

New possibilities for judicial decision-making in Brazil: an approximation with the common law system

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1. *Introduction*

Starting from the second half of the twentieth century, the Judiciary takes on a new interpretative role due to the human rights revolution and the consequent judicialization of politics.

This new role requires that the Judiciary face issues that involve political and moral content related to human or fundamental rights, which will only arise during the judging of cases, the moment when these rights have their meanings defined.

In other words, whereas in the context of the positivism that influenced the development of the civil law tradition, it was assumed that the meaning of a norm was already included in its text and, therefore, that the Judiciary, in its interpretative role, would be already limited by that norm, the new reality that involves trials related to human rights no longer fits in this old mechanistic model.

In contrast, because human rights have an open and undetermined nature and moral content, it is possible to state that they only acquire substantial meaning in their implementation. Moreover, this meaning will be given by the Judiciary, which begins by not being limited only by what is manifested in the written text.

This new situation causes legal uncertainty because there are not pre-established limits to the interpretative activity, at least not in the mechanistic model; judges become free to give substance to human rights. Moreover, Brazilian courts not feeling tied to the legal decisions that come from the Superior Courts concerning the same subject also causes legal uncertainty.

In this article, the intention is, first, to contextualize the problem of legal uncertainty caused by the unpredictability of legal decisions in Brazil by analyzing how the principle of legal certainty works in both common law and civil law models. How constitutionalism and the openness of fundamental rights

contributed to the rise of legal uncertainty and unpredictability in the scope of the Judiciary Power will also be addressed.

As a second step, the model of law as integrity proposed by Dworkin will also be analyzed in terms of how it is compatible with the broad doctrine of *stare decisis*.

Moreover, it will be demonstrated that civil procedure law has already been approaching a specific model of case law in the last few years.

Finally, that the adoption of a doctrine of binding precedent that applies the principle of integrity in adjudication will be capable of guaranteeing legal certainty, predictability, stability and equality, not only in cases in which the legal decision conflicts with the one coming from superior courts but also in difficult cases faced by the Supreme Federal Court (STF), will be supported.

2. *The principle of legal certainty and the interpretation of fundamental human rights*

Security is part of human life, needed for human beings to plan and conduct their lives; this is why the principle of legal certainty is a constituent element of the rule of law (Canotilho, 2000, p. 252; Dworkin, 2007, p. 176.).

Civil law systems care about guaranteeing legal certainty through the codification of law, seeking by this means to make the system complete and more well-known by the population and therefore guaranteeing certainty and predictability in law. Furthermore, codes and their pretension of being complete would guarantee security, certainty and predictability in legal relationship because all solutions would be manifested in codes, and judges would then be limited to applying the law that was already provided and determined.

In contrast, in common law systems, the seeking of legal certainty is not based on the law itself or the alleged completeness of the system but on the system of judicial precedents in which, by means of a specific rationality, a guarantee of coherence among legal decisions has been sought. Thus, in this system, although judges have not been limited by the law itself, they have been limited by precedents. This limit imposed by the doctrine of *stare decisis* means respect for precedents, which encompasses the actions of following them, distinguishing them or revoking them. What has never been allowed is the possibility of ignoring previous legal decisions that portray the constitutional practice and the political morality of a community.

Conversely, in these systems, in which the idea of “judge-made-law” has always prevailed, the primacy of the Judiciary Power is considered “an element of stability that translates into an activity of normative building focused on legal certainty” (Duarte, Moura, Mastrodi, & Tsubone, 2005, p. 50), particularly because this activity has always been limited by the doctrine of *stare decisis*.

What occurred, however, was a large change in juridical systems in the second half of the twentieth century because of the human rights revolution. Consequently, several countries started adopting democratic constitutions encompassing lists of fundamental rights – as occurred in Brazil with the Federal Constitution of 1988 – or incorporating international documents for the protection of human rights. The change in the pillar of the juridical structures in civil law systems to accommodate a primacy of fundamental human rights substantially modifies the role of constitutional jurisdictions in the interpretation of law because it is not possible to define these rights *a priori*. In other words, although many times they are manifested in a written document, there is no means of predicting the result of their interpretation in an actual case.

What is noticeable is that these rights because of their own nature, are abstract and will only have their meanings defined in an actual case. This abstraction is an essential part of constitutional rights, which counts on the intention of a minimum consensus concerning their affirmation. In other words, although it is not possible to define the limits and consequences of the right to equal treatment, for example, it is possible to support its presence in a constitutional document as a supreme value that must be respected by all. That is what happens to most human and fundamental rights; consensus occurs at an abstract level but not at a concrete one because, in particular, dissension is typical of human nature.

Because the norms that establish fundamental rights, that is, of moral content, require having the meaning of their content defined, the Judiciary starts taking on a new role, which implies legal decisions that reflect the political morality of a community. Uncertainty occurs because issues of moral and political content about which there is no consensus in the community are ultimately decided by a power not elected by the population.

Note that human and fundamental rights norms refer to political morality norms, whose debate need not necessarily pass through a discussion concerning relationships between law and morality. This omission is justified because human rights arise specifically to reconnect law and morality, recovering the ethics forgotten during periods of war and authoritarianism.

Note that in plural and multicultural societies such as Brazil, Canada and the United States, for example, the existence of moral dissension concerning relevant facts of life such as abortion, same-sex civil union and the death penalty, to mention a few examples, is very common. In these cases, it is difficult to identify what is established by the Constitution and how fundamental rights will determine and substantiate the trials that must set a single standard to be accepted by the whole community.

Thus, although there is a consensus concerning abstract principles contained in fundamental rights such as freedom, equality, dignity, justice and others,

there is not an agreement about the implications of these rights in concrete situations. In other words, although everyone agrees that equality must be sought, it is difficult to reach a consensus concerning its meaning and its extent – if equality justifies the adoption of affirmative action, for example.

Similarly, norms that establish fundamental human rights because of the minimum consensus required when being affirmed, provide only the beginning of a solution in their normative range because it is not possible to identify from their abstract description all necessary elements to form their meanings.

It is also possible to state that in most controversial issues, there is a minimum consensus, even when it is not yet theorized, concerning the meaning of the law. In other words, when different moralities overlap, it is possible to talk about some sort of common morality, although imperfectly (Waluchow, 2008, p. 69-70).

However, it is complex to balance the fact that the morality affirmed through the adoption of fundamental rights reflects the morality of the majority of the population and at the same time is inherent to fundamental rights concerning the protection of minority groups that are vulnerable to majorities. In other words, thinking that fundamental rights reflect the moral positions of the majority would be to leave unprotected exactly the ones who think of themselves as recipients of the protection of these rights.

Establishing their meanings will be the task of interpreters and, although an open community of interpreters of the Constitution is accepted (Häberle, 2002), the preoccupation this paper is focused on the interpretation and signification of the content of fundamental rights granted by the Constitutional Jurisdiction.

It is essential not to lose sight of the point that “the norm cannot be confused with the normative statement” but rather must be considered a “product of the interaction text/reality” (Barroso, 2009, p. 308). Therefore, in cases connected to the meaning of fundamental rights, which do not exist abstractly in the norm and cannot be abstracted from it, it is possible to state that a fundamental right norm only exists when materialized.

Thus, it would be possible to support that because a fundamental right norm only exists when materialized, the law leaves the text to legal decisions. Therefore, it also leaves written law to unwritten law, justifying once again the approach of the Brazilian system to the case-law system, which, in turn, has its own particular structure to guarantee certainty and coherence to unwritten law.

To explain because the real meaning of fundamental right norms is not contained in the text but in legal decisions that interpret them and apply them in an actual case, it is possible to say that there is a shift from written law to unwritten law, in the sense of not being written in a formal document.

This materialization of a norm implied by the Constitutional Jurisdiction will involve, in turn, a moral reading of it. Because they are norms with an open

texture and endowed with plasticity, it will be necessary to define their content through an interpretative process that will involve an analysis of the political morality of the community at issue.

Thus, it is possible to talk about the existence of a constitutional morality of a specific community that, according to Waluchow (2008, p. 76), means “the set of moral norms and considered judgments, properly attributable to the community as a whole as representing its true moral commitments” but that is somehow “tied to its constitutional law and practices” – in summary, to “the political morality presupposed by the laws and institutions of the community” (Dworkin, 2002, p. 197).

Moral standards influence legal decisions, particularly when the Constitution is interpreted because it provides “instances that impose moral limits to whatever laws that can be validly created” (Dworkin, 2006c, p. 10-11) in a specific country. Similarly, restrictions imposed by fundamental rights to public authorities form moral restrictions (p. 42).

At this level, the moral reading of human and fundamental rights proposes that interpreters of the Constitution interpret and apply abstract provisions “considering that they refer to moral principles” (Dworkin, 2006b, p. 2) of a community and that their definition will only arise when the norm is materialized, inserting political morality in the center of the constitutional debate.

Even when it is stated that those norms reflect the political morality of a specific community affirmed in fundamental rights that reflect, in turn, the morality accepted by most of the population currently, the issue that arises is who will perform the interpretative work of ascertaining the content of this morality and how will they do it.

The criticism made of judges when they perform this interpretative work is that they include their moral preferences, raising the democratic issue of their legitimacy.

In the Brazilian system and in the American one, such competence has been assigned to judges, particularly to the Supreme Federal Court (STF). Moreover, the criticism made of a moral reading of fundamental rights provided in the Constitution is that this reading would give judges (and not representatives elected by the people) “absolute power to impose their moral beliefs on the greater public” (Dworkin, 2006b, p. 3). Furthermore, there is the concern that these judges might, when interpreting these rights, impose their own political morality, an attitude that would be anti-populist, anti-republican and anti-democratic (p. 9).

Moreover, many fundamental rights appeal to many moral concepts, such as human dignity, equality, life, freedom, honor, social purpose, due process and others. Thus, although it appears that vagueness prevails, when the moral content that represents the political morality of a community is defined, this

vagueness will be reduced. Human and fundamental rights must then be understood as moral rights (or rights with moral content) against the State because they “appeal to moral concepts (background rights) and not to a formulation of specific conceptions”.

That is the moment when the Judiciary steps in to define the content of these rights and fundamental principles and have the final say about the most controversial issues of a specific society that involve political morality, about which until that moment the majoritarian institutions were not able to reach a consensus. Legal certainty is part of the building of constitutional liberalism itself, which links the functions of the State to laws made to protect liberty and the economy (Canotilho, 2000, p. 105).

Nevertheless, what becomes concerning is the absence of coherence and predictability in the interpretation of these moral rights, which brings great legal uncertainty to the society.

The principle of legal certainty seeks to spread the sense of predictability concerning the juridical effects of the regulation of behaviors in the midst of society. Such a sense attempts to reassure citizens, allowing them to plan their future actions “whose legal discipline they are aware of, assured that they are in the way through which the implementation of law norms is materialized” (Carvalho, 2004, p. 149).

Although legal certainty is unattainable, what is actually intended is to reduce legal uncertainty to reasonable rates (MacCormick, 2009, p. 11).

Legal certainty is not established when inferior courts diverge in their legal decisions from superior courts or when groups or chambers from the same court decide differently. Similarly, the principle of legal certainty is violated when the superior court fails to honor its own practice and its own precedents, a situation that can occur particularly during the trial of difficult cases that involve interpretation and thickening of the content of fundamental rights.

Note that legal certainty in legal decisions can only exist attached to the principle of equality because it cannot occur when there are conflicting legal decisions concerning subjects and facts that are identical. The fact that equality is the basis of legal certainty cannot be ignored, particularly concerning attachment to precedents. The principle of legal certainty existing in a legal democratic state and established by the Constitutional Charter of 1988 demands that norms – provided in a legal text or abstracted from a legal decision – shall apply to everyone, transforming equality into another feature of security.

Because of the principle of the rule of law, the values of legal certainty, juridical stability and predictability for citizens of the implementation of law are deeply connected. Such constitutional values or principles would justify the practice of respecting precedents, either by having them merely interpretative as in countries linked to the civil law tradition or having them binding as in countries attached to the common law tradition.

Thus, in any juridical system, there is a tendency for courts to give precedents a certain weight regardless of the intrinsic merits of the legal decisions contained in them, something that can be strongly justified by the necessity for stability and predictability both in law and in legal decisions given on behalf of the law. Moreover, all of the above, according to Zenon Bankowski, is inherent to the core of the idea of giving citizens a tolerable measure of legal certainty and trust in their usufruct of any rights conferred on them by law (Bankowski, MacCormick, Morasowski, & Alfonso Ruiz, 1997, p. 488).

3. *Legal uncertainty and incoherence in legal decisions*

When uncertainty is mentioned, not only different legal decisions coming from Brazilian courts not concerned with the previous legal decisions given by superior courts and affronting principles of legal certainty, stability, predictability and equality are being noted. In addition to this concern, there is one concerning coherence among legal decisions from the Supreme Federal Court – in other words, concerning in what manner the Court, when practicing constitutional jurisdiction, must respect and adhere to its own precedents.

Conversely, because of the openness of norms concerning constitutional rights and principles, it is necessary that the justices from the Federal Supreme Court provide them content and meaning. Insecurity about such norms emerges because they hold moral or political content, many times with no consensus from the community about their interpretation, and the definition of the political morality of the community will be undertaken by a group of justices, not elected by the people, when judging an actual case.

Some scholars have also been worrying about the legal uncertainty caused by the possibility of constitutional transformation being performed by the STF (Salgado, Eneida Desirée, 2010) by the power justices hold of using principles not written in the Constitution as foundation for their legal decisions, thereby replacing the duty of legislators.

Actually, these scholars still suffer from a great influence of the traditional perspective of civil law, which expects a codified document (at the present time, the Constitution) to be able to limit with its text the practice of the Judiciary. Therefore, they only recognize as legitimate the formal reform of the Constitution because they see it as a text and not a living document.

Constitutional principles, similar to the fundamental rights affirmed in the Constitution of 1988, are open norms that possess background moral values, which means that their language and the text itself cannot limit the practice of interpreters, particularly because it is typical of the nature of language to enable several meanings. Trying to limit the interpretation of the Constitution through

written norms is equating a norm to its text, something that is not possible, particularly when we talk about fundamental human rights.

The connection between the Constitution and historical reality is established by the constitutional practice of the community and by the Judiciary Power. The connection is typical of fundamental rights norms and their abstract quality. The possibility of “constant evolving of their meaning and adjusting of their purpose to the demands of reality without the need to evoke the manifestation of derived constituent powers every time” – in other words, its openness – enables “the permanent evolving of the meaning of the constitutional order so it can walk side by side with history and its progress” (Clève, 2000, p. 26-27).

This tendency does not only occur in the constitutional area. Because of the fast transformation that contemporary society goes through, codes have started establishing, intentionally, open general clauses that enable some margin to judges so that they can adapt norms to the new values of a certain society (Martins-Costa, 1998, p. 134-135). In other words, the perpetuity of constitutional or legal systems occurs exactly because of the adoption of general, abstract and open norms whose content is undetermined and that are able to adapt to quick changes in the present society.

Note that, in the United States, judicial revolution and not-formal amendments to the Constitution have served as one of the main means of fundamental change in the Constitution, the latter being understood as a living instrument (Ackerman, 2007, p 1742).

Within this context, to guarantee legal certainty in difficult cases that involve issues of political morality related to fundamental rights, such as same-sex union and abortion, it is proposed that the STF be the one that, even when facing the theme for the first time, must examine what has been built concerning the right that is involved, facing and basing its new legal decision on the historical, moral, social and judicial construction of law.

4. *Precedents and integrity*

The security and stability that are proposed are not contained in the certainty or predictability of the legal decision itself or in knowing what is going to be tried but in the assurance that justices will decide according to integrity. In other words, they will be committed to a coherent and defensible perspective of the rights and duties held by the people, something that is possible when the doctrine of *stare decisis* is adopted. *Stare decisis* encompasses the idea that the adhering of courts to the past means that they can apply a precedent, revoke it or distinguish it, but never ignore it.

In this scope, following, distinguishing or revoking a precedent are essential

parts of the search for integrity among legal decisions because precedent is connected to the idea that what has been decided in the past is important to what must be decided now.

It is by the doctrine of *stare decisis* based on the idea of law as integrity that legal certainty will be guaranteed not only in easy or repetitive cases but also in difficult cases that involve issues of the political morality of a specific community.

The demands of integrity can be separated in the following principles of political integrity: principle of integrity in legislation and principle of integrity in trials.

The principle of integrity in legislation “asks the ones who create law through legislation to keep it coherent to its principles” (Dworkin, 2007, p. 203); in other words, it asks legislators to try making the body of laws morally coherent to the community morality. The legislator shall then strive to protect the political and moral rights of everyone “in such a way that public norms express a coherent system of justice and fairness” (p. 266).

Therefore, Chueiri explains that “laws must represent the common morality shared by the members of a community” and, therefore, political legitimacy and the possibility of a coercive law would originate “from a fidelity held by citizens to the principles of the community which would represent their moral standards” (Chueiri, & Sampaio, 2009, p. 55-56).

For its part, the principle of integrity in trials asks judges, “when deciding what law is, to see it and enforce it as being coherent in that sense”; in other words, it “consists of the demand that legal decisions try to analyze laws as being morally coherent” (Chueiri, & Sampaio, 2009, p. 55). Thus, judges must view the law as an “association of principles, [and] as a community ruled by a simple and coherent perspective of justice, fairness and due process qualified in an appropriate proportion” (Dworkin, 2007, p. 483).

Integrity in judicial deliberations requires, in this scope, that judges treat the “present system of public norms as if it expressed and respected a coherent body of principles and, within this aim, interpret these norms to find out implicit norms among and under the explicit ones” (Dworkin, 2007, p. 261).

Thus, by interpreting decisions and verifying the arguments behind the principles that were employed, it will be possible to create a binding not only to the explicit content of collective decisions made in the past “but also, in a wider sense, to the system of principles required for their justification” (Dworkin, 2007, p. 273), it being necessary to consider the full range of juridical norms that currently prevail in the community at issue.

Therefore, not only principles that justify decisions in the sphere of the Judiciary must be abstracted but also those made in the sphere of the Legislative. However, although judges cannot use arguments of political justification to

base the making of a law, they can verify, through an inductive method, which principles served as foundation. In other words, even underlying affirmed rules, there are principles that can be inferred from them.

Thus, it is possible to affirm the use of the doctrine of binding precedents from this point of view not in the sense of stiffening legal decisions but that present decisions base themselves on previous decisions and count on the idea of law as integrity, with its body of principles, as a foundation to adapt law to social reality.

Conversely, we must bear in mind that *stare decisis* has two variations; it can be vertical or horizontal. Vertical *stare decisis* demands that inferior courts follow the decisions that come from superior courts. This requirement can be explained as facilitating coordination among judges and has the potential to improve the process of judicial decision making because justices from superior courts supposedly hold an “immaculate legal knowledge” and a greater experience than do those of first instance, in addition to guaranteeing uniformity and stability in decisions. Horizontal *stare decisis*, in turn, demands that courts follow their own precedents. The most convincing reason is for there to be an obligation that judges apply the same principle in new cases, even when doing so is not affirmative of their personal convictions and will only be justifiable to those who see law as integrity and commit themselves to the history of their community.

Note that at no stage is integrity seeking uniformity of decisions but rather that they be based on principles because people are not only ruled by a body of rights and duties but, more than that, by principles that form a political ideal that leads life in society, such as unwritten principles of a common law constitution.

Seeing law as integrity does not mean supporting, by this means, a blind adhering to precedents, in the sense that judges must respect precedents they find incorrect. Within the framework of the *stare decisis* theory, it is possible that courts revise their decision because it was wrong “owing to the fact that the principles that determined it are incoherent to the most fundamental principles embedded in the structure of the Constitution and in its history” (Dworkin, 2006b, p. 168). According to Dworkin, this power of revising past decisions must be performed with modesty and good faith, and revising decisions does not mean ignoring them.

Thus, the integrity that is intended requires coherence in moral principles and, therefore, it is justified that “when its historical practices (...) cannot be considered consistent with principles elsewhere recognized, those practices must be abandoned”. In other words, when defending the use of the doctrine of *stare decisis* as in the traditional method of common law to apply the principle of integrity in legal decisions, it is possible to support the possibility of revocation or distinction of precedents based on non-consequentialist grounds.

In other words, the theory of *stare decisis*, which obeys the principle of

integrity, requires respect to precedents but not their immutability; however, it does not admit the revocation of a precedent because it will be better to the whole community, as with pragmatism, which ignores precedents, basing itself on political arguments. Thus, what is supported through the application of the principle of integrity in legal decisions is the use of a broad doctrine of *stare decisis* through which respect to the past is imposed, something that can be done by following, revoking or distinguishing precedents.

On the next topic, the intention is to demonstrate the possibility of using the doctrine of binding precedents, which respects the principle of integrity in adjudication to guarantee legal certainty in the Brazilian context. This doctrine advocates that the Supreme Federal Court, as with the “chain novel” proposed by Dworkin, write Brazilian case law with a single voice, as though the court was only one author that reinterprets what has been written thus far to write the next chapter.

5. *The principle of integrity in legal decisions: a possibility of guaranteeing legal certainty in Brazil*

The present Brazilian juridical system, although it bases its tradition in civil law, ultimately must face a paradox because the system is not able to provide predictability when applying laws. Conversely, it also does not admit a system that seeks coherence in legal decisions as a means of guaranteeing legal certainty to citizens and stability and predictability in social relationships.

However, although precedents have, at first, taken on a merely interpretative quality in Brazil, from the moment the presence of ambiguities, obscurities and undetermined norms in codes is admitted and human rights are affirmed in the Constitution through the adoption of a system of fundamental rights, it becomes necessary to broaden the interpretation of implicit or unwritten principles to reveal or preserve or even form a rational and coherent system of law, demonstrating that norms and juridical principles develop according to the needs of society at a given time (BANKOWSKI et al., 1997, p. 484).

Note that since the Federal Constitution of 1988, a reading of constitutional law based on principles has prevailed in the Brazilian juridical system, shifting the STF from the role of mere applicator of law into “rights maker” and “guarantor of constitutional principles” (Chueiri, & Sampaio, 2009, p. 45-46). This change is particularly felt in case law and the more incisive role of the Supreme Court, particularly when the court must decide differently from previous decisions by the Legislative or the Executive.

Thereby, there is an approach to the role of judges (particularly justices from the STF) in the Brazilian system of Romano-Germanic tradition to the common law system, in which judges have a role of “*judge-made law*”.

Conversely, although there is already an approach of some procedural institutes to the doctrine of binding precedents, this approach remains partial, unable to handle the diversity among decisions concerning the same subjects that occasionally even come from the same court. Nor can this approach handle the insignificance of decisions emanated from superior courts to inferior courts, which do not feel obliged to decide uniformly and coherently with what has been decided by the courts that are superior to them.

That is the context in which the importance of the study of law as integrity and the idea of “chain novel” thought by Dworkin is justified, that is, as a means of guaranteeing coherence in law and legal decisions, avoiding a particular type of legal uncertainty. That uncertainty exists because not only do decisions from inferior courts not consider what has already been decided by the superior courts but also justices from superior courts are able to freely ignore previous decisions currently, using them “in a random way, with no confirmation of the content of the decision – or strategically – only the ones that are favorable to the argumentative point of view of the justice in question” (Vojvodic, Machado, & Cardoso, 2009., p.22).

Integrity and coherence in decisions emanated from STF are important, particularly concerning difficult cases in which justices must take a stand not only verifying the stand already taken by the court on other occasions but also seeking that these decisions serve as precedents to future similar cases. Moreover, the obligation of integrity and coherence in decisions clearly must also apply to inferior courts concerning their own decisions and decisions established by courts that are superior to them.

The STF does not worry about justifying the integrity of its decisions to society, in the sense that it does not base them on its previous decisions concerning the same subject either to treat citizens with the same thoughtfulness and respect or to demonstrate, departing from this previous decision, that the court now sees the issue differently or that the new case is not similar to the previous one in a manner that would justify the application of precedents.

The use of the idea of “chain novel” and “law as integrity” proposed by Dworkin is advocated here so that the STF starts rendering decisions as though it were writing the chapters of a novel, with coherence to the previous chapter and allowing that the novel continues to be written by other decisions (chapters) in the future, such that there will be not only a continuity in the decision-making process in time, which must be coherent not only to decisions made in the past but also to norms and particularly to principles built up by the political community (Chueiri, & Sampaio, 2009, p. 52).

This integrity and continuity of the decision-making process guarantees a greater stability, predictability and legal certainty to citizens in this new model of Brazilian constitutional law that, concerning fundamental rights and constitutio-

nal principles, approaches common law jurisdictions, seeking in them their experience concerning the idea of binding precedents, which Ronald Dworkin tries to justify in his theory that the decisions of the Supreme Court must be written as though they were chapters of a novel in the history of Brazilian case law.

6. *Approach of civil procedure to the system of precedents*

Although in the scope of constitutional concreteness, an approach between civil law systems and common law systems exists that uses human rights as a substantive baseline for judicial review, it is also true that in Brazilian law, there has been a procedural concern about bringing in the experience of the doctrine of *stare decisis* that exists in the common law system. There is a concern not only with respect to legal certainty and uniformity in legal decisions but also with respect to and particularly concerning promptness in adjudication.

At this level, some changes in Brazilian civil procedure already portray this approach, in addition to the new project making it clear that when exposing motives, its explicit intention is also a procedural approach to the system of precedents in common law.

The first changes could be felt with Constitutional Amendment no. 45, dated December 30, 2004. This amendment altered the wording of article 102 of the Federal Constitution in its second paragraph to amplify the *erga omnes* and also binding effect of the Supreme Federal Court decisions rendered on Direct Unconstitutionality Actions, which demonstrates the vertical application of the doctrine of *stare decisis* when it binds all other branches of the Judiciary Power to follow precedents.

In addition, the third paragraph of the aforementioned article inserts the demand for general repercussion of constitutional matters discussed in a specific case. This demand demonstrates a clear intention of objectification of the Constitutional review in Brazilian law and an approach to the American system, which requires the occurring of such repercussion, particularly because a decision rendered by the Supreme Court will have *erga omnes* and binding effects.

Furthermore, the demand of a demonstration of this general repercussion by the parties involved for an extraordinary appeal to be admitted demonstrates the seeking of objectification in the diffusive control of constitutionality because, when demonstrating political, economic and social repercussions, the protection coming from STF becomes connected to the protection of the legal system to protect society and not only the subjective right discussed in an actual case.

If in the ambit of an extraordinary appeal to the STF, the parties must demonstrate that the matter to be analyzed finds repercussion in the political,

economic or social scope, it is clearly possible to support that the result of these decisions must also have a social, political or economic repercussion that justifies the rule of application of precedents, that is, a decision requiring binding and *erga omne* effects.

Amendment no. 45 also inserted article 103-A in the Constitution of 1988. This article creates the possibility of the Supreme Federal Court, after reiterated decisions on a constitutional matter, approving a *summula* with binding effects to other branches of the Judiciary Power and to public administration (whether direct or indirect) in all spheres of power, aiming to standardize jurisprudence, avoiding legal uncertainty by that and also avoiding repetitive law suits concerning the same subject.

Note that, in these terms, it is possible to support the point that it is more coherent and secure to adopt the doctrine of *stare decisis* as it was built in common law systems than to adopt it in pieces such as in binding *summulas*. Because *summulas* are not solely a synthesis of a case-law understanding, it is not possible to identify either the important facts for the trial or the *ratio decidendi* that will bind in future cases from their reading only. In practice, what occurs is that judges do not seek *ratio decidendi* in the decisions that originated a certain *summula* and, therefore, wrong interpretations concerning a specific precedent can occur.

The new Code of Civil Procedure demonstrates an approach to the doctrine of *stare decisis*, in the sense that precedents from superior courts bind the judgment of inferior courts, although in common law systems, it is not necessary that several decisions form a prevailing jurisprudence. Rather, only one precedent is sufficient to bind inferior courts.

In these cases of objectification of the judicial review, the Brazilian constitutional system approaches the common law system because the *ratio decidendi* considered abstractly from a decision binds society to the public power. Therefore, the Judiciary must worry about judging based on integrity, according to the political and moral compromises of the Brazilian society that can be found in laws, in the Constitution, in judicial precedents and in the history of the community and its social practice.

As in common law systems, the decisions, or the abstract quality of the *ratio decidendi*, produce *erga omnes* effects, in other words, effects on all the community, and law as integrity is justified, in the sense of respecting political compromises agreed by the community.

In the Legislative scope, it is not necessarily a justification for the decisions made there because integrity in legislation occurs through generality and electoral legitimacy. Conversely, in the judicial scope, integrity in decisions occurs through the political, moral and historical compromises agreed by a certain community because the legitimacy of the Judiciary does not come from voting machines but from judicial practice. Adjudication must try to guarantee integrity

in law by means of a moral reading of fundamental rights, trying to give meaning to their content with respect to conquered rights that were historically built, something that must occur not only in the Constitution and in law but also in judicial precedents. Moreover, social practice law must be addressed “as a coherent and structured whole” (Dworkin, 2007, p. 477).

Note that there is a difference between a binding decision and a decision with *erga omnes* effects. A decision that forms a precedent has its effects on the actual case at matter and demands judges, in case they face new cases that are similar to the previous one, to have the same understanding – the idea of “treating like cases alike”. In contrast, a decision that produces *erga omnes* effects immediately irradiates its effects to everyone who finds themselves in that specific situation.

This tendency of the Brazilian system to procedurally approach the common law system is even more visible when some provisions in the new Code of Civil Procedure are read. There is a great concern concerning procedural promptness but also a legal certainty that must be promoted by avoiding conflicting decisions and seeking stability in the jurisprudence that has already been consolidated, which can only be altered under a suitable justification. The standardization of case law also seeks to sustain the principle of equity.

In addition, during the debates, a consideration of the common law model was indicated “in which more attention is given to the facts of a cause judged by the courts”. There was also an indication that the dispersion of the contents of the votes should be avoided because doing so would reduce the strength of precedents, in addition to a “bigger adoption of the practices of distinguishing and overruling” being suggested (Dworkin, 2007, p. 477). Similarly, it was recommended that courts uniform *interna corporis* their jurisprudence to allow inferior courts to respect precedents.

The new rules stated in the new Code of Civil Procedure will only produce their aimed effects of guaranteeing legal certainty through the standardization and stabilization of legal decisions and the principle of equality if the doctrine of *stare decisis* is applied and if the principle of integrity in adjudication is adopted.

7. *Final considerations*

Applying the principle of integrity does not only mean having consistency in legal decisions in the sense of applying similar decisions to similar cases. Deciding according to integrity can even justify a new interpretation concerning the determining reasons of a precedent, justifying its revocation or distinction from a specific previous case (Dworkin, 2006a, p. 70; Duxbury, 2008, p. 171).

The justification of decisions must accommodate itself to previous decisions on similar matters. Principles and fundamental rights written or not written, manifested or implicit, must be used coherently.

The judges' reasoning must consider that principles and rules emerge in a particular historical context. The moral foundation of the Constitution can be understood as an appeal to build a better society that is in compliance with the historical development of the nation.

Decisions can bring new rules and principles that emerge from the constitutional text itself, from the historical background and from previous judicial interpretations about the understanding of the Constitution. Therefore, judges must be aware that, although law is constantly changing, judicial interpretation itself must involve methods that guarantee continuity, stability, coherence and integrity.

By adopting the model of integrity, it will be possible to limit the freedom of a legal decision, preventing abuses and guaranteeing by this means legal certainty, as noted by Michel Rosenfeld:

To prevent abuses, interpreters should be held to a standard of integrity according to which shifts from one available interpretive avenue to another would only be justifiable IF accompanied by a full and sincere assumption of all the burdens associated with the latter interpretive avenue. Consistent with this requirement of integrity, an interpreter might not resort to an available interpretive avenue to press for an advantage on one occasion and then on the next occasion, abandon that interpretive avenue in favor of another to avoid a burden. An interpreter, however, might switch from one available interpretive perspective to another if that interpreter sincerely believes that the latter perspective is better suited to promote the attempted reconciliation sought and if he or she is fully prepared to assume all the burdens that might flow from adoption of the new perspective (Rosenfeld, 1998, p. 28).

Thus, the adoption of the interpretative model of law as integrity is justified, particularly as applied to the Brazilian constitutional jurisdiction in the interpretation of human rights and constitutional principles.

In this case, the Supreme Federal Court must examine the gravitational force of precedents, verifying in every new decision the explicit and implicit principles that underlie the determining reasons for similar previous decisions. Thus, the effect of the doctrine of *stare decisis* in the horizontal scope will be guaranteed for integrity, requiring judges to be consistent with the principles on which they base their decisions.

Moreover, by adopting integrity in their decisions through the doctrine of *stare decisis*, the STF will be attending to the principle of equality, not only treating similar cases similarly but also, more broadly, treating them according to the same principles.

Conversely, supporting respect for the doctrine of binding precedents to guarantee predictability in legal decisions and the resulting legal certainty does

not mean the impossibility of altering them. In contrast, even in cases of revocation or distinction of precedents, legal certainty will be guaranteed, for what is required is not the certainty of decisions but that justices decide according to integrity, in other words, committed to a coherent and defensible view of the content of the right at matter.

The STF must then speak with a single voice, acting in a manner that is based on principles and that is coherent with respect to the claimants at matter, in a manner that extends to everyone the substantive standards of justice and equity that were used for some, needing to consider not only the written text of the Constitution but also non-written principles, implicit fundamental rights or the invisible Constitution (Tribe, 2008), which can be taken from judicial precedents and Brazilian constitutional practice so that a specific decision reflects, in the best possible way, the political morality of the community.

Abstract:

TITLE

by Estefânia Maria de Queiroz Barboza

This article analyzes the new interpretation and application of law introduced by the centrality of human and fundamental rights in the second half of the twentieth century, which led the preponderance of the judiciary in moral and political decisions of the State to assume the role of *judge-made-law*, which is traditional to Common Law systems. When the law is interpreted, the rule only exists in practice; therefore, legal security can no longer be found in written texts. This work also advocates the use of the doctrine of *stare decisis*, which, in turn, is compatible with Dworkin's model of law as integrity, for the guarantee of legal certainty, predictability and stability of judgments. For this reason, the work brings the systems of civil law and common law within the constitutional jurisdiction, particularly in the constitutional review based on human or fundamental rights. To support the thesis, the work indicates that the material fundamentality of human rights has moral content and serves as a bellwether for *judicial review* in both systems, whether implied or not in a written constitutional document. Additionally, from the study of Dworkin's "law as integrity", this work concludes that it is possible to adopt the doctrine of *stare decisis* and apply the value of integrity in adjudication in the Brazilian Constitutional Jurisdiction, which will ensure consistency, stability, predictability and judicial security of its decisions.

Key words: Civil Law and Common Law; Judicialization of Politics; Contemporary Society; Brazilian Constitutionalism; Human Rights; Integrity; Certainty in Law.

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