CONSIDERATIONS ON “PROSPECTIVE OVERRULING” IN CIVIL PROCEDURAL LAW

CONSIDERAÇÕES SOBRE O “PROSPECTIVE OVERRULING” NO DIREITO PROCESSUAL CIVIL

CONSIDERACIONES SOBRE LA "REVOCACIÓN PROSPECTIVA" EN EL DERECHO PROCESAL CIVIL

https://doi.org/10.56238/sevened2026.013-002

Marina de Jesus Lameira Carrico Nimer[1], Beatriz Lameira Carrico Nimer[2], Olavo de Oliveira Neto[3]

ABSTRACT

The role of case law in the formation and development of Law varies according to the legal system in which it operates. In countries of the common law tradition, judges create the Law, and adherence to their precedents is an imperative of legal certainty. However, in countries of the Roman law tradition, characterized by statutory law, the idea of legal certainty and stability derives from enacted legislation. Even within this system, the relevance of case law cannot be denied, especially with regard to consolidated precedents, given the need to ensure uniformity in the interpretation of the law. Thus, the role of the modulation of effects in cases involving the overruling of established understandings emerges as a matter of significance, particularly concerning the guarantees of legal certainty and legitimate expectations that citizens place in the Judiciary. In this context, the prospective effects of overruling appear to be one of the means of giving practical effect to such an objective.

Keywords: Case Law. Precedents. Legal Certainty. Overruling. Modulation of Effects.

RESUMO

O papel da jurisprudência na formação e na conformação do Direito varia de acordo com o sistema jurídico em que se esteja inserido. Nos países de tradição common law, os juízes constroem o Direito, de modo que a vinculação aos seus precedentes é imperativo de segurança jurídica. Porém, nos países de tradição romanística, com Direito legislado, a ideia de segurança jurídica e estabilidade deriva da lei positivada. Mas mesmo nesse sistema não se pode negar relevância ao papel da jurisprudência, mormente no que tange aos precedentes consolidados, dada a necessidade de busca da uniformização da interpretação legal. Emerge, pois, como questão de relevo, o papel da modulação de efeitos nos casos de

[1] Master’s Degree Student in Law. Pontifícia Universidade Católica de São Paulo (PUC/SP).
E-mail: marina@lcnimer.com.br Orcid: https://orcid.org/0009-0005-9116-7301
Lattes: http://lattes.cnpq.br/9218088939135352

[2] Dr. in Law. Universidade de São Paulo (USP). E-mail: beatriznimer@alumni.usp.br
Orcid: https://orcid.org/0000-0002-8889-2335 Lattes: http://lattes.cnpq.br/3227382860887660

[3] Postdoctoral Researcher. Università degli Studi di Milano; Pontifícia Universidade Católica de São Paulo.
E-mail: olavodeoliveiraneto01@gmail.com Orcid: https://orcid.org/0000-0002-4421-1219
LatteS: http://lattes.cnpq.br/1787839156157448

superação de entendimentos consolidados, em especial quanto às garantias de segurança e confiança que os cidadãos depositam sobre o Poder Judiciário. Para tanto, os efeitos prospectivos do overruling parecem ser uma das formas de se dar concretude a tal escopo.

Palavras-chave: Jurisprudência. Precedentes. Segurança Jurídica. Overruling. Modulação de Efeitos.

RESUMEN

El papel de la jurisprudencia en la formación y configuración del derecho varía según el sistema jurídico en el que se inserta. En países con tradición de common law, los jueces construyen el derecho, por lo que la adhesión a sus precedentes es imperativa para la seguridad jurídica. Sin embargo, en países con tradición de derecho romano, con derecho codificado, la idea de seguridad jurídica y estabilidad se deriva de este. Pero incluso en este sistema, la relevancia de la jurisprudencia es innegable, especialmente en lo que respecta a los precedentes consolidados, dada la necesidad de buscar la uniformidad en la interpretación jurídica. Por lo tanto, la modulación de los efectos de la anulación surge como una cuestión crucial en los casos en que se anulan los entendimientos consolidados, en particular en lo que respecta a las garantías de seguridad y confianza que los ciudadanos depositan en el Poder Judicial. En este sentido, los efectos prospectivos de la anulación parecen ser una forma de concretar este objetivo.

Palabras clave: Jurisprudencia. Precedentes. Seguridad Jurídica. Anulación. Modulación de Efectos.

1 INTRODUCTION

The purpose of this article is to analyze the temporal modulation of court decisions that overcome previously prevailing jurisprudential understandings. It seeks to study the subject in the light of the principles of legal certainty and legitimate trust in the Judiciary, in the midst of the system in force in the current Brazilian civil procedural discipline.

The so-called *overruling* consists of the revocation of one judicial precedent by another, proceeding to overcome the jurisprudential understanding on a given subject. The expression emerged in the legal systems of *common law tradition*, but it is also of interest to countries where *civil law prevails*, such as Brazil, where the understanding of the Courts – especially the pacified one – allows the uniformity and constancy of interpretation in a system that does not innovate the law, but gives it a general sense of orientation.

Civil law and *common law*, however, are not incommunicado. In addition to the Brazilian tradition of romanistic bases, the Code of Civil Procedure of 2015 affirmed the orientation of standardization of the jurisprudence of the courts, so that it remains stable, integral and coherent (CPC/15, art. 926, *caput*) – something that the *common law system* advocates and, more than that, imposes.

It happens that it is common for collegiate bodies to change – not infrequently, abruptly – understandings that have prevailed until then. However, considering that the decisions of the higher courts have a paradigmatic and guiding character of legal interpretation at the national level, the possible immediate applicability of the new understanding that goes beyond previous jurisprudence could sound reckless to those who have guided their actions by the jurisprudential guidance in force until then. Therefore, the issue of modulating the temporal effectiveness of decisions that alter previously consolidated understandings (whether *ex tunc* or *ex nunc*) becomes relevant.

The current Code of Civil Procedure of 2015, innovating in relation to the normative discipline that it previously supervises, now expressly provides, in its article 927, paragraph 3, the following: "In the event of a change in the dominant jurisprudence of the Federal Supreme Court and the higher courts or that arising from the judgment of repetitive cases, there may be modulation of the effects of the change in the social interest and in that of legal certainty."

The relevance of the so-called *prospective overruling stands out*, that is, the prospective effects of overcoming jurisprudential understandings for reasons of legal certainty and legitimate expectation of the parties under jurisdiction before the Judiciary. Such guiding principles are another normative innovation introduced with the civil procedural reform of 2015, according to the dictation of paragraph 4, of article 927, of the current *Codex*,

which is expressed by providing that in order for the courts to modify statements of precedents, settled jurisprudence or thesis adopted in the judgment of repetitive appeals, they must observe the duty of adequate and specific reasoning and consider the principles of legal certainty, the protection of trust and isonomy.

Based on this line of study, the structure of this article starts from the definitions of hermeneutics and legal interpretation, with the analysis of the way in which the interpreter's activity operates, that is, whether he subsumes the norms to the facts in a mechanical way, or whether he exercises creative contours in his exegesis. In the second chapter, the role of jurisprudence in the common law tradition and civil law systems is analyzed , with special emphasis on the Brazilian model. In the third chapter, the review and overcoming of precedents is studied in the light of the principles of legal certainty and protection of confidence, with ultimate observance of the phenomenon of *prospective overruling* in the jurisprudence of the Federal Supreme Court and the Superior Court of Justice.

The methodology used is purely related to the Science of Law, with doctrinal and jurisprudential analysis about the limits of the proposed theme, in addition to a comparative study between the *common law* and *civil law systems.* It is not intended to exhaust the theme under study, given its complexity and breadth, so it is proposed, here, to bring light and direction about the premises and general concepts that permeate the matter.

2 HERMENEUTICS AND INTERPRETATION: MECHANICAL SUBSUMPTION OR CREATIVE ACTIVITY?

The interpretative activity is, par excellence, the way in which the Judiciary exercises its function, applying the law to concrete cases with the force of definitiveness.

Endowed with generality and abstraction, legal norms – the genre in which rules and principles are framed – gain concreteness when they are subsumed to the facts that occur in the phenomenal world. And the one who discovers and fixes the meaning and scope of the norms is the interpreter, who is responsible for establishing the relationship between the legal precept and the social fact.

Interpretative techniques – which are guided by rules and principles proper to scientific theory – form legal hermeneutics. Therefore, quoting Carlos Maxilimiliano, "Hermeneutics is the scientific theory of the art of interpreting".[4] While hermeneutics has as its object

[4] MAXIMILIANO, Carlos. *Hermeneutics and application of law.* 20. ed. Rio de Janeiro: Forense, 2011, p. 1.

exclusively the law,[5] interpretation falls on two objects: the Law and the fact. That is, therefore, the theory that underlies its activity.

The interpreter operates through three-phase activity: (a) analysis of the *quaestio juris* in its strict sense, that is, of the essence of the norm, with the identification of its content and scope; (b) examination of the *quaestio facti*, namely, the concrete and its circumstances; (c) adaptation of the rule to the concrete hypothesis.[6]

Adapting the norm to the fact, in turn, presupposes four stages: (a) the first is critical, which requires the verification of the authenticity and constitutionality of the norm; (b) the second is the interpretative itself, in order to identify the meaning and scope of the normative text; (c) the third is the one that makes it possible to fill gaps with the use of analogy, customs and general principles of law (LINDB, art. 4); (d) the fourth, finally, is the verification of the validity of the norm in time and space.[7]

It can be seen, therefore, that in all hypotheses of application of the law there is a need for interpretation, which is not restricted to cases in which the normative text is imprecise or doubtful. Interpreting does not only mean declaring something, translating into an activity constituting a concrete solution to the numerous cases that require a legal solution. That is why interpretation generates a true "decision norm", which is expressed in the judicial pronouncement, be it a sentence, judgment or interlocutory decision.[8]

Is the old brocardo *in claris cessat interpretatio* consistent with contemporary hermeneutics?[9] It seems clear to us that it is not. Even clear laws require interpretation to ensure that they remain valid and perennial even with the passage of time, and so that they can be applied to the most diverse facts of the phenomenal world with which they have a correlation.[10]

In the jurisdictional activity, the judge must carry out the decision-making process based on the historical moment in which he is introducing, taking into account the legal system as a whole, and not just a certain normative text. It is the classic idea that the law is

[5] Here we refer to the "law" in a broad sense, encompassing not only the formal law (enacted by the legislator after the due legislative process, generating ordinary, complementary or delegated law), but also all the norms that make up the legal system (Kelsen's pyramid in the broad sense), as a result of the principle of legality.
[6] MAXIMILIANO, Carlos. *Hermeneutics and application...* op. cit., p. 6.
[7] Idem, p. 7.
[8] GRAU, Eros Roberto. *Essay and discourse on the interpretation/application of law.* 4th ed. São Paulo: Malheiros, 2006, p. 11.
[9] Contrary to what many think, this adage in Latin does not derive from Roman Law, but from the Middle Ages, dating back to the time when glossers should give clarity to the law. On the subject, cf. SILVEIRA, Alípio. The "in claris cessat interpretatio" and its decline. In *Hermeneutics in Brazilian Law*. São Paulo: Revista dos Tribunais, v.1, 1968, p. 41.
[10] CARREIRO, C. H. Porto. The practice of law. In: *Introduction to the science of law*. Rio de Janeiro: Rio, 1976, p. 224.

not interpreted in strips, in pieces, but always through a path that starts from the statement that must be subsumed to the concrete hypothesis, until reaching the Constitution.[11]

But, then, is the judge's activity mechanical – that is, it obeys objectively measurable criteria – or does it involve the creation of Law? In fact, the normative text will not always be determined and clearly visible in the face of any and all phenomenal hypotheses. It is not even possible for the legislator to foresee and attribute legal consequences, in advance, to everything that may occur in the world of facts.

There are cases in which the law establishes a framework within which a spectrum of possibilities for concrete applications is inserted, and it is up to the interpreter to exercise discretionary competence, based on criteria of convenience and opportunity, as occurs in the gradation of penalties, or valuation of damages, within the legal frameworks. It is what can be called the intentional indeterminacy of the law.

On the other hand, there is unintentional indeterminacy when the normative text contemplates a plurality of meanings of the words that compose it, or when there is a difference between the will of the legislator and the content expressed therein, or when there is an apparent contradiction between two or more norms that simultaneously govern a certain matter.[12] In these cases, the interpreter has the task of applying the law to the specific case, producing an individual norm that can fulfill the framework of the legal norm. This activity has a high degree of linkage, not only to the Constitution, but to all infra-constitutional laws and normative acts. While, faced with a field of constitutional indeterminacy, the Legislative Branch has a wider range of creative activities, the same cannot be said of the Judiciary, whose creative activity is limited to the production of the individual norm of decision, namely, the command that is applied to the concrete case through the process.

Exacerbated positivists consider that there is only jurisdictional activity purely linked to the law.[13] However, even Hans Kelsen understands that the application of the rule to the specific case cannot escape the discretionary exercise of the judge. In his words:

> The relationship between a higher and a lower level of the legal order, like the relationship between the Constitution and the law, or law and judicial sentence, is a relationship of determination or binding: the norm of the higher level regulates (...) the

[11] GRAU, Eros Roberto. *Essay and speech...* op. cit., p. 42-44.
[12] KELSEN, Hans. *Pure theory of law*. São Paulo: Martins Fontes, 1985, p. 364-365.
[13] "Stassinopoulos denies that there can be discretion in the judicial function; In this there is only the work of interpretation, that is, of seeking the only possible solution before the law. For him, many possible solutions or a free choice between them are two elements incompatible with the rigid notion of res judicata; the solution that the judge arrives at is unique: it is the same that the legislator would have adopted" (In: DI PIETRO, Maria Sulvia Zanella. *Technical discretion and administrative discretion.* Brazilian Journal of Public Law – RBDP. Belo Horizonte: Forum, 17:75-96, Apr./June 2007, p. 73).

> act through which the norm of the lower level is produced, or the act of execution, when it is already only a question of it; (...).
> This determination is never, however, complete. The norm of the higher echelon cannot bind in all directions (in all aspects) of the act through which it is applied. There must always be a margin, for greater or lesser extent, of free appreciation, in such a way that the norm of the higher echelon always has, in relation to the act of normative production or execution that applies it, the character of a framework or frame to be filled by this act. Even an order as detailed as possible must leave to the one who fulfills or executes it a plurality of determinations to make. If organ A issues a command for organ B to arrest subject C, organ B has to decide, at its own discretion, when and how to carry out the arrest warrant, decisions that depend on external circumstances that the organ issuing the command did not foresee and, to a large extent, could not even foresee.[14]

The jurisdictional function, of course, contributes to the evolution of Law, since there is always a creative potential that is inherent to it. Each time there is a new application of the law, there is creative activity by the judge. There is no pure mechanicality. Otherwise, the judge could easily be replaced by a robot. Hence the relevance of jurisprudence for the production of Law.

3 THE ROLE OF JURISPRUDENCE IN THE *COMMON LAW* AND *CIVIL LAW SYSTEMS*

The civil *law tradition* dates back to 450 BC, with the "Law of the Twelve Tables", which consisted of an incipient written system of conflict resolution in Roman Antiquity. It was succeeded, at the time of Emperor Justinian of Constantinople, by the *Corpus Juris Civile*, with the codification of Roman Law. In the Middle Ages, this legislation fell into disuse, but it was studied again in the European Renaissance, with the gradual systematization of Private Law, Public Law, Procedural Law and Criminal Law. This caused the *civil law system to* spread throughout Europe and the colonies of South America, Africa, the Middle East, and Asia.[15]

The tradition of the *common law system*, in turn, dates back to the conquest of England by the Normans in 1066 A.D., when King William "the Conqueror" delegated to a body of loyal judges the jurisdiction and competence for the resolution of local conflicts through the production of commandments with a normative character. The intention was to establish Norman law in the foreign country through the imposition of the decisions of the judges appointed by the conquerors. The eagerness to calm the spirits of the local population, making them feel welcomed, was incorporated into the tradition of the jury, with decisions made by jurors who represented the interests of the locality – jurors who, most of the time,

[14] KELSEN, Hans. *Pure theory of law...* op. cit., p. 364.
[15] MERRYMAN, John Henry. *The civil law tradition: an introduction to the legal systems of Western Europe and Latin America.* 2. ed. Standford: Standford University Press, 1985, p. 2-10.

were illiterate and simple people, who could not make written decisions. Therefore, the procedures became oral, and oral also became the jurisprudential creation. That is why it is often said that the *common law* system was a "historical accident". With the absence of writing or positive legislation, the tradition of common law ended up being present in several nations, reaching English colonies, including the United States of North America, Australia, Canada, South Africa, New Zealand, India, Zimbabwe, Ghana, Zambia, Botswana, Nigeria, Somalia, Tanzania, Gambia, Sierra Leone, Malawi and many Caribbean islands.[16]

Still in the context of the difference between the systems, the sources of law, in *civil law*, derive from the positive formal legislation, emanating from the Legislative Branch, with the Federal Constitution as its hierarchical top. And a controversial point concerns the legal position of customs in such a system.

In the Brazilian context, the LINDB[17] expressly provides, in its article 4, the following: "When the law is silent, the judge shall decide the case according to analogy, customs and general principles of law". But such customs only fit our tradition of Romanistic origins, in which there is the rule of law, if they are considered properly legal elements that aim to fill legal gaps,[18] and cannot be confused with mere collective practices or uses of a moral, social or religious nature.

And an even more controversial issue refers to the use of jurisprudence as a source of Law in systems of *civil law* tradition, which can be considered "jurisprudential custom". In *the common law* system, the Law is built over time from concrete cases, with the invocation of general principles for the solution of demands. Judges are producers of the legal norm with the force of precedents in the midst of the system called *stare decisis*, with the scope of ensuring certainty, equity and consistency to the Law constructed. Hence the relevance of jurisprudence in the *common law*.[19]

Since the origin of such a system in England, when William the Conqueror appointed judges he trusted to settle conflicts in Normandy, such judges were seen as citizens of high respectability and prominence in society. To this day, Anglo-Saxon magistrates are chosen from among the best lawyers in the country to assume the honorable and prestigious judicial function.[20]

---

[16] GLENN, H. Patrick. *Legal traditions of the world.* 2. ed. Oxford: Oxford University Press, 2004, p. 223-9.
[17] Law of Introduction to the Rules of Brazilian Law – Decree-Law 4.657/1942.
[18] According to the understanding of André Franco Montoro, customs are "the long, inveterate, day-to-day, consuetudo of the Romans, relative to a given factual situation and observed with the conviction of corresponding to a legal need" (MONTORO, André Franco. *Introduction to the Science of Law.* 26. ed. São Paulo: Revista dos Tribunais, 2005, p. 405).
[19] O'CONNOR, Vivienne. *Common law and civil law traditions.* INPROL - International Network to Promote the Rule of Law, Mar./2012, p. 13-4.
[20] FERRAZ JR., Tercio Sampaio. *Introduction to the study of Law.* 4. ed. São Paulo: Atlas, 2007, p. 244.

Continental Law of the Romanistic tradition (*civil law*), however, especially after the French Revolution, judges began to be seen as supporters of the Ancien Régime, which gave them contours of social distrust. That is why, in the post-revolutionary context, an attempt was made to limit their power, so that they would restrict themselves to applying the law codified by the people's representatives in Parliament.[21]

This does not mean that jurisprudence does not have relevance in codified law. The principle of legality is the structuring basis of the *civil law system*, but the jurisprudential understanding, especially the settled one, enables the standardization and constancy of judicial interpretations, which do not innovate the law, but guide its meaning.

And this does not change when we talk about binding precedents and uniformity of the jurisprudence of the Courts, [22] since, in the *civil law tradition*, the law precedes the judicial decision, and the latter is only based on the application of the rule to concrete cases, through the interpretative exercise of the judge. In other words: "law and jurisprudence have a different nature, being linked to different institutions, and referring to different chronological events".[23]

In short, it can be seen that, while in *common law* jurisprudence is part of the historical formation of law, in *civil law* its role is to shape the established law, that is, interpretative guidance on the meaning and scope of the legal norms affirmed by the legislator.

3.1 THE ROLE OF JURISPRUDENCE AND PRECEDENTS IN BRAZIL

Judicial precedents can be conceptualized as any res judicata, or court decision, that can be considered an example or argument of authority for other identical or similar cases that succeed it, or for simular questions of law.[24]

In Brazil, observing precedents is a way to standardize interpretation, aiming to provide legal certainty to those under jurisdiction. However, precedents, unlike laws, do not originally innovate in the legal order, relying on the aforementioned limited power of normative creation of judicial decisions, from which the expansive capacity to regulate behavior is not extracted.[25]

---

[21] Idem, p. 244-5.
[22] Cf. CPC-15, "Art. 926. Courts must standardize their jurisprudence and keep it stable, complete and coherent. Paragraph 1. In the manner established and according to the assumptions set forth in the internal regulations, the courts shall issue summary statements corresponding to their dominant jurisprudence. Paragraph 2. When issuing precedent statements, the courts must stick to the factual circumstances of the precedents that motivated their creation."
[23] MANCUSO, Rodolfo de Camargo. *Brazilian system of precedents.* 2. ed. São Paulo: Revista dos Tribunais, 2016, p. 79.
[24] Definition contained in BLACK, Henry Campbell. *Black's Law Dictionary.* 6. ed. Minnesota: West Publishing Co, 1991, p. 814. "A 'precedent' is an adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law".
[25] RAMOS, Elival da Silva. *Judicial activism – Dogmatic parameters.* São Paulo: Saraiva, 2010, p. 104-5.

The enlightening considerations of the English judge Lord Radcliffe on the subject are quoted:

> (...) the judge may well strive for the strictest adherence to the principle of strictly respecting precedents; He may well conclude his own day's work every afternoon in the conviction that he has said nothing or decided except in perfect accordance with what his predecessors said or decided before him. But even so, when he repeats the same words as his predecessors, they assume in his mouth a materially different meaning, for the simple fact that the man of the twentieth century does not have the power to speak with the same tone the inflection of the man of the seventeenth, eighteenth or nineteenth century. the referential situation is different; and whatever the judge's intention, the sacred words of authority become, when repeated in his language, coins of new coinage. In this limited sense, it can well be said that time uses us all as instruments of innovation.[26]

The excerpt, although extracted from the doctrine of the application of judicial precedents in the *common law*, also has applicability in systems of legislated law, such as ours.

The principle *stare decisis et non quieta movere*, or, simply, *stare decisis*, requires that the precedents of the higher courts be followed by all judges. This is what, in the *common law*, gives stability and security to the system. In *civil law*, on the other hand, although the law plays the role of insurer of the legal system, the legal system provides for instruments that intensify the degree of isonomy in the treatment of those under jurisdiction and provide for the guidance of judges. For example, the precedents (persuasive and binding), the judgments of general repercussion, the judgments of repetitive demands for the uniformity of jurisprudence, and the jurisprudence itself, properly speaking.[27]

But if the Judiciary imposes the duty of compliance with the Constitution and the laws, as we have already clarified, and if its creative activity is limited to the parameters outlined by the established legal order, it is not appropriate to apply the *stare decisis principle* to our system. This is because, although it is *desirable* to seek uniformity in the interpretation of laws, there is no way to impose the cogent observance of watertight precedents, under

---

[26] RADCLIFFE, Cyril John. *Not in feather beds: some collected papers.* London: H. Hamilton, 1968, p. 271, *apud* CAPPELLETTI, Mauro. *Legislator judges?* Porto Alegre: Sergio Antonio Fabris, 1993, p. 23.

[27] "Extensively, this is said to designate the set of decisions on the same subject or the collection of decisions of a court. (...) Thus, jurisprudence is not formed in isolation, that is, by isolated decisions. It is necessary that it be established by successive and uniform decisions, constituting a creative source of Law and producing a true *jus novum.* It is necessary that, by *habit*, the interpretation and explanation of the laws come to be formed. The Romans always regarded it as the source of law, calling it *auctoritas rerum perpetuo similiter judicatorum*, although Justinian advised against giving it exaggerated authority, *cum non exemplis sed legibus judicandum sit.* In fact, it is established today that jurisprudence only binds the judged species, not being, properly, a source of Law" (SILVA, De Plácido e. *Legal vocabulary.* Rio de Janeiro: Forense, 2008, p. 809).

penalty of distorting the main characteristic of our legislated Law, which is not of jurisprudential formation, but legal.

There is no denying, however, that the Brazilian procedural system has increasingly aimed at the adequate grounding of judicial decisions that do not follow precedents, and the modulation of the effects of decisions that incorporate a new understanding that will surpass the previous one[28].

In this vein, article 489, paragraph 1, of the Code of Civil Procedure, expresses well the dissonance of our system with the principle of *stare decisis*: although the rule, at first, encourages the judge to stick to existing precedents, on the other hand it also opens room for the judge to stop following them, but if he does, he must adequately substantiate its decision, justifying the reason why the precedents invoked by the party do not apply to the specific case, or stating the reasons for overcoming that understanding. This margin of freedom is not given to judges in rigid systems of *stare decisis*, in which only the same Court that produced the precedent can change it or not apply it.

In any case, precedents and jurisprudence have an unequivocal role of relevance in our Law, which was affirmed in article 927 of the CPC/15,[29] which, despite critical voices,[30] must be applied within the limits set forth herein.

4 REVISION AND OVERCOMING OF PRECEDENTS

Let us use the *common law* system again to understand contours of *overruling* also in our codified system.

In the *common law* tradition, law develops through the creation and review of precedents by the courts. There are two main ways for the review to occur: the most typical is the so-called *distinguishing*, whereby the court agrees to uphold the previous precedent

[28] CPC/15, "Art. 489, §1. Any judicial decision, whether interlocutory, sentence or ruling, is not considered to be grounded if: VI - fails to follow the statement of precedent, jurisprudence or precedent invoked by the party, without demonstrating the existence of a distinction in the case under trial or the overcoming of the understanding".

[29] CPC/15, "Art. 927. Judges and courts shall observe: I – the decisions of the Federal Supreme Court in concentrated control of constitutionality; II – the statements of binding precedents; III – judgments in an incident of assumption of jurisdiction or resolution of repetitive claims in judgment of extraordinary and special repetitive appeals; IV – the statements of the precedents of the Federal Supreme Court in constitutional matters and of the Superior Court of Justice in infra-constitutional matters; V – the orientation of the plenary or the special body to which they are linked".

[30] "The normative text imperatively imposes on judges and courts to comply with and apply the precepts listed therein. (...). Only in the case of the binding precedent, the STF has constitutional competence to establish precepts of a general nature. As this is an exceptional situation – the Judiciary exercising a *typical function* of the Legislative Branch – the authorization must be expressed in the constitutional text and, moreover, it is interpreted restrictively, like any precept of exception. (...) The objective sought by CPC 927 needs to be authorized by the FC. As there was no modification of the Federal Constitution to allow the Judiciary to legislate, as due process was not obeyed, the legitimacy of this institute provided for in the commented text cannot be affirmed. (...) Here, the easiest but unconstitutional path was chosen" (NERY JUNIOR, Nelson; NERY, Rosa Maria de Andrade. *Comments on the Code of Civil Procedure.* São Paulo: Revista dos Tribunais, 2015, p. 1837).

but limits the scope of its application by establishing a new rule of judgment for the circumstances and hypotheses in relation to which the old precedent will not apply. The second and less typical form of revision of the jurisprudential understanding occurs with *overruling*, through which the court replaces an old precedent with a new one, extirpating the previous understanding from any new scope of incidence.[31]

Even in systems of *civil law tradition,* in which the meaning of the positive legal norm is given by the interpreter, the higher courts have an undeniable nomophilic function, that is, they are oriented to maintain the integrity of the law, standardizing the application of laws. And such activity is relevant when the courts are faced with general legal clauses and indeterminate legal concepts, occasions in which the jurisprudence that delimits their contours becomes the primary source of law, alongside the law itself.

However, it cannot be denied that the dynamics of Law and social relations prevent the normative text from maintaining watertight interpretations. Therefore, despite the fact that the current Brazilian Code of Civil Procedure advocates the uniformity of jurisprudence, it is common for the courts, in the midst of such legal dynamism, to change understandings once considered pacified or prevalent.

In theory, *overruling* can be both expressed and tacit. However, the tacit route, in Brazil, does not seem to be in line with the constitutional duty to state reasons for judicial decisions (article 93, IX, of the FC/88), nor with the high degree of argumentation that the current Code of Civil Procedure imposes for the exercise of jurisdictional argumentation (article 927, paragraph 4, of the CPC/15).

In addition, *overruling* can occur diffusely, when the court changes its previous jurisprudence based on a new case that comes before it, or in a concentrated manner – a situation in which an autonomous procedure is instituted that is intended to reexamine the previously established understanding.

In our Law, the formal assumptions of *overruling* are competence and reasoning. As for the former, unlike the *distinguishing technique*, for which there is no judicial hierarchy between the body issuing the *ratio decidendi* and the one that renders the decision that makes the distinction, in *overruling* the competence to overcome the previous legal thesis falls on the same court that had produced it. With regard to the duty to state reasons, the non-compliance with the criteria contained in article 927, I to V, of the CPC/2015, and the failure to demonstrate the distinction in the case under trial, or the overcoming of the

[31] SHLEIFER, Andrei; GENNAIOLIA, Nicola. Overruling and the instability of law. In: *Journal of Comparative Economics* 35 (2007), 309–328, p. 310.

understanding, constitutes a hypothesis of nullity, under the terms of article 1,022, sole paragraph, item II, of the CPC/2015.[32]

As for the material assumptions, the overcoming of a legal thesis requires the demonstration that the previous understanding is now contradictory, outdated, obsolete in the face of legal mutations, or even mistaken. Legitimately valid *overruling* must therefore be a consequence of a prior erosion of the social and systemic congruence of the precedent that will be overcome.

The problem arises, however, both in *civil law* and *common law* translation systems, when the jurisprudential change occurs by *overruling* not guided by pure legal criteria, but by political or personal convictions of the judges who make up the judicial courts. When judges change precedents based on preferences guided by factors external to the interpretative activity itself (social and political pressures, personal values, ideologies, etc.), especially in cases involving polarized valuations, there are risks of volatility and exegetical unpredictability that leads to a loss of efficiency of the system and crises resulting from the legal uncertainty that can be caused. with a consequent lack of confidence in the Judiciary.[33]

4.1 IMPERATIVES OF LEGAL CERTAINTY AND PROTECTION OF LEGITIMATE EXPECTATIONS IN THE MODULATION OF THE EFFECTS OF *OVERRULING*

Every Rule of Law is only characterized as such if, in its relations with the people, it submits itself to a regime of Law that encompasses both the norms that guarantee the citizens and those that propel the achievement of the ends of government. In both hypotheses, the expected effect is to limit the State's discretion.

Such a structure is conceived in favor of the rights of society, so that each individual can avail himself of instruments that allow the defense of his interests against the abuses of public authorities. This differs, however, from merely legalistic States, such as those that, despite being based on a formal normative order, do not necessarily erect norms that limit the power of the State.[34]

The idea is well summarized by Sérgio Resende de Barros, who highlights the following:

> Thus, inspired by Carré de Malberg, one can and should distinguish the rule of law from the state of legality. What he called the "legal" State today can be called the State

[32] GOMES, Rodolfo Perini. Prospective overruling as a rule – Legal (In)certainty in the event of a jurisprudential turn. In: *Journal of Doctrine and Jurisprudence.* 55. Brasília. 111 (1), p. 28-45, Jul-Dec 2019, p. 7.
[33] Idem, p. 311.
[34] MALBERG, R. Carré de. *Teoría general del Estado*. Trans. to the Spanish of José Lión Depetre. Mexico: Fondo de Cultura Económica, 2001, p. 449.

> of legality: degeneration of the Rule of Law, which jeopardizes the fair performance of the law in the enunciation and concretion of social values as individual, collective, diffuse rights. In the mere State of Legality, the law is edited and applied without taking into account the result, that is, without considering whether it results in an unjust oppression of rights. Legalism prevails, which is the most subtle form of authoritarianism, in which the authoritarian spirit nestles and disguises itself in the law itself. The legislative process meets the political convenience of the powerful of the moment, when it is not this in persona who issues the norm provisionally.[35]

Therefore, from the idea of the Rule of Law, the presence of the essential elements for its characterization emerges: legal certainty, separation of powers, limitation of power by a system of checks and balances, guarantee of the fundamental rights of the human person and democratic regime.[36]

Legal certainty, which is of interest to this study, can be verified based on criteria of predictability and stability of the Law. It is necessary for the "protection of subjective rights, in the face of the formal mutations of the established law, especially in the face of the succession of laws over time and the need to ensure the stability of acquired rights".[37]

The consequences of legal certainty are, among others, the stability of laws and the rule of their non-retroactivity (except in the hypotheses admitted in Law), the legal predictability of state behavior, the acquired right, the perfect legal act and res judicata.[38] Such duties of predictability, stability and non-retroactivity can also be applied, with the appropriate temperaments, to judicial action, especially when it comes to *overruling*.

From the Explanatory Memorandum of the Preliminary Draft of the Code of Civil Procedure of 2015, there is an excerpt that deserves transcription:

> This is the function and reason for the existence of the higher courts: to render decisions that shape the legal system, objectively considered. (...) Legal certainty is compromised by the abrupt and complete change in the understanding of the courts

---

[35] BARROS, Sérgio Resende de. *Dialectical contribution to constitutionalism.* Campinas: Millennium, 2008, p. 140.

[36] As for purely legalistic states, Marilena Chauí teaches: "It is a society in which laws form weapons to preserve privileges and the best instrument for repression and oppression, never defining rights and duties. In the case of the popular strata, rights are always presented as concessions and grants made by the State, depending on the personal will and discretion of the ruler. A situation that is clearly recognized by the workers when they say that 'justice only exists for the rich' and that it is also part of a diffuse social conscience, as expressed in a well-known saying in the country: 'for friends, everything; for enemies, the law'. As a consequence, it is a society in which laws have always been considered useless, innocuous, made to be violated, never transformed or contested. And where popular transgression is violently repressed and punished, while rape by the great and powerful always remains unpunished" (CHAUÍ, Marilena. *Conformism and resistance.* São Paulo: Brasiliense, 1993, p. 54-5).

[37] SILVA, José Afonso da. Constitution and legal certainty. In ROCHA, Cármen Lúcia Antunes (Coord.). *Constitution and legal certainty: acquired right, perfect legal act and res judicata.* Belo Horizonte: Fórum, 2009, p. 19.

[38] Cf. BARROS, Sérgio Resende de. Non-retroactivity of laws. In BEÇAK, Rubens (Org.); QUINTILIANO, Leonardo David; NIMER, Beatriz Lameira Carriço. *Constitutional Principles*: Contributions in the light of the work of Sérgio Resende de Barros. Belo Horizonte: Arraes, 2018., p. 219.

> on questions of law. (...) But perhaps the most significant changes in the procedural system linked to the objective of harmonizing it with the spirit of the Federal Constitution, are those that concern rules that induce uniformity and stability of jurisprudence. The new Code honors the principle of legal certainty, obviously of a constitutional nature, since it is housed in the folds of the Democratic Rule of Law and aims to protect and preserve people's fair expectations.[39]

As can be seen, the new Code of Civil Procedure prioritizes legal certainty, raising it to the status of "should-be". This principle has a static and timeless purpose (determination vs. knowability) and a dynamic and intertemporal one (predictability vs. calculability).[40]

When talking about a change in jurisprudential understanding (dynamic and intertemporal perspective), the reasoning to achieve legal certainty must start from the assumption that every individual who submits his claims to the Judge-State does so in accordance with the current Law, deducing that he will not be affected by subsequent changes, not even those of a semantic order. It is a state of reliability in the face of a legal system that is expected to be a protector of expectations and a guarantor of stability in the changes that may occur.

Legal certainty does not admit, therefore, any sudden and drastic changes, or very frequent changes in jurisprudence, since the jurisdictional parties need to know in advance the consequences of their actions, so that they can exercise calculability and predict the outcome of their claims.

In view of this, the current Code of Civil Procedure provides, in its article 927, paragraph 3, the possibility of modulating the effects of the change in the dominant jurisprudence of the Federal Supreme Court and the higher courts, or that arising from the judgment of repetitive cases, so that the social interest and legal certainty are met. However, it is silent as to the temporal effectiveness that should be attributed to *overruling* (whether *ex tunc* or *ex nunc*), despite the fact that, in paragraph 4 of the same provision, it is expressed with regard to the need for courts to observe legal certainty, protection of confidence and isonomy.

Although retroactive effectiveness is common to the main contemporary legal systems, its application does not seem to have a place in situations in which compliance with the principle of protection of legitimate expectations is expected, which imposes four basic requirements: (a) basis of trust; (b) reliance on such basis; (c) exercise of said trust in the

[39] BRAZIL. Draft of the Code of Civil Procedure, 2010a, p. 25-27.
[40] GOMES, Rodolfo Perini. Prospective overruling as a rule – Legal (In)certainty in the event of a jurisprudential turn. In: *Journal of Doctrine and Jurisprudence.* 55. Brasília. 111 (1), p. 28-45, Jul-Dec 2019, p. 9.

basis that generated it; and (d) frustration of trust when producing a subsequent and contradictory act of the Public Authority.[41]

The basis of trust is always present through legal norms, whether general and abstract, or individual and concrete, which include judicial decisions representative of the settled jurisprudence of the higher courts. The longer the period of effectiveness of the act, the less rigor is required of the basis of trust.

It is also necessary to consider the binding nature and the intention of permanence of the decision, which derive from its formal or material normative force. The precedents listed in the items of article 927 of the CPC/15, for example, despite not having formal binding force, have it in the material sphere as a result of their content or the body that issued them (which is indisputable when derived from higher courts). Therefore, even these decisions without formal binding force can indicate an idea of permanence or low probability of change, creating a "qualified basis of trust".[42]

To this basis of trust is added the trust in such a basis, which can be translated into the very authority of res judicata of decisions on the merits rendered by the higher courts. In view of this, when the defendant, based on such trust, exercises an act of disposition of law and, when judged, is faced with a change in the jurisprudential understanding that may harm him, the frustration of trust becomes evident, in the face of the subsequent and contradictory act of the Judiciary.

In view of this, the change in the jurisprudential understanding previously adopted and the option for a new legal thesis, in many situations, should not retroact. The first prerequisite for the modulation of the effects of *overruling* must be, therefore, the protection of the individual's confidence in the acts of the State: the previous jurisprudence must protect all those who acquired rights, practiced legal transactions and, in general, planned their conduct at the time of that guidance.[43]

When there is a change in firm jurisprudence that is not summarized or imprinted in a binding precedent, it must be verified whether there was convergence of understanding in a certain sense before the changes promoted by the court. In this case, the courts must modify the change that previously existed, which may generate the need to modulate the effects of

[41] ÁVILA, Humberto. *Teoria da segurança jurídica*. 3. ed. São Paulo: Malheiros, 2014, p. 375.
[42] Idem, p. 498-499.
[43] ALVIM, Teresa Arruda; MONNERAT, Fábio Victor da Fonte. *Modulation: how, at what time and by whom?* Available at: <https://www.migalhas.com.br/arquivos/2021/2/0a7cb742497b59_modulacaocomo,emquemomentoepor.pdf>. Accessed on 11/30/2024.

the new guidance, with a view to protecting those who legitimately relied on the previous jurisprudential direction that was consolidated.[44]

Furthermore, if the Court indicates a possible change in its understanding, there will also be no violation of the principle of protection of confidence. This is what makes the *obtain dictum*, or the declaration of unsuccessful vote, relevant instruments for the indication of a probable future change in the court's understanding. Thus, when the court signals (*signaling technique*) in this sense, this alert is an indication that the current precedent may be in the process of being overcome, and that the jurisdictional parties should prepare for the coming changes.[45]

In any case, the overcoming of consolidated jurisprudential understandings should always be viewed with caution. When the *overruling* arises from the need to correct an error that has been identified in the previous jurisprudential guidance, it would make sense for the effects of the new understanding to be retroactive. But in cases where the precedent no longer adapts to the social reality, or in cases of systemic incongruity, it is necessary to try to prevent the jurisdictional parties who have acted in accordance with the prevailing orientation until then from being surprised by the retroactivity of a new understanding in a different sense.[46]

Therefore, the reliance on previous precedents may justify the court adopting prospective effects to the new understanding, which is called *prospective overruling.*

The modulation of effects, in itself, should not be part of the judgment of overcoming the court's understanding, and it is forbidden to impact on the conclusion that such change is positive or negative, desirable or not. According to Michel Hernane Noronha Pires, "the institute of modulation of effects serves to mitigate the deleterious effects of the change in jurisprudential law, not to legitimize the change".[47] Therefore, modulation refers to the consequences of *overruling*, but is not intended to authorize it.

The practical relevance of such a study is closely linked not only to the role to be played by the judges, but also to the performance of the parties so that the overcoming of a jurisprudential understanding is achieved. An example of this is the admissibility of special and extraordinary appeals. Certainly, our law provides that the lower court denies the continuation of such appeals when they confront understandings signed in the context of

[44] Idem, p. 4.
[45] DIDIER JR., Fredie; BRAGA, Paula Sarno; OLIVEIRA, Rafael Alexandria de. *Civil Procedural Law Course:* theory of evidence, evidentiary law, evidentiary actions, decision, precedent, res judicata and anticipation of the effects of guardianship. 10. ed. Salvador: JusPodivm, 2015. v. 2, p. 505.
[46] ALVIM, Teresa Arruda. *Modulation in the alteration of firm jurisprudence or binding precedents*. São Paulo: Thomson Reuters Brasil, 2024. RB-6.1. E-book. Available at: <https://next-proview.thomsonreuters.com/title>.
[47] PIRES, Michel Hernane Noronha. *The overcoming of binding precedents.* Curitiba: Editora Direito Contemporâneo, 2023, p. 163.

general repercussion or in repetitive appeals (CPC/15, art. 1.030, I, "b"). However, if such appeals are postulating, in an appropriate manner, the overcoming of the consolidated understanding, then it seems that there is no legitimacy for the lower court to deny them follow-up, given that only the higher courts could do so.[48]

In practice, therefore, the prospection or retroactivity of the effects of a decision that accepts the thesis of overcoming a consolidated understanding should always be based on the criteria of trust and legal certainty outlined herein.

4.2 *PROSPECTIVE OVERRULING* IN THE CASE LAW OF THE SUPREME COURT AND THE SUPERIOR COURT OF JUSTICE

There are significant judgments of the STF and the STJ in which the courts chose to adopt prospective effects to overcome previous understandings. Within the scope of the Supreme Court, this may occur, for example, in some cases of constitutional mutations[49] that may involve changes in the interpretation of provisions of the Constitution. But not only in this field is the prospection of effects admitted.

In judging RE 637.485[50], in 2013, which dealt with the change in the interpretation of article 14, paragraph 5, of the CF/88, promoted by the TSE, the STF established the following thesis of general repercussion:

> The decisions of the Superior Electoral Court that, in the course of the electoral process or soon after its closure, imply a change in jurisprudence, do not have immediate applicability to the specific case and only will be effective over other cases in the subsequent electoral election.

---

[48] "It should be noted that the understanding of what constitutes the overcoming judgment brings an *argumentative burden* not only to the judge, but also to the parties. In this sense, the grounds for the special or extraordinary appeal that turns against a binding precedent stating only that it disagrees with it, without presenting any reason that could effectively lead to the overcoming of the understanding, is deficient. To the appeal that only claims to disagree with the binding precedent, the fate is, in fact, the denial of follow-up, under the terms of article 1,030, I, 'b', of the CPC. However, in the case of an appeal that has discharged the burden of presenting reasons that could lead to the overcoming of the precedent, its destination is to be referred to the Superior Court, so that it can exercise the judgment of overcoming. It is the only court, it should be repeated, that it has the competence to do so" (PIRES, Michel Hernane Noronha. *The overcoming of binding precedents...* op. cit., p. 164).

[49] The mutations promoted by judicial interpretation presuppose social mutability and the evolution of political, economic, social and moral values over time. According to Anna Cândida da Cunha Ferraz's notes, constitutional mutation through jurisprudential construction occurs "when it is considered to apply the constitutional norm to situations not expressly provided for in the constitutional text, but which arise from it or emanate from it by logical imperatives or from the constitutional system itself" (FERRAZ, Anna Cândida da Cunha. Informal processes of change of the Constitution. 2. ed. Osasco: EDIFIEO, 2015, p. 129).

[50] STF. RE 637485, Rel. Min. GILMAR MENDES, Full Court, judged on 08-01-2012, ELECTRONIC JUDGMENT GENERAL REPERCUSSION - MERITS DJe-095 DIVULG 05-20-2013 PUBLIC 05-21-2013 RTJ VOL-00227-01 PP-00675.

In RE 631.240[51], decided under the general repercussion regime in 2014, the STF reinterpreted the principle of inalienability of jurisdiction (article 5, XXXV, CF/88), establishing the thesis that, in lawsuits involving social security rights, the citizen's interest in acting is only configured after the rejection of the benefit claimed from the INSS, before which there is no injury or threat to the right. After recognizing a prolonged jurisprudential oscillation on the matter, the court stipulated transitional rules, modulating the effects of the new understanding in a prospective manner, in order to ensure that all the lawsuits that were underway in the country were not immediately affected by *overruling.*

In the STJ, the understanding in the sense of modulating the effects of its decisions is much less frequent than in the STF. An example of this was the judgment of the Motion for Clarification of Divergence in REsp 738.689[52], judged in 2007, in which the recognition of the right to use the IPI premium credit, which was instituted by article 1 of Decree-Law 491/69, was discussed. In this case, Justice Herman Benjamim, who delivered the opinion, pointed out that the understanding that had been consolidated in 2004 was being changed in a different sense, which made him propose the modulation of the temporal effects of the new guidance. To this end, it stated the following:

> (...) also within the scope of the STJ, decisions that alter reiterated jurisprudence, strongly and unexpectedly shaking the expectations of those under jurisdiction, must have weighed the limits of their effects over time, seeking the integrity of the system and the enhancement of legal certainty. The recognition of the 'shadow of legality', resulting from the State's jurisdictional activity, reveals indisputable the need to safeguard the acts performed by taxpayers under the expectation that this was the best interpretation of the law, since it was embodied in a reiterated jurisprudence, in a sense favorable to their claims, by the Court that has the constitutional competence to give the last word on the matter.

It so happens that the Reporting Minister and all the other justices of the First Panel of the STJ in that judgment, with the exception of Justice João Otávio de Noronha, rejected the understanding expressed in such opinion, understanding that it was not up to the STJ to modulate the effects of its decisions that overcame previous understandings.

On the other hand, the Third Section of the STJ has some judgments in which prospective effects were conferred on its *overruling*, having as a *leading case* HC 28.598, in which the following was decided:

---

[51] STF. RE 631240, Rel. Min. ROBERTO BARROSO, Full Court, judged on 09-03-2014, ELECTRONIC JUDGMENT GENERAL REPERCUSSION - MERITS DJe-220 DIVULG 11-07-2014 PUBLIC 11-10-2014 RTJ VOL-00234-01 PP-00220.

[52] STJ. EREsp n. 738.689/PR, Rel. Min. Teori Albino Zavascki, First Section, judged on 6/27/2007, DJ of 10/22/2007, p. 187.

1. In fact, the Federal Supreme Court, based on the plenary judgment of Habeas Corpus No. 83,255/SP (Bulletin No. 328), decided that the appeal period for the Public Prosecutor's Office is counted from the entry of the case on the premises of the Institution. The Superior Court of Justice, in turn, adhered to the new orientation of the Supreme Court.
2. It should not be forgotten, however, that the jurisprudential understanding, until then, long established in the STF and STJ, was precisely in the opposite direction, that is, it was understood that the personal subpoena of the Public Prosecutor's Office was given with the "aware" entered in the records, when effectively delivered to the ministerial body.
3. Thus, it can be seen that the Attorney General, in the 2000s, taking into account the then settled jurisprudence of the Superior Courts, made use of it, filed the appeal within the legal deadline.
4. It could not now be required that the appellant ministerial body be guided differently, as if it could foresee a change in the jurisprudential understanding. This requirement would be unacceptable, as it would be creating an insurmountable obstacle. It is worth saying:
After the party has performed the procedural act, according to the praetorian orientation prevailing at the time, it would be appealed with the non-cognizance of the appeal, when it could no longer react to the change. This would simply translate into summary usurpation of the right to appeal, which cannot exist in a Democratic State of Law, especially if the appellant represents and defends the public interest.
5. Order denied.[53]

It is, as can be seen, a clear example of *prospective overruling.*

5 CONCLUSION

a. The Judiciary exercises its function through the application of the law to concrete cases with the force of definitiveness. In doing so, he always exercises interpretative activity, since even clear laws require interpretation so that they can be applied to the various facts of the phenomenal world.
b. The interpretive activity is not mechanical. Although it can only occur, in systems of legislated law, within the legal frameworks, the application of the rule to the concrete case always presupposes a certain degree of discretionary activity of the judge.
c. Unlike the *common law system*, in which jurisprudence and precedents create the law, in Roman-based systems, such as ours, there is not such a significant integrity to the binding to the understandings of the courts (*stare decisis*). This does not mean, however, that the jurisprudential role is relegated to the background, since the

[53] STJ. HC n. 28.598/MG, Rel. Min. Laurita Vaz, Fifth Panel, judged on 6/14/2005, DJ of 8/1/2005, p. 480.

consolidated understandings of the courts serve to give stability to the interpretation of laws by delimiting their content and scope.

d. The overcoming of consolidated jurisprudential understandings, either by the dynamism of social relations or by the finding of errors as to what the court had previously understood, requires the preservation of imperatives of legal certainty and protection of the legitimate trust that the parties under jurisdiction place in the Judiciary, under penalty of instability and outflow to arbitrariness and injustice.

e. The CPC/2015 brought relevant advances in the study of the matter under consideration, especially by expressly providing for the possibility of modulating the effects of judicial decisions that overcome previously consolidated understandings. The higher courts, in turn, have been increasingly admitting *prospective overruling*, so that there is respect and stability to the social behaviors that have been taken in the validity of the jurisprudence or the precedents superseded, in order to avoid the breakdown of the relationship of trust between citizens and the State, as well as to guarantee to all individuals the exercise of calculability prior to taking actions.

f. To prevent the rule of law from succumbing, rationality must be imprinted on those who have the authority to judge citizens and interpret the law, so that logic, convenience and opportunity must be the vectors for modulating the effects of court decisions that overcome understandings previously expressed.

REFERENCES

Alvim, T. A., & Monnerat, F. V. da F. (s.d.). Modulação: Como, em que momento e por quem? https://www.migalhas.com.br/arquivos/2021/2/0a7cb742497b59_modulacaocomo,emquemomentoepor.pdf

Alvim, T. A. (2024). Modulação na alteração da jurisprudência firme ou de precedentes vinculantes. Thomson Reuters Brasil.

Ávila, H. (2014). Teoria da segurança jurídica (3ª ed.). Malheiros.

Barros, S. R. de. (2008). Contribuição dialética para o constitucionalismo. Millennium.

Barros, S. R. de. (2018). Irretroatividade das leis. In R. Beçak (Org.), L. D. Quintiliano, & B. L. C. Nimer (Eds.), Princípios constitucionais: Contribuições à luz da obra de Sérgio Resende de Barros. Arraes.

Black, H. C. (1991). Black's law dictionary (6ª ed.). West Publishing Co.

Carreiro, C. H. P. (1976). A prática do direito. In Introdução à ciência do direito. Rio.

Chauí, M. (1993). Conformismo e resistência. Brasiliense.

Didier Jr., F., Braga, P. S., & Oliveira, R. A. de. (2015). Curso de direito processual civil: Teoria da prova, direito probatório, ações probatórias, decisão, precedente, coisa julgada e antecipação dos efeitos da tutela (10ª ed., Vol. 2). JusPodivm.

Di Pietro, M. S. Z. (2007). Discricionariedade técnica e discricionariedade administrativa. Revista Brasileira de Direito Público, 17, 75–96.

Ferraz, A. C. da C. (2015). Processos informais de mudança da Constituição (2ª ed.). EDIFIEO.

Ferraz Jr., T. S. (2007). Introdução ao estudo do Direito (4ª ed.). Atlas.

Glenn, H. P. (2004). Legal traditions of the world (2ª ed.). Oxford University Press.

Gomes, R. P. (2019). Superação prospectiva (prospective overruling) como regra – (In)Segurança jurídica em caso de virada jurisprudencial. Revista de Doutrina e Jurisprudência, 55(111), 28–45.

Grau, E. R. (2006). Ensaio e discurso sobre a interpretação/aplicação do direito (4ª ed.). Malheiros.

Kelsen, H. (1985). Teoria pura do Direito. Martins Fontes.

Malberg, R. C. de. (2001). Teoría general del Estado (J. L. Depetre, Trad.). Fondo de Cultura Económica.

Mancuso, R. de C. (2016). Sistema brasileiro de precedentes (2ª ed.). Revista dos Tribunais.

Maximiliano, C. (2011). Hermenêutica e aplicação do direito (20ª ed.). Forense.

Merryman, J. H. (1985). The civil law tradition: An introduction to the legal systems of Western Europe and Latin America (2ª ed.). Stanford University Press.

Montoro, A. F. (2005). Introdução à ciência do Direito (26ª ed.). Revista dos Tribunais.

Nery Junior, N., & Nery, R. M. de A. (2015). Comentários ao Código de Processo Civil. Revista dos Tribunais.

O'Connor, V. (2012, março). Common law and civil law traditions. INPROL - International Network to Promote the Rule of Law.

Pires, M. H. N. (2023). A superação dos precedentes vinculantes. Editora Direito Contemporâneo.

Radcliffe, C. J. (1968). Not in feather beds: Some collected papers. H. Hamilton. (Citado em Cappelletti, M. (1993). Juízes legisladores? Sergio Antonio Fabris.)

Ramos, E. da S. (2010). Ativismo judicial – Parâmetros dogmáticos. Saraiva.

Shleifer, A., & Gennaioli, N. (2007). Overruling and the instability of law. Journal of Comparative Economics, 35, 309–328.

Silva, D. P. e. (2008). Vocabulário jurídico. Forense.

Silva, J. A. da. (2009). Constituição e segurança jurídica. In C. L. A. Rocha (Coord.), Constituição e segurança jurídica: Direito adquirido, ato jurídico perfeito e coisa julgada. Fórum.

Silveira, A. (1968). O "in claris cessat interpretatio" e seu declínio. In Hermenêutica no direito brasileiro (Vol. 1). Revista dos Tribunais.