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Abstract
This article aims to analyze and qualify the changes introduced in the New Brazilian Civil Procedure Code by the Bill 168/2015 under two very different philosophical assumptions: the utilitarianism of Richard Posner and the Kantian perspective of John Rawls.

Keywords
Economic Analysis of Law; Posner; Rawls, New Brazilian Civil Procedure Code; appeals; right to a trial within a reasonable time.

Summary

1. Introduction
After five years in process, the New Civil Procedure Code was finally approved and promulgated in March 2015. Out of a myriad of new appeals, rules concerned to dealing with two major problems overwhelming courts and litigants in Brazil emerge:
jurisprudential dispersion and the extraordinary number of lawsuits. These two vicissitudes hurt two basic constitutional values, respectively: equality and the reasonable duration of the lawsuit.

The rules of the New Code of Civil Procedure –NCPC-, which address such major difficulties, should be organized so that we can confirm the existence of two **microsystems** in the new code. Since independent, they are interrelated: the microsystem of judicial precedents and the microsystem of judgment of repetitive lawsuits.

Indeed, mechanisms such as the incident of resolution of repeated demands -IRDR- and the new way of judging repetitive Special and Extraordinary Appeals are meant to solve the problem of repetitive demands in a rational and economical way. On the other hand, these same mechanisms, with the addition of innovations such as the Incident of Competence Assumption, are also aimed at setting binding precedents.

Even though not the object of this short essay, it is important to say that within each microsystem the norms communicate and interrelate. By analogy it is possible to use a norm which regulates an institute to bridge the gap in solving a similar problem in the operation of another institute.

For example, the solution to a problem involving the recurring decision of first degree suspending the lawsuit due to the existence of an Incident of Resolution of Repetitive Demands on the same topic can be found in the legal regime governing the judgment of Repetitive Special and Extraordinary Appeals, for which the interlocutory appeal may be used to discuss the property of that suspension.

It is important to make this clear in order to understand the extent and magnitude of the changes brought about by Bill 168/2015 on the original wording of the NCPC. By partly changing the legal regime of Repetitive Special and Extraordinary Appeals, the Bill is at once changing the legal regime of the two abovementioned microsystems: judgment of repetitive lawsuits and setting precedent.

The legal universe seems polarized on these changes. There are shrill voices treating the Bill as an attack on democracy and on the good intentions of the legislator.

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2 Art. 1.037, Paragraph 13th, I. That's when the party may disagree with the suspension because of an obvious difference existing between their lawsuit and the original cause which originated the incident of resolution of repetitive demands.
who drafted the NCPC\(^3\). On the other hand, judges tend to sympathize with the Bill, and it is known that even Justices have worked hard for it to be approved\(^4\).

It would be presumptuous to simply declare whoever is right or wrong in this dispute. After providing an overview of the amendments, our goal is to qualify them from two very different philosophical points of view: the Kantian one and the utilitarian one. We believe that in the light of such different thoughts, the virtues and flaws of the new act will be clearer. It is possible that they point to different results or, surprisingly, that they indicate the same result. Knowing that Kantians and Utilitarians disagree on almost everything, a dual indication for the same result would be an important sign that the new act is really either very good or very bad. In the event of likely different results, may each one have their Manichaeanism or concerns only about what ultimately really matters: to deal with the new set of rules in the best possible way so as to improve the delivery of judicial activity, because this is knowingly currently not doing well.

In order to represent the Kantians and Utilitarians we have chosen contemporary thinkers. For the first group we borrowed John Rawls’s philosophy, especially his idea of *Public Reason*. For the utilitarian group, we made use of Richard A. Posner’s, one of the greatest representatives of the *Law and Economics* movement - also known as the *Economic Analysis of Law* - of overtly utilitarian nature.

In the end, we will state our opinion on the new law.

### 2. An overview of the amendments

Bill 168/2015 promotes 44 amendments to the original text of the NCPC\(^5\), which includes modifications, additions and retractions to articles, sections, paragraphs and subparagraphs. Out of these, there are 14 effective revocations.

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\(^5\) At the time of writing this article Bill 168/2015 has been approved by both legislative houses and sent for presidential approval. The sanction is virtually certain and we believe the changes will actually be implemented, so sometimes we will refer to them as "the new law".
Amendments or revocations regard several topics, namely: judging and processing in chronological order - arts. 12 and 153; deposit waiver hypotheses for further provisional execution - art. 521 and 537, Paragraph 3rd; judgment of appeals and lawsuits in virtual section - also called virtual plenary - art. 945, revoked; appropriateness of rescission action by manifest violation of the rule of law by the absence of distinguishing in the application of precedent - art. 966, Paragraphs 5th and 6th; appropriateness of complaint - art. 988, III, IV and Paragraph 5th; admissibility judgment of special and extraordinary appeals - art. 1029, Paragraph 2nd - revoked; art. 1030, with new sections and paragraphs; art. 1035, Paragraph 3rd. II - revoked; art. 1041, Paragraph 2nd; competence to grant suspensive effect on special and extraordinary appeals- art. 1029, Paragraph 5th, I and III.; term of suspension of lawsuits due to repetitive appeal- art. 1035, Paragraph 10th - revoked; art. 1037, Paragraph 5; appeal against the decision which denies follow-up to special or extraordinary appeals or determines the suspension of lawsuits with special or extraordinary appeal - art. 1035, Paragraph 7th; art. 1036, Paragraph 3rd; art. 1,037; 1042, caput and revocation of items I to III and Paragraph 1st, as well as amendment of Paragraph 2nd of the same article; limit the Supreme Court to decision allocation when judging repetitive appeals - art. 1037, Paragraph 2nd; reasoning for the decision that judges affected repetitive appeals - art. 1038, Paragraph 3rd;

Out of all these changes, we are interested in those that alter the judgment of admissibility of special and extraordinary appeals as well as in those which restrict appellate possibilities due to the negative admissibility of these appeals. Those are the most controversial changes. These particular provisions are important to us: art. 1,030; art. 1035, §7th; art. 1036, Paragraph 3rd; art. 1042, caput and Paragraph 2nd6.

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6 Amendments regarding the appropriateness of complaint to higher courts, which now depend on filing all the ordinary appeals possible, are also very controversial, but we won’t specifically address them because they share the same nature of the amendments to be discussed below.
Let us explain: these are the norms whose amendments had the biggest impact in doctrine, arousing comments and passionate criticism\(^7\), much of them founded in the difficulty of access to Supreme Courts which would result from these changes.

Let us objectively describe such "news":

In its original wording, the NCPC innovated in relation to the 1973 regime by imposing that special and extraordinary appeal should be brought to the Supreme Courts regardless of judgment of admissibility - art. 1,030, single paragraph). The idea was that such a judgment was made directly at the Supreme Court or the Superior Court of Justice, except in the following cases: (i) the existence of a Supreme Court decision denying general repercussion to the same issue - art. 1035, Paragraph 8th and art. 1,039, single paragraph; (ii) the existence of judgment in repetitive special or extraordinary appeal rejecting the appeal thesis - art. 1040, I and art. 1056, I.

Even in the above exceptions, in which there was no follow-up to the appeal, a direct appeal could be brought to the Supreme court or Superior Court of Justice against this decision - art. 1042, II and III. In addition, a similar appeal could be brought against the decision to deny request for distinguishing on the repetitive appeal deferred in court a quo - art. 1036, Paragraphs 2nd. and 3rd.\(^8\)

It is not hard to see, therefore, that the legislature's intention, when choosing the original wording approved for NCPC, was to facilitate that any special or extraordinary appeal be examined by the Supreme Court or Superior Court of Justice, whether originally or by interlocutory appeal. In order to get there, first the general rule of admissibility of judgment only at the Supreme Court was created. Then, in a few cases remaining from conducting admissibility of judgment in the original instance, an interlocutory appeal was expected to be filed directly to those courts when such judgment is negative. Finally, the same interlocutory appeal was provided


\(^8\) In the best tradition of common law, the NCPC inherited the institute of *distinguishing*, according to which key differences between the case to be judged and the precedent that should apparently be applied can be demonstrated, dismissing it in the event of a concrete case.
for cases of suspension of lawsuits at the origin - deferral due to the systematic operation for judging repeated special and extraordinary appeals.

Bill 168/2015 completely changes this logic, returning the examination of admissibility to the original instance - regardless of further examination in a higher instance, of course - and restricting the interlocutory appeal hypotheses against the negative judgment on admissibility or the suspension of the lawsuit - often replacing the direct interlocutory appeal to the Supreme Court or the Superior Court of Justice with an internal, horizontal appeal, making it possible to re-discuss the issue in the court itself a quo.

2.1. The new system of judgment of admissibility and its appeals.

As we have said, with the new norms brought about by Bill 168/2015 the judgment of admissibility is again made as a general rule at the court of origin (art. 1030). It is, so to speak, old news.

In summary, with the amendments by the Bill, after the petition of special or extraordinary appeal is received by the secretariat of the court a quo and the defendant is ordered to present counterarguments, the President or Vice President should: (i) deny follow-up to extraordinary appeal regarding controversy to which the Supreme Court has denied general repercussion; (ii) deny follow-up to an extraordinary or special appeal filed against decision complying with precedent of “general repercussion” or special appeal in a repetitive legal issue; (iii) submit the case to the judging body for a retraction judgment in the case the decision differs from precedent of general repercussion or special appeal in a repetitive legal issue; (iv) defer the appeal on controversy of repetitive nature not yet decided by a higher court; (v) select the appeal as an instance of constitutional or infra constitutional controversy of repetitive nature, in accordance with Paragraph 6th of art. 1036.

Besides the hypothesis of item V – an appeal selected as representative of controversy, the appeal will only be brought to Supreme Court if (i) it has not yet been submitted to the regime of general repercussion or repetitive appeals; (ii) judgment of retraction has not yet occurred (respectively, subparagraphs a and c of section VI of art. 1030).

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9This mechanism is similar to the American Supreme Court’s writ of certiorari.
The first hypothesis is marked by the unprecedented nature of the matter. The second is the result of breach of a precedent already signed by the Supreme Court on the subject by the court of origin - including rejection of the possibility of retraction.

Only in such hypotheses - the ones in section VI – an interlocutory appeal can be brought directly to the Supreme Court should a follow-up to the appeal be denied - Paragraph 1st. Art. 1030 and art. 1,042 caput). In other cases, the use of distinguishing to avoid denial of follow-up based on the application of already set precedent should be given exclusively by the interposition of internal appeal - art. 1030, Paragraph 2nd and art. 1042, caput).

The key to well understand the system introduced by Bill 168/2015 is the literalness of the caput of art. 1,042:

An interlocutory appeal can be brought against the decision of the president or vice president of the appellate court that does not admit extraordinary special appeal unless based on the application of precedent of general repercussion or of repetitive special appeal.

It is to say: if the inadmissibility was due to the application of precedent already set at a higher instance - the judgment of repetitive appeal or denial of overall repercussion on the issue - any distinguishing is restricted to the original instance through the interposition of internal appeal in the form of art. 1021, allowing the examination of the issue by the collegiate of the court. In other cases, an attack to the negative of admissibility will be through direct appeal to the Supreme Court or the Superior Court of Justice - remembering that even in the case of positive judgment of admissibility if the topic has already been judged in general repercussion or in repetitive appeal, the president or vice president of the local court should admit to the body which issued the decision the possibility of retraction before admitting the appeal in order to guarantee adequacy to the precedent - art. 1030, VI, c and art.1.041.\textsuperscript{10}

\textsuperscript{10} In fact, for us the retraction judgment is mandatory whenever there is binding precedent by the Supreme Court in the opposite direction. The apparent possibility for maintaining the decision should be justified by distinguishing, and the body responsible for the decision must
In other words, Bill 168/2015 only allows new cases to be brought to a higher court, or cases in which the already set precedent has been breached and the body responsible for the decision denies retraction. In such cases -and only in such cases in which the special or the extraordinary appeal is denied - a direct interlocutory appeal can be brought to the Supreme Court.

It is precisely because of this limited access to the Supreme Court or to the Superior Court of Justice that squeaky voices of doctrine point to the authoritarian bias of Bill 168/2015, which would create authoritarianism or a dictatorship of the Superior Courts, preventing the evolution of jurisprudence - which would be provided otherwise if such roads were wider, as they were in the original wording¹¹, ¹².


The first reason for the existence of Bill 168/2015 is its utilitarian nature. Such a statement is not speculative; it is directly underpinned in the bill’s objective memorandum, still back in the House of Representatives, and then in the Federal Senate, which reads:

*This bill aims to restore and improve the system of pre-judgment of admissibility of special and extraordinary appeals, suppressed by the new Civil Procedure Code (Act No. 13,105, of March 16, 2015). Such a measure is justified on the basis of the relevant preclusive filter function of the examination of admissibility in local courts.*

*For the sake of exemplification, according to the Superior Court of Justice, within the current mechanism 48% (forty-eight per cent) of special appeals in origin were not brought to that court. This means that out of 452,700 special appeals,*

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¹¹ Lenio Streck and Dierle Nunes even talk of *juristocracy of the Supreme courts*, op. cit.

¹² However, it is worth pointing out that the original conception of the NCPC draft, deposited in the Federal Senate under the heading Bill 166/2010, did not foresee such a scale of access to the Supreme Court or the Superior Court of Justice, being, in fact, very close to the design now resumed by Bill 168/2015. The turning point eventually occurred in the House of Representatives, under the influence of another group of lawyers with different ideology that prevailed until the approval of Bill 168/2015.
78,000 were taken, but 146,800 were still locked in local courts and without the interposition of an interlocutory appeal\(^\text{13}\).

Utilitarianism is a philosophical current initiated by Jeremy Bentham in the 18th century, according to which individuals are rational maximizers of their own satisfaction in all walks of life\(^\text{14}\). Much criticized, especially by thinkers of Kantian matrix\(^\text{15}\), utilitarianism has evolved and has several varieties\(^\text{16}\). According to J. Harsany, the most important thinker of 20\(^{th}\) century utilitarianism, - also called neoutilitarianism -, any norm is either good or bad depending on how much it will contribute to the common good\(^\text{17}\).

One of the modern utilitarian varieties - led initially by Guido Calabrese\(^\text{18}\) and Richard Posner - is *Law and Economics*.

The *Law and Economics* recommends that economic techniques be used to establish non-economic costs and benefits, be it in the elaboration of a law or in its enforcement. The core of the movement is in the idea that law enforcement produces effective results, i.e. results that avoid social waste\(^\text{19}\).

Among these techniques, one of the most known - albeit heavily criticized - is the *Pareto superiority*, according to which a form of resource allocation is superior to another if it can improve the situation of at least one person without harming the like\(^\text{20}\). Since the direct measurement of the utility is impossible, the only way to

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\(^{17}\)Nicola Abbagnano, *op. cit.* P. 1173

\(^{18}\)Guido Calabrese, *Some thoughts on risk distribution and the law of torts* – Yale L. J. – 1961. Nevertheless, it is important to highlight that professor Guido Calabresi and Professor Richard Posner are not on the same page concerning of Law and Economics.


demonstrate the superiority of changing a resource allocation by the Pareto method would be to show that there was the consent of all affected people, which is obviously very difficult to obtain with such a change that involves large social strata\textsuperscript{21}.

Another technique created to solve the above problem is called the \textit{criterion of Kaldor-Hicks}, according to which, instead of requiring that no one be made worse or that all consent, it is enough that the increase in value - utility - is sufficient to fully compensate those made worse. The problem with this criterion, according to Posner, is that it does not guarantee maximization of utility, because it is not possible to accurately measure the value generated to those made better off by the change, if compared to the \textit{disutility} to those affected in the absence of compensation. It is to say that compensation might involve reduction of general utility, which would be economically irrational\textsuperscript{22}.

Finally, Posner proposes the idea of "\textit{ex-ante} compensation" in order to ensure consent and, therefore, the applicability of Pareto criterion. According to the author, whenever someone makes a choice they are already consenting to a built-in risk resulting from normal activity development. For example, if someone buys a lottery ticket, they acquiesce with the possibility of not winning\textsuperscript{23}. If someone buys a home valued by the existence of a mall nearby, they are already consenting to the risk of the mall shutting down one day. In a way, this is already built into the \textit{price} of the product.

A more Brazilian example will make everything clearer. Due to the announcement of the 2016 Olympics in the city of Rio de Janeiro, real estate developments in certain areas of the city had an impressive increase in value. Those who bought real estate paid for it. Of course, there is always the possibility that the promised event or improvements to the region do not take place. It is possible that due to a severe economic crisis like the current one, the government change the allocation of resources more efficiently from a social point of view. For example, instead of duplicating a road, building a park or a new subway line or cleaning up a lake, the government may decide to allocate resources in health and prevent the collapse of the

\textsuperscript{21} \textit{Idem}
\textsuperscript{22} Richard A. Posner, \textit{op. cit.}, p. 109
\textsuperscript{23} Richard A. Posner, \textit{op. cit.}, p. 112
health system - which, by the way, is unfortunately happening at the time of writing this article.

Whoever paid a high price for the property that would be next to the park or the subway will be made worse, so it would obviously be difficult to obtain the consent of that person to reallocate resources. However, when they bought the property, the citizen consented to the risk. And they consented because this risk was built into the price paid. If the probability of implementing the improvements was likely to be 100%, the amount to be paid would be even higher. Think of the inclusion of a clause in the contract in which the developer commits to the existence of a subway station near the project on a certain date: this would cost money, because it would increase the developer’s risk as the buyer's risk decreased. On the other hand, flirt with the possibility of acquiring this property only after the effective implementation of improvements: of course the price will be higher than that offered at the beginning, when its realization was still a risk. So, in order to pay a lower price, the buyer consents to the possibility of a change in the efficient allocation of resources. It is Posner’s "ex-ante" compensation.

Let us now turn to the amendments brought by Bill 168/2015. Would this be an effective change, after having satisfied Posner’s criterion? We think so.

As we have seen, the very reasoning of the bill highlights the explosion of work that the Supreme Courts would have if examination of admissibility of special and extraordinary appeals became to be only it’s duty. It is clear that the Supreme Court and the Superior Court of Justice are inefficient in that they undergo an absolutely incompatible workload with its structure and its constitutional functions. It is important to emphasize that simply increasing its structure - such as the much advocated expansion of the Superior Court of Justice - would also be inefficient because a court that unifies jurisprudence is not able to keep their understanding cohesive if there are too many judges, which occurs for example - and with negative consequences - in Italy24. Thus, resource allocation to enhance the structure and size

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of these courts would be useless per se in seeking realization of their constitutional mission.

Would the changes promoted by the bill - the damming of repetitive appeals in Regional Courts, the possibility of distinguishing only in origin, and the possibility of appealing to the Supreme Court / Superior Court of Justice only when the issue is original or when the precedent is disrespected – be efficient per se? And if so, how would they satisfy Posner’s criterion?

The efficiency of the amendments with regard to the better functioning of those courts is clear and can be proven in numbers, largely by what has been happening in the Supreme Court with the adoption of general repercussion and the development of jurisprudence regarding that – which has been incorporated into Bill 168/2015 to a large extent.

In numbers, the adoption of the general repercussion systematic noticeably reduced the number of lawsuits brought to the Supreme Court - from 112,938 in 2007 to 44,170 in 2013. During that period, 696 cases were submitted to the exam of general repercussion. Out of these, 199 had denied repercussions and 493 had recognized repercussion. Out of the latter, only 163 were judged, so there is a backlog of 330 lawsuits with recognized repercussion and pending judgment.

On the other hand, considering that the Supreme Court judges on average 27 lawsuits per year with recognized repercussion, we come to the startling conclusion that: as of today, if no repercussion were recognized, the Supreme Court would take incredible 12 years to clear that backlog! What would be the result if, besides this backlog, the Supreme Court had to do original judgment on admissibility of each

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25 The efficiency of respect for precedents from an economic point of view was perceived long ago by Teresa Arruda Alvim Wambier: The practice of precedents, as a rule, even generates economy. I.e., the harm posed to society - divided and unstable jurisprudence - is also and perhaps particularly reflected in the economic field "- Precedentes e evolução do direito, in, Direito Jurisprudencial, Teresa Arruda Alvim Wambier – Coord., 2012, São Paulo, Ed. Revista dos Tribunais, p. 32.


extraordinary appeal, and could be accessed directly by interlocutory appeal whenever inadmissibility at the origin is founded on precedent set by the Supreme Court itself, just so that this sort of issue need not be addressed? The adoption of NCPC without the amendments of Bill 168/2015, as we have already written in 2011 still under the enforcement of the 1973 Code - when everything revolved around the jurisprudence on arts. 543-A to 543-C and the doctrinal comments on it - would mean real
\textit{Sisyphean labor} to the Justices\textsuperscript{28}.

It is to say: at the mercy of such irrationality under a logical and economic point of view, the adoption of doctrinal thinking that eventually incorporated into the initially approved wording of the NCPC could only be the fruit of eternal damnation of the Supreme Court to the gods of Olympus!

The new technique should lower time for setting a precedent, with consequent reduction of lawsuit backlog in all sectors of justice, whether by natural acceleration of procedures due to setting precedent – making possible to shift burden of proof, judge unfounded injunctions, make monocratic judgment by the rapporteur in court, etc.- or by the discouragement that the existence of a precedent will generate in those who would be willing to a hold contrary view in a particular demand.

In a simple formula, we would say: setting the precedent discourages the judgment of lawsuits based on theories already rejected by the precedent itself. On the other hand, it stimulates actions guided by the precedent. However, these benefits do not cancel each other: by knowing they will lose, the other party tends to come to an agreement in order to avoid honorary fees and even when there is no agreement, the techniques to accelerate the procedure - all based on the existence of precedent - will make the process faster. Advantages related to the security, predictability, equality and reasonable duration of the process are absurdly obvious.

But how to justify the efficiency of the Bill amendments according to the \textit{consentment} technique?

That’s simple. Process rules are clear: provided there is no violation of the constitutional guarantees of the lawsuit, the law ought to format the most reasonable way of proceeding. When the demand is filed, the author agrees to these rules and so does the defendant when contesting the demand. The possibilities of access to the

Supreme Courts are already included in the cost of the lawsuit, i.e. the public costs - legal fees and expenses in general - and private - contractual and defeat fees. If such access were a certainty, the lawyers would charge higher fees and the initial costs would be higher as well. Since it is unlikely, the values tend to decrease.

At the beginning of the process, the litigants know they will be constrained by a final and mandatory decision, issue after the due process. With Bill 168/2015, this process brings about intense debate and production of evidence in the first instance, intense debate in the second instance, respect for precedent and, in the absence of precedent from a Supreme Court or in the case of disregard to it, access to the Supreme Court or the Superior Court of Justice.

The new procedural outline is more efficient as it generates a system of precedents which brings security, predictability, equality and reasonable length of process, besides directing the Supreme Courts to their true constitutional mission. On the other hand, when the lawsuit is filed, the litigants consent to the new filters, reflecting somehow in the public and private costs of the lawsuit.

For the reasons above, we think Richard Posner would applaud the novelties brought about by Bill 168/2015, especially when compared to the wording originally approved for the NCPC. Since Posner is alive, teaching and judging in Chicago, maybe one day we can personally ask for his opinion about it.


John Rawls is undoubtedly the greatest icon of liberal thought of the 20th century. In his seminal work *A Theory of Justice*, Rawls proposes a society organization based on the concept of *justice as fairness*.

Rawls is well-known for developing very particular ideas and concepts and extremely useful to operate his conception of justice. Notable examples, among others, are the notions of *original position*, *veil of ignorance*, *comprehensive doctrines*, *well-ordered society* and *overlapping consensus*. 
Rawls is a Kantian contractualist due to reportedly working with the concept of social contract by Rousseau and Locke. He is Kantian due to adapting Kant’s transcendental theory to the theory of justice in the 70s\textsuperscript{29}.

Rawls rejects totalitarianism as a way of thinking about justice or ‘doing the right thing’\textsuperscript{30}. For him, it is possible to produce principles of justice in serial mode so that freedom comes first, followed closely by equality: differences between individuals can only be accepted when they serve the common good.

In \textit{Political Liberalism}, Rawls is concerned with how a society composed of citizens who are deeply divided into several comprehensive doctrinal concepts - philosophical, political and religious - can be stable and fair. As we will see, the key idea here is \textit{overlapping consensus}.

In \textit{The Law of People}, Rawls expands his idea of society based on ‘justice of the reasonable’ at an international level. Finally, in \textit{The Idea of Public Reason Revisited}, as he says in the preface to \textit{The Law of People} - which includes a reprint of \textit{The Idea (..)}, the Harvard philosopher explains in detail how the constraints of public reason can be admitted even by followers of comprehensive, religious and non-religious doctrines\textsuperscript{31}.

Of all the concepts by John Rawls, the one that matters most here is \textit{public reason}. According to the thinker, this idea applies only to the \textit{public political forum}, which can be divided into three parts, the first being the discourse of judges, especially the Supreme Court ones\textsuperscript{32}.

In order to be highly specific on this point, we can say that Rawls’s concern is with the fact that supporters of irreconcilable comprehensive doctrines will not promote mutual understanding unless these doctrines, in the forum of political discourse, are replaced by a sense of \textit{politically reasonable}\textsuperscript{33}. Thus, when all the aforementioned government officials act out of public reason, and all citizens think of

\textsuperscript{29} \textit{My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant. A Theory of Justice – Revised edition}, Harvard University Press, 1999, p. 10

\textsuperscript{30} Rawls, op. cit. P. 20

\textsuperscript{31} \textit{O Direito dos Povos}, Translated by Luis Carlos Borges, São Paulo, Martins Fontes, 2001, preface, p. XVII.

\textsuperscript{32} \textit{Idem}, p. 176. The others are: the discourse of government officials, especially legislators and executives and the discourse of candidates for public office.

\textsuperscript{33} \textit{Idem}, p. 174
themselves as if they were legislators following public reason, legal provision expressing the opinion of the majority - voted by the Parliament, for example - will be legitimate.

Therefore, the question here is: will the now analyzed provisions of Bill 168/2015 be able to be considered legitimate according to Rawls’s public reason? Let us remember that public reason is likely to inevitably impose restrictions and *a priori* disagreements by the supporters of comprehensive doctrines, but since these restrictions can be reasonably accepted by reasonable citizens, the political legitimacy of the legal provision will remain preserved - given that the contents of the Constitution are preserved, obviously.

Rawls proposes a criterion for measuring such political legitimacy: *reciprocity*. The criterion of reciprocity says: *our exercise of political power is appropriate only when we honestly believe the reasons to be offered to our political actions - if we should formulate them as government officials - are sufficient, and once we reasonably think that other people could also reasonably accept those reasons* \(^{34}\).

The criterion of reciprocity applies on two levels: *one is the constitutional structure itself; the other is the level of statutes and particular laws enacted in accordance with this structure* \(^{35}\). In this study, Bill 168/2015 is the law to be submitted to the scrutiny of the criterion of reciprocity applied to the second level.

What are the reasons that could be offered as justification for Bill 168/2015 norms under study? In addition to those described in the justification of the bill itself, regarding the efficiency of the Supreme and Superior Courts, we could add the need for stabilization of judicial precedents to provide our society with greater equity and predictability, allowing people in similar situations to receive similar responses from the Judiciary Branch.

Rawls is dead and therefore we can never be sure of his opinion about our law. However, his work is very much alive and points to equality as the second most important principle of justice, second only to freedom, not nearly breached by bill 168/2015.

In the name of efficiency of formation and stabilization of binding precedents, the bill establishes access filters to the Supreme and Superior Courts in order to avoid the

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\(^{34}\) Idem, p. 181

\(^{35}\) Idem, p. 181
aforementioned Sisyphean labor and increase the efficiency of the courts themselves in the task of their constitutional mission: unify the country’s jurisprudence in binding precedents, always up to date and consistent with the current evolutionary moment of society.

Are the filters reasonable? Although some scholars may disagree, could these filters be reasonably accepted for the sake of higher goals? If restrictions were absolute, they wouldn’t be reasonable. However their reasonableness seems evident, since these restrictions exist only to prevent the appeal to the Supreme or Superior Courts when one of its binding precedents had been applied by regional courts in its decision. It seems clear that even disagreeing with and thinking their particular case deserved the Court’s review, a particular individual could comply with the new filters. That is because he was offered two instances of justice for broad discussion. The third one was only denied because a similar decision had already been made in the second instance.36

Another of Rawls’s idea will certainly help us to demonstrate the reasonableness of restriction. It is the concept of overlapping consensus.

A well-ordered society guided by justice and fairness needs stability. This stability is not easy to be achieved in a liberal regime, shared by citizens fond of different comprehensive doctrines. If such stability results from enforcement, then the system will not be liberal.37 The assumption is to form this stability upon citizens’ consent, which, even if different, is rational and reasonable. In short, pluralism is considered and it is accepted - provided it is reasonable, of course. However, consensus on common points between comprehensive doctrines is sought. Once found, it should be strengthened and expanded.

Having been sought in such way, consensus tends to be stable, because it results from the coincidence of personal beliefs - of political, philosophical or religious origin - and not an agreement that may be appropriate at some given point but changed afterwards. Rawls calls this modus vivendi, referring to the example of

36 We also highlight that the New Civil Procedure Code establishes a more democratic and open procedure to lawsuits aimed at setting a binding precedent. This means that, at least in theory - but hopefully in practice too - manifestation of opportunity for social strata to be potentially affected by the decision was given, either through amicus curiae or directly at the public hearings, all provided for by the law.
international treaties - result of negotiation between nations - which takes into account not entrenched convictions, but the circumstances of the moment, which naturally can change and, does not have real stability precisely because of that.

But how to achieve such stability? Rawls points to two stages: the first is the constitutional consensus and the second is the overlapping consensus.\textsuperscript{38}

Constitutional consensus is equivalent to an acceptance of certain principles of public justice, such as the right to vote and other democratic electoral procedures, just so that the elected can mediate existing rivalries stemming from the lack of a deeper consensus on the content and limits of various rights and freedoms.\textsuperscript{39} Therefore, this agreement begins as a modus vivendi and will become denser as citizens start to believe those political manoeuvres are fair - because Rawls believes in citizens' ability to accept principles of justice that are reasonable. At this point there is a virtuous circle in a way, for once a still unconvinced citizen sees their peers' acceptance, they will come to accept the same principles eventually.

This trust increases as basic institutions created to ensure our fundamental interests are firmer and voluntarily recognized.\textsuperscript{40} At this point, the citizens' comprehensive views tend to converge on the principles accepted as reasonable. Even the unreasonable comprehensive views turn into reasonable ones and the basic principles of the constitution, which originally were accepted reluctantly, now seem natural. However, at this stage, there is no consensus on the limits and content of rights.

What forces are able to lead society from mere constitutional consensus to overlapping consensus? Rawls mentions several, among them the political debate of rival groups and the need for each of these groups to move away from their own narrow political view to reformulate their convictions in order to get their ideas to be accepted by groups which do not share the same ideas at first. Another force is the Judiciary Branch itself. Judges should develop a political conception of justice under which light the constitution is interpreted, even to help preserving these values.

\textsuperscript{38} Idem, p. 205
\textsuperscript{39} Idem, p. 205
\textsuperscript{40} Idem, p. 210
\textsuperscript{41} Idem, p. 213
Therefore, the basis of everything is trust. From a simple *modus vivendi*, a consensus will turn into an overlapping consensus in fact when citizens freely abide by the established precepts, mainly because they believe other people will do the same. As the success of political cooperation remains, the citizens' trust in each other increases until it reaches overlapping consensus\(^{42}\).

What does it all have to do with Bill 168/2015? As the Judiciary Branch confirms the overlapping consensus by respecting legitimately established precedents, there is no reason to seek decision review in the Supreme Court, since it set that precedent itself!

Setting binding precedents is absolutely essential to strengthen public trust in the sense that any citizen will be treated as equal when subjected to the same circumstances that gave rise to setting the precedent\(^{43}\).

The bill only allows someone to go to the Supreme Court to set the precedent or enforce its application, that is, respectively, in the case of novelty or when the regional court breached the trust placed in certain consensual interpretation of the content and limit of a given right.

It is true that this violation by the first instance can be caused by a social changing in the consensus itself. A consensus can change! In this case, it is essential to reopen the door to the Supreme Court, even so to give further opportunity to changing the precedent for strengthening the new consensus.

The Bill allows an overruling in the case of an alleged changing in society. If it occurs, the original court can disregard the binding precedent. In this case, the appeal will be brought to the Supreme Court or the Superior Court of Justice to allow its overruling.

In a reasonably organized society there must be institutions which are able to put the ideals of justice into practice. One is certainly the Judiciary Branch, which performs the task by setting and enforcing a series of binding precedents. Bill 168/2015 reinforces this system and, therefore, in our opinion, is aligned with the main aspects of public reason and the concept of justice by John Rawls.

\(^{42}\) *Idem*, p. 216

\(^{43}\) *Underlying the need for the respect of the precedents of 'civil law' is the principle of 'legality' and 'equality', both connatural to the idea of Rule of Law*. Teresa Arruda Alvim Wambier, *op. cit.* p. 31
As we have said, Rawls is dead, but his work is a beating heart in the current legal thinking. For all aforementioned, it looks that the Bill 168/2015 would not make him turn over in his grave.


All in all, our conclusion recognizes the legitimacy and reasonableness of Bill 168/2015. It is not a Manichaean or a biased view, nor does it stem from preconceived ideologies - comprehensive doctrines. It is merely the finding of someone who, from a distant point, watches\textsuperscript{44} two very opposing philosophical currents flowing into the same quiet, peaceful ocean. We hope that in this blue ocean, the ship of Justice is able to sail quietly and resolutely towards the achievement of its high scopes in order to work effectively in building a better society.

\textsuperscript{44} Obviously, the observer's eyes tend to change the observed object. But this is a damnation from which we cannot escape.