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THE ROLE OF THE BGH AND THE STJ AS COURTS FORMING JUDICIAL PRECEDENTS AND THE UNITY OF LAW IN GERMANY AND BRAZIL[243]

O PAPEL DO BGH E DO STJ COMO TRIBUNAIS FORMADORES DE PRECEDENTES JUDICIAIS E A UNIDADE DO DIREITO NA ALEMANHA E NO BRASIL

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ABSTRACT: This study is the comparative analysis of the role of the German and Brazilian superior courts – specifically, BGH and STJ – from the perspective of promoting the uniformity of jurisprudence. Next, the influences of the German civil process on the formation and development of the Brazilian civil process are highlighted. At the end, the roles and procedures adopted by the BGH and the STJ as courts committed to promoting the development and unity of law will be examined.

KEY-WORDS: BGH – STJ - unity of law - uniformity of jurisprudence – superior courts - German civil process - Brazilian civil process

RESUMO: Este estudo consiste na análise comparativa do papel dos tribunais superiores alemães e brasileiros – especificamente, BGH e STJ – na perspectiva de promover a uniformidade da jurisprudência. A seguir, são destacadas as influências do processo civil alemão na formação e no desenvolvimento do processo civil brasileiro. Ao final, serão examinados os papéis e procedimentos adotados pelo BGH e pelo STJ como tribunais comprometidos com a promoção do desenvolvimento e da unidade do direito.

PALAVRAS-CHAVE: BGH – STJ - unidade do direito - uniformidade da jurisprudência – tribunais superiores - processo civil alemão - processo civil brasileiro

INTRODUCTION

The purpose of the present study is the comparative analysis of the role of the German and Brazilian superior courts – specifically, BGH and STJ – from the perspective of promoting the uniformity of jurisprudence. Although there is no model of binding to judicial precedents as a judgment technique in Germany as there is in Brazil, in CPC/15, the commitment to the

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uniformity of jurisprudence permeates the German legal system, including in civil procedure. In this sense, see, for example, the procedural provision of the *Revision* appeal, which has as admissibility requirements the need for uniformity of understanding on a given matter (*Sicherung einer einheitlichen Rechtsprechung*) and the preservation of legal certainty (*Rechtssicherheit*). They both grant the decisions of the BGH (*Bundesgerichtshof*) authority and compliance with the system in general, with the court exercising an important prospective/forward-looking function.

In order to seek an effective contribution to a better and more qualified jurisprudence by the Brazilian Superior Court of Justice, we will highlight the influences of the German civil process for the formation and development of the Brazilian civil procedure. Then, we will move on to the analysis of the common approaches and challenges between the two systems, through the approach of the dogma and doctrine of both countries. To this end, the study of the evolution of the main legislative reforms to the current panorama will be of fundamental value.

In the end, we will confront the roles and procedures adopted by the BGH and the STJ as precedent cuts committed to the promotion of development and unity of the law. The aim will be to contribute to the better functioning of the Brazilian Superior Court, based on the German paradigm.

1. CURRENT OVERVIEW OF CIVIL PROCEDURE IN GERMANY AND IN BRAZIL: APPROACHES AND COMMON CHALLENGES

1.1. GERMAN CIVIL PROCEDURE: THE *ZIVILPROZESSORDNUNG* – ZPO AND THE MAIN REFORMS

The German Civil Procedure Code (Zivilprozessordnung – ZPO) was promulgated in 1877 (effective in 1879) and has undergone several subsequent legislative amendments. In the first decade of the 20th century, after the end of the First World War, the Austrian procedure started to influence the German civil procedure. Consequently, it has moved away from the liberal canons (French influence) which inspired the promulgation of the ZPO of 1877 with the restriction of the autonomy of the parties (*Parteiherrschaft*) and the corresponding increase in the powers of the judge.[244]

After the Second World War, Germany was in ruins, with severe economic, social, political and military damage, and its reconstruction was necessary. Thus, the Nazi legal framework was deconstructed and the creation of the German Democratic Republic (DDR) had divided the country. The consequence was the emergence of two distinct legal orders, one Soviet and socialist and the other democratic, marked by the promulgation of the Basic Law

[244] Beneduzi, *Introdução ao processo civil alemão*, 2015, p. 22.

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(*Grundgesetz*) in 1949. Since then, the democratic values and the protection of fundamental human rights have reinvigorated, and a true constitutionalization of the civil procedure (*Konstitutionalisierung*) has been witnessed with the dogmatic construction of certain fundamental procedural rights, such as the right to the administration of justice (*Justizgewährungsanspruch*).[245-246]

The division into two separate legal systems only broke up with Reunification in 1990 with the abolition of GDR and with the entry of the new *Bundesländer* into the Federal Republic. Thus, the ZPO of 1877 was once again in force throughout Germany, including the states that were part of the former DDR.[247]

Since the 1970s, the concern has been to simplify (*Vereinfachung*) and speed up (*Beschleunigung*) procedures, and to guarantee access to justice. The German civil procedure has received some instruments and procedures aimed at achieving speed and effectiveness such as provisional execution. [248] In 2001, there was a reform in the appeals court, with emphasis on the monocratic trial,[249] on the procedural simplification and on the change of the system of appeal into an instrument for error control (*Instrument zur Fehlerkontrolle*).[250]

The reform on the monocratic trial dealt with the possibility for the appeals court not to admit an appeal, without an analysis of the merits, when it is unanimous that the appeal has no chance of success (*keine Aussicht auf Erfolg*), the legal issue has no fundamental significance (*keine grundsätzliche Bedeutung*) and the development of the law or the preservation of a unified jurisprudence in the interest of legal certainty[251] do not require a decision of the appeals court. Peter L. Murray and Rolf Stürner on this point:

> *The July 2001 reforms have introduced an additional opportunity for the court to dispose of patently non-meritorious appeals in a summary manner. If as a result of the preliminary review the appeals court is of the unanimous conviction that 1) the appeal has no chance of*

[245] Habscheid, Der Anspruch auf Rechtspflege. *ZZP* 67 (1954), p. 194.

[246] German Civil Procedural Law is a branch of public law (*öffentliches Recht*), precisely because it regulates the exercise of the civil service of the jurisdiction, such as Brazilian civil procedural law.

[247] Beneduzi (footnote 1), p. 24/25.

[248] Jauernig/Hess, *Zivilprozessrecht*, 30th ed., 2011, p. 249.

[249] Beneduzi (footnote 1), p. 45.

[250] Barbosa Moreira pondered that such a reform sought to move the ZPO away from the model that makes the second instance a *novum iudicium* and not a mere instrument of control and eventual correction of errors committed in the first instance (*revisio prioris instantiae*). (Barbosa Moreira, Breve notícia sobre a reforma do processo civil alemão. In: *Temas de direito processual*, 2004, p. 204).

[251] In the German legal system, legal certainty derives from the principle of the rule of law (*Rechtsstaatsprinzip* – Article 20 (3) of the German Basic Law (*Grundgesetz*); see Hömig/Wolff (org.), *Grundgesetz für die Bundesrepublik Deutschland: Handkommentar*. 11th ed., 2016, p. 287.

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> *success (keine Aussicht auf Erfolg); 2) the legal issue has no fundamental significance (keine grundsätzliche Bedeutung); and 3) the development of the law or the preservation of a unified case law does not require a decision of the appellate court, the court can dismiss the appeal as unmeritorious.*[252]

The influence of the US Law is visible in the German civil procedure[253], especially in the field of probationary law, such as the duty of the parties, and also of the third parties to display certain documents, an amendment introduced in the ZPO in 2002.

Therefore, the most important reforms in ZPO were those promoted by the law of 27.07.2001 — in force since 01.01.2002[254] —, in addition to the law of 13.07.2001, which renewed the provision of the form of legal acts, adapting them to the technological development of the means of information and communication (electronic documents and hearing by videoconference, for example). There was also the reform of the provision of *subpoenas* (*Zustellungsreformgesetz*), of 25.06.2001.[255]

The two main points of the reform concern the strengthening of the first degree of jurisdiction and the revision of the appeals system[256] to seek greater speed and procedural economy. To this end, the German legislator invested in the means for litigants to be able to foresee the probable outcome throughout the process[257]. The scope was to enable the parties to assess the real need to submit the case to the Appellate Court based on the existence of errors.[258]

The German ZPO has also been amdended in recent years to adapt to technological innovations (electronic communication of procedural acts, for example). The development of arbitration and mediation also reveals the concern of the German civil procedure with the "dejudicialization" of dispute resolution (as in Brazil), such as, for example, the publication of the Mediation Act (*Mediationgesetz*) in 2012.

In 2002, the current wording was given to the § 139 of the ZPO, which deals with the cooperation[259] between judge and parties, certainly an important source of inspiration for the Brazilian civil procedure, although there was already a provision in the CPC/73 regarding the duty of a third

[252] Murray/Stürner, *German civil justice*, 2004, p. 378-379.
[253] Christoph A. Kern explains that, as in other countries of the world, in Germany, the main task of civil procedure is the realization of the subjective rights assigned to individuals based on the legal, political and social order in force. (Kern, O processo civil dos EUA e da Alemanha numa análise comparativa. *Revista de Processo* 227 (jan/2014)).
[254] Gilles, Civil court proceedings, technology and "E-Procedural Law". In: Gilles/Pfeiffer (org.), *Neue Tendenzen im Prozessrecht*, 2008, p. 166/167.
[255] Barbosa Moreira (footnote 7), p. 199.
[256] Oberheim, *Die Reform des Zivilprozesses*, 2001, p. 3/4.
[257] Barbosa Moreira (footnote 7), p. 200/201.
[258] Rimmelspacher, *Zivilprozessreform 2002*, 2002, p. 92.
[259] Jauernig/Hess (footnote 5), p. 104.

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party to display documents through a court order. This cooperation is taken as a fundamental rule of the process in art. 6 of ZPO and also as an instrument to optimize the instruction in art. 357, § 3 of the CPC/15[260] as the duty of the judging body to take into consideration when judging the relevant points, in fact and in law, raised by the parties and to confront them in the grounds for the decision. [261] The duty of prohibiting surprise is also perceived, since the § 139(3) of the ZPO requires the Court to warn the parties to cognizable points by law on which they have not yet manifested themselves, allowing them to speak in time.[262]

As already mentioned, the reform of 2001 promoted adaptations and updates in the recursive scenario, especially regarding *Berufung* (Appeal), aiming, essentially, at turning it into a mechanism for control and correction of errors. However, the jurisprudence of the BGH, since the reform, understands that the court must consider the new facts that arose in the appeal instance. [263] Moreover, the reform expands the possibilities that one of the members of the court will judge the *Berufung*, instead of the collegium, by its decision. Paragraph 526, 1st paragraph of the ZPO lists the situations in which this can be the case, such as when the matter does not present special difficulties as to the facts and law involved or when the legal issue has no fundamental significance.[264]

Revision is the analogous appeal to the Brazilian special appeal and has the function of protecting the objective law and ensuring uniformity of jurisprudence. The revisable objective law, different from the Brazilian provision, covers not only the federal law (*Bundesrecht*) but also certain state law rules, the European and the foreign law rules, except for the administrative acts. [265] As a rule, appeals may be lodged against final decisions (*Endurteile*) handed down in appeal proceedings (§ 542(1) ZPO), but also exceptionally against certain interlocutory decisions (*Zwischenurteile*). A decision on the

[260] Art. 6. All subjects of the proceedings must cooperate to obtain, a fair and effective decision on the merits of the case within a reasonable time.
Art. 357. If none of the hypotheses of this Chapter occur, the judge, in a decision of reforming and organization of the procedure, shall observe the following: (...) § 3º If the cause is complex in terms of fact or law, the judge shall designate a hearing so that the reorganization can be done in cooperation with the parties, at which time the judge, if appropriate, shall invite the parties to integrate or clarify their allegations.

[261] Barbosa Moreira (footnote 7), p. 202.

[262] Another undeniable influence on the Brazilian civil process, which consecrated in the CPC/15, as a fundamental rule, the art. 10, which provides on the prohibition of the surprise decision: "Art. 10. The judge cannot decide, in any degree of jurisdiction, based on which the parties have not been allowed to manifest themselves, even if it is a matter on which he must decide *ex officio*".

[263] Roth, Zur Überwindung gesetzgeberischer Modellvorstellungen im zivilprozessualen Berufungsrecht durch das bessere Argument der höchstrichterlichen Rechtsprechung. In: Gsell/Hau (org.). *Rechtsmittel im Zivilprozess – Hommage an Bruno Rimmelspacher*, 2019, p. 29.

[264] Barbosa Moreira (footnote 7), p. 207/208.

[265] Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*. 15th ed., 1993, p. 829.

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granting of emergency protection is not subject to *Revision* (§ 542(2) ZPO).[266]

There are two kinds of Revision: 1) *Zulassungsrevision* (by admission)[267] which must be granted if the challenged judgment decides a legal question of fundamental importance (*grundsätzliche Bedeutung*), if a decision of the BGH is warranted in the interest of the development of the law (*Fortbildung des Rechts*) or if a decision of the BGH is necessary to ensure the uniformity of jurisprudence (*Sicherung einer einheitlichen Rechtsprechung*);[268] 2) *Sprungrevision* (*per saltum*) suitable for a first-degree judgment and brought directly before the BGH if both parties agree to the "leap" and if it exceeds the jurisdiction value of 600 euros, in addition to the requirements of the Revision (§ 566 ZPO).[269]

The appeal of Revision must be lodged within a period of one month, whose initial term is the service of the judgment (*Zustellung*) and not the *Verkündung* (public notice). The request for *Revision* must be signed by a lawyer with specific (and exclusive) authority to act before the BGH (the point will be dealt with in chapter three). The appeal may be made before the deadline has run its full course, without any risk of untimeliness (§ 312(2) ZPO). The deadline for filing a request for *Revision* is not to be confused with the deadline for filing the reasons for the appeal (*Revisionsbegründung*), and the simultaneous filing of the reasons is possible, whose deadline is two months from service of the judgment (§ 551(2) ZPO). Therefore, the appeal of Revision must be reasoned (§ 554(3)), and the content must include the request for revision, with a statement of the points of objection to the decision, as well as the legal question of fundamental importance.[270]

The same provision concerning the time limits for lodging the appeal and the reasons for lodging it applies to the first appeal (*Berufung*).

As for the regime of the *Revision*, the reform [271] determined that the admission is no longer subject to any requirement related to the value[272], and the possibility of filing the appeal is subject to the permission of the second-degree judge of the *Berufung*. Such a permission must be granted whenever the legal issue has fundamental significance or if a decision of the BGH is necessary for the development of the law or the

[266] Beneduzi (footnote 1), p. 125.

[267] May, *Die Revision in den zivil- und verwaltungsgerichtlichen Verfahren*, 1995, p. 21.

[268] Such as, for example, when the court of the first instance diverges from the applicable jurisprudence or interprets it in a wrong way, but also when one has infringed fundamental procedural rights.

[269] Oberheim (footnote 13), p. 18/19.

[270] Jauernig/Hess (footnote 5), p. 382.

[271] It should be noted that modern German doctrine believes that such a reform in the appeal system and in the *Revision* appeal is unsatisfactory and demands new changes. (Winter, Die Zulassungsgründe des § 543 Abs. 2 ZPO – rechtliche Bindung oder freies Annahmeverfahren? In: Gsell/Hau (footnote 20).

[272] The 2001 reform abolished the scope of the admissibility of *Revision* but retained it for the *Nichtzulassungsbeschwerde* in the amount of EUR 20 000. (Beneduzi (footnote 1), p. 128).

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guarantee of a uniform jurisprudence (§ 543).[273] An appeal by Revision must, thus, be admissible if the *Oberlandesgericht's* judgment differs from a decision of the BGH or the joint session of the higher courts and it is sufficient that such a difference consists in a considerable objection to the application of the BGH's opinion.[274]

The Judging body of the Appeal must clarify in the holding of its own judgment whether or not it authorizes Revision (§ 543(1) ZPO). If there is no authorization, § 544 of the ZPO provides for the filing of a *Nichtzulassungsbeschwerde* (a kind of appeal for admission to a Special and Extraordinary Appeal of the Brazilian civil process).[275]

The competent Senate of the BGH to judge *Revision* depends on the subject matter to be decided; however, in cases which are not evident, lawyers admitted to the BGH may send the request to a particular Senate and most frequently this choice is followed by the BGH.

As with *Berufung*, *Revision* also has the possibility of adherence by the opposing party (*Anschlussrevision* – § 554 ZPO) and the 2001 reform made the former division of the adhesive appeal into two modalities, the dependent and the independent, disappear.[276]

Although *Revision* is an appeal primarily concerned with the examination of points of law, there are exceptional cases where new evidence may be submitted at the trial of the appeal before the BGH, such as the case where it is essential to establish that a procedural defect has occurred.[277] However, old facts the trial court of *Revision* (BGH) rejects, rightly or wrongly, remain definitively precluded as they would have been precluded since the decision of the *Berufung* was made.[278]

Thus, the scope of the appeal is the protection of objective law, and only in a meditated form it also protects the subjective right of the appellant. As a result, the German doctrine considers the interest of the party to be a vehicle of general interest (*Vehikel des Allgemeininteresses*).[279]

Once the *Revision* appeal is granted, the contested decision is annulled and the right solution to the question of law that is the object of the appeal is defined (judgment of cassation - § 562 ZPO). Therefore, unlike the Brazilian system, as a rule, the case must be returned to the court *a quo* for a retrial following the understanding of the BGH (§ 563(1) ZPO). However, in cases where the cause is considered mature for decision, the judgment of cassation may be exceeded with the application of the right to the species (§ 563(3) ZPO). In such an exceptional case, the BGH is entitled to reassess the evidence and to review the respective conclusions of the court of the first

[273] Barbosa Moreira (footnote 7), p. 208/209.
[274] Jauernig/Hess (footnote 5), p. 379.
[275] Beneduzi (footnote 1), p. 128.
[276] Oberheim (footnote 13), p. 19.
[277] Gottwald, *Die Revisionsinstanz als Tatsacheninstanz*, 1975, p. 356/357.
[278] Idem, p. 357.
[279] Jauernig/Hess (footnote 5), p. 298.

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instance as to the facts relevant to the decision.[280]

The concept of "fundamental importance" (*grundsätzliche Bedeutung*) or "fundamental significance" refers to the idea of the old "relevance of the federal question". This is a requirement that the Federal Supreme Court had adopted to admit an extraordinary appeal in certain cases. The same was later enshrined in the requirement to demonstrate general repercussion for the admission of the extraordinary appeal, functioning as an appeal filter.[281]

Therefore, there is also a filtering mechanism in the German Court of Review, even though the selection of appeals is made based on the objectively established legal criteria and even the court can judge the case immediately. Thus, in this model of the Court of Review there is not yet an excessive workload.[282]

The German doctrine translates the concept of "fundamental significance" as the question that, because it is decided based on a specific case, is susceptible to generalization to an undetermined number of cases, and serves the unity and development of law in the same sense as the Brazilian institute of "general repercussion". Specifically regarding the essential part of the Revision decision, the German doctrine defends the possibility of synthesis in a general principle of law, capable of favoring legal certainty, beyond the case examined.[283]

Although the German legal system does not adopt the model of linking to judicial precedents as a judgment technique, it presents the concern with the uniformity of jurisprudence (*Sicherung einer einheitlichen Rechtsprechung*) and the preservation of legal certainty (*Rechtssicherheit*) as guidelines which consist of requirements for the admission of appeal (*Zulassungsberufung* – § 511(4) ZPO and *Zulassungsrevision* – § 543(2) ZPO). Therefore, such guidelines guide the work of the BGH as a court exercising a prominent prospective function.[284]

Thus, the only case of formally binding precedents relates to

[280] Rosenberg/Schwab/Gottwald (footnote 22), p. 844.

[281] It was included in the Brazilian legal system by Constitutional Amendment 45 of 2004, known as the "Judiciary Reform". CPC/15 foresees in its article 1.035, § 1 that: "For general repercussion, the existence or the lack of relevant issues from the economic, political, social or legal point of view that go beyond the subjective interests of the process shall be considered", that is, the issue raised cannot be beneficial only for the concrete case proposed but for the interest of the community.

[282] In 2023, the BGH received 5,897 civil cases and 3,703 criminal cases, totaling 9,600 new actions. There were 5,328 judgments in the Zivilsenate (civil senates) and 3,844 in the Strafsenate (criminal senates), with an 11% decrease in civil filings and a 5% increase in the criminal area. (Source: free translation of *Bundesgerichtshof* website:https://www.bundesgerichtshof.de/DE/Service/Publikationen/Taetigkeitsberichte/taetigkeitsberichte_node.html. Accessed on 22/07/2025).

[283] Rosenberg/Schwab/Gottwald (footnote 22), p. 858/859.

[284] Alexy/Dreier, Precedent in the Federal Republic of Germany. In: Maccormick/Summers (org.). *Interpreting precedents: a comparative study*, 1997, p. 62.

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precedents of the German Federal Constitutional Court, which are strictly binding. According to § 31(1) BVerfGG, all decisions of the Federal Constitutional Court are binding on all constitutional bodies of the Federal Republic and states, as well as on all courts and authorities.[285]

As a result, it is clear that in Germany, the concern for the unity of law permeates the legal system as a whole, representing a true expression of its tradition and culture. To that extent, the German system constitutes an important model of inspiration and source of contribution to the Brazilian civil procedure. [286] It considers, for example, the highly prospective function performed by the *Bundesgerichtshof* when judging *Revision*, without congestion [287] or defensive jurisprudence, an important reference for a better and more qualified functioning of the Brazilian Superior Court of Justice.[288]

In this regard, a comparative analysis of the German and Brazilian legal systems[289] can be very valuable, based on a critical analysis of the functioning of the BGH and the STJ (specific topic in chapter 3), considering the scope of obtaining unity of Law[290] and coherence. To this end, practices aimed at the uniformity of jurisprudence and the effective exercise of a prospective function by the higher courts in the two countries will be confronted in the context of the formation of judicial precedents.

1.2. BRAZILIAN CIVIL PROCEDURE: THE 2015 CIVIL PROCEDURE CODE AND THE SEARCH

[285] Idem, p. 26.

[286] Foreign law can serve as an important tool for the development of the national legal system. Foreign law therefore corresponds to legal rules that are not valid per se in the national legal system. This partial conclusion is, however, too restricted, since it is supported by an exclusively positivist perspective: a legal system is not characterized solely by its laws and other normative acts. According to Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*. 2nd ed., 1991, p. 502.

[287] The revisions and *Nichtzulassungsbeschwerden* totaled 4,157, of which 10.2% resulted in the admission of the revision; 73.4% were dismissed as manifestly unfounded. At the end of the fiscal year, there were 5,409 pending civil appeals and 779 criminal appeals. (Free translation of the *Bundesgerichtshof*: https://www.bundesgerichtshof.de/DE/Service/Publikationen/Taetigkeitsberichte/taetigkeitsberichte_node.html. Accessed on 22.07.2025).

[288] Beneduzi (footnote 1), p.129.

[289] Sérgio Bermudes describes the importance and contribution of the study of other legal systems: "The complete study of Brazilian Civil Procedural Law imposes the permanent consultation of the procedural institutions of the countries that are part of the Roman-Western system, and therefore they either inform ours and make it easier for them to understand, or they offer abundant subsidies for their improvement". (Bermudes, *Introdução ao processo civil*, 4th ed., 2006, p. 169).

[290] In Brazilian doctrine, Luiz Guilherme Marinoni states that "the unity of law is the result of a system of mandatory precedents and reflects the coherence of the legal order, making the predictability and the uniform treatment of similar cases possible. The precedent, therefore, is a value in itself, since it is something indispensable for the unity of the law and a coherent legal order, requirements for the rationality of the law". (Marinoni, *A ética dos precedentes: justificativa do novo CPC,* 3rd ed., 2018, p. 105).

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FOR A FAIR AND CONSTITUTIONALLY ADEQUATE CIVIL PROCEDURE

The Brazilian legal system adopted the system of binding judicial precedents, proper of *common law* countries[291], from the promulgation of CPC/15, with the discipline of articles 926 to 928. However, in forensic practice, there is still the difficulty of effective granting of the integrity of the law through the uniformity of the jurisprudence, due to the non-observance and adequate application by the judiciary of the techniques and mechanisms made available by the system, in addition to the still unsatisfactory prospective function performed by the Superior Courts.

In the Brazilian democratic state, the civil process must serve as an instrument for the realization of the material rights involved in the concrete case and observe the constitutional dictates and precepts. [292] Thus, the issue of the reconstruction of the sense of the law or the exercise of a normative function by the Judiciary and the application of techniques in this regard must be in accord with the context of the Constitutional State. Therefore, respect for the normativity of the constitution must prevail. The normativity of the constitution binds the interpreter not only to the norms of positive law and legality but also relies on the theory of precedents to bind him/her, to a later degree, to the decisions themselves, leading to rationality.[293]

Considering the redefinition of the techniques to be observed in the search for uniformity of jurisprudence and unity of law in the Brazilian system, it is necessary to reformulate the roles of the Superior Courts in terms of control, interpretation, and application of the law.[294]

Brazilian doctrine already points to the need of reformulating the functions of the Superior Courts, called "*Cortes de Precedentes*," which should be distinct from the "*Cortes de Justiça*" (Courts of Justice and Federal Regional

[291] In common law, judicial precedents have binding force and appear as the most important source of law: by the principle of *stare decisis*, the preceding decision creates law. In this orbit, common law judges have the functional duty to follow the precedents of analogous cases, and it is not enough to use them as relevant persuasive subsidies. (Tucci, *Precedente judicial como fonte do direito*, 2004, p. 13).

[292] Ingo Wolfgang Sarlet highlights the need to observe the normative force of the Constitution: "(...) the conception of a direct binding of individuals to fundamental rights is supported by the argument that, because fundamental rights constitute norms expressing values applicable to the entire legal order, as a result of the principle of the unity of the legal order, as well as because of the postulate of the normative force of the Constitution, it could not be accepted that Private Law would form a kind of ghetto on the fringes of the Constitution, and there is no way of admitting a binding exclusively of the public power to fundamental rights". (Sarlet, Direitos fundamentais e direito privado: algumas considerações em torno da vinculação dos particulares aos direitos fundamentais. *Revista Jurídica* 352 (feb./2007), p. 58).

[293] Zaneti, *O valor vinculante dos precedentes: o modelo garantista (MG) e a redução da discricionariedade judicial – uma teoria dos precedentes normativos formalmente vinculantes*, 2015, p. 384.

[294] Welsch, *Legitimação democrática do poder judiciário no novo CPC*, 2016, p. 100.

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Courts), since they occupy the "vertex" of the judicial organization (Supreme Court and Superior Court of Justice). While the "Courts of Justice" should exercise retrospective control over cases decided at first instance and standardize jurisprudence, the "Courts of Precedents" should provide a forward-looking interpretation and impart unity of law, even for proper organization to the judicial administration.[295]

In this sense, Luiz Guilherme Marinoni understands that the Supreme Courts have the function of defining the meaning of the law and its validity in a system in which all judges interpret the laws and control their constitutionality (diffuse control). Thus, neither the judge nor the court, not even the Supreme Court itself, can resolve a case or decide in disregard of the precedent signed.[296]

Thus, in Brazil, the necessity of a split between courts for a fair decision and precedent-setting courts is already being discussed, or in other words, between Courts of Justice and Courts of Precedents.[297] In this regard, defining the role of the Courts[298] in the control and interpretation of the law, as well as in the formation of precedents with binding effect is of fundamental importance. According to Karl Larenz:

> *The courts resolve specific cases. (...) Indeed, the courts, especially the higher courts, seek to be guided to a large extent by such paradigmatic resolutions – by precedents – which is useful for the uniformity and continuity of jurisprudence and, at the same time, above all, for legal certainty.*[299]

Naturally, one cannot disregard the reality and contexts proper to the Brazilian system, and it is necessary to reformulate the position and establish criteria and paradigms the judiciary, which needs to develop and commit itself to a new legal and procedural culture, should observe. Also, the judiciary needs to raise the awareness of the operators of the law as a whole, especially the legal profession, which has the important responsibility of directing the discussions and pleadings and establishing the burden of adequate grounds for judicial decisions, especially those that constitute judicial precedents.[300]

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[295] Mitidiero, *Precedentes: da persuasão à vinculação*, 3rd ed., 2018, p. 81.

[296] Marinoni (footnote 47), p. 104.

[297] Mitidiero (footnote 52), p. 82.

[298] Regarding the fundamental task of the courts in the activity of standardizing the interpretation of the law, Sergio Chiarloni states that: "E dunque sul''uniforme interpretazione della legge' che occorre concentrare l'attenzione. Questo è il compito fondamentale della corte di cassazione e in generale di tutte le corti supreme". (Chiarloni, Um singolare caso di eterogenesi dei fini, irrimediable per via di legge ordinária: la garanzia constituzionale del ricorso in cassazione contro le sentenze. In: Medina/Cruz/Cerqueira/Gomes. *Os poderes do juiz e o controle das decisões judiciais: estudos em homenagem à professora Teresa Arruda Alvim Wambier*, 2008, p. 846/854).

[299] Larenz, *Metodologia da ciência do direito*, 3rd ed., 1997, p. 610/611.

[300] CPC/15 establishes a list of decisions in article 927, which will have a binding effect and therefore judges and courts, considering the

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The establishment of a system of judicial precedents in the Brazilian legal system, formally through the provision of the CPC/15, aims at the granting of greater isonomy and legal certainty, which should be applied through the appropriate instrumentalization of the technique of judgment by the courts. In this sense, Daniel Mitidiero considers that:

> *The Federal Supreme Court and the Superior Court of Justice have the function of interpreting the Constitution and the federal infra-constitutional legislation in an appropriate manner, promoting the unity of law through the formation of binding precedents. As a result, the actions of these Supreme Courts are at the root of the Constitutional State insofar as the rule of stare decisis implied in the adoption of a system of precedents aims to ensure equality of all before the Law and to promote legal certainty.*[301]

This insertion of the system of binding judicial precedents in the Brazilian legal system, historically Civil Law, clearly demonstrates the progressive approximation of the techniques of the Common Law system, despite the structural differences, the objectives pursued by the two systems are coincident since they seek to ensure the stability and predictability of the Law.[302]

History and experience demonstrate the inefficiency of the pure civil law system in current Brazilian law in terms of the resolution of disputes in the light of the Constitutional State, at a time when not only the resolution of the case but also its character as justice is required.

Therefore, it is clear that the Brazilian legal system has undergone a series of changes and redefinitions regarding models and techniques to be observed and practiced in the search for uniformity of jurisprudence and unity of law. This search stands out for legal certainty, with strong inspiration in the model of judicial precedents of the "common law" system and determines the Superior Courts to reformulate their roles and functions in the control, interpretation, and application of the law.

In this context, it is necessary to extend the model of vertex courts to a model of supreme courts, in other words, abandoning the premise of the formalist interpretation of the law, the

specific case and the matter involved, must observe. Brazilian doctrine calls this list formally binding precedents (Zaneti (footnote 50), p. 311/330).

[301] Mitidiero, *Cortes superiores e cortes supremas: do controle à interpretação da jurisprudência ao precedente*, 2013, p. 113.

[302] According to Teresa Arruda Alvim, "in both *civil* and *common law* systems, the law was born and exists with the predominant objective of creating stability and predictability. The most curious thing is that *civil law* systems are a supposedly rational creation that had as a specific and practically declared objective, the exact achievement of those purposes that, as we know, in Brazil, are not always achieved". (Arruda Alvim Wambier, Estabilidade e adaptabilidade como objetivos do direito: civil law e common law. *Revista de Processo* 172 (jun./2009), p. 121).

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superposition courts should assume their role as courts of interpretation and therefore as courts of precedent.[303]

Ovídio Baptista has long maintained that the modern function of the Supreme Courts is not to serve the uniformity of jurisprudence, but rather they are Courts that intend to ensure the unity of law, projecting their decisions for the future. However, the author also observed one can only achieve this ideal, if in some way the courts are allowed to choose, among the many causes they receive, those of greater relevance.[304]

In this perspective, as to the possibility of higher courts to select causes of greater relevance and transcendence, one may have a look at the German system. The higher courts cite the *Bundesgerichtshof* when judging the Revision appeal, which has as its admission criterion the necessary existence of fundamental importance (*grundsätzliche Bedeutung*) of the matter or the relevance for the development of law (*Fortbildung des Rechts*). In the third chapter, we will analyze the Brazilian Superior Court and the German BGH as courts that set precedents for the unity of law and legal certainty, in a comparative manner, seeking possible contributions of the German Superior Court system to the Brazilian Superior Court model.

Therefore, the mechanisms of uniformity of jurisprudence with binding character present in the Brazilian legal system demonstrate the growing implementation of a system of precedents in the reality of the Democratic Constitutional State, mainly from the Code of Civil Procedure of 2015. Such a system turns the institute of the Incident Resolution of Repetitive Claims (articles 976 to 987 of CPC/15), which consists of another technique of trial by sampling and equalization of court decisions, positive.

Considering the context of the implementation of judgment techniques that grant effectiveness to binding judicial precedents in the Brazilian legal system, the observance of decision-making criteria to act as canons of interpretation and markers for the formation of qualified decisions/precedents becomes indispensable. It also becomes prudent in the sense of technique and justice, and helps to avoid the occurrence of arbitrariness tending to damage constitutional guarantees and the Democratic State of Law itself.

In this sense, the performance of *amicus curiae is important* as a factor and means of democratic legitimacy of judicial decisions, especially in cases of repetitive potential – due to the nature and transcendence of the matter discussed. It is also important in the formation of binding judicial precedents, considering the need for technical and legal qualification in the formation of the *ratio decidendi* of the judicial precedent, which one will apply to other analogous and future cases.

[303] Zaneti (footnote 50), p. 391.

[304] Baptista, *Processo e ideologia: o paradigma racionalista*. 2nd ed., 2006, p. 258.

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The Code of Civil Procedure of 2015 provides for *amicus curiae* in Article 138[305] as a kind of third-party intervention in the process. The procedural legislation also provides for the possibility of participation of *amicus curiae* in the trial system of repetitive resolution incidents (art. 983 of CPC/15) and of extraordinary and special repetitive appeals (art. 1.038, I and II of CPC/15).[306]

However, the provision of article 138 of CPC/15 defines a mere faculty of the judge to determine the intervention of *amicus curiae* when the judge considers it convenient. This fact still does not ensure a condition or criterion of political and democratic legitimacy for the formation of the judicial decision (which may become a judicial precedent with binding effectiveness), since it is not mandatory. Besides it does not foresee objectively the matters and nature of actions in which such manifestation should occur, configuring mere judicial discretion, which is not a factor of legal certainty.

Therefore, the necessary participation of the figure of the friend of the court in the formation of the *ratio decidendi* of these formally binding precedents would be opportune as a way to pluralize the debate and democratize the content of the judicial decision, granting greater democratic legitimacy to the judiciary.[307]

In Germany, there is also the *amicus curiae* in certain situations, and there are procedures in some special laws that serve to assert general interests.[308] On the one hand, it is the case of procedures that originally serve to reinforce transindividual interests, as in collective actions. On the other hand, when in lawsuits in which grouped individual interests are asserted, such as in group actions and model procedures, a deterrent effect should also be employed to protect society from behaviors that harm the individual and thus preserve the general legal order.[309]

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[305] Art. 138. Considering the relevance of the matter, the specificity of the subject matter of the claim or the social repercussion of the controversy, the judge or rapporteur may request or admit the participation of a natural or legal person, body or specialized entity, with adequate representation, within 15 (fifteen) days of his summons, by unappealable decision, ex officio or at the request of the parties or whoever intends to manifest.
§ 1 The intervention dealt with in the caput does not imply a change in the jurisdiction or authorize the lodging of appeals, except for the opposition of embargoes of declaration and the hypothesis of § 3.
§ 2 It shall be up to the judge or rapporteur, in the decision requesting or admitting intervention, to define the powers of the *amicus curiae*.
§ 3 The *amicus curiae* can appeal the decision that judges the incident of resolution of repetitive demands.

[306] Luiz Guilherme Marinoni understands that the system of precedents provides an opportunity for the development of law in a very positive way since the power to give meaning to the law brings in itself the power to develop it. The precedent is not a sign of "plastering" of the law, but of stability. (Marinoni (footnote 47), p. 105).

[307] Habermas, *Consciência moral e agir comunicativo*, 2003, p. 83.

[308] Kern, O papel das Cortes Supremas. *Revista dos Tribunais* 948 (okt/2014).

[309] Kühne, *Amicus curiae*, 2015, p. 179.

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Besides the participation of the *amicus curiae* figure in the judicial process, through bodies and entities representing the rights and interests of society in general, there are public hearings to corroborate the democratic space in demands that require a certain complexity for the final judgment, ensuring greater popular participation in the process.[310]

It is important to note that the participation of the *amicus curiae* does not take away the magistrate's autonomy and power of persuasion, which is not conditioned to the position of the friend of the court, but also cannot ignore the content of that demonstration, which must bring elements of contribution to the process.

Regarding the admission/inclusion and the role of *amicus curiae* under the provisions and systematics of art. 138 of CPC/15, we compare the menu and the complementary information of the judicial precedent signed by the STJ, in the context of a special repetitive appeal, in which a legal thesis was signed on the possibility of mitigating the role of art. 1.015 of CPC/15 when there is verified urgency due to the uselessness of the judgment of the issue in the appeal. Considering the relevance and repercussion of the matter discussed, as well as the need for technical rigor in the formation of the decision, "*amici curiae*" were admitted to act in favor of the clarification of the matter discussed, to democratize the debate and democratically legitimize the decision to be rendered.

> *SPECIAL REPRESENTATIVE CONTROVERSY APPEAL. CIVIL PROCEDURAL LAW. LEGAL NATURE OF THE LIST OF ART. 1.015 OF CPC/2015. IMMEDIATE OBJECTION OF INTERLOCUTORY DECISIONS NOT PROVIDED FOR IN THE ITEMS OF THE SAID LEGAL PROVISION. POSSIBILITY. MITIGATED RATE OF RETURN. EXCEPTIONALITY OF THE IMPUGNATION OUTSIDE THE HYPOTHESES PROVIDED FOR BY LAW. REQUIREMENTS.*
> *1- The purpose of this special appeal, processed and judged under the rite of repetitive appeals, is to define the legal nature of the list of art. 1.015 of CPC/15 and verify the possibility of its extensive interpretation, analogical or exemplary, to admit the filing of an interlocutory appeal against an interlocutory decision that relates to hypotheses not expressly provided for in the clauses of the referred legal provision. (...)*
> *6- Thus, under the terms of art. 1.036 and following of CPC/2015, the following legal thesis is established: The list of art. 1.015 of CPC is of mitigated appeal, therefore it admits the filing of an interlocutory appeal when the*

[310] Art. 983, § 1º and art. 1.038, II, CPC/15.

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urgency arising from the uselessness of the judgment of the issue in the appeal is verified.

Complementary Information to the Syllabus:

"(...) Furthermore, the fact that the deadline to respond to the internal bill of review has not yet expired is a mere irregularity that does not result in nullity, especially because of the unique role played by the 'amicus curiae' in the formation of the precedents – whose intervention is not in favor of this or that one, but in favor of clarifying the matter at issue, to democratize the debate and legitimize the decision to be made – so that there is no need to talk about conflict of interest with the other 'amici curiae'.

The internal appeal against the one-off decision refusing entry of the 'amicus curiae' is not admissible. This is so because the reading of art. 138 of CPC/2015 leaves no doubt that the unipersonal decision on the admissibility of the 'amicus curiae' is not challengeable by internal appeal, either because the caput expressly places it as an unappealable decision, or because § 1 expressly states that the intervention does not authorize the filing of appeals, except for the opposition of embargoes of declaration or the filing of an appeal against the decision that judges the Incident of Resolution of Repetitive Appeals (IRRA).

"[...] it is necessary to differentiate the institutional interest, essential to those who wish to intervene as amicus curiae in a process of others to clarify the issues related to the controversial matter, from the legal interest, which nourishes those who only wish to see a certain position to become a winner".

"[...] in the context of special appeals representing controversy, any modalities of intervention by third parties are misplaced, except that provided for in the system as a means of contribution by society to the examination of the matter and democratic legitimation of the decision to be taken – entry as amicus curiae [...]".[311]

This decision represents an important paradigm, since it was handed down in a special repetitive appeal by the Superior Court of Justice, forming a binding judicial precedent and, as such, standardizing the jurisprudence on the matter at the national level. To this extent, the Superior Court performed prospective activities of granting unity of the Law but depending on the due observance

[311] Appeal n. 1.704.520/MT (Subject 988). Trial Date 05/12/2018.

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and application of the legal thesis by the courts for the implementation of the constitutional precept of legal certainty.

Therefore, in the case of the Brazilian legal system, one cannot be under the illusion that only the legal provision of procedural institutes and judgment techniques aimed at reducing the number of mass claims will make the Judiciary faster, giving greater legal certainty and isonomy of treatment to similar cases. Thus, the need for cultural and operational change in the legal community is clear so that the legislative reforms can reap positive results.

2. STJ AND BGH AS COURTS FORMING PRECEDENTS FOR THE UNITY OF LAW AND LEGAL CERTAINTY

Initially, we will briefly discuss the BGH with the scope to point out its role, relevance, and functioning in the legal system in Germany, as well as its contribution to the development and unity of law.

The BGH succeeded the *Reichsgericht*, the highest court in the Empire (*Reich*) in civil and criminal matters from 1879 to 1945. Art. 95 of the Basic Law established the BGH, and §§ 123 and the following paragraphs of the *Gerichtsverfassungsgesetz* (GVG) regulate the BGH. The judges composing the court must be over thirty-five years old (§ 125 GVG) and are chosen by the *Richterwahlausschuss* (Committee for the Selection of Judges) jointly with the Minister of Justice, by Art. 95(2) of the Basic Law and rules of the *Richterwahlgesetz* (Law Governing the Selection of Judges – RiWG).

Currently, the BGH is composed of 153 judges distributed in 19 senates. Thirteen of the senates are civil (*Zivilsenate*) and six of them are criminal (*Strafsenate*). The Senate is composed of six to eight judges each (alongside the president). However, only five members of the Senate participate in the trial, including the president. Besides the civil and criminal senates, there are eight senates with special powers (agrarian, notarial, patent issues, etc.). There are also two Grand Senates – one in civil matters and the other one in criminal matters – which together form the Grand United Senate. A joint/common senate ensures the uniformity of jurisprudence of the five highest federal courts (Federal Court of Justice in Karlsruhe, Federal Administrative Court in Leipzig, Federal Finance Court in Munich, Federal Labour Court in Erfurt and Federal Social Court in Kassel). Furthermore, about 75 judges and state prosecutors work as an academic team in the Federal Court of Justice.[312]

The competence of BGH in civil procedure as provided for in § 133 of the GVG corresponds to the judgment of *Revision*, *Sprungrevision*, *Rechtsbeschwerde*,

[312] Data obtained from the website *Bundesgerichtshof*: https://www.bundesgerichtshof.de/DE/Service/Publikationen/Taetigkeitsberichte/taetigkeitsberichte_node.html. Accessed on 22/07/2025).

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Sprungrechtsbeschwerde and *Wiederaufnahme* (a kind of termination action) of its own judgments (§ 584 ZPO).[313]

As already mentioned, the *Bundesgerichtshof* is not congested. In 2023, the BGH received 5,897 civil cases and 3,703 criminal cases, totaling 9,600 new actions. There were 5,328 judgments in the Zivilsenate (civil senates) and 3,844 in the Strafsenate (criminal senates), with an 11% decrease in civil filings and a 5% increase in the criminal area.

As for the tasks of the German BGH, the main task of the court is to guarantee the unity of the law, to clarify fundamental legal issues and to develop/form law. [314] As a matter of principle, it only reviews the decisions of the courts of instance – the district courts, regional courts and higher regional courts – regarding legal errors. Even if the decisions of the Federal Court of Justice are formally binding only in individual cases, the courts of instance do follow their legal opinion almost without exception. [315] The far-reaching impact of the decisions of the Federal Court of Justice is also based on the fact that legal practice regularly stands on them, particularly in the area of civil law.

Thus, it is clear that, although there is no express legal provision for the binding effectiveness of the decisions rendered by the Federal Court of Justice (BGH), respecting the decisions and understandings issued by the court, which precisely has the mission of promoting the development and unity of law is a premise and cultural guideline of the German legal system.[316]

As for the existence of public or general interest in the decisions of the Supreme Courts, Christoph A. Kern argues that they correspond to the interest in the uniform application of the law and, in more modern legal systems, to the interest in the development of the law, since they reinforce predictability and confidence in the court system.[317]

Acting before the BGH requires specific authorization (currently there are 46 qualified lawyers [318]), whose requirements are being over 35 years old, having a minimum of 5 years of uninterrupted forensic practice (§ 166 (3) BRAO – *Bundesrechtsanwaltsordnung*) and

[313] "There are complex regulations about the role of the Federal Court of Justice. Its most important role is to hear appeals (Revision) from decisions by the higher courts of the States. The Federal Court of Justice is in principle bound to the account of the facts in the lower court. It hears only legal, not factual questions." (Alexy/Dreier, Statutory Interpretation in the Federal Republic of Germany. In: Maccormick/Summers (org.). *Interpreting statutes: a comparative study*, 1991, p. 115).

[314] Althammer, Die Zukunft des Rechtsmittelsystems. In: Bruns/Münch/Stadler (org.). *Die Zukunft des Zivilprozesses*, 2014. p. 98/99.

[315] "German judges are highly influenced by academic writings and legal dogmatics. In particular, higher courts take account of and refer to scholarly writings." (Alexy/Dreier (footnote 70), p. 118).

[316] Alexy/Dreier (footnote 70), p. 107.

[317] Kern (footnote 65).

[318] The consultation held on the BGH website in July 2025.

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having a law office in the city of Karlsruhe (headquarters of the BGH). The lawyer may join only one other lawyer equally qualified before the BGH and may only be perform the practice of law before the highest courts.

In order to better understand the practical functioning and the guidelines of BGH, a judge acting in the Frankfurt *Oberlandesgericht* conducted a guided tour to the court. It included the accompaniment of a trial session, where a decision was publicly announced (*Verkündung*), and the hearing of the relevant arguments of the lawyers for the trial in three cases, all of them in *Revision* appeal grade (*mündliche Verhandlung*).

In the trial session, it was possible to verify the collegiate trial system in the German courts (monocratic trial is not allowed – § 555 (2) ZPO), with two different public sessions in the course of an appeal. The first has the scope of hearing the arguments of the lawyers of both parties (presentation of a written piece and oral debates) to be considered at the trial [319], which will take place privately, safeguarding the secrecy of the deliberation (*Beratungsgeheimnis*) and the principle of the integral manifestation of the collegiate. The second session is for the public announcement of a decision (*Verkündung*). The judges' deliberation room of the BGH was on display during the visit to the physical spaces of the Court. The aim was to show its striking feature of high glass windows that symbolize the transparency with which they make their decisions, although the debates among the judges are not public.

The historical court museum, the library and an annex building reserved for the "Forum Recht" in Karlsruhe (headquarters of the court), where space is being developed to bring society (especially young people and students) closer to the German Judiciary and the law in general, were also on display. The idea of the Forum is to develop projects in cooperation with other courts, universities, and institutions. Such mobilization highlights an important democratic awareness in the modern German constitutional state, especially considering society's demand for interest in knowing the judiciary and the limitation of access to higher courts, especially the *Bundesverfassungsgericht* (*BVerfG*).

Chapter 2 of this study addressed the *Revision* appeal procedure with a description of the main aspects and procedural changes made by the legislative reforms. Thus, in this last point, it is important to promote a comparative analysis between the function performed by the German BGH and the role played by the STJ, in the processing and judgment of the Brazilian analogous appeal (Special Appeal), from the perspective of the formation of precedents and effective granting of unity of law.

Therefore, it is necessary to briefly verify the effective function performed by the Brazilian Superior Court of Justice and to point out its

[319] Althammer (footnote 72), p. 101.

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difficult points to propose possible and positive reformulations for the concrete performance of a prospective function, based on the German model and experience.

The constituent of 1988 created the Superior Court of Justice, and assumed part of the extraordinary appeal jurisdiction of the Federal Supreme Court corresponding to infra-constitutional federal law as result of the so-called "Supreme Court crisis".[320]

According to article 104 of the Federal Constitution of 1988, the Presidency of the Republic may appoint at least 33 ministers to compose the STJ: one-third among judges of the Federal Regional Courts (TRF), one-third among judges of the Courts of Justice (TJ) and one-third alternately among lawyers and members of the Federal, the State, the Federal District and the Territories Public Prosecutor's Office (MP).

The ministers split up into three specialized trial sections, each composed of two classes, which analyze and judge matters according to the nature of the case submitted for consideration. Above them is the Special Court, the highest organ of the Court. The First Section (First and Second Classes) deals with matters of public law, especially administrative law, tax law, and social security law, as well as security mandates filed against acts of state ministers; the Second Section (Third and Fourth Panels) judges decide matters of private law, dealing with civil law and commercial law. The Third Section (Fifth and Sixth Classes) focuses on criminal law cases.

Due to the vertiginous increase in the number of causes that began to reach the Supreme Court, the Constitution of 1988 distributed jurisdiction between the STF and the STJ, the former being the guardian of the Constitution and the latter, of the federal legislation. Then, the two courts divided the exceptional appeals between themselves, with the judgment of the extraordinary appeal falling exclusively to the STF and the judgment of the special appeal to the STJ.

The Brazilian special appeal originated, as well as the extraordinary appeal, in the writ of error that arose in the United States in 1789, with the function of the tutelage of the authority and the unity of the federal law and controlling the legality of the judgment rendered by the lower courts.

Law 11.672/2008 amended the Code of Civil Procedure (CPC/73) to try to unburden the judiciary with the introduction of a new procedure for the trial of repetitive appeals or appeals representing repetitive controversies. With the 2015 Code of Civil Procedure, the decisions rendered on special repetitive appeals became a binding effect, through articles 926 and 927, which established the list of formally binding precedents.

Currently, the case backlog of the STJ (Superior Court of Justice)

[320] Alfredo Buzaid dealt with the "Supreme Court crisis" in 1960 (Buzaid, A crise do Supremo Tribunal Federal. *Revista da Faculdade de Direito* 55 (1960), p. 327).

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exceeds 332,000 cases. However, throughout 2024, a total of 501,024 cases were filed — marking the first time in the court's history that the number of filed and registered cases surpassed the 500,000 mark. [321] Therefore, the superior court is still facing a scenario of congestion and needs measures to optimize its functioning.

Within this scope, the constitutional amendment 125/22 [322] establishes a new admissibility criterion for the RESP was presented: the need for relevance of the federal issue discussed for the appeal to reach the STJ. According to the constitutional amendment, the STJ will only judge appeals whose subject matter is of legal relevance capable of justifying the decision of the higher court. The justification for the requirement is the need to resolve the congestion in the higher court, as occurred in the Supreme Court with the insertion of the requirement of general repercussion on the admissibility of the extraordinary appeal, which significantly reduced the number of cases distributed in Excellent/Superb Court. In this way, the higher court would no longer act as a "third instance" reviewer of cases whose interest is often restricted to the parties and would be better able to exercise its constitutional role of standardizing jurisprudence on federal legislation. Therefore, it is possible to see a similarity between the proposed appeal filter mechanism for the admissibility of the Brazilian special appeal and the requirement for admissibility of the German *Revision* appeal of the fundamental importance of the matter to be dealt with, which

[321] Source: Data obtained from the Superior Court Justice website: https://www.stj.jus.br/sites/portalp/SiteAssets/documentos/noticias/STJ%202024%20-%20Destaques%20do%20balan%C3%A7o%20estat%C3%ADstico-19122024.pdf . Accessed on 23.07.2025.

[322] **Article 1** The Article 105 of the Federal Constitution shall come into force with the following amendments:
"Article 105. .....
.....
§ 1 .....
.....
§ 2 In a special appeal, the appellant must demonstrate the relevance of the issues of infraconstitutional federal law discussed in the case, pursuant to the law, so that the admissibility of the appeal is examined by the Court, which may only refuse to acknowledge it on this ground by the manifestation of two-thirds (2/3) of the members of the competent body for judgment.
§ 3 The relevance referred to in § 2 of this article shall be applicable in the following cases:
I - criminal proceedings;
II - administrative misconduct actions;
III - actions where the amount in controversy exceeds 500 (five hundred) minimum wages;
IV - actions that may result in ineligibility;
V - cases in which the appealed decision contradicts the prevailing jurisprudence of the Superior Court of Justice;
VI - other cases provided for by law." (New wording)
Article 2 The relevance referred to in § 2 of Article 105 of the Federal Constitution shall be required in special appeals filed after the entry into force of this Constitutional Amendment, at which time the party may update the amount in controversy for the purposes set forth in item III of § 3 of the aforementioned article.
Article 3 This Constitutional Amendment shall come into force on the date of its publication.

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gives rise to a comparative analysis between the German model and the current Brazilian model.

The original wording of the ZPO (1877) did not provide for the requirement of fundamental importance, and *Revision* was to be admitted if the value of the cause was greater than 1,500 marks (the currency of the time) or in the hypotheses listed. However, over time the provision had to be adapted to a new currency, the Deutsche Mark introduced after World War II, and – more important for our topic – the limit had to be raised due to the increasing congestion of the BGH. Thus, the requirement for the admissibility of "fundamental importance" (*grundsätzliche Bedeutung*) was only included in the German *Revision*'s appeal in 1975[323]. From that time the appellate courts began to admit *Revision* when its value exceeded the threshold of 60,000 DM (the value determined in the legislation of the time – old § 546), when the case was of fundamental importance or when the contested judgment differed from the understanding of the BGH. § 554b of the previous wording of the ZPO also allowed the BGH, by a decision of 2/3 of the judges in the Senate of the appeal, to dismiss it, even if the value exceeded 60 thousand DM when it lacked fundamental importance.[324]

It was the reform of 2001 which eliminated the compulsory admission basis of the value on the cause (*streitwertige Annahmerevision*) and also the *Revision* independent of admission (*zulassungsfreie Revision*).[325]

Therefore, the new program had two goals: firstly, it had to ensure access to the BGH in cases of legal as opposed to merely economic importance; and, secondly, it had to result in a decongestion of the BGH for practical reasons. The preponderance of one of these purposes is not easily recognizable. In a general analysis, the *Revision* procedure should focus on the tasks of ensuring the uniformity and the development of the law.[326]

From a comparative point of view, the German system is more effective in promoting the uniformity of jurisprudence, since it ultimately determines the appropriate solution to the question of law raised on appeal. In addition, both the judiciary (first and second instance) and legal practice have good reasons to consider and apply the understanding espoused by the BGH. In the Brazilian Special Appeal procedure, the first and second degree courts may not apply (due to ignorance or disagreement) the understanding of the STJ, and the correct and unified solution of the issue is only determined when the higher court judges decide the appeal after a long and costly procedure.

It is still necessary to consider that the Brazilian Superior Court, despite its important function in

[323] *Gesetz zur Änderung des Rechts der Revision in Zivilsachen v. 8.7.1975*.
[324] Rosenberg/Schwab/Gottwald (footnote 22), p. 829.
[325] Piekenbrock/Schulze, *Zulassung der Revision nach dem ZPO-Reformgesetz*. *Juristenzeitung* 57 (2002), p. 911.
[326] Traut, *Der Zugang zur Revision in Zivilsachen*, 2006, p. 9.

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creating judicial precedents and guaranteeing the uniformity of jurisprudence, presents a defensive posture, [327] as imposed by *sumula* (restatement of case law) n. 7,[328] which prohibits the review of a matter of fact in the judgment of the special appeal. This stance is still present when the STJ does not admit a special appeal because the matter is constitutional and, therefore, within the jurisdiction of the STF.[329] Such problems do not arise in the German BGH. As mentioned above, in exceptional cases the German BGH may carry out the re-evaluation of evidence and the re-examination of the respective conclusions of the court of first instance as to the facts relevant to the decision when the cause is mature or when a procedural rule applicable to the determination of the fact has been violated (*Verstoß gegen eine Verfahrensvorschrift*). [330] Furthermore, the admissibility criteria of *Revision* make it possible to deal with the matter whenever the BGH deems it necessary to develop and grant unity of law, as well as when the matter is of fundamental importance, these being the filters for admission of the appeal.

Therefore, if the matter presents a fundamental relevance and may have general repercussions, the German BGH will analyze and judge the *Revision* appeal. Consequently, the judiciary will observe and follow the content of the decision signed by the court, and legal practice as a guideline will exercise a de facto binding function in the German legal system. In the Brazilian legal system, article 927 of CPC/15 classifies only the special and extraordinary repetitive appeals as formally binding precedents (item III) and there is no reference to the special and extraordinary appeals in terms of general repercussion. The duty of observance by judges and courts does not cover such extraordinary appeals, which consists of a failure of the legislation, [331] as to the aspect of granting unity of law.

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[327] José Rogério Cruz e Tucci developed the following comments on defensive jurisprudence: "Nevertheless, in our legal experience, completely forgetting that speed must serve the parties and not the State, the courts, in various situations, go beyond procedural guarantees and legislate to the detriment of the material law of the courts, as occurs, for example, in the context of the notorious defensive jurisprudence. Certain obstacles to the admission of appeals to higher courts are the result of ingenious construction, which retains some hermeneutical consistency with the procedural rules in force. However, there are, in significant numbers, other barriers that most identify with 'perversity and praetorian abuse,' which have no plausible reason to subsist within the framework of a democratic legal system, committed to the effectiveness of judicial protection". (Tucci, Contra o processo autoritário. *Revista de Processo* 242 (apr./2015), p. 55).

[328] "The desire for a simple review of evidence does not give rise to any special appeal".

[329] Marinoni, *A Zona de Penumbra entre o STJ e o STF: A função das Cortes Supremas e a delimitação do objeto dos recursos especial e extraordinário*, 2019, p. 102.

[330] Jauernig/Hess (footnote 5), p. 304.

[331] According to Luiz Guilherme Marinoni: "It would be little more than absurd to deny the character of a precedent to a decision rendered in an extraordinary appeal under general repercussion or to a decision taken in a special appeal that dealt with a question of law of important social relevance only because the

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The great crisis or difficulty present in the Superior Court of Justice corresponds to its effective role in the performance of its activities and, therefore, in the definition of its function in the Brazilian legal system.

Currently, there is much discussion in Brazilian procedural doctrine about the need to reformulate the apex courts with a view to rationality and effectiveness in a system of judicial precedents. Dialogue and alignment between the two supreme courts (STJ and STF) are necessary to avoid overlapping functions. To this extent, Luiz Guilherme Marinoni believes that the STF should only control the constitutionality of the meaning the STJ attributes to the law through precedents. Besides, for such control, the STF should also base on the interpretation of the law under the Constitution, since there is no rationality for the Supreme Court to interpret the law accordingly before the Superior Court of Justice defines the meaning of federal law.[332]

The excessive number of cases and the high workload imposed on the STJ is a major obstacle for the court to perform its true and relevant constitutional function of standardizing federal law. Thus, reducing the volume of cases and workload/judgments in the higher court would be, in fact, the most effective solution to the problem, since the increase in the number of ministers and the attempt to change the posture of the system would not only require time and availability but would also fail to fully solve the problem.

Therefore, it remains clear that the inspiration from the German model of imposing an admissibility requirement of fundamental importance/signification for the analogous appeal of *Revision* is positive and can contribute to the system of the Brazilian Special Appeal since the German experience demonstrates the gain in effectiveness and functionality of the Superior Court (BGH) through the application of the relevance recursive filter.

The constitutional amendment 125/22 has the purpose of inserting a recursive filter to demonstrate the relevance of the infraconstitutional federal law issues discussed in the case, according to the law, so that the Court may examine the admission of the appeal. However, the processing of the infraconstitutional regulation of the aforementioned constitutional amendment in the competent legislative houses is very slow and, meanwhile, the Superior Court of Justice continues functioning without being able to perform its essential constitutional function effectively, which harms the system as a whole, due to the shake for legal certainty and the development of the law.

Although the experience of inserting the requirement of general repercussion for the admissibility of the

litigious question is not one that is being discussed in numerous actions that have already been proposed or that will be proposed before the Judiciary. (Marinoni (footnote 88), p. 161/162).

[332] Marinoni (footnote 88), p. 106/107; 112.

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extraordinary appeal in the STF has succeeded, there is doctrinal criticism of the extension of the filter of appeals to the system of admission and trial of the special appeal in the STJ under the argument that this court should assume the role of the Citizenship Court and thus be open to the demands of society. This part of the doctrine believes that the constitutional mission of the STJ (unification of the interpretation of federal law) could remain unattended. It also believes it may be inconvenient to adopt the relevance of the federal issue as a filter of admissibility for the special appeal since the STJ would no longer rule on many federal issues that affect the entire population.[333]

In any case, the essential criterion for checking the relevance of the application of the recursive filter to the dynamics of the special appeal is the common function performed by extraordinary appeal, which corresponds to the standardization of the interpretation and application of the law through the protection of objective law.

Therefore, one must consider the common nomophylactic function of the extraordinary appeals, in addition to the positive result achieved of a considerable reduction of cases in the STF with the insertion of the admissibility requirement of the transcendental importance of the matter discussed in the extraordinary appeal.

Therefore, the influence of the successful German experience in providing for the equivalent institute is relevant ground for the improvement of the operation and of a qualified judicial provision of the STJ, which are essential for ensuring the uniformity of jurisprudence and legal certainty.

CONCLUSION

As explained throughout the study, although the German legal system does not adopt the model of binding judicial precedents as a judgment technique, it presents, as guidelines, the concern with the uniformity of jurisprudence (*Sicherung einer einheitlichen Rechtsprechung*) and the preservation of legal certainty (*Rechtssicherheit*). Both of them are grounds to admit appeals (*Zulassungsberufung* – § 511(4) ZPO and *Zulassungsrevision* – § 543(2) ZPO) and, therefore, guide the work of the BGH (*Bundesgerichtshof*) as a court exercising a prominent prospective function.

[333] Marco Aurélio Serau Junior states that: "The STF is a Constitutional Court and, therefore, there is full justification for the implementation of the admissibility limitation requirement which is the general repercussion of the extraordinary appeal. In the case of the STJ, we believe that the picture is relatively diverse. Although the magnitude of this Court, a truly extraordinary instance, does not go unnoticed, its specific constitutional role still seems to be little studied. The limitation on the admissibility of the special appeal, when the relevance of the federal issue discussed is absent, may imply inadequate limitation of the Court's action" (Serau, Relevância da questão federal como filtro de admissibilidade do recurso especial: análise das propostas de emenda constitucional n. 209/2012 e n. 17/2013. *Revista de Processo* 224 (2013), p. 250).

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Therefore, it is clear that the concern for the uniformity of jurisprudence permeates the legal system as a whole in Germany, representing a true expression of its tradition and culture. To that extent, the German system constitutes an important model of inspiration and source of contribution to the Brazilian civil procedure. It considers, for example, the highly prospective function performed by the *Bundesgerichtshof* when judging the *Revision*, without congestion or defensive jurisprudence, an important reference for the more qualified functioning of the Brazilian Superior Court of Justice in the context of the formation of judicial precedents.

Despite the procedural reforms undertaken, the Brazilian Superior Court is still facing a congestion scenario and needs measures to optimize its performance, in line with the processing standard of the German *Revision* to the BGH. The adoption of an appeal filter for the admission of the Special Appeal similar to the admissibility requirement of "fundamental importance" (*grundsätzliche Bedeutung*), in accordance with Constitutional Amendment No. 125/2, is a possible and relevant ground for the efficiency of the judicial provision by the STJ. Also, the essential criterion for checking the relevance of applying the appeal filter to the dynamics of the special appeal is the common function performed by extraordinary appeals, which corresponds to the standardization of the interpretation and application of the law through the protection of objective law, factors of the uniformity of jurisprudence and legal certainty.

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