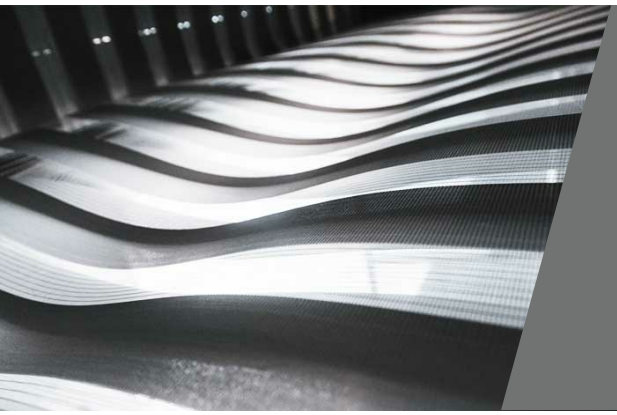

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BINDING PRECEDENTS PURSUANT TO THE BRAZILIAN PROCEDURE CODE AND THE USEFULNESS OF THE AVERAGE VOTE

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The system of precedents established by the Brazilian Procedure Code published in 2015 (CPC/2015) is based on the premise that trials of given instruments will have a binding effect on the Judiciary and that, solely for this reason, decisions that do not follow the understanding of such precedents will be challenged by a special lawsuit named "Reclamação". Decisions with binding effects resulting from: i) trials held by the Federal Supreme Court (STF) in concentrated control of constitutionality; ii) stare decisis ("súmula vinculante") issued by STF (here, also binding on the Administration, not just for the Judiciary); iii) trials in incidents for assumption of jurisdiction or resolution of repetitive claims; and iv) trials of extraordinary or special repetitive appeals by the STF or the Superior Court of Justice (STJ), respectively.

The CPC/2015 establishes that (i) the publication of the stare decisis by the STF and the STJ and (ii) decisions issued by a special body of the courts must be observed by the trial and lower courts. However, these decisions have reduced binding force at the option of the lawmakers, which is why we believe that their relevance is greater in the persuasion of trial in lower courts.

Precedents with binding force in the system of the CPC/2015 therefore emerge from the fact that the decision was rendered in a trial of a certain instrument, and there is no specific discipline regarding the content that effectively binds the bodies of the Judiciary. Is it the majority opinion? Is it the theory set out in the conclusion of the trial? Is it the briefs leading to the understanding that prevailed? These inquiries are not adequately established by the CPC/2015.

At least in relation to decisions resulting from the trials of extraordinary or special repetitive appeals, it is possible to conclude that the matter analyzed has a binding effect (article 1,039). This is despite the fact that 1,038, paragraph 3, of the CPC/2015, states that the decision published shall comprise a review of the relevant grounds of the matter debated.

Although this rule is specific to the binding effect of decisions rendered in repetitive appeals, which establishes similarity with the binding precedents, since there is only one extract indicating, in a summarized form, the understanding that must be followed, we believe that the system established by the CPC/2015 did not give that much prestige to the briefs for the decisions.

Thus, by rendering a decision that, according to CPC/2015, will assume a binding nature for the Judiciary as a whole, the Court will act, in an indirect way, as if it were a legislator. This situation occurs because the summary of the theory decided will be similar to any section of a given law that should be interpreted by the judge when applying the law at the moment of deciding a specific case.

For this, the discussions raised after the trial of Theory of General Repercussion 69. Upon concluding the trial of Extraordinary Appeal 574.706-PR, on March 15, 2017, the STF ruled that "the ICMS tax cannot be included in the calculation basis of PIS and Cofins contributions." Many inquiries regarding the scope of the theory ruled could be resolved if the CPC/2015 provided that, upon conclusion of a decision whose decision would be binding, the panel would not only ruled the summary of the precedent, but also indicate the reasons guiding the interpretation of the statement of law in an additional chapter of the decision that contemplates the analysis of the relevant grounds accepted by the majority, the so-called average opinion or vote.

Such a procedure would prevent the issues raised from the interpretation of the binding precedent from remaining on the agenda of the courts.

Therefore, we believe that the system of precedents designed by the CPC/2015 will fail in its objective of giving priority and promoting legal certainty and stability of case law if the issue pointed out in this article is not fixed.

And the harmful effect of the current system is verified empirically, since, once a theory is ruled in a trial of an instrument with binding effect, the precedent has been applied without distinction. In addition, in the cases of misinterpretation done in conjunction with the reasons of the trial rendered, the supposed objective of re-discussing that subject already decided and whose decision is qualified by binding force is invoked as a ground to not assess the merits of the special or extraordinary appeals.

Therefore, that the system of precedents of the CPC/2015, as mentioned above, results in a mere mechanism for managing cases that deal with similar matters and one more argument to be used by so-called "defensive case law" as an obstacle to hearing appeals.