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# A civil law for the age of precedents? A look into Brazilian adjudication

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**Abstract:** This paper is an attempt to understand why Brazilian legal theorists, specially civil procedure scholars, have suddenly become to talk so much about precedent. It is also an attempt to see whether their studies are theoretically sound. First, I try to identify what is the problem that precedent is seen as the solution to. Next, I talk about how Brazil developed its own model of precedent, and then compare it to the theory of precedent as it developed in common law systems, concluding that the Brazilian system still has a lot to learn before being able to create a proper, fair and democratic system of legal precedent.

**Keywords:** Jurisprudence. Civil Procedure. Brazilian law. Precedent. *Súmulas*.

**Summary:** 1. Introduction. 2. Adjudication in Brazil and what, if anything, is wrong with it 3. Brazil's very own model of precedent 4. Precedent in Brazil vs. precedent in Anglo-Saxon jurisdictions 5. Can law create a culture of precedent? 6. Bibliography.

## 1. INTRODUCTION

The doctrine of precedent (or something very similar) has taken Brazilian legal theory by storm. In a country marked by the very serious issue of fragmentation and unpredictability of its judicial decisions, scholars have turned to precedent as the one logical solution. Inspired by such studies, lawmakers have seen fit to operate this change through statutory reform. Coming after a number of such reforms, the 2015 Civil Procedure Code[1] grants binding authority to a specific set of decisions, something that has been largely hailed as good thing.

This paper follows a three-part structure. Beginning with a general picture of adjudication in Brazil, I attempt to pinpoint the reasons that led the legal community to turn to this theory of precedent. One of the main problems with the Brazilian Judiciary is its inability to solve cases in quick and just manners – and by "just", I specifically mean "with equality between different cases". This notion of substantial equality, the idea that like cases should be dealt with not only by the application of the same statutes but by actually being treated alike by the Judiciary, is one that has great appeal for the contemporaneous Brazilian legal thinker, specifically students and professors of civil procedure. In order to achieve this, legal thought has turned to the common law and what its scholars have written about precedent.

The second part follows the reforms in the Constitution and in statutes that have brought the binding authority of judicial decisions to the spotlight, specifically the culmination of these legal reforms, the CPC/15. Despite it being currently very fashionable to say that precedent is a foreign and new idea in the Brazilian legal system, one quickly dissipates that idea when studying legal history. Not only has Brazil been worrying about precedent for a long time, the country has actually developed a very specific way of having past cases influence present ones – a system of *súmulas* and other types of rules laid down by previous judges. If the Brazilian system of precedent has any one defining characteristic, it is this tendency to have the precedent judge enunciate a general and abstract rule that takes the form of something similar to a statute; these rules are then binding based solely on the fact that they were created by a previous court. Based on Dworkin's view of "plain-fact positivism", I call this the *plain-fact view of precedent*.

In the last segment, I try to understand if those statutory reforms are an adequate way to create a "culture of precedent", from the point of view of legal theory and legal reasoning. The conclusion, I fear, won't be too optimistic. For the reasons that will soon become clear, I do not believe such a systemic reform can be brought about through simple statutory reforms – and, in the end, those reforms might be aggravating rather than solving the problem.

1. From here on out, referred to only as the CPC/2015.


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## 2. ADJUDICATION IN BRAZIL AND WHAT, IF ANYTHING, IS WRONG WITH IT

The task of analyzing adjudication in Brazil, in any capacity, is overwhelming. It is not my intention to create a definitive guide, or even to thoroughly study the most influential academic theories. I am concerned about adjudication in practice, an honest attempt do capture how judges decide cases, and its consequences to building a theory of judicial precedent that fits Brazilian reality.

Considering Brazil is firmly rooted on a civil law background, it is only natural that legal positivism is greatly influential. In this we are greatly inspired by the works of Kelsen – not by a substantial reading of his pure theory of law, but by the basic notion of formal validity contained therein. To Kelsen, the notion of legal validity is connected to the existence of specific historical facts that are objectively verifiable. It is as strictly *formal* notion of validity that has nothing to do with the contents of the norms, and everything to do with their structure and their place within the legal system[2]. Law is ultimately a system of written norms backed by the threat of coercion. The code's legitimacy stems from the democratic procedure that precedes it.[3] This is the basic framework for the teaching of legal theory in most Brazilian law schools.

In this sense, the ruling theory of law, in the eyes of the average Brazilian jurist, is very close to what Dworkin called the plain-fact view of law, wherein "the law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past".[4] The main difference, of course, is that courts are *generally* not seen as legal institutions in this sense, because their decisions are seen not as creators of law, but as mere interpretations of a pre-existing law, derived from legislatures, city councils and such. So far, this is fitting with generalized descriptions of a "pure" civil law system, where judges have no creative power and the Legislative is the sole creator of the law, by the means of written statutes.

This is very basic description, of course, that fails to grasp the complexity of the Brazilian legal system. Things are seldom so simple in practice, since written statutes can't possibly solve every case in a preemptive fashion, and so a fair amount of room is left, during adjudication of concrete cases, for judges to develop solutions that don't immediately follow from the statutes. While this is an undeniable truth, legal academia has only recently begun to delve deeper into its consequences for jurisprudence.

Indeed, saying judges can create the law is not an easily acceptable idea in Brazilian legal theory, in no small amount because it so deeply influenced by the ideals of the French Revolution, the historical inspiration of most civil law countries (though Kelsen

2. KELSEN, Hans. *Teoria pura do direito*. São Paulo: Martins Fontes, 2006. 7ª ed., pp. 11-16.
3. For a complete description of Kelsen's view of a legal system, and to understand how this superficial view is not a fair description of its intricacies, see RAZ, Joseph. *O conceito de sistema jurídico*: uma introdução à teoria dos sistemas jurídicos. São Paulo: Martins Fontes, 2012.
4. DWORKIN, Ronald. *Law's empire*. Oregon, USA: Hart Publishing, 1986, pp. 6-7.

himself would take issue with this, for even his pure theory of law recognizes that the judicial decision is itself a new norm, created by the judge through an act of will[5]). Law, or so goes the traditional continental view, should come from Parliament alone, since legitimate, democratic norms stem from the people. A judge should be nothing other than the "mouth of the law". In this light, traditional legal process theory defines adjudication (*jurisdição*, in Portuguese) as the function of the State through which it settles disputes by replacing the will of the parties with its own, thus pacifying conflict. This pacification is achieved through a declaration of the "concrete will" of the law, contained in the normative text[6]. A simple logical syllogism involving the abstract norms and the specific facts of the case in dispute is enough to describe adjudication.

Of course, academic legal theory has recognized, decades ago, that law and adjudication are *not* this simple; but this view still holds a staggeringly high level of credibility within general legal thought. This means that the most recent advances in legal theory have been largely ignored by judicial practice (except when such theories are convenient, that is, when they allow a judge to take a small detour from the solution prescribed by written law and decide cases in his own preferred manner). And how can this excessively simplified notion of legal validity and judicial adjudication have survived in light of the plain, simple, unavoidable fact that code law is never unequivocal? What feature of adjudication, as seen in the real world, can be used to circumvent the realization that judges *do* create law and that hard cases[7] are an everyday occurrence? This is, in fact, one of the biggest concerns about legal positivism itself[8], but it is of great relevance in Brazil specifically, because of the peculiar way in which this problem was dealt with throughout the years.

Brazilian legal practice came up with a very questionable solution to the problems contained in this plain-fact view of law: absolute, uncontrolled judicial discretion. Judges merely declare the intent of the law, but it falls within their authority to interpret *what* that intent is. As long as a judge can point out which legal rule is nominally being applied, he can decide any particular case however he sees fit, because such rules are open to interpretation, and the Judiciary has the last say in just what the correct interpretation is. Any interpretation of a legal rule is valid, as long as it is a "reasonable" (of course, it is also up to the Judiciary to say what is a "reasonable" interpretation). If statutes are being nominally applied, the matter of *how* they are being applied, under this train of thought, is of little consequence. Judges are free to interpret and apply

5. KELSEN, Hans. *Teoria pura do direito*. São Paulo: Martins Fontes, 2006. 7ª ed., p. 394.
6. GRINOVER, Ada Pellegrini, et al. *Teoria geral do processo*. São Paulo: Malheiros, 2010, 26th ed, p. 147.
7. I understand hard cases as did Dworkin, manifesting themselves "when a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance" (DWORKIN, Ronald. *Taking rights seriously*. New York: Bloomsbury, 1977, p. 105 – digital edition).
8. SHAPIRO, Scott J. *Legality*. Cambridge, Massachusetts: Harvard University Press, 2011, pp. 237-240.


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statutes as they see fit, according to nothing but his own personal understanding. It is judicial discretion taken to its extremes.

This idea has been called the "principle of the judge's free conviction", meaning the end goal of parties in a lawsuit should be to convince the judge that the solution they propose is the best, and nothing else. It should be said, though, that "free conviction" is an idea that had its meaning warped. It originally meant that parties are free to use any means of evidence available in order to settle controverted matters of fact before the judge, and nothing else. It wasn't until later on that it got distorted into meaning judges can adjudicate however they see fit.

It is most curious that, overall, the common-sense view Brazilian legal system fails to grasp (or, even worse, *refuses* to grasp) how this idea is intrinsically incompatible with the plain-fact positivist view of adjudication. There are several reasons for this selective blindness, and they all deserve to be studied separately. It is undeniable, though, that this lack of concern for the intricacies of fairness and equality in adjudication is, in large part, a symptom of the baffling number of lawsuits presented before the Judiciary every year, and its systemic incapability of dealing with them. This structural problem is an important point, one which this article will come back to later on.

In this context, previous judicial decisions offer nothing but guidance for the well-meaning, a glimpse of how previous judges have interpreted the code in the past. Indeed, previous decisions hold no authority over how the code should be interpreted now, since any judge feels free to do it in his own way. Their authority, if any, is *persuasive* at best, but even that is left to the judge's discretion[9]. The rationale doesn't even go as far as saying that previous judges have been wrong or misguided in their views, having failed to extract the "true" meaning of the text. The precedent judge's opinion is taken as just another possible, equally reasonable reading of what the law is, with which the current judge simply disagrees. This is not surprising – after all, even the legal code itself falters before judicial discretion.

Such an individualistic view of adjudication is completely incompatible with *stare decisis* and hierarchical precedent. Judges are free to change their minds, and the court structure only means that higher courts will reform the decisions of subordinate judges (appeals are generalized and happen in almost every case). Hence the current state of Brazilian legal system: every judge is an island, every case is decided from scratch, with no regard to historical context or previous decisions. Citizens cannot expect like cases to be decided alike, and the Judiciary is not held accountable to rules issued in previous judicial opinions. This is the problem that jurists currently face and struggle to deal with. It seems natural, in a way, that such a scenario would be followed by attempts to develop a strong culture of precedent. If disagreement runs amok, the strengthening of the hierarchical structure of the Judiciary is the most plausible answer.

9. MARINONI, Luiz Guilherme. *Precedentes obrigatórios*. São Paulo: Revista dos Tribunais, 2016. 4ª ed.

In very general lines, this brief exposition might help understand why everybody is suddenly talking about precedent. The next section of the paper will delve a bit deeper into how Brazil has tried to instill among lawyers, judges and scholars the idea that like cases should, indeed, be decided alike.

## 3. BRAZIL'S VERY OWN MODEL OF PRECEDENT

This fragmentation is, by and large, the biggest challenge faced by current Brazilian legal theory. Here I enter into the paper's second section, where I look into the constitutional and statutory reforms that grant binding authority to some judicial decisions. There is a very simple rationale behind them. Since divergent opinions are out of control, what Brazil needs is some kind of centralized authority to tell judges how to decide cases. Common law theory seems an easy way out: if it is the reliance on the code that got us this far, then it is time we looked for the solution somewhere else: *stare decisis* (or something very similar).

Indeed, the idea that Brazil should adopt the doctrine of *stare decisis* is not new. Legal reforms have been attempted but had little success throughout the years. The earliest of those reforms that still holds influence today dates back to the sixties, when the Supreme Federal Court (STF) created the *súmula*[10], which works in the following way. The court interprets its own cases and extracts a general rule from them, which is then written down in an abstract and general fashion, completely detached from the cases themselves – just like a written statute, then. The *súmula* is this general, abstract rule, generally not longer than a single, short phrase. In its inception, the point of the *súmula* was mostly organizational, a helpful way to catalogue the court's position in relevant points of law, directing the interpreter to the cases. As time went by, the idea of the *súmula* as a helpful organizational tool dissipated. The rules they contained grew a life of their own and became completely detached from the cases. Lawyers and judges began referring to the *súmulas* themselves, instead of the cases that originated them. They became, for all intents and purposes, statutes – except for the fact that they are issued by the Judiciary, and the existence of a lot of uncertainty regarding just how much future judges are bound by them.

*Súmulas* became an entrenched feature of the Brazilian legal scenario – and the non-argumentative way in which it influences future judges became the norm for further statutory and constitutional reform, as we shall see. In more recent years, the first relevant reform came in the mid-2000s, in the form of the 45th Constitutional Amendment, that created the "binding *súmula*", limited to constitutional matters, and binding to every branch of the Judiciary and Executive powers. The same Amendment brought "general repercussion" as a prerequisite for appeals presented before the

10. There is a language barrier here, which is why the word was left in Portuguese. Nothing in common law countries comes close to the *súmula*, as will become clear.


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STF, inspired by the American idea of having the Supreme Court grant certiorari as a prerequisite for hearing a case. All of these changes signal an understanding of the STF's role as being closely tied to bringing uniformity to the application of law throughout the country, establishing precedents that should orient future decisions in every lower court.

But the main reform was not a constitutional one. The CPC/2015 is the clearest attempt so far to set up a system of binding precedents that limit judicial discretion.

The code does this in two ways. First, some sections tell judges how they should decide cases. For example, Article 489, first paragraph, enumerates specific kinds of decision that are considered null, for a lack of proper exposition of the judicial opinion, such as decisions that ignores some of the arguments brought forth by the parties, and decisions that base themselves on precedent or *súmula* without properly drawing analogies between the facts of the precedent cases and the case in dispute. Indeed, it is a constitutional right in Brazil that the judicial opinion behind any judicial or administrative decision should be properly expressed, or else the decision is null (article 93, IX, of the Brazilian Constitution). In the same vein, article 926 of the CPC/15 prescribes that a court's body of decisions (its *jurisprudência*, a term that means something very different than what "jurisprudence" means in English) should be kept with "stability, integrity and coherence".

Reforms of this first kind are well intentioned. There is a clear attempt to create legislative barriers to the aforementioned "principle of the judge's free conviction" by creating argumentative onuses to the judge. However, they fall prey to a trap. The same Judiciary that is required to conduct in the manner prescribed by the rules is responsible for making sure those rules are followed. So, the judge who says if a judicial opinion is properly exposed or not is the very same one who solved the dispute in the first place. There is no one to guard the guardians. Schauer's study on how and why judges themselves should obey the law is very relevant to understand this point – in no small amount because of his observation that "official obedience to the law, absent the threat of formal legal sanctions, may well be less than is commonly assumed" [11].

Also, expressions like *integrity*, *stability* and *coherence* might mean something to legal theory – and even then, they a pretty vague expressions that might mean different things to different people – but in the real world they are dependent on being properly enforced by the Judiciary. It is pretty hard, in this sense, to identify with any objectivity whether any single court's body of decisions is indeed "stable" or "coherent", whatever those expressions might mean. This seems an underlying risk of turning theoretical concepts into written law, where their meaning is always dependent on real world applications, with all its imperfections. In the end, then, this

11. SCHAUER, Frederick. *The force of law*. Cambridge, Massachusetts: Harvard University Press, 2015, digital edition, pp. 87-92.

first kind of legal reform falls prey to the very sting of unlimited judicial discretion that it wishes to fight.

The second way that the code has attempted to create a system of precedent is much more objective. Article 927 enumerates specific types of judicial decision and *súmulas* that courts should see as *formally* binding. There is no room for doubt here: judges *have* to decide in the manner prescribed by those precedents and *súmulas*, because the law says so.

In addition, there are also a number of mechanisms that are designed to produce binding rules, like the *incidente de resolução de demandas repetitivas* ("motion for the resolution of repetitive claims"). Described in Articles 976 to 987, this motion is a specific kind of legal procedure that is designed, from the start, to solve several similar claims at the same time, while setting binding precedent for similar claims in the future. A court chooses one of many similar cases and solves it, immediately setting an abstract rule (referred to by the law as a "legal thesis") that is supposed to be applied to all similar situations, both past and present. This judgment can be provoked by any one party, or even by the judge himself. Once the court lays down this thesis, it is immediately and irrevocably binding, unless the court itself decides to overrule it.

Of course, this brings one back to the same problem laid above – the law says judges should follow these decisions and *súmulas*, but who is to say judges will really follow them? In other words, how is this objectively identifiable kind of precedent any better than the wider duty of deciding with stability, coherence and integrity?

If anything, it is simply *easier* to enforce. One might have trouble identifying whether any given decision respects the principle of integrity, but the task of comparing the decision given to the instant case with, say, a legal thesis set during the judgment of an *incidente de resolução de demandas repetitivas*, is significantly simpler. Indeed, because Article 927 allows for a kind of mechanical application of precedent that, in the eyes of Brazilian courts – especially the ones higher up in the hierarchy – really help to reduce the amount of lawsuits. From a somewhat utilitarianist perspective, there is actual incentive for higher courts to enforce Article 927, since it means that matter settled in those decisions will actually bind courts for good, ending several different lawsuits at one time. This is quite different from the abstract, almost philosophical concepts contained in Articles 489, first paragraph, and Article 926. In this manner, a judge who refuses to comply with formally binding precedent should pretty soon find all of his decisions being overturned by higher courts, which works as an incentive to stop struggling and simply accept the authority of the binding precedent.

Indeed, the concern with using precedent as a way to settle repetitive legal issues is perhaps the single most important characteristic of this system of precedent, perhaps because the multiplication of lawsuits is one of the most alarming problems of the Brazilian judiciary in the twenty-first century. So, to make this system work, the code has set a number of other tools that serve to effectively stop legal issues that have already been decided from ever reaching courts again: summary judgments, setting fines for


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parties who choose to litigate against binding precedent, and even the limitation of the right to appeals (something that goes against the hierarchical nature of civil law courts, where appeals are a general, almost universal feature of any lawsuit).

So, basically, the CPC/15's "system" of precedent works as follows: if the higher courts decide an issue of law under one of the hypotheses set by Article 927, that decision is binding, and should be automatically applied to similar cases in the future. It doesn't matter if the decision is one of first impression, or how evolved is the legal discussion around the topic; courts are expected to settle controverted points of law as quickly as possible. The precedent rule is immediately identified as such by the precedent court, knowing full well that the solution given to the case at hand will solve all similar cases in the future, and there shouldn't be any room for doubt or interpretation of said rule.

Indeed, not only has the CPC/15 instituted the obligation for courts to follow precedent, it has also built several procedural rules around it, all of them based on the idea that cases dealing with matters already settled in previous decisions should be settled briefly, with as little steps as possible. This is the practical side of precedent, which allows one to finally understand why all of these reforms have been left to procedural law instead of, say, a Constitutional reform: forcing judges to abide by past decisions is a way to deal with the pathological expansion of lawsuits within the Judiciary.

It is a very mechanical way to deal with precedent. The code seems to concern itself more about consistency in specific issues of law, the ones that cause the biggest proliferation of lawsuits, than about a communal sense of integrity and *stare decisis* (though the code seems to hope to counterbalance this mechanical attitude with the interpretive and argumentative behavior that is demanded by Articles 489 and 926, mentioned above).

Hence the impression that previous decisions are not a way to achieve cohesive and systemic legal reasoning, but a mere *judgment technique*, a way to deal with repetitive claims through mechanisms that allow a superior court to settle an issue of law with an authority so universally binding that it stops similar cases from ever reaching courts again. It is no coincidence that these reforms come from the Civil Procedure Code, of all places – after all, the doctrine of precedent, in all of its complexity, can hardly be considered a merely procedural problem. All in all, the new procedural rules seem to concern themselves a lot more with the resolution of the underlying problem of the Judiciary, by forcibly reducing the number of lawsuits, instead of the proper administration of justice in particular cases, and the evolution of law through legal debate.

When the Judiciary's biggest concern is the number of lawsuits, justice becomes a matter of quantity and not of quality – hence why theoretical disagreement about the law, the kind that normally allows the law to grow and evolve, have suddenly become the villain. Indeed, in this mechanical system, little or no attention is given

to two sides of the practice of precedent: the creation of precedential rules, and the application of said rules to future cases.

If the responsibility of interpreting a case and the reasons of principle that justify it lies solely in the precedent court, how should judges go about creating these rules, in order to keep them legitimate and not contradictory to statutory law? Surely, the creative power of the judges is not unlimited even in common law systems, but doubly so in the civil law, where there is no pure "common law" environment where law is purely precedent-based.

Sadly, it is not uncommon to see judges create *súmulas* or rules written with a level of generality and abstraction that goes way beyond the scope of the case at hand, at openly ignores or even contradicts preexisting law. When setting a rule based on what was decided in a specific case, it is to be expected that the rule should be analyzed in accordance to the circumstances of the case itself, since a court can't possibly identify all the future applications of said rule. While this might seem obvious to a common lawyer – which is why comparing cases is such a basic feature of common law legal education – it is not how *súmulas* work; once proclaimed, they become autonomous from the cases that originated them.

Legal practice shows that referring to a *súmula* while mentioning the circumstances of the originating cases is an astoundingly rare practice, be it in documents written by lawyers or judges, be it during legal education. Once a superior court says something, it is taken as the absolute, unquestionable truth – a matter that is settled and no longer open for discussion, a sort of "official" appeals to authority. So, the creation of the *súmula* – which should, all in all, be an expression of the *ratio decidendi* of the legal decision – is a largely uncontrolled process. While adjudication in itself is (generally, and at least in theory) an activity that happens within the boundaries set by written statutes, the process of writing the rule (the *súmula*, or the case's headnote) is one that the precedent court undertakes with absolute discretion. A closer look at the cases that led to the creation of the rule might reveal that it is way over-inclusive, or even openly contradicts applicable statutory law.

As for the practice of *interpreting* those decisions and *súmulas*, this is also seen as a non-issue: it is seen as just a matter of reading the rule and applying it to the case at hand, as if the existence of a *súmula* or binding decision mean that the applicable law can be identified easily, simply by referring to the rule itself. The rule is binding because of the authority, granted by law, to the court that proclaimed it. The reasons of principle that lie underneath said rules are irrelevant; even worse, the case from which the rule came from is also irrelevant. The rule detaches itself from the case where it came from, and it works, for all intents and purposes, as a statute. It is precedent with all of the authority, but none of the reasoning.

Legal scholars might draw a parallel between this method of working with precedential rules, and the "semantic sting" that affects legal positivists, as described by Ronald Dworkin. Indeed, drawing an analogy Dworkin's terminology, it is fair to


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say that Brazil has adopted a sort of "plain-fact view" of precedent, where previous decisions are valid and applicable to cases not because of the general reasons of principle behind them, but because the CPC/15 grants them binding force. That is to say, decisions are not binding in themselves, but as rules laid down by previous courts. Hence a decision constitutes precedent to a future case not because its material facts are similar, and not because the reasons adopted in the previous case are logically compatible with the case at hand, but because there is a past political decision (the CPC/15) saying that it should count as precedent.

## 4. PRECEDENT IN BRAZIL VS. PRECEDENT IN ANGLO-SAXON JURISDICTIONS

The number of competing views on what precedent is and how it works is just as big as the number of people that have thought about it. Even among common lawyers, the nature of this phenomenon called precedent is controversial – Larry Alexander said, in 1989, that "our theoretical understanding of the practice [of precedent] is still at a very primitive stage"[12], and it doesn't look as if that field has been the target of any paradigmatic shift in the few decades since that sentence was written. It is certainly shocking, then, that Brazil has taken to common law theory as enough to explain the phenomenon of precedent in a civil law context, when it hardly seems mature enough to explain its own origins. There is an underlying disharmony between the quoted texts, developed by Anglo-American authors in a common law environment, and Brazilian laws about precedent, as described in the last section.

A great number of scholars might be offended by that last paragraph, so some clarification is in order. What I am saying is not that the concept of precedent is organically incompatible with a civil law system. One of the basic expectations of anyone who is capable of reasoning, be it legal reasoning or not, is that of coherence – that is, that reasons, once stated as applicable to one situation, should naturally be applicable to other, similar cases. Schauer's basic example is that of a person who states their reasoning for carrying an umbrella as being caused by a particularly bad weather forecast that morning. It is to be expected, then, that this person will *always* carry an umbrella in days with similarly bad weather, because reasons are over-inclusive; they fit more than one individual case[13]. If this is expected of any given person, it is a basic requirement of the Judiciary, whose whole function – assigned by the Constitution, one might point out – is to apply the law equally to every citizen.

In this sense, there is nothing that differentiates civil law and common law jurisdictions, even if this is where general legal thought seems to be headed – a Minister of the STF (a position analogous to that of a Supreme Court Justice) recently

12. ALEXANDER, Larry. Constrained by precedent. In: *Southern California Law Review*, v. 63:1, 1989, p. 1.

13. SCHAUER, Frederick. *Playing by the rules*: a philosophical examination of rule-based decision-making in law and in life. New York: Oxford University Press, 1991, p. 176.

said Brazil is "walking in large strides towards the common law" because of the new Civil Procedure Code[14]. The reasoning behind this seems to be that any attempt to increase the authority of courts represents one step closer to the common law, but this is frankly not true. Brazilians are not any more tolerant of illicit discrimination between citizens that Americans are, even if it does happen more often in civil law courts. In programming jargon, one would say that this inequality is a bug, not a feature.

What I am saying, though, is that legal reform is creating a specifically Brazilian system of precedent, built around pre-constructed legal rules and the granting of legislative authority to the upper levels of the Judiciary, not magically transforming Brazil into a common law system. This is where the paradox lies: by quoting and referencing authors that are talking about something completely different, legal scholars seem to legitimize these specifically Brazilian reforms. It works in the common law so it should work here, is how the logic goes, even if it does not work like that in the common law at all.

That last affirmation is not self-evident – or, at least, it doesn't seem to be self-evident to the better part of Brazilian legal scholars, who tend to view these reforms as something that is, indeed, building a genuine theory of precedent in Brazil, just like in common law countries. In this final section of the paper, I intend to do the opposite: instead of using common law theory to explain these legal reforms, I will contrast them common law theory and the Brazilian practice, pointing out just what are the main differences, and if such reforms would actually allow one to claim Brazil has adopted a "culture" of precedent.

While several competing views of the practice of precedent could be mentioned – say, how Hart says precedent is binding if it fits the criteria set forth by the rule of recognition[15], or how Dworkin points out the respect for precedent as a necessary part of legal practice, based not only on the requirement of consistency (deciding like cases alike) but on the larger value of integrity[16] – there are two specific theories that deserve a closer look, because of how appropriately they seem to describe the Brazilian model of precedent. I am referring to Frederick Schauer's conception of precedent as a practice closely tied to giving reasons, and to Larry Alexander's three models of dealing with precedent, specially what he calls the rule model of precedent.

Schauer's view of precedent is based on his study of rules and reasons, according to which precedent is a necessary consequence of the practice of giving reasons, and

14. CONSULTOR Jurídico. *"Caminhamos a passos largos para o common law", afirma Teori Zavascki.*, 10/11/2015. Available in: http://www.conjur.com.br/2015-nov-10/caminhamos-passos-largos-common-law-teori-zavascki.
15. HART, HLA. *O conceito de direito*. Lisboa: Calouste Gulbenkian, 2007, 5ª ed., pp. 16-17.
16. DWORKIN, Ronald. *Law's empire*. Oregon, USA: Hart Publishing, 1986, pp. 228-232.


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holding courts to their own words in the future[17]. Hence, if a judge decides a case in a given way, people naturally expect the same reasons to be applied to similar cases in the future, because there is no substantial difference between litigants in both cases, and they should be treated in the same fashion. Precedent is closely tied to the fact that the reasons given in a judicial opinion are necessarily broader than the rule applied to the particular case; and there is no way to properly identify just what those reasons are other than to pay attention to what a court actually *says* about what it is deciding. In this sense, Schauer is greatly critical of the basic idea that the holding of a case can be derived by looking at nothing but the facts and the conclusion; the stated judicial opinion is fundamental in understanding what factors were important to reach the conclusion.[18] And isn't this just what a Brazilian court does when deciding a case and proclaiming a general rule, in the form of a *súmula*, headnote or abstract "legal thesis"? I believe there are substantial differences that will be addressed shortly.

The other Anglo-American description of precedent that seems to adequately explain Brazil's concept of precedent is Larry Alexander's, who describes two different, competing views of precedent, that he calls the "natural" model and the "rule" model. In the natural model, legal reasoning happens in a moral and empirical level. Precedent is not authoritative in any sense beyond basic expectations of consistency, and can be easily overruled if the court concludes that deciding the instant case in a way that contradicts the precedent case would be morally better than respecting what has been previously decided just for the sake of consistency – that is, reliance in previous decisions is a moral value in itself, and doesn't take any pre-given precedence over other possible reasons for deciding (though Alexander denies the value of equal treatment as being morally important in itself – but that is a discussion for another time and place)[19]. The natural model is absolutely incompatible with a civil law system, for its morally guided analysis has no place for the authority that follows from written statutes.

Meanwhile, in the rule model of precedent, past decisions are afforded a more authoritative position. This is Alexander's preferred model. *"In this model, prior judicial rules operate as serious rules, preempting the question whether the reasons for the rule justify the outcome it prescribes in a particular case"*[20]. That is, it makes little difference if the judge believes the previous case was decided incorrectly or if there are stronger moral reasons for not applying the rule than applying it. A judge should apply precedent because it is precedent, a rule that carries intrinsic authority,

17. SCHAUER, Frederick. *Thinking like a lawyer*: a new introduction to legal reasoning. Massachusetts, USA: Cambridge University Press, 2009, pp. 175-176.
18. SCHAUER, Frederick. *Thinking like a lawyer*: a new introduction to legal reasoning. Massachusetts, USA: Cambridge University Press, 2009, p. 55.
19. ALEXANDER, Larry; SHERWIN, Emily. *Demystifying legal reasoning*. New York: Cambridge University Press, 2008. p. 42-50.
20. ALEXANDER, Larry; SHERWIN, Emily. *Demystifying legal reasoning*. New York: Cambridge University Press, 2008. p. 53.

stemming from the fact that it is derived by a superior court. Unlike the natural model of precedent, this one seems highly applicable to the civil law system at first glance – the concept of *súmulas*, for example, seems to be comprised of this basic concept of a rule-model of precedent, only taken to its extreme: if the precedent acts as a rule, it's to be expected that this rule should be made as clear as possible, and nothing could be clearer than it being announced as a rule by the court itself, hence dealing with the problem of cases with no discernible rules.

Indeed, there is some truth to this – indeed there are convergence points between common law reasoning and civil law reasoning, since they are both about settling legal matters, and they both share some basic features of human reasoning. While it might seem that I have been proven wrong, that I managed to find a common law theory that does adequately explain the Braziliam system of precedent, it is necessary to point out what was left unspoken: that, ultimately, both Schauer's and Alexander's rule-based views of the practive of precedent are unfitting to the Brazilian reality because they were developed in a common law environment, where judicial law-making powers are nothing out of the ordinary.

A civil law system works differently, though – and this is a subtlety that often seems to pass unnoticed by several Brazilian authors when writing about precedent, and when using common law theories to explain (and even to legitimize) the Brazilian system of precedent. Talking about judge-made law is still something new – and it seems only natural that the new phenomenon will be examined and interpreted in the light of the *status quo*. So the conclusion comes naturally: since the law comes from the statutes, then judge-made law necessarily means judge-made statutes. And from them on it's easy to see how the collective unconscious of Brazil's legal minds developed something like the *súmula*, which is not judge-made law, but, in every fashion, a *judge-made statute*, to the point that most cases where *súmulas* are discussed focus not on the cases that originated the precedential rules, but on the wording and interpretation of the *súmula* itself. That is what happens when syncretism between the two systems happens without control, and without proper criteria.

The writer who came the closest to reaching this same conclusion was Larry Alexander, who dedicated an Appendix to his 1989 article *Constrained by precedent*[21] solely to discuss precedential constraint under a scenario where the court is limited by a written statutory or constitutional norm. Even then, Alexander pointed out that the American *"statutory/constitutional regime is an impure one"*, something that doesn't ring so true to the ears of civil lawyers, who are used to a "pure" statutory system. But even here, even when reading the works of an author who openly defends *"that precedent rules are best conceptualized as judicial statutes, with all that implies for*

21. ALEXANDER, Larry. Constrained by precedent. *Southern California Law Review*, v. 63:1, 1989. p. 57-59.


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*their identification and interpretation"*[22], it is necessary to point out how different both systems are in their conceptions of what the law is and where it comes from. So when Schauer or Alexander point out that is always better for the precedent court to clearly promulgate the rule that derives from the case, they take into account that said rule will always be interpreted in light of the case where it came from. That observation is often taken for granted and not stated out loud because it literally goes without saying for a common lawyer – but not so much for a civil lawyer, to whom the most basic legal operation is the interpretation of abstract statutes, not concrete cases[23].

Indeed, however diverse all of the theories about precedent may be, there is one fundamental, underlying truth to all of them: precedent, no matter how one chooses to look at it, is an argumentative phenomenon. It is not surprising that it should be so, considering the practice of precedent is one that grew organically within the heart of the common law system – so even the most rule-based description of precedent always takes the cases into account. Schauer and Alexander might be both right when proclaiming the advantages of having the precedent court to promulgate a clear rule, but that doesn't stop the instant court from having to identify similarities between cases, to establish the applicability of said rule. The link between instant case and precedent case is one that has to be built and shown through discourse. In fact, one of the greatest difficulties faced by common law scholars and professionals dealing with precedent lies in determining just what it is that makes two cases materially alike[24]. The practice of precedent has everything to do with the *reasons* given to decide one case, and the expectations that subsequent cases should be resolved in the same manner, and with the values of consistency in how cases are decided and of treating different people in similar situations with the same consideration, or however one chooses to look at it. This, it seems, is the underlining idea of *stare decisis*. Even analogical reasoning, at its core, is tied to the idea that reasons given in the past should be given again in similar cases, because they are *universal* reasons.

It should be commonsense that reasons are universal and, once stated, should apply to more than one particular case. Indeed, this is a basic premise in most studies written in common law countries – a starting point, but something that seldom needs to be argued in itself. This basic expectation that a court be coherent with itself[25] is the underlying notion behind *stare decisis* and treating like cases alike. It gets complicated

22. ALEXANDER, Larry. Constrained by precedent. *Southern California Law Review*, v. 63:1, 1989. p. 60.
23. Which is why the opening scene of the 1973 movie *The Paper Chase*, where a Harvard Law professor menacingly asks his students to "recite the facts of *Hawkins vs. McGee*", seems so quaint to civil lawyers, to whom learning to interpret cases and recite facts is not something expected from first-year Law students.
24. DUXBURY, Neil. *The nature and authority of precedent*. New York: Cambridge University Press, 2008. p. 15.
25. SCHAUER, Frederick. *Thinking like a lawyer*: a new introduction to legal reasoning. Massachusetts, USA: Cambridge University Press, 2009, p. 177.

further on, of course, when understanding the specific workings of precedent and its specific tools in each legal tradition; but this basic principle is *universal*. As stated above, there is nothing peculiar about the civil law that makes people *less* expectant of coherence from the Judiciary. In this sense, learning how to deal with previous decisions and their influence in new cases is to be expected of lawyers, judges and legal scholars in any legal system around the world[26]. Obvious as this may seem, it is still something that needs pointing out in Brazil's current reality, where precedent gets routinely referred to as a specific feature of the common law.

There is, of course, structural difference in *how* precedent works in Anglo-American and continental law. Indeed, this is unavoidable, since precedent in civil law countries is irrevocably tied to a statutory framework, while precedent, in common law countries, is bound only by the principles set forth by other cases. Damaška points out that civil law courts, being used to thinking of legal reasoning as deductive reasoning that starts from an abstract proposition and creates the individual rule of the case, tend to expect precedent to give "a rulelike pronouncement of higher authority, the facts of the case stripped to their shadows", while common law courts seek symmetry between the *material facts* of the different cases[27]. Jan Komárek, adopting a very similar basic distinction, correctly points out that there is nothing inherently superior about either way of understanding precedents (the case-bound and the legislative model, he calls them), as long as the differences in method between both are properly understood[28]. They are right, of course. It is absurd, even silly, to suggest that Brazil – or any civil law country, for that matter – should turn into common law countries, or adopt something akin to a pure common law jurisdiction, in order to achieve equality before the law.

Anywhere in the world, people should legitimately expect to see like cases treated in similar fashion by courts, be it the case-bound or the legislative model. Precedent is part of legal reasoning because holding people true to their word is a basic feature of human discourse. So Brazil *can* develop a culture of reasoning with precedent. *Should*, actually. Lawyers should pay attention not only to *what* was decided by a previous court (even if that is a very important aspect of the practice of precedent, as described by Alexander and Schauer), but also about *why* the court got to that decision. But the CPC/15 seems to be going the opposite way, towards a non-argumentative system of precedent, focused not on cases but on *súmulas* and headnotes. Controverted issues of law are settled with a level of immutability that is unseen even on early 20th Century House of Lords. However false it might be to say that the common law *works itself pure*, no system of precedent should stop the law from keeping up with the times.

26. BUSTAMANTE, Thomas da Rosa. *Teoria do precedente judicial*: a justificação e a aplicação de regras jurisprudenciais. São Paulo: Noeses, 2013. pp. 103-114.
27. DAMAŠKA, Mirjan. *The faces of justice and state authority*: a comparative approach to the legal process. New Haven, USA: Yale University Press, 1986. pp. 33-34.
28. KOMÁREK, Jan. Reasoning with previous decisions: beyond the doctrine of precedent. In: *American Journal of Comparative Law*, n. 8/2012. Disponível em: http://dx.doi.org/10.2139/ssrn.2150133.


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This is a kind of change that can only be accomplished through gradual discussion, through *promoting* divergence of judicial opinion rather than having judges apply pre-built answers to complex legal problems; this kind of evolution is very peculiar to case-based reasoning[29].

The concept of precedent that is set forth by the code – an abstract rule, set forth by a court, designed to reduce the number of lawsuits by killing discussion about controverted grounds of law – is incompatible with the idea of properly reasoned judicial opinions. Precedent can't be mechanical *and* argumentative at the same time. When this two aspects clash, only the first one is actually enforced. While common law jurisprudence struggles to find a theory about law that fits and justifies the practice of precedent[30], Brazilian civil procedure law is going about it the other way around, attempting to use the force of law to bend the practice so it fits the theory. This seems to be a recurrent theme when contrasting the common law and civil law. For example, Guido Calabresi wrote "A common law for the age of statutes" (the work that inspired the title of this paper) as a *reaction* to the statutorification of a previously precedent-based system[31]. Brazil gets it backwards: instead of using legal theory to explain the phenomenon of judicial precedent, Brazilian lawmakers try to *create* this phenomenon, based on its perception of what legal theory says it *should* be.

All of this is not to say that law can't be used as the starting point for a bigger, widespread cultural change. Perhaps I am being too much of a pessimist; perhaps the law *can* cause change in the legal practice, and consequently in legal reasoning. In this sense, the binding decisions listed in Article 927 of the CPC/15 might end up being a starting point in affirming the values of *integrity, stability and coherence* contained in Article 926, thus representing the first step towards a major revolution in Brazilian adjudication, where decisions are always accompanied by the proper reasons, and citizens can expected to be treated with equality by the Judiciary. Several authors see these reforms with this positive outlook, expecting – or hoping, at least – to see some change in the near future[32].

29. SCHAUER, Frederick. *Playing by the rules*: a philosophical examination of rule-based decision-making in law and in life. New York: Oxford University Press, 1991. pp. 174-181.
30. LAMOND, Grant. Do precedents create rules? *Legal theory*, n. 11, pp. 1-2, 2005.
31. CALABRESI, Guido. *A common law for the age of statutes*. Cambridge, Massachusetts: Harvard University Press, 1982
32. BUSTAMANTE, Thomas da Rosa; DERZI, Misabel de Abreu Machado. O efeito vinculante e o princípio da motivação das decisões judiciais: em que sentido pode haver precedentes vinculantes no direito brasileiro? In: CAMARGO, Luiz Henrique Volpe, et al. (org.). *Novas tendências do processo civil*. Salvador: JusPodivm, 2013, p. 360.

## 5. CAN LAW CREATE A CULTURE OF PRECEDENT?

Identifying and solving problems that are deeply entrenched within a legal system is no easy task, nor is it one that can be deal with through any simple or quick means. This is the case with the fragmentation of judicial decisions, and consequent lack of security and predictability, that currently characterizes the Brazilian legal system. Such a multifaceted problem carries no one-note solution, and with this paper I intended to show why turning to precedent as the definitive solution to all problems is, ultimately, innocuous, while also pointing out that learning to properly utilize precedent is a necessary aspect of legal reasoning, one which could use some fine tuning in Brazil's Judiciary.

This is where common law theory comes in, and where syncretism between both systems feels welcome. It is desirable, indeed, that Anglo-American jurisprudence be read and understood among civil lawyers, because of the experience that can be derived from a system where the respect for precedent grew organically. Even if the nature of precedent is controversial in common law countries, there is still no better place to study and learn legal reasoning involving past decisions.

However, there is a thin line between recognizing the importance of precedent and judicial coherence, while still addressing it as part of a whole, and treating precedent as the one and only solution to every legal issue. Choosing the latter is especially grievous when it is done in the authoritative fashion that is drawn by Brazil's statute-driven system of precedent; and it is particularly alarming to see Anglo-American legal theory being used as a way to explain and justify this system of precedent that, all things considered, has little to do with how precedent works in common law countries, for it fails to grasp the subtle but important difference between judge-made law and *judge-promulgated statutes*. Recognizing judges have law-making powers does not mean granting courts absolute statute-creating powers, since they are not a democratically installed Legislature. In this way, common law legal is utilized in an instrumental fashion, seeking not to understand and improve but rather to justify and legitimize the Brazilian "system" of precedent.

The fragmentation of judicial decisions is not the *cause* of all problems with the Brazilian judiciary. It is, actually, a symptom of a larger issue: the general distaste for proper legal reasoning, often hand-waved away in favor of adopting the judge's own sense of justice, even in cases where written statute clearly applies and should limit judicial discretion. This is what needs to change, but that is also where one is faced with the very uncomfortable truth that there is no easy answer on how to do it.

Sure, the CPC/15 *talks* about the judge's duty to work with proper legal reasoning and to maintain structural integrity and coherence in judicial decisions, but, as was said before, these are non-enforceable rules. Statutory reforms alone might *help* change this scenario, but Brazil needs deeper change to address the (apparently insurmountable) deficit in proper, good faith legal reasoning. This can't be corrected through legal reform alone, and there's no guarantee that the CPC/15 is even on the right track.


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Montesquieu might lie centuries behind, but there is still something to be said for the separation of powers. The Judiciary should still be acting on a case-by-case basis, with proper motivation, while leaving general, policy-based, rules to the lawmakers. This does not mean civil law theory should step back into the seventeenth century, but it does mean that recognizing judicial law-making authority does not grant courts the freedom to legislate in whichever sense they see fit, since this authority is ultimately still derived from the court's primary function, which is that of adjudication, that is, settling concrete cases. And judge-made law, in this sense, is not something that the civil law is impermeable to, because it derives from the basic expectation of consistency.

The law can't force judges and lawyers to reason with good faith and candor. There are no easy answers to complex problems. It is essential that studies on jurisprudence and legal theory be brought back to the Brazilian law school menu. Rebuilding faith on the Judiciary might simply be a task best left to legal reasoning itself. And it is about time that Brazilian legal reasoning learned to defend itself.

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