RAIS | RESEARCH ASSOCIATION for INTERDISCIPLINARY STUDIES
OCTOBER 2017

How Efficient is to Judge By Standards in a Civil Law Country? A Law and Economics Approach on Brazilian's Precedent System

Edson Antônio Sousa Pontes Pinto
Professor of Law at Catholic University of Rondônia, Brazil
edson@dplaw.com.br

ABSTRACT: In civil law countries, the law arises, as a general rule, from a political legislative source that, through popular legitimacy, create norms that make up the legal system, differently from the common law tradition, in which the binding precedents are acknowledged as a legal source. However, recently Brazil has structured a new system of precedents that imperatively binds all the Judiciary, in order to recognize, from here onwards, the normative force of the Brazilian's Superior Courts decisions, in a system very much alike the judge-made law. Albeit, due to this legal innovation, the question that remains is if this is the most efficient form of judicial decision-making, or if the application and interpretation of law by the Magistrates, in an independent and individual manner, is the best way to judge. For that reason, the present essay analyzed this new Brazilian's Precedent System on an approach of Law and Economics, considering the proper institutes of this legal doctrine, and demonstrated that the efficiency gains in this new binding system, justifies its application even if it means, for part of the jurists, the reduction of Judges liberty to adjudicate.
KEY WORDS: Precedent, Civil Law, New Civil Procedure Code, Law and Economics, Biding Decision Making.

1. Introduction

The civil law countries are characterized by the use of law as a normative matrix, so that it is the instrument par excellence to bring the legal rules, leading the other sources of law to a secondary role, among them the judicial precedents formed by the Courts.

Brazil, a country classified as one of civil law, has recently adopted a precedent system in the reformation of its Civil Procedure Code, binding all judges to the understanding established by the State, Federal and Superior Courts.

Several critics were appointed to this innovation of the Code, claiming it as a way to reduce the freedom of judges to adjudicate, forcing them to follow the rulings of the Courts; or that the application of precedents would turn the judges into true automatized robots only to apply the *ratio decidendi* described therein; and even that the judicial understandings would be frozen since once the formation of precedents has been formed, the capacity to modify it is lost.

However, it becomes a case of true political choice by the Brazilian legislator, given that *by means of the law* there are procedural instruments capable of formalizing or modifying precedents, it is not a precedent culture as seen in countries such as the United States and England.

We could cite several reasons why the Brazilian judicial system is in a true qualitative and quantitative decline, however, in the perspective of the present work, it interest us to delineate that judicial precedents, as we shall see, bring stability, predictability, integrity and coherence to the judicial system, in such a way as to reduce the transaction costs of the citizens, allowing for a greater efficiency in the relations between economic agents, independently of the performance of the Judiciary, since, as we have seen, the precedent given by the standardizing Court is considered a public informational good, and from its inception, will induce or inhibit behavior in society.

The arguments presented are economic in nature, but we use them as a method of analyzing legal instruments, seeking to demonstrate the impact of this new system from an economic perspective. Let's see.

2. The Brazilian Precedents System in the New Civil Procedure Code

The valuation of precedents imposes a paradigm shift regarding the exercise of the judiciary power, in such a way that its decision is bound, *by the law*, to the precedents formulated by the instruments the legislator chose for such purpose.

In this context, we consider as precedent the decision that is able to influence the judgment of future cases, so that the past guides an action in the present, and likewise lead to the solution of questions brought in the future.

Hence, to follow precedents is to decide the present based on the past, when there is the answer to standards already applied, after all, when one decides based on precedent, it is assumed in essence that the same decision has already been issued. However, in the same way, we must consider that creating precedents and following them are forward-looking activities, given that the magistrates who today decide are the precedent setters of tomorrow (Duxbury 2008). And, in this perspective, Frederick Schauer asserts: "an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decisionmakers. Today is not only yesterday's tomorrow; it is also tomorrow's yesterday" (Schauer 1987, 572-573).

The authority of precedents in *common law* derives from the ability to influence future cases, in which their *ratio decidendi* will be applied in similar cases, thus seeking an isonomic treatment of the cases put in court (*treat like cases alike*).

In this context, there is no legal obligation to apply precedent, but rather a linkage derived from the authority itself to the institute of precedent in *common law* within the doctrine of the *stare decisis*, which states the need of lower courts to apply the *rationes decidendi* of superior courts in identical cases, ensuring integrity and coherence to the decisions of the Judiciary, and as result, stability, isonomy, and predictability.

However, it appears that this is not the basis for application of precedents in the Brazilian system. The New Civil Procedure Code brings the instruments that will ensure the effectiveness of precedents, so that for the Procedure Code there is no binding authority of Courts precedents, but only those classified by the procedural law.

In other words, in Brazilian systematic the precedent will be formed by instruments described in law, since the Civil Procedure Code presents, as said above, a method of formulation termed as *"static"*, by which the precedent arises through legal instruments "that, by the will of the Legislator, serves as a formally obligatory standard for solving similar cases" (Santos 2012, 174).

The article 927 of the Procedural Code[1] then lists the types of provisions that will link future cases, so that their *rationes decidendi* will be used as basis in equal cases, or to justify divergences when dealing with different cases by *distinguishing* them, or even to request its *overruling* or *overriding*, thus guaranteeing the constant oxygenation of formulated precedents. It is of interest here to assert that the judicial precedent does not therefore appear as a mere vector of interpretation of the norm, but principally it derives true normative content, and must be considered, even, in the grounds used by

the act of judging, adding itself to the other sources of law, thus modifying paradigms that until then disqualified the precedents as a legal source.

The procedural statute aims to give integrity and coherence to the understandings signed by the Courts (art. 926, CPC)[2], which by their competence dictate the final word on certain matters, eliminating the casuism inherent of "lottery judgments", ensuring that equal cases are treated in the same way, thus materializing constitutional equality.

Thus, the precedent system of the Procedural Code contains instruments that will oblige the judge to base their decision on precedents already signed by the competent courts, if the case in question is related to its *ratio decidendi*, in order to apply the same understanding to like cases. The solipsisms of judicial decisions in Brazil are shown both in varied treatment of equal cases, and in the lack of legal certainty, particularly of predictability, in the relationship between citizen and State, which greatly affects the daily routine of the former, as they are exposed to the elements of interpretation of the law.

For this reason, the adoption of a precedent system brings economic impacts that can be described by the economic analysis of the law, which will demonstrate the efficiency of its application as opposed to the random judgments inherent to a legal system without a *binding adjucation*.

3. Economic Aspects of Judicial Precedents

It's valid to emphasize the parallels between the legal cultures of *civil law* and *common law* when we compare the sources of law and the way in which it is produced in a given society. However, we maintain that the adoption of a precedent system in Brazil is not an import of the doctrine of United States precedent (*stare decisis*), nor is it derived from the English culture of respect and attachment to established precedents.

Instead, our reality is one of application and respect for the law, which ordains all magistrates to be bound by the precedents as they are prescribed by the hierarchically superior courts, whether at the state or federal level. But even in a system in which legislation is the supreme source of law, precedents have legal nature as a normative source, and as such can be considered a properly constituted capital stock.

By definition, the legal capital of a given society is "the set of legal rules (originally legislative or not) that the Judiciary applies to a type of case at any given time" (Gico Jr 2012, 2). As said by Landes and Posner: "We treat the body of legal precedents created by judicial decisions in prior periods as a capital stock that yields a flow of

information services which depreciates over time as new conditions arise that were not foreseen by the framers of the existing precedent" (1976, 3).

Thus, the Judiciary Power has a capital stock to be applied in the solution of conflicts, so that the citizens (economic agents) in knowing the rules applicable to each case, can predict the position of the magistrates and, with this, rationally organize their actions based, therefore, on the resulting legal consequences.

Therefore, this system of precedents is justified and based on two values indispensable to all judicial decisions: stability and predictability - both intrinsically linked to legal certainty. Legal certainty, as we know, is a value intrinsic to the Constitutional Rule-of-Law State, and as a fundamental right, it orders the State to protect the security by means of norms that effectively protect the citizen's trust, after all, you cannot speak of security and predictability when lacking the legitimate trust of the citizen.

In addition, legal certainty, such as stability and predictability, is a constitutional principle whose purpose is to safeguard equal judicial treatment, thus ensuring that equal cases have equal decisions, removing the solipsisms and decisionisms, which so influence the legal praxis. Legal security is thus an important characteristic of a precedent system by allowing economic agents to distribute the risks of the conflict by allocating and guaranteeing the economic agents sufficient information to avoid legal action or to treat it in the most efficient manner.

James Buchanan, in volume VII of his work The Limits of Liberty: Between Anarchy and Leviathan, described law as a durable good to be enjoyed over time (1975, 99), so that the yield from creation of a legal rule is delayed in time, determining and inducing conduct at a future time, and allowing economic agents to know with predictability the rules of the game. That is, judicial precedents, as part of the body of norms of a society, constitute both a legal capital at the service of judges and economic agents and a durable public good.

Moreover, considering that transaction costs, as Ronald Coase (Coase 1960) teaches us, are those necessary for the use and maintenance of the property rights of a particular economic agent, we argue that a procedural system based on precedents, and therefore with stability and predictability, reduces the transaction costs required by economic agents to negotiate rights.

That is to say, transaction costs encompass several costs that involve the entire process of economic interaction, in addition to the actual gross cost of acquisition. Thus, the legal security provided by the precedents guarantees the reduction of these costs, since, among other characteristics, these procedural instruments bring information and

allow greater planning by the economic agents. Therefore, the presence of precedents also diminishes the informational asymmetry between agents, as it allows all the knowledge of the judgments, considered as a public good.

The judicial precedent, therefore, as legal capital, avoids the individualistic action of each magistrate, since it binds their actions to the standard previously formed by the Court, and with this it prevents several rights to be solved in court and opens the possibility of agreements between parties (Gould 1973, 296), since it brings stability to judicial understandings and allows for estimations by the economic agents.

4. Conclusion

Considering, then, this innovation brought by the new brazilian Civil Procedure Code, the system of precedents recently adopted by the national law system contains instruments able of formulating and modifying precedents, binding the magistrates to the understandings of the State, Federal, as well as Superior Courts.

As seen, the command of article 926 is clear in determining that jurisprudence must be kept stable, with integrity and coherence, so that the State must act in a consistent manner before the citizens, bound by principles, guaranteeing the same standards of justice and fairness to all.

But beyond the principiological structure brought by the procedural system, the act of judging must be analyzed from the economic point of view, in such a way that the application of judicial precedents brings several benefits and efficiency gains, after all, it is a legal capital of the State, which provides predictability and stability to the Courts' understanding, in the same way, that it reduces transaction costs and increases the informational symmetry among economic agents.

In addition, judge's respect for precedents and, consequently, for the integrity and coherence of the legal system, will also be beneficial to the State, as this may reduce unnecessary judicial demands, since the understanding of every Judicial Branch will be in unison and in accordance with the Superior Courts.

Therefore, in treating like cases alike, the State will allow the citizen to foresee the legal consequences of their own actions, as well as of third parties, and the State itself, once it is clear not only what is defined in the law but especially the meaning the Judiciary derives from it (Marinoni 2010, 135). Garanteeing, since, that the right will be applied in an uniform manner to all, without casuism, solipsism and bias, is an indispensable consequence of legal certainty and, likewise, of equal treatment of citizens.

Equality is thus an essential element in the rule of law and in securing legal certainty, so that stability and predictability, as areas of legal certainty, will lead to the equal treatment of equal cases, thus removing *lottery judgment* (Marinoni 2016, 107).

It is therefore a matter of efficiency of the legal system, in so that such instruments avoid the unnecessary use of public resources the moment the State provides the citizen with a faster, more stable and predictable result, respecting, as such, all the fundamental rights provided for in the Brazilian Constitution.

Notes

[1] Art. 927. Os juízes e os tribunais observarão: I - as decisões do Supremo Tribunal Federal em controle concentrado de constitucionalidade; II - os enunciados de súmula vinculante; III - os acórdãos em incidente de assunção de competência ou de resolução de demandas repetitivas e em julgamento de recursos extraordinário e especial repetitivos; IV - os enunciados das súmulas do Supremo Tribunal Federal em matéria constitucional e do Superior Tribunal de Justiça em matéria infraconstitucional; V - a orientação do plenário ou do órgão especial aos quais estiverem vinculados.

[2] Art. 926. Os tribunais devem uniformizar sua jurisprudência e mantê-la estável, íntegra e coerente.

References

Coase, R. H. 1960. "The Problem of Social Cost." *Journal of Law and Economics* 3 (October): 1-44.

Buchanan, J. M. 1975. *The Limits of Liberty: Between Anarchy and Leviathan* 7. IN: Liberty Fund Press.

Gico Jr, Ivo. 2012. *A Tragédia do Judiciário: subinvestimento em capital jurídico e sobreutilização do Judiciário.* Tese de Doutorado. Brasília: Universidade de Brasília. Gould, John P. 1973. "The Economics of Legal Conflicts." *The Journal of Legal Studies* 2, no. 2 (June): 279-300.

Landes, William M., and Richard Posner. 1976. "Legal Precedent: A Theoretical and Empirical Analysis." *Journal of Law and Economics* (September): 249-307.

Marinoni, Luiz Guilherme. 2010. *Precedentes obrigatórios.* São Paulo: RT.

Marinoni, Luiz Guilherme. 2016. *A ética dos precedentes: justificativa do novo CPC.* São Paulo: RT.

Santos, Evaristo Aragão. 2012. "Em torno do conceito e da formação do precedente judicial." In: WAMBIER, Teresa Arruda Alvim (org.). *Direito Jurisprudencial.* São Paulo: Revista dos Tribunais.

Schauer, Frederick. 1987. "Precedent." *Stanford Law Review* 39 (February): 571-606.