

# UNITED STATES OF AMERICA AND BRAZIL: A STUDY OF THE COMPARATIVE LAW ON THE IMPLICATIONS IN THE CONSTITUTIONALITY CONTROL

ESTADOS UNIDOS DA AMÉRICA E BRASIL: UM ESTUDO DE DIREITO COMPARADO SOBRE AS IMPLICAÇÕES NO CONTROLE DE CONSTITUCIONALIDADE

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## ABSTRACT

First, the study gives a brief historical account of the evolution of judicial precedents in the United States through the *Marbury v. Madison* and the importance of this case in American constitutional law. Following on the doctrine that defends the precedents in Brazil and its arguments and grounds for its application in the internal scope. In this way, the main objective of the study is to explain the consequences that the application of judicial precedents can bring to the Brazilian State if it is carried out in the way that is occurring, that is, without interpretation criteria and without grounds for its effective application, which can be harmful not only to the legal system, but to society as a whole. Therefore, the important use of the reasoned interpretation that must be used by Brazilian courts and not simply a composition of non-systematic presumptions of the Judiciary Power, as has been occurring in the Brazilian scenario, remains crystal clear.

**KEY WORDS:** Constitutionality Control. Comparative Law. United States of America and Brazil. Science of Interpretation.

## RESUMO

Primeiramente o estudo realiza um breve apanhado histórico da evolução dos precedentes judiciais nos Estados Unidos através do caso *Marbury v. Madison* e a importância deste caso no direito constitucional americano. Na sequência a doutrina que defende os precedentes no Brasil e seus argumentos e fundamentos para sua aplicação em âmbito interno. Desta forma, o objetivo principal do estudo é explicar as

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consequências que a aplicação dos precedentes judiciais pode acarretar ao Estado brasileiro se realizada da forma que está ocorrendo, ou seja, sem critérios de interpretação e sem fundamentados para sua efetiva aplicação, que pode ser prejudicial não apenas ao sistema jurídico, mas à sociedade como um todo. Logo, resta cristalina a importante utilização da interpretação fundamentada que deve ser utilizada pelos tribunais brasileiros e não simplesmente uma composição de presunções não sistemáticas do Poder Judiciário, como vem ocorrendo no cenário brasileiro.

**PALAVRAS-CHAVE:** *Controle de Constitucionalidade. Direito Comparado. Estados Unidos da América e Brasil. Ciência da Interpretação.*

## 1 INTRODUCTION

When we enter into the vast territory of the search for the application of precedents in Brazil, there is much to be discovered and analyzed, from the roots of the Common Law system to the form of decisions handed down by Brazilian Courts.

First, let it be clear that Brazil brings its legal traditions from the system that has been passed on to us from Rome, Portugal, France and Germany. Brazil is and has always been Civil Law. However, with the novelties brought into the Brazilian system due to the 'concentrated control of constitutionality', as well as taking into account the general repercussion, these possibilities provide Brazil with a judicial lawsuit similar to that of Common Law. The problem is that: we are still a country that carries the tradition of Civil Law in its daily routine, and the possibilities of using precedents in today's Brazil are more than frustrating, if not disastrous.

What we intend to show here is how the decisions taken by the Brazilian Courts go against the Common Law system. There are no concise reasons, studied and argued as it's done in Common Law and in the doctrine of *stare decisis*. Of course, it cannot be agreed that in countries that adopt this system, decisions aren't controversial and aren't subject to change. However, it's from these decisions that the catalog of precedents is built, and that is why it's necessary to carry out an interpretive and systematic analysis of each specific case.

The first chapter of this scientific article deals with the development of Common Law in the United States and how the precedents were achieved through the case of *Marbury v. Madison* and of the doctrine *stare decisis*.

In the second chapter, the objective is to show the Brazilian doctrine that defends precedents in Brazil, and what benefits the application of precedents can bring to the internal legal system. However, on the other hand, an analysis is carried out through a reading by Lenio Streck on the way that court decisions are made or performed. Through hermeneutics, this author criticizes the form of interpretation applied by the judges in the Brazilian State when deciding the cases they analyze. In other words, Brazil is on the opposite path to the Common Law system, with respect to the way in which judicial decisions have been made and uttered.

On the other hand, it is also shown that with the advent of the 'New Civil Procedure Code' (*Novo Código de Processo Civil Brasileiro* or *Código de Processo Civil de 2015* or *CPC/2015*), there is something to celebrate, as the judiciary's discretion is somewhat restricted, making the use of the principle free conviction is diminished, or even extinguished by the courts.

Broadly speaking, the present study isn't intended to measure whether one system is better than the other, or whether the judicial precedents are harmful to the law. What must be considered here is the interpretation to be carried out and its limits, already concluding, beforehand, that the limit is the Constitution.

## 2 THE EVOLUTION OF PRECEDENTS IN THE UNITED STATES OF AMERICA

As is known, the precedent system is a theory provided for in Common Law, a system that isn't adopted in Brazil. The United States is one of the countries that adopted the Common Law system, also known as Anglo-Saxon, with roots brought by English law, since the United States was colonized by the English. Therefore, precedents have binding force in their legal system. Compared to the precedent system in England, the number of precedents in the United States is much greater, regardless of the subject.

Its interesting to analyze that, unlike England, Common Law in the United States has its own characteristics, not only in terms of the judiciary, but in various organizational spheres. The organizational pluralism is one of those peculiarities of the American state.

Constitutional law in the United States didn't start in a very peacefully way. Around the 17th century, the United States began to be colonized by Englishmen who migrated to the place for several reasons. The colonies implanted in the new continent were faithful to the English colonies and the governor was designated by London.

In the middle of the year 1760, with the occurrence of the Stamp Act, an episode in which the British Crown imposed taxes on stamps, newspapers and other documents with the aim that their colonies contributed to their own defense, only aggravated the situation that was no longer in total control, there was great disobedience, because the British colonies questioned their non-participation in the decisions of the English Parliament.

Between the years 1775-1788 the colonies were at war, deciding for their own independence and that consequently would generate the American revolution. So, it was from such an act that there was the great mark of American independence, as explained by BARROSO (2013, p. 38):

There it was decided to set up an organized army, whose command was given to George Washington; former colonies were encouraged to adopt written constitutions; and a commission was appointed to draw up the Declaration of Independence, whose main rapporteur was Thomas Jefferson. Signed on July 4, 1776 by members of Congress, this document is considered a milestone in the history of political ideas, now symbolizing the independence of the thirteen American colonies, still as distinct States. (Our translation into english)

As the years went by, there were still difficulties in ratifying the new constitutional model by the States. However, the Constitution didn't have a bill of rights, which was only introduced in 1791, with the first ten amendments, known as the Bill of Rights. The Bill of Rights brought

a variety of rights that enshrined freedom of religion, expression, the right to meetings and rights related to due process and the conditions for a fair trial.

The American Constitution, compared to the 1988 Brazilian Constitution, has undergone few amendments and is still in force today. The American Supreme Court has a fundamental role in constitutionalism in the United States through its interpretations.

The decisions arising from the Court's interpretations weren't consolidated quickly, nor were its decisions always of a charitable nature at the national level and even at the international level. Along with the precedents, a main characteristic of the Common Law system, it cannot always be considered that they were and still are applied in the United States in a way that doesn't deserve criticism. However, as mentioned, it's a main feature of the Common Law system, that is, it's the form that constitutional law presents for its possible effectiveness in the United States.

## 2.1 THE STARE DECISIS DOCTRINE AND THE DEVELOPMENT OF PRECEDENTS

The *stare decisis* doctrine means to say that the decisions of the higher courts become binding on all the lower bodies of a jurisdiction. The institute *stare decisis* has an important and complex role in the construction of precedents in the American State and isn't expressly provided for in the United States Constitution, it's an institute originating from Common Law.

However, it's important to mention that this doctrine isn't synonymous with the 'precedents' and both cannot be confused, according to analysis by STRECK (2014, p. 40):

In this perspective, cannot lose sight of the fact that *stare decisis* is more than the application of a similar solution rule for equal cases, as this would be a very simplified view of a highly complex procedure that has been structured in those communities for centuries. (Our translation into english)

And the author adds by, citing that (STRECK; 2014, P.40):

(...) the *stare decisis* doctrine, in its technical sense, only emerged later, through a systematization of decisions, which distinguished the elaboration/construction (holding) and the case that would consist of the precedent and would be binding for future cases, and the *dictum*, which consisted of in the argument used by the court, dispensable to the decision and, therefore, weren't binding. (Our translation into english)

In this way, what is considered according to the author above, is that the doctrine of precedents and the doctrine *stare decisis* cannot in any way be confused, since this came long after that, and the first, that of precedents, was structured at the end of the 17th century.

With the *stare decisis* the decisions of the American Supreme Court start to have a binding effect, and in these cases the judges are linked to the decisions of the past, as APPIO quotes (2009, p.57): "a judge may even disagree with the correction of the previous decision, signed in the precedent and, even so, will have to adhere to what has already been decided in the past. In cases of vertical linking, the adhesion is unrestricted and mandatory". In cases of horizontal link APPIO (2009, p.57) explains that: "judges are linked to the precedents of their

predecessors and can only stop applying these precedents if they choose to revoke them expressly (overruling)" (our translations into english).

In the *stare decisis* system, cases of overruling are possible, that is, revocation of a precedent. For the overruling to be applied, it's necessary to comply with relevant criteria for the revocation of the precedent. Again in the words of APPIO (2009, p.60):

It's important to add the information that *overruling* cannot be invoked by a lower court or judge with the purpose of revoking a decision of a Superior Court and that the precedents of the United States Supreme Court - because the highest body of the American Judiciary - can only be revoked by the Supreme Court itself (or by Congress). (Our translation into english)

So, it's possible to perceive the importance of analyzing the case and the reasoning, both for the construction and for the deconstruction of a judicial precedent.

## 2.2 MARBURY V. MADISON CASE AS A CONCRETE OF CONSTITUTIONAL PRECEDENTS IN THE UNITED STATES

In the American state, there was the experience with precedents, but not in the sphere of Constitutional Law. The application of constitutional precedents in the United States didn't solidify with the arrival of the American Common Law system, because for a doctrine of precedents to be consolidated, prior decisions were necessary. *Stare decisis* also cost to consolidate, mainly related to constitutional decisions, as analyzed by SARLET (2012, p. 884-885):

It's true that American doctrine took a long time to individualize constitutional precedents - that is, precedents that deal with constitutional issues - in the face of the precedents of Common Law and legal interpretation. This is probably because the constitutional jurisdiction represents something absolutely new for lawyers from the origins of the American judicial system. There was experience with the precedents of the Common Law, but not with the constitutional precedents. The doctrine took time - almost a century - to develop a theory capable of clarifying the relations between the different kinds of precedents. (Our translation into english)

Constitutional law in the United States materializes with the famous case *Marbury v. Madison*, and despite the fact that there is no provision for the control of constitutionality in the American State, it was with this case that the American constitutionality control emerged and, as a result, the first precedent was consolidated.

The case *Marbury v. Madison* is a major milestone in the constitutional law of the United States and it will always be important to describe it, especially when entering the extensive path of precedent, and especially when it comes to constitutionality control. Brazil also started to use this institute when analyzing the rules that aren't in line with the 1988 Federal Constitution.

The decision through the interpretation of the Supreme Court in the case *Marbury v. Madison*, is a decision that shouldn't be analyzed in isolation, given its importance for all American institutional spheres. In the year 1801, John Adam, the President of the country at the time, was nearing the end of his term and appointed some judges who were allies to

his party to occupy positions available in the federal judiciary, and among the nominees was William Marbury.

It turned out that there was no time for Marbury to start the new position, as Thomas Jefferson, who was in theory against John Adams politically, took office as President, appointing James Madison as Secretary of State. Madison, when analyzing the situation of the appointments made by Adam, realized that most of the judges had not received the letter of appointment and for this reason decided to cancel the act of the ex-president because the act wouldn't be complete.

Marbury, unhappy with Madison's decision, filed a request in the Supreme Court, *writ of mandamus*, foreseen in the Judiciary Act, for the ex-president's appointments to be maintained by the new President, as he believed that there was a potestative right to become a magistrate. The Executive was summoned to present a defense, but did nothing.

John Marshall, who had previously been Secretary of State under the Adam government, and at that time held the position of President of the Supreme Court, found himself in a situation that was completely difficult to resolve. If he ordered that Jefferson to take over Marbury, he would have no way of implementing the command; the Supreme Court would be demoralized. If he gave to Jefferson the reason, without his having defended himself, he would appear fearful, weak, the Supreme Court would emerge from the fray demoralized as well. (GODOY; 2004, p.65)

It was then that, in 1803, Marshall, with his great skill, recognized that Marbury was entitled to the appointment of the magistracy, since it was a matter of fulfilling the public interest. However, he still substantiated his decision that the device that Marbury used to substantiate his request was an unconstitutional provision, that is, it was null, therefore, the Supreme Court had no legitimacy to consider Marbury's request.

In this way, we can analyze in the explanation of MACIEL (2006, p.40):

(...) even though it couldn't be extracted from the device in question, unquestionably, the Court's original competence to judge the writ saved by Marbury and others, Marshall, surreptitiously and highly ingenious, said that the section 13 of the Organic Law attributed unconstitutionally competence to the Supreme Court to judge the *writ*. (Our translation into english)

In Marbury's interpretation, the Judiciary Act wasn't in accordance with the Constitution, and as Marshall understood by the hierarchy of Constitutional rules, the infralegal rules that weren't in line with the Constitution wouldn't be valid, therefore, declared the article of the Judiciary Act that Marbury used, as unconstitutional, carrying out the 'constitutionality control' for the first time and the first precedent in the United States. Thus, in the face of this decision, he didn't conflict with then-current President Thomas Jefferson, didn't fail to give to Marbury a reason, and even spared the Supreme Court from making a decision that could harm and vex itself.

Analyzing the perspective of precedents from the aforementioned case, it's clear that, despite the United States being governed by the Common Law system, the law set isn't left aside, as the Judge Marshall interpreted and decided on the constitutional hierarchy, that is, due to the prevalence of the Major Law, even though it had no constitutionality control. Thus, it can be understood according to FARNSWORTH (1963, p.72) that: "the United States has



its own system of legislation, but judges are in the courts not to modify the statutes, that is, the legislation, but rather to decide according to the existing law through interpretation" (our translation into English).

Let's look in more detail:

Although the interpretation of statutes raises some questions, which are peculiar to the American legal system, many of the fundamental are familiar to the most of the legal system. To begin with, it is axiomatic that as between the court and the legislature, the command of the legislature is supreme except, to be sure, on the point of validity of the statutes itself. Case law can be and often is altered by statute but, at least in principle, statutes cannot be altered by court decision. The court's function is dealing with the legislation is that of interpretation. As to the nature and limits of this function, however, there is no universal agreement.

Thus, with the consolidation of the constitutional precedents in the American State from the important case *Marbury v. Madison* understands that the courts must interpret and apply the existing legislation.

It's evident that the entire precedent system in the United States has different sides. On the one hand, there are judges who can be considered activists, who, as a rule, follow the ideologies of the Democratic Party, with the most activist being Judge Earl Warren, but this one, appointed by the President of the time who belonged to the Republican Party. At this stage, it's understood that the Supreme Court has rendered, let's say, progressive decisions in the history of the United States.

On the other hand, there are judges considered as textualists, originalists, who understand that interpretations must be carried out literally with the text of the Constitution. After the death of William Rehnquist, the current president of the United States Supreme Court was John Roberts, who was appointed by President George W. Bush in 2005. Roberts is a Republican and has a very conservative tendency.

In the conservative phase that the United States Supreme Court is currently experiencing, the decisions reached by the way of thinking of the Court previously established, known as the Warren Court, are gradually becoming more and more conservative.

Just as a demonstration of how the American Court is changing, in 1989 with Rehnquist in the presidency, with the *Webster v. Reproductive Health Service*, there was a major constraint on abortion practices.

A few years before Robert took over the presidency of the Court in 2005, he wrote a document requesting that the decision taken in 1973, in which the legality of abortion was decided, the case described briefly above, be revoked. However, to no avail. It's true that there are differences between the American States, but, in general, the United States doesn't criminalize the act.

Despite being a legal system originating from the American State and an "inheritance" of the English Common Law system, what is undoubtedly perceived is the judicial activism when interpreting the American Constitution, which has been in force since 1789. It's obvious that in all the years in which the United States Supreme Court has acted, there have been many positive changes for the State itself, and consequently for Brazil, since, to a large extent, the Brazilian judicial model is based on the American model. However, it's of greater relevance

to analyze the decisions commented so far, and to understand the extent to which 'interpretations and judicial opinions' can be reached in specific cases. In other words, there is a very fine line between decisions and opinions and one must not be confused with the other.

### 3 DOCTRINES ON PRECEDENTS IN BRAZIL

As it became known, Brazil adopts the Civil Law system in a legal context, also known as Romano-Germanic. Civil Law has its origins in ancient Rome. Just as the Common Law of the United States has dispersed somewhat from its English origin, Civil Law also has some distinctions from its Roman roots.

Unlike Common Law, in Civil Law the laws are the main source for conflict resolution and guarantees of fundamental rights, they are based on forms of 'Codes' coming from the Legislative Power, however, they need to be in line with the Brazilian Federal Constitution. In addition: the laws of the Roman-Germanic system, used in a specific case, aren't intended to be used, not exactly the same, for the resolution of future cases; since in a system in which the law is prevalent, there isn't only one correct law to apply to the case to be tried.

The Brazilian idea of 'constitutionality control' (*controle de constitucionalidade*) has a Bahian matrix, in Ruy Barbosa's thinking. In fact, in the comments to the 1891 Republican Constitution, one of its creators, the always remembered Ruy Barbosa (1929, p. 87), teaches, about the 'constitutionality control' that:

Justice has to know about their existence, to know about the existence of the law. But it doesn't exercise, in this respect, the least discretionary function. The Constitution outlined in arts. 36 and 40 the rules of legislative elaboration imposed on the three factors, on whose cooperation the legitimate formation of laws depends. If any of these rules is materially confiscated, or postponed, and of that flagrant infraction, authentic evidence is preserved in the Congress or Government's own acts, intended to certify the deliberation, sanction, promulgation, there is no law; because its elaboration wasn't consumed. The courts, therefore, cannot apply it. In a word, any material contravention of constitutional forms, authentically proven, in the legislative drafting process, is addictive and nullifies the act of the legislator. Not so the simple violation of regulatory forms. (Our translation into english)

The Brazilian doctrine defending the precedents claims that: there is a great approximation of the Common Law and Romano-Germanic system, mainly after the new Civil Procedure Code. MARINONI (2013, p. 22), defends the approximation of the two systems and mentions that there is "(...) the need to surrender respect to precedents in Brazilian law". The author further explains that (2013, p. 22):

Despite the transformations that took place in Civil Law - including the conceptions of law and jurisdiction, markedly due to the impact of constitutionalism - and the specificities of the Brazilian system - which is subject to diffuse control of the law's constitutionality, there is a notable resistance, not to mention indifference, to common law institutes of great importance for the improvement of our law, as is the case of respect for precedents. (Our translation into english)



The author WAMBIER (1997, p. 80), who is also a defender of the doctrine of precedents, explains that: "It's an achievement of civilized peoples, which generates security, predictability and constitutes a defense of the system against arbitrariness" (our translation into english).

Both authors believe that: the courts equally deciding on a specific concrete case and with mandatory force, the decisions rendered will have a more isonomic character, guaranteeing the parties' rights in a more concise manner. In other words, they believe that judicial precedents bring security to the legal system, and that when the Civil Law system is applied there is no guarantee of equality for all individuals under the State of Law (*Estado de Direito*).

### 3.1 BRIEF ANALYSIS OF THE THEORY OF PRECEDENTS IN THE CIVIL PROCEDURE CODE OF 2015

The new Civil Procedure Code didn't bring the regulation of precedents in the Brazilian State, but in several of its articles the subject is mentioned. For many years the Superior Courts have been, in some way, trying to introduce the practice of precedents, even before Constitutional Amendment nº 45 of 2004, which regulated the institute of 'binding summary' (*Súmulas Vinculantes*) issued only by the Supreme Federal Court (*Supremo Tribunal Federal*).

As for the new Civil Procedure Code of 2015, BARROSO and MELLO (s/a, p. 11-12) mention:

It established a broad system of binding precedents, providing for the possibility of producing judgments with such effectiveness not only by the higher courts, but also by the second-degree courts. In this line, art. 927 of the new Code defined, as understandings to be mandatorily observed by other instances: (i) the binding summary, (ii) the decisions rendered by the STF in the context of concentrated control of constitutionality, (iii) the judgments handed down in judgment with general repercussion or in an extraordinary or special repetitive appeal, (iv) the judgments of the courts handed down in incident of resolution of repetitive demand and (v) incident of assumption of competence, (vi) the statements of the simple summary of the jurisprudence of the STF and the STJ and (vii) the guidelines signed by the plenary or by the special bodies of the second-degree courts. (Our translation into english, corresponding to the original text of the items: "(i) as súmulas vinculantes, (ii) as decisões proferidas pelo STF em sede de controle concentrado da constitucionalidade, (iii) os acórdãos proferidos em julgamento com repercussão geral ou em recurso extraordinário ou especial repetitivo, (iv) os julgados dos tribunais proferidos em incidente de resolução de demanda repetitiva e (v) em incidente de assunção de competência, (vi) os enunciados da súmula simples da jurisprudência do STF e do STJ e (vii) as orientações firmadas pelo plenário ou pelos órgãos especiais das cortes de segundo grau.")

In the institutes shown above, two of them weren't previously foreseen, these being the 'incidents of resolution of repetitive demand' (*incidentes de resolução de demanda repetitiva*) and 'assumption of competence' (*assunção de competência*).

The theory of precedents has been taking shape not only at the constitutional level, but also at the procedural level with the advent of the New Civil Procedure Code (*Novo Código de Processo Civil de 2015*). ATAÍDE JR. (2012, p. 363) mentions that the practice of precedents "(...) resolves, with greater legal certainty, coherence, speed and isonomy, the mass demands,

the repetitive causes, or better, the causes whose relevance goes beyond the subjective interests of the parties" (our translation into english).

Analyzing art. 927 of the *NCPC*, already mentioned above according to Barroso, in what concerns the 'incident of resolution of repetitive demand', was one of the biggest news brought in the *new CPC*. As explained by BARROZO and MELLO (s/a, p. 12): "The incident of resolution of repetitive demand corresponds to a special procedure for the judgment of a repetitive case that can be instituted in the second-degree of jurisdiction" (our translation into english). That is, in analysis of articles 976 to 987 of this CPC/2015, the purpose of the institute is so that: when a certain jurisprudence is established on a given issue, it's feasible that the courts of second instance decide all the following cases, as a rule, equally.

Regarding the second important point mentioned above, brought by article 927 of the CPC, the incident of 'assumption of competence', BARROZO E MELLO (s/a, p. 12) explain that: "The incident of assumption of competence allows the judgment of a relevant question of right, with great social repercussion, which isn't repeated in different cases, to be assessed by a specific body, indicated by the internal rules of the court" (our translation into english).

The institute provided for in article 947 of the CPC/2015 establishes several requirements for its admissibility, but what is most relevant in the present research is what is mentioned in § 3º - "The agreement rendered in assumption of jurisdiction will bind all judges and fractional bodies, unless there is a thesis review" (our translation into english). Therefore, in interpretation of the Civil Procedure Code, WAMBIER (WAMBIER et al. 2015, p. 2113) cite that:

With the intention of imposing compliance with what is defined by the collegiate, § 3º of art. 947 of the current legislation expressly provides that the decision will bind all judges and fractional organs of the court. There, the great distinction between the assumption of the 1973 CPC and the current CPC. There is nothing more natural for the link to occur as the higher collegiate recognized the relevance of the issue and decided it. There would be insecurity if decisions were taken in other processes regarding the same thesis signed in a different sense, in addition to such an action going against the importance of respecting the jurisprudence of hierarchically superior bodies. (Our translation into english)

In this way, what is generally understood, not only with the implementation of the two institutes clearly in the CPC, but also with the objective of implanting the theory of precedents in the Brazilian judicial system, is that: what is sought is 'equality' and 'legal certainty' in the decisions of so-called 'similar cases' (*igualdade e segurança jurídica nos casos similares*).

But the question is: is there really equality and legal certainty in decisions, based on the premise that the practice of precedents is already implemented in our system? We understand that no: the jurisprudential praxis of our Supreme Federal Court (*Supremo Tribunal Federal*) demonstrates a stupendous fragility of this Brazilian Supreme Court in maintaining its own jurisprudence, so that this Supreme Court of Brazil judges against itself when using the new instruments that have been made available by the Constitution of 1988 and by the *NCPC*. Legal instability - which violates the constitutional principle of legal certainty - is what causes the injunctions granted by the Supreme Federal Court ministers (*Ministros do Supremo Tribunal Federal*), successively, against each other, almost all of them going in paths that aren't those of the Class (*Turma*) and/or those of the Plenary of the Court (*Plenário da Corte*). Therefore, it's to be suspected that the *STF*, in its current composition is, indeed, politicized.

### 3.2 A READING BY LENIO STRECK - HERMENEUTIC CRITICISM OF LAW

Brazilian doctrine that defends precedents states that: with judicial precedents, equality, isonomy and legal certainty will be guaranteed, as isn't consistent that in similar cases, judges use a different interpretation of the law, that is, it's necessary to have consolidated an interpretation, so that equality is present in the decisions and fundamentals.

In Brazil, there is no possibility for the Civil Law tradition to be extinguished in order to start using Common Law criteria. First, STRECK (2014, p. 35) mentions that: "(..) in the Civil Law tradition, it's only possible to assess the importance of jurisprudence if we take into account its relation with the law". At another point, the author also mentions that (STRECK; 2014, p. 52): "to discuss precedents, jurisprudence and binding summaries is, necessarily, to enter the delicate field of hermeneutics. There are several ways of working on the "hermeneutic question", which, in the end, will be the "hermeneutic question"". (Our translations into english)

Well, it's true that in the Civil Law system, judges aren't exempt from interpretation in order to arrive at the best possible decision in each specific case, but there is a need for these interpretations to be linked to the law, and not a tangle of decisions without the proper structure of law or right, that is, a jumble of unfounded decisions, where 'the judge decides how he wants', because, such a fact would become a kind of judicial arbitrariness, which is also not acceptable in the Common Law system. And today, what is perceived in the Brazilian judiciary is this phenomenon, which STRECK calls 'solipsism'. In this way, we can analyze the criticism made by the author (2014, p. 330-331):

The pre-judgments are conditions for the possibility of understanding because it allows us to project meaning. However, the projected meaning can only be confirmed if it derives from a legitimate prejudice. Illegitimate pre-judgments generate projects of illegitimate meaning and, inevitably, cause the interpretation to be in error. Only those who suspend their own previous judgments are those who interpret correctly. A judge who is unable to suspend his previous judgments is incapable of his task. (Our translation into english)

Before going further into the theory of judicial precedents in Lenio Streck's view, it's essential to mention the interpretation of the norm from a text. The norm is the interpretation of the text, it arises from a hermeneutic process carried out by the interpreter who will apply the text, in the form of a norm to the specific case, but again, this application must not be carried out through any interpretation.

In the words of KELSEN (1998, p. 3):

What transforms this fact into a legal act (lawful or unlawful) isn't its facticity, it isn't its natural being, that is, its being as determined by the law of causality and enclosed in the system of nature, but the objective meaning that is connected to this act, the meaning that it has. (Our translation into english)

Therefore, it's perceived that it's up to the interpreter of the law to make/to give sense of the text in which the norm is inserted and to analyze it in face of the problematization posed. Let's see in the words of GRAU (2006, p. 35):

The interpreter discerns the meaning of the text from and in view of a given case; the interpretation of the law consists of implementing the law in each case, that is, in its application [Gadamer]. Thus, there is an equation between interpretation and application; here, we aren't, facing two distinct moments, but facing a single operation [Marí]. Interpretation and application embody a unitary process [Gadamer], overlapping. (Our translation into english)

Following in the words of STRECK, who states that the norm will always be the interpretation of the text, let's see (2014, p. 312-313):

Therefore, in a simplified way, it's possible to affirm that when one speaks of "the norm that emerges from the text", isn't talking about a hermeneutic-interpretative process carried out by parts (thus repeating the classic hermeneutics - first I know, then I interpret, finally, apply). *Obviously not*. I don't see the text first and then "couple" the respective standard. The "norm" isn't a "cover of meaning", which would exist apart from the text. In contrast to this, *when I come across the text, it's already standardized*, from my condition of be-in-the-world. (Our translation into english)

Thus, in view of the explanation between text and norm and understanding that the norm is a consequence of the interpretation of the text, comes to understand the need for a cohesive interpretation of the text, and not the mere practice of solipsism practiced by judges. Therefore, it is worth thinking: if with the norm arising from a text expressed in a legislation, misinterpretations occur, how is being the interpretation by the judges in Brazilian courts in cases of application of judicial precedents with the attempt to match the Common Law model? However, it's important to remember that, even in a precedent system, the judge has discretion for interpretation, it's necessary to observe the entire catalog of existing precedents.

The rule of *stare decisis* from the precedent system is the main feature of Common Law, as already seen, and is an essential point for the application of precedents. In other words, with the need to apply *stare decisis* at the moment of analysis, for a decision to become a precedent, an element with binding force for the entire system is perceived, which isn't provided for in local law, but yes in tradition. Since, for the effective creation of a precedent, the *ratio decidendi* and the *obiter dictum* must be analyzed.

Well, at this moment we will enter the field of 'summaries' (*súmulas*), which are inherent to the Civil Law system. It's therefore essential to establish, at once, that 'summaries' (*súmulas*) and precedents (*precedentes*) aren't the same thing.

### 3.3 BINDING SUMMARY (*Súmula Vinculante*) X PRECEDENT

We clarify, first and essentially, that we will deal, specifically, in 'binding summaries' (*súmulas vinculantes*), that is, summaries edited by the Supreme Federal Court (*Supremo Tribunal Federal*), that need a serious interpretation of the law/right so that they can have binding force. And, therefore, to think that editing binding summaries through a any and relativistic interpretation of law is to generate precedents, is a big mistake.

STRECK criticizes the binding effect attributed to the STF in lawsuits that declare the 'unconstitutionality of norms', see (2014, p. 723):

The first issue that emerges is the apparent novelty in the sense that a decision that declares unconstitutionality - therefore, the invalidity - of a law has a binding effect. Nothing more obvious, and it's surprising that it was necessary to establish this effect in legislation. Hermeneutically, a decision that declares unconstitutionality is a decision that "nadifies". If a law is invalidated by the Court charged with finally saying whether a law is unconstitutional or not, how admit that someone, judge or court, could say otherwise? And what would the judge be judging? About something that is no longer valid? About a vain law? None? Therefore, nothing more logical than the binding effect in a lawsuit that declares the invalidity of a normative act. (Our translation into english)

Likewise, it can be said that there is a binding effect of the declaration of constitutionality and unconstitutionality, and the author concludes by saying that (STRECK; 2014, p. 723-724): "these are different things, treated wrongly by the legislator. In other words, while the declaration of nullity implies the annulment of the law, the declaration of constitutionality doesn't have a similar effect" (our translation into english).

With all this novelty that Constitutional Amendment nº 45 brought to the Brazilian legal system, it's clear that with the STF's prerogative to interpret the law as it sees fit, there is a kind of change in the interpretation of the rule/norm and even a change in the mutation constitutional itself, (this, coming from German law) where the constitutionality of these changes isn't always observed.

It's crystal clear that there is a need to interpret the rule/norm and the specific cases so that the binding effects of these decisions can have an effect, and here isn't said that all decisions of the higher courts shouldn't be taken into account, what is said is that the law must be observed and thoroughly analyzed before decisions with effect *erga omnes* are launched into the legal system.

It's necessary that the diffuse and concentrated constitutionality control be distinct, since both are different in their object, form of analysis of the law and also in their effects. The doctrine defender of the application of precedents in the Brazilian State, has argued that diffuse control and concentrated control of constitutionality should be seen as a single institute. However, it must be realized that such thinking is contrary to the Constitution. Thus, explains José Afonso da Silva (SILVA, 2013, p. 51):

Political control is what gives the verification of unconstitutionality to bodies of a political nature, such as: the Legislative Power itself, a predominant solution in Europe in the last century; or a special organ, such as the Presidium of the Supreme Soviet of the former Soviet Union (Constitution of the USSR, art. 121, § 4º) and the Conseil Constitutionnel of the current French Constitution of 1958 (arts. 56 to 63). The jurisdictional control, widespread today, called judicial review in the United States of North America, is the faculty that the constitutions grant to the Judiciary to declare the unconstitutionality of law and other acts of the Public Power that contradict, formally or materially, constitutional precepts or principles. (Our translation into english)

The two forms of constitutionality control must not be equated. STRECK (2014, p. 58) calls this theory of equalizing diffuse and concentrated control: "objectification of diffuse control", because "(...) it carries the idea that the STF and the STJ don't judge conflicts" and "their actions would be only objective". And he concludes that (STRECK, 2014, p. 58) "(...) in



reality, the so-called objectification allows the STF to do whatever it wants, including departing from the constitutional text" (our translation into english).

The fact that the higher courts are only available to act in an objective manner isn't compatible with the Constitution of 1988 and such a fact couldn't even occur with a change in the constitutional text, because the Superior Courts, STF and STJ, would be transformed into courts just to analyze constitutional remedies, that is, writ of mandamus (*Mandado de Segurança*), *habeas corpus*, injunction (*Mandado de Injunção*) and *habeas data*, therefore, it would lose the jurisdictional function of dispute settlement, not only through the judicial remedies, special and extraordinary (*Recurso Especial e Recurso Extraordinário*), but also the function of acting in the control of constitutionality and defense of the Federal Constitution.

Both the summary and the precedent, are texts that have been given meaning arising from a specific case, thus (STRECK; 2011, p. 368):

(...) consequently, there will always be a degree of generalization to be extracted from the core of the decision, which will make the hermeneutical link (discursive commitments) with the cases that will be analyzed in their individuality, promoting the emergence of new norms as the new cases are arising. (Our translation into english)

Therefore, STRECK (2014, p. 61) concludes that: "(...) this means that the norm that emerges from "this specific case" is, in the next moment, also a text, from which a new norm will emerge" (our translation into english).

The fact that differentiates the summary from the precedents of Common Law is that the summary isn't edited to solve only one specific case, as it's done in Common Law, where the precedent aims, first, to solve the case under analysis, but the summary aims at the resolution of all future cases, and not a specific case that is under consideration, therefore, should be seen as a normative text.

Therefore, in a system that adopts Civil Law, as is the case in Brazil, it is not relevant that the Judiciary Power has the prerogative to legislate and to attribute interpretation to the norm according to its conviction. There is a great need for a serious analysis of law/right, to be done before the publication of binding summaries and even precedents, coming from the Common Law system.

Another highly relevant distinction made by Streck is that there is no reason to safely compare that Common Law is better than Civil Law, as part of the precedent-defending doctrine it understands to be. Nor can it simply be said that Common Law is better than Civil Law because a country's legal system works better than Brazil's legal system. It's necessary to analyze all the relevant and historical points of each country to understand its legal functioning. What can be said in the face of such a position, according to STRECK (2014, p. 91) is that: "(...) as a rule, in Germany or in England, the judicial decisions may be better than ours". Therefore, what matters isn't necessarily the legal system of each country, but the quality of judicial decisions.

Therefore, for the analysis of the quality of decisions in Brazil, isn't relevant to make this analysis only by comparing it to the Common Law legal system, it's also important to analyze guided in other countries that adopt the Civil Law system itself, as is the case of Germany. In this way, it will be possible to have more precise conclusions regarding the decisions made in



Brazil, considering the equality of the legal systems, even each one with its own peculiarities. Finally, the author concludes (STRECK; 2014, p. 93) that: "(...) arguing by law or by precedent doesn't, in itself, guarantee a hermeneutically authentic answer".

### 3.4 NEW CIVIL PROCEDURE CODE AND THE ADVANCEMENT OF LAW HERMENEUTICS

There are those who defend that: the precedent system was implemented in the New Civil Procedure Code, with the argument that this will generate more equality and legal certainty. However, STRECK (2016, s/p) mentions that "through the creation of decision-making instruments, which makes it seem that this doctrine ignores that the Constitution itself and the legislation that complies with it effectively link the performance of the Judiciary before of everything. And not the other way around" (our translation into english).

For STRECK (2016, s/p) Civil Procedure Code of 2015 (*Código de Processo Civil de 2015 ou Novo Código de Processo Civil Brasileiro – CPC/2015 ou NCPC*) doesn't have a precedent system based on the Common Law system, what it does bring are "(...) binding judicial provisions whose function is to reduce the judicial complexity to face the Brazilian phenomenon of repetitive litigation. Answers before questions. But, we cannot equate article 927 with a system of precedents, under penalty of having a distorted application of the *CPC*" (our translation into english). In other words, they must be read as judicial provisions, with binding effects without presenting greater complexity in cases presented as similar.

Through the analysis carried out so far, although it's certain to say that in the Brazilian judiciary there is a lot of judicial protagonism and the discretion exercised by the judges is immense, STRECK considers the need to recognize that there were advances with the advent of the *NCPC*, in light of the theory of the Hermeneutic Criticism of Law. The main advance brought, through a proposal by STRECK, is the extinction of free conviction in judicial decisions. The author considers that such withdrawal was a "hermeneutic achievement" ("*conquista hermenêutica*").

There were several provisions in the *NCPC* project that dealt with the judge's free assessment, which were extinguished on the grounds that (STRECK; 2016, p.148-149):

(...) although historically the Procedural Codes are based on free conviction and free judicial appraisal, it's no longer possible, in full democracy, to continue transferring the resolution of complex cases in favor of the subjective appraisal of judges and courts. As the Bill started to adopt polycentrism and co-participation in the process, it's evident that the Project's structure approach can now be read as a system no longer centered on the figure of the judge. The parts of the process are of particular relevance. This is the perfect marriage called "co-participation", with strong hints of polycentrism. The corollary of this is the withdrawal of "free convincing". The free conviction was justified in view of the need to overcome the tariff test. Philosophically, the abandonment of the formula of free convincing or free appreciation of evidence is a corollary of the paradigm of intersubjectivity, whose understanding is indispensable in times of democracy and autonomy of law. Thus, the invocation of free conviction on the part of judges and courts will result, in all evidence, the nullity of the decision. (Our translation into english)

This justification was accepted by the Chamber of Deputies (*Câmara do Deputados*), given the fact that it's no longer possible to develop codes in which the State can be seen as an enemy of the citizen. Thus, with the removal of the provision that the Code brought about the free conviction of the judge, some of the discretion of the decision or of the 'discretionary decision' is removed from the courts, limiting the judges to make decisions as they see fit, that is, the judge must decide based on reasons.

It's seen that it's impossible to deal with both summaries and precedents without the interpretative element. However, 'can't say anything about anything', it means (STRECK; 2014, p. 113): "(...) interpretation is application; is to settle senses. The senses aren't random. There is no grade zero. There is an interpretive chain that links us. Both in daily life and in law" (our translation into english). Therefore, with the consistency and seriousness considered in the interpretations, it's concluded that there is a binding interpretation, regardless if it's a summary, a law and a precedents.

Thus, returning briefly to the analysis of the hermeneutical advances in *CPC/2015*, there is no denying that there was a leap towards a non-solipsist view of judicial decisions. But this doesn't mean that the *CPC* couldn't be better developed.

In view of this brief analysis of the hermeneutic conquest, what can be concluded, so far and in general, is that: the Common Law system is no better than the Civil Law system; there is great discretion in the Judiciary in Brazil; binding summaries and precedents shouldn't be confused; text and norm are also not the same, and the cohesive hermeneutics is necessary in the decisions of Brazilian courts.

Therefore, hermeneutics is necessary in the analysis of cases, especially those in the Supreme Federal Court (*Supremo Tribunal Federal*), and it's obvious that: as decisions are presented today, Brazil is going against the Common Law system. Finally, in the words of STRECK (2014, p. 373): "Hermeneutics is experience. It's life! This is our challenge: to apply it in the world of life!" (Our translation into english).

## 4 FINAL CONSIDERATIONS

The Supreme Federal Court (*Supremo Tribunal Federal – STF*) is a court whose main purpose is to keep the Constitution and respect its legal dictates. Therefore, there is no reason to say that the *STF* is a court that is designed to create laws, but rather to decide according to what is expressed. It's obvious that the interpretation must be carried out, but not based on solipsism, a phenomenon in which the judges decide according to their opinion, as already addressed by STRECK.

For a concise and serious analysis, it's very important, above all, to understand the systematic of the legal systems Common Law and Civil Law, and each of the peculiarities presented in the countries that adopt one of these systems. In Brazil, there are those who argue that the application of precedents from Common Law is the best alternative for the controversies brought to the judiciary, however, on the other hand, it's essential to carry out an analysis based on the hermeneutics of the decisions handed down by the courts.

Regarding the relation between precedent and binding summary, as mentioned, they cannot be confused and assimilated; since that in the precedente, there is a need to present the requirements based on the *stare decisis* doctrine and to first assess the case under analysis; and the binding summary is destined for the resolution of all future cases (to resolve all future cases), and not a specific case that is under consideration, therefore, should be seen as a normative text.

Thus, there are no safe parameters to affirm that the Common Law system is better than Civil Law, since each one has its own peculiarities and are adapted according to the need of the legal system of each country, through its historical and cultural movements. Therefore, what matters isn't necessarily the legal system adopted itself, but the quality of the judicial decisions.

Therefore, Brazilian courts, specifically the Supreme Federal Court, need to use the prerogative it holds: to defend the Federal Constitution and use the mechanisms that are there to act fairly for society and in the face of society; and not to think that "doing justice" is to put one's own opinion as Ministers find it most relevant in the decisions in which they are responsible for appreciating and justifying that it's "for the good of society" to decide a case totally contrary to their past decisions, which supposedly have already been pacified, and mainly decide against the Constitution of the State.

In this way, there will be no legal system to support so many controversies based on anything, which consequently (instead of how the defenders of precedents in Brazil claim that with their application there will be more legal security), there will be no security at all, whereas the practice that has been practiced in Brazilian courts is to modify something that is already decided, confirmed and is positive.

Therefore, despite the entire study, there are still questions to be asked regarding the (non) evolution of judicial precedents in the Brazilian State, such as: how to defend a legal security that moves contrary to the Federal Constitution? How to defend a legal security that distances itself even from the real essence and application of the common precedents from Common Law?! And besides: instead of trying to bring judicial precedents into the Civil Law system, why not, first, improve the existing legal and hermeneutical bases within our own legal system? Anyway, perhaps this is another issue to be studied in depth, considering the need for a serious hermeneutic analysis to be carried out.

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