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Uniformization of precedents: for a materialization of the process in Habermasian pluralist communication

Uniformização de precedentes: para uma materialização do processo na comunicação pluralista habermasiana

Grace Ladeira Garbaccio[1]
Gonçalo Nicolau Cerqueira Sopas de Melo Bandeira[2]
Bruno Ribeiro Marques[1]
[1]Brazilian Institute of Education, Development and Research, Brasília, Brazil.
[2]Higher School of Management, Barcelos, Portugal.

Abstract: This article analyzes the judiciary system's tendency to unify multiple jurisprudences and eventual conflicts with cultural diversity. The judiciary system's interpretation of laws is interpreted with skepticism, as they might result in derogation of the legislative prerogatives. Critics have gained strength from the actual procedure code's disposals that made compulsory judiciaries pronounce in state and national levels. The present study investigates how judicial understandings of laws could provide voices to the diversity of cases that might eventually be submitted to the Courts' analyses. The broad participation of the *amicus curiae* in each biding case along with the full applicability of atypical procedural agreements should be conceived as an indispensable condition to give plain social validity and maximum effectiveness to the judiciary pronunciation, especially whenever regarding the most fundamentals concepts of the democratic archetypes resembling the main ideas forecasted by the second generation of the Frankfurt Philosophical School, among whom Jürgen Habermas is considered as the field's most influential author. The present study uses a dialect-inductive methodology to confirm the hypothesis that both state and superior Courts must analyze various juridical divergent theses so that the bindings might not lack social effectiveness, especially by using the amicus curiae's opinion thoroughly.

Keywords: Standardization of jurisprudence. Civil procedure code. Legal security. Cultural multiplicity.

Resumo: Este artigo analisa a tendência unificadora dos entendimentos judiciais e suas interrelações com a multiplicidade cultural. Questiona-se se a pacificação de entendimentos por uma Corte não acabaria por subverter os arquétipos sensíveis do pacto democrático de direito. O tema ganha relevo, sobretudo, face às previsões legislativas processualistas que passaram a conferir efeito vinculante aos enunciados proferidos pelo poder judiciário, quer a nível estadual, quer nacional. Desta feita, se os entendimentos firmados em precedentes e demandas repetitivas passaram a ter eficácia *erga omnes* com o intuito de se conferir segurança jurídica e otimização às causas que afogam o judiciário pátrio, não há como não se pôr em perspectiva eventuais efeitos deletérios reflexos desses pronunciamentos. O presente estudo investiga as formas com as pacificações de teses jurídicas poderiam se adequar à multiplicidade de demandas singulares que chegariam à apreciação colegiada. A ampla participação do *amicus curiae* nos firmamentos de teses jurisprudenciais e o uso majorado de acordos processuais atípicos seriam condições irrenunciáveis a se conferir validade e eficácia democrática-social aos pronunciamentos exarados pelo poder judiciário, em simetria, aos modelos comunicativos propostos pela segunda geração reformista da Escola de Frankfurt, notadamente, por Jürgen Habermas. A pesquisa parte da metodologia indutiva-dialética, com a qual objetiva-se investigar como as novas redações processualistas poderiam conferir vozes à multiplicidade de questões submetidas à deliberação colegiada.

Palavras-chave: Uniformização jurisprudencial. Novo Código de Processo Civil. Segurança Jurídica. Multiplicidade Cultural.

1 INTRODUCTION

National order is endowed with several vague expressions. Terms such as the social functions of the contract, the social process of property, diffuse interests, and the supremacy of the public interest end up awakening voices that are more dissident than confluent in national doctrine and jurisprudence.

Allied to this scenario, the reluctance of the derived legislator to regulate constitutional provisions, such as the right to go on strike for public servants, has conferred particular social apprecision to what

has been ordinarily conceived as judicial activism, which is a response from the judiciary to incremental social demands.

However, these pronunciations from the judiciary power are seen with a certain relativism of the independence of the three constitutional powers. Therefore, the Judiciary Court seems to act as the *ultimate ratio* of citizens for granting constitutional rights that overall lacked regulation for more than 30 years.

This increase in jurisprudence pronouncements by the judiciary of the 27 (twenty-seven) federated entities are frequently seen altogether incompatible among each other. This scenario is further aggravated exponentially due to several legislative shared competencies that have been equally delegated to all 27 Brazilian federation entities, such as issues regarding the environment, culture, and leisure.

Consequently, it remains evident that this diversity of interpretations ends by subverting the foundations of the so-called Democratic State of Law. So, it remains unclear which judicial thesis judges ought to apply in cases submitted to them.

In these terms, there is no doubt that a minimum of interpretive homogeneity should be attributed to the different legal interpretations, most of whom tend to be discrepant one from another altogether.

To provide some solutions to the diversity of interpretation, the actual civil law procedure code expressly provided, in its item II of article 976, a disposal that prescribes that the applicability of the institute of the incident of the resolution shall be appropriate to give homogeneity to the judicial system regarding repetitive demands that tend to be dissident and whose permanence in the judiciary field could cause: "(...) II - the risk of offense to isonomy and legal security".

Therefore, the new procedural code provided several judiciary techniques in order to harmonize the country's multiple divergent jurisprudence, such as a) the incidents of repetitive demands as well as b) the incident of assumptions of competencies, along with c) extraordinary appealing to supreme courts with repetitive demands.

The legislator, thus, conferred legal certainty on the diversity of jurisprudence understandings as it had already been foreseen by the original legislator in the Federal Constitution of 1988, in its § 1, art. 103-A: "The summary will aim to provide uniformity and validity as well as uniform interpretation, and effectiveness of certain rules, about which there might have a current controversy between judicial bodies or between them and the public administration that leads to serious legal uncertainty and relevant multiplication of cases on identical issues."

In the case of appeals submitted to higher courts, the defedant or author is not even required to stay in the suit, so even after the party has abandoned the lawsuit, the judicial thesis must be established with a clear relativization of the conditions of action (in the archetypes forecasted by Von Bülow) and inevitably relativizing the principle of the *inertia* of the judiciary, thus resulting in several inescapable critics among major proceduralists.

However, this jurisprudential uniformity hides another latent instrumentality: relieve the number of suits that overcharges the judiciary, especially those multiple demands that could be judged after the fixation of a unique thesis that ought to be applied to all similar cases under the same discussion.

Therefore, unlike the opt-in and opt-out systems forecast in the common law system, the Brazilian legislator did not, at first, provide forms of similar agglutination demands in a single collective process or suit. Consequently, class actions remain the exceptionality in the Brazilian legal system apart from its widespread use in other judicial procedures such as common-law procedures.

As a result, in the national legal system, several procedural instruments, such as connection and contingency methods, resulted in many dispersions for multiple cases submitted to the same Court that could be better judged within a single paradigmatic case presented to a unique judgment and whose decision shall be applied to similar issues within the same Court.

In other words, many others would be extinguished with a single paradigmatic case as the juridical theses firmed must then be applied to all other similar cases; cases that had been waiting for the judgment of the paradigmatic case and whose understanding will then be used for several other similar causes.

In response to the diversity of almost identical actions, the secondary legislator gave binding universal applicability to the paradigm cases they judged so as to avoid multiple discrepant judgments.

Although, on the one hand, the means of jurisprudential unification serve as specific relief of the judiciary demand, on the other hand, they maintain the Judiciary power in a position that was supposed to be placed by the positive legislator, with a clear relativization of the separation of powers, hence putting into perspective the plural participation of all members of society in the decisions to whom they might be interconnected.

The problem, therefore, occurs in the form of reconciling the two dissonant institutes: on the one hand, the relief of public power through repetitive judgments and, on the other hand, the democratic plurality of citizens' expressions of thought in suits that influence their lives.

In these terms, this study starts from a dialectical methodology to investigate how this inevitable incompatibility of the mentioned institues has been discussed in academia and the forums of proceduralists, with particular attention to the method that might allow the judiciary power to provide voices to multiple singularities' point of view required in most democracies in suits that inevitably influence several peoples' lives.

To do so, the refutable hypothesis of the study is that the participation of the *amicus curiae* in incidents and binding precedents should provide a vast debate arena in which all the specificities of each cause can be duly weighed under penalty of offending the democratic pact.

In the same way, it will be verified how the procedural pacts such as endo and Exo procedural agreements would impose a duty of

the judiciary to behave in a more collaborative way towards the parties to permit themselves to figure out the most appropriate solution for their specific cases with more autonomy.

The main idea is to maximize the discussions through diverse points of view to allow parties to find by themselves the best solution for each specific case and by enabling multiple theses to be discussed within the judiciary so that the most plausible one shall be selected and applied to several other issues that share the same discussion.

Simplifying the issue through the debate of several specialist, the judiciary power will have more arguments from multiple points of view to fix better the thesis that will be applied to several other cases with similar discussion and under debate, in the exact terms proposed by the second reformist current of the Frankfurt school, which is also prescribed by Jüngen Habermas.

2 STANDARDIZATION OF JURISPRUDENCE: DIALECTICAL DIALOGUE IN THE FRAMEWORK OF BINDING JURISPRUDENCE THESES

The repetitive demandable incidents (IRDR) are institutes provided in both arts. 976 and 977 of the current Civil Procedure Code, whose objective is to standardize the jurisprudence of the Courts of Justice with *ultra-parts* effectiveness (and even *erga omnes* enforceability), capable, thus, of radiating binding effects on all other judgments subordinated to the respective Court, granting legal certainty to similar causes, under the terms provided in § 1, of art. 103-A, of the Federal Constitution of 1988.

The request for the initiation of the incident must be addressed to the President of the Court of Justice, which can be proposed either by the judge or a member of the *ad quem* Court, ex officio, or by either party, through a specific petition, by the Public Ministry and even by Public Defender's Office (Oliveira, 2016, p. 68).

The role of the Public Prosecutor's Office is broader, as it acts as a *custus legis* in this case. However, the performance of the Public Defender's Office remains conditioned to the thematic related to its institutional functions; hence, the participation of public defendants must have some relation to the rights of the incapables or low-sufficient people to whom it is institutionally obligated to safeguard (Marioni, 2016, p. 81).

It aims, therefore, "to prevent unequal jurisdictional treatment. The incident mentioned above aims to establish, in a qualified collegiate discussion, with the multilateralization of the contradictory, the examination of all the determining legal arguments" from several theses and which one is to be established and applied to further cases (Dresch; Freitas, 2017, p. 3).

The various theses and arguments must then be debated as widely as possible, resulting in a final objective to refine a position that will remain compulsory on all other courts and jurisdictions. Therefore, the eventual withdrawal of the parties does not prevent the extension of the act, in which case the Public Prosecutor's Office will have to assume the ulterior titularity of the lawsuit.

However, as questions of law are not dissociable from factual questions, the doctrine converges that it would not be up to the Court to analyze superficial discussions – *obiter dictum* -, but only to give voices to the various legal theses. In these terms, Statement n. 305, from the Permanent Forum of Civil Proceduralists, concluded that: "in the judgment of repetitive cases, the court will analyze all the arguments against and in favor of the thesis to be discussed and established."

There is, therefore, a dialectical instrumentality in the analysis of the conflicting legal theses to be debated in the incident of repetitive demand to provide a more comprehensive analysis through multiple arguments from anyone that might be directly or indirectly affected by the paradigm case that shall be fixed and its further compulsory application to all similar claims under the same circumstances.

Therefore, there will not br specific parties in this incident, but rather, several divergent legal theses debated within a collegiate in which a specific point of view will win, which is why participation in this process occurs, above all, through the *amicus curiae* intervention.

This is the reason why Sofia Temer appoints as leaders (and not parties) all subjects, with knowledge in issues like a) legal, b) doctrinal, or c) jurisprudence, capable of providing the Court the best understandings to reach a dominant position to be adopted in the suit under discussion and that may become obligatory and applied to many other similar cases (2016, p. 135; p. 151).

The incident, however, is still the object of countless doctrinal discrepancies. One of the controversial points concerns the reviewing of the decisions through the use of unique or extraordinary appeals with anomalous purpose taken by the Superior Court of Justice (S.T.J.) or even by the Federal Supreme Court (S.T.F.) granting binding effects, at the national level, and then reforming all other theses that some appealing courts had already established. (Marioni, 2016, p. 107).

There are also criticisms about using the technique as a substitute for the formulation of summaries. Most authors understand that the summary would do nothing more than reflecting an overview of the winning legal theses - *ratios decided* -, repeatedly adopted by the respective Court.

On the contrary, there are authors, such as Sofia Temer, who argue that "because [these summaries] only have the function of serving as a synopsis or description of court decisions repeatedly adopted" (2016, p. 215), they should not be confused or interchanged with the precedents which are supposed to fix a juridical thesis to be applied to any other further similar cases.

Despite the author's position, there are no reasons not to use precedents as a basis for summaries, provided that the sentence or Judgment makes an express distinction between the model of the Judgment applied - precedent – or resume and the reasons why a specific precedent might have gained a status of summary, in case, due to its

continuous and established use in many other situations submitted to the Court. In other words, precedents that remain stable for a long time can also become summaries.

The inadequacy between one or the other methods of Judgment must be evident in the decision (summary or precedents), which must be explicit in the decision taken. Otherwise, it will be reformed by the *ad Quem court*, as parties that may argue that the decisions taken might be *cintra petita* or *ultra petita*, so either a summary or a repetitive incident must be explicitly indicated in the final Judgment in order not to cause it to be withdrawn.

The argument gains greater importance, above all, when it comes to terminative decisions (such as the preliminary injunction of the request) in which there is not even a chance for any argumentative answer from the defendant, in a very sumptuous judgment of cognition. In those cases, the judge shall only decide the argument is not plausible due to further conflict with a summary or a precedent that is already fixed or established.

This refusal occurs because any request that contradicts a binding precedent may be, monocratically, dismissed by the judge without even hearing any arguments from the defendant. Moreover, even if there is an appeal, the rapporteur may deny it ex officio based on the precedent already fixed.

It remains clear that the primary intention of the legislator is to interrupt multiple similar issues already in the *ad quo* court and whose non-compliance may give rise to a claim beyond an *ad quem* court to preserve their judgments and the homogeneity of the judiciary pronounces.

Despite both precedents and repetitive jurisprudence having gained binding character, in the recent reforms of the C.P.C., Bruno Dantas and Tereza Arruda Alvim point out the need to differentiate the two judgment techniques: the precedent is embodied in a single case that will serve as a model and whose understanding, signed by the collegiate, must be adopted by all other *ad quo* courts, the

jurisprudence, on the other hand (with *erga omnes* effects) demands several confluent and pacified decisions in the same direction in multiple cases (2016, p. 277).

This time, establishing theses around a question of law (*a ratio decidendi*) in a precedent, this one becomes stable and binding to all other subordinate bodies. However, the Court might review its previous position, even ex-officio, when it proves to be incompatible with the new values adopted by the society as a whole – overruling – or even end up, tacitly, revoked, in case of other express and incompatible legislative manifestation.

Because it has severe legal consequences, Luiz Guilherme Marioni asserts that the *ratio decidenti* would only be obtained when more than half of the votes of a collegiate from a particular court are obtained (2016, p. 105 - 119), moreover, if there is more than one question to be debated, the plenary, or its singular chamber, should deliberate on each case in separate sections.

However, the effects of the incidents have raised several discussions in academia. The first one is pointed out by Luís Gustavo Reis Mundim (2019, p. 335) to whom the uses of binding precedents by judges and courts based on "extra-legal" criteria, saying what is better or worse for society [...] would generate the continuity of judicial solipsism by preventing the parties from participating in the construction of decisions their bidding". This concern is supported by the Forum of Proceduralists, which stipulated that, in incidents, there must be an appreciation of all theses that are or can be argued in Court (Statement nº 305).

Another issue that divides academia concerns the instrumentality of these judgment techniques in Special Courts that deal with a minimum amount of money – common causes. The topic is addressed by authors Renato Luís Dresch and Pedro Augusto Silveira Freitas. According to them, "a controversial issue concerns the admissibility and jurisdiction to establish IRDRs, when [...] they are processed in the sphere of the Special Court" (2017, p. 9). The divergence arises from

the inadmissibility from S.T.J. to reform a decision made by special courts that do not represent a significant amount as to require further pronounces from the superior Courts (Summary n. 203 of the S.T.J.).

It happens because while the S.T.F. has a filter in assessing the causes submitted to it that allows the Supreme Court to accept only cases that might have severe federal controversies, the S.T.J. does not have the same prerogative due to the constitutional commandment that imposes the obligation to standardize national jurisprudential understandings.

Therefore, Summary n. 203 must be interpreted as instrumental in avoiding multiplication of discussions in the already congested S.T.J., originating from discussions of small importance, without any ultra-parties' further interests.

Most authors, however, refutes that, for them, despite dissonant voices in doctrine, the judiciary should be considered a unique and indivisible organ which is governed by a hierarchical system, hence imposing the subjection of IRDR even over the microsystem of special courts apart from the Summary n. 203 of S.T.J. already mentioned. In other words, the amount of money shall not be the unique criterion to judge whether a cause has juridical significance or not.

This last understanding was also confirmed in Statements n. 468 and n. 471 of the Procedural Forums: the "incident of assumption of jurisdiction applies in any kind of court" and "the suspension provided in art. 982, § three must be made with the presence of the Public Prosecutor's Office that must be heard in each case submitted to the discussion."

In the same way, it foreshadows the Statement nº 467. Whenever precedents are fixed, there must be the most extensive and most exhaustive deliberation whenever setting the theses to be applied.

In addition, there would not even be an intercurrent prescription concerning cases that still be waiting for the fixation of the winning theses (Statement n. 452). So, prescription deadlines do not begin for other parties until a final decision prevails and will be soothed and

applied to the cases that had been waiting for the setting of precedent for so long.

Additionally, the system of binding precedents remains mandatory, even at the state level and over subordinate *ad quo* courts (Statement n. 454 c/c n. 456). Therefore, it is necessary to check a more significant margin of dialogue between the parties for the "maturity of the thesis, such as the holding of prior public hearings and the participation of the *amicus curiae* (Statement nº 460) to establish the best thesis to be fixed once and for all".

Furthermore, the legislator did not confer binding effects only for the incident of repetitive demands. Still, it did the same for incidents of assumption of competencies, which occur when the rapporteur assumes the original competence of the *ad quo* court, foreseeing a possible conflict of theses between the fractional bodies of the Court (Abboud; Fernandes, 2018, p. 340-342; Fernandes, 2020, p. 20-22) and therefore fixing the theses even for hypostatical furtherer discussions. The idea is to prevent eventual conflicts among chambers within the same Court before any litigation.

Regarding the theme, the pronouncement of the Permanent Forum of Proceduralist n. 201 has already established that: "in the event of the assumption of competencies the rules provided for in art. 983 and 984 (IDRs) shall be fully applied".

In symmetry, the Forum Statement n. 334 also converged with the majority doctrinal understanding, establishing a preference for IDRs over the assumption of competence. Thus, it is preferable to develop a thesis for a conflict already discussed rather than hypothetical ones such as those seen in incidents of assumptions of competencies.

In addition, IRDR and the assumption of competencies can be demanded in Superior Courts and Supreme Courts in cases called Special and Extraordinary appealing (resource) with IRDR unusual applicability. The idea is to use extraordinarily appealing biding effects at the national level to avoid further divergences among state courts.

The subject was studied by Nicolas Mendonça Coelho Araújo and Hélio Silvio Ourém Campos, for whom, although Courts must send at least two antagonistic cases with different legal reasoning to the STJ, the latter is not bound to such cases. The STJ may order other cases to be sent to it, as well as request from the other State and Federal Courts cases with different legal reasoning for a better understanding of the legal thesis that will prevail. The same logic applies to the STF.

Furthermore, in Special Appeal n. 1,120.295-SP, "the deadline for parties to provide arguments to the court has passed *in albis*, and so the special appeal has been rejected at the origin" (Araújo; Campos, 2012, p. 63), as it was impossible to fix jurisdictional theses without the full participation of parties in the lawsuit, which then demanded other cases to be submitted to the Court to appoint a further jurisdictional interpretation on a specific subject correctly and weighing several points of views, so the most appropriate idea can prevail.

It should be noted that the procedural reforms were not insignificant. The issue is complex from the multicultural social perspective because, in the case of the precedent, a single judgment will bind the whole society, which imposes a burden on the judiciary to give voices to all those who, directly or indirectly, might be affected by the decision to be established.

However, these incidents have been the legislator's response to the diversity of causes submitted to Judgment based on the same discussion or legal interpretation for a system that privileges singular litigation rather than class actions agglutinations.

As already mentioned, the Brazilian legal system did not favor the agglutination of typical demands in a single process like class actions, so reuniting several similar cases in one single Judgment had been the response from the judiciary to provide a more efficient and rapid decision.

In these terms, Kazuo Watanabe (2007, p. 80-83) and Amanda de Araújo Guimarães (2018, p. 419-420) expose that the national order

preferred to privilege atomistic demands to the grouping of needs in a single process – molecular requirements - whose result could not be other than the congestion of the judiciary for issues that share the same request and cause of the demand.

There are several examples to support these authors' point of view, for example: the inflationary replacement of the Collor I and II plans or the non-submission of banks to tax accumulation of PIS/COFIS[1]. These cases demonstrate the number of suits based on the same questionable jurisdiction discussion that should be joined into a single paradigmatic judgment. However, this absence of agglutination of the process is not the common law standard methodology for several cases with the same jurisdiction *ratio*.

Luciano Picoli Gagno and Thiago Felipe Vargas Simões (2018, p. 127) show that the American law system would provide 02 large groups of class actions in its peculiar model. They are forecasted in either Rule 23 (b) (2) and Rule 23 (b) (1) (A) of the Federal Procedural Code (class actions code), that would be used for the cases in which it has intended to grant "injunctive or declaratory measures with the purpose of institutional reforms in social policies [...] or the diffuse claim for indemnities". There would be several similarities between the two hypotheses, which would imply that, in the real world, the demands could fall into one or another forecasted disposal (2018, p. 128) and so multiple cases shall be joined in a single paradigmatic lawsuit.

In any case, the British require explicit delegation of powers to all members to allow the lawsuit to produce *erga omnes* effects (opt-in method). On the other hand, the American methodology is based on the certificate of representative members of parties to which all members ought to be attached. So, in the American model – opt-out system – unless one member uses the prerogative of not being linked

[1] PIS e COFINS: Contribuições Federais para a Seguridade Social sobre o faturamento das empresas/ Federal Contributions to Social Security on company revenues.

to the decision, all members will suffer the pros and ons of the decision to be made.

As a result, special attention has been given to the standard law system's proper representation regarding the whole class's binding effect.

The subject was the object of study by Flávia Hellmeister Clito Fornaciari, who points out the lack of appropriate representation as a reason for modulation of the effects of the Judgment that may not encompass an entire class, but only part of it (2010, p. 48- 57).

The author, for instance, brings the case of *Johnson* v. *Uncle Ben's Inc* (628 F.2d 419), in which a decision on racial segregation by an American company regarding people of color, including both African Americans and Hispanics, ended up being segregated in two separate lawsuits as Hispanics have not been adequately represented, and so the decision made should not affect them.

Therefore, the American judiciary considered that despite the defenses presented in Court by both classes, the Hispanics - Mexicans - had not have been adequately represented, which restricted the binding effect of the case only to part of the litigating classes (the people of color) who were adequately represented in the lawsuit.

At the same time, the German-Austrian system provided an alternative. In that system, the beginning of the suit presupposes the class's interest (*Verbandsklagen*[2]). The model is based on one of the private initiative actions that can be started only by the association of people. Parties must then be considered tacitly represented (Moreira, 1972, p. 78).

However, it was not the option of the national legislator that favored a dispersion of causes rather than their agglutination in class actions, as seen in most common law systems. As demonstrated, in the Judgment of the incident, there will not be, appropriately,

[2] *Verbandsklagen*: Collective actions of the exclusive initiative of the associations.

parties, but rather, interested people on the cause who must raise all possible legal theses that will be the object of deliberation, which, therefore, does not prevent eventual changes in the poles of the litigation.

The trend of changing poles in the dispute, in addition, had already been observed by Antônio do Passo Cabral, to whom this phenomenon would tend to gain even more significance in the judgments of incidents, making the traditional relationship of parties (authors, defendants, and judges) more fluid and dynamic (2009, p. 43) with a more collaborative perspective.

However, this flexibilization of procedural relations is not a uniquely national phenomenon, but also observed in several other Franco-German studies because of the democratic social principles that impose broad participation in the social debate in subsequent binding decisions that might affect the whole society (Marsch; Vilain; Wedel, 2014, p. 140).

International studies, moreover, demonstrate an inevitable deficiency in the legal precepts, both of Common Law and of Civil Law, which is considered incapable of gathering the multiplicity of singularities of causes that could be sued in a Court, arising, above all, a national cultural plurality (Schmiegelow, 2014, p 43) that must have an arena to be widely debated.

In addition, comparative studies among civil procedure in both common law and civil law have long observed the deficiency of both systems to provide complete protection of collective rights (Buckland; Mcnair, 2008, p. 400). In these terms, Louis Lebel and Pierre-Louis Saunier reached the same conclusion in an analysis of the studies of the significant decisions of the Canadian Supreme Court (2006, p. 180).

Therefore, it remains questionable how this diversity of points of view from several parties in the debate might converge to a unique biding solution that best fits most parties' interests, a theme that has been studied for many years by Jungen Habermas.

3 TYPICAL AND ATYPICAL PROCEDURAL BUSINESSES AND THE CONFLUENCE OF COGNITIVE DIALOGUE WITH JÜRGEN HABERMAS'S THEORY

As explained, the legislator relativized the static and traditional position of the parties in the incident judgment processes, which started to demand broader participation, via *amicus curiae*, of the entire society in the causes that interest them, in a clear relativization of procedural ideals of Bülow and Chiovenda. This flexibility is also seen in other legal devices, such as the possibility of procedural agreements. (Articles 190 and 200 of the C.P.C.).

Thus, Guilherme Henrique Faria points out that a very favorable field for "procedural negotiation is evidential procedures. Several ways of disposing of rights related to evidence are remembered by the doctrine, which allows private autonomy as a sample of [...] absence of public order issues" (2016, p. 91). Paulo Henrique Nogueira, likewise, observes that the law provided several mechanisms of procedural agreements, including a) freedom of negotiation, freedom of creation, c) freedom of stipulation, and d) freedom of binding (2016, p. 134), which are also allowed in private procedures to permit parties to achieve their best interests better.

There are even authors who defend the possibility of the parties to compromise with the stipulation of a single forum (unique Court), expressly renouncing the right to appeal, which, however, has been refuted by most of the doctrine, given its possible unconstitutionality because of the implicit right forecasted in the constitution regarding the double degree of jurisdiction that will only admit exceptions foreseen by the original constituent itself.

Despite the criticisms, social dynamism has imposed a relativization of traditional process models, demanding a less mandatory judgment and putting the judiciary in a wider collaborative stance among parties. In these terms, the main suits ought to focus on promoting a broad social participatory basis, especially whenever fixing

precedents with binding legal theses. As already mentioned, this topic has long concerned several common law class actions authors.

In these terms, the second reforming current of the Frankfurt School, significantly influenced by Jürgen Habermas' ideas, advocated towards a broader social debate in the legislative processes, without which any devices would lack effectiveness and social validity. Thus, for Habermas, the role of law-making procedure should reflect "the dissensions in a pluralist society [being, therefore, an inherent] integrative social element" (Pereira; Rosário; Góes, 2017, p. 112).

As a result, since the legislator has given the precedents' jurisprudence the same imposing-normative force provided for laws, it is evident, from an ontological-teleological analysis that all members of society, directly or reflexively subject to decisions, must be called into the debate to provide contributions to the better cognition of the Court in fixing the theses what will prevail under penalty of lacking social validity.

This call for other people rather than author and defendant ought to be made by representatives of categories that might be tidily affected by the lawsuit.

Hence, for example, in a legal theses statement that affects accountants, there will be a burden imposed on the Accounting Council to communicate the debated issue to its members so they can provide specific and technical contributions to the discussed topic, under penalty of obligating the Court to limit the scope of the effects of the judgments to the parties that have been well represented in symmetry to what has been done in many cases of class actions judgments in civil law such as 628 F.2d 419 already mentioned by Fornaciari (2010).

4 HABERMAS AND HIS MORAL DISCURSIVE CRITIC

From a first perspective, Jüngen Habermas relives the possibility of moral existence within rules that have long been discarded by

positivist theory. According to his theory, the law ought not to be free from ethical questions that should be incorporated into parliament's debates (Teixeira, 2016, p. 305).

His main idea emanates from moral communicative discourse: communicative acting should be most important for the democratic procedure in elaborating further normative disposals.

Maíra Baumgarten poses the idea that Habermas' theory is mainly based on the perspective of humans' emancipations, which means that just as society develops, so should the norms do it in the direction of an emancipatory debate (1998, p. 137).

The author points out those 03 central ideas that might be seen within Habermas' whole works: the formation of knowledge procedure, the cultural perspectives along with the communicative debate.

Regarding the latter, the most prominent problems of society ought to be solved through mutual discussion that eventually and finally converges in allowing parts to come to terms (Baumgarten, 1998, p. 137).

The author's main point is that as society becomes more complex, it might require further regulation that ought to be made through debates that must occur in the public sphere (parliament), a place where "approaching public opinion can be formed [and where] access is guaranteed to all citizens. […] communication, [hence], requires specific means for transmitting info and influencing those who receive it." (Habermas, 1974, p. 49).

So, law becomes a replacement (or most common a result) of the process in which market and public sphere's interests might come to terms and where society's ideas must prevail in order not to allow any subjugation of people's interest below the prominent laws of free concurrences. In this termes, Jüngen Habermas poses : «Le droit apparaît comme une substitute aux échecs des autres mécanisme d'intégration – les marches e les administrions. […]. Sa capacité d'intégration peut s'expliquer par le fait que les normes juridiques» (1997, p. 43).

To provide an equitable term, parts must debate with balanced arguments. In other words: one part should not have privileged information, nor can it dominate the public discourse.

That's the idea found in Jüngen Habermas' statement in which he poses that he: "considers this model to be monological because it consistently attributes the intersubjectivity of meaning [...] [which means:] mutual sharing of identical meaning: [so] the sender and receiver are previously equipped with the same program" (1970, p. 362).

But communication is not just a process in which market and mutual player society come to terms; It is also a place where the community can evaluate. In Habermas' idea, as parts come to terms, so does their knowledge about its values. When a person renounces his values and viewpoints in favor of others, it inevitably increases his world knowledge. Therefore, admitting different values that seem more plausible than yours is a process of mutual cognition toward a significant plural sociological higher self-understanding: a development of shared ideas.

Regarding this specific topic, Jüngen Habermas describes: "It is in response to this devaluation of the cognitive dimension of language that in my generation the attempt was made to re-establish the tendencies of Humboldt's philosophy" (1999, p. 414).

As the most prominent author of the second generation of the Frankfurt School, Habermas disagrees with the significant ideas of the liberalist-positivist foundations: the absence of public interference in the market and blind belief of Descartes' enlightens progressive perspectives.

According to Jüngen Habermas, the idea of equality and fraternity is unreachable through the invisible hands of the market, as posed by David Ricardo and Adam Smith's shared perspectives.

As opposed to Habermas, the fraternity's achievements could only be accessed by allowing mutual parts to access an amplified debate in which people might come to terms to provide a better understanding of each other and, therefore, abdicating their point of view for accepting a different idea that might seem more plausible regarding

a mutual and plural intersubjective pilar. In other perspectives: it is through mutual understanding that people might figure out what is best for the whole community:

Jüngen Habermas narrates, "according to republican view, the model of negative liberties does not determine the status of citizens: prominently, rights of political participation and communication are positive liberties […] citizens can make themselves into what they want" (1994, p. 2).

Among many authors, the most preeminent adversary of Habermas was John Rawls since he has ideologized a liberal model (the veil of ignorance) in which people inevitably might come to terms in favor of a much higher mutual understanding. However, Rawls's model does not abdicate liberal ideas, nor has it dismissed the free-market perspective. Instead, according to Rawls, it is perfectly achievable to provide a better world within liberal attitudes.

Habermas and Rawls have been friends during their entire lives, sharing most ideas in common. Although they have been close friends, Habermas poses a significant question over Rawls's theory: "from this functionalist perspective [raises] the question of whether this theory (of the veil of ignorance) can meet with the public agreement: that is, from the perspective of different world views in the forum of public use of reasons would lose an epistemic meaning." (Habermas, 1995, 121).

So, according to Habermas' theory, the whole society should engage in multiple debates, which is precisely what the *amicus curiae* sought to provide. An amplified arena where several ideological law theories may be self-debate to figure out better which one might safeguard the whole societies' interests and consequently prevail so to be applied in further identical cases.

5 CONCLUSION

This study presented positions and questions related to precedents that became binding in the national order, especially after the last reform of the C.P.C.

Thus, it was demonstrated the severe concern on significant representation from all categories that the Judgment might influence, whose absence of observation might impose several restrictions over whom the Judgment might be obligatory.

In case some parties might not well be represented, the effects of the judgments will not be able to impose them any further obligation or guarantee any rights, as their guarantee of complete and self-defense has not been widely conceived, so they might not be linked or compulsorily obligated to its eventual outcomes.

Moreover, this same interpretation should be transposed to the national law and IRDR procedures, as already exposed in the Permanent Forum of Proceduralists, must be a broader social debate of the various dissonant theories in the foundations of the legal theses to provide the Court a broader perspective to fix wisely the main jurisdictional point after weighing several discordant points of views.

It was also presented that the proper representation of all members of the class in the binding precedents would be an indispensable condition for the social effects of these judgments, imposing a burden on class entities and associations to communicate any disputes involving their members so their members can provide means to contribute with the theses to be analyzed and fixed within a huge debatable arena.

That is precisely the democratic procedure foreseen by the 2nd generation of the Frankfurt School. Notably, Jürgen Habermas, which is in symmetry to the homogeneity of judiciary pronounces forecasted by constitutional legislation, specifically within § 1 of art. 103-A, of the Brazilian Federal Constitution of 1988.

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GRACE LADEIRA GARBACCIO

Professor of the Masters in Law and Masters in Public Administration at Brazilian Institute of Education, Development and Research - IDP; Master and PhD in Law of Limoges University/France.

Professional address: Module 49, SGAS 607 - Asa Sul, Brasília - DF, Code 70200-670, Brazil.

Orcid id: https://orcid.org/0000-0002-0658-9472.

E-mail: glgarbaccio@hotmail.com.

GONÇALO NICOLAU CERQUEIRA SOPAS DE MELO BANDEIRA

PhD in Legal and Criminal Sciences from the Faculty of Law of the University of Coimbra (2009). Master in Public Law from the Faculty of Law of the Portuguese Catholic University (2003). Degree in Law from the Faculty of Law of the University of Coimbra. Adjunct Professor of Public Law at the (State) School of Management of the Polytechnic Institute of Cávado e Ave (IPCA).

Professional address: IPCA Campus, Barcelos, Vila Frescaínha, S. Martinho, Code 4750-810, Barcelos/Portugal.

Orcid id: https://orcid.org/0000-0001-8859-4023.

E-mail: gsopasdemelobandeira@ipca.pt.

BRUNO RIBEIRO MARQUES

PhD student in Law at Brazilian Institute of Education, Development and Research – IDP. Master and Graduate in Law.

Professional address: Module 49, SGAS 607 - Asa Sul, Brasília - DF, Code 70200-670, Brazil.

Orcid id: https://orcid.org/0000-0002-0839-0117

E-mail: brunomarquesxxx@hotmail.com

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