The influence of Judicial Review in Brazil, Japan and Germany: perspectives regarding the modern role of the Judiciary[1]

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For the last two hundred years, the world has witnessed the importance of judicial review, originally developed in the American legal culture. History poins out that it worked efficiently as an important barrier against the abuse of the State, and has directly influenced Japan, Germany, and finally Brazil. Currently, judicial review still remains as one of the most important tools in enhancing and fostering human rights and liberties. This article will examine the influence, characteristics, and potential benefits of this instrument in the Brazilian judicial system.

The relation between the American Common Law and the Brazilian Civil Law may be defined by significant and convergent points. The first direct step towards such approximation was the influence of the U.S. Constitution of 1787 on the Brazilian Constitution of 1891.[3] According to Salvio de Figueiredo Teixeira[4], from that point forward, the Brazilian constitutional system abandoned its latin origins and turned toward the American judicial review.[5]

After World War II, American legal culture also influenced other countries in a more explicit manner. Japan was governed under the 1889 Meiji Constitution. It then embraced many elements of monarchical

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[3] The title of the 1891 Constitution refers to the "Republic of the United States of Brazil", in respect to American constitutionalism.

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[5] *See* 'A Súmula e Sua Evolução no Brasil' *Revista Trimestral de Jurisprudência dos Estados*, v. 179, 15-34 (2000).

constitutionalism from the 1850 Prussian Constitution.[6] The judicial system was inspired by the French and German models; therefore, there was no judicial review.[7] However, the Potsdam Declaration brought deep structural reforms to the Japanese Constitution of 1946, which was highly influenced by American Constitutionalism. Most of the legal ground was established by the Supreme Commander of the Allied Powers General Douglas MacArthur.[8] Ever since then, Japan is familiar with the doctrines of judicial review[9], and the Supremacy Clause.[10]

Germany had seen the awakening of judicial review in *Marbury v. Madison*[11]. Under the influence of American constitutionalism,[12] the 1848 Constitution of Saint Paul already granted the German Supreme Court–the *Reichsgericht*–enough power to decide constitutional issues. Nevertheless, this Constitution never went into legal effect.[13] Only in 1925, did the German Court establish a constitutional court, in order to decide legal issues under the Constitution.[14] The post–World War II

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[6] *See* Yoichi Higuchi, *Five Decades of Constitutionalism in Japanese Society,* 4 (2001). The author states that "[t]he Meiji Constitution was founded on a Japanese element – an emperor who ruled by his divine authority – and incorporated many elements of Prussian-style narrowly conceived monarchical constitutionalism."

[7] *See* Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System,* in *Japanese Constitutional Law*, 125-126 (1993).

[8] *See* Kelly Cristina Spinelli, 'Conhecimento a serviço da dominção', Ms. Ruth Benedict was given the assignement to analyze the obedience of the japanese soldiers to the Emperor. She defended that the maintenance of Emperor Hiroito in power would ease the transition to a democratic system.

[9] *See* Hidenori Tomatsu, *Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories. Five Decades of Constitutionalism in Japanese Society* 254 (2001). The author mentions that, in 1948, the Japanese Supreme Court, held, in the case 2 Keishu 801 (Sup. Ct., Oct. 8, 1952), 'that Article 81 expressly provided the power of judicial review as it was construed by American constitutional law.' *See* also Toshihiko Nonaka, *Supreme Court Precedents and the Lower Courts in the Exercise of Judicial Review*. Five Decades of Constitutionalism in Japanese Society 280-281 (2001). The author states that it has been commonly accepted that 'the lower courts have the power to rule on the constitutionality of all laws, orders, regulations, and so on. Supreme Court has also justified this (4 Keishu 73, Sup. Ct., Feb. 1, 1950).'

[10] Art. 98 of the Constitution of Japan establishes: "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity. 2) The treaties concluded by Japan and established laws of nations shall be faithfully observed."

[11] 5 U.S. 137 (1803).

[12] *See* Wolfgang Hoffmann-Riem, *Two Hundred Years of Marbury v. Madison: The Struggle for Judicial Review of Constitutional Questions in the United States and Europe*. *German Law Journal* 5 v., n. 6, ano 1, junho de 2004 (www.germanlawjournal.com, acesso em 15.09.08). Hohmann-Riem was a member of the Bunderverfassungericht.

[13] *See* Nuno Rogeiro, *A Lei Fundamental da República Federal da Alemanha* 30 (1996). Rogeiro states that the *Bill of Rights* of the American Constitution influenced the 'forgotten' 1849 Constitution of Frankfurt. This constitution also influenced the German Constitutions of 1871 and 1919.

[14] RGZ 111, 320 (1925).

Basic Law, in 1949, merged the 'Frankfurt Documents',[15] and the previous German experience, with the 1919 Weimar Constitution. Two years later, in 1951, Germany created its Supreme Court–the *Bunderverfassungsgericht*.

The German Basic Law also influenced many other european constitutions, such as the 1976 Portuguese Constitution.[16] Those principles and fundamental rights´ in turn inspired the drafters of the 1988 Brazilian Constitution. Thereafter, the Brazilian Supreme Court works both as a constitutional court and as a court of cassation. Thus, the modern Brazilian constitutional system combines the traditional American judicial review with the Austrian constitutionality control, and the German Fundamental Law.[17]

American judicial review touched Brazil, Japan, and Germany in very different ways. However, in all of these cases, its essence was preserved. Because of this fundamental reality, American judicial review is an extremely important factor in the adequate comprehension of these other constitutions, and it is therefore relevant to point similarities between the systems, especifically as it is related to the American and Brazilian constitutional cultures.

Thus, this essay will offer a general overview of the American legal system. The American Common Law rests on two fundamental bases: the *stare decisis* doctrine,[18] and the doctrine of *judicial review*. Furthermore, in comparison to its former sovereign, the United States adopted a written Constitution, explicitely establishing the separation of powers,[19] in contrast to the Magna Carta of 1215. Such provided an excellent framework to the development of both doctrines, because it divided power through *time*–mandate for a determined period for the president and the Congress–and *space*–the

[15] *See* Hiedo Otake, *Two Contrasting Constitutions in the Postwar World: The Making of the Japanese and the West German Constitutions* in *Five Decades of Constitutionalism in Japanese Society* 56 (2001). Otake mentions that the Frankfurt Documents were basically 'the counterpart to the "MacArthur Notes" to Japan, although the crucial difference was that in the case of Germany the Allies instructed the Germans to convene a constitutional convention composed solely of Germans and to draft a constitution through that organ."

[16] *See* Vital Moreira, *50 Anos da Lei Fundamental Alemã*, in *Revista Jurídica Virtual*, vol. 1, n. 2, June 1999 (http://www.planalto.gov.br/ccivil_03/revista/Rev_02/Conti_alema.htm, last visited on Oct. 1st, 2008).

[17] *See* Ricardo Arnaldo Malheiros Fiuza, 105-136 and 298/299.

[18] *See* Charles D. Cole, *Comparative Constitutional Law: Brasil and the United States* xxii-xxiii (2006).

[19] *See* Ricardo Arnaldo Malheiros. Op. cit., p. 32.

sovereignty of the States regarding the Union[20] –, which also fostered the evolution of the *checks and balances* and separation of powers doctrine. All this complex development empowered the Judiciary as the real and efficient third brench of Power, enhancing the American Common Law by stare decisis and judicial review.

The adherence to judicial precedents traces back to ancient Roman Law.[21] Although civil law countries traditionally obsverved that latin legal system, respect to judicial precedents is much more evident in Common Law countries, such as the United States. The Court analyzes the constitutionality of a statute or act and establishes binding or persuasive precedents.

Meanwhile, the American legal culture created a complex support system. The binding or persuasive authority of the judicial precedent is limited by the jurisdiction of each court. That does not mean that all the inferior courts shall be bound by such precedent in a blind rigidity. *Stare decisis* doctrine is not 'etched in stone.' The court may distinguish the case if the facts necessary for decision are different enough from those of the earlier case to change th legal outcome. For example, Charles D. Cole cites two U.S. Supreme Court cases–*United States v. Lopez*[22] and *Garcia v. San Antonio Metropolitan Transit Authority*[23] – noting that "one should recognize that the cases are distinguishable on the facts necessary for decision; therefore, the precedents of both cases remain viable."[24]

The stability of *stare decisis* doctrine relies on the preservation of precedents. However, one may note that such stability is directed to one purpose: to serve well the citizens and their rights. To the extent that such precedents may become inconsistent to social reality, a court of the same or higher level may determine that their legitimacy ceases. One may say that the *stare decisis* doctrine embodies not only the obedience to precedents, but to overrule them, if necessary. In other words, stare decisis may be eternal, but not immutable.

These two types of process–distinguishing and overruling–provided flexibility for the development of American Common Law and the evolution of jurisprudence, as described in the U.S. Supreme Court

[20] *See* Tocqueville, *A Democracia na América*, 2nd ed., São Paulo: Martins Fontes, 2005, p. 139.

[21] *See* Kenneth Pennington, *Roman and Secular Law in the Middle Ages, reprinted in Medieval Latin – An Introduction and Bibliographical Guide*. Washington, D.C.: *Catholic University of America Press*, 1996, p. 257-258.

[22] 514 U.S. 549 (1995).

[23] 469 U.S. 528 (1985).

[24] *See* Charles Cole. *Op. cit.*, 129.

case, *Funk v. U.S.*[25]. Four subsequent cases illustrate how the U.S. Supreme Court has delicately construed the meaning of the Due Process of Clause of the 14th Amendment concerning abortion. The 1973 case *Roe v. Wade*[26] struck a balance between the individual right to privacy and the compelling state interest to protect the life of the mother and the child after viability. In the later 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[27] the U.S. Supreme Court preserved the essential holding of *Roe* and explicitly ruled that any statutes or regulations concerning abortion decisions should be reviewed unde strict scrutiny, and would be upheld only if narrowly tailored to further a compelling state interest.[28] The Court, however, rejected the trimester framework and recognized that the spousal notification requirement posed an undue burden to the right to choose abortion.[29] In *Stenberg v. Carhart*,[30] the Court also recognized an undue burden on the individual right of liberty if a state regulation or statute endangered women´s health,[31] and required the compelling interest to be demonstrated in a reasonable and readily apparent narrowly tailored construction.[32] In *Gonzales v. Carhart*,[33] however, the Court determined that there was state compelling interest to pass legislation in areas where there was medical and scientific uncertainty.[34]

In all of these four cases, medical and scientific evolution served as relevant evidence to the meaning of Due Process. The *Stare Decisis* doctrine is flexible and recognizes that society is in permanent evolution and modification, both in its moral beliefs and scientific evolution. It also indicates that the stability of the *stare decisis* doctrine rests on the trust and ability of the public to follow precedents.

In addition, within the field of education, a complex support system was created and developed to enhance the use of the *stare decisis doctrine*. First, Christopher Columbus Langdell idealized the case method of law school instruction in Harvard in the beginning of the 20th Century. Second, an efficient system was developed in order

[25] *See* 290 U.S. 371, 383-383 (1933).
[26] *See* 410 U.S. 113 (1973).
[27] *See* 505 U.S. 833 (1992).
[28] *See* 505 U.S. 833, 871 (1992).
[29] *See* 505 U.S. 833, 877 (1992).
[30] *See* 530 U.S. 914 (2000).
[31] *See* 530 U.S. 914, 938 (2000).
[32] *See* 530 U.S. 914, 944 (2000).
[33] *See* 127 S.Ct. 1610 (2007).
[34] *See* 127 S.Ct. 1610, 1636 (2007).

to search for judicial precedent that is applicable to the case. This is essential because there are thousands of state and federal courts' decisions. The United States has, in addition to the official reporters, edited by the State and Federal Courts (which are not annotated), private legal databases on a fee basis that contains the same decisions, in an annoted fashion, linking cases by relevant holding and subject matter, legal encyclopedias, such the *Corpus Juris Secundum* and *American Jurisprudence*, treatises organized by legal topic and heavily citing cases published periodically by professional committees and finally, law journal articles written by professors or students that expound on the precedents set in the federal and state cases.

In Brazil, the importance of such issues increases with the recent *Súmula Vinculante*,[35] herein defined as an orientation derived from the jurisprudence of the Brazilian Court[36] addressed in a *ratio decidendi* that is to be generally applied by all the inferior courts and public administration to later cases with the same relevant facts of the cases that originated such *Súmula*.

However, there is still much controversy regarding the use and applicability of the *Súmula Vinculante*, introduced into the 1988 Constitution by the Amendment 45 of 2004. Many have argued that *Súmula Vinculante* is not consistent with the Brazilian Civil Law legal culture. I will briefly analyze the main issues and argue that the focus shall shift to bring and adapt the benefits of the American traditional *binding precedent* to the Brazilian constitutionality control.

The first controversy to be faced is the myth regarding Civil Law countries, that exclusively would potentially use deductive reasoning in contrast to the inductive reasoning of Common Law countries.

In order to enact a *Súmula Vinculante*, the Supreme Court in Brazil may apply the law and statutes in a *deductive* reasoning but also the precedents in an *inductive* reasoning. If there is already a *Súmula Vinculante*, the trial court judge will act as the "fact-finder" or the "goal-keeper" in an *inductive* reasoning, establishing the most relevant facts of the case in order to apply, or not, the binding precedent.

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[35] *Súmula Vinculante* is provided by the Constitutional Amendment 45, which granted the Supremo Tribunal Federal [Federal Supreme Court] the jurisdiction to establish these decisions. It shall also have a binding effect to all inferior courts, the Legislature and Executive.

[36] *See* Internal Appeal on the *Reclamação* 3.979/DF. This definition of súmula was given by Justice Gilmar Mendes, who delivered the opinion of the Court.

Therefore, the deductive and inductive manners of reasoning are complementary, and both foster the adequate comprehension of the law and guides jurisprudence.

The second issue touches the alleged infringement of established Powers. The binding effect of the *Súmulas Vinculantes* is limited to cases,[37] and controversies. This argument alone is sufficient to reject the criticism. The Judiciary is the branch of power originally designed to solve cases and controversies. Besides, the judge is empowered through the sovereignty of the State. That is the reason why judicial decisions are imperative, and they can constitutionally influence the contents of the Constitution and the laws, or the meaning of its texts, or even, if necessary, the political guidelines of the State.[38] Therefore, once jurisdiction is an expression of the sovereignty of the State, such does not differ from the regulations and the statutes.[39]

What distinguishes the judiciary from the legislature–for the purposes of this work–is that the former acts to settle cases and controversies. Miguel Reale stated that the law must consider the facts, and *Súmula Vinculante* perfectly attends to such requirements.[40]

However, there are cases that may be repetitive and, thus, should receive identical treatment by the Judiciary. Hence, the *Súmula Vinculante* is an instrument for the judiciary to adjudicate in a generic manner, in order to grant essentially equal and fast decisions to all cases alike. In other words, the generic characteristic of the *Súmula Vinculante* is consistent to the separation of powers, as provided in the Brazilian Constitution.

Given this premise, it is logical that the judiciary should be able to settle cases and controversies in an effective manner issuing the *Súmula Vinculante,* since the most relevant facts of such disputes are essentially identical. The binding effect becomes an instrument to bring more predictability and stability to the system.

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[37] *See* Cândido Rangel Dinamarco, *A instrumentalidade do processo,* 13th ed. 44 (Malheiros ed. 2007).

[38] *See* Cândido Rangel Dinamarco, *A instrumentalidade do processo,* 13th ed. 45 (Malheiros ed. 2007).

[39] *See* Cândido Rangel Dinamarco, *A instrumentalidade do processo*, 13th ed.136 (Malheiros ed. 2007).

[40] *See* Miguel Reale, *O Modelo Jurisdicional e o STJ,* in "STJ – 10 anos" [STJ – 10 years] Brasília, (1999) at 135-143 (Professor Miguel Reale is the author of the tridimensional theory of law in which he proposed that the facts, values and norms should interact with each other in order to reach the law. He was also favorable to the *súmula vinculante* both to the Federal Supreme Court and Superior Court of Justice).

Therefore, it is the conclusion of this author that the *Súmula Vinculante* is a constitutional and important legal tool as such as the statute is for the Legislature for the Courts to define binding precedents.

The third argument is that the *Súmula Vinculante* would freeze jurisprudence from change. This author recognizes two important types of divergence. The first occurs at the same time in different courts. The second occurs in different times, and, generally reflects the evolution in society.[41] Changing jurisprudence is natural. However, what we shall avoid is the divergence of jurisprudence brought by similar cases with *different* decisions at *the same time,* in spite of having essentially the *same relevant* facts which were necessary for decision.

The consequence is the absence of predictability, and consequent juridical insecurity. Justice Victor Leal mentioned that "the same cases, inside the same social and historical context, should not have different solutions. The common sense does not understand converse judgments, and the juridical commerce does not tolerate it, because it seeks predictability."[42]

In other words, if two cases are substantially the same, they should be decided in the same manner at the same space and time. The *Súmula Vinculante* shall prevent such type of divergence of jurisprudence. Due process is a common thread of the American and Brazilian legal cultures. And the adequate balance of such guarantee, *i.e.,* the equilibrium of due process, shall be obtained by the active role of the judge in preserving the opportunity of the parties to produce relevant evidence. If, for a justified reason, any of the parties could not produce such evidence, the judge could order any other relevant evidence to prove in some other possible way the right of such party.

It is hard to say that the American *writ of certiorari* and the Brazilian general repercussion are exactly the same. They are not.[43] But similarities are enormous. One may note that while the American *certiorari* requires the "compelling reasons,"[44] the Brazilian general repercussion requires the "existence, or not, of relevant questions under an economic, political, social or juridical perspective, that cross the subjective interests of the case."[45] And judicial discretion is the

[41] *See* Sydney Sanches, *Uniformização da Jurisprudência*, 7 (Revista dos Tribunais ed. 1975).
[42] *See* Victor Nunes Leal, *Atualidade do Supremo Tribunal*, year 61, vol. 208, (Revista Forense ed. oct-dec. 1964) at 16.
[43] One may note that the writ of certiorari only lies if the case is not appealable by *writ* of *error*.
[44] *See* Rule 10 of the Supreme Court Bylaws.
[45] *See* CPC, Art. 543-A, §1, altered by the recent Law n. 11.418/06.

scrutiny by which the Court could decide to hear one case because it regards it is important to the meaning of the Constitution.[46]

The Constitutional Amendment 45 to the Brazilian Constitution clearly intended to reduce the number of repetitive cases. However, a collateral, but not less important effect is the reasonable predictability of judicial decisions. If it is true that the *Súmula Vinculant*e resembles the American binding precedent in some manners, it is also logical that it shall foster and enhance the stability of the judicial system. Time is important to settle the adequate *ratio*, which shall be applied by both judges and lawyers, in developing jurisprudence.

This collateral effect is also important to the success of alternative dispute resolution systems, such as mediation, arbitration, and conciliation. In the United States, there is a previous cost-benefit relation study to almost every controversy before the parties seek judicial intervention. The predictability of the system will allow the Brazilian lawyer to also establish parameters of risk and opportunity in considering dispute resolution alternatives.

The purpose of this study was to identify possible solutions among different legal cultures for essentially the same legal issues both in the United States, and Brazil. The perfect system is an ideal to be sought, and, if only possible, reached. This author is aware that in the United States, many criticize the real effectiveness of the doctrine of *stare decisis*. In Brazil, others criticize the complete lack of predictability of the judiciary. In Japan, some would argue the conservative position of the Supreme Court. In Portugal, there are those who support the idea of a new Constitution. Any of these criticisms is worthless. But any of them is absolute. The predictability of the *stare decisis* is still effective and reasonable if compared to other civil law countries, such as is the case in Brazil. In Brazil, there are so many different social and cultural realities that not every jurisprudential divergence is nocive. One could not expect that Japan, a secular country with its own culture and tradition, may alter a complete and radical reform in a short space of time of fifty to sixty years. In Portugal, a new Constitution is not the solution for all the modern problems in that country.

[46] In the United States, the cert pool usually reads petitions and writes memorandums for the justices with a synopsis of the facts and issues. There is not an organ exactly alike, but the Superior Court of Justice counts with NUPRE, an organ destined to select repetitive cases and classify them.

The approximation of legal traditions appears as a global tendency. Europe discusses the idea of a single constitution. Brazil, alike the U.S., comes as a result to the union of different peoples and cultures, and has recently celebrated the 100th anniversary of the Japanese imigration with Prince Naruhito´s visit.

Globalization has brought the perception that the societies have common problems and issues. And History has taught us something: avoiding radicalisms is always a secure path for obtaining good results. Prudence indicates that not always "good fences make good neighbours."[47]

[47] *See* Robert Frost, *Mending Wall*.