OS PRINCÍPIOS CONSTITUCIONAIS E A JURISPRUDÊNCIA DEFENSIVA

CONSTITUTIONAL PRINCIPLES AND FIXED CASELAW

PRINCIPIOS CONSTITUCIONALES Y JURISPRUDENCIA DEFENSIVA

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Resumo:
Este escrito se debruçará sobre a chamada "jurisprudência defensiva" no âmbito do Superior Tribunal de Justiça, fazendo-se um cotejo com princípios constitucionais, como do acesso à justiça e do devido processo legal. O artigo partirá da conceituação do termo "jurisprudência defensiva", especialmente de acordo com a doutrina, e de esclarecimentos acerca de sua aplicação durante a vigência do Código de Processo Civil de 1973. O estudo caminhará para uma análise das diretrizes do atual Código de Processo Civil, ao privilegiar decisões de mérito — sendo este, inclusive, um norte que permeia toda a legislação —, fazendo-se uma comparação o diploma legal anterior, bem como da Constituição Federal. Ao final, far-se-á uma análise crítica de acórdãos recentes do Superior Tribunal de Justiça sobre o tema, trazendo para debate a provocação que intitula este artigo.

Palavras Chave: Jurisprudência Defensiva. Superior Tribunal de Justiça. Constituição Federal. Princípios Constitucionais. Primazia da Decisão de Mérito

Abstract:
This paper examines the "fixed caselaw" in the Superior Court of Justice, providing a comparison with constitutional principles, such as the principles of fair access to justice and due process of law. This paper will initially provide the definition of "fixed caselaw", particularly in relation to the doctrine, as well as an explanation on its application during the effectiveness of the Brazilian Code of Civil Procedure published in 1973. Next, the guidelines of the current Brazilian Code of Civil Procedure, which favors decisions on the merits, and in turn, guide all legislation, are reviewed. This review will also provide a comparison of said guidelines with those of the former Code of Civil Procedure and the Federal Constitution. In the end, the paper will provide a critical analysis of the recent appellate decisions ruled upon by the Superior Court of Justice on the subject, bringing the matter related to the title of this paper to debate.

Key Words: Fixed caselaw. Brazilian Superior Court of Justice. Federal Constitution. Constitutional Principles. Authority of the Decision on the Merits.

Resumen:
Este escrito se centrará en la llamada "jurisprudencia defensiva" dentro de la Corte Superior de Justicia de Brasil, haciendo una comparación con los principios constitucionales, como el acceso a la justicia y el debido proceso. El artículo comenzará a partir de la conceptualización del término "jurisprudencia defensiva", especialmente de acuerdo con la doctrina, y de las aclaraciones sobre su aplicación durante la vigencia del Código de Procedimiento Civil de 1973. El estudio avanzará hacia un análisis de las directrices del Código de Procedimiento Civil actual, al privilegiar las decisiones sobre el mérito, siendo este, incluso, un norte que impregna toda la legislación, haciendo una comparación con el diploma legal anterior, así como con la Constitución Federal. Al final, habrá un análisis crítico de las sentencias recientes de la Corte Superior de Justicia sobre el tema, llevando a debate la provocación que da derecho a este artículo.

Palabras clave: Jurisprudencia defensiva. Tribunal Superior de Justicia de Brasil. Constituicion Federal. Principios constitucionales. Primacía de la Decisión de mérito.

1. INTRODUCTION

The unrestricted use of procedural regulations while the admissibility of appeals is subject to the perusal of the Superior Court of Justice is a common practice used by said Court to dismiss the appeals, thus avoiding the judgment on the merits of the case and reducing the cases in circulation with the courts of Justice. This practice, which is extremely harmful to the Brazilian procedural system and contrary to the Federal Constitution, has been called '*Fixed caselaw'*.

This paper initially aims to define Fixed caselaw, by bringing doctrinal lessons, and the critical analysis of the subject, particularly related to the constitutional principles of the prospect to be heard and due process of law. Therefore, the establishment of the manner in which the Superior Court of Justice applies fixed *caselaw* during the effectiveness of the 1973 Brazilian Code of Civil Procedure is essential. This paper also demonstrates several cases of inadmissibility of appeals based on minor procedural irregularities and flaws that are easily remediated.

On the other hand, the 2015 Brazilian Code of Civil Procedure favored the principle of the authority of the decision on the merits exactly as a means to fight fixed *caselaw*. This paper, therefore, will present a discussion on the new legal mechanisms that aims to limit, or even eliminate, such practices.

In closing, we will demonstrate that the 2015 Brazilian Code of Civil Procedure, particularly regarding the deterrence of fixed *caselaw*, was partially successful as the said Code had been transitorily unable to provide the necessary guidance for the conduct of the Superior Court of Justice.

2. FIXED CASELAW

The expression *fixed caselaw* can be considered a conduct frequently adopted by the Superior Courts to deter the disbursement of knowledge and the review of appeals in contrast to 1st Instance decisions based on mere procedural issues, even though these procedural issues can be described as minor irregularities. The extreme conformity to procedural issues is seen by the Superior Courts as a kind of shield to deter the filing of special and extraordinary appeals. In other words, such rigidness in conformism is almost a counter-attack taken by the Judges against the excessive number of appeals that are filed with their Courts, even though the appellants have the constitutional right to do so.

The admissibility of appeals is a bottleneck that is gradually narrower, in an attempt to decrease the actual heavy workload of the Justices of the Superior Courts, even though this conduct violates and is detrimental to the constitutional principle of fair access to justice.

Pedro Miranda de Oliveira defends a new definition for such expression. The author defends this practice is referred to as *active case law*, instead of *fixed caselaw*, since the

practice *affronts the following principles: legality, non-obviation of judiciary jurisdiction, adversary proceedings, good faith, and cooperation*. The author continues his line of thinking, stating that the active case law *offends the common sense, the legal certainty and the principle of reasonableness. The active case law is active to the practice of law, since it puts the client-lawyer relationship in jeopardy. Therefore, the active case law offends citizenship*."[1].

In 2018, legal entities drafted the manifesto "*A advocacia se opõe à jurisprudência defensiva pelos tribunais brasileiros*" (Free translation of title: *Lawyers are against fixed caselaw applied by Brazilian courts)* as a protest against fixed caselaw,[2] Such manifesto warned about the following:

> (...) fixed caselaw is not compliant with the fundamental right of fair access to justice and the due process of law, and contradicts the principles of the authority of the judgment on the merits and the instruments as are part of the proceeding, which are based on the Brazilian legal system and, now, included in the new Civil Procedure Code.

We are not defending the dismissal of the examination of the admissibility of the appeal, or otherwise that the Superior Court of Justice must necessarily decide on the merits of any and all special appeals that are filed with that Appellate Court, as if it were a Trial Court. However, the examination of the admissibility of the appeal must be carried out based on good judgment, evaluation, common sense, and particularly taking into consideration the principle of authority of the decision on the merits. Undeniably, special appeals that are not filed in a timely manner, or the analysis of which requires the review of evidence[3], or even those special

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[1] OLIVEIRA, Pedro Miranda de. *O princípio da primazia do julgamento do mérito recursal no CPC projetado: óbice ao avanço da jurisprudência defensiva*. São Paulo: Revista dos Tribunais, v. 950, 2014, p. 115.

[2] The document was approved during the event *Defensive case law: who cares? The lawyer's opposition to this practice of the courts*. The manifesto was signed by AASP, the Brazilian Bar Association – São Paulo Chapter (OAB-SP), the Instituto dos Advogados de São Paulo (IASP), pelo Centro de Estudos das Sociedades de Advogados (CESA) and the Movimento de Defesa da Advocacia (MDA). The manifesto then listed five *conclusions* regarding the *defensive case law:* (a) the defensive case law offends constitutional guarantees of access to justice and the due process of law; (b) the defensive case law offends the principle of the authority of the judgment on the merits, which was confirmed in Section 4 of the Brazilian Code of Civil Procedure, and also provided in about two dozen provisions of the same Code; (c) the rules that establish the pre-requisites for filing appeals, which, since they are restrictive rules, they must be interpreted restrictively; (d) the heavy workload in the Superior Courts should be resolved through administrative and public management measures; but never through measures that restrict the fundamental rights of citizens; and (e) access to justice and the guarantee of a judgment on the merits is the ground of the democratic rule of law, for which the Lawyers have always fought and will always fight relentlessly. Available at https://www.conjur.com.br/2018-set-21/entidades-advocacia-opoem-pratica-jurisprudencia-defensiva, accessed on 03.22.20.

[3] STJ Precedent 7: "*The claim for a new examination of evidence does not require the filing of a special appeal.*"

appeals that presents poor/ incomprehensible appeal briefs[4] should be dismissed – this is even advisable – prior to the decision on the merits. However, the conduct by the Superior Courts that prevents the acceptance of appeals conspicuous in their absence are unable to provide relevance to insignificant issues and easily remediated flaws. Issues such as errors upon filling out judicial cost slips, the failure to file power of attorneys within the succession of substitution powers, among others, will be further discussed in the following chapter.

José Carlos Barbosa Moreira considers the courts should not overact, by failing to accept appeals due to events not provided for in the law, including tacitly, or interpreting any question that may arise against appellants[5].

We are not categorically ignoring the official rules under the Brazilian Civil Procedural Law. However, the disproportionate, excessive strict procedures used mainly by the Superior Court of Justice dismisses appeals and prevents the administration of fair justice to appellants. This is essentially what fixed caselaw means, i.e., the excessive reliance on procedures, reaching un-intended consequences that prevents the emergence of a decision on the merits, thereby obstructing the scope of the civil proceedings[6].

2. COMMON PRACTICES IN LIGHT OF THE 1973 CODE OF CIVIL PROCEDURE

After defining *fixed caselaw* to better understand its functioning during the effectiveness of the 1973 Brazilian Code of Civil Procedure, we will present some common examples of fixed caselaw in the Superior Court of Justice.

In case appellant files a special appeal and the appellee files a motion for clarification of judgment against same appellate decision, the court has positioned itself for a

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[4] Precedent 284 / STF: "*The extraordinary appeal is inadmissible, when the insufficient reasoning does not allow the exact understanding of the dispute*". This statement is applied by analogy by the Superior Court of Justice to special appeals (AgInt no AREsp 728.833/PE, Rapporteur Justice REGINA HELENA COSTA, First Panel, Judged on 06.02.16, DJe 06.09.16).

[5] "Therefore, a careful and balanced treatment of the matter is what is expected from the law and the law enforcers, which does not impose excessive burden on one of the values at stake, for the benefit of the other. In other words, the dismissal of the appeal is a correct attitude - and highly recommended - whenever the absence of any admissibility requirement is clear. However, the courts should not exceed themselves: for example, creating reasons for rejecting cases that are not provided for in the legal text, even tacitly, increasing in a non reasonable way their requirements, or interpreting the questions to the detriment of the appellant."
BARBOSA MOREIRA, José Carlos. *Restrições Ilegítimas ao conhecimento dos recursos*, São Paulo: Revista dos Tribunais, v. 386, 2006, p. 155.

[6] VAUGHN, Gustavo Fávero. *Jurisprudência defensiva e processo incivil*. In: *Entre o Processo Civil e o Processo Incivil*. coord. RIBEIRO, Sérgio Luiz de Almeida e BIAZOTTI, Thiago D'áurea Cioffi Santoro. São Paulo: Editora Lualri, 2019, p. 225.

lawsuit transpiring over an extended period of time considering that the decision of the special appeal should be confirmed after the publication of the decision of the motion for clarification of judgment, under penalty of its inadmissibility[7]. The recurrent case law of the Superior Court of Justice even led to the publication of Precedent 418, which provided as follows: "the special appeal filed before the publication of the decision on the motion for clarification of judgment, without subsequent ratification is inadmissible" — this precedent was later annuled by the Superior Court of Justice due to its clear incompatibility with the 2015 Brazilian Code of Civil Procedure. Even if the decision on the motion for clarification did not amend the contested decision, fixed *caselaw* required the Appellant to file a petition with a few lines ratifying the wording of their special appeal, which was, therefore, a clear bureaucratic practice.

As a matter of fact, the Superior Court of Justice also considered the special appeal to be filed at a date later than the stipulated term upon its filing before the publication of the appellate decision [8], which is unwarranted. The publication of the decision in the official media aims to bring about the awareness of the dispute between the parties and its content, establishing the initial term for filing the appeal. However, if a party to the dispute becomes aware of the decision by any means other than the official publication and decides to act prior to the publication of the decision in the official media by filing a special appeal, the denial of the appeal under the argument that the decision has not yet been published is unwarranted and runs contrary to the principle of procedural celerity.

Another well-known case, which negatively impacted many petitioners and contributed to the spread of fixed *caselaw*, refers to errors, however commonplace they might be, upon filling out the legal fee slip. In the Special Appeal REsp 1.121.715/BA, for example, the appellant failed to provide the "reference number" (case number in the Court *a quo*) in the Federal Government Payment Slip - GRU[9]. In the Special Appeal REsp 1.282.248/PR, Appellant entered the incorrect "Revenue Code" in the Legal Feel Slip of the Special Appeal[10]. Both Special Appeals were dismissed by the Superior Court of Justice. The understanding that,

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[7] See: AgRg in REsp 1380686/MG, Rapporteur Justice PAULO DE TARSO SANSEVERINO, Third Panel, Judged on 05/19/2015, DJe 05/25/2015; AgRg in AREsp 514.606/SP, Rapporteur Justice OLINDO MENEZES (CONVENED ASSOCIATE JUSTICE OF THE TRF 1st Region), First Panel, Judged on 09/08/2015, DJe 09/23/2015.

[8] AgRg in AREsp 714.749/SP, Rapporteur Justice JOÃO OTÁVIO DE NORONHA, THIRD PANEL, Judged on 11/17/2015, DJe 11/20/2015.

[9] AgRg in REsp n. 1.121.715/BA, Rapporteur Justice MARIA ISABEL GALLOTTI, FOURTH PANEL, Judged on 3/27/2012, DJe 4/10/2012.

[10] AgRg in REsp 1282248/PR, Rapporteur Justice ANTONIO CARLOS FERREIRA, FOURTH PANEL, Judged on 03/05/2013, DJe 03/12/2013.

in any case, the error committed while completing the revenue code in the payment slip prevented the continuation of the appeal and did prevail in a stoppage [11]. The Interlocutory Appeal AgRg in Appeal Ag. 824.114/SP is also an example of this situation. In this case, the special appeal was dismissed due to the failure to collect BRL 1.12 (one real and twelve cents).[12]

There is also the case of the incomplete filing of documents within the succession of the substitution powers, in which the party filed the special appeal but failed to file the power of attorneys that delegated powers to the successive attorney who filed the appeal. The special appeals filed with this flaw were dismissed, without the appellant being given the opportunity to remedy it, by filing the missing document[13].

To close the list of examples, we will cite two other examples, in which, based on excessive and unconditional conformity to procedural strictness, the party was punished with the dismissal of their appeals due to errors committed by Court officials. In Special Appeal REsp 1.601.788/MG, both parties had their special appeals dismissed due to absent power of attorneys [14]. The documents of the case, however, had been filed in hard copy. Therefore, the case reached the Superior Court of Justice without all the power of attorneys in place due to the incorrect scanning of the documents by the Court of Justice of Minas Gerais.

Regarding Special Appeal REsp 1.197.811/DF, Justice Marco Buzzi dismissed the case due to the unreadable condition of the legal fee payment form. In the interlocutory appeal, the appellant argued that the legal fee payment form was filed in hardcopy, which was readable, and that the unreadable condition had resulted from the scanning by the Court of Justice of the Distrito Federal. The Fourth Panel of Justices of the Superior Court of Justice, however, dismissed the appeal under the argument that Appellant was responsible for getting a certificate with the Court of Justice of the Distrito Federal attesting to the irregular scanning of the document[15]. That is, the appellant is left at the mercy of the court registry.

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11 AgRg in AREsp 449.265/PR, Rapporteur Justice RAUL ARAÚJO, FOURTH PANEL, Judged on 02/20/2014, DJe 03/26/2014.

12 AgRg in AREsp 824.114/SP, Rapporteur Justice JOÃO OTÁVIO NORONHA, SECOND PANEL, Judged on 03/20/2007, DJe 04/18/2007.

13 See: (a) AgInt in AREsp 898.879/SP, Rapporteur Justice RAUL ARAÚJO, FOURTH PANEL, Judged on 02/14/2017, DJe 02/22/2017; and (b) AgInt in AREsp 993.862/ES, Rapporteur Justice NANCY ANDRIGHI, THIRD PANEL, Judged on 02/07/2017, DJe 02/14/2017, both judged under the effectiveness of the 1973 Code of Civil Procedure.

14 RESp 1.601.788/MG, Rapporteur Justice FRANCISCO FALCÃO, monocratic decision ruled upon on 06.06.16.

15 AgRg in AREsp 1.197.811/DF, Rapporteur Justice MARCO BUZZI, FORUTH PANEL, Judged on 12/15/2016, DJe 02/02/2017.

3. THE NEW BRAZILIAN CODE OF CIVIL PROCEDURE AND THE PRINCIPLE OF THE AUTHORITY OF THE DECISION ON THE MERITS

The 2015 Brazilian Code of Civil Procedure has made significant advances in the arguments against fixed *caselaw* by validating the principle of authority through a decision on the merits, as a direct result of the constitutional principle of fair access to justice. Due to the authority of the decision on the merits, strict irregularities that could put an end to a case should be avoided as much as possible, protecting the right of the appellant to see its case closed with a decision on the merits. This principle is included in the first provisions of the law, more particularly in its Section 4, which provides as follows: "the parties have the right to obtain the full resolution on the merits, including the enforcement of the judgment, within a reasonable term".

In the opinion of José Miguel Garcia Medina, the current Brazilian Code of Civil Procedure demonstrates that procedural requirements are subject to a functional approach, thus overcoming the doctrine of priority of procedural requirements. In view of the new procedural law, the principle of *authority of the examination on the merits* has been adopted. However, this does not mean that the procedural requirements do not play a relevant role, however only that they should serve to protect and enforce procedural guarantees[16].

Alexandre Freitas Câmara, through the principle of the authority of the decision on the merits, is contrary to fixed caselaw, and demonstrates that the identification of flaws that can be remediated (to the resolution on the merits) and the failure to make efforts to overcome them are unacceptable conduct. The determination of a nullity, the dismissal of an appeal or the archiving of a case without resolution on the merits will only be lawful in those extraordinary cases where a flaw cannot be remediated or, if the flaw can be remediated, and the appellant disregards such remedy to the flaw, preventing the continuation of the proceedings[17].

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16 MEDINA, José Miguel Garcia. *Novo Código de Processo Civil Comentado*. 5ª ed., Revista dos Tribunais, São Paulo, 2017, p. 48.

17 CÂMARA, Alexandre Freitas. O princípio da primazia da resolução do mérito e o Novo Código de Processo Civil. Available at http://genjuridico.com.br/2015/10/07/o-principio-da-primazia-da-resolucao-do-merito-e-o-novo-codigo-de-processo-civil/, accessed on 03.22.20.

The principle of the authority of the decision on the merits guides the entire Brazilian Code of Civil Procedure published in 2015. According to Section 488, the judge must decide on the merits whenever the ruling favors the party that would also benefit from any procedural decision that dismissed the dispute[18]. In other words, when the party will win the case either through a procedural decision or a decision on the merits, the civil procedural law necessarily favors the second alternative, so that the Appellant obtains an answer from the Court that actually decides on the merits of the case Section 317 requires the Judge to grant the party to the dispute the opportunity to remedy any procedural flaws before dismissing the case[19].

In a comment to this last legal provision, professors Teresa Arruda Alvim, Rogério Licastro Tores de Mello, Leonardo Ferres da Silva and Maria Lúcia Lins da Conceição clarify that the dismissal of the case or the end of the evidentiary stage without ruling on the merits is the most unwanted result. Therefore, in the case of flaws that can be corrected, the parties must be given every opportunity to correct them, provided that (a) this is materially likely; and (b) there is no infringement to any constitutional principle.[20]

Considering the domain of appeals, in order to halt fixed *caselaw*, Section 932, sole paragraph, of the Brazilian Code of Civil Procedure provides that the rapporteur justice must "grant appellant a 5-day term to remedy any flaw or supplement the required documentation" before dismissing the appeal. The legislator aimed to avoid that flaws that could be corrected became the cause of inadmissibility of appeals, thereby eliminating common

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18 Section 488. The judge will resolve on the merits whenever the decision is favorable to the party that would benefit from any pronouncement under the terms of Section 485, as applicable.

19 Section 317. Before rendering a decision without a decision on the merits, the judge should grant the party an opportunity to correct the defect, if applicable.

20 "The defensive case law and the correction of defects in the scope of appeals. The Code is against the defensive case law (artificial obstacles created by the Courts to not review the merits of the appeals) with the sole paragraph of Section 932. Before the current Code, the 1973 CPC had a similar provision, that is, the 4th Paragraph of Section 514 ("in case there is a case of nullity that can be corrected, the Court may order the execution or renewal of the procedural act, notifying the parties; after the requirement is met, whenever possible, the appeal will be reviewed"). However, this provision was included in the chapter related to the appeal and used expressions such as 'remediable nullity' and 'may', allowing an interpretation other than that intended by the legislator. On the contrary, the current provision forces the judge to grant the appellant a 5-day period to resolve the defect, before dismissing the appeal. This is appellant's right, and not the power of a judge (the Code provides: "the rapporteur shall grant"). Furthermore, this provision is applicable to all appeals, including extraordinary appeals. Thus, for example, STJ precedents such as Precedent 115 ("in the special instance, no appeal can be filed by a lawyer without the existence of a power of attorney in the case file") is incompatible with that provision (Statement 83 of the FPPC). According to Statement 82 of the FPPC, "the rapporteur has the duty and not the right to grant the appellant a 5-day period to remedy the defect or supplement the required documentation, before dismissing the appeal, including the extraordinary appeals." WAMBIER, Teresa Arruda Alvim, CONCEIÇÃO, Maria Lúcia Lins, RIBEIRO, Leonardo Ferres da Silva, TORRES DE MELLO, Rogério Licastro, *Primeiros Comentários ao Novo Código de Processo Civil*. 2ª edição. São Paulo: Revista dos Tribunais, 2016, p. 596.

practice, particularly within the scope of the Superior Court of Justice, of treating procedural minor irregularities with an extraordinary and disproportionate significance.

For Teresa Arruda Alvim, Fredie Didier Junior, Eduardo Talamini and Bruno Dantas, this provision aims to remove "artificial obstacles created by the Courts in order not to review the merits of the appeals"[21]. Nelson Nery Junior and Rosa Maria de Andrade Nery defend that the said legal provision aims to prevent, in a comprehensive way, that minor procedural irregularities are used as a reason to dismiss appeals, serving as a reminder that, ultimately, the entire structure of the Judiciary Branch exists to review the merits of the decisions submitted to them[22].

Therefore, based on Section 932, sole paragraph, of the Code of Civil Procedure, if the special appeals referred to in the previous chapter had been filed today, they would not be able to be summarily dismissed, and the appellant would have the opportunity to remedy the procedural flaws, by filing, for example, the missing power of attorney within the succession of substitution powers, or a payment slip filled-out properly.

Particularly concerning legal fees, Section 1007, 7th Paragraph of the Brazilian Code of Civil Procedure provides that "the mistaken completion of the legal fee form shall not imply the application of the penalty of dismissal of the case, and the rapporteur justice, in case of doubt as to the payment of said revenue, shall notify the Appellant to remedy the flaw within 5 (five) days". Although the requirement for a previous notification of the appellant to remedy the incorrectly filed legal fee form could be deduced from Section 932, sole paragraph, of the Code of Civil Procedure, the legislator preferred to confirm this provision by inserting a specific rule.

The failure to collect the legal fee is also subject to correction, even though the law provides for a financial penalty for those who commit this irregularity. Under Section 1007, 4th Paragraph, of the Brazilian Code of Civil Procedure, "the appellant who does not prove, upon filing the appeal, the payment of the legal fees, including case remittance and return fees, shall be notified, through their lawyer, to pay twice the legal fees, under penalty of dismissal of the appeal".

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21 WAMBIER, Teresa Arruda Alvim. DIDIER JR, Fredie; TALAMINI, Eduardo; DANTAS, Bruno. *Breves Comentários ao Novo Código de Processo Civil*, 1ª ed.. São Paulo: Revista dos Tribunais, 2015, p. 2.030/2.031.

22 NERY JUNIOR, Nelson; NERY, Rosa Maria de Andrade, *Código de Processo Civil Comentado*, 16ª edição. São Paulo: Revista dos Tribunais, 2016, p. 1.980/1.981.

Another case that would not be subject to fixed *caselaw* is the appeal that is filed in discrepancy with the term provided for in the case, according to examples referred to in the previous chapter. Paragraph 5 of Section 1024 of the Brazilian Code of Civil Procedure put an end to the discussion, stating that "if the motion for clarification of judgment is rejected or does not change a previous ruling, the appeal filed by the other party before the publication of the motion for clarification will be reviewed and its ruling will be entered into regardless of confirmation".

Thus, there are several specific rules listed in the Code of Civil Procedure that, due to the constitutional principle of fair access to justice and the authority of the decision on the merits (Section 4), aim to discourage the application of the detrimental *fixed caselaw*, which has long been turned into a common practice in the Superior Courts, especially in the Superior Court of Justice.

4. IS THIS THE END OF FIXED CASELAW?

The analysis of the provisions of the 2015 Code of Civil Procedure raises a predictable hopefulness regarding the end of fixed *caselaw* of the Superior Court of Justice. However, unfortunately, this is still far from today's reality.

The recent discussions in the Special Court of the Superior Court of Justice at the time of the judgment of Special Appeal REsp 1.813.684 / SP can transform this hopefulness into disappointment. The Justices had the opportunity to standardize the case law of the Superior Court of Justice to decide whether the special appeal filed without proof of local holiday should be considered filed after the legal term, or whether this failure would be deemed a remediable flaw, subject to a period of regularization, under the provisions of Section 932 of the Brazilian Code of Civil Procedure[23].

According to the appellate decision, the Special Court concluded that the local holiday could not be proved subsequently, due to the rule under Section 1003, 6th Paragraph, of the Brazilian Code of Civil Procedure, which provides that "the appellant shall prove the occurrence of a local holiday upon filing the appeal". However, due to the need to ensure legal

[23] RESp 1.813.684/SP, Rapporteur of the Appellate Decision Justice LUIS FELIPE SALOMÃO, SPECIAL COURT, Judged on 10/2/2019, DJe 11/18/2019.

certainty, only those appeals filed after the publication of said appellate decision that standardized the case law would be considered filed after the legal term.

This solution was no longer adequate, based not only on the regular review of the Code of Civil Procedure, which favors the judgment on the merits and orders the granting of an additional period for the parties to remedy possible procedural irregularities, but also due to the inexistence of a particular penalty for the failure to comply with Section 1003, 6th Paragraph, of the Code of Civil Procedure, not authorizing the application of Section 932 of the same Code. The Special Court of the Superior Court of Justice went further and limited even further the chance to correct this procedural flaw. By means of an Objection presented to discuss the scope of the effects of this appellate decision, which had already become res judicata, the Special Court unanimously decided that the subsequent proof of a local holiday would apply only to the Carnival Monday, but not for other holidays.

Another example that fixed *caselaw* is still applied by the Superior Court of Justice is demonstrated in the recent review of the Interlocutory Appeal in the EDcl in Special Appeal AREsp 1.539.007 / RJ, published on March 13, 2020, when the Third Panel of Justices considered the special appeal was filed after the proper term since the copy of the procedural calendar "*extracted from the website of the Court a quo is not adequate to prove a local holiday and the suspension of procedural terms. Therefore, the definition of the term for filing the appeal is not feasible.*"[24] That is, even if the appellant has taken steps to get a procedural calendar on the website of the Court a quo to file as evidence that there was a holiday on certain dates in that region, the Superior Court of Justice has considered that this document obtained from the local Court of Justice was invalid.

On the other hand, in the Appeal AgInt filed in the Special Appeal REsp 1.813.192/AL, published on March 10, 2020, the Second Panel of Justices considered that a "*evidence provided at a later date would be admitted in an interlocutory appeal only if the special appeal had been filed during the effectiveness of the 1973 Brazilian Code of Civil Procedure.*"[25]

Therefore, the enactment of the 2015 Brazilian Code of Civil Procedure, which clearly avoids strictness and encourages decisions on the merits, has been used by the

[24] AgInt in EDcl in AREsp 1.539.007/RJ, Rapporteur Justice MARCO AURÉLIO BELLIZZE, THIRD PANEL, judged on 03/09/20, DJE 03.13.20.

[25] AgInt in REsp 1.813.192/AL, Rapporteur Justice FRANCISCO FALCÃO, SECOND PANEL, judged on 03.03.20, DJE 03.10.20.

Superior Court of Justice for opposing purpose, clearly misrepresents the legislator's intention. The practice of *fixed caselaw* is rooted in the Brazilian Superior Courts, and is still far from being completely eradicated. The Superior Court of Justice, aiming to circumvent the provisions of the Brazilian Code of Civil Procedure, merely masks its decisions, but maintains its loyalty to *fixed caselaw.*

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