International Journal of Legal Information 46.3, 2018, pp. 176–180. © The Author(s) 2018
doi:10.1017/jli.2018.39

The Influences of Common Law on the Brazilian New Code of Civil Procedure

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Abstract

Most legal scholars assume that there are only two "families" of legal systems in the world: common law and civil law. Briefly, common law is applied in all countries that speak the English language and has its origination from the "habits of society." On the other hand, civil law is applied just about everywhere else, with a few exceptions, such as in tribal law areas, jurisdictions that follow Islamic law, and a few other smaller legal systems. Brazil's New Code of Civil Procedure was promulgated in 2015 and brought innovations to Brazilian law. Elements of common law were incorporated into the Brazilian legal system, particularly that of using precedent. The application of common law elements in Brazilian law is being studied by various legal specialists. This present study explains how common law can be applied in civil law jurisdictions, similar to the way it is being adapted and applied in Brazil.

Some Considerations About Common Law and Civil Law

Throughout the world, there are common law and civil law legal systems; however, the existence of these two legal regimes does not imply that they are completely exclusive, or that there is or can be no blending between them. Miguel Reale, a Brazilian jurist, affirms that there are diverse cultural expressions that, in the last few years, have been the object of reciprocal influences, as civil law legal norms gain increasing importance in some common law systems; in turn, judicial precedent plays an ever more relevant role in the Brazilian civil law system.[2]

Many lawyers around the world—mainly lawyers in civil law jurisdictions—mistakenly believe that common law is just a field of law that merely studies case law. For example, in the Arkansas case *Mason v. State*[3] (2005), the Chief of the Supreme Court of Arkansas wrote "The common law is judicially created law that is developed on a case by case basis." Based on this statement, it is easy to understand common law as formed from time to time, following the evolution of society. Further, common law is not based on legal codes or on the literal words of law. According to Black's *Law Dictionary*[4] (1891), common law is "the body of law derived from judicial decisions, rather than from statutes or constitutions." Generally, then, common law emerges or evolves as precedent from cases where the parties disagree and the court looks to other, previous decisions before arriving at a judgment.

The principle of common law appears when the court or even the lawyer, realizes that a similar dispute in the past was resolved. Based on that past case, the court may be bound to follow the reasoning used in that decision (called *stare decisis*).[5] In a case where the court finds that the facts are distinct from previous cases, the judges

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[2] Reale, Miguel. *Lições Preliminares de Direito*. 25 ed. São Paulo: Saraiva, 2000.

[3] *Mason v. State*, 361 Ark. 357, 206 S.W.3d 869 (2005). https://caselaw.findlaw.com/ar-supreme-court/1416540.html.

[4] https://thelawdictionary.org/.

[5] See, e.g., https://www.merriam-webster.com/dictionary/stare%20decisis, which states that *stare decisis* is "a doctrine or policy of following rules or principles laid down in previous judicial decisions unless they contravene the ordinary principles of justice."

use statutes or regulations to resolve the dispute. In cases where the legislation cannot solve the present case, the court will resolve the issue using their own judgment and reasoning.

Civil law, on the other hand, originated from the Roman Law. Civil law uses the codification of social principles as a reference to apply in most legal disputes. As a general principle, civil law uses a system where the judges are bound to follow "collections of laws" and "codes." These codes contain the principles of law, rights, entitlements, and how basic legal mechanisms work.[6] The statutes and legislation are sources of law and the judges dominate trials, leading the lawyers, asking questions of the parties, and accepting questions from lawyers.[7] Being a system built upon legislation, what is predominant in civil law is the rationalist conception of law—abstract concepts are the source of law in the civil law system. In civil law jurisdictions, precedent is a secondary source of law, the main source of law is the Constitution. It provides the fundamental standard followed by all other sources.

THE INFLUENCE OF COMMON LAW ON THE BRAZILIAN NEW CODE OF CIVIL PROCEDURE

Brazil is a civil law jurisdiction. It was introduced to Brazil through Portuguese colonization and Portugal's influence from Roman-Germanic systems. The Brazilian Constitution, promulgated in 1988 tells in its 5th section, subsection II, that "*no one will be obliged to do or not to do anything other than by established law*."[8] This is clearly a fundamental precept of civil law. However, many years ago, the Brazilian legal system was also influenced by countries that had adopted the common law system, mainly from the United States. This can be seen in the Judiciary, Legislative and Executive powers in the Brazilian constitution.

Osvaldo Agripino de Castro Júnior[9] explained that the Brazilian system is a hybrid, adopting both "families," as the Brazilian legal system was influenced by the American and Roman-Germanic systems. Furthermore, Rosenn (1986)[10] found that a clear example of common law in the Brazilian legal system is the constitutional control that was inserted in the Brazilian Constitution of 1891.[11] This was inspired by the concept of *judicial review*[12] from American law, derived from the famous case of *Marbury vs Madison*.[13] Still following what Rosenn explains, adopting the same constitutional control as the American legal system, the Brazilian legal system gives to the judges, since the beginning of the Republican period, the possibility of being more than mere enforcers of the law. Rather, judges can permit or deny the validity of assertions, issues, or principles that confront the Constitution.

The first Brazilian code, dated from 1939, was a result of the 1934 Constitution. It introduced oral proceedings, concentrated many proceedings, and gave judges a much more active role.[14] After three decades, a new code of civil procedure was the second codification of civil procedure. This code "was designed to minimize the defects commonly criticized in Latin American codes, such as excessive emphasis on written documents and pleadings, lack of a trial or focused hearing, severe circumscription of the powers of the judge, and a plethora of opportunities for creating seemingly interminable delays."[15]

Rosenn explains:

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[6] Charles Arnold-Baker, *The Companion to British History*, s.v. "English Law" (London: Loncross Denholm Press, 2008), 484.

[7] Charles Arnold Baker, *The Companion to British History*, s.v. "Civilian" (London: Routledge, 2001), 308.

[8] http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

[9] Castro Júnior, Osvaldo Agripino. Teoria Prática do Direito Comparado e Desenvolvimento: Estados Unidos x Brasil. Florianópolis: Fundação Boiteux, 2002, pp. 583–584.

[10] Rosenn, Keith S., Civil Procedure in Brazil, 34 am. J. Comp. L. 487 (1986).

[11] http://www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm.

[12] See, e.g. https://www.britannica.com/topic/judicial-review, which defines judicial review as the "power of the courts of a country to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the constitution. Actions judged inconsistent are declared unconstitutional and, therefore, null and void. The institution of judicial review in this sense depends upon the existence of a written constitution."

[13] 5 U.S. (1 Cranch) 137 (1803).

[14] Amaral Santos, supra n. 3 at 56; Sidou, a Recepção da Oralidade no Sistema Processual Brasileiro, 31 r. Bras. Dir. Proc. 77 (1982).

[15] See Rosenn, supra.

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> The CPC (Brazilian code of civil procedure) made a number of desirable reforms. It permits the parties, albeit in limited fashion, to present evidences, objections, and arguments orally in a single concentrated hearing, a reform that has saved considerable litigation time. Brazil has also departed from traditional civil law practice by giving judges greater powers in all phases of judicial proceedings. Most Latin American codes reduce judicial activity to the final stage of the proceedings, the judgement stage, giving judges few powers to intervene at prior stages. Brazil, on the other hand, grants its judges the power to dismiss a complaint for failure to state a cause of action, to dismiss a party for lack of standing to make evidentiary rulings, to order discovery, to raise procedural defects during the proceedings *sua sponte* to grant summary judgment at an early stage, and even to make personal inspections of places, persons, or things *sua sponte*.[16]

After almost four decades, in 2009, a new project to create a new code of civil procedure came before the National Congress. The reasons for a new *codex* is to adapt to the Federal Constitution of 1988, the commission designated to elaborate the new code manifested:

> The weakening of cohesion between procedural rules was a natural consequence of the method of including changes in the CPC, compromising its systematic form. The complexity resulting from this process is confused to some extent with this disorganization, jeopardizing the speed and generating avoidable issues (issues that generate controversy and attract the attention of magistrates) that unduly subtract the attention of the operator of the law.[17]

From these motives, it is possible to identify that there was an interest in making judicial processes faster by reducing the number of appeals and other instruments that could delay the civil process.

Some institutions or concepts originating from common law have been inserted into the new Code of Civil Procedure, which entered into force in 2015. In Brazil, this use of common law institutions has been called "Commonalization."[18]

One of the common law institutions is the *amicus curiae*,[19] which, even though it was created in Roman Law, is widely used in countries that adopt the common law system. That happens because people and entities with no direct interest in the lawsuit are seeking to influence the present decision to use it as a precedent in the future. The Brazilian Code of Civil Procedure of 1973 provided for *amicus curiae* through article 482, paragraph 3:

> The rapporteur, considering the relevance of the matter and the representativeness of the claimants, may admit, by unappealable decision, the manifestation of other organs or entities.[20]

This rule could only be used in a declaration of unconstitutionality, which corresponds to a small number of legal proceedings.

Amicus curiae allow third parties to file statements on the grounds that they believe that the judgment of a lawsuit may affect some future interest. Minister[21] Gilmar Mendes, of the Brazilian Supreme Court, argues, based on the theory of the German, Peter Haberle:

> According to this view, interpreters of the Basic Law should be extended to cover not only public authorities and formal participants of it in constitutional review lawsuit, but all citizens and social groups who, in one way or another, experience constitutional reality.[22]

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[16] Id.

[17] http://legis.senado.leg.br/mateweb/arquivos/mate-pdf/160823.pdf.

[18] See, e.g. Douglas Silva Dias, Precedentes Judiciais Através do Espelho: O Direito Como Aquilo Que os Tribunais Dizem Que e, in which Dias defines the term and its origins in detail https://repositorio.ufjf.br/jspui/-handle/ufjf/6194.

[19] See, e.g. https://www.merriam-webster.com/dictionary/amicus%20curiae, which defines *amicus curae* as "one (such as a professional person or organization) that is not a party to a particular litigation but that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question."

[20] http://www.planalto.gov.br/ccivil_03/leis/l5869impressao.htm.

[21] The eleven judges of the Brazilian Supreme Court are called Ministers (Ministro), although there is no similarity with the government body of ministers. See, http://www2.stf.jus.br/portalStfInternacional/cms/ver-Conteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120283.

[22] Mendes, Gilmar Ferreira. Homenagem à doutrina de Peter Häberle e Sua influência no brasil. < http://www.stf.jus.br/repositorio/cms/portalstfinternacional/portalstfagenda_pt_br/anexo/homenagem_a_peter_haberle__pronunciamento__3_1.pdf>.

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The Brazilian New Code of Civil Procedure, therefore, allowed the use of the *amicus curiae* any time, dedicating an exclusive chapter to the precept. The judge has the power to accept or decline the intervention of third parties, and besides that, the judge may request an *ex officio* participation, and no appeal from any party is possible. The article says that:

> The judge or the rapporteur, considering the relevance, the specificity of the subject or the social influence of the controversy, may, by an unappealable decision, *ex officio* or at the request of the parties, or who wish to express, request or admit the participation of natural or legal person, body or specialized entity, with appropriate representation within 15 (fifteen) days of your subpoena.[23]

Another concept originating from common law used in Brazil's new Code of Civil Procedure is the use of precedent. This concept has existed in the Brazilian system since the constitutional amendment 45/2004, which strengthened the dominant jurisprudence, which summarized and published them, establishing a parameter for legal decisions of all kinds.

The Brazilian system also incorporates the concept of "*súmulas*" to standardize precedents. These are a kind of summary of the dominant jurisprudence, which has a binding effect. Article 103-A of the Brazilian Constitution states:[24]

> The Federal Supreme Court may, *ex officio* or after manifestation, by a decision of two thirds of its members, after repeated decisions on constitutional matters, approve precedents (*"súmulas"*) that, from its publication in the official press, will have binding effect in relation to the other organs of the Judiciary and the public administration, at the federal, state and municipal levels, as well as to review or cancel it, in the form established by law.

In the explanatory memorandum[25] for the creation of the new Brazilian Code of Civil Procedure, it was stated:

> Applies, following the direction already followed by the Brazilian legal system, expressed in the creation of the binding *"súmula"* (precedent) of the Federal Superior Court and the regime of joint judgment of *special* and *extraordinary* appeals, a tendency to create incentives for jurisprudence to become uniform, based on what to decide high and state courts, and stabilize.

Furthermore, Article 489 of the New Code of Civil Procedure stipulates that the judge should decide on using a precedent; however, he should identify the fundamentals that indicate the similarity between the cases. The same article 489 states that if a judge's decision does not follow jurisprudence or precedent invoked by the parties, without showing the existence of a distinction in the case at trial or the overcoming of the understanding, it will not be valid.

In addition, other articles in the Brazilian New Code of Civil Procedure demonstrate the application of common law institutes such as articles 1.029 and 1.042. Article 1.029 deals with the divergence between decisions, which must be decided by the higher courts:

> The extraordinary appeal and the special appeal, in the cases provided for in the Federal Constitution, shall be filed before the president or vice president of the appealed court, in separate petitions that will contain:
> (…)
> §1st: If the appeal is based on divergent case-law, the applicant must prove the divergence with the certificate, the copy or citation of the official or accredited repository of case law, including in electronic media, where the dissenting judgment has been published, or the reproduction of judgments available on the Internet, with an indication of the source, and in any case, should mention the circumstances that identify or resemble the cases faced.

Article 1.042 deals with the possibility of a kind special or extraordinary appeal:

> Art. 1.042: An "Agravo" (Grievance) can be used against a decision of the president or vice-president of the court appealed that judged extraordinary appeal or special appeal inadmissible, except when based on the application of understanding signed with general repercussion or in judgment of repetitive appeals.

[23] http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm.
[24] http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.
[25] https://www2.senado.leg.br/bdsf/bitstream/handle/id/512422/001041135.pdf.

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CONCLUSION

The Brazilian legal system, especially after the New Code of Civil Procedure, is strongly influenced by the common law system. The bigger emphasis is on *amicus curiae* and on the application of precedent (*stare decisis*), both of which are now applied in all kinds of trials. The application of precedent brings benefits to Brazilian jurisprudence, because it produces celerity in addition to reliability and legal security. Therefore, the Brazilian trend of introducing elements of common law brings diversified benefits that, in the long term, will help the Brazilian legal system become more stable.

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