A FULL DELIBERATION OF THE BRAZILIAN SUPREME COURT FOR THE EFFECTIVE CREATION OF BINDING PRECEDENTS: A VIEW OF THE DELIBERATIVE PROCEDURE OF THE US SUPREME COURT*

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ABSTRACT

The paper concerns the implementation – by the Brazilian Civil Procedure Code of 2015 – of a binding judicial precedent system and the consequent need to adjust the collegiate voting procedures of the Brazilian Supreme Court and other counties' courts, so that precedent-generating decisions are the result of full collegial deliberation, with institutional recognition of precedents. The models of collegiate decision analyzed are *seriatim*, *per curiam* and majoritarian practice, concluding that the latter, which is adopted by the US Supreme Court, is more appropriate for the Brazilian Supreme Court. The purpose of this paper is to demonstrate that the inadequacy of the deliberative procedure will result in the ineffectiveness of this precedents system. The method adopted is hypothetical-deductive, through a critical analysis of the need for improvement in the process of creation and respect of precedents.

Keywords: Collegial deliberation. Brazilian Civil Procedure Code of 2015. Binding precedents. Brazilian Supreme Court. US Supreme Court.

INITIAL CONSIDERATIONS

The great margin of norm interpretation disposed in the Brazilian legal order through the use of open clauses creates variation in the form of conflict solution in similar causes, which generates instability in the jurisdictional system.

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This reality is aggravated by the judges' discretion, who, as a rule, do not feel part of the system, meaning that the judicial unit is viewed only as a Judiciary Branch, and not as a uniformity of jurisdictional action. Usually, each judge finds him or herself autonomous and sentences the case according to his personal interpretation of the law, without having to abide by the understanding of his superior court or his own court.

In addition to the decisions handed down in concentrated constitutional control, until the advent of the Brazilian Civil Procedure Code of 2015 (from now on referred to as simply 2015 Brazilian CPC), there were no concrete forms of seeking uniformity in the interpretation of the law in judicial decisions, which ultimately led to the disrespecting of principles of isonomy, predictability and legal certainty.

This systemic crisis in Brazilian Judiciary was thought to have been settled through the implementation of the judicial binding precedents contained in the 2015 Brazilian CPC, in order to create parameters for solving cases, and, by doing so, partly reducing the margin of law interpretation.

However, the mere legal provision of decisions being able to generate binding legal precedents will not have the power to guarantee stability in Brazilian courts' understandings if there is no change in the deliberative procedure for obtaining decisions that effectively result in the Court's view. Without this, with each new decision, a new precedent may be generated, based on different grounds, on the same matter of law, even though the decision formally typifies one of the subsections of article 927 of the 2015 Brazilian CPC.

Thus, Brazil will continue to coexist with jurisprudential instability, which is already so prevalent in this judicial system, and a mere legal prediction, with little or no efficacy, of binding judicial precedents.

To contribute to the effective implementation of the binding judicial precedents system in Brazil, the legal provision of this institute will be approached in this paper though the lens of I) 2015 Brazilian CPC, II) the deliberative reality of the Brazilian Supreme Court and, finally, III) the deliberative experiences of other constitutional courts seeking full judicial precedents.

THE BINDING PRECEDENTS OF THE BRAZILIAN CIVIL PROCEDURE CODE OF 2015 AND THE DELIBERATIVE REALITY OF THE BRAZILIAN SUPREME COURT

The 2015 Brazilian CPC imposes, via article 927, a system of precedents to be adopted by the entire national judicial system. This article establishes precisely what will be considered a binding precedent, such as: the decisions rendered by the Brazilian Supreme Court that generate binding precedents and those

pronounced in concentrated control of constitutionality; the decisions rendered by the Brazilian Supreme Court and by the Brazilian Superior Court of Justice, generating non-binding precedents; and the decisions rendered in extraordinary and special repetitive appeals, decisions handed down by any court in an incident of assumption of jurisdiction or resolution of repetitive claims, as well as the guidance of the plenary or special body of any Brazilian Court.

As Brazil has no tradition in creating precedents, the Brazilian courts are careful to only judge the appeals that are directed to them, rendering a decision that denies or grants that specific appeal, being concerned only with the solution of the case, without any prospective view, therefore not aiming to create a precedent for the solution of future correlated cases. However, the correct thing to do would be that the time and resources spent in solving the individual conflict were also used for the gradual formation of a pattern of conduct[1].

Nevertheless, so that the courts' decisions are able to generate precedents, there is a necessity to adjust the collegial voting procedure to allow the institutional presentation of the resolution to result in a single text, by the exhaustion of the case's relevant arguments, in order to enable the subsequent identification of the judgment's *ratio decidendi*.

The current procedure for deciding appeals by the Brazilian courts, in which each Justice, in a sole proprietorship with his or her assessor and without full dialogue between them and with the lawyers, "express their vows based on their own premises and constructing grounding completely disparate, does not attend to this new moment that Brazil begins to experience"[2].

Instead of taking his written vote to the trial session[3], which only allows a vote of adhesion or rejection by his peers, the rapporteur should extend the discussion to all of the Court's members, so that there is a full debate of the grounds and future definition of the *ratio decidendi*. In fact, there is no rationality in deciding before deliberating, much less in "justifying in writing before deciding.

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1 SANTOS, Evaristo Aragão. Em torno do conceito e da formação do precedente judicial. *In*: WAMBIER, Teresa Arruda Alvim (coord.). *Direito jurisprudencial*. 2012. p. 189.

2 BAHIA, Alexandre Gustavo Melo Franco; NUNES, Dierle. Precedentes no CPC-2015: por uma compreensão constitucionalmente adequada do seu uso no Brasil. *In*: BARROS, Lucas Buril de Macedo; FREIRE, Alexandre; PEIXOTO, Ravi. *Coletânea novo CPC*: doutrina selecionada. 2015. p. 732.

3 "The fact that votes are decided beforehand and very often merely read in the public session gives some measure of disregard for the opinion of other members. It seems evident that there is no awareness of the value of the convergence of individual positions when one does not even make an effort to compose votes that reach the same point of conclusion, even if they follow different paths" (translated by the author). MENDES, Conrado Hübner. Desempenho deliberativo de cortes constitucionais e o STF. *In*: MACEDO, Ronaldo Porto; BARBIERI, Catarina (org.). *Direito e interpretação*: racionalidade e instituições. 2011.

It is very important to perceive the distinction between collegial decision and a gathering of individual decisions of the collegiate members"[4].

The need to design a new voting procedure aimed at establishing precedents applies even in cases of unanimous voting. It is common in the Brazilian Supreme Court, when discussing complex cases, that each Justice presents his written vote at the trial session, and, after the voting, even if the result is unanimous, each voter presents a reason for deciding, without any collegial deliberation, which prevents the creation of a precedent in this trial. This procedure results in a final decision composed of a collection of independent votes, containing the understanding of each Justice and not the common decision adopted for the case, demonstrating "the absence of argumentative linearity and the diversity of premises used by the Justices in the formation of their decisions"[5].

The same occurs in the simplest cases, in which the judge's vote is read and merely agreed upon by the other members of the collegiate, without deliberation on the subject. This kind of judgment creates an extremely weak precedent, and may lead to a different future decision in a correlated case, on another basis and with another direction, since there is no identification by the Court of the previous precedent, given the lack of institutional deliberation on the subject.

In addition to providing a set of precedents, the 2015 Brazilian CPC establishes, in its article 926, that "courts should standardize their jurisprudence and keep it stable, complete and consistent", with the intention of creating predictability in the judgments, according to the consolidated understanding of the courts.

Stable jurisprudence is one that is not altered by the judge's individual understanding, respecting the precedents defined by a higher court or by the court itself which is deciding a particular case[6].

However, stability alone does not achieve the objectives set by the precedents system established in the 2015 Brazilian CPC, since stable jurisprudence does not necessarily mean a jurisprudential understanding that has been consolidated in the light of constitutional guarantees, as it is "possible to decide repeatedly in a

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4 MARINONI, Luiz Guilherme. A função das Cortes Supremas e o novo CPC. *Revista Consultor Jurídico*. 2015. Disponível em: http://www.conjur.com.br/2015-mai-25/direito-civil-atual-funcao-cortes-supremas-cpc. Acesso em: 22/01/2016.

5 BAHIA, Alexandre Gustavo Melo Franco; NUNES, Dierle. Precedentes no CPC-2015: por uma compreensão constitucionalmente adequada do seu uso no Brasil. *In*: BARROS, Lucas Buril de Macedo; FREIRE, Alexandre; PEIXOTO, Ravi. *Coletânea novo CPC*: doutrina selecionada. 2015. p. 753, 754.

6 PANUTTO, Peter. *Precedentes judiciais vinculantes*: o sistema jurídico-processual brasileiro antes e depois do Código de Processo Civil de 2015 (Lei n. 13.105, de 16 de março de 2015). Empório do Direito, 2017. p. 144.

wrong, unjust sense, that violates the law, and yet affirm that the idea of stability is being fulfilled"[7].

Consistency guarantees the application of the same precepts and principles which have been applied previously, therefore ensuring respect for the principle of equality, in order to guarantee equal treatment of similar cases by the Judiciary. This way, arbitrariness and discretion by the judge should be prevented, since there is no democratic gain in possessing both Constitution and laws that establish rights if legal questions can be "solved in discretionary parameters that are not necessarily legal, because they are based on the will and subjectivity of the judge"[8].

Integrity, which "is the virtues of fairness, justice, and procedural due process"[9], becomes a political ideal when the State, taken "to be a moral agent", acts "on a single, coherent set of principles, even if its citizens are divided about what the right principles of justice and fairness really are".

The rendering of decisions endowed with integrity is a must for every judge, forcing them to decide the case having unity as a parameter of the law. "For this the principles must be reconstructed in the present, taking into account the past (in a reflexive way and not as a mere repetition) and also into the future, as an opening for the next generations"[10,11].

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7 BAHIA, Alexandre Gustavo Melo Franco; NUNES, Dierle. Precedentes no CPC-2015: por uma compreensão constitucionalmente adequada do seu uso no Brasil. *In*: Lucas BARROS, Buril de Macedo; FREIRE, Alexandre; PEIXOTO, Ravi. *Coletânea novo CPC*: doutrina selecionada. 2015. p. 323, 324.

8 ABBOUD, Georges. *Discricionariedade administrativa e judicial*: o ato administrativo e a decisão judicial. São Paulo: Revista dos Tribunais, 2014. p. 462.

9 DWORKIN, Ronald. *Law's empire*. São Paulo: Martins Fontes, 2014. p. 164, 166.

10 "In his specificity, Dworkin, by combining legal principles with political objectives, provides jurists/interpreters with a wealth of possibilities for constructing/elaborating responses consistent with positive law – which provides a shield against discretion (if one chooses), also known as "legal certainty" and with the great contemporary concern of law: the claim of legitimacy (...). Fundamentally – and in this sense no matter what the legal system under discussion –, it is a question of overcoming conventionalist and pragmatist theses by obliging judges to respect the integrity of the law and to apply it consistently. In a word, the correct answer (adequate to the Constitution and not to the conscience of the interpreter) has a degree of scope that avoids *ad hoc* decisions. The importance of decisions in constitutional jurisdiction is demonstrated here, especially for their role of providing the precedent for similar cases. There will be consistency if the same principles that have been applied in the decisions apply to the other identical cases; but, more than that, the integrity of the Law will be assured from the normative force of the Constitution" (translated by the author). STRECK, Lenio Luiz. *O que é isto*: decido conforme minha consciência? 5. ed. Porto Alegre: Livraria do Advogado, 2015. p. 116, 117.

11 BAHIA, Alexandre Gustavo Melo Franco; NUNES, Dierle; THEODORO JÚNIOR, Humberto. Breves considerações sobre a politização do Poder Judiciário e sobre o panorama de aplicação no direito brasileiro: análise da convergência entre o *civil law* e *common law* e dos problemas de padronização decisória. *Revista de Processo*. São Paulo: Revista dos Tribunais, 2010. p. 36.

The need to maintain a stable, complete and coherent jurisprudence demonstrates that there are not only institutional reasons for respecting precedents but also moral reasons, demanding the law is reinterpreted based on the conception of the political morality of society, establishing the court's necessity to create and maintain morally justifiable precedents[12].

In spite of the fact that the decisions made in concentrated control and the binding precedents already have a mandatory effect as a result of a Brazilian constitutional provision[13], the 2015 Brazilian CPC provided, in its article 926, an institutional gain for these decisions by establishing that binding judicial precedents (including concentrated control decisions and binding precedents) should be endowed with stability, coherence, and integrity, a fact that requires the Brazilian Supreme Court, by legal determination, to comply with these guidelines also when exercising this modality of constitutional control.

In this way, it is demonstrated that the full creation of precedents, through effective deliberation, endowed with stability, integrity and coherence, is not restricted to the political will of the courts, but rather derives from law, and the Brazilian Courts must conform to the provisions of the Civil Procedure Code to guarantee greater juridical security to the society, being sure that the example must be given by the Brazilian Supreme Court.

The judgment handed down by the Brazilian Supreme Court in the Action for Non-compliance with Basic Precept ADPF 132 (which dealt with the constitutionality of the homo-affective union) exemplifies this procedure, in which each Justice tried to demonstrate his understanding of the subject, without the court stipulating the *ratio decidendi* of the decision. The sentence is composed of the vote of the rapporteur – Justice Ayres Britto –, the vote of the Justice Carmen Lúcia, and the votes of the Justices Luiz Fux, Ricardo Lewandowski, Joaquim Barbosa, Gilmar Mendes, Marco Aurélio, Celso de Mello and Cezar Peluso[14], with all of them presenting different reasons for deciding, despite all having voted for the triumph of the request. The unity of the judgment is noted only in the syllabus, which is useless for future identification of the *ratio decidendi*, both because of its insufficiency of grounds, and because its text is not deliberated by the Court, being elaborated monocratically by the rapporteur Justice after the judgment and published together with the judgment[15].

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12 BUSTAMANTE, Thomas da Rosa de. *Teoria do precedente judicial*. São Paulo: Noeses, 2012. p. 251, 255.

13 Art. 102, § 2 and art. 103-A, *caput*, of the Brazilian Federal Constitution, both altered by Constitutional Amendment n. 45.

14 Justice Ellen Gracie was absent, and Justice Dias Toffoli was prevented from acting.

15 Disponível em: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628633. Acesso em: 30/01/2017.

The Action for Non-Compliance with Fundamental Precept ADPF 130, which dealt with the unconstitutionality of the Press Law, also had a trial characterized by the presentation of separate votes, with great difficulty in identifying the *ratio decidendi*, a fact that generated legal uncertainty due to the lack of clarity of the questions discussed in the law under review, even during the constancy of the trial[16]. Months later, in the judgment of the Complaint 9.428[17], the interpretation of the votes of ten out of the eleven Justices who had participated in the Action of Non-compliance with Basic Precept 130 voting was requested, in order to clarify the reason behind the decision rendered in this proceeding[18].

The 2017 institutional crisis between the Branches of the Brazilian Republic caused by the liminal removal of the Federal Senate's President, Mr. Renan Calheiros, through a monocratic decision[19] issued by the Brazilian Supreme Court Justice Marco Aurélio Melo as a precautionary measure in the proceedings of the Non-Compliance Action of Precept Fundamental ADPF 402, (which was proposed by the political party "*Rede Sustentabilidade*" to question the possibility of "defendants in criminal proceedings occupying positions that are in the line of substitution of the Republic's Presidency"), expressed the necessity of the political stabilization of the Brazilian Constitutional Court, so that it could demonstrate its strength as a collegial body and not as a collection of autonomous Justices.

It is essential, at this moment, that the Brazilian Supreme Court, serving as a role model for other Brazilian courts, acquires a position of dialogue among its members, so that the decisions handed down are based on the precedents of the court and not solely founded on the understanding of a certain Justice[20] in order to address

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16 Thales Morais da Costa makes a thorough analysis of the Action for Non-Compliance with Fundamental Precept (ADPF) 130 trial, as well as subsequent complaints lodged on the basis of this ADPF, presenting the debate between the Justices and expressing the serious divergence as to the *ratio decidendi*. COSTA, Thales Morais da. Conteúdo e alcance da decisão do STF sobre a Lei de Imprensa na ADPF 130. *Revista Direito GV*. p. 119, 154; 2014.

17 Complaint by the "O Estado de Sao Paulo" newspaper against a judicial decision that prohibited publication of journalistic material subject to a judicial proceeding under cover of judicial secrecy, on the grounds of violation of the authority of the decision rendered in ADPF 130. This complaint was not judged under the understanding that there was no breach of the authority of the decision given in ADPF 130. Disponível em: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=612474. Acesso em: 02/06/2017.

18 COSTA. Thales Morais da. Conteúdo e alcance da decisão do STF sobre a Lei de Imprensa na ADPF 130. *Revista Direito GV*. p. 139, 2014.

19 Disponível em: http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF402.pdf. Acesso em: 16/01/2017.

20 "In this case, their preferences end up prevailing over the preferences that result from the aggregation of decisions by Justices from around the collegiate court (note that if it was a monocratic decision informality is not required). These informal behaviors have an effect: each Justice can become a sort of institution for actors outside the court, insofar as their preferences prevail and must be taken into account by such actors" (translated by the author). ARGUELHES, Diego Werneck; RIBEIRO, Leandro Molhano. O Supremo individual: mecanismos de atuação

the arguments presented by the collegiate in a sincere and well-grounded manner[21]. In the scope of the Supreme Court there was some discomfort between the Justices due to the fact that such an impactful decision was granted monocratically. Aiming to circumvent the crisis, Justice Carmen Lúcia, who was then the president of the Brazilian Supreme Court, referred the injunction granted against Mr. Renan Calheiros to the plenary, which was rejected by a majority of votes[22].

This collegial voting procedure, based on the argument of authority[23], to the detriment of the debate that could generate a true collegial decision, violates the principle of legal certainty, since the reason for deciding is obtained by the judgment of the Justice and not by the understanding of the collegiate. By changing the Justice, the understanding is changed. "In the case of arguments of authority, the formation of decision-making standards is based on the subjective reasons for deciding"[24,25].

In spite of this, to effectively respect the system of precedents established by the 2015 Brazilian CPC, in terms of its article 927, in addition to deciding the case, they should define their *ratio decidendi*, in order to effectively respect the constitutional principles of legal certainty, isonomy and predictability.

The 2015 Brazilian CPC should have advanced in order to shape the voting procedure in collegiate to obtain a decision resulting from full deliberation by

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direta dos ministros sobre o processo político. *Direito, Estado e Sociedade*. p. 121, 155, 2015.

21 LAURENTIIS, Lucas Catib de; PANUTTO, Peter. A força do Supremo Tribunal Federal está na colegialidade plena. *Revista Consultor Jurídico*. Disponível em: http://www.conjur.com.br/2016-dez-10/forca-supremo-tribunal-federal-colegialidade-plena. Acesso em: 16/01/2017.

22 They voted for the repeal of the preliminary injunction, with Renan Calheiros in charge, Justices Celso de Mello, Dias Toffoli, Teori Zavascki, Luiz Fux, Ricardo Lewandowski and the Carmen Lúcia.

23 "The predominant individualism in the STF (Brazilian Supreme Court), however, does not have much to do with winning the debate. Winning or losing, in the Court's environment, matters less than publicly marking individual opinion, especially in cases of greater public prominence. The STF cultivates and rewards the issuance of 'strong opinions', which resist, on principle, the counter-argument to avoid any sign of moral and intellectual weakness" (translated by the author). MENDES, Conrado Hübner. O projeto de uma Corte deliberativa. *In*: VOJVODIC, Adriana; PINTO, Henrique Motta; GORZONI, Paula; SOUZA, Rodrigo Pagani de (org.). *Jurisdição constitucional no Brasil*. São Paulo: Malheiros, 2012. p. 72, 73.

24 Virgílio Afonso da Silva points out important elements for effective collegial deliberation: "Collegiality implies, among other things, (i) the disposition to work as a team; (ii) the absence of hierarchy among the judges (at least in the sense that the arguments of any and all judges have the same value); (iii) the willingness to listen to advanced arguments by other judges (i.e. being open to being convinced by good arguments of other judges); (iv) cooperativeness in the decision-making process; (v) mutual respect among judges; (vi) the disposition to speak, whenever possible, not as a sum of individuals but as an institution (consensus seeking deliberation)". SILVA, Virgílio Afonso da. Deciding without deliberation. *International Journal of Constitutional Law*. p. 557, 584; 2013.

25 RODRIGUEZ, José Rodrigo. *Como decidem as Cortes?* Para uma crítica do direito (brasileiro). Rio de Janeiro: FGV, 2013. p. 70, 80.

the courts, establishing, therefore, criteria for definition of the *ratio decidendi* and effective creation of precedents, but, unfortunately, this did not happen.

THE SEARCH FOR LEGAL CERTAINTY IN CREATING AND RESPECTING PRECEDENTS

The 2015 Brazilian CPC seeks the legal certainty based on the grounds of the decision to depersonalize the decision-making process, making the judges themselves less important. To overcome the given structure, "it will be necessary to argue in a rational way to convince the other judges of the court of their wrongness to the case"[26].

What the 2015 Brazilian CPC seeks, apart from the creation of binding judicial precedents, is the guarantee of equality and predictability, so that future cases can be judged based on precedents with the same legal matter, thus guaranteeing greater security to the legal relations and isonomy in the solutions of conflict, with respect to the motto "*treat like cases alike*".

It is no longer possible to conceive full autonomy in the interpretation provided by the judge when rendering the decision, disregarding the precedents of his own court and superior bodies. The judge must "maintain consistency and watch over the respectability and credibility of the Judiciary. Moreover, it should not transform its own decision, in the eyes of the court, into a 'nothingness'"[27], forcing the defeated party to bring an appeal to establish an understanding of the already defined legal matter in precedent[28].

A different solution to correlated cases, besides generating legal uncertainty, disrespects the principle of equality, since, as standards must be applied in a uniform and impersonal way, citizens who are in an equivalent situation must receive equal treatment[29].

In order for them to comply with this legal determination, which will make it possible for the court to generate precedents, and also for the lower courts, the public administration, lawyers, public defenders, public prosecutors and society in general to respect it, Brazilians courts must internalize the necessity for full deliberation and review the procedure for collegial voting to create precedents.

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26 *Op. cit*., p. 107, 111.

27 MARINONI, Luiz Guilherme. Aproximação crítica entre as jurisdições de *civil law* e *common law* e a necessidade de respeito aos precedentes no Brasil. *Revista de Processo*. p. 207, 2009.

28 PANUTTO, Peter. *Precedentes judiciais vinculantes*: o sistema jurídico-processual brasileiro antes e depois do Código de Processo Civil de 2015 (Lei n. 13.105, de 16 de março de 2015. Florianópolis: Empório do Direito, 2017. p. 65.

29 ÁVILA, Humberto. *Segurança jurídica*: entre permanência, mudança e realização no direito tributário. São Paulo: Malheiros, 2012. p. 229, 230.

Therefore, the Brazilian Judiciary should confine itself to its institutional function of guiding its decisions for the settlement of future cases, in order to facilitate the resolution of conflicts that are the subject of legal proceedings through the application of binding judicial precedents, since the "Judiciary, besides judging actual concrete cases, can serve as a guide for future cases"[30], as well as preventing the emergence of new judicial processes, since society will know in advance the courts' precedents, which will enable the prior definition of forms of conduct and the consequent prevention and out-of-court settlement of conflicts of interest[31].

THE DELIBERATIVE EXPERIENCE OF OTHER CONSTITUTIONAL COURTS IN SEVERAL TYPES OF COLLEGIATE DECISION

The problems previously pointed out in the form of board deliberation are not unique to Brazil. Even the countries with the longest traditions in creating precedents are constantly preoccupied with adjusting the deliberative procedure of their Constitutional Courts to ensure that the response given is indeed deliberate.

It can be said that there are three types of collegiate decision: *seriatim*, *per curiam* and majoritarian practice, which, with minor variations, are used in traditional Constitutional Courts.

Seriatim decision

The *seriatim* decision is characterized by the presentation in series of the votes of the members of a collegiate, the decision being the sum of these votes, without interaction between them, privileging the exposure of the opinion of each judge, to the detriment of the institutional understanding on the subject. The judgment is a "patchwork"[32], without concern for the collegial construction of the decision, with the presentation of the individual vote by each judge in the intention that their understanding prevails over the other members of the collegiate.

The unit of the decision is often guaranteed only by the conclusion, and there may be different grounds in each presented vote. Adding up the votes that are in favor and those against, you arrive at the result of the decision, without considering the diversity of arguments presented.

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30 TUCCI, José Rogério Cruz e. *Precedente judicial como fonte do direito*. São Paulo: Revista dos Tribunais, 2004. p. 12, 25.

31 PANUTTO, Peter. *Precedentes judiciais vinculantes*: o sistema jurídico-processual brasileiro antes e depois do Código de Processo Civil de 2015 (Lei n. 13.105, de 16 de março de 2015. Florianópolis: Empório do Direito, 2017. p. 73.

32 "A non-deliberative *seriatim*, in this perspective, resembles a patchwork of pieces – individual decisions glued side by side, which do not talk to each other". MENDES, Conrado Hübner. O projeto de uma corte deliberativa. *In*: VOJVODIC, Adriana; PINTO, Henrique Motta; GORZONI, Paula; SOUZA, Rodrigo Pagani de (org.). *Jurisdição constitucional no Brasil*. São Paulo: Malheiros, 2012. p. 67.

Throughout the second chapter of this paper, it was demonstrated that deliberative practice in the Brazilian Supreme Court, especially in complex cases, is *seriatim*, resulting in a judgment composed of the votes of the rapporteur Justice and the other Justices, who feel compelled, whether by tradition, or by the televising of the trial sessions, to present their own "decision" to the case, disregarding the votes of the other Justices. It follows that, even if the votes have the same provision, the decision doesn't carry a deliberative identity of the Court, which prevents the creation of a precedent of this decision, since there is no *ratio decidendi* as a result of collegial deliberation.

The experience in the Brazilian Supreme Court suggests that during trials of complex cases, each Justice is concerned about expressing his opinion to the other Justices and, above all, to the external community. In these cases, it is rare to have an interaction between the Justices to avoid the vote of one influencing the others. In fact, this becomes extremely difficult due to the fact that votes are already written even before the trial session, reducing the collegiate session to a mere reading of the individual understandings.

The legal determination of creation and respect for binding legal precedents, in the hypotheses of article 927 of the 2015 Brazilian CPC, is incumbent upon all courts, but it is undeniably the main responsibility of the Brazilian Supreme Court to incorporate this new legal-procedural system, so that it demonstrates internally, at trial sessions, and for the legal community and society in general, that it recognizes its role in full collegial deliberation so that decisions result in institutional understanding[33].

The traditional English House of Lords also adopts the *seriatim* decision, a characteristic that the specialized doctrine criticizes[34], for the same reason of difficulty in future application of the precedent.

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[33] "If higher courts want to take on a new role – and they seem to need it urgently – they must also take on their share of responsibility, changing the way they decide the cases before them. The votes that make up a collegiate judgment cannot have dispersed grounds, and it is not enough that the provision is unison because the *ratio decidendi* of a precedent is not in the syllabus of the decision, which is only binding related to the specific case. If the court is not concerned with the *ratio decidendi*, it cannot expect that the precedent will be respected in the future, because it has contributed to or created this difficult situation of the interpretation of the precedent" (translated by the author). NOGUEIRA, Gustavo Santana. *Precedentes vinculantes no direito comparado e brasileiro*. Salvador: Juspodivm, 2013. p. 240, 241.

[34] "When each judge pursues an individual decision-making protocol, individual protocol, each express the reasons for his disposition that he would give if he were sitting alone. Under this practice, however, the reasons of the *court* remain unclear. The obscurity derives from the multiplicity of rules (and reasons for rules) that the panel of judges may announce. Though the choice of disposition is dichotomous, the choice among rules is not. In general, one can support a given disposition with many different rules" KORNHAUSER, Lewis A. Deciding together. *Revista de Estudos Institucionais*. p. 51, 2015. Disponível em: https://www.estudosinstitucionais.com/REI/article/view/10.

The great distinction between the English *stare decisis* and the system of precedents implemented by the 2015 Brazilian CPC is that in England, decisions are not born as precedents, being pronounced and in the future are able to be invoked as such. In Brazil, on the other hand, if the decision rendered typifies one of the hypotheses of article 927 of the 2015 Brazilian CPC, it is already born as a precedent. This way, the adoption of the *seriatim* decision in England makes the future application of the decision as a precedent more difficult, due to the difficulty in identifying its *ratio decidendi*; in Brazil, this model of decision generates difficulty both in the creation (since the decision is already born as precedent by legal provision), and in its future application.

The definition of the *ratio decidendi* in common law countries does not always occur at the time of the decision of the specific case. To the extent that the judgment of a previous case is applied to solve similar future cases, the judge identifies the *ratio decidendi* and applies the previous understanding as precedent. Therefore, the creation of the precedent, in these cases, arises not from the original decision, but from the judge who applies the previous decision to solve the analogous future case[35].

For this reason, in order to better apply the precedent in the future, the existence of a single basis in the decisions has been defended in the English system, as a way to better identify the reason for deciding[36].

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[35] "La determinación de lo que vale por fundamento (*rationale*) de la decisión del tribunal, uma tarea que han de llevar a cabo los jueces vinculados por el *holding* de la decisión, és ocasionalmente uma pesquisa complicada, para la que, de modo nada sorprendente, sirve como pauta de orientación la regla de identificar como *ratio* de la decisión el mínimo común compartido por los argumentos individuales. Por esta razón, algunos autores distinguen entre la *ratio decidendi* del juez, digamos, el principio de derecho conforme al cual dispuso el caso y que pretendió fijar como precedente, y la efectiva "regla de caso", la que jueces posteriores deducen como precedente vinculante a partir de su interpretación del caso. Si aun esse "mínimo común" parece ausente, el precedente que la decisión fija quedará reducito a la conexión entre los hechos relevantes del litigio (*material facts*) y el resultado final". RUIZ, Maria Angeles Ahumada. La regla de la mayoría y la formulación de doctrina constitucional: rationes decidendi en la STC 136/1999. *Revista Española de Derecho Constitucional*. ano 20, n. 58, p. 157, 2000.

[36] "Uno de los câmbios que consideramos sería benéfico para el Derecho inglés sería que se incrementara el número de asuntos em los cuales el tribunal competente para resolver las apelaciones está obligado a que su sentencia este integrada no por múltiples votos razonados, sino por una sola ponencia. (...)" [Consideramos que es una importante ventaja para quienes están encargados de administrar justicia en el área del Derecho penal, así como para aquellos jueces que están obligados a seguir las decisiones del Tribunal de Apelaciones Criminales, es que tal tribunal debe exponer su decisión en una única ponencia en la que presente el Derecho relevante, con lo cual es innecesario entrar a examinar múltiples votos cuál fue el fundamento de la decisión que es común a todos ellos]. "Sin lugar a dudas hay quienes consideran que ello es igualmente cierto en relación con la administración de la justicia en matéria civil". CROSS, Rupert; HARRIS, J. W. *El precedente en el derecho inglés*. Tradução de Maria Angélia Pulido. Barcelona: Marcial Pons, 2012. p. 120.

By virtue of English tradition, the US Supreme Court also adopted the *seriatim* decision in a model similar to that currently adopted by the Brazilian Supreme Court in complex cases. In this model, which ran from 1793 to 1800, the US Supreme Court announced its decisions through the *seriatim* opinions, so that "each Justice pronounced its individual vote and the set of all the opinions set forth 'in series' was thus presented to the public"[37].

Per curiam decision

The *per curiam* decision is characterized by the institutional presentation of the deliberation results. The decision is not peculiar to each judge, in a unanimous vote or by majority of votes, but of the collegiate. It is the Court that, deciding together, announces the result of the vote, disempowering the figure of the judges and strengthening the figure of the institution. "In this way, the impression is given that the Court has its own voice, which does not necessarily identify itself with that of the members who compose it"[38].

For the decision *per curiam* to be possible, the Court must reach a consensus initially on the grounds and later on the conclusion. There is no need for unanimity, and the decision may be proclaimed by a majority. The grounds are presented initially by a Judge-Rapporteur, for further discussion aiming for a consensus. This system is adopted by the French Court of Cassation[39].

This model of decision demonstrates a challenge for the complex cases, because of the difficulty in reaching a consensus before a variety of fundamentals and conclusions, with understandings very distant from each other. In these cases, the deliberation can be prolonged, without great prospects, mainly because this model of decision does not contemplate the divergent votes[40].

Therefore, the *per curiam* decision demonstrates antagonism in face of the *seriatim* decision. If the latter has not been useful for the institutional strengthening of the Brazilian Supreme Court, the unrestricted adoption of the first one in the Brazilian system would be tragic, since, by the tradition of the

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37 VALE, André Rufino do. *É* preciso repensar a deliberação no Supremo Tribunal Federal. *Revista Consultor Jurídico*. 2014. Disponível em: http://www.conjur.com.br/2014-fev-01/observatorio-constitucional-preciso-repensar-deliberacao-stf. Acesso em: 28/01/2017.

38 RUIZ, Maria Angeles Ahumada. La regla de la mayoría y la formulación de doctrina constitucional: rationes decidendi en la STC 136/1999. *Revista Española de Derecho Constitucional*. ano 20, n. 58, p. 156, 2000.

39 KORNHAUSER, Lewis A. Deciding together. *Revista de Estudos Institucionais*. 2015. Disponível em: https://www.estudosinstitucionais.com/REI/article/view/10. Acesso em: 28/01/2017.

40 RUIZ, Maria Angeles Ahumada. La regla de la mayoría y la formulación de doctrina constitucional: rationes decidendi en la STC 136/1999. *Revista Española de Derecho Constitucional*. ano 20, n. 58, 2000.

Brazilian Supreme Court of presentation of individual votes by the Justices, it would be unlikely that an institutional understanding would fail to record divergent votes, because "only a naive vision and, if it allows the expression of the judicial decision, allows to conform to the rule of the absolute prohibition of the expression of dissent in collegiate judicial organs"[41].

Even if the collegiate voting procedure in the Brazilian Supreme Court is improved to guarantee more deliberation, with a view to consensus among the Justices, it would be inconceivable to disregard the dissenting vote. Improving the deliberative procedure[42] in the Brazilian Supreme Court would allow the elimination of purely concurrent votes, which agree with the conclusion pointed out by the rapporteur, but disagree partially or totally with the grounds presented. The divergent vote, even if defeated, would be important to retain in the Brazilian Judiciary system since it improves the democratic process, guarantees the wealth of ideas, and can wave future change of precedent. In any case, a decision that, even with a defeated vote, results in an institutional understanding, making the Brazilian Supreme Court "an institution that has a voice of its own, rather than the sum of 11 dissociated voices"[43].

Majoritarian practice

Seeking the middle ground between the *seriatim* and *per curiam* decisions, the decision resulting from the "majoritarian practice", adopted by the US Supreme Court, initially follows the rite of the *seriatim* decision, with the collection of the individual votes of the judges. After reaching a majority, the Court continues to deliberate in order to define the *ratio decidendi* which contains the institutional understanding of the grounds and the syllabus of the decision. The composing of the Court's understanding rests with the oldest Justice among those who have stayed in the majority[44].

This model of decision differs from the *per curiam* decision because minority understandings are considered, as separate votes are added to the decision

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41 *Op. cit*., p. 169.

42 "Besides the lack of prior discussion, the Justices also recognize that the wording of the vote just prior to the debate not only harms the resolution but it is also responsible for the high number of split votes (and competitors)" (translated by the author). SILVA, Virgilio Afonso da. De quem divergem os divergentes: os votos vencidos no Supremo Tribunal Federal. *Direito, Estado e Sociedade*. n. 47, p. 205; 255, 2015.

43 SILVA, Virgílio Afonso da. O STF e o controle de constitucionalidade: deliberação, diálogo e razão pública. *Revista de Direito Administrativo*. Rio de Janeiro, v. 250, p. 197; 227, 2012. Disponível em: http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/4144. Acesso em: 27/07/2017.

44 KORNHAUSER, Lewis A. Deciding together. *Revista de Estudos Institucionais*. 2015. Disponível em: https://www.estudosinstitucionais.com/REI/article/view/10. Acesso em: 28/01/2017.

resulting from the Court's opinion[45]. "As a starting point, the court aspires to the agreement and, as far as possible, unanimity, but no rule [...] limits the judge's right to express his opinion separately"[46].

The US Supreme Court, which, as stated earlier, originally adopted the *seriatim* decision by British influence, began to adopt, "since 1801" the majoritarian practice, a fact that was shown to be "crucial for the Supreme Court's assertion as an institutional unit in the face of other Branches"[47].

This model seems appropriate for the Brazilian Supreme Court and other courts throughout Brazil, since it preserves in a certain way the tradition of presenting individual votes in series, but seeks at the end the institutional understanding of the topic discussed. In addition, it also contemplates the Brazilian tradition of respecting the defeated vows, adding them separately to the decision that contains the opinion of the Court on the subject. Thus, the majoritarian practice proves to be the one that most respects the Brazilian tradition of collegial voting and, if adopted by Brazilian Courts, will comply with the provisions of the 2015 Brazilian CPC regarding the creation and respect of precedents, in order to guide the solution of similar future conflicts, with a decision that contemplates not only the institutional understanding on the subject, but also the dissenting votes, as a form of oxygenation of the precedent.

There would be a need for other procedural changes, such as the previous presentation of the Rapporteur's vote, in order to make it possible for the other members of the collegiate to know about the matter and to make deliberation feasible, since "it does not seem to make sense for Justices to arrive at a decision without knowing the opinion of the one who most intensely dealt with the case to be decided"[48]. In addition, it is up to the Rapporteur[49] to define the matter of

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45 *Op. cit*.

46 RUIZ, Maria Angeles Ahumada. La regla de la mayoría y la formulación de doctrina constitucional: rationes decidendi en la STC 136/1999. *Revista Española de Derecho Constitucional*. ano 20, n. 58, p. 159, 2000.

47 VALE, André Rufino do. *É* preciso repensar a deliberação no Supremo Tribunal Federal. *Revista Consultor Jurídico*. 2014. Disponível em: http://www.conjur.com.br/2014-fev-01/observatorio-constitucional-preciso-repensar-deliberacao-stf. Acesso em: 28/01/2017.

48 SILVA, Virgílio Afonso da. Um voto qualquer? O papel do ministro relator na deliberação no Supremo Tribunal Federal. *Revista de Estudos Institucionais*. 2015.

49 "It was found that in 242 judgments, the demonstrations without statements of vote and the vote of the rapporteur would be enough to form the majority. On the contrary, this has not occurred in 25 judgments. This means that 9 out of every 10 judgments in the sample surveyed were based on the reasons given by the Justice-rapporteur. It was therefore found that the rapporteur has, for the most part, the important task of establishing the decision and its respective grounds. By doing so, he has a significant influence on the judgment. His guiding vote becomes the Court's understanding, as it was observed" (translated by the author). SUNDFELD, Carlos Ari; SOUZA, Rodrigo Pagani de. Accountability e jurisprudência do STF: estudo empírico de variáveis institucionais e estrutura das decisões. *In*: VOJVODIC, Adriana;

law in his vote, which, in most cases, will be followed by the collegiate, reinforcing the need for procedural revision in cases where there is a follow-up of the rapporteur's vote, without a presentation of votes by the other Justices, in order to institutionally legitimize this precedent.

Certainly, these procedural changes will require a great deal of internal discussion within the Brazilian Supreme Court, with the respective adequacy of its internal regulations, which should rely on previous guidelines established by the Brazilian National Council of Justice, to address the issue not only in the Brazilian Supreme Court, but also in all other Brazilian courts.

CONCLUSION

The implementation of binding legal precedents in Brazil will require the awareness of the members of the Brazilian courts of their importance in the judicial system, as well as their individual importance as a judge, since precedents arise from the deliberate understanding of the Court and not from the individual understanding of each judge.

The example of what needs adjustments and the laboratory for the correction of vicissitudes is the Brazilian Supreme Court. It is clear in this court that, as a rule, each Justice views himself to be as important as the court itself. There is no fully deliberate understanding. There are relevant injunctions granted monocratically, often without weight or even being contrary to precedents of the court. In collegiate decisions, in the simplest cases, there is a mere follow-up of the rapporteur's vote, without deliberation; change the rapporteur, change the understanding of the precedent. In more complex cases, each Justice prevails his own understanding of the subject, resulting in a trial composed of votes with a wide variety of reasons, and there is often unity only in the syllabus.

The question that arises is: how to foster a culture of precedents, now legally set forth in the Brazilian Code of Civil Procedure, if the highest Brazilian Court does not recognize the importance of collegial deliberation?

This situation implies the need for immediate awareness of the Brazilian Supreme Court to act effectively as a collegiate body, because the strength of this court is placed in its collegiality and not in its individual Justices. Each injunction granted in cases of national relevance, each interview granted by Justices dealing with issues on the agenda, each judgment composed of a collection of disparate votes, leads to institutional weakness of this court.

PINTO, Henrique Motta; GORZONI, Paula; SOUZA, Rodrigo Pagani de (org.). *Jurisdição constitucional no Brasil*. 2012.

The role of the Brazilian Supreme Court is essential in creating and respecting its own precedents, since it acts as a guide to the other Brazilian courts and to the judges in general.

However, this awareness may not be born naturally, as it leads to the loss of individual power of each Justice. It is necessary then that the Brazilian National Council of Justice establishes parameters for the collegial deliberation in pursuit of the full creation of precedents. These parameters should be based on the majoritarian practice, closer to the Brazilian reality of respect for votes in series and divergent votes, but with a judgment resulting from an institutional understanding.

This discussion will result in the full effectiveness of the system of binding judicial precedents established by the Brazilian Code of Civil Procedure of 2015.

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