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Arbitral Precedent: Still Exploring the Path II*

Precedente arbitral: todavía en la exploración del camino II

Paula Costa e Silva
Profesora catedrática de la Universidade de Lisboa.
Código ORCID: 0000-0002-3990-0001 | Contacto: paulacostaesilvaarb@gmail.com

Beatriz de Macedo Vitorino
Doctoranda en Ciencias Jurídicas en la Universidade de Lisboa.
Código ORCID: 0009-0008-8398-7301 | Contacto: beatrizmacedovitorino@gmail.com

Filipa Lira de Almeida
Maestranda en Derecho y Ciencias Jurídicas con especialidad en Derecho Civil de la Universidade de Lisboa.
Código ORCID: 0000-0002-3469-8203 | Contacto: filipalira@fd.ulisboa.pt

Resumen
El estudio de los laudos arbitrales sigue siendo un tema oscuro en lo que respecta a su capacidad para formar precedentes para futuros árbitros y jueces estatales. En contraste, el estudio del propio proceso de toma de decisiones sigue siendo en gran medida insuficiente en materia de arbitraje, principalmente porque los deberes del árbitro al decidir aún no son claros. En este texto profundizamos nuestro intento de construir una teoría del precedente que sea acorde con nuestra concepción del derecho.

Palabras clave: Precedente arbitral, precedente vinculante, naturaleza del arbitraje, teoría del precedente, filosofía del derecho, toma de decisiones, pragmatismo legal.

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Abstract:
The study of arbitral awards is still somewhat obscure when it comes to their ability to form precedents to future arbitrators and state court judges. In contrast, the study of the decision-making process itself is still very much insufficient when it comes to arbitration, mainly because the arbitrator's duties when deciding are still not obvious. In this text we further our attempt at construing a theory of precedent that is consonant to our idea of law.

Keywords: *Arbitral precedent, binding precedent, nature of arbitration, theory of precedent, philosophy of law, decision-making, legal pragmatism.*

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1. Introducing the subject matter

1. Is there such a thing as an arbitral precedent? Can it be *binding* to judicial courts? The answers to these questions will depend on the clarification of another set of broader issues relating to the existence of precedents themselves and their inevitable role in shaping today's possible conceptions of Law.

We will analyse these matters and attempt an answer to the initially posed questions. We have already spoken of this theme in one of our Author's paper[1] and our collective paper;[2] in *O discurso indizível, ou o estilo possível pela Lei da Boa Razão*,[3] soon to be published, some questions related to the ones that we will face here are deepened and some insight into the stances we will take is provided.

Now, we continue exploring the path leading up to adopting a theory of the arbitral precedent.

1 Costa e Silva (s.f.).

2 Costa e Silva *et al*. (2018).

3 A paper by Paula Costa e Silva and Ana Fouto.

2. Defining *precedent*

1. A precedent may be defined, as does Duxbury,[4] as a «a past event—in law the event is nearly always a decision—which serves as a guide for present action». This is, still in vague terms, the concept at the base of our reflexion–we refer to *precedent* as an anterior decision which plays a leading role to subsequent ones by *binding* the decision-maker to the *previous* decision. Therefore, we mean to distinguish between *precedent decisions*—meaning *anterior* decisions—and *decisions with precedential* value—meaning the constraint of ensuing courts or tribunals' power to decide.

This is too what Duxbury considers *following a precedent* is: in his own words, «to follow a precedent is to draw an analogy between one instance and another» and «entails looking for guidance to an established standard».[5] If following a precedent depends on the possibility of drawing an analogy between cases, it is a cognitive activity, and what actually *binds* the decision maker is the duty to decide *well*, which may or may not imply the necessity to apply the *ratio decidendi* of a previous case. We will try to demonstrate this throughout the text.

2. Furthering what we stated above about decisions with precedential value, we must clarify that the precedent differs from the decision from which it originates. It is the *ratio decidendi* that may provide elements prone to establish such relevant connections with posterior cases (the analogy Duxbury refers to) that the anterior decision presents itself as *having precedential value* to a later one.[6] The decision-maker must *identify* such similarities between the two cases that make the *ratio decidendi*[7] applicable; are those similarities not to be found and the case at hands falls out of the precedent decision's scope.

There is said to exist binding and persuasive precedents—a subdivision we will later on submit to a *stress* test—and while the former are as such recognized by all courts pertaining to a national legal order—even if only few of them are actually bound by said precedents (might it be because the law says so or because courts themselves assume the obligation of following certain courts' decisions' *ratio decidendi*)—, the latter are extracted from whichever decision a decision-maker finds adequate to solve (or help solve) the case in hands: we

4 Duxbury (2008, p. 1).

5 Duxbury (2008, p. 2).

6 Cross (1961, pp. 201 *et seq*).

7 Cross (1961, p. 104).

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may, at this point, already conclude that *every decision that applies the Law of a certain country may form a precedent* (i.e., have precedential value) and that it is considered as such whenever another decision-maker applying said law finds so to be adequate (as stated above, even if there is a system of binding precedents, it is always a *relative* and *cognitive* exercise to determine when there are enough relevant connections between cases in order to apply the *ratio decidendi* of one to another one).[8]

The existence of a precedent rule and the obligation for a court to apply a preceding *ratio decidendi* are questions somehow extrinsic to the decision-making process. We will look further into this matter in § 10.

3. Based on what we have already stated, we will now attempt to understand if self-standing rules contained in arbitral awards and state court decisions may be applied by arbitrators and judges indistinctly, when both apply the same legal order. This said, the statements we made in § 2 require further development, which will be attempted in the following paragraphs.

3. Preliminary conclusions based on the definition of precedent

3.1. May arbitral awards form precedents to arbitrators?

W. Mark C. Weidemaier[9] explains it is clear arbitrators cite other arbitrators' decisions. This is particularly true when it comes to institutionalized arbitration, such as sports arbitration, where the lack of a set of principles or rules applicable means one of the tasks of the arbitrator is to develop the substantive system, which implies that each arbitrator is aware of creating a new rule (which will guide future arbitrators).

Gabrielle Kaufmann-Kohler noted, at her Feshfield Lecture,[10] the lack of precedential value in commercial arbitral awards. However, this lack is mostly

8 See what we write in § 13, in regards to the nature of the obligation to follow precedents in a system that applies the *stare decisis* principle and in regards to the fact that, despite us stating that following a precedent is always a cognitive exercise, sometimes it occurs that, in a system of binding precedents, decision-makers follow precedents they do not agree with.

9 Weidemaier (2012).

10 We have already spoken of this Lecture in our article Costa e Silva (s.f.). *Cfr.*, Kaufmann-Kolher (2007, pp. 357 *et seq*).

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practical, it does not mean arbitrators deciding a commercial case are indeed prohibited of creating a rule or following a rule created by a precedent.

The awareness of having to create a new rule when deciding a case inserted in a most lacunar system is not necessary to indeed create a rule: the arbitrator that decides a case included in a fairly complete system may still create a self-standing rule, since a system (whichever system, but more so a legal one) is never fully complete.[11] Indeed, the awareness of creating a rule or principle is not the criterion to determine whether such rule or principle exists and whether it may be followed in the future.

That would lead us to a more in depth, here useless, consideration on the process of creating rules and on the pre-existence of legal rules before their appliance.[12] However, although to the decision-maker such awareness is, despite its attempt at universality and systematicity, only relevant to the case being decided at the moment, he has, as Karl Llewellyn states, a «responsibility for the precedents which their present decisions may make»,[13] i.e., a «responsibility accompanying the power to commit to the future before we get there», as Frederick Schauer puts it.[14]

This is relevant to understand, as Duxbury notes, that precedents should not be looked upon solely on a precedent-following perspective, but also a precedent-creating one, by stating that «creating precedents, and even following precedents, can be a forward-looking activity». [15]

Contrary to the conclusion one might have arrived at if seeing arbitration as an *ad hoc* forum focused only on solving the issue at hands, it is clear there is nothing prohibiting or impeding an arbitrator of citing an arbitral award. At least in some cases, it is not only not prohibited but also required—not because of a supposedly binding force of certain precedents for coming from certain courts of law, but, as we Will further on explain, because of the *duty to decide well*.[16]

As to the question if it is *always* required, we will clarify throughout this paper that it is our opinion that applying a certain legal order means looking not only into its rules (and norms, a concept we will develop in § 11) but also to

11 Note, however, what we state about this matter in §§ 3 and 11.

12 We will discuss this matter *infra*, in §§ 7 to 12.

13 Llewellyn (1930, p. 251).

14 Schauer (2011, p. 573).

15 Duxbury (2008, p. 4).

16 More on this issue in §§ 4, 5 and 14 to 17.

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all past decisions with the force of *res judicata*, both arbitral and strictly judicial—this, of course, does not mean necessarily following their principles, i.e., following a precedent decision or even concluding there is precedential value to a decision (by containing a self-standing innovative rule);[17] we mean solely that in order to comprehend, interpret and apply a legal system and to do so *well*, one must know how it is usually—or has been sporadically—applied, or even how legal orders with the same principles regarding the issue of the case being decided (and with the same lack of positivized rules regarding the specific matter of the conflict) have decided similar cases.[18]

3.2. May state court decisions form precedents to arbitrators?

Considering what has already been said, we also admit the precedential value of state court decisions to arbitrators. In fact, this discussion only makes sense in the context of Civil Law systems, since it is clear that an arbitrator applying Common Law could never only rely on written laws. And it is when considering Civil Law systems that it is most pertinent (yet paradoxical) to assert that arbitration does not mean a positivistic view of the Law: it is not a field in which decision-makers (who may not be judges or even law professionals or practitioners) are only to consider written laws.

This observation may seem bizarre, since it seems to assert something undisputed, as the most common and intuitive thoughts about arbitration picture it as a more open and resourceful environment to solve a conflict;[19] yet, when seen as an instance where the arbitrator is to read a law and interpret it without resorting to outer interpretations (i.e., an *ad hoc* instance of problem solving that does not have to follow the same methodology of state courts), the result could

17 In § 11, we will show that all decisions may be said to contain a self-standing innovative rule. Therefore, the matter of whether a decision has or has not precedential value is always relative: a decision either has or has not precedential value *to a later case*, which depends on the possibility of drawing an analogy between both cases.

18 In § 12 we will explain that we see past decisions are sources of law and sources of knowledge of law, and what we understand by these concepts.

19 This perception seems to have historical background: when trying to trace the history of Commercial Arbitration, Earl S. Wolaver notes that medieval traders «preferred justice 'according to the Law of Merchants' to that of the common law precisely because the decision method was free, (...) each case viewed in the light of practical expediency and decided in accord with the ethical or economic norms of some particular group» (Wolaver, 1934, p. 132). The flexibility to consider the specific features of the context within which the dispute arose resulted in a more open environment and thus was a synonym to *fairer* decisions.

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be precisely a positivistic approach. We mean to distance ourselves from it. Unless the parties agree on a decision based on equity, arbitrators must base their decision in an existent national legal order or international set of rules (broadly, a legal system)—not only fragments of it, but in its entirety. This implicates the need of looking into previous decisions and interpretations of the Law.[20]

Beyond the literal meaning of the expression *legal order* or *legal* system—from which the arbitrator cannot exclude *any* previous decisions (both arbitral or strictly judicial)—there is yet another significance to it that must be analysed. The ultimate goal of all decision-makers is to render a decision—this is a simple statement with which one can easily agree.[21] But we also think there is more to it. The *non liquet* prohibition compels the judges—here, in a broad sense—to reach a decision: they have the obligation to decide. We ask: mustn't the decision they shall produce have certain characteristics? They are legally bound to render a decision—*any* decision? Don't they have a duty to obtain a good decision, the *best* decision?

4. This seems particularly relevant if we consider that, save for exceptional cases, arbitral decisions cannot be contested in judicial courts: if an arbitrator does not follow a preceding *ratio decidendi* containing an applicable and adequate solution for a present case, that decision cannot be appealed from in a judicial appellate court. Does this imply a different understanding of the word *obligation*, or a reconfiguration of that primordial duty? We answer both questions negatively. Neither duties nor obligations depend on peripherical or ulterior supervision. Even if it is true that the lack of consequences resulting from the non-compliance to an obligation may originate more breaching situations, it does not mean that the unobserved duty did not previously exist.

20 This is recognized, for example, by the Statute of the International Court of Justice (1945, arts. 59 and 38 (1)(d)) which provides that «[t]he decision of the Court has no binding force except between the parties and in respect of that particular case» and that the International Court of Justice shall apply «judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law». This goes to show that even though there is no doctrine of *stare decisis* in international law, prior decisions may be used by the courts to support their findings.

21 We will look into the function and goals of the decisión-maker in § 5.

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The lack of a supervision does not free the decision-makers from their duties[22]—neither the arbitrator nor the state court judge. Should we state the contrary and we would be admitting that final instance courts and, generically, all those rendering decisions that cannot be contested, are free to decide in whichever way they please: higher courts and final decision-makers would have no duty to reach the best decision, precisely *because* it would not be subject to further scrutiny.

5. A system like the one described most ultimately contradicts the underlying assumptions of the judiciary organization and cannot be accepted. This is why we understand that the fact that arbitral awards cannot be altered by state courts does not mean arbitrators are solely obliged to decide. They are limited and subject to a legal order—whichever it might be—, which means they, as much as state court judges, must decide *well*. What it means to decide well or, in other words, the content of this duty we state all judiciary instances are bound by, will be furthered in the title where we handle the decision-making process.

For now, we must deepen our belief that there is a duty to decide well. Indeed, one must, as states Alexander J. Bělohlávek,[23] distinguish between the *right to court proceedings*, which may be waived on the basis of party autonomy (for instance, by means of signing a valid arbitration agreement), and the *right to legal protection*, which cannot be waived. As the Author states:

> [a]rbitration is therefore a process of finding and applying the law. [S]uch legal protection must be approved by the law (laws and regulations) applicable at the seat of arbitration. An arbitration agreement as a manifestation of autonomy only initiates this dispute resolution mechanism within the framework laid down by the *lex arbitri*. This condition is a necessary prerequisite for attributing legal force to arbitration awards, which are therefore enforceable by public authority. The state assumes no responsibility for the provision of legal protection via private mechanisms (arbitration). Arbitration tribunals

22 In these regards, *cf.*, Hart (1994), where the reader may find an explanation of the concept of internal point of view as the adoption of a critical reflective attitude to patterns of behaviour shared by people engaged in a common enterprise, being that judges adopt an internal point of view towards judging as they accept the rules applicable to that activity as standards for the appraisal of their behaviour by others and by themselves, and vice-versa.

23 Bělohlávek (2011, pp. 47 *et seq*).

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> do not represent public authority but are nonetheless instruments of legal protection.[24]

In these regards, it is clear we do not sustain a vision of arbitration as a dispute resolution mechanism that aims only at the individualized and isolated maximization of the parties' satisfaction. Before any other reasoning and despite there being opinions to the contrary, the motive for our option is the logical impossibility of such vision.

Aiming at the maximization of the parties' satisfaction *always* implicates the other two goals of dispute settlement that Thomas Schultz enumerates:[25] the sustainment of the rule of law and of predictability; and the enforcement of substantive societal values, meaning that dispute settlement must provide «means to implement the fundamental agreed allocation of entitlements underlying in the legal system of a given society at a given time, which may not yet have translated into positive legal rules», an idea that, as Shultz puts it, derives from the *suum cuique tribuere* principle.[26] Even if in a specific case our statement may not appear to be true and the satisfaction of the parties may seem to ask for a dismissal of societal values and the rule of law, a theory of law which sees in it the best system of party protection, both substantively and procedurally, means that the decision rendered must always be coherent with the whole of the system being applied, regardless of the nature of the decision-maker.[27]

If we were to admit otherwise, i.e., that alternative dispute resolution methods would only have the function of maximizing the parties' satisfaction (or, as Owen Fiss puts it, that while adjudication would aim at achieving justice,

24 In regards to the first sentence of the quoted excerpt, and considering the approach we have been and will be adopting, we would think about the reference to *law* as *any set of rules that work as criteria for case solving*, not only written law; the nature of the *law-maker* is also not important for our purpose, which is to demonstrate that the duty to decide well is common to all decision-makers and that the *good* decision-making process does not differ according to the *source* of their power to decide.

25 Schultz (2011, pp. 227 *et seq*).

26 Schultz (2011, p. 242).

27 This idea is consonant with Alexy's reference to the principle of the universality of the law, which he elaborates in his *Theorie der juristischen Argumentation: Die Theorie des rationalen Diskurses als Theory der juristischen Begründung* (Alexy, 1983, pp. 259 *et seq*). In his view, it is unacceptable that, being the applicable rules the same, courts of different nature shall solve similar conflicts in different ways as a result of that dissimilarity alone, thus being that principle required by both formal and material justice. This idea is, of course, consonant with Schultz's view, as we have seen before. On the relevance of this principle to understand precedent's binding scope, *cf*. Bellocchi (2017, pp. 177 *et seq*).

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all other methods would only aim at achieving peace),[28] the parties' satisfaction itself would be put at risk as the peace obtained by the decision would be temporary—his was the reason why authors such as Owen Fiss saw these methods so sceptically.

Moreover, as Thomas Schultz states in regards to the first goal we enunciated, «satisfaction cannot be a function of the resolution of the dispute, but of the procedure itself», as resolving a dispute may be as simple as the «dint of a role of a dice or the consultation of an oracle», whereas «the search for truth and the provision of a fair hearing are a different matter altogether».[29] From the author's words we may conclude that even if the maximization of the parties' satisfaction were to be considered the only goal of arbitration and of other non-judiciary dispute resolution methods, that would never only signify solving the dispute between the parties; it would always lead to taking all the necessary steps to solve definitively the underlying conflict,[30] searching for truth and providing a fair trial.

This is, of course, consonant with the fact that, despite us stating many times throughout this paper that law is a system of norms and principles, it may not be seen merely as a system of abstract rights, but more so as a method of reconciling conflicting interests.[31] In other words, law is both the substantive and the procedural, but it is in the procedure that it finds its most characteristic features, as rules of conduct (permissive, prohibitive or demanding) may constitute any other form of ethical, religious or societal code of conduct. Besides, Law

28 Fiss (2009, pp. 1276-1277).

29 Schultz (2011, p. 237).

30 John Collier and Vaughan Lowe (2000) distinguish conflicts from disputes, considering that the former are a «general state of hostility between the parties», whereas the latter is a «specific disagreement relating to a question of rights or interests in which the parties proceed by way of claims, counterclaims, denials and so on».

31 As first discovered by Rudolph von Jhering in his 1872 *Der Kampf um's Recht (The Struggle for Law)* and in his 1872 *Der Zweck im Recht (Law as a Means to an End)*. Von Jhering understood that Law was not an end in itself, but a means to an end, being the final end the existence of society. Therefore, legal concepts had within themselves no productive power and were not eternal, which meant that legal methodology ought not to be based on a mathematical construction of principles from which all rules would derive. Although we do not agree with the exclusion of logic from the juristic method (we will explain what we think the decision-making process to be, below), we do defer to the idea that law exists in order to empower societal peace, which is achieved through the procedural guarantees of each person in litigation. *Cfr.*, Von Jhering (1913) and von Jhering (1915). For more on von Jhering's legal thought evolution, see Seagle (1945, pp. 71 *et seq*).

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may not be seen as a system of abstract rights, as rights only exist in the concrete, the real and material situation.

As results from what we wrote, the right to legal protection, with all it includes, is of course demanding on arbitral procedures and decisions. As Owen Fiss provoked, the resort to arbitration and non-judiciary methods of conflict resolution often stems from the inefficiencies of the exercise of judiciary powers, which often lead to long-lasting, burdensome and draining (in both emotional and monetary senses) procedures, therefore actually damaging the parties' right to (speedily obtained) justice. Or, as the Author puts it, the preference for settlement may very well be a «function of the deplorable character of the options available to them».[32]

All we have stated so far leads us not to look for answers regarding the role of precedents in arbitration in any of the theories that aim to justify the assignment of power to decide in a definitive manner to arbitrators by identifying the source of that assignment.[33] This will become clearer throughout the paper, as we intend to demonstrate that every decisionmaker is bound to and by the same duty—that of deciding well—, this resulting from the intellectual and rational nature of the deciding process.

The role played by the decision-maker in the decision-making activity cannot be surpassed by that of institutional devices designed to legitimize the decision they render, under penalty of subverting the very idea of *justice* that underlies the resort to a third-party to solve a conflict.

6. Stating that arbitrators *must* take notice of previous arbitral awards and judicial decisions might sound surprising, since arbitration is often seen, as W. Mark C. Weidemaier states, «as an *ad hoc* forum in which arbitrators do

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32 It was Owen Fiss' belief precisely that the peace achieved by settlements, not being a wide-scale social peace, was in reality «often a very fragile and temporary peace» (Fiss, 2009, p. 1277).

33 This idea does not seem to gather consensus amongst legal thinkers. Teresa Arruda Alvim, in her paper *Arbitrating in Brazil: Arbitration and Binding Precedents*, states that arbitrators are *comparable to judges* (2008), a distinction based on the premise that the activity of decision-making is influenced by the source of the power to decide. On these grounds, she concludes that arbitrators *cannot be creative* nor depart themselves from binding precedential decisions rendered by superior state courts, for it would mean the party's agreement on the law applicable to the case was not being observed. The occult premise seems to be that decisions rendered by arbitrators are not part of any legal system, despite of the set of rules the parties might have chosen.

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justice (at best) within the confines of particular cases»,[34] but, besides what we already stated regarding our non-positivistic approach to arbitration, we do not see in Weidemaier's statement a differentiated characteristic of arbitration. In fact, the judicial court judge also decides a particular case: that is what *doing justice* means. As we stated above, this cannot mean the other two main goals of solving a conflict may be waived, as the right to legal protection itself may also not be waived. If arbitrators are set on the goal of *doing justice* by applying the Law, then they cannot be oblivious to previous decisions, whether rendered by arbitral or judicial courts. Consonant to this idea of arbitrators also having to decide in a *systemic* way is Thomas E. Carbonneau's statement that some systems of arbitration produce «substantive results that have a systemic character».[35]

This is precisely what Thomas Schultz states when considering the implications of the above-mentioned goal of decisions of sustaining the rule of law, indicating that «[i]f dispute resolution outcomes are to collectively satisfy [the principles of governance by general rules, public as certain ability, prospectivity and steadiness over time], one element in the procedural setup of the system becomes crucial: the precedential force of prior outcomes».[36] Also bridging the concepts of rule of law and predictability, and therefore also of systematicity, Lon Fuller explains that a society is only ruled by law when there is predictability and consistency, dismissing the idea that the rule of law may exist when all issues are decided on an ad hoc basis and stating that «the enactment of contradictory rules (...) does not simply result in a bad system of law; it results in something that is not properly called a legal system at all».[37]

This is also what Gabrielle Kaufmann-Kohler states,[38] considering that, if it may be debatable that arbitrators have a legal obligation to follow precedents, it is certain that there is a *moral* obligation to do so, in order to foster a normative environment that is predictable and, therefore, consonant to the «inner morality of law» that Fuller speaks about. If this morality comes from their position as creators of law and solvers of legal disputes, then it becomes clear this need of morality is a legal duty as it is, as Fuller puts it, a condition of any legal system. We will however explain later on when we believe such duty exists. A hint: the duty to follow a precedent exists when deciding *well* demands so.

34 Weidemaier (2012).

35 Carbonneau (2004, p. 1205).

36 Schultz (2011, p. 240).

37 Fuller (1969, pp. 38-39).

38 Kaufmann-Kohler (2007, pp. 357 *et seq*).

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3.3. May arbitral awards form precedents to state court judges?

7. We concluded before that every decision applying a certain set of rules may form (at least persuasive)[39] precedents to the decision-maker applying the same legal order or an order that regulates the disputed matter similarly, which already allows us to try to answer some important questions. We can therefore affirm that the *ratio decidendi* of a first instance judicial court decision, appellate court decision, as well as arbitral decisions may contain selfstanding rules,[40] hence, forming precedents, taken into account by a decision-maker in the deciding process.

It follows, of course, that it is possible and rational for a judicial court judge to decide the same way an arbitrator previously did, whenever the relevant alleged facts (as such considered by the judge) are analogue to those that the arbitrator considered in order to decide a certain way, so far as the judge thinks the conclusion to which the arbitrator arrived is the correct one—when thinking so, the judge must be able to explain the thought process leading up to such decision.

The unity of the judicial system—whichever ways the Common Law and Civil Law traditions have conceived to achieve it—depends on the coherence of the decisions rendered. The stability and predictability of decisions and, of course, the accountability of the decision-makers are the mainstay of that system and, as far as we see it, there is no sufficient reason to exclude arbitral decisions from its perimeter. If arbitral decisions were not to be considered by judicial courts, the State would be failing at one of its most crucial duties—delivering Justice through its courts—, for they would be reporting to incomplete, stale laws (for their application is also their formation),[41] thus creating a parallel legal context in which former solutions are to be ignored, while the reasoning of solutions found without using all possible tools would be legally binding.

8. As we have concluded in our already quoted *Arbitral Precedent: Once and Again:*[42]

39 The reference to the persuasiveness of the precedent serves only the purpose of clarifying that until this point we have only been trying to understand if arbitral and judicial decisions may have precedential value for future decisionmakers. We have not yet taken a stance on the difference between persuasive and binding precedents and on what might make a precedent decision binding.

40 Goodhart (1930).

41 See §§ 10, 11 and 12.

42 Costa e Silva (s.f.).

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> the morality of Law depends, from the legal theory's point of view, on the uniform resolution of identical cases. The conclusion is insensible to the particular source of the rule: be it a legal text or on any other source, as Law is found in the concreteness, what is of interest to us is always the decision. And, in a *prima facie* analysis, the nature of the decision-maker should also be irrelevant.

We will speak more about our input on the nature of arbitration, which will clarify our statements, below. We will also try to understand what the difference between persuasive and binding precedents is and what relevance it may have (and what relevance we think it *should* have) when considering the application, by a state court judge, of a rule created by an arbitral award, and vice versa.

4. Why apply a precedent?

9. Guilherme Rizzo Amaral[43] states the place occupied by the arbitral precedent within the judicial framework will depend on the chosen theory as to the nature of arbitration. The reader may by now comprehend we assume a standing point that is favourable to seeing arbitral decisions as part of the process of Law application and therefore of Law creation, which leads us to accepting that arbitrators follow both arbitral and judicial precedents and that judges follow arbitral precedents as well. What makes us think this way?

10. Both arbitrators and judges *pertain* to the Law, since their activity is the highest expression of its interpretation and application, and, therefore, *creation* of such Law. We have already adopted this view in our paper *Arbitral Precedent: Once and Again*: we consider that the essential mission of jurisprudence is the contribution to the revelation *and* creation of Law;[44-45] the nature of the decision-maker is secondary to this matter. Therefore, we do not agree with Charles L.

43 Rizzo Amaral (2017).

44 Quotes as follows: «If the objective of observing the precedent is to provide coherence to the Law, with jurisprudence contributing to the promotion of equality of all before the law in the material sense, attaining these objectives, in the civil law system, through the decanting, based on the best arguments, of a norm from the rule, and by setting the norm, in praetorian terms, in the common law systems, we ask if one may speak of systemic coherence in just one way? Coherence that determines the observance by arbitral tribunal of the judicial precedents but would allow state courts to feel free to disregard arbitral jurisprudence?».

45 This statement will be further developed in § 11.

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Knapp's statement that «[w]hatever else arbitration may be, it is not 'law'—the kind of findable, studiable, arguable, appealable, restateable kind of *law*» that courts produce.[46]

We stated before that following a precedent, either binding or even persuasive, is somewhat secondary to the decision-making process (see above, § 2). What we meant is that we believe a judge could still decide the same way even if the preceding decision did not exist—in that case, *that* would be the decision containing the self-standing and innovative rule.

Knowing whether to apply a precedent is therefore a secondary (we might even say *formal*) exercise, which has not so much to do with applying the Law, in its ampler sense, i.e., the legal system of principles and rules, but with applying an already decanted norm from such system: the idea of *applying a precedent* (that is, the rule contained in a previous *ratio decidendi*) is relevant to determine the *fons iuris* of the rule applied, but not to determine the application of the rule itself.

The application of the precedent is circumstantial, because it depends solely of a preceding decision having decided a certain way, which is transferrable to the decision being sought at present. On the contrary, the application of the rule is not circumstantial, it is necessary and derives from the particular case at hands.

11. Clearly, this matter regards the nature of the decision-making activity as *revealing* or *creating* rules of Law. For what we have been stating to make sense, it is important to clear up that, in our opinion, *decision-makers do not create norms; they reveal them through applying the whole legal system*.[47] In other words, we believe the interpretation and application of a rule is part of the process of creation of a rule, *maxime* by revealing it. This follows from the acceptance of the idea that interpreting something necessarily implies the overcome of the object being interpreted. That object is, in this particular case, written discourse.

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46 Knapp (2002, p. 766).

47 The word *system* is used to represent the idea of *entirety* of a legal order. We do not mean to suggest Kelsen's theoretical conception of Law, developed on his *Reine Rechtslehre*. Our approach is mostly practical-oriented; this choice of words is justifiable by the need to distinguish between the designation of a certain set (which would then be referred to as *corpus*) and an axiologically oriented, intentionally created reality that aims to coherently solve any disputes that may arise in a certain legal context in a predictable and stable manner, that being its function. As for the concept of a functional/functionalized system, *cf.* Canaris (1983, pp. 155 *et seq*).

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Moreover, and as Armin Kaufmann notes,[48] the interpretative activity of the legal practitioner has the specific purpose[49] of linking different realities—existence and oughtness. If this is true, at the very moment a decision is rendered, something different from the legal text has been created: a synthesis between it and the (perceived) reality, which is *brought to the text* and attributes *meaning* to it[50]—the norm. That interpretative *attitude* is, therefore, *creative*.

But because the idea of system we have been alluding to leads us to accept its wholeness, every valid decision *reveals* the optimal[51] solution for the case at hands—it can always be found within the system.

However, we do not believe such creation begins and ends on a court. A (judicial or arbitral) decision cannot even be considered the last phase of the formation of a norm, since with every new application the rule evolves, its content becomes clearer and therefore its force (in terms of predictability and justification of its application and effects) becomes stronger.

Although we have stated that a system is always incomplete, what we mean is that it could never become completed, since every new decision rendered reveals a new possibility of application of the whole system. This does not mean that a system's fundamental principles cannot be altered partially or completely (in that case, we might say the whole system changed), for example, because of a change of political system.

Simply, even if some norms do not exist *yet* (for the correspondent formal rule never having been applied, which requires interpretation—and this only if we were to consider that a norm can be applied more than once, rather than that every rule contains virtually unlimited possibilities to intervene in the process of problem-solving, each possibility representing a different norm), they might stem from the existent set of principles agreed upon by deciders. It is when a norm has not been applied before that a (judicial or arbitral) decision may be said to contain an innovative self-standing rule.

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48 Kaufmann (1984, pp. 25 *et seq*).

49 This practical view of the (in this case, legal) interpretative activity is explored by Gadamer in a different perspective: that of establishing the *conditions for understanding*, among which would be the pre-comprehension of the object and the *interest in understanding* it, which would guide the interpretative activity. Therefore, the overcome of the interpreted object would not only be a necessary result but a condition under which interpretation is possible (Kaufmann, 1975, pp. 250 et seq).

50 Schroth (1989).

51 This concept will be further analysed in § 18.

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However, as norms are never truly applied the exact same way and may contain several normative contents (and these may evolve through time and social reform), we must note that all decisions end up containing (revealing), in a sense, an innovative norm, be it highly independent of any other decisions and interpretations of the same set of rules (not being analogue to any previous decision), be it just innovative in the sense that *the specific case X* (i.e., a specific matter of fact) had never been resolved by that norm (in other words, that that norm had never been applied to case X, but had been applied to cases involving analogue matters of fact).

12. To put it simply—and in order not to contradict ourselves, since before we stated that the application of Law is necessary for its creation—, we sustain that the particular case is decided through the weighing of all elements provided by a system, which is not yet Law up until the decision is rendered. Therefore, Law is created through the confrontation of the whole legal system and the particular case, resultant in a decision. The norm, now revealed, was already and always virtually part of the system, and in every new decision the content of the rule from which it stems will continue to be revealed.

Therefore, the concept of *precedent* is not necessary to the harmonization of the system, but it can favour the uniformization of Law application. Having said this, we mean to emphasize that the very word *precedent* should be used as an adjective, not a noun: it reports to an anterior rationalizing process, resultant in a decision that is now repeatable in the limits of the subject matter of each case.

In sum, it is our case that judicial decisions (either coming from state courts or arbitral tribunals) are sources of law regardless of the legal order being applied, as applying a rule is always part of the process of creating it, regardless of it never having been applied, of it not even being positivized or of it being positivized and having been applied several times. This does not mean, however, that by source of law we mean that judicial decisions may not be diverted from and that the system must be rigid; we mean that judicial decisions are both a source of law in the sense that application of law is part of the *creation* process of a rule and in the sense that they are a source of knowledge of the law (i.e., of any set of principles, rules and norms pertaining to a certain system), as decisions *reveal* the norms that the applied system's core principles demand. Looking into past decisions is therefore necessary in the decision-making process, but following a precedent is only necessary when the judge so considers, or, as Wasserstrom puts

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it, «precedents ought always to be followed except when they should not»,[52] a statement we will get back to.

5. Taking a stance on the nature of arbitration

Arbitral awards are determined by the existence of a previous arbitration agreement celebrated between the conflicting parties. However, the parties' goal when recurring to arbitration is still the same as when recurring to judicial courts: getting a decision which is able to solve the conflict fairly (the criteria being the legal system applied) and definitively, in a heteronomous manner—resorting to arbitration is not a synonym of arriving to a decision through an agreement of the parties; actually, it is still a revelation of lack of consensus. As we stated before, the arbitrator and the judicial court judge are bound by the same duties, in particular, the duty to decide *well*. We now move in the field of the above-mentioned right to legal protection.

In other words, and consequently, we do not think that the contractual nature of arbitral tribunals should imply that they be excluded from the idea of jurisdictional system, which consistency depends—even more so if we consider the Common Law family—on the concept of preceding rulings being, at some extent, taken into account by decision-makers.

As Sanders teaches, in arbitral conflict solving:

> [o]n the one hand, there is the contractual basis: no arbitration without a valid agreement to arbitrate. This agreement may also regulate the appointment of the arbitrators; in addition, the conduct of the arbitral proceedings may be regulated in great detail by reference of the parties to a set of arbitration rules. On the other hand, arbitration is a judicial process. The arbitrators render, as private judges, a binding decision which is enforceable like a court judgement. Neither of the two aspects can be neglected. The nature of arbitration is influenced by both lines of approach.[53]

Arbitrators have the power of jurisdiction insofar as they have the power to *say the law* (*jurisdiction*), regardless of not having the coercive power to execute decisions. Jurisdiction is, nowadays, shared between state courts and other instances that may determine definitively the law in a specific case.

52 Wasserstrom (1961, p. 46).

53 Sanders (2014, p. 5).

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The definition of precedent has already made us arrive to these conclusions, which will be the starting point to the second half of this paper where we will ponder the weight of the traditional distinction made between binding and persuasive precedents and its usefulness, in an attempt to understand which nature an arbitral precedent (which we have by now clarified as existent) may have. As for now, we will take a short look into how precedents are framed by the legal families of Civil and Common Law.

So far, and we will continue to do so, we have only spoken about precedents and arbitral awards in a *lato sensu* manner, but it is clear that we are concerning primarily arbitration inserted in national contexts, since the questions relating to the possibility of judicial courts applying arbitral awards' *ratio decidendi* rendered in an international context is a different one. Nevertheless, and considering what we have written and the stream of thought we have been following, two additional notes are in order.

Firstly, it would be relevant to determine if a *legal system* is or should be confined by national borders. An unrestricted negative answer would imply that i) a set of internationally consensual rules had to exist, all pertaining to a coherent international legal system, from which all norms must stem and, consequentially, ii) all decisions, regardless of the court rendering them, had *precedential* value, either binding, persuasive or, as we will develop further in this text, precedential value resulting from the nature of the decision-making process.

Secondly, recalling what we wrote on § 3 and anticipating what will be stated below, decision-making making is an eminently rational process, which means that if there are enough relevant similarities between two cases, the chosen decision for each of them shall not differ. But this statement is only true if the criteria applicable to solve the case are the same, regardless of whether the previous decision applied the legal system also being applied at present or a different legal system that generally treats the issue in the same way, i.e., resorting to the same principles but maybe not containing a clear, undisputed resolution to cases such as the one being decided.

6. The reach of *fons ius* theories

The set of conclusions to which we seem to have arrived must now be put to the test and regarded from different angles.

There is no doubt both Common Law and Civil Law traditions structure their judicial organization in a pyramidal shape, the courts at its vertex being assigned (by Law, which in this context means by the State) certain prerogatives

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and the ones at the basis being directly influenced by the exercise of those duties—the change of words is not innocent, as the reader might have already understood from what was written above.

Two questions should now arise: why do these *superior* courts have particular powers? Why is it that only superior courts shall have them? Or, to put it clearer, why are hierarchic structures related to the assignment of duties to courts? These interrogations concern the internal organization of the State's conflict-solving apparatus; nevertheless, the answers provided will directly impact the subject-matter of this reflection, as we now intend to demonstrate.

13. In the Common Law tradition, the *stare decisis* principle implies that the *ratio decidendi* (and not the *obiter dicta*) of previous decisions, rendered by the same or by a hierarchically higher court—therefore, either operating horizontally or vertically—, should define not only a pattern to subsequent ones but, in some cases, peremptory criteria for case resolution[54]. In this tradition, there are two ways of non-appliance of a precedent: either through distinguishing or through overruling.

The *stare decisis* principle actually only arose in the XVIII century, over six hundred years after the establishment of common law, which is explained by Duxbury[55] as a consequence of the arrival of the duty to justify decisions: for a long time decisions needed not be justified by logical, comprehensible arguments. It was the necessity to do so that gave rise to the precedential value of decisions and, therefore, the rule of law in the Common Law. The fact that, however, the *stare decisis* principle is mandatory and the possibilities of non-appliance of a precedent are limited and often times not used because of various reasons,[56] sometimes judges follow precedents of which they do not approve.[57]

54 Hardisty (1979).

55 Duxbury (2008, pp. 18 *et seq*).

56 Reasons of which Duxbury takes account, such as laziness, lack of imagination, pressure for time to think about a problem afresh, timidity, prudence regarding the potential effects that a new decision could have on future ones, etc., following up with the statement that «[m]ore often than not, however, following a precedent serves the cause of restraint rather than creativity» (Duxbury, 2008, p. 10).

57 *Jones v. DPP* (1962, p. 633), per Lord Devlin: «[T]he principle of *stare decisis* (...) does not apply only to good decisions; if it did, it would have neither value nor meaning». See also: «The ordinary business of judges is to apply the law as they understand it to reach results with which they do not necessarily agree» (Newman, 1984, p. 204).

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Civil Law orders face the same challenges regarding predictability, equality and ultimately the deliverance of Justice in the form of just decisions. Yet, while in Common Law systems these concerns are addressed precisely by the doctrine of *stare decisis*, put into practice by the use of precedents, in Civil Law, past judgments (more precisely, their reasoning) are presented as relevant arguments both by the parties and the judge, nevertheless being challengeable; also, they can almost always be diverted from and are not equivalent to parliamentary legal dispositions, save for rare exceptions.

Despite these—as far as we see it, apparent—differences,[58] a remark is to be made: in both families, the formation[59] of decisions with precedential value—both binding and persuasive—is taken as a consequence of the hierarchic position of the court that renders the decisions.

In both traditions, this vertical display of courts is sustained by assumptions. They regard the quality of the decision-maker (thus implying another set of assumptions), the jurisdiction of the court or even its composition; more profoundly, it should be noted that, if binding, court decisions are equivalent to written law (although *subordinate* to it, since «a statute can always abrogate the effect of a judicial decision»)—[60] which making power belongs to the State. Therefore, and although these assertions might not be explicitly made, they follow from the *fons iuris* theories and tend to lead the Doctrine not to accept the precedential value of arbitral tribunal's decisions.

The national legal orders that regulate precedents do so in a way that reinstates these theories, by ordering that only decisions coming from high courts have binding effects,[61] pursuant to the vertical dimension of the *stare decisis* principle.

58 In fact, even if is true that some courts are legally bound to apply precedents under certain circumstances (namely, the appetency of a previous decision's *ratio decidendi* to address a present case), the duty to decide well would also imply the re-use of that same *ratio decidendi*, if the decision-maker thinks it is correct to do so. This means that the reason why the decision-maker is bound to apply a precedent should always be the same, whether we are considering Common Law or Civil Law Systems. This is our opinion, contrary to the ones we referred to in the previous note.

59 As we explained before, a persuasive precedent is formed through the application of a norm emerged from a preceding decision by the present decision-maker when he or she finds so to be adequate. Differently, a binding precedent receives its legitimacy from formal, or we might also say institutional, criteria. We will analyse this idea below.

60 Cross (1961, p. 164).

61 For a detailed explanation on the vertical *stare decisis* doctrine in the United States, *cf*. Mead (2012). As for the functioning of such a doctrine in English Law, cf. Cross (1961, pp. 103 *et seq*).

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14. At this point, we must ask again: is it correct to justify the binding force of precedents based on a classic *fons iuris* theory?

That method of analysis might be adequate to sort out difficulties concerning institutional legitimacy (even if it still fails to provide entirely satisfactory answers, as we briefly noted above), but should the rendition of Justice through courts—any courts, being that both arbitral and State courts share the same primordial goal—[62] depend on those institutional criteria? Should they not, on the contrary, serve that first purpose?

It appears so. So, if we put together everything we have written so far concerning the need of a systematic approach if courts are to render *the* good, just decision—the one that incorporates all the resources provided by that system; the one that is rational; the one that is correct; the one that is *valid and aims to be good*—[63] we believe the traditional approaches require development.

In fact, we do not believe that the sort of vertical precedent structure we referred to above actually constraints the judge and the case's outcome, since the judge, being bound by the duty of deciding well and being confronted by several norms originated by higher courts, will apply the norm that appears to be more suitable.

Or, as W. Mark C. Weidemaier states:

> it is questionable whether vertical precedent serves as a material constraint on case outcomes. Among other reasons for scepticism is the fact that, although decision rules announced by superior courts are binding on inferior courts, most disputes will potentially implicate a host of competing decision rules, each of which may be binding within its sphere[64].

This said, we fundamentally do not think that a precedent which legitimacy was acquired from being announced by law influences very much the deciding activity. As Allen states regarding the common law, «[t]he 'binding force' of precedents has through constant and often unthinking repetition, become a kind of

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62 It cannot be ignored that State courts occupying the vertex of the institutional pyramid are assigned duties apparently more related to the uniformization and development of Law through its use at the specific case than to the deliverance of a judgment that *merely* solves it. However, we have already stated that all judgments applying the Law also develop it, by solving the particular case, which is, of course, the fundamental duty of all courts. See what is stated in § 5 regarding the three main functions of dispute settlement.

63 Further developments on this idea will be made on § 18.

64 Weidemaier (2010, p. 1900, footnote 5).

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sacramental phrase which contains a large element of fiction», as the judges are trained to believe

> that the most conclusive logic is the analogy of antecedent cases, especially if they have been decided by Courts of higher jurisdiction than his own. By these we say he is 'bound.' But he is only bound in tellectually (...) It is he himself who must decide whether the precedent is authoritative or not.[65]

Let us now understand this assertion a bit better, by examining the decision-making process and therefore the criteria decision-makers shall observe when deciding whether or not to apply the *ratio decidendi* of a previous decision.

7. The decision-making process

If regarded as previously developed schemes for the resolution of an ensuing conflict, it is easily understandable that the binding content of precedents does not lie on the operative part of the judgment, for the final decision cannot be separated from the situation that requires it.

Those schemes—the *ratio* decidendi—result from the intellectual effort of selecting from the reality, as presented to Court, what might be relevant for the final goal of delivering a judgment. That process is not crucial only for the purpose of reasoning the final decision. It is also the exercise that enables the construction of a pattern: identifying the general contours and the specifying elements of any given situation.

The selection process itself involves a certain understanding of the facts and knowledge of the applicable legal dispositions. From the choosing of elements and their—at least simultaneous—logical concatenation, a chain of deductions can be made, ideally syllogistically culminating in one sole conclusion, but often leading to a plurality of potential valid options, from which one is to be elected by the decision-maker as *the* good decision.

15. «Valid»—as it is used here and as we used it before—is not a naively chosen word. The processes we are discussing are eminently rational and it is in this rationality that the crucial condition of legitimacy for the rendition of a judgment is. It may be argued that a court's legitimacy derives from its powers being assigned by the State (even if an arbitrator may be perceived as to having less of a public legitimacy)—this

65 Allen (1925, pp. 333-334).

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would be the positivistic approach to the much wider question of knowing what makes everything binding and an understanding of the word «jurisdiction» that we cannot follow. Even if we were to accept this statement, it would be now helpful to recall what we have previously written: it is not the operative part of the judgment that must be applicable to subsequent situations.

16. We would like to emphasize this idea a bit further, since the conclusions we will try to extract are subtly provided by the precedent doctrine itself. It is not the previous court given order that must be followed; thus, the cornerstone of the precedent doctrine cannot be the mere power to order.

The part of the decision that is *binding*—in the sense of legally having to be followed by subsequent decision-makers—is the intellectual path the decision-makers trace. If *valid* (when designed and if applied to this new case), such path ought to be reproduced. The precedent doctrine itself deconstructs the association between the institutional legitimacy a court needs to produce enforceable decisions and the judiciary legitimacy that leads to a valid decision and lays at the rationality of the judgment.

17. Even though it may be true that only certain entities may, by law, validly—institutionally validly, of course—pronounce judgments, it is not true that the conditions for that political kind of validity apply to the strictly legal and philosophical validity of a judgment[66]. Coherence between premises and conclusion does not depend on any kind of hierarchy or institutional criteria, but on the prevalence of reason over randomness and, consequently, unpredictability, which is the enemy to be fought against by any legal thinker.

Trying to explain the existence and functioning of precedents using the *topoi* from which we discuss institutional legitimacy is an incomplete manner of analysing such matter and tends to deny the possibility of formation of binding arbitral precedents. The only acceptable justification for the existence of binding legal precedents also implies accepting arbitral precedents, if the process to achieve the final judgment is submitted to the same rationalizing elements. What we mean to say is that, while a decision is only legitimate when formed by a rational process which can be communicated, and rendered by a competent entity, there is no competent entity to say whether the *ratio decidendi* of a decision may form a binding precedent, since it is the necessity of a rational decision able to

66 Neves (1995, pp. 85 *et seq*).

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put to terms the conflict taking place that may oblige the decision-maker to follow a previous set of decisions.

The idea we want to make clear is that the source of validity of every precedent rests in its *ratio decidendi*, which can only be achieved by the rationalizing process of sorting and applying facts and legal criteria, a process which must be linguistically expressed and comprehensible: as Castanheira Neves explains, the relevant rationality is not the one that simply aims to achieve a necessary inference or demonstration or a true and universal knowledge or explanation, but a finalistic, practical and relational rationality that aims to solve definitively the conflict in a way that is understandable by the parties and third persons.

We adopt, not a formal conception of logic and rationality, but a conception of rationality that allows for a *trans-subjective* validity,[67] not an objective one—it is not to Truth that the decision-maker is bound. Several conclusions can be drawn from this standing point: first of all, the decision-making process is not and shall not be disconnected from the particular *conflict* to which the decision is required—hence, *decidendi*. This already implies that the *judgment* is not a purely intellectual activity, although it must be justifiable through rational arguments (which construction already requires a value judgment by the decision-maker) and a rational display of those arguments, on which the communicability depends—hence, *ratio*.

18. This is why we think that the goal of achieving one decision is merely ideal—it is not incompatible with the potential validity of several judgments. The correspondence between a logical—justifiable—conclusion and a court decision is its most fundamental condition of validity.

The cautious reader might now be asking how to articulate the idea of a single *good*—fair—decision, mentioned on § 7, and this last statement. The apparent irreconcilability between these statements—meaning the existence of only one good decision for a certain case not implying the validity of only

67 In fact, as asserted by W. Mark C. Weidemaier, it is the explanation the decision-maker gives to substantiate a decisión that allows the observation of the norms applied, namely jurisprudentially generated norms. In the Author's words, «the practice of citing to and engaging with past awards [by the arbitrator deciding a case] suggests that system participants invest those awards with 'normative authority' and that arbitrators view themselves as engaged in a lawmaking enterprise. (...) [A]rbitral precedent must be observable to the relevant constituency» (Weidemaier, 2010, p. 1902).

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that decision—ought to be solved by sorting out the different realities the two adjectives report to.

Dworkin's well-known *Hercules J.*[68] would be the prototype of the ever-good decision-maker: being omniscient, his ability to access every aspect of the system on which he was integrated would allow him to resort to the integrity of it when faced with the necessity to render a decision. And it is precisely because of that unlimited knowledge and lack of inherent human constraints such as time, space and outer motivations that the solution he arrives to is the only valid one—if the decision-maker is able to access all aspects of the reality presented to him and has the capacity to mobilize a system in its integrity, the result from his decision-making process is necessarily a flawless decision.[69] In this scenario, the validity and the adequacy of the decision rendered necessarily coincide: the good decision is a perfect one.

However, (fully) human decision-makers do not assemble Dworkin's Hercules. The *corpus* of information they may master is immensely limited. And in the absence of the god-like characteristic of omniscience, the lacunar grasp of information available to them leads to the impossibility of *absolute* correctness—it allows them to aim for coherence, at best, and even so within the perimeter traced by the reality known to them.

This means that if we were to consider that reality exceeds its own representation, the decision rendered by the human *judge* can be rationally correct without being *good:* i.e., the best possible decision is not, except for the existence of a decision-maker such as Hercules, the ultimately good decision.

However, the human judge/arbitrator who reaches a certain judgment regarding a case via logical thinking and concatenation of rational arguments does so within a specific framework of rules and principles, that is, the applicable legal order. What we mean is that the determination of whether a decision is rational must be done in regard to the legal order applied, more specifically the interpretation and application of the legal rules that the decisionmaker finds adequate and relevant to the case.

Therefore, the rationality demanded to a decisionmaker is not only communicative, but also relative, not absolute—it is *relational*, as it stems from a triangular relationship between the law, the case *and* the judge. It is this type of

68 Dworkin (1986, pp. 239 *et seq*).

69 A different problem would be that of determining if a system is or can ever be complete—we briefly address that question in § 3 and 11.

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rationality that allows for a decision to be deemed *valid*: such decision is not only *correct*, but also *good*. Perhaps not the absolute *best* decision virtually provided by the system, but the best decision provided by all the circumstances of a decision-making (human) process, in which is included the limitedness of the decision-maker. Tending to this concept of rationality, the valid-because-rational decision is the *optimal* decision.

19. However, the binding effect of a decision does not solely derive from its validity. It is not because the conclusion derives logically from the premises—as taken to court by the parties—that the judgment is binding, for that would imply an ontological leap: this is where institutional legitimacy plays its most relevant role. It transforms the conclusion of the judiciary syllogism into an order, meaning that the decision itself (as final phase of conflict solving) can be observed from two different perspectives: as an authoritarian order and as a rational climax—if an order is not substantiated, it is authoritative; if it follows a rational explanation, it is the rational *climax*, rendering enforceability to the judgment, but also concluding the rationalizing process by finally giving an answer to the claimant's petition. Indeed, the correctness of an intellectual construction that supports a final illation does not instantly correspond to the reasoning of the judgment or to the judgment itself.

These are different realities, interlocked by institutional powers, assigned to courts by Law. The gap between logic thought and a declaration that alters a parties' juridical situation and consubstantiates an enforceable order is both linguistical and logic itself; yet, the chasm is filled by the implicit transformative power that comes along with the power to render a judgment.

We would like to recall our previous statements concerning the different kinds of legitimacy at presence—the legitimacy derived from a justified and therefore comprehensible reasoning process of deciding (jurisdictional legitimacy, which allows the validity of the decision) and the institutional legitimacy, both relevant to explaining the binding effect of any decision.

20. One final note regarding the decision-making process: we have stated before that we agree with von Jhering's vision that Law is essentially a method of problem solving, rather than a system of abstract rights, but that we do not agree that logic should be excluded from the juristic method. In these regards we have added that the law only exists in the concrete, real, material, i.e., with every situation of life that demands the interpretation (and therefore application) of legal rules, be it in adjudication when a conflict arises or, regardless of any

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conflict, whenever someone accepts or is forced to taking on a responsibility or a duty before someone else.

We have also stated that the rationality we believe to be demanded in adjudication is a relational one, or triangular, as it arrives at a meeting point between the judge, the case and the law (i.e., the legal system being applied and all other legal materials, both foreign legal systems and doctrines). In sum, we believe in a conciliation of empiricism and rationalism, or of empiricism, normativism and conceptualism, loosely in the lines of William James' Pragmatism:[70] experience providing the ultimate test to any concept.

In these regards, we follow Roscoe Pound's critique of «mechanical jurisprudence»[71] (a formal style of reasoning through which courts decide cases based on broad principles and concepts): if experience is the ultimate test, a case may not be decided solely on the basis that the facts seem to fit in the definition of a certain juridical institute (such as liberty of contract, for instance), despite the harmful consequences of applying the predefined legal regime of that institute.

And a certain concept (juridical institute) may not predefine consequences that will be so rigid as to not allow a good decision to all cases that fall into it. This does not mean concepts ought not to exist or be taken into account, but

70 James (1907).

71 Pound (1908, pp. 605-623). The author writes: «Law is scientific in order to eliminate so far as may be the personal equation in judicial administration, to preclude corruption and to limit the dangerous possibilities of magisterial ignorance. Law is not scientific for the sake of science. Being scientific as a means towards an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation». And, regarding the effects of a scientific legal system upon courts and legal professionals: «Perfection of scientific system and exposition tends to cut off individual initiative in the future, to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another. This is so in all departments of learning. One of the obstacles to advance in every science is the domination of the ghosts of departed masters. Their sound methods are forgotten, while their unsound conclusions are held for gospel. Legal science is not exempt from this tendency. Legal systems have their periods in which science degenerates, in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence». And the author adds further: «I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. (...) The idea of science as a system of deductions has become obsolete, and the revolution which has taken place in other sciences in this regard must take place and is taking place in jurisprudence also».

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simply that their adequacy is tested by the substantive effects they produce.[72] Roscoe Pound, in these regards, introduces the sociological movement in jurisprudence as opposite to mechanical jurisprudence as «a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument».[73]

Once again we stress that this is not contrary to seeing predictability and consistency as one of adjudication's goals, but most importantly, it must be predictable that all decisions will be adequate to the specific facts of the case being decided.

8. Final thoughts

21. There is, in the end, only one optimal decision: the one reasoned (which means it must be justifiable and driven by practical motives: obtaining the definitive composition of the conflict and the harmonization of the system and all its rules) and institutionally legitimate.

The two conceptions of validity that we intended to present and explore—the judicial and legislative (therefore, political) perspectives—must gather when it comes to appreciate the legitimacy of a judgment[74] and, as far as precedents are concerned, their hypothetical binding effects. However, we also tried to

72 As António Manuel Hespanha puts it, «Although many concepts or juridical principles are much more modern tan generally supposed, it is true that there are others which seem to exist, with their *face value* (i.e., referred to with the same words or as sentences) for a long time. Indeed, concepts such as person, freedom, democracy, family, obligation, contract, property, theft, homicide, are known as juridical constructions since the beginning of the history of European law. However, if we advance a little in their interpretation, we see right away that, underneath the surface of their *terminological* continuity, there are decisive ruptures in their *semantic* meaning. The meaning of the same word, in its different historical occurrences, is intimately connected to the different contexts, social or textual, of each occurrence. In other words, the meaning is eminently *relational or local*. (...) Behind the apparent continuity in the surface of words lies hidden a radical discontinuity in the profoundness of meaning. And this semantic discontinuity frustrates completely that aspiration of a intemporal validity of the concepts embedded in the words, even if the latter remain the same», also explaining in footnote that by *relational* the author means that all concepts are used in each time in relation to others that are also used in the same time in the history of discourse (v.g., freedom to slavery, democracy to monarchy, etc.). *Cfr.*, Hespanha (2012, pp. 17-18) (here, freely translated).

73 Pound (1908, p. 610).

74 Neves (1995, p. 93).

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demonstrate that the current understanding of what «institutional legitimacy» (which corresponds to legislative validity) might significate (in a nutshell, the supremacy of State courts' *auctoritas* over the *auctoritas* recognized to arbitral courts, which results in different assignments of *potestas*)[75] appears not to be adequate to the conceptualization of the precedent doctrine: in one hand, that kind of legitimacy stands on assumptions, mainly concerning the appetency of some courts to better decide certain cases—those assumptions don't seem to serve the purpose, when it comes to our current object of analysis; on the other hand, basing the precedent doctrine on institutional legitimacy criteria seems to result in the closure of a system which is pre-eminently dialectical and which affirmation, creation and re-creation occurs by the exercise of its main function—to decide.

22. This obliges us to conclude that, institutional legitimacy checked, binding judicial precedents cannot be accepted without also accepting the formation of arbitral precedents and their binding effects. Why? Because the condition of validity for both judgments lies on the same justification: both judge and arbitrator must reach a reasoned decision to stabilize the legal situation of the parties at conflict; at the same time, the *fons iuris* theory proves itself unsatisfactory when it comes to deep reflection on this subject-matter. We go back to Wasserstrom's phrase that «precedents ought always to be followed except when they should not».[76]

Even though this maxim is considered by Duxbury to be «unhelpful»,[77] it dethrones the *fons iuris* theory and guides us in concluding that, in a legal system in which the Law aims to reach a definitive solution to a conflict that is not incompatible with any other decisions and legal rules, the difference between binding and merely persuasive precedents ought to not exist, even though it exists in the praxis of both Civil and Common Law.

We sustain that, if the mainstay of the precedent doctrine is, as we argued, the validity of the judgment, all decision-makers must try to achieve that rational decision and therefore make use of every source of Law, both formal and informal. Only institutional and political-legislative structures may make use of

75 We would like to recall our previous notes on the legally determined hierarchic organization of State courts and the assignment of duties that both result from and underlie that distribution, being those justified by implicit assumptions, as stated on § 6.

76 Wasserstrom (1961, p. 46).

77 Duxbury (2008, p. 13).

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hierarchic and judicial vs. arbitration differential criteria, for validity criteria are common and equivalent whether they concern arbitral or state court judgments.

If our premises stand, there is no alternative but to perceive both Civil and Common Law as a rational and, therefore, systematic core of legal rules. The word «systematic» might raise some eyebrows, considering that one of the main distinctions made between Civil and Common Law is the systematic nature of Civil Law[78]—however, the path we rationally traced in this paper forces us to conclude that, in Common Law, it is precedents and not legal codes that reveal its systematic nature, preventing contradictory rulings and guaranteeing predictability and equality before the Law.

This does not mean that in Common Law systems precedents should be binding when coming from certain Courts of law and that, therefore, judges ought to decide in ways they do not agree with, simply because of the previous rendition of a judgment concerning an analogue case. In Common Law, decisions simply reveal more intensively the norms of the system, as less written statutes exist, but the precedent rule ought not to oblige the following of a precedent solely because of institutional criteria. Deciding is still in this context, as always, a cognitive exercise aimed at the final purpose of party satisfaction through conflict solving via just, fair reasoning (i.e., considering the existent system of rules and the need for predictability). The decision-maker's duty is still to decide well.

23. Traditional—but still taking effect nowadays—constructions only confer binding effects to precedents derived from decisions rendered by higher courts, basing such option on assumptions of various kinds. These constructions stem from the realization of the inexistence of Dworkin's Judge Hercules[79] and, therefore, the practical impossibility of having a system able of discovering the absolute best (past) decision.

The deliverance of Justice is as limited as we are, for the systems chosen are designed by persons who have limited amounts of knowledge, experience and time. Yet, we still need to decide; what is most, we need to decide in the best, longest-lasting way possible. Therefore, these constructions are based on assumptions, on the penalty of facing the impossibility to decide in reasonable time. Binding precedents coming only from higher courts are meant to save the

78 Cross (1961, p. 4).

79 Dworkin (1986, pp. 239 *et seq*).

judge from the burden of looking into every past decision and deciding which is best, and are meant also to help enforce judicial certainty and predictability.

These assumptions aim to help more the system's continuity than the specified decision taken, for they might not be verified in a certain case. As we understand it, there is no relation of causality between one instance (legal or jurisdictional) saying which precedents (judicial or arbitral) are or are not binding and their actually binding effects, for it is the process of decision making itself that forces a judge to investigate past decisions and juridical opinions to better interpret laws and apply rules and principles. It is the goal—*rectius*, the judge's duty—of reaching the optimal decision for the case in hands that might lead him or her to decide according to a past decision, be it originated from a state court or an arbitral tribunal.

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