fulfill their mission of acting as true links between the coldness of the law text and the warmth of society, smoothing the path in search for a safer and more transparent procedural model.

That is the desire of all our citizens in Brazil, to see through the maturing of the nature of this system of judicial precedents that is peculiar to our country, the *Stare Decisis Brasiliensis*.

Despite the still lingering resistance by part of some, the new system of *stare decisis* has provided promising results. The Brazilian Supreme Court announced on the official platform of the court (https://noticias.stf.jus.br/postnoticias/stf-tem-menor-numero-de-processos-em-30-anos), that their stock of cases awaiting trial is at an all-time low in 2024, with "only" 22.021 suits in line for verdicts, the smallest number in the last thirty Years of the court's history. The main reason for this downsizing, as stated by the current Chief Justice, is directly linked to the implementation of a system of judicial precedents.

With the adequate observation and correct application of binding precedents in the verdict being disclosed by judges, especially those on the bench of the units of the Judiciary that exercise lower jurisdiction over the great masses of the Brazilian population, a natural consequence is the reduction in the number of appeals that arrive in the superior courts, considering that the technical filter in the examination of the admissibility of judicial review typically includes requirements such as the existence of a violation of a precedent within the ruling, the defective usage of such precedent or the lack of reference to a precedent that was wrongly ignored.

Reducing the number of cases and appeals is only the most visible result of the appropriate management of a system of judicial precedents. Harder to demonstrate through statistical evidence, but much more relevant are consequences such as the growing feeling of unity and cohesion within the complexity of a Judiciary formed by a great number of units and an even greater number of singular professionals empowered with jurisdiction. And, equally as important, the strengthening of the legitimacy of a more trustworthy Judiciary in the eyes of society.

To reach genuine effectiveness in the operation of a system of *stare decisis*, the collaboration of judges that exercise lower jurisdiction is not a mere interest, but an absolute necessity. To reach such active participation has been a challenge in Brazil, notably because of two great obstacles.

First, a culture of strong judicial independence and the concept of liberty to rule and freedom to decide for more than a century have frequently led judges of lower jurisdiction to feel at will to overrule a binding precedent defined by superior courts. In the past decades, it was not rare to see within the text of judicial

sentences, when a judge exposed the motives of his verdict, an explicit refusal to follow a precedent that the judicial official personally disagreed with.

Second, a negative reaction coming from a considerable amount of judges based on the concept that the new system established by Federal law number 13.105 of 2015 (Code of Civil Procedure) was antidemocratic, considering the practically nonexistent participation of judges of lower jurisdiction in the construction of the precedent. Instead of what occurs in countries with traditional models of stare decisis such as England and the United States, where the general respect towards precedents is natural considering that the genesis starts with the rulings of judges in lower courts, the formation of precedents in Brazil characterizes a tyranny of the higher courts, establishing precedents with little or no discussion from the lower levels of the Judiciary.

Both problems, representing considerable difficulties at first, are progressively being overturned by a series of measures materialized in the past few years after the edition of the Civil Procedure Code.

The introduction of *stare decisis brasiliensis* to the Brazilian "Law of the Land" has in fact brought on a new horizon. In light of the new scenario, the National Council of Justice—CNJ (a body within the Judiciary established by the 45th Constitutional Amendment in 2004 to overview and improve the administration and efficiency of the Brazilian tribunals and ensure administrative control and transparency), since 2016 has edited various norms establishing politics for the application of judicial precedents and consequent management of cases with the corresponding system, including the creation of administrative units within the tribunals to monitor the usage, supervise the production and register the producing of judicial precedents, such as the CNJ Resolutions 235/2016 (https://atos.cnj.jus.br/files/compilado214200202203146 22fb6a8cf5bd.pdf) and 286/2022 (https://atos.cnj.jus.br/files/resolucao_286_25062019_02092019192605.pdf).

Following a requirement established in Article 927 of the Code of Civil Procedure, and demonstrating an interesting tendency towards the embracing of technological innovations to modernize and improve the efficiency of the Judiciary, the National Council of Justice created in 2022 the "National Bank of Precedents" (https://atos.cnj.jus.br/files/original182945202203146 22f89992c0cf.pdf), named "PANGEA" (https://www.cnj.jus.br/tecnologia-da-informacao-e-comunicacao/justica-4-0/banco-nacional-de-precedentes-bnp/), destined to serve as a digital platform for the dissemination, research and consultation of judicial precedents by judicial officials, lawyers and the general public.

Multiple pacts of judicial cooperation have been celebrated by superior courts in Brazil with the explicit objective of strengthening the use of precedents by members of the bench in all levels of jurisdiction, establishing goals in the reduction of judicial appeals and adopting internal measures destined to increase the prestige of precedents created in the new formulas of *stare decisis brasiliensis*,

aiming to rationalize institutional relations and guarantee more efficiency in the administration of justice, while simultaneously providing more stability and security. An example of such cooperative conventions is the "Acordo de Cooperação Tecnica 03/2023" signed by the Brazilian Supreme Court and the Superior Labour Tribunal (https://tst.jus.br/-/tst-e-stf-aprimoram-acordo-para-reduzir-processos-e-fortalecer-precedentes).

In a series of institutional seminars recently organized by the Brazilian Supreme Court, the Superior Labour Tribunal and the Superior Tribunal of Justice (https://www.stj.jus.br/sites/portalp/Paginas/Comunicacao/Noticias/17062021-Gestao-de-precedente-contribuiu-para-reducao-de-processos-e-aumento-da-qualidade-dos-julgados--diz-Sanseverino.aspx), with the participation of justices and judges from all of Brazil, along with the exhibit of official statistics showing the reduction of approximately 50% in the number of appeals that reach some sections of the superior courts, lectures and debates orbited around one common conclusion: the use and management of judicial precedents is essential to the adequate administration of jurisdiction and key to courts and tribunals maintaining the trust and legitimacy of the Brazilian society.

To reach such impressive and promising results, the Brazilian Judiciary has focused on several internal campaigns to raise awareness among judges about the importance of applying judicial precedents in their rulings and upholding the new system of *stare decisis*. The "judicial schools" maintained by the tribunals have also dedicated a considerable portion of their budget towards judicial training aimed at capacitating judges in the techniques of applying binding precedent and managing cases in a way such as to assure the prevalence of *stare decisis brasiliensis* and as a result reduce the workload of the superior courts. For example, the National School of Training and Improvement of Labour Judicial (*Escola Superior de Formação e Aperfeiçaomento de Magistrados do Trabalho—ENAMAT*), the official centre for judicial training maintained by the Superior Labour Tribunal of Brazil, has not only promoted multiple courses to thousands of labour judges on applying precedents and managing cases in a system of *stare decisis* but even produced a manual in the form of a book with a collection of texts involving elements and orientations of invaluable importance for the comprehension and practice of *stare decisis brasiliensis* (http://www.enamat.jus.br/wp-content/uploads/2024/09/Livro-ENAMAT_vol-11_Gestao_de_Precedentes.pdf).

These measures, and the registered results, demonstrate that the original resistance is being overpassed and those who form the Brazilian Judiciary are progressing to a more adequate comprehension of the advantages of a system of judicial precedents. Despite the difficulties, *stare decisis brasiliensis* is on a firm and steady pace, aiming towards greater security and equality, with a Judiciary that longs to produce jurisprudence that is not only uniform but also stable, integral and coherent, as established as an objective duty for all judges and tribunals by

Article 926 of Code Civil Procedure (Brazil, 2015a).

Going forward in that direction, the Brazilian society strives to have a Judiciary that does not reflect internal anarchy by producing a "lottery jurisprudence", but materializes steadyness, safeguard and confidence. With the growing comprehension of the dynamic of *stare decisis brasiliensis*, judges and justices in Brazil are on track to accomplish those goals.

Conflicts of Interest

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

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