

Ano V, v.1 2025. | submissão: 03/10/2025 | aceito: 05/10/2025 | publicação: 07/10/2025

Precedents and Statutory Law: A Critique of the Brazilian Legal System

Precedents and Statutory Law: A Critique of the Brazilian Legal System

Haroldo Domingos Bertoni Filho – PUC-SP

ABSTRACT

This paper examines the challenges of transferring legal institutions between the common law and civil law traditions, with a focus on the application of precedent analysis within the Brazilian legal system. It argues that while both traditions utilize elements of Roman law, their distinct historical development and social constructions lead to fundamentally different approaches to legal reasoning. The paper examines the fundamental characteristics of common law, highlighting the doctrine of stare decisis and the practice of distinguishing, while contrasting these with the civil law tradition's emphasis on codified law and the persuasive, rather than binding, nature of precedent. The increasing trend of "staturification" in common law systems and the limitations of applying stare decisis in civil law contexts are discussed. Ultimately, the paper concludes that the complexities of each system, rooted in unique societal experiences, necessitate careful consideration of these differences when attempting institutional exchange, highlighting the potential risks of disregarding these fundamental distinctions.

Keywords: Common Law, Civil Law, Stare Decisis

RESUMO

Este artigo examina os desafios de transferir instituições jurídicas entre as tradições da common law e do direito civil, focando na aplicação da análise de precedentes dentro do sistema jurídico brasileiro. Argumenta que, embora ambas as tradições utilizem elementos do direito romano, seus desenvolvimentos históricos e construções sociais distintos levam a abordagens fundamentalmente diferentes para o raciocínio jurídico. O artigo explora as principais características da common law, enfatizando a doutrina do stare decisis e a prática de distinguir, contrastando-as com a ênfase da tradição do direito civil na lei codificada e na natureza persuasiva, e não obrigatória, dos precedentes. A crescente tendência de "estatutificação" nos sistemas de common law e as limitações da aplicação do stare decisis em contextos de direito civil são discutidas. Finalmente, o artigo conclui que as complexidades de cada sistema, enraizadas em experiências sociais únicas, exigem uma consideração cuidadosa dessas diferenças ao tentar a troca institucional, destacando os riscos potenciais de ignorar essas distinções fundamentais.

Keywords: Common Law, Civil Law, Stare Decisis

1. INTRODUCTION

Legal systems globally are predominantly discussed through the lens of two major traditions: civil law and common law, despite the existence of other rich legal traditions such as Talmudic, Islamic, and Hindu law. These legal traditions are not merely sets of rules, but complex cultural constructs that reflect the historical and social development of their respective communities.

The study of legal systems reveals that these traditions are deeply rooted in unique cultural contexts, making the indiscriminate transplantation of legal institutions problematic. When legal frameworks are imported without careful consideration of their original socio-historical environment, they risk becoming superficial "tropicalized" versions that may undermine the fundamental stability and integrity of the legal system.

Key challenges arise from preconceptions and misunderstandings between different legal traditions. These misconceptions often create barriers to meaningful dialogue among jurists and can lead to partial or inappropriate adoption of legal institutions. The nuanced differences extend beyond mere rules, encompassing underlying practices that shape the social understanding of law.

The text aims to explore these complexities, with a specific focus on analyzing common law and examining the primary mistakes in applying precedent analysis within the civil law tradition, particularly within the Brazilian legal system. This analysis will be conducted through a comprehensive review of academic literature, aiming to highlight the most important aspects of each legal tradition.

The goal is to promote a more nuanced, contextual understanding of legal traditions that respect their unique historical and cultural origins.

2 COMMON LAW AND CIVIL LAW

Exploring the parallel development of Western law, we can identify as a starting point the increasing tensions arising from the Gregorian Reform and the rise of the mercantile bourgeoisie in the 11th and 12th centuries. The need for a legal framework to counter Canon Law and papal authority, combined with the rediscovery of a reproduction of Justinian's Digest around 1080 in Florence, provided northern Italian merchants with a legal text that supported the emerging trade relations.

As the situation evolved, early students began forming corporations for mutual protection and for hiring teachers. These corporations later became the first *universitas*, fostering the work of the glossators, who meticulously interpreted the Digest and other Roman legal texts.

It is also important to note that, beyond Italy, France—the cradle of great medieval kingdoms—witnessed the application of civil law alongside common law. While northern France developed common law, southern France, under a comparatively lighter feudal influence, adopted Roman law in conjunction with common law. In regions that followed common law, Roman law served merely as a subsidiary argument, invoked only when customary law failed to address a legal issue.

Therefore, Roman law itself does not serve as a defining criterion to distinguish the two

legal traditions, as both incorporated it in different ways according to their own legal frameworks.

During the same period, the Norman invasion of England in 1066 profoundly altered the country's legal traditions, paving the way for a legal system distinct from that of the continent. As part of the reorganization of the newly conquered kingdom, including its ecclesiastical institutions, William the Conqueror introduced the reformist tradition of continental Canon Law, which was then evolving in Europe. This significantly transformed the prevailing Anglo-Saxon legal practices.

Until then, England's Courts of Justice had been fragmented. However, under Norman rule, they adopted more refined legal techniques from French canonists, allowing for the stabilization and centralization of judicial proceedings. Access to these courts was facilitated through the writ system, which helped structure legal claims more systematically.

Over time, common law acquired more clearly defined contours, particularly in contrast to the English system of equity, which was applied by the Court of Chancery. This judicial body, characterized by a high degree of judicial discretion, sought to remedy "flagrant injustices". As a result, the common law focused on more rigorous procedural trials, later integrating equity after the Supreme Court of Judicature Act of 1873.

Moreover, even in England, a leading exponent of common law, written laws were never entirely disregarded, contrary to the simplistic characterizations of these legal traditions. Alongside the common law courts, there existed a class of civilians who operated in specialized English courts, where applicants frequently invoked written law, much like in the rest of Europe.

After the formative period of common law, it becomes crucial to emphasize the role of a strong judiciary in shaping this legal tradition. The English legal system saw the Judiciary Aligning with Parliament against the king's authority, securing legal guarantees that were unprecedented in other nations. This development, combined with an enlightened view of human reason, granted judges the power to interpret legislation in a way that suited contemporary needs.

As a result, rather than relying on a rigid, codified set of legal rules, the English viewed their legal system as uniquely capable of adapting to new historical and social realities.

This creative capacity of the Judiciary, though limited (as explained below), should be understood within the framework of *stare decisis*—the doctrine that binds future decisions to precedent. However, this does not occur merely by comparing cases; rather, it involves adherence to the fundamental principles of the prior decision, along with an analysis of the facts that shaped its context. These elements must then be examined and compared with the current case through the practice of distinguishing.

Distinguishing can be seen as an exercise in which the judge demonstrates how the facts of the present case differ from those of the precedent, thereby justifying why the prior ruling should not be followed.

According to Antonin Scalia, common law developed in such a way that the distinguishing practice shaped the doctrine of stare decisis. A court deciding a subsequent case faced a disjunctive obligation: either follow the precedent or identify a relevant distinction that would justify a different ruling.

The first option stems from the idea that courts should consider the conclusion of a past decision as correct, preserving the arguments used to help the interpreter uncover the legal definition embedded in the ratio decidendi—the "core" of the preceding decision.

However, following precedent differs significantly from simply following the law and applying it to a specific case. Although subsequent courts are not bound by the justifications presented in earlier decisions, they must understand the previous case in its entirety. This is because precedents do not end with a formula as codified laws do. Moreover, given the power of distinguishing, it is more appropriate to understand the doctrine of precedent through case law rather than suggesting that courts are merely "making" the law.

If each precedent is tied to the context in which it was decided, how should we understand the disjunctive obligation described above? One way is to examine the facts considered in the previous case, as proposed by Grant Lamond.

Lamond dissects precedent by focusing on the facts presented and the decision reached, identifying which facts were deemed sufficient to produce the outcome. These facts form a deontological formula:

If [j, k, l], then R1.

It is essential to note that the prior case might involve other facts but not j, k, or l. For example, the set of facts in the earlier case could be $F1 = [i, j, k, l]$, with the court determining that only three elements (j, k, l) were sufficient to reach R1. Other facts, although important, do not directly influence the outcome in that case.

In the second case, assuming j, k, l are included, the facts could be $F2 = [-i, j, k, l, m]$, with the addition of m influencing judicial review. The judge must assess whether this new fact is enough to alter the deontological formula and produce a new result, R2.

Lamond's key insight is that, even when following precedent, the presence or absence of different facts—such as i and m — can change the understanding of the prior ruling. The inclusion of m transforms the insufficient set of facts and may change the outcome.

Thus, viewing precedent as a case-by-case study, rather than as judicial lawmaking, broadens the idea proposed by Antonin Scalia. While the practice of distinguishing adds nuance to the connotative definition of a given legal principle, following precedent introduces new terms as a

"counterconcept". This "counterconcept" not only expands by including elements that do not fit the original concept, but also introduces a concept, even if negative.

There is no doubt that, as part of a broader legal doctrine, precedent may eventually be replaced by legislation. This occurs as legislation provides criteria refined over years of continuous court work. However, it is important to note that, in such cases, it is not the ratio decidendi or the grounds of the previous case that hold the most weight in guiding the upcoming judge. Instead, it is the precedent, encompassing both positive and negative facts, that guides judicial interpretation.

In summary, the key characteristic of common law is the obligation to consider previous decisions as correct, while recognizing the factual context in which they were made. The primary role remains conflict resolution, but this work is informed by centuries of legal tradition, which evolves each time a dispute is brought before a judge.

It is also important to note that common law is not free from criticism. Some core aspects of this system have been challenged, such as the idea that common law is based on the immemorial customs of the people. Jeremy Bentham criticized this notion, arguing that it is a fiction created by lawyers:

A Decision of Common Law upon a new point never seems to have set up the general rule that may be deduced from it. It supposes, contrary to the truth, that the rule has already been set up. It supposes, therefore, that the rule ought always to have been conformed to. It can fix no era to its commencement (Bentham Manuscripts, UC Ixix, f. 6)

On the other hand, many benefits can be outlined from the adoption of the stare decisis model, as pointed out by Larry Alexander and Emily Sherwin (2008):

The most significant moral consequences of judicial decisions fall under the heading of reliance. Reliance enters the picture in several ways. Most obviously, the parties to the original controversy must conform their behavior to the terms of the decision. Disputants A and B, having litigated a point and complied with the remedial orders of the court, should not face the possibility that their dispute will be reopened.

Apart from the immediate impact on parties, in a system of public decisions, others who observe the outcomes of prior cases will tend to expect consistent decisions in the future and will adjust their behavior accordingly.

(...)

Another reason often cited in favor of consistency with past decisions is that by deciding consistently, courts treat litigants equally (ALEXANDER, SHERWIN, 2008, p. 27).

3. THE THREATMENT OF PRECEDENTS IN THE CIVIL LAW TRADITION

Based on the distinct formation process of the civil law tradition, precedents acquire a different value in judgments. This can be mainly explained by the fact that the normative text, which is the product of the regular legislative process, serves as the limit and reasoning for every

decision. Other sources are subsidiary elements that assist the judge in understanding the statute's content. The decision's ratio must reflect the positive law described in the statutes, even if the judge's opinion deviates from the written law in the concrete case.

Unlike the model proposed by Kelsen, where a normative system is built upon a hypothetical fundamental rule that supports and provides validity to the subsequent rules, the common law tradition bases its decisions on precedents. This represents a conceptual distinction between these traditions: in civil law, the community's will is crystallized into written formulas that justify the judges' decisions, whereas in common law, society's moral principles are captured by the court and transcribed into a decision.

Under the civil law system, reliance comes exclusively from the law, and any distortion in interpreting the rules should be mitigated to avoid divergent conclusions in real situations. This would ideally be an opportunity for the application of precedent theory, which, as will be demonstrated, does not occur.

It should be noted that, under the civil law tradition, precedents are considered persuasive tools rather than strict guidelines for making the most suitable decision. In other words, if previous decisions are brought up during a trial under the civil law system, they usually aim to justify a potential option for the judge, rather than being treated as binding, as in the *stare decisis* principle.

For the precedent to be characterized within the common law perspective, it suffices for a single decision ratio. In contrast, civil law considers jurisprudence, which is usually composed of multiple decisions selected to reinforce a particular statutory interpretation, often at the discretion of the parties involved.

Another aspect to consider is the absence of a distinguishing criterion in the civil law tradition. This lack of a mechanism means that judges are unable to precisely identify the components of a previous case, as is done in common law.

Additionally, we must observe the public's identification with the historically adopted criteria and the need to adapt the judiciary structure to meet this demand. These adjustments must include not only instruments to evaluate previous decisions, as mentioned earlier, but especially to reinforce the judge's law-creating power.

Given all the above, we are compelled to conclude that the *stare decisis* principle is inadequate within the civil law tradition, relegating precedents to a role as a justification tool, placed on the same hierarchical level as doctrine.

It is worth mentioning some attempts to reconcile these distinct traditions, as will be discussed below.

4. STATUTORY CODIFICATION, PRECEDENTS, AND APPROACHES BETWEEN LEGAL TRADITIONS

As Georges Abboud (2013) points out, the current reality in the United States and Britain—two of the main countries under the common law system—shows a significant increase in legislative enactments across various fields, especially in the United States. This has led to the coining of the neologism 'staturification,' which reflects the growing influence of statutes (legal texts, as compared to our laws in the strict sense). Likewise, we highlight as follows (ABBOUD, 2013):

Interestingly, many common law legal systems around the world, including most, if not all, the jurisdictions other than Louisiana in the United States, have placed a greater emphasis on enacting laws and have relaxed their interpretation and use of the doctrine of stare decisis (ABBOUD, 2013, p. 221)

It should be emphasized that the phenomenon described above is not exactly new. Antonin Scalia, in his reference to *A History of American Law* (1973), reaffirms the dominance of laws, decrees, and regulations in the current American system. He states: 'Every issue of law I resolve as a federal judge is an interpretation of text—the text of a regulation, or of a statute, or of the Constitution.

Given that this is the statement of a judge from the US Supreme Court, it is evident that the assertion at the beginning of this work, regarding the challenges faced by the Superior Courts, also applies to the United States. The magistrate concludes (SCALIA, 2012):

Indeed, even in the Supreme Court of the United States, I would estimate that something less than a fifth of the issues we confront are constitutional issues – and probably less than a twentieth if one excludes criminal-law cases. The vast majority of what I do is to interpret the meaning of federal statutes and of federal agency regulations (SCALIA, 1997, P.88)

It should be stressed that using precedents as a platform for evaluating laws involves recognizing the prospective effect a decision may have. A system that privileges previous decisions operates through the 'assimilation' of the linguistic account from a past event (usually contained in a prior decision) to address the event being judged in the present.

Since court decisions are also subject to the limits of language, we can relate this to the doctrine advocated by Frederick Schauer and observe that assimilation occurs through the definition of the concepts presented in the sentence viewed as a precedent. The linguistic aspect, evident in the construction of the concepts that guide the future judge, combined with the fact that the common law system inherently follows the rule of precedence— where previous jurisprudence cannot be ignored— leads to a practical and direct result in terms of the number of cases affected by a

particular decision and its future impact. In this regard, we emphasize (SCHAUER, 1987)

The bigger the group of cases the original decisionmaker is effectively deciding, the more constraining will be the mandate to treat all those cases alike. Conversely, if the categories of assimilation are comparatively small, the decisionmaker needs to consider only a few cases beyond the instant case, and the constraints of precedent will be comparatively inconsequential. (SCHAUER, 1987. P.579)

The broad connections and conceptual narrowing that shape legal positions in relation to future cases are particularly evident in cases such as the judgment of the 'Patient Protection and Affordable Care Act.'. This is because it represents a comprehensive public policy at the federal level, distinct from positions taken in previous cases.

In addition to the prospective scope that links future judges, and aside from the exercise of distinguishing cases and the possibility of being overruled by higher courts, the precedence of past decisions affects the present. The binding case law of common law inherently minimizes risk, as it prioritizes consistency even at the cost of potentially less-than-optimal trials, to avoid future distortions.

Thus, the relationship between a precedent and a specific statute does not depend solely on the case at hand. Instead, it places responsibility on the court to interpret the law within a jurisdictional framework. This interpretation affects not only the case in question but also potentially influences all legislative texts that may be assimilated through the trial. In this way, the precedent establishes a legal concept that can influence broader legal classifications.

In judicial construction, the key concept to understand from a decision is that the issue should be approached with a forward-looking perspective, even considering the productivity of the judiciary, which works from an already established starting point on the matter at hand.

This starting point, which offers the future judge certain criteria, does not alter the ethical framework previously set. It remains a dominant element of the legal-cultural context within the legal community. The influence of this shared context among jurists prevents highly disparate decisions, promoting consistency. The precedent, shaped by the relationships within the legal community, fulfills its primary purpose: 'the point of precedent is to facilitate convergence in decisions, not to create divergence. Thus, the cost efficiency and stability of decisions are influenced by the need to prioritize these concerns, which would not be as evident if they were not given such importance.

The interaction between statutorification and the rule of precedence occurs within a judiciary that shapes its arguments based heavily on its own institutions. However, judges cannot simply disregard the widely accepted definitions established by society. In the common law system, it is important to distinguish between laws and the decisions that create precedents, ensuring the growth

of the American corpus juris continues unhindered.

Unless legislative power is exercised through the overrule, the courts' power is restricted. For previous decisions to be followed, they must be substantiated through a well-founded distinguishing exercise, which convinces future judges to adhere to prior rulings, rather than being merely an intellectual exercise. It remains the responsibility of the legislator to take broader action that respects 'the legal terminology and the traditional divisions of all matters', operating through institutions and legal concepts already consolidated.

In conclusion, the convergence of legislative and judicial functions is not without its challenges and tensions. John Londregan highlights that the implementation of public policies, especially those focused on income redistribution, often generates controversy when subjected to judicial evaluation.

5. DIFFICULTIES IN APPLYING PRECEDENTS

We can infer that the information society is predominantly driven by likelihood rather than truth. This can be partially explained by the external signs that seem more valid and, thus, guide and justify certain decisions, as they are perceived to represent the collective interest. The search for indisputable truth is often impractical due to the time required for its discovery. As a result, common knowledge or arguments that simplify reality tend to be emphasized.

We base our point of view on Steven Orla Kimbrough's study¹, which, after analyzing the relationship between likelihood and truth, concludes (KIMBROUGH, 1980):

Strictly speaking, of course, I have shown that likelihood cannot guide us to the truth because it cannot distinguish between two hypotheses that differ by a set of zero measures. It is in the following sense that likelihood guides us to the truth: by using likelihood, we can choose a hypothesis which is in principle observationally identical with the true hypothesis. (KIMBROUGH, 1980. P. 117)

The same applies to law, where the need for flexibility in interpretation within a rigid structure promotes a search for alternatives that allow for a broader understanding of a problem, leading to resolutions that are more adapted to reality. A judge operating within a civil law system would interpret the issue based on the most suitable norm, resulting in a partially constructed truth—one that aligns with the collective desire for answers that are temporarily valid and provided within a short timeframe.

¹ Kimbrough, Steven Orla. On the Use of Likelihood as a Guide to Truth. . PSA: Proceeding of the Biennial Meeting of the Philosophy of Science Association. Vol. 1980, Olume One: Contributed Papers (1980), pp. 117-128

In this context, we can draw a comparison between the distinguishing practice in common law and the analysis of case-law application, though it is important to note that the two approaches are not the same. In the Breton model, the current decision is necessarily tied to the content of a previous judgment, whereas in civil law, the focus is on justifying an interpretation.

In other words, the systems differ from their very starting point: in one system, the interpretation of the norm is derived from a prior judgment, with statutes serving to confirm a shared truth; in the other system, the law defines the judge's range of action, acting as the source from which the interpreter must derive meaning, and can be complemented by other sources, such as precedents, to justify a decision.

Thus, it is impossible to equate the jurisprudential unification tools in civil law with the stare decisis model. The former merely compiles past cases without any inquiry into the underlying reasoning, whereas the latter focuses on maintaining consistency through judicial reasoning and the application of precedents.

We must also consider the distinction between the 'material' and 'formal' truths in civil law. While truth is a unitary concept, in civil law, it is divided into 'material' truth—comprising the perceptual elements of reality—and 'formal' truth—represented by what is demonstrated through legal procedures. In our view, this division limits the application of precedents in civil law, as the jurisprudence referenced in a petition only considers the elements formally accepted in that procedure. In other words, the judge does not have access to the full historical record of a past case, but only to the portions relevant under the procedural rules.

6. CONCLUSION

Considering the above, we can conclude that the difficulty in adopting mechanisms from different legal traditions arises from the complexity of the social systems they govern, reflecting the unique aspects of community development. Efforts from both sides to reinforce the connections between societies ruled by different systems can serve to update rules to better align with the people they govern. However, some core points will remain untouchable. Ignoring these peculiarities could lead to the collapse of the legal system.

Ultimately, the issue lies not only in applying tools out of context but also in the distortive evaluation of the same reality from different perspectives. The outcome of this evaluation is shaped by the lived experiences of each society during a particular period, and these experiences cannot be excluded in a serious analysis.

REFERENCES

- ABBOUD, Georges. Introdução à teoria e à filosofia do direito. São Paulo: Editora Revista dos Tribunais, 2013.
- ALEXANDER, Larry. Sherwin, Emily. Judges as Rule Makers. Common Law Theory - Cambridge Studies in Philosophy and Law. Cambridge, UK. P 27-51, 2008
- ALGERO, Mary Garvey. Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation, The. Louisiana Law Review. New Orleans, USA, v. 65, n. 2, p. 775-822, 2005.
- GOODMAN, Ellen. The Origins of the Western Legal Tradition: from Thales to the Tudors. Sidney: The Federation Press, 1995.
- KIMBROUGH, Steven Orla. On the Use of Likelihood as a Guide to Truth. PSA: Proceedings of the Biennial Meeting of the Philosophy of Science Association. Vol. 1980, Olume One: Contributed Papers (1980), pp. 117-128
- LAMOND, Grant. Do precedents create rules? Legal Theory, Cambridge, UK, v. 11, n. 01, p. 1-26, 2005.
- LONDREGAN, John. Common Law vs. The Civil Code: Precedent and Predictability. Princeton: Princeton University, 2002. (Mimeo).
- SCALIA, Antonin. Common-law courts in a civil-law system: The role of United States federal courts in interpreting the Constitution and laws. Tanner Lectures on Human Values, Cambridge, USA, v. 18, p. 77-122, 1997.
- SCHAUER, Frederick. Precedent. Stanford Law Review, Stanford, USA, v. 39, p. 571-605, 1987