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# Bringing Uniformity to Brazilian Court Decisions: Looking at the American Precedent and at Italian Living Law

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## INTRODUCTION

This article proposes to tackle the question of the uniformity of court decisions in Brazil and in Italy.[1] Part I of the analysis is dedicated to the institution of the *Súmula vinculante* in the Brazilian system. *Súmula vinculante* was born as an instrument to bring uniformity to the decisions of the courts. It has been described as "a collection of rules of law that have become firmly settled by decisions of the Supreme Federal Tribunal. Its provisions are summarily cited to dispose of those issues in future litigation."[2] It can only be overruled or modified by two thirds of the members of the full tribunal. *Súmula vinculante* is like a general and abstract precedent with binding effect in a civil law system.

Part II discusses the rule of living law in the Italian system, the instrument through which the lower courts follow the settled interpretations established by the higher courts. On this subject, it was thought desirable to devote more space to the use that judges can make of

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[1] *See* Lenio Luiz Streck, Súmula no Direito Brasileiro, Efficácia, Poder e Função (Livraria do Advogado, 1998); Antonio Castanheira Neves, O Instituto dos assentos e a função jurídica dos Supremos Tribunais (Coimbra, 1983); Eva da Cruz Feliciano, *O instituto da uniformização da jurisprudência*, Rev. dos Tr. (1979); Jesus Costa Lima, *Uniformização da jurisprudência*, in Enciclopédia Saraiva do Direito (Saraiva, 1977); Cláudio Vianna Lima, *Uniformização da jurisprudência*, Rev. For. (1977); Sydney Sanches, *Uniformização da jurisprudência*, Rev. dos Tr. (1975).

[2] *See* Keith S. Rosenn, *Brazil's Legal culture: the Jeito revisited*, 1 *Fla.Int'l. L.J.* 34 (1984).

it and to the normative consequences and social impact which can derive from it. At the end of the analysis of the institutions comes the role of the U.S. system – by recourse to precedent and to so-called judicial minimalism – which both Brazil and Italy regard once more, as *tertium comparationis*. In fact, the rule of precedent can be an element capable of impeding established expectations and also of threatening the security of expectations: depending on its use and the context in which it is justified.

Part III identifies the biggest problem created by the SV. This is that it develops a paradoxical system entrenched behind the binding effect. In particular, this essay undertakes to highlight the contradictions, the cracks which, within a juridical-social system, appear following the adoption of instruments of doubtful constitutionality and of questionable democratic nature. The problem of the resolution of controversies is therefore presented in such a way that attention is centred on the normative expectations and their connexion with cognitive expectation (or with the legitimate demand of citizens to see their fundamental rights made concrete).

Finally, the article concludes by considering some proposals to solve the short-circuit of the *súmula*. In fact, the debate still on-going in the South American context involves the fundamental rights of the citizen and the identity of the Country (Romano-Germanic in origin).

## I. THE INSTITUTION OF THE SÚMULA VINCULANTE

The term *Súmula* (from the Latin *summula*: little summation) means the collection of "a collection of rules of law that have become firmly settled by decisions of the Supreme Federal Tribunal".[3] It works as a "precedent" with binding effect in which there are some elements of judicial trends in similar cases.

The *Súmula* was included for the first time in the Brazilian legal system in 1973 by Article 479 of the civil procedure code. Already in 1946, however, the Institute of Brazilian Lawyers had advanced a proposal. To give uniformity to the decisions of the courts, in the case of different interpretations of federal law by two courts or by a court and the Supreme Federal Court (which is competent on constitutional matters), the latter would give the "correct" judgment, to which the other judges would have to concur.[4] This proposal, however, was not accepted. When in 1973 the procedural civil code came into force, Article 479 did not establish the binding effect of the *Súmula* (made official in 2004 with Amendment no. 45). It

[3] *See* Keith S. Rosenn *Brazil's Legal culture: the Jeito revisited*, *supra* note 2, at 34.
[4] *See* C.A. Motta De Souza, O papel Constitucional do STF 85 (Brasilia Juridica, 2000); Lenio Luiz Streck, Súmulas no Direito Brasileiro, Eficácia, Poder e Função, *supra* note 1, at 110.

said that decisions made "by an absolute majority of members of the Court, would be subject to *Súmula* or would constitute a precedent for the uniformity of the line of cases."[5]

Not all the decisions of the courts are subject to become *Súmulas,* but only those which do so by virtue of their repetition, connexion or coherence with other decisions. What is more, not all *Súmulas* will have binding effect, but only those which have the support of a quorum of two thirds of the members of the STF( Supreme Federal Tribunal). Furthermore, it has to regard constitutional matter on which multiple decisions have been made, subject to controversy that could cause a serious juridical ambiguity and a consequent multiplication of court cases.[6]

Constitutional Amendment no. 45 of 31 December 2004 modified Article 103-A B.C.[7] of the Brazilian Federal Constitution (C.R.F.B.) of 1988 with the institution of the *Súmula* with binding effect (*Súmula vinculante*).

According to the new Article 103-A, the Supreme Federal Court (*Supremo Tribunal Federal*) through a decision taken by two thirds of its members, after repeated decisions on similar questions on matters of constitutional relevance, can approve the *Súmula.* After official publication, it will have binding effect in relation to the other organs of Judiciary Power and to the direct and indirect public administration, in the federal, governmental (state) and municipal sphere. It will be able to proceed to its review or overruling in the form established by law.

According to Section I of the same article, the *Súmula* will have as its object the validity, the interpretation and the effectiveness of specific laws for which there is at present a controversy. It has to be among the Judicial powers or between the judicial powers and the public administration which could lead to a serious juridical ambiguity and a consequential rise in the number of judgements on identical questions.

Section II grants, to those empowered to promote an *Açao Direta de Inconstitucionalidade* (Direct Action of Unconstitutionality), the additional power to review, to overrule or to approve the *Súmula*, without prejudice of that which has been decided by law.

Finally, Section III 3 says that administrative acts or judicial decisions which conflict with the *Súmula,* are likely to be disputed at the Supreme Federal Tribunal. The decision on the case will quash the administrative act or overrule the disputed judicial decision. It will establish that another decision is given with or without the application of the *Súmula*, according to the specific case.

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[5] *See* Article 479 CPC (1973).
[6] *See* Br. Const. (1988) Article 103-A as modified by Const. Amend. no. 45 (2004).
[7] *See* Br. Const. (1988) Article 103-A as modified by Const Amend. no. 45 (2004).

## II. ARTICLE 103-A OF THE BRAZILIAN CONSTITUTION

According to Section I, the need to intervene by means of a *Súmula* occurs where there is doubt as to the conformity to the Constitution of a law, such as when the Supreme Court is required to make a judgement following the consideration of different judges' decisions. Then, among the things which could require the use of a *Súmula* are persisting doubts about the interpretation of a legal text (or some part of it) which can give rise to the attribution, by different courts, of a variety of "meanings." It is possible to think in these cases of an "interpretation conforming to the Constitution"[8] (*Verfassungskonforme Auslegung*) as a new decision with a new interpretation. Such an interpretation would be dismissing a previous decision judged unconstitutional by the judge *a quo* and deemed constitutional by a judge of constitutionality. This latter will follow an attribution of meaning in conformity with the Constitution.

Another hypothesis could be that of "partial invalidity without reduction of the text"[9] (*Teilnichtigerklärung ohne Normtextreduzierung*). In such cases, while the judgement on the validity of the law regards constitutionality, that on interpretation (which presupposes that of its validity) regards the affirmation of constitutionality (because the *Súmula* in order to be binding must have constitutional content). The *Súmula*, finally, will have the purpose of deciding on the effectiveness of the law and this involves an examination by the Supreme Court. This is not exclusively limited to the force of the law, but involves – because effectiveness presupposes the need for the validity of the legal text – the social context where the effects of the said legal text will be produced.

Among the necessary conditions for the *Súmula* to have a binding effect is the risk of a rise in the number of judgements on identical questions, the risk of a serious juridical uncertainty. This element does not apply to *Súmula*s before Amendment no. 45/2004. In fact, such *Súmula*s do not compromise procedural celerity because the binding effect is an expedient used for present controversies. The necessary conditions for enacting *Súmula*s with binding effect will not have an efficacy *ex tunc*. The *Súmula*s before the Amendment therefore do not have binding effect.[10]

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[8] *See* Lenio Luiz Streck, *O efeito vinculante e a busca da efetividade da prestação jurisdicional. Da revisão constitucional de 1993 à reforma do Judiciário (EC 45/04)*, in Comentario à reforma do Poder Judiciário, 165 (Ed. Forense, 2005).

[9] *See* Lenio Luiz Streck, *O efeito vinculante e a busca da efetividade da prestação jurisdicional. Da revisão constitucional de 1993 à reforma do Judiciário (EC 45/04)*, in Comentario à reforma do Poder Judiciário, *supra* note 8, at 166.

[10] Article 38, L. no. 8038 and Article 557 of the procedural civil code says the opposite, in fact there have been a lot of questions of unconstitutionality and now of compatibility to Amendment 45/04; *See* Lenio Luiz Streck, Jurisdição constitucional e hermenêutica, 506 (Ed. Forense, 2004).

According to §2, the power to promote a Direct Action of Unconstitutionality and the power to make a decision about the review, overruling or approval of the *Súmula* without prejudice of what has been decided by law, are all possible according to the "thematic pertinence thesis".[11] In fact, being decisions of the courts confirmed by the STF, it has to have a direct relationship with the institutional objectives of the power which started the above-mentioned action.

There would therefore be no sense in institutions that do not have the power to promote the Direct Action of Constitutionality in order to have a "supervision of the decisions of the courts" on the Supreme Federal Court (STF). In this way, with the "thematic pertinence" criterion it is possible to avoid a political use of such an action and the law decides the effects of the quashing or the review of the *Súmula*. The Direct Action of Unconstitutionality can be general (Article 103 B.C.) and so be able to establish in abstract the unconstitutionality of a law or of a normative governmental or federal act (Article 102, I, a B.C.); or it can be *interventiva* both federal (from the Attorney General or the STF) and state (from the Attorney General of Justice).[12] In the first case there is a direct and "concentrated" (centralised) control, delegated to the member states and with *erga omnes* and *ex tunc* effect. In the second case, there is not a declaratory judgement of unconstitutionality, but the resolution of a controversy between the Union and the single State where the decision by the STF may or may not be a "prosecutable action," with the effect (if it is necessary) of federal intervention in the State in question.

§3 lays down, finally, that an administrative act or a judicial decision which clashes with the *Súmula*, will be liable to appeal at the Federal Supreme Court which – by pronouncing on the case, will remove the administrative act, will quash the appealed judicial decision and will establish that another decision should be pronounced with or without application of the *Súmula* (considering the concrete case).

It is self-evident then, that the force of a *Súmula vinculante* is to constitute a new legal text. If there is a *Súmula contra legem* it is impossible to declare that is against the law and if there is a *Súmula* against the Constitution, it should be declared unconstitutional. It is as easy to imagine as it is very difficult to realise, because the *Súmula* of the STF will have the same force as a "constitutional rule". It is a legal text with binding effect and it is it is unusual for the SC to overrule its own rule deciding that it is "unconstitutional."

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[11] *See* Lenio Luiz Streck, *See* Lenio Luiz Streck, *O efeito vinculante e a busca da efetividade da prestação jurisdicional. Da revisão constitucional de 1993 à reforma do Judiciário (EC 45/04)*, in Comentario à reforma do Poder Judiciário, *supra* note 8, at 161.

[12] *See generally* P. Bonvaides, Curso de direito constitucional (Malheiros, 2005). On the same point, Arruda Alvim, Ação civil pública. Reminiscências e Reflexões após dez anos de aplicação 152 (Milaré, 1995).

## III. A NECESSARY COMPARISON: LOOKING AT THE AMERICAN SYSTEM AND AT THE ITALIAN EXPERIENCE

The *Súmula vinculante* has some elements which recall precedent in the U.S. legal system.[13] In fact, in the common law system, *stare decisis* has a decisive importance because it regards actual cases. The fulcrum is the specific case in its concreteness and its comparison with other cases that a judge has previously decided. Vice-versa, in the civil law system (as in Brazil), the resolution of a case takes place within the normative system in which it is possible to find general and abstract rules with which to decide actual cases.

### A. STARE DECISIS AND PRECEDENT

According to the *stare decisis* rule, the judge has to follow decisions delivered in the past on cases similar to that which he is examining. The *ratio decidendi* of the decision has no ambition of forecast, of legislation for the future, so that precedent binds when it is an application of the rule to an actual case. Furthermore, in the common law system, with the application of "distinguishing" there is the possibility that every analogous case, where the rule previously used seems applicable, is <<distinguished>>. There is a sufficient flexibility to avoid an exact reproduction of the principle contents of an earlier case which could lead to an unjust decision. In the United States a judge has the power to overrule a precedent considered inadequate. It happens when, after a prudent analysis, is found to be lacking in rationality or incompatible with other precedents.[14]

> The five most prominent rationales for the policy of *stare decisis* are (A) predictability; (B) fairness; (C) judicial efficiency; (D) integrity of the judicial system; and (E) vigilant judicial decision making. As will be clear, these rationale are somewhat related and overlapping. Predictability because the use of precedent promotes predictability in the law and stability in commercial and other relationships. Fairness there is when similar cases involving similar facts are decided in a similar way. This principle gives the appearance of justice and the avoidance of arbitrary decision-making, as it provides a seeming neutral authority on which judicial decision-making proceeds. Judicial Efficiency because once the rule of *stare decisis* becomes a guiding principle, parties whose positions are not supported by legal precedents will be discouraged, and hopefully deterred, from bringing frivolous cases and baseless appeals on well-settled points of law. Integrity of the Judicial System because the use of

[13] *See* John Hart Ely, Democracy and distrust: a theory of judicial review (Harvard University Press, 1980); Mauro Cappelletti, Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato (Giuffrè, 1968).
[14] *See* T.M. Fine, *Stare decisis and the binding nature of precedent in the United States of America*, with kind permission of the Author.

> precedent can well enhance the integrity of the judicial system and judicial processes. A legal system based on precedent also tends to impress the citizenry with a sense of stability and confidence in the legal regime. If legal rules are constantly reformulated and applied inconsistently, the system gives the appearance of instability, flux, and arbitrariness. Vigilant Judicial Decision Making because the doctrine of *stare decisis* means that today's judicial decisions will be tomorrow's precedent, judges operating under a system of binding precedent have an even greater incentive to take the utmost care in formulating their opinions and in providing an adequate rationale for their decisions.

In the civil law system, even if there are some advantages of precedent, it will not be in any way possible for a precedent to override the law. In fact, it does not derive from the will of the legislature but from the reiterated will of the judges. The institution of the *Súmula* risks becoming a model of pre-established decisions within the limits of which successive cases would have to be decided, a kind of "prefabricated" judgment.[15]

Within the system of *common law* recourse to precedent turns out to be substantially a constraint which appeals to a rule. It is justified in the name of predictability, fairness, judicial efficiency, integrity of the judicial system and vigilant judicial decision making. Since in this argument the use of the "past" is evident, it is right to point out that to look at the past as regards precedents is different from considering it mere experience. In this latter hypothesis, past acts, compared to current ones yet to be decided, are important "now" for their reciprocal similarity. These as such, unless substantial characteristics of the similarity emerge, are merely *phenomenological*. This is not the case with precedents, since these operate in a similar way to a rule and therefore, although they can be declared mistaken, would still influence a present decision like an argument founded on a rule, on an "authority." Naturally, recourse to the doctrine of the precedent is also justified by a need for continuity as regards principles and past choices, through an "interpretive *continuum*."[16] The problem is that it rarely happens that there are two perfectly identical cases allowing for a present case to be resolved by reference to a past one. The constraint imposed by the precedent would operate in the sense of being able to "check" all the facts subsequent to it and which are "like" the past one. [17]

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[15] *See* J. Anchieta da Silva, A Súmula de efeito vinculante amplo no direito brasileiro 60 (Del Rey, 1998).

[16] *See* Frederick Schauer, Playing by the rules, (Oxford University Press, 1991. F. Schauer, *Precedent*, in 39 Stanford Law Review 589 (1987): "If the future must treat what we do now as presumptively binding, then our current decision must judge not only what is best for now, but also how the current decision will affect the decision of other and future assimilable cases."

[17] *See* F. Schauer, *Precedent*, in 39 *Stanford Law Review supra* note 16, at 577.

> No two events are exactly alike. For a decision to be precedent for another decision does not require that the facts of the earlier and the later cases be absolutely identical. Were that required, nothing would be a precedent for anything else. We must therefore leave the realm of absolute identity. Once we do so, however, it is clear that the relevance of an earlier precedent depends upon how we characterize the facts arising in the earlier case. It is a commonplace that these characterizations are inevitably theory-laden. In order to assess what is a precedent for what, we must engage in some determination of the relevant similarities between the two events. In turn, we must extract this determination from some other organizing standard specifying which similarities are important and which we can safely ignore.

Sometimes, what is more, judges in decision-making leave things as much as possible *undecided*, just enough to justify the result arrived at, feeding the phenomenon known as "*judicial minimalism*," in which analogy is the usual instrument.[18] The solution adopted in this way remains open, offering a chance for the democratic process to intervene in the forming of further developments. *Judicial minimalism* would tend to push for the need for either an adequate explanation in a case in hand or for fundamental decisions taken by democratically responsible subjects. Naturally, this method could be found to be a determining factor in the case of particularly complex questions and which could in some way build a beacon, an indication of a change in sensibilities towards important issues, which operate on a grand scale.

Naturally, the usefulness of such "incompletely theorized agreements"[19] is undeniable: while they facilitate early decisions on controversies. They limit procedural delays and costs of long-lasting conflicts, favouring a certain stability for the entire system. They guarantee a saving in time and locate possible solutions – the precedent, for example, "frees the judges" from looking after a certain number of cases. In those systems in which the precedent is an unavoidable fact, they are obviously a fundamental support. What is more, they represent an important element in the development of concepts over time – consider that of equality or liberty:[20]

[18] *See* Cass R. Sunstein, *Foreword: Leaving things undecided*, in 110 *Harvard Law Review* 4 (1996).
[19] *See* Cass R. Sunstein, *Incompletely theorized agreement*, 108 *Harvard Law Review* 1733 (1994).
[20] *See* Cass R. Sunstein, *Foreword: Leaving things undecided*, in 110 *Harvard Law Review* supra note 18, at 34.

> This process is not incompatible with the fundamental project of minimalism, because it reduces the need for theory-building and for generating law from the ground up by creating a shared and relatively fixed background against which diverse judges can work. The process of case analysis also allows judges to proceed incrementally when appropriate. The distinction between holding and dicta, and the power to recharacterize holdings, give subsequent courts the discretion to hold that earlier cases, properly understood, left many issues undecided. And the process of case analysis allows greater flexibility than the process of rule-following, and in that way absorbs the minimalist's concerns about the burdens of decision, the risk of error, and the need for latitude over time and changing conditions.

## B. LIVING LAW

Until the fifties Italian judges interpreted the law in conformity to the Constitution as long as it was not in contrast to it, in defence of the unity and of the logical coherence of the entire juridical system. From the seventies it was felt that there were new needs overturning the principles of positivism. Judges turned their attention to the private individual, towards the recognition and defence of his rights, to compensation for injuries and damage.[21] Hence a "communicative action"[22] aims to resolve the individual case through the application of constitutional principles capable of fulfilling those demands for justice which the ordinary law does not succeed in satisfying. To be able to evaluate constitutional principles as sure and established, applicable as such and without the mediation of a different interpretive model, it is necessary that the constitution offers data which is scientifically reliable, that it is not bound by principles subordinate to it from which conclusions need be drawn.

If this were not the case, one could not speak of the "direct application of the Constitution," but of recourse to principles which pre-existed it and the return to which is equivalent to a mere "argumentation," the habitual instrument of law.

In Italy, uniformity of court decisions comes by means of living law, meaning the settled interpretation of the higher courts and successive adaptation by the lower courts.[23] Since living law is the concrete symbol of the evolution of leading case shift, it constitutes one of the parameters which the Court can refer to in the evaluation of the constitutional legitimacy of a law.

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[21] *See* G. Volpe, Il costituzionalismo del Novecento (Laterza, 2000); G. Minda, Teorie postmoderne del diritto (Il Mulino, 2001).
[22] *See* Jürgen Habermas, Teoria dell'agire comunicativo (Il Mulino, 1997).
[23] *See* Lorenza Carlassare, *"Astrattezza" e "concretezza" in un giudizio principale su indirizzo e coordinamento*, in Giur.Cost. 1109 (1989).

Particular difficulties arise in the search for suitable criteria for identifying a sufficiently homogenous and constant standpoint capable of producing living law. For this purpose, precedent plays a fundamental role because it contributes to the concretization of the living law itself. Since the decision of a judge is the result of a choice influenced by a surrounding socio-cultural environment, the existence of a consolidated standpoint constitutes a limit to the discretion of the Constitutional Court. It will have to evaluate the constitutional legitimacy of a law interpreted according to the standpoint of the Courts on the basis of living law. On the other hand, it represents a parameter, a value on which is founded the relationship between a decision and the actual exercising of jurisdiction.[24]

The ideal scenario is one in which the judge of an actual case and the constitutional judge are in continual dialogue sustained by the need for justice. To satisfy this need, there is a return to the fundamental principles of which a specific case is an expression, a concrete and living example. It is necessary that the value which emerges from the individual fact of life stands up to the universal demands of justice. In the dialogue between the Constitutional Court and the judge a quo, the latter, respecting the parameters and restrictions established by the former, will have to build his case as a "model." The court will have to assess how far the law is able to satisfy any emerging requirements. An eventual reference by constitutional decisions to living law is synonymous with the "common sense" of the system in which it operates.

Although the role of Judicial precedent in the Italian system is not that of a source of law, nor is it a mere virtual authority. Instead, drawing strength over time through the interpretive activity of judges, it does not have prognostic pretensions and therefore it does not have a definitive character, limiting itself to the present.[25]

In this way, precedent constitutes an indicator to the predictability of the juridical consequences of conduct or of an act, assuring therefore the certainty of the law. It will be realised in the certainty of the action through the law, in an ethical and utilitarian perspective, so as not to reduce it to pure appearance. The value of the certainty of law and in law indicates the need for the individual to be in a position to know the consequences of his own actions. Living law is therefore placed as representative of a precise cultural context but is supported by the element of the precedent and, thus, from the acts which are "crystallised" through it, it is made concrete. In this way, living law allows for a new interpretation of the

[24] *See* Michele Carducci, *Corte Costituzionale e diritto parlamentare vivente*, Giur.It. 1 (1996); Andrea Pugiotto in web.unife.it/progetti/forumcostituzionale/giurisprudenza/ap1202004.htm.
[25] *See* Massimo Cavino, Interpretazione discorsiva del diritto 187 (Giuffrè, 2004); M.Cavino, *Il precedente tra certezza del diritto e libertà del giudice: la sintesi nel diritto vivente*, in Diritto e Società 169 (2001).

past through the attribution of meaning to a determined notion of "good;" the notion of this "good," then, opens up other interpretive possibilities in cases which are subject to a subsequent attribution of meaning.[26]

To sum up the essential elements of the argument, we could say that on the one hand precedent represents a reference parameter of the past, living law is the *tertium comparationis* capable of pointing the judge in the direction of the future with a perspective not only of continuity with the past, whose matrix of principles he intends to respect, but also of change, of a "civilization of expectations."[27] The resolution of controversies by a judge through precedents or through recourse to living law is therefore deciding in accordance with established values rather than merely responding to a demand for concreteness.

The discretion which the judge enjoys when he attributes a certain meaning to precise text (for example, a law) is always synonymous with a choice between two or three possible interpretations. Only in the future will it be possible to say which of the two or three was best. This very open-endedness of the interpretative process determines some "free zones" in which it would be easy for the interpreter to opt for the direction most likely to be of personal advantage to him. According to a principle of integrity to which all interpreters should be subject, the passing from one interpretation to another would only be justifiable if it included the assumption of all the obligations deriving from the chosen option.

## IV. PROBLEMS OF DEMOCRACY

Problems raised by the institution of *Súmula vinculante* are evidently connected to the fundamental principles of a democratic State, first of all that of the separation of powers. In fact, the Judiciary power, issuing *Súmula* s with binding effect, with *erga omnes* efficacy, seems to be exercising those functions which are proper to a Legislative power. It undermines the constitutional right of citizens to participate in law making (Article 14 B.C.) and the right to have a democratic legislative process which is open and participative (Article 59, B.C.).

When the Judiciary power also takes on a legislative function, issuing binding *Súmula*s that fix themselves on the same level as law, it fixes the interpretation not only in reference to the text but also to the rule deducible from it. In this way, on the one hand the *Súmula vinculante* closes down the legal system. On the other hand, it produces a new

[26] *See* Michel Rosenfeld, Just Interpretations 260-265 (University of California Press, 1998).
[27] *See* Niklas Luhmann, La differenziazione del diritto, 39 (Il Mulino, 1990); M. Neves, *Costituzionalizzazione simbolica e decostituzionalizzazione di fatto*, in *Costituzionalismi difficili*, 31 (Pensa, 2004); R. Zamorano Farias, *Civilizzazione delle aspettative e democrazia nelle periferie della società moderna*, in Costituzionalismi difficili, 123 (Pensa, 2003).

legislative text, so that it opens itself up to other interpretations, considering that it is not possible to admit a separation between text and rule, intended as a result of a process of attributing an interpretation to the text itself. This is the real paradox!

Thus, its complexity is due to the fact that on the law-effectiveness level, "the *Súmula* changes into a category or a concept that serves as an assumption to assert inferences or subsumptions that recall typical criterions of a metaphysical positivism." In other words a return to creating general ideas "through removing any particular element of every concrete fact, until they obtain a sufficiently universal but abstract formula that is able to contain all the individual situations from which it was created." So, it seems a return to that juridical positivism that does not admit any ethical influence in the procedure of the creation of the law and the function of the judge would be limited to the application of the rule to a specific case. It is evident that in the outlined scenario, where the application of a rule is imposed from above, that those elements which in time would have fed, if not generated, a crisis in the positivist theory, (that is, social-juridical pluralism and the justice of an actual case), have not been taken into consideration.

Hence, it seems that the *Súmula vinculante* produces decisions which create an autopoietic system that consolidates itself by means of those elements that it itself generates. In this way it is possible to guarantee uniformity of the decisions of the courts and procedural celerity while at the same time the law and decision making is centred on the same subject.[28] What is more, if the interpretation allows an interpretative definition of the law within the text (as it was a linguistic and temporal flux), with the *Súmula* with binding effect (that is the disposition and its contents) it is as if it was out of time. In fact, the *Súmula* should be able to regulate, to absorb future cases, even if it is not law, even if it does not grant any form of "distinguishing." It is evident how this kind of system has an incongruity so that, the certainty of law is sought inside a pattern that probably could be undemocratic. It must be considered then, that an interpretation by its very nature is conditioned by its own historical context, becoming, for this reason, relative and temporary. Prejudices and expectations, to which every interpreter is prone, act as filters to the act of understanding which is a historical event open to subsequent contemporary interpretations. In this way, if the interpretation accomplishes itself with an actual use, in the same way the validity of that which has been interpreted is realised by its applicability to an actual case.

What Gadamer defines as the "ontological turn" (*Ontologische Wendung*) is to be noted here. Every interpretative activity is really an application, where the words do not have meanings in themselves but they have constant need of an external operation (just from the

[28] *See* Willis Santiago Guera Filho, Autopoiesis do direito na sociedade pós moderna (Livraria do Advogado, 1997)

interpreter) with which they can justify themselves.[29] The time of decision making and the time of interpretation/application should therefore never be separated but directed to the opening of the historical concreteness that the interpreter considers: "Application, as understanding and explanation, is a constitutive part of the whole interpretative action."[30] This discourse refers to the difference between rule and disposition (that is, contents and container), that is the rule and the text that receives it. Where civil law prevails, the judge should feel himself at liberty to decide the specific case because the only bonds existing are given by the law and the Constitution. This means that the *Súmula* as text does not bind the judge but, if it is the expression of a "correct" interpretation and concretisation of law, that is, if it is a "correct" answer because it is adequate to the case according to the binominal text/context, it can justify the judicial decision for the resolution of similar matters. Otherwise, it only remains an enunciation that is not able to solve the problems of application without recourse to the dogmatic doctrine where there are no facts because they are deduced from *Súmula*.[31]

The institution of *Súmula vinculante* was specially born out of the need to give uniformity to the decisions of the courts, even though, for this purpose, in 1993 the Brazilian Government elaborated the *Açao Declaratoria de Constitucionalidade* (Declaratory Action of Constitutionality) which was able to ratify the constitutionality of a specific law. In this way, compliance to the Constitution could be verified. The above-mentioned Action could be exercised by the President of the Republic, the Federal Senate, the Chamber of Deputies, or the General Attorney of the Republic. But, even this instrument was criticised by important jurists such as Lenio Luiz Streck, Gilmar Ferreira Mendes, Sacha Calmon Navarro Coêlho and Moreira Alves who underlined how it would weaken access to Judiciary power, abolishing the rights of citizens and removing the principle of cross-examination and of defence (because it involved an abstract control of constitutionality, without the need of a specific controversy ) This would transform the Supreme Court into an advisory power, undermining the principle of the separation of powers. Subsequently, Amendment no. 45/2004 extended the binding effect from the Declaratory Action of Constitutionality to the Direct Action of Unconstitutionality (Article 102, §2, C.B.), until the institution of the *Súmula vinculante*.

[29] *See* Lenio Luiz Streck, Hermenêutica Jurídica e(m) crise 219 (Livraria do Advogado, 2004).
[30] *See* Hans Georg Gadamer, Verità e Metodo, 637 (Bompiani, 2000); Antonio Osuna Fernandez – Largo, La Hermenêutica Jurídica de Hans-Georg Gadamer (Universidad de Valladolid, 1993).
[31] *See* Eduardo Domingos Bottallo, *A natureza normative das Súmulas do STF, segundo as concepções de direito e de norma de Kelsen, Ross, Hart e Miguel Reale*, in Riv. de Dir. Públ. 17-25 (1974); Miguel Reale, Lições preliminare de direito 162-163 (Saraiva, 1976).

The hypothesis of an unconstitutional *Súmula* goes back to the idea of the judicial review which, in the Brazilian system, is complex and eclectic because it is decentralised and concentrated; abstract and concrete at the same time.[32] The first model – the decentralised one – obviously corresponds to the North American model, within which constitutional jurisdiction is attributed to all organs competent to examine in a tangible way the unconstitutionality of the law like an argument of a controversy. Decentralised control is effected by the Federal Supreme Court through extraordinary recourse and its decision always has *inter partes* force. The exception to this is in cases in which the STF puts the question back to the Federal Senate which suspends the execution of the law that has been declared unconstitutional with a decision with *erga omnes* and *ex nunc* effect.

Concentrated control of constitutionality on the other hand goes back to the *kelseniano* model by which control is effected by a single organ in principal and in abstract with a decision of *erga omnes* ed *ex tunc* effect.[33] Concentrated control can be proposed by means of the *Açao Direta de Inconstitucionalidade* (ADIn); the *Açao Declaratoria de Constitucionalidade* (ADC)[34] and the *Arguiçao de Descumprimento de Preceito Fundamental* (ADPF). The latter was instituted through Law no. 9882/99 so as to avoid or repair the lesion of a fundamental precept resulting from an act of Public power or in the event that it is relevant to the founding of a constitutional controversy of law or of a federal, state or municipal act of law. This includes those which predated the Constitution. The decision reached as a result of submitting the question to the STF in direct and individual form, incidentally or not, will have *erga omnes* and binding effect on other organs of Public Power.

Consequently, in the event that a *Súmula* is deemed to be unconstitutional, it would be declared as such, either following a judgement on an actual case, during a decentralised control, by a judge or court, or following an abstract control by the Federal Supreme Court. This is verified by Amendment 45 /2004 which declared the *Súmula* with binding effect, making it a normative act with force of law. In fact, before the cited Amendment the *Súmula* could be declared unconstitutional only through the ADPF. In conclusion, as soon as a *Súmula* acquires binding effect, it enjoys a normative status in as much as a normative act is subject to the control of constitutionality (which can be done during a decentralised control). In the case of a violation of an *infraconstitucional*, or non-constitutional, the *Súmula* will be declared unconstitutional by direct violation of the Constitution or it may not be applied according to

[32] *See generally* Gilmar Ferreira Mendes, Controle de constitucionalidade. Aspectos Jurídicos e Políticos (Saraiva, 1990); P. Bonavides, Curso de direito constitucional, *supra* note 12, at 325.
[33] Although, in conformity to law 9868/99 the Supreme Court can attribute *ex nunc* effect.
[34] *See* Gilmar Ferreira Mendes, *Alguns Aspectos da ação declaratória de constitucionalidade*, in G.F. Mendes, I.G. Martins, Ação declaratória de constitucionalidade (Saraiva, 1994); José Carlos Alfredo de Oliveira Baracho, Processo constitucional (Ed. Forense, 1984).

the criteria of the resolution of the antinomies. Finally, one could go back to the mechanism of "consistent interpretation" and to that of "partial unconstitutionality without reduction of the text" at the time of the application of the *Súmula*.[35]

In order to avoid recourse to the instrument of *Súmula vinculante*, in search of a solution capable of containing a crisis in Judiciary Power, research has been encouraged, within the civil and penal process, on mechanisms able to resolve, that is to "filter" controversies. Among them, for example, there is Article 282 of the CPC which allows the judge to avoid the pursuance of the process when the necessary procedural requirements are lacking because the process is over. Moreover, in the penal process through the accusatory principle the judge can reject a case if it is of little value (*principio da insignificancia*); still, the creation of *ad hoc* administrative courts, with the task of solving controversies on administrative and fiscal questions would be necessary; and these are but a few examples.

It could be considered, then, that a correct use of constitutional jurisdiction could turn out to be an effective instrument in the realisation of the above mentioned objective. The reference, in this regard, is to the hypothesis in which the unconstitutionality of a normative act is declared: it would be enough that the Federal Supreme Court submit from the beginning to the decision of the Senate of the Republic, according to the intention of Article 52, X, B.C. In short, an immediate retrieval by the STF of the decisions taken during decentralised control at the Senate would be desirable, suspending the law (declared unconstitutional by the STF) with *ex nunc* effect; by means of an *ADIn* from the Procurator General of the Republic the unconstitutionality could then be declared to also be *ex tunc*. Finally, in the event of the STF realising later that the law under examination is, after all, constitutional, the Procurator General could intervene with a binding *ADC*.[36]

## V. THE ROLE OF THE STF: WARDEN OF THE CONSTITUTION

The Supreme Federal Court was born out of the need of the federal system that presupposes the existence of two plans of operation of the law – state and federal – as well as the supremacy of the Constitution and the prevalence of federal law. The "extraordinary appeal" was instituted so as to avoid juridical chaos assuring the primacy of the Constitution and federal law and the unity of the line of cases. From the 1920s, the Supreme Court began to complain about its workload which was impeding the smooth running of their office. A crisis arose in the STF when the number of cases increased. These cases included the federalization

[35] *See* Celso Ribeiro Bastos, Ives Gandra Martins, Comentários à Constituição do Brasil, (Saraiva, 1989); Lenio Luiz Streck, *O efeito vinculante e a busca da efetividade da prestação jurisdicional. Da revisão constitucional de 1993 à reforma do Judiciário (EC 45/04)*, in Comentario à reforma do Poder Judiciário, supra note 8, at 166.
[36] *See* L.L. Streck, *O efeito vinculante das Súmulas e o mito da efetividade: uma crítica hermenêutica*, in Crítica à dogmática 114 (Instituto de hermenêutica jurídica, 2005).

of civil and penal law (which allowed for the possibility of extraordinary appeals),the restriction of the field of ordinary appeals in the matter of agreements, as well as extensive interpretation on the part of the STF on some questions, all of which could give rise to new and numerous controversies.

To give a concrete example from recent years, 72,133 judgments were made in the 1970s; 163.950 in the 1980s; and 288.261 in the 1990s.[37] Since the introduction of the *Súmula* with binding effect, judges of lower courts have had to follow the decisions of the higher courts. For this reason there is an unquestionable pragmatic value supporting the reasonable duration of trials with a reduction in the backlog of trials and a greater fluency in the resolution of cases. In fact, the reform of Article 103-A was aimed at giving uniformity to the line of decisions and staunching the crisis of Judiciary power. It was used to decide similar questions which were causing congestion and the proper progress of actions.

It was with the Constitution of 1988 that the Supreme Court of Justice (*Superior Tribunal de Justiça*) was created. It was competent for questions of legislative matters (*infraconstitucional*) and had the function of giving uniformity to the decisions of the courts through the special recourse provided by Article 105, III C.F.[38] If with reference to a *Súmula* emanating from the STF there is "the obligation" for the lower courts to abide by it (Article 103-A §3 B.C.); in the case of *Súmula* STJ or TST, work of the so called "*Súmula impeditiva de recurso*"[39] by which, if the judge or the court should give a decision conforming to a STJ or TST *Súmula*, it will be irreversible; in the case of a decision against, an appeal will be admissible.

The STF, however, through the Direct Action of Constitutionality and Unconstitutionality of law and through extraordinary appeal according to Article 102, III, B.C. retained the tricky and complex function of "Warden of the Constitution."[40] To be precise, Article 102, III B.C. says that the Supreme Federal Court is competent to judge, through an extraordinary appeal, decisions against the Constitution, to make decisions on an unconstitutional treaty or federal law, to declare the validity of law or a local government act contested on constitutional grounds and to make decisions on the validity of local law contested on the grounds of federal law.

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[37] *See* C.A. Motta De Souza, O papel constitucional do STF, *supra* note 4, at 80.

[38] *See* Athos Gusmão Carneiro, *Do recurso especial e seus presuppostos de admissibilidade*, in 66 *Ajuris* (Tribunal de Justiça, 1996).

[39] The *súmula impeditiva* is not yet passed an act of Parliament. But, according to Laws no. 9.756 8.038 e 12.276, it already works as *impeditiva de recursos*. The *Súmula impeditiva de recurso* clashes with the democratic principle of the separation of powers because *STF* and *STJ* arise upon the Legislative power. *See* L.L. Streck, *As Súmulas vinculantes e o controle panóptico da Justiça Brasileira*, in Argumentum 17 (2004).

[40] *See* Luiz Antonio Severo da Costa, *O poder normativo do Supremo Tribunal Federal*, Rev. dos Tr. (1973); Ferreira Filho, Comentarios a Constituição Brasileira 257 (Saraiva, 1974).

The second and third paragraphs were added with Amendment no. 45/04. Through this, the final decisions given by the STF in Direct Action of Unconstitutionality and Declaratory Actions of Constitutionality will have supreme effectiveness and will be binding, in relation to the other branches of Judiciary Power and to the direct and indirect public administration in the federal, governmental (state) and municipal sphere. By extraordinary appeal the claimant will have to prove the general repercussion of constitutional issues discussed in the specific case, according to law, so that the Court can decide on the acknowledgment of the appeal, having the power to disallow it by means of a decision taken by two thirds of its members.

## CONCLUSION

In the Brazilian system a reduction in the number of controversies is not possible with the *Súmula vinculante*, although it is easy to find well established decisions which are also used in new but similar cases. In fact, there are cases which are always returned to in order to decide identical or similar hypothesis. Since the Brazilian system is based on the rule of law, it seems unlikely that it could operate or be operated by the *Súmula vinculante*. It does not allow "distinguishing" because it is not compatible with its nature, having been created to give uniformity to more cases. Still, to avoid further procedural slowness and to unify the decisions of the courts. The Brazilian system uses *Súmula vinculante* even to the detriment of the democratic principle of separation of powers and accepting the risk of a limiting of fundamental rights.

The fundamental point of the article is that the Brazilian juridical system is a civil law system, where the *Súmula* with binding effect, that is force of law, is not allowed. To be specific, the primary contradiction regards Article 105, III B.C. because it grants the right to special appeal when the decision is against a federal law. Article 102, III B.C. says that an extraordinary appeal is possible in the case of violation of the Constitution. In neither article is there a collision with the *Súmula*.

On the other hand, according to Article 557 of Procedural Civil Code and to L. 9765/1998, Article 38, all appeals against the *Súmula* of the Courts are required to be dismissed.[41] This is a problem of compatibility with Constitutional rules; but it is also a question of deadlock of the judgements of the STF, consignee of the extraordinary appeal, causing in this way, with the *Súmula vinculante*, the breakdown of the system. The use of the *Súmula* is unacceptable if it is an indiscriminate, de-contextualised way to standardise the legal system with the ability to fossilise it, and with a binding effect that, beyond its limits, concurs to arrest the evolution of the legal system.

[41] *See* T. Negrao, *Código de Processo Civil e legislação em vigor*, Rev. dos Tr. (1996).

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