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THIRD PARTY INTERVENTION IN INCIDENTS OF JUDICIAL PREVIOUS DECISIONS

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ABSTRACT: The current study has the objective to analyze the possibility of a third party intervention in incidents of judicial precedents, which does not have a legal provision in Brazil yet. The Brazilian legal system has been reformed gradually in order to concede binding or persuasive efficacy to certain precedents, creating influence on other procedures related to a similar legal relationship. The stare decisis theory, already used by the Common Law, influences a lot of changes in the Brazilian Law, which leads to the necessity of a deeper study about the judicial precedent theory. However, the mentioned reforms have deficiencies that must be outnumbered by the doctrine. Consequently, it is important to notice the possibility of third party intervention on procedures to fixate thesis before legal courts, with the intention to match the precedents theory with constitutional principles, such as the due legal process, the full defense and the contradictory. It is the creation of a new modality of intervention, considered *sui generis*, that must follow established requisites, like the legitimacy and the interest, under penalty of disorganizing the mentioned procedures.

Key-words: Civil Procedure Law, Third party intervention, *Amicus Curiae*, Judicial

INTERVENÇÃO DE TERCEIROS NOS INCIDENTES DE FORMAÇÃO DE PRECEDENTES

RESUMO: O presente artigo tem como objetivo analisar a possibilidade de o terceiro intervir em incidentes de formação de precedentes, possibilidade esta que, atualmente, não possui previsão legal no Brasil. O ordenamento brasileiro vem gradativamente realizando reformas pontuais no sentido de conceder eficácia vinculante ou persuasiva a determinados precedentes, influenciando ou determinando outros processos que tratam de relações jurídicas semelhantes. Desta forma, entende-se que a teoria do *stare decisis*, já utilizada pelo *common law*, vem influenciando as modificações realizadas no Direito Brasileiro, sendo necessário um maior estudo acerca da teoria do precedente judicial. No entanto, as referidas reformas pontuais possuem lacunas que devem ser preenchidas pela doutrina. E, sendo assim, destaca-se a importância de se atentar para possibilidade de o terceiro intervir em procedimentos de fixação de teses perante os Tribunais, com o objetivo de adequar a teoria dos precedentes a princípios constitucionais, como o do devido processo legal, o da ampla defesa e do contraditório. Trata-se, portanto, acerca da criação de uma modalidade de intervenção, considerada *sui generis*, que deve cumprir requisitos estabelecidos, como o da legitimidade e o interesse, sob pena de tumultuar os mencionados procedimentos.

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Palavras-chave: Direito Processual Civil; Intervenção de terceiros; *Amicus Curiae*; Precedente Judicial.

1 INTRODUCTION

Society nowadays has been creating relations in a massive way. This tendency, that started a while ago, is being reflected in legal relationships, which started to be organized in a similar way, being declared, consequently, as mass legal relationships. The most evident example is the consumption relationships, in which only the parts change and the object of the relationship stays the same, after all, they are adhesion contracts. This is only an example, from many others that can easily be noticed within the modern society.

In this way, the changes in the social context start to be reflected in the Judiciary power because in the moment that many similar legal relationships begin to exist, inevitably, the legal discussions regarding the object of those relationships come to the judiciary through similar lawsuits.

On the other hand, as a way to adapt the judiciary power to this new reality, new forms to adjust the legal system to the repetitive lawsuits were created. Therefore, one of the ideas found is being used through reforms with the goal of conceding binding or persuasive efficacy to legal precedents. Which means the efficacy of a decision made for a specific case becomes ultra partes, and influences other processes where there is a similar legal relationship being discussed.

However, in the moment the legal system starts to concede this efficacy to certain precedents, it becomes necessary to think of the possibility of a third party interfering in the mentioned procedures, because when fixing the Court's understanding, certain principles, such as the full defense, the contradictory and the due legal process, can be attenuated, consisting on a disrespect to the Federal Constitution.

This work has as the purpose to analyze the way the third party can exercise the full defense and the contradictory in procedures that try to level the Court's understandings, without causing a procedural trouble, since, in what regards mass relationships, many people will be influenced by this new precedent.

2 JUDICIAL PRECEDENT

The study of judicial precedents becomes more important in the brazillian legal system because of the multiplication of mass relations, in which similar legal relationships are discussed, and because of the restoration the legislators made in order to create new procedures to fixate thesis before the courts.

It is right to assure that judicial precedents are present in any legal system, since they are decisions of a process that have the possibility to influence similar cases – the main difference is the efficacy that each system gives to them.

The common Law is the legal system in which the precedents and customs are essential sources of law and, therefore, the jurisprudence has important efficacy. The civil law, on the other hand, comes from the Roman Law and has as a basic proposition the submission to the written law.

It is fundamental to notice that the stare decisis theory – that confers binding effects to the legal precedents, especially those that come from the Supreme Court (DIDIER JR, BRAGA, OLIVEIRA, 2010, p. 385), and gives two characteristics: the obligatory power of the precedents and the idea of the functional hierarchy between them – cannot be confused with the common law, and Marinoni mentions this difference well (2010, p. 33):

> The creation of rules and principles that regulate the use of precedents and the determination and acceptance of their authority are quite recent, especially the notion of binding precedents, which is even more. Besides the common law having been born centuries before the beginning of this discussion, it worked well as a legal system without bases and concepts made for the theory of precedents, as, for example, the concept of *ratio decidendi*.

Thus, the common Law, which has an existence way longer them the existence of the stare decisis, utilizes currently this theory, having as a premise the respect to hierarchically superior decisions. It is important to distinguish the common law system from the stare decisis theory to affirm that the civil law system can adopt this theory without having to lead away from its essential principles.

In Brazil, civil Law was always predominant. The Brazilian legal order always gave an important role to the written law, the Constitution, followed by many ordinary and complementary laws, which are the main source of the brazillian Law. Until today the debate of whether jurisprudence is or not a source of our law is alive. This discussion, however, is being outnumbered because in the jurisdictional activity there is much more than a simple interpretation method and application of the law. There is a true creation of the law that gives the jurisprudence the status of a genuine source of the Brazilian law.

It is necessary to mention that the brazilian civil Law is changing its premises. Currently, there isn't anyone who thinks that the judge is only an applicator of the law and cannot create the law, and in this context that it is possible to realize a gradual approach between the common and the civil law in what regards the stare decisis theory. In Brazil, as an example, there is the binding pronouncement ("súmula vinculante"), the general repercussion of extraordinary appeal, the repetitive special appeal, and other cases where the legislator concedes efficacy to the decision that bind future decisions in similar cases.

Doubtlessly, those changes do not mean that in Brazil the law stopped having a primordial role. They are an attempt to confer efficacy to the decision without leaving behind the civil law principles, which means that the doctrine, the jurisprudence and the legislators are trying to adapt the stare decisis theory to the Brazilian legal order.

It is also important to understand that the juridical reality is changing. Nowadays, the legal relationships are massive, and this results in repetitive demands, in which there is the same legal debate. As an example, the consumption relationships with telephony companies, that, in case of an illegal charge for a service, many people can sue the company in order to receive the same legal tutelage. In this context, there is no reason why the Superior Courts should analyze the same situation over and over, since their understanding is already established.

That's why it is true that the efficacy of the precedents consolidates at least four principles: the principle of legal certainty, economy, procedural fastness and isonomy.

Luiz Guilherme Marinoni (2012, p. 2-3) says that "the legal order must be coherent; it is not only composed by laws, but also by judicial decisions. Different decisions to similar cases reveals an inconsistent legal system".

About this matter, it can be concluded that the Brazilian legal order must concede efficacy ultra partes to the precedents to assure that a sentence uttered in a case will be applied in similar legal relationships, prohibiting the judge's independent interpretation over cases already discussed by Superior Courts. It is not the objective of this idea that the judges should be only an applicator of precedents, but that there should exist a coherency in the legal order, since there is a logical reason behind fixed understandings.

2.1. CONCEPT

The judicial precedent is a legal decision uttered in a process with some peculiarities. It is not possible to assure that any decision over a process will be a precedent since it is only

a precedent the decision whose argumentation (*ratio decidendi*) is used as a base to similar cases.

Precedents, consequently, can be defined as "a judicial decision uttered in a concrete case whose essential core can be used as a guideline to a posterior judgment of equivalent cases" (DIDIER JR, BRAGA, OLIVEIRA, 2010, p. 381).

As it will be seen in the following topics, a judicial decision that is capable to influence other processes is composed by different parts, creating a legal and broad norm in which will be exposed the interpretation of laws over that case. It is at this moment that, for example, the judge will fulfill an undetermined concept, and for this reason this decision can be used to judge another process. Inside the decision, there is also an individual law, which will have efficacy between the parts, since the judge will expose his conclusions over that case – judge the acceptance or not of the request, the fees, etc.

Following the doctrine mentioned before, a precedent can be considered a legal act-fact. It is a fact because it will exist anywhere, differing only the intensity of its efficacy, established by its legal order. At the same time, it is an act because the human action to utter the decision will produce effects determined by the law, which means it has ex lege effects and one effect is attached to the judicial decision.

2.2 STRUCTURE

Therefore, inside a precedent, which, as it was affirmed before, creates two legal norms (a general and an individual norm), there are different parts that are fundamental to this study because they will establish what will influence and determine other processes.

In this matter, it is considered that a precedent has the *ratio decidendi* and the obter dictum.

For Marcelo Alves Dias de Souza (2007, p. 125-126), *ratio decidendi* can be defined, based on some definitions extracted from the legal English literature, as a rule of Law explicitly or implicitly established by the judge to support his decision, his response given to the legal question of the case.

Because of that, it can be inferred the importance of this part of the decision to the study of the precedents' efficacy, since it is in this part that will occur the Judiciary's creation and, consequently, the legal concrete norm will be elaborated and used in other similar processes. It can also be found the word "holdings", which is a synonym of *ratio decidendi*, however, the first one is more used in the United States, while the other, in England.

To Cruz and Tucci (2004, p. 175):

> The *ratio decidendi* (...) is the essence of the legal thesis that is sufficient to decide the concrete case (rule of Law). It is composed of: 1) the statement of material facts, 2) the legal reasoning and 3) the judgment.

Before the importance of this part of a precedent, the judge must expose clearly and in a comprehensible way the elements above, although sometimes this is not respected, making it harder to identify the *ratio decidendi* and, consequently, its application in other processes.

Continuing the study of the precedents' structure, we must analyze the obter dictum.

In what concerns the terminology, dictum is a proposition of Law, frequent in the judgment of precedents, that, despite not being *ratio decidendi*, has a notable relation to the subject of the judged case and bigger persuasion power.

The obter dictum, or simply dictum, is the arguments exposed temporarily in the motivation of decisions, consisting in accessory, secondary, momentary judgments or impressions that do not have a relevant and substantial influence on the decision itself. It is usually defined negatively: the obiter dictum is the proposition or rule that cannot be considered *ratio decidendi*, which means, consequently, that it does not have binding power (SOUZA, 2007, p. 140-141).

3 THIRD PARTY INTERVENTION IN INCIDENTS OF JUDICIAL PREVIOUS DECISIONS

The Brazilian legal system is being formed to concede efficacy to certain decisions, giving power to influence or determine the solution uttered in processes that have similar subjects. However, those reforms are punctual: the legislator does not worry about modifying the whole system and, because of that, there are deficiencies which must be fulfilled by the doctrine.

The reforms that try to create incidents to confer binding and persuasive efficacy to precedents need to respect the due process of law – it is important to analyze in which way the third party, who will be influenced by a certain precedents, can interfere in cases that create precedents. That is why it is essential to elaborate parameters that will allow interventions in those procedures, as a way to strengthen constitutional principles, such as the contradictory and the full defense.

If on one hand the legal order, that adopts the stare decisis theory, which concedes ultra partes efficacy to decisions, tries to implement principles such as legal certainty, isonomy and coherence, on the other hand, it cannot forget other principles, like the due process of law, the contradictory and the full defense, guaranteed by the 5th article, items LIV and LV of the Constitution.

In this context, in the moment when the decision influences and determines many other legal relationships, it becomes necessary to elaborate ways to allow the third party to manifest itself and bring new legal thesis to be analyzed when a new precedent is created.

It is necessary to emphasize that in the creation of a precedent with binding or persuasive efficacy, the participation of the third party, representative entities and the *amicus curiae* brings relevant contributions to form a more stable judgment, embodying the presentation of thesis and the representation of certain interests existent in the society (BASTOS, 2012, p. 186).

When a binding or persuasive precedent is created, the biggest number possible of relevant thesis should be analyzed in order to give a significant legitimacy to the decision and avoiding its constant overcoming. Doubtlessly, despite the participation of the third party that legitimates the creation of the precedent, the overcoming of a precedent can happen if, for example, a new law about that subject is promulgated or there is a substantial change of social aspects.

From that we can conclude, before the punctual reforms of the Brazilian legal order, which utilized the stare decisis theory, that the legal system must be organized to keep applying the principles of the full defense and the contradictory. Thus, this study tries to analyze the way this theme is treated nowadays, and to bring new parameters to allow the interested third party to interfere in the decisions that create new precedents.

3.1 THE *AMICUS CURIAE* INTERVENTION

Today in the Brazilian legal order, there isn't a typical kind of intervention in procedures that fix binding or persuasive precedents. Due to this, each procedure has different characteristics about the possibility of the third party to manifest itself, and it is up to the doctrine to analyze and establish the parameters not mentioned by the law.

The most known and accepted intervention in procedures that establish thesis before the Courts is the *amicus curiae*. This procedural institute was born in the United States to

implement the deliberative and participatory democracy, as well as to allow other parts of society – that were not included in this process before - to debate the theme.

The brazilian order, in some situations, tolerates the third party participation to improve the decisions; the doctrine and the jurisprudence, however, understand that this intervention is exactly the friend of the Court.

The first topic to be discussed is the intervention on the creation of binding pronouncements (súmula vinculante) incident. The 11.417/2006 federal law, in its 3rd article, 2nd paragraph, affirms that the rapporteur can admit the third party manifestation in the edition, revision or cancelation of wordings procedures of binding precedents in the terms of the Internal Regiment of the Supreme Federal Court (RISTF). As a consequence, the RISTF, in its article 354-B, says that, after receiving of the binding precedent project and the verification of the meet formal requirements, the announcement will be published in the Court's site and in the Electronic Diary of Justice, so the interested parts can be aware and appeal in a five days deadline.

Palhares Moreira Reis (2008, P. 202-203) affirms that this kind of intervention is the exact same thing as the *amicus curiae*. According to him, this participation occurs through a memorial and, without being part of the process but trying to help the Court in the outcome of the demand, the friend of the court should bring essential information to the discussion of the Court.

This is also the understanding of Didier Jr., Braga and Oliveira (2010, p. 401-402) when they say this type of manifestation is one more case of the *amicus curiae* intervention, and it aims the enlargement, within the social context, of the discussion over the content of the binding precedent in order to confer a bigger democratic legitimacy to the creation of norms by the Supreme Court.

The *amicus curiae* intervention cannot be considered a typical third party intervention since it is assistance to the case that has as a purpose the improvement of the Judiciary Power's decisions, helping with technical-juridical information, and it is not necessary to prove an interest in the solution of the case.

Another topic that deserves contemplation is the matter of an intervention brought by the 11.418/2006 law, which introduced the articles 543-A and 543-B to the Procedural Civil Code, that legislates on the general repercussion of extraordinary appeals. Thus, the 6th paragraph of the 543-A article affirms that the rapporteur may admit the written demonstration of third parties, under proxy, in the terms of the Supreme Federal Court's Internal Regiment (RISTF). This document, in its articles 323, 3th paragraph, says that in

unappealable decisions, the Rapporteur can admit, without motivation or under third party requirement subscribed by an attorney, the general repercussion of the question.

Consequently, once more the possibility of third party intervention is contemplated in a procedure that will fix a thesis which must be followed by other similar processes, and this creates a binding precedent.

Before analyzing the modality of intervention that the legal text mentions, it is important to remember that the Supreme Federal Court (STF) is starting to "objectify" the diffuse control of constitutionality by using the extraordinary appeal, almost transforming it into a concentrated control. This means that the decisions uttered by the Court inside a diffuse control and that were not enshrined in binding pronouncements (súmulas vinculantes) have ultra partes efficacy. Thus, those decisions become linking precedents and can be revised by the Court if new arguments arise or if there is an evolution of the reasoning about this subject (DIDIER JR and CUNHA, 2011, p. 350).

Before this ascertainment, the intervention allowed by the law and by the RISTF is the *amicus curiae*. Cassio Scarpinella Bueno (2006, p. 554) thinks that there are two questions that would allow this kind of intervention. The first of them would be the fact that the term "general repercussion" is an undetermined legal concept that needs an fulfillment of values. Besides, the author affirms that the expressed mention in the 5th paragraph of the 543-B article of the Procedural Civil Code "gives the notion of the impact that the paradigmatic judgment will have on the third party life".

Due to the reasons mentioned above, such as the objectification of the extraordinary appeal, that gives ultra partes efficacy to the decisions uttered by the Supreme Federal Court (STF), besides the legal acts, which allows the possibility of the third party manifestation on the general repercussion, the "friend of the court" can interfere in those situations improving the Court's decisions and bringing technical-juridical elements to the debate. It is important to remember that this institute is considered a help to the decision, and does not become part at the moment it participates in the procedure.

However, the legislator brought the possibility of an intervention only in the analysis of the general repercussion. Thus, the friend of the court, according to the law, can only interfere when the High Praetorium discusses the general repercussion, which is a requisite to admit the extraordinary appeal. There isn't any provision of the participation of this important figure when the STF discusses the appeal, which would be a huge opportunity to create a bigger debate, since the uttered decision influences similar processes because of its ultra partes efficacy.

In this context, Bueno (2006, p. 557) advocates for the *amicus curiae* intervention to be used in the merit of the question. According to him, the amicus' performance should be focused on the merit of the question, providing arguments to justify its intervention, bringing new information, elements and only exceptionally this performance should occur related to the admissibility.

It is essential to notice, nonetheless, the fact that, in the specific case of the general repercussion of the extraordinary appeal, the admissibility question is not a procedural question, but the discussion can be about a material right. So, it seems that the friend of the court's intervention should occur in the moment of the general repercussion analysis, even it being a requisite to the admissibility, as well as in the merit of the question, by the doctrinator's arguments.

The 10.259/2001 law, in its article 14th, paragraph 4th and 9th, and 15th article, besides the RISTF, already allowed the amici curiae intervention in the merit questions' debate about extraordinary appeals related to Especial Federal Court. It's important to emphasize that this text existed before the modifications made in the extraordinary appeal.

In the brazilian legal order, there is also another possibility of intervention that the doctrine, like Didier Jr. and Cunha (2011, p. 315), understands concerns the *amicus curiae*. This opportunity can be found in the 4th paragraph o the 543-C article and says that, in cases of repetitive especial appeals, judged by sampling, the rapporteur can admit manifestations of people, institutes or entities with interest in the controversy, considering the relevance of the matter.

There is another manifestation of the friend of court, because of the single paragraph of the article 481, Procedural Civil Code. This norm says that in case of inconstitutionality incidents where the question has already been object of discussion in that plenary of that Court in the Supreme Federal Court, the organ will not submit again the same question to the Plenary.

The possibility to interfere, in the case above, is in the paragraphs of the 482 article in the PCC. When analyzing the case, the Court will fix the leading case to all other cases submitted to the Court that involve the same question.

Didier Jr. and Cunha (2011, p. 577) affirms that this is why, like happens in the ADI and ADC, it is possible the *amicus curiae* intervention in this incident, as it is written in the 482 article of the PCC.

Therefore, the brazilian system already establishes, in some cases, the intervention of the assistant in incidents that form precedents. It is certain that those possibilities must occur to improve the binding and persuasive decisions, providing a better legitimacy to them.

It is important to emphasize that the friend of court's intervention can occur through legal entities, like organs, associations, labor unions. On the other hand, it is also possible to occur intervention of people like *amicus curiae*, such as in cases that demand technical information to be solved, and that physicians, sociologists, for example, are capable to help the Judiciary Power.

Cassio Scarpinella Bueno (2006, p. 56) highlights that this intervention consolidates the cooperation principle once there will be an exchange of information, giving to the judge all the possible and necessary information to make the best decision.

On the other side, Antonio Adonias Bastos (2012, p. 184) warns that the admissibility must be guided by arguments that improve and diversifies the debate, and there is no reason to allow the participation of someone who simply wants to repeat arguments already showed to the Court, which could disorganize the procedure and slow it down without necessity.

Thus, the brazilian order admits certain procedures for the Courts to fix the possibility of intervention and the doctrine, as mentioned above, believes that this intervention is the *amicus curiae*. However, the participation of this procedural figure does not constitutes a third party intervention, because it is an assistance to the decision and has the aim to improve the Judiciary's decisions, and does not necessarily have some kind of interest in the cause.

It is necessary, consequently, to think about a modality of third party intervention for the procedures that create binding and persuasive precedents, since only the *amicus curiae* intervention seems not to be enough for the mentioned procedures.

3.2 *SUI GENERIS* INTERVENTION

It is fundamental to create new forms to permit the third party, who will be influenced by decisions elaborated from procedures that fix thesis in Courts, to manifest itself over the procedure, under penalty of violation of the due process of law, full defense and contradictory principles.

There are some procedures that already allow an intervention, which the doctrine understands it is a case of *amicus curiae*, but this is not enough since it is not about a subjective right of the third party to interfere in the procedure of creation of binding or persuasive precedents.

So, the legal system has a deficiency regarding this subject.

The Supreme Federal Court faced this problem when judged the Extraordinary Appeal number 550.769/RJ, provoked by the Cigarette Industry against the Federal Union. This appeal criticized the Regional Federal Court's, of the 2nd Region, decision which considered constitutional the Decree-Law 1.593/77 by the Law 9.822/99.

About this Extraordinary Appeal it is important to emphasize it that its solution would create a precedent concerning Cigarette Industries because of the "objectification" of the appeal and its ultra partes effects. That is why the Union of Smoke Industry in the state of São Paulo – SINDIFUMO tried to interfere, and the STF accepted as a simple assistance – as it can be observed in the Question of Order decided by the Court in February 28 of 2008.

However, according to Antonio Adonias Bastos (2012, p. 188), despite the intervention being approved as simple assistance, the Union did not have any legal relationship with the object of the process, not having, therefore, a legal interest as the national doctrine recommends. This intervention had the purpose of participate in the creation the Court's understanding about the constitutionality of certain indirect way of coercion for the payment of taxes. In that case, the legal interest concerned a collective legal relationship, involving the protection of uniform individual rights.

Thus, this accepted interference could not be considered a simple assistance because, as it was seen in the last topic, it has a legal relationship connected to the one discussed in the case, which did not happen in the mentioned situation.

Regardless of the inexistence of a typical modality of intervention, its occurrence is necessary to consolidate constitutional principles and give legitimacy to the decision. About this, Bueno (2006, p. 626) affirms that the only way to legitimate decisions with binding and persuasive effects is to recognize that people and entities of the civil society must be heard previously, verifying if their interests, rights and values are properly represented.

It is important to remember that the third party intervention institute is fundamental to the development of a fair process. The Federal Constitution (CF), in its 5th article, LV, gives the guarantee of the contradictory and the full defense to any litigant in a judicial or administrative process. There is no immediate application of, mainly, those two principles if the infraconstitutional legislator does not allow the intervention of someone who might suffer the effects of the decision and are stranger to the procedural triangulation.

Considering the ideas above and the extraordinary appeal (RE) 550.769/RJ, when the Supreme Court accepted the intervention yet used the wrong modality, it is necessary to think a new modality of third party intervention for the formation of precedents incident, which is

not equal to any of the modalities already registered in law, and, because of that, can be considered *sui generis*.

The mentioned modality cannot be considered assistance once the third party that will interfere does not have a legal relationship linked to the one discussed in the procedure, not justifying the intervention. As it was seen, the simple assistant is an extraordinary subordinate legitimize, because it would be necessary the presence of the discussed right's holder. He helps the part to obtain a favorable sentence, and does not defend his own rights.

In the *sui generis* intervention, the intervener will defend his own rights since the decision of that process will directly influence a similar legal relationship discussed in another process – that why it cannot be considered a simple assistance. Besides, there is no litisconsorcial assistance once the third party is not the holder of the relation that will fix the precedent, because its legal relationship will be discussed in an autonomous process.

Another modality in our legal order is the opposition which is the demand used by the third party to deduct the incompatibility of the pretension with the conflicting interests between the author and the accused of a pendent cognitive process (DINAMARCO, 2004, p. 381 – 382). Without a doubt, the intervention in the incident that forms precedents does not intend to contest the right that is already being discussed in another process. The legal relationship of the intervener is being treated in a process by its own. It will be only influenced by the fixation of the thesis by the Court whose process is being analyzed and that is why it is not an opposition.

The nomination to the author consists in a third party intervention in which the demanded polo of the process is corrected, without the need to extinguish the action. The possibilities in which it is allowed the application of this intervention is written in the Procedural Civil Code. The *sui generis* intervention does not intend to square the procedural polo, but bring new and believable arguments so that the Judiciary Power can analyze in the moment to fixate the thesis – thus, there is no reason why it should be considered a nomitation to the author.

The complaint of the discussion can be considered a demand, an exercise of the right of action (DIDIER JR. 2010, p. 366). This demand would have especial characteristics, such as the regressive, eventual, provoked and anticipated pretension. It is a third party intervention in which the main part affirms that because of another legal relationship, in case it fails in this process, the responsible for the failure will be reported.

Before the summarized explication of this institute, we can conclude that the *sui generis* third party intervention is not a complaint against the discussion, since there is no

right to regress in case of failure and it is not provoked – it is a spontaneous modality and only happens when the third party brings new arguments to the question, besides needing to have legitimacy.

In the study of the typical modalities existent in our order, there is the call to process, considered an incident through which the debtor calls the other obliged by the debt to be part of the process in order to make them also responsible for the result (THEODORO JR., 2007, p. 157). This *sui generis* intervention does not concern the same legal relationship, but similar ones. Thus, it cannot be fitted into the call to process once there is neither co-obligation nor mutual responsibility.

Therefore, the third party who intends to interfere in the process of creation of precedents does not have a co-obligation or solidarity relationship with the other procedural poles of that demand. Once more we need to remember that the purpose of this intervention is to legitimate binding and persuasive decisions that will be constructed.

After this analysis and the conclusion that the *sui generis* intervention does not fit into any other modalities accepted by the law, we should be aware of the importance of this figure to the Brazilian legal system in this context of creation of procedures whose decisions have ultra partes efficacy.

Following Antonia Adonias Bastos' thoughts (2012, p. 189), the third party participation is useful in the procedure in which will be discussed the legal question since it permits the demonstration of a wider variety of arguments – the more quantity of arguments analyzed in the formation of precedents, more stable it will be, which makes it harder to modify the Court's understanding, although this might happen eventually.

Hence, it is necessary to admit the third party participation in procedures that will create precedents as a way to improve and legitimate the understandings fixed, besides avoiding its easy overcome, even if possible. However, this intervention must obey some parameters, have bounds, so it won't be a discretionary act of the rapporteur before the concrete case, and also does disorganizes the process, under penalty of compromising other principles, such as the celerity and the reasonable duration of the process.

In the following topic, some parameters will be analyzed in order to guide the *sui generis* intervention.

3.3 REQUISITES FOR NA INTERVENTION

Like on the other modalities of third party intervention in the brazilian system, for the *sui generis* intervention to occur it is necessary to fulfill some requisites, under penalty of making the process confusing. This intervention should not depend only on the discretionary act of the judge before the case, like happen currently with the *amicus curiae* intervention in the procedure that allow this type of participation, such as the ones mentioned above.

Therefore, requisites like legitimacy and interest are important, and should be present when the third party intends to interfere in procedures that will create binding and persuasive precedents.

3.3.1 Legitimacy

Firstly, it is essential to remember that in all modalities of third party intervention it is necessary to prove the legitimacy to interfere; if not proved, the intervention will not be approved, according to Didier Jr (2010, p. 351). In the *sui generis* intervention this could not be different, and it is fundamental to be clear who are legitimated to participate on the fixation of thesis procedure before the Courts.

To Begin, we must analyze the legitimacy of legal entities to represent the interest of the parts.

According to Antonio Bastos (2012, p. 187), we can notice that representative legal entities have legitimacy to interfere in procedure that create binding precedents. Yet, the question of suitable representation of class actions in collective processes must be emphasized here.

Thus, the legal entities intervention in procedures of understanding's fixation by Courts is similar to the collective tutelage, once the representative entity will act to help individuals who will be influenced by a binding decision and that, most of the times, do not have condition or interest to interfere by their own because of difficulties or lack of information regarding this intervention.

That is why representative entities must be allowed to interfere as a legitimate class, like occurs in class actions, to permit the mentioned representation. A suitable representation means that the legitimate parts must be adequate to defend the collectivity's interests and correspond to the expectation of the class because, otherwise, the representative of the collective legitimacy will be compromised. Therefore, aspects like the relevance of the subject area, appeals etc are analyzed.

We can conclude from this that representative entities have the legitimacy to interfere in incidents that create precedents if they show the possibility to represent correctly the parts, following the necessary shape in collective tutelage, which has as a base the American class action.

Besides the representative entities, interested private individuals, that are part in processes and whose legal relationship is similar to the one discussed by the Court and that will create a precedent with ultra partes effects, also have legitimacy to interfere.

This possibility comes from the fact that those parts will be influenced by the sentence uttered in the process of precedent creation and, because of the full defense, the contradictory and the due process of law principles, expressed in the 5th article of the Constitution, items LIV and LV, have the right to manifest themselves in this procedure.

Despite being legitimated, those parts must fulfill the interest requisite, that will be discussed next.

The procedures that create binding precedents come from repetitive or mass demand legal relationships and, this way, someone could think that interventions would confuse the process before the possibility of a big amount of people interfering in these procedures. However, other criteria must be analyzed to avoid innumerous interventions in order to make the procedural course flow.

Exactly because of the reason above, private individuals and legal entities that have similar legal relationship as the one discussed in Court, yet do not have a process in course, are not legitimated to interfere, otherwise it would disorganize the procedure, except representative entities.

In this context, Antonia Adonias Bastos (2012, p. 189-190) affirms that in a way or another, those individuals will be influenced by this precedents, since it can have effects on acts of the relations. Nevertheless, it seems not wise to admit this type of intervention because of the probability of provoking more inconveniences and loss than benefits for the fixation of the thesis.

Following the author's reasoning, the benefit would be the increase of the diversity of arguments to be analyzed by the Court, what would make the precedent more stable; however, in the moment that the participation of representative entities and of parts of interrupted similar processes is allowed, this argument loses strength. Furthermore, the interest is a reflex and an eventuality – not necessarily those parts will be influenced by the precedents – and if this relation becomes a judicial process, they will have the opportunity to present their arguments capable of overcoming the precedent through certain techniques.

3.3.2 Interest

The requisites for a *sui generis* intervention must be analyzed carefully in order to not make the process confunsing, because it has repetitive causes from massive relationships. After the analysis of the legitimacy under the eyes of the criterias mentioned above, the third party should prove that has a legal interest in the closure of the debate concerning the procedure that will fix the Court's understanding.

The first thing is to highlight that like in the other modalities of third party intervention in the Brazilian order, here the third party must also prove its legal interest. Didier Jr (2010, p. 344), when talking about the third party interventions already cited in the law, affirms that the third party should show that has a legal interest – an intervention based on economical or moral interests will not be accepted.

The legal interest that must be proved in the *sui generis* interventions consists on the proof that this decision will influence legal relationship of the third party, beucase of its similarity.

Antonia Adonias Bastos (2012, p. 188) warns that fact that in case of class representative entities the interest will be indirect because it will not influence material legal relationship of the entities, but the procedural defense of the represented's interests, and are, therefore, partial and can present favorable or prejudicial arguments for the cause.

Like in the typical modalities in our order, the *sui generis* intervention requires the presence of a legal interest: the third party must prove that its legal relationship will be influenced by the disclosure of the decision, even if indirectly, in the case of representative entities.

Besides, the third party need to bring new arguments to the decision that were not yet discussed about the question, under penalty of procedural turmoil. There would be no sense to permit third party to interfere if not bringing anything new to the debate because the objective of the intervention is not to simply allow the third party manifestation, but to increase the legitimacy of the decision under the analysis of different arguments, giving the possibility for the thesis to be more close to the society influenced by this same decision.

The Idea here is the same of the cooperation principle studied in the examination of the *amicus curiae*. Bueno (2006, p. 56) says that if the purpose of this principle is the judge to have a bigger number of relevant information to decide the cause, logically, the permission of the addition of new arguments by the third party can be also applied to this principle.

Considering the reasons above, specially the respect to constitutional principles, as well as the cooperation principle and the legitimacy of the Court's decisions, the *sui generis* intervention is possible, even without a law expressing it.

Since the aim of third party intervention in the creation of precedents is to consolidate principles, mainly the constitutional principles, there would be no need to a expressed legal provision for the Courts to accept this modality if the requisites are respected.

According to this proposal, if the legal order starts to accept this third party intervention in the procedures above, the hypothesis cited by the law cannot be extended. This characteristic is stated because the intention of this type of intervention is avoid the influence of a decision without the possibility of the third party to manifest itself.

Thus, this intervention must be allowed in any incident that intends to create a precedent with binding or persuasive effects, which would influence the judicial sphere of third party.

Therefore, the *sui generis* intervention is not similar to any of the modalities in our order, despite being essential to legitimate precedents. Nonetheless, it is necessary to establish requisite and bound to this possibility, so the institute will not be invalid. Only then, constitutional principles will be effectively respected and the stare decisis theory will have an application that will fit the Brazilian order.

4 CONCLUSION

Before the exposed in this article, we can see the importance of the theme, with the change of legal relationships and the adoption of the stare decisis theory by the brazilian legal order. It is necessary to think about the system as a whole because in the moment when punctual reforms are made, principles as the full defense, the contradictory and the due process of law can be forgotten, which would consist a disrespect to the Constitution.

Therefore, the possibility of third party intervention in incidents that fixate understandings before Courts is essential.

This intervention need to occur even if this modality is not expressively allowed by the law. As the aim of the third party intervention in incidents of creation of precedents is consolidate constitutional principles, there would be no need to a legal forecast for the Courts to accept this intervention, if the requisites are fulfilled.

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