

PECULIARITIES OF THE REASONING OF JUDICIAL DECISIONS IN BRAZIL: THE NEW CIVIL PROCEDURE CODE

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This paper deals with a relevant topic: the reasoning of a judicial decision as a requirement for its validity. In fact, this need is typical of democracies. In democracies, authorities have to justify their decisions which interfere in private lives. Decisions have to be reasoned also because they are, as a rule, appealable. What is challenged in an appeal is precisely the reasoning / motivation of judicial decisions.

The main novelty in this context is a provision which exists in a Brazilian Bill for a new Civil Procedure Code, which determines how the decision must be reasoned. It openly recognizes that a judge bases his or her decision not only on statutes literally considered, but also on legal writing and on case law. The legislator was very bold, because we are a civil law jurisdiction, where students are currently led to believe the decisions emerge automatically from statutory law.

Furthermore, this new provision teaches judges how to deal with all these elements, under penalty of having the decision being declared void or null.

Keywords: decision; judicial decision; reasoning; motivation; case law; legal writing.

Brazil is a country of great contrasts. Some things, such as the so-called 'defensive'¹ case law, are regrettable, while others are highly laudable. One of the latter is the widespread awareness among judges and jurists that the judicial decision does not arise from the automatic application of statutes to the case at hand. It is openly acknowledged that a judge interprets the law in the light of legal writings and case law. In general, it can be said that it is acknowledged that the law is based on a tripod: legal rules (statutes) and legal principles, legal writings and case law.

The possible subjectivity on which a decision may have been based, must be conveniently *absorbed* by the objectivity of the reasoning.

¹ Due to the case overload of Brazilian courts, judges very often do not hear appeals based on the lack of formalities which in fact are not necessary.

The reasoning, as we know, is rational rather than logical. Logic is nothing but one of the aspects of rationality.

The current demand that judicial decisions be substantiated arises from two needs. One of them is the need to be accountable to society, in states ruled by law. This need *absorbs* the possible subjectivity of the decision and is a way of avoiding arbitrariness. The other is a technical need: it makes it possible to appeal against the decision. In the appeal, it is precisely the motivation that is challenged.

When one studies the reasoning of the decision, in fact, one is studying what *appears* in the decision, which is a sort of '*façade*,' but, in any case, it is interesting to study this phenomenon, as it represents, at least, that which is understood to be satisfactory substantiation of a decision, in terms of the demands of a given system. Other grounds that may influence decisions (ideological, psychological, *etc.*) are not clearly evident in the text and are not relevant to the law. They should have been *absorbed* by the suitable objectivity and rationality of the reasoning. Otherwise, the decision will be arbitrary and contrary to the law.² These are the grounds that will be analysed in this article: the visible grounds.

The awareness that a judge does not decide based exclusively on statutory law, *i.e.* that the decisions do not automatically '*sprout*' from the statutes, cannot be found either in the legislation or judicial practice of many European countries. The statutory provision in Italian legislation that forbids a judge to quote the opinions of jurists³ is well known, as is the common practice in French law of settling cases in few words, as a syllogism, as if the only element taken into consideration by a judge were the literal wording of the law.⁴ Through not in every country.⁵

² Zenon Bankowski et al., *On Method and Methodology*, in *Interpreting Statutes: A Comparative Study* 17 (Neil MacCormick & Robert S. Summers, eds.) (Dartmouth 1991).

³ A respeito da proibição da citação da doutrina, a lei italiana é expressa (Art. 118(3) do CPC Italiano): '*118 disp. att. c.p.c. – Motivazione della sentenza*
La motivazione della sentenza di cui all'art. 132, secondo comma, n. 4), del codice consiste nella succinta esposizione dei fatti rilevanti della causa e delle ragioni giuridiche della decisione, anche con riferimento a precedenti conformi.
Debbono essere esposte concisamente e in ordine le questioni discusse e decise dal collegio ed indicati le norme di legge e i principi di diritto applicati. Nel caso previsto nell'art. 114 del codice debbono essere esposte le ragioni di equità sulle quali è fondata la decisione.
In ogni caso deve essere omessa ogni citazione di autori giuridici.
La scelta dell'estensore della sentenza prevista nell'art. 276 ultimo comma del codice è fatta dal presidente tra i componenti il collegio che hanno espresso voto conforme alla decisione.'

⁴ See interesting reflections on the topic in: Antoine Garapon & Ioannis Papapoulos, *Julgar nos Estados Unidos e na França: cultura jurídica francesa e Common Law em uma perspectiva comparada* 172 (*Lumen Juris* 2008); Eugênio F. Neto, *A sentença em perspectiva comparada; Estilos norte-americano, francês e italiano em confronto*, 39(235) *Revista de Processo São Paulo* 407 (2014).

⁵ In German law, for example, both the opinions of jurist and case law are cited in judicial decisions. There are statutory articles that demand, as a prerequisite for granting leave of appeal, the potential to contribute to the development of the law. This provision is a good example and was included in the *Zivilprozessordnung* (ZPO) in 2011:

Brazilian legal writers openly acknowledge that a judge makes use of a series of elements to reach a decision on the merits, *i.e.* that a judicial decision is not based only on statutes. When the Bill for the New Civil Procedure Code [hereinafter NCPC] is passed, the law will contain explicit reference to fact that a judge must base his / her decision on precedents.

Since 2009, there has been a Bill, drafted by a Commission of 12 jurists appointed by the Senate, which is pending in Congress (of which I / the author was the rapporteuse). This Bill contains a very interesting provision precisely about the way in which judicial decisions should be reasoned. The NCPC includes an interesting article that tells a judge *how* he / she must reason the decision. If the reasoning is not drawn up in accordance with the provisions of Art. 499 of the NCPC,⁶ it is deemed that the decision is *not substantiated*.

§ 543. Zulassungsrevision

(1) Die Revision findet nur statt, wenn sie

1. das Berufungsgericht in dem Urteil oder
2. das Revisionsgericht auf Beschwerde gegen die Nichtzulassung zugelassen hat.

(2) Die Revision ist zuzulassen, wenn

1. die Rechtssache grundsätzliche Bedeutung hat oder
2. die Fortbildung des Rechts oder die Sicherung einer einheitlichen Rechtsprechung eine Entscheidung des Revisionsgerichts erfordert.

Das Revisionsgericht ist an die Zulassung durch das Berufungsgericht gebunden.'

⁶ Article 499. Below are the essential elements of the judgment:

I – the report, which will include the names of the parties, the identification of the case, with a summary of the claim and the answer, as well as a record of the main occurrences in the course of the proceedings;

II – the basis on which the judge will analyse the matters of fact and law;

III – the provision based on which the judge will settle the main issues brought before him / her by the parties.

§ 1. One shall not consider to be substantiated any judicial decision, whether it is interlocutory, judgment or appellate decision that:

I – that merely names, reproduces or paraphrases the law, without explaining its connection with the claim or issue settled;

II – employs vague legal concepts, without explaining the concrete reason for their incidence in the case;

III – cites grounds that would serve to justify any other decision;

IV – does not take into consideration all the arguments drawn from the proceedings that could, in theory, invalidate the conclusion reached by the judge;

V – only cites case law or quotes precedents without identifying the decisive reasoning or showing that the case on trial fits that reasoning;

VI – does not adhere to the precedent or case law cited by the party without demonstrating the existence of a distinction between the case on trial and the case cited or the subjugation of the understanding.

§ 2. In the case of a conflict between rules, the court must justify the subject matter and the general criteria used in the deliberation carried out, stating the reasons that allow the rejection of one rule and the factual grounds for the conclusion reached.

§ 3. The judicial decision must be interpreted as the conjunction of all its elements and in conformity with the principle of good faith.

This provision lists the essential elements of the *judgment*: the report, the reasoning and the order imposed by the judgment or *decisum*.

Paragraph 1 is certainly a welcome and interesting innovation, which demonstrates how concerned the commissions dealing with the NCPD were with the 'constitutionalisation' of procedure, that is, making it very clear that the CPC is part of a broader normative context, at the top of which is the Federal Constitution.

This provision states that the guarantee of the substantiation of judicial decisions, of a constitutional nature, has not been fulfilled if said substantiation does not comply with certain minimum parameters of quality. In other words, the requirement will not be fulfilled by just *any* reasoning.⁷ The rules discussed below do not merely refer to judgments, but to *any* judicial decision, even those that settle incidental matters.

In subsequent rules, the NCPD lists cases in which it is considered that the judicial decision is not, strictly speaking, substantiated. This is a typical case of the applicability of Motions for Clarification: due to the absence of reasoning.

According to Art. 499(1)(I), it is considered that there is no substantiation of any judicial decision that, purely and simply, paraphrases the law without expressly stating *why* the rule is applicable to the case being judged. Thus, if the decision states: the decision is x, because the rules determines y, this decision lacks substantiation as it did not establish a *link* between the wording of law, stated differently, and the facts of the action.

This rule will be inserted into the system. The fact that it is not in the 1973 CPC, currently in effect, does not, in any way, mean that the requirement did not exist.

This requirement, which will be expressly included in the new law will be more incisive in cases where the judge decides based on a legal rule, whether a statute or some principle, that uses a *vague or indeterminate* concept in its wording (Art. 499(1)(II)).⁸

Principles, as we know, are almost always verbally formulated using vague concepts and, increasingly, in the modern world, these concepts are also frequently inserted into the wording of statutes.

Lately, all over the world, there has been a visible change in the style of legislating. Positive law increasingly presents less detailed rules with a broader scope and whose boundaries are not very clear (*fuzzy*). The complexity of contemporary societies, the trend towards having the law almost completely govern life in society, and the growing access to justice have demanded intentionally less precise rules of the legislator.⁹

⁷ As already stated: 'Inadequate reasoning is not reasoning.' Teresa A.A. Wambier, *Nulidades do processo e da sentença* ¶ 3.2.3, at 322 (7^a ed., Revista dos Tribunais 2014).

⁸ 'Vague or indeterminate concepts are linguistic expressions (signs) whose semantic reference is not so clear, lacking clear boundaries. These concepts do not refer to subjects that are easily, immediately and readily identifiable in the world of facts.' Teresa A.A. Wambier, *Recurso especial, recurso extraordinário e ação rescisória* 151 (2^a ed., Revista dos Tribunais 2008) [hereinafter Wambier, *Recurso especial*].

⁹ 'The complexity of the situations that arise in modern societies has led us to believe that they should "be solved by the applier of the law according to their circumstances; since the increase in demand, in general, for greater justice, even if, to some extent, at the detriment of the stability and predictability of the past," constituting, for science, the obligation to meet life's demands, which no longer recognises all rights in the statutes.' Wambier, *Recurso especial*, *supra* n. 8, ¶ 1.4, at 28.

These legal rules, intentionally less detailed, more open-ended and flexible, usually employ vague concepts and occasionally include *general clauses*, which are also vague expressions loaded with value judgments, given that they incorporate principles.

The content of general clauses is gradually built from the work of legal writers, but also, mainly, from the work of judges. Therefore, they are intentionally vague. A good example of this is Art. 1.228(1) of the Civil Code, which states that property must perform its *social role*.¹⁰

Vague concepts are those that refer to a subject matter that is, in itself, not very well defined. *Core business, best interest of the child, respectable media, general repercussion* and many other terms, are examples of terms that can give rise to discussion, in other words, it is possible that some will understand that a concrete measure serves the public interest, while others will understand the exact opposite.

This does not occur, or occurs to a lesser degree, with the so-called determinate concepts, such as *lease-purchase agreement, retirement, commodatum (loan for use or gratuitous loan), husband, salary* and many others.

There are varying degrees of vagueness, and it is also clear that the vaguer the concept contained in the rule applied to the settlement of the concrete case, *the greater the need for a judge to explain why he / she considered that the rule should apply to the facts of the case adjudged*. The reason for this is that, when the law contains vague concepts or general clauses, there is no detailed verbal description of the factual framework to which it must be applied. The same occurs with legal principles: its wording does not contain a careful and precise description of the facts that must lead to its application.

This *difficulty* corresponds to the *need* that the decision be *solidly* reasoned. When said decisions are based on *legal principles, on general clauses* and on rules whose wording includes *vague concepts*,¹¹ the act of substantiating the judicial decision is more complex.

The proposed Bill does not consider that a motivation which would serve the purpose of justifying any merits would be appropriate. The decision, reasoned in this way, is considered *not to be* reasoned: 'I grant the preliminary injunction given that all the legal requirements have been met.'

¹⁰ 'General clauses, alongside legal principles and vague or indeterminate concepts, that are increasingly found in the wording of statutes, are characteristic elements of contemporary Law. They are expressions, whose meaning is also vague, that unite in "pores," allowing the law to communicate with reality.

The general clauses are signs that contemporary Law tends to be open and flexible. Laws with these features intend to encompass both contemporary and future reality.' Wambier, Recurso especial, *supra* n. 8, ¶ 6.1, at 161.

¹¹ '... In our view, they are all excellent examples of *hard cases*, in which the Judicial Branch not only could but, in fact, should apply a healthy dose of creativity, comprehensively and significantly substantiating the decision, showing that it has arisen from the combination of the elements of the *system* and applying universal arguments.' Wambier, Recurso especial, *supra* n. 8, ¶ 4.2, at 107.

There is another rule in this Bill that has generated much discussion and that, in my opinion, need not have done so because, in fact, it is a guideline that can be deduced from the system – mainly in a system such as ours that prizes *the right to be heard*. Article 499(1)(IV) establishes that unless *all* the arguments raised in the proceedings are dealt with, and by arguments one means both factual and legal arguments that would have the power to *otherwise* sway the judge's decision, said decision is deemed to be unsubstantiated. Should these arguments not be admitted, they must be expressly dismissed in the decision.

This does not, in any way, imply that a judge, or the court, is required to answer a 'questionnaire.' It does, however, intend to show the judge that his / her duty is to *hear* the parties, which must be shown to have been done in the motivation of the decision.

This is merely the outline of the contemporary notion of the principle of *the right to be heard (audi alteram partem)*. This principle, known as '*contradictoire*' in French, is not limited to the actions of the parties, in the sense that they have the *opportunity* to declare and *prove* the right they claim to have. They have the *right to be heard*. In fact, the right to be heard only makes sense if one assumes the existence of a neutral, meaning impartial, observer who *witnesses* the dialogue between the parties (claims + evidence) in order to later decide.

The proper moment for a judge to show that he / she participated in the adversary proceedings is at the time of substantiating the decision. The parties must be heard and have their allegations taken into consideration, even if these allegations are not admitted, if they could have led to a decision that diverges from the one rendered.

After all, in Brazilian law, the judge may base his / her decision on grounds not mentioned by either of the parties (*jura novit curia*), but not before giving the parties an opportunity to manifest themselves.¹²

A consequence of this, that is both interesting and relevant, is that: a decision can only be judged to have been well reasoned, or not, *within the context of the case in which it was rendered*. Its *interna corporis* consistency does not suffice: it must refer to elements outside its internal consistency, dismissing them even so as to reinforce the correctness of the decision taken.

¹² '... [T]he assurance of having the grounds recited represents the last *manifestation of the right to be heard*, as the duty to recite the grounds of his / her decision represents, as far as the judge is concerned, the obligation of taking into consideration the results of the right to be heard and, at the same time, demonstrate that the formulation of the judgment occurred as a result of the participation of the interested parties.

In fact, it would be pointless to grant the parties such a broad and complex range of prerogatives, powers and resources, that converge to achieve a favourable result at the end of process, if the measures actually taken could be dismissed by the judge at the moment of rendering the judgment. The dialectic structure of the process is not limited to the mere participation of the interested parties making themselves heard, but implies above all the relevance of what is said by both sides to the author of the judgment; the statements of the parties may even be dismissed, but never ignored.' Antonio M.G. Filho, A motivação das decisões penais n. 4, at 84 (2^ª ed., Revista dos Tribunais 2013).

In line with what was mentioned at the beginning of these considerations, assuming that a judge bases his / her decision on case law, or even on *one* precedent when it is, for example, an appellate decision of the Federal Supreme Court (Supremo Tribunal Federal (STF)), there is still another situation in which it is deemed that the decision is not substantiated: should the decision cite, as a relevant element of its reasoning, a *precedent* without showing *why* the holding, which is the basis of the precedent and is mentioned in its wording, is applicable to the facts of the case, the decision will also not be considered to have been substantiated. Strictly speaking, this rule is identical to the one mentioned previously – if a statutory rule is applied to the case at hand, it must be explained *why* the rule is deemed applicable to settlement of the specific case. Similarly, if one applies a *precedent*, one is, in fact, applying the core of the precedent: likewise, its pertinence to the case at hand must be shown in the reasoning of the decision.

Item V is, in a way, contained within item IV: if the precedent, case law cited by the party is disregarded, the reasons for dismissing it must be explained. The reasons can be the following: either the case is not analogous or the legal doctrine on which the precedent is based cannot be admitted because it has become obsolete.

This provision could, and one hopes that it does, have a very interesting and desirable consequence.

We know that in Brazil, in recent decades, we have witnessed the prominence of a phenomenon which should not be welcomed. There have been frequent and radical changes in the guidelines provided by case law, mainly in the superior courts, especially the Superior Court of Justice. This throws the courts of second instance, the first instance judges and society itself into a state of confusion.¹³

The Bill for a NCPC introduces several provisions aiming to control this trend. Clearly, the reach of such a Civil Procedure Bill in terms of the resolution of this problem, which is serious and has reached unacceptable proportions in Brazil, is very limited because this is a cultural problem and laws do not work miracles. There is a whole aspect based on principles that aims to discourage the courts from behaving thus. It is said, for example, that the Superior Courts must respect their own precedents, in order to generate uniform and stable case law that serves as a guideline for the other bodies of the Judicial Branch.

This provision may discourage the courts from *departing from their own precedents!* This provision establishes a judge's duty to explain *why* a precedent from a second

¹³ '... [[I]t is interesting to note that there are judges in Brazil who feel diminished by the fact that they have to bow down to the dominant precedents of a superior court or binding precedent. Fortunately, there are those who recognise that the dispersion of case law and lack of stability fundamentally compromises the credibility of the Judicial Branch as a whole. The standardisation of case law "is most probably the practice that increases the power of the institution whose role it is to decide ... internal harmony or coherence reinforces external credibility." I believe this too occurs in Brazil: excessive dispersion of case law discredits the Judiciary and lets down those who litigate before the official courts. It represents an evil for society.' Teresa A.A. Wambier, *Precedentes e evolução do direito*, in *Direito Jurisprudencial* ¶ 3, at 40 (Teresa A.A. Wambier, ed.) (Revista dos Tribunais 2012).

instance or superior court cited by one of the parties *was dismissed*, and why he / she settled the case differently. However, it also sets forth the need for the *judge to justify the dismissal of a precedent from the same Court to which he / she belongs!* Hence, one foresees that there will be fewer occurrences of incessant divergences on certain topics within the same court. Nowadays, this occurs habitually with immense and undesirable frequency, and judges normally do not even make any mention of the precedents that are being contradicted.

Despite its complex wording, para. 2 contains a salutary rule: it may happen that two different rules, which can lead to different solutions, can be applied to the same situation. One of the two is chosen based on the consideration of values. These values inspire. Said values inspire or are applied by conflicting rules.

Once again, one notes the perception held in Brazil that a judicial decision is often an *option* between several possible alternatives. This option must be justified. One cannot, therefore, 'make believe' that the alternative chosen was the only possible one in more complex cases. In other words, we think positively, as one cannot control reality while denying its existence.

Finally, para. 3 contains an interpretative rule of judicial decisions. These must be understood in the light of the set of elements they contain and in accordance with the principle of good faith. This provision corresponds to the sole paragraph of Art. 323,¹⁴ which refers to the claim. The correlation between the claim and the judgment is undeniable. As has already been stated, the former is a 'rough draft' of the latter, when the claim is held to be valid.

This new rule does not mean that the right to be heard can be disrespected and that a judge may grant that which was not requested. Instead, it is a matter of understanding, for example, that a decision that terminates an agreement also involves a deciding that one must return to the *status quo ante*.

To conclude, we can say that according to the NCPC, the decision is held to be *unsubstantiated* if the substantiation of a judicial decision does not comply with the minimum parameters of quality. One hopes that, once the NCPC is in effect, this provision will be taken seriously and not be rendered banal. Adherence to the rules contained in the Bill will certainly be able to generate improved judicial relief. It may even be that the number of reversed decisions, as well as the number of appeals, will decline.

Not all decisions need be substantiated in accordance with *all* the rules contained in Art. 499. The degree of complexity of the disputes that must be settled by the Judicial Branch varies greatly. It is, therefore, up to the parties to show the judge

¹⁴ Article 323: 'The claim must be valid; however, the following are included in the principal: statutory interest, price index adjustment (adjustment for inflation) and costs of loss of suit, including the respective counsel's fees.

§ 1. The interpretation of the claim will take into account all the elements of the action and observe the principle of good faith.'

that there is conflicting case law for the situation under analysis, that it is a complex case, and that there is more than one way of settling it (one being the correct way and the others must be dismissed...) etc. and that, therefore, judgment must be rendered in accordance with the quality parameters determined by Art. 499, which can be pointed out by the parties.

At this point, it is pertinent to recall another principle mentioned in the NCPD and which is not always readily understood. It is the *principle of cooperation*. An excellent example is: the parties must cooperate¹⁵ so that a judge may render a decision without defects, which is desirable for the case, for the good of all concerned, and for the Judiciary itself.

References

Bankowski, Zenon, et al. *On Method and Methodology*, in *Interpreting Statutes: A Comparative Study 17* (Neil MacCormick & Robert S. Summers, eds.) (Dartmouth 1991).

Filho, Antonio M.G. A motivação das decisões penais n. 4, at 84 (2^a ed., Revista dos Tribunais 2013).

Garapon, Antoine, & Papapoulos, Ioannis. *Julgar nos Estados Unidos e na França: cultura jurídica francesa e Common Law em uma perspectiva comparada* 172 (Lumen Juris 2008).

Neto, Eugênio F. *A sentença em perspectiva comparada; Estilos norte-americano, francês e italiano em confronto*, 39(235) Revista de Processo São Paulo 407 (2014).

Wambier, Teresa A.A. Nulidades do processo e da sentença ¶ 3.2.3, at 322 (7^a ed., Revista dos Tribunais 2014).

Wambier, Teresa A.A. *Precedentes e evolução do direito*, in *Direito Jurisprudencial* ¶ 3, at 40 (Teresa A.A. Wambier, ed.) (Revista dos Tribunais 2012).

Wambier, Teresa A.A. Recurso especial, recurso extraordinário e ação rescisória ¶ 1.4, at 28, ¶ 4.2, at 107, 151, ¶ 6.1, at 161 (2^a ed., Revista dos Tribunais 2008).

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¹⁵ Article 6 of the NCPD: 'All those involved in the case must cooperate with each other in order to achieve, in a reasonable period of time, a just and effective decision on the merits.'