Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach

Abstract

Two important legal reforms in court procedure have taken place in Brazil recently: súmula vinculante (all courts have now to follow the reasoning of the Supreme Court in similar cases) and requisito da repercussão geral (the Supreme Court only hears cases that are of general importance). They respond to a long debate in the Brazilian legal community on how to address the general court congestion, the heavy workload of the Supreme Court, and the role of the higher courts in establishing case law. We discuss the implications of these two important reforms from the comparative perspective (by explaining the similarities and differences with U.S. law, in particular stare decisis and the writ of certiorari) and from a law and economics approach (the likely consequences in terms of incentives for the Supreme Court, the court system, and the litigants more generally).

I. INTRODUCTION

Two important far-reaching legal developments have taken place in Brazil in the last couple of years. Unlike the United States and the common law world more generally, the absence of a general principle of *stare decisis* and strong precedent was noticeable in the Brazilian legal system. Traditionally, strong precedent is nonexistent in civil law but this was particularly significant in Brazil given the inclination of Brazilian judges to be legally creative, and the numerous repetitive cases against governmental actions and measures. At the same time, the absence of precedent reduced the power and the influence of the Supreme Court over the entire judiciary. Finally, the inexistence of formal precedent was usually perceived as a possible reason for court congestion, frivolous appeals and general delays in dispute resolution.

Precedent has recently been emulated by the new *súmula vinculante.*[1] Before the existence of *súmula vinculante,* courts could apply different legal reasoning than that of Supreme Court. Even when courts followed the Supreme Court decisions, the previous system did not bar appeals, hence allowing excessive and inefficient appeals, such as strategic appeals with the sole purpose of postponing the enforcement of an unfavorable judgment. The new system has effectively changed the balance of power in favor of the Supreme Court by enhancing its influence on establishing case law. In fact, the main criticism seems to be that the new *súmula vinculante* system reduces heterogeneity in legal doctrines across courts, therefore arguably impairing the independence of the lower courts.[2]

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[1] Introduced by the *Emenda Constitucional* number 45, December 2004, the *súmula vinculante* is a one-sentence-pronouncement issued by the Brazilian Supreme Court, with binding effect to all other courts, which states clearly the interpretation that the Brazilian Supreme Court gave to a constitutional issue after repeated decisions on the same matter. For instance, *súmula vinculante* n. 12 reads: "Charging enrollment fees to students in public universities violates article 206, IV, of the Federal Constitution." By March 2011, the Brazilian Supreme Court has issued thirty-two *súmulas vinculantes*. For more details on the *súmula vinculante*, see also Oliveira (2006).

[2] For example, Arantes (2005) suggests that the new *súmula vinculante* has been criticized and badly received by the sectors that want to use the courts strategically for political struggles or to avoid expensive claims.

At the same time, unlike the United States, the Brazilian Supreme Court historically had little control over its docket because there was no equivalent to the *writ of certiorari.* A new requirement of "general interest for admission of extraordinary appeals" that could in principle approximate the *writ of certiorari* has now been in force since 2007 (*requisito da repercussão geral*).[3] Enabling the Supreme Court to select cases brings up questions about universal access to justice and possible strategic control of the docket.

The legal implications of these two mechanisms, *súmula vinculante* and *requisito da repercussão geral,* can be extremely significant in a congested court system and where activism by lower courts has been noticeably problematic in terms of legal certainty and effective law enforcement. However, these mechanisms raised interesting questions about the internal balance of power between lower and higher courts. There are important repercussions for the functioning of the Supreme Court, in terms of influence in establishing legal doctrines and quashing case law.

The Brazilian legal system has been under pressure for its perceived lack of effectiveness. The quality of the court system has also been documented by the World Bank to be inappropriate to be conducive of economic growth and attract more foreign direct investment (for example, the governance indicators of the World Bank or the business-friendly indicators of the Doing Business). These two new mechanisms, *súmula vinculante* and *requisito da repercussão geral*, might be regarded as a serious reform of procedure to promote more efficient courts and improve case law, thus enhancing legal certainty.

Our paper makes three significant contributions. First, it explains to an English-speaking audience these recent developments that can potentially revolutionize the Brazilian legal system and which,

[3] The *Emenda Constitucional* number 45, December 2004. Article 102, paragraph 3 of the Brazilian Constitution states since 2004: "In the extraordinary appeal, the appellant shall prove the general repercussion of the constitutional issues discussed in the case, as prescribed by law, in order for the Court to examine the admission of the appeal, the refusal being permitted only by voting of two thirds of the justices." As a consequence, the implementing Law 11418 (Dec. 2006) limits the Court's jurisdiction to appeals of general interest or of general impact (socially, economically, politically or legally). If an appeal does not get the status of general interest or general repercussion, review is immediately declined by the Court.

in our view, have not yet attracted the deserved attention among legal comparativists (in fact there is no good literature in English about these two recent developments).

Second, we provide a contextual analysis of these two mechanisms from a comparative perspective, in particular by looking at the American principles of *stare decisis* and *writ of certiorari*. Under the traditional common law doctrine of *stare decisis*, judicial precedent is a source of law, while in civil law, at best, case law is regarded as law *de facto*. The doctrine of *stare decisis* has two principles, namely, lower courts are bound by superior courts (vertical *stare decisis*) and the higher courts are bound by their previous decisions (horizontal *stare decisis*), both for the sake of equality, predictability and legal certainty. In civil law systems, lower courts have freedom to depart from decisions by superior courts. However, judicial precedent exists when established by a significant number of decisions. The French *jurisprudence constante,* the German *ständige Rechtsprechung,* the Italian *dottrina giuridica* and the Spanish *doctrina juridica* create effective precedent and allow appeal to the supreme court of a judicial decision that violates established case law.

The *writ of certiorari* is the mechanism by which the U.S. Supreme Court allows a case adjudicated at a lower court to be reviewed for legal error. Four out of the nine justices have to be favorable to the writ. Higher courts in civil law jurisdictions have much less control of their docket. Nevertheless, most supreme courts have developed rules to define jurisdiction and therefore, under some well-defined circumstances, decline a particular case.

Our article explains the important Brazilian developments in the context of common law and civil law jurisdictions. The new *súmula vinculante* is probably different from *stare decisis* and certainly more important than the current civil law doctrines. The *requisito da repercussão geral* is not a *writ of certiorari* but, at the same time, it is more ambitious than the standard practices in civil law higher courts.

We also emphasize the recent developments in Brazil from a Latin American perspective. The problems faced by the Brazilian Supreme Court are not significantly different from other jurisdictions such as Argentina or Chile. A comparison of how

precedent and control of the docket has been addressed there is illustrative of alternative solutions.[4]

Third, our article provides for a law and economics perspective over the advantages and disadvantages of these two legal developments, with a special focus on the incentives for lawmaking at the Brazilian Supreme Court. The law and economics literature of American inspiration has provided for important arguments to support the existence of *stare decisis* and the *writ of certiorari*. We critically summarize these arguments and assess them from the Brazilian perspective. The period of time that has elapsed since the enactment of these two measures also permits a more careful analysis of the new incentives.

This article will start by explaining in detail the two legal developments, *súmula vinculante* and *requisito da repercussão geral.* The following section summarizes the comparative literature on precedents and mechanisms of *certiorari*. Section four introduces the law and economics of legal precedents and *certiorari*. Section five provides for a discussion of the Brazilian legal innovations. Final remarks are addressed in section six.

II. THE NEW LEGAL DEVELOPMENTS IN BRAZIL

(A) SÚMULA VINCULANTE

The Brazilian Supreme Court's constitutional adjudication encompasses both the U.S. concrete (or decentralized) model of judicial review, as well as the European abstract (or centralized) model of constitutional review. Although the binding effect of the Supreme Court decisions has already been in place regarding the abstract constitutional review since 1993,[5] the lack of binding effect of the concrete judicial review has produced backlogs and overwhelmed the Court's docket.[6]

After extensive debate on judicial reform in Brazil, Constitutional Amendment number 45 (December 2004) introduced the *súmula*

[4] *See* Garoupa and Maldonado (2011) for a general framework concerning the functioning of Latin America Supreme Courts.
[5] Constitutional Amendment number 3 (March 1993). This arrangement follows closely the German model.
[6] *See* detailed discussion by Oliveira (2006).

vinculante (literally meaning, binding pronouncement), which endows the Supreme Court's concrete constitutional adjudication with a binding effect.

Conceived by Justice Victor Nunes Leal,[7] the *súmula* was a one-sentence pronouncement created by the Supreme Court in the 1960s to inform judges and lawyers about the Court's legal interpretation repeatedly decided in multiple individual claims on the same subject matter.[8] Essentially, a *súmula* consists of a one-sentence pronouncement with no binding effect but with a persuasive authority. It was used for expediting judgments on similar questions that had been already decided by the Court, and for discouraging appeals that contradicted the *súmula*. The persuasive authority of the *súmula* was likely to induce legal certainty and reduce unpredictability for parties involved in litigation. A practical consequence in the Court's operating procedures was that, if a *súmula* was applicable to a case, the Court was excused from writing an extensive opinion explaining its legal reasoning. The first batch of *súmulas* was issued in 1964, as Table one shows.

Table One: *Súmulas* without binding effect

Súmulas	Publication Date
1 to 370	March, 1964
371 to 404	May 12, 1964
405 to 438	July 6, 1964
439 to 472	October 10, 1964
473 to 551	December 10, 1969
552 to 600	January 3, 1977
601 to 621	October 29, 1984
623 to 736	October 9, 2003

[7] Justice Victor Nunes Leal (1914-1985) served in the Supreme Court from 1960 to 1969 when he was in effect ousted by the military dictatorship under *Ato Institucional* number 6 (Feb. 1969), which imposed his unasked retirement.

[8] Starting in 1964 to expedite judgments of similar questions over which the Court had already decided, the Supreme Court issued 736 *súmulas* without binding effect; the last batch of persuasive *súmulas* were issued in 2003. Due to its pedagogical and informative character, lower courts and even the General Attorney's office (*Advocacia-Geral da União*) started issuing their own *súmulas* to guide judges and government attorneys on controversial issues, as well as to expedite the proceedings of similar cases.

It is unclear why no more *súmulas* were issued after 1984 until 2003.[9] In 2003, Justice Sepúlveda Pertence presented new proposals to the court *en banc*, and 113 *súmulas* were approved. After 2004, however, it is very unlikely that the Supreme Court will ever again issue any other traditional *súmula* due to the advent of the *súmula vinculante*.

Constitutional Amendment 45 authorized the Supreme Court to issue *súmulas vinculantes*, that is, pronouncements with binding effect. Such pronouncements have binding effect not only on lower courts, but also on the federal, state and municipal administrations.[10] As a result, once a *súmula vinculante* is enacted, there is no need for similar cases to go all the way to the Supreme Court to decide the issue, because lower courts are required to automatically apply the Supreme Court ruling. It also bars appeals based on arguments contrary to the *súmula vinculante*. Consequently, the Supreme Court's docket should not be overwhelmed with multiple similar cases, thus reducing its backlog and contributing to a quicker and more uniform disposition of cases.

This new mechanism aims to settle controversial issues that have raised serious legal uncertainty and brought about multiple similar cases on the same question. Because of the exceptional character of the binding effect of judicial decisions in traditional civil law jurisdictions, the Brazilian Constitution requires a 2/3 majority vote of Supreme Court justices to approve, modify or annul a *súmula vinculante* through a special proceeding.[11] The Brazilian Supreme Court may *sua sponte* propose the enactment of a *súmula vinculante*. Also, certain government actors or non-political individuals[12] may file a proposal of *súmula vinculante* to the

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[9] Justice José Paulo Sepúlveda Pertence, Remarks at the SFC Plenary Session (Aug. 28, 2003), when the *súmulas* were discussed (on file with authors).

[10] Braz. Constitution of 1988, Article 103-A, introduced by Constitutional Amendment number 45 (December 2004).

[11] See *Supremo Tribunal Federal*, *Resolução* number 388/2008 which stipulates the proceedings of proposals of *súmula vinculante* at http://www.stf.jus.br/ARQUIVO/NORMA/RESOLUCAO388-2008.PDF (last visited Dec. 29, 2010).

[12] Law 11417 (December 2006), Article 3 enumerates who has standing to request the enactment, review, or annulment of a *súmula vinculante*: the President of Brazil; the directing boards of the Senate, the Chamber of Deputies, and the state legislative assemblies; the Attorney General; the Federal Council of the Brazilian Bar Association; the federal Public Defender; a political party

Supreme Court. Furthermore, during the proceedings, it is possible that third parties offer briefs to express their views on the subject matter.[13]

Different from the *stare decisis* doctrine of the U.S. system, which entails all U.S. Supreme Court rulings with the force of precedent, the Brazilian *súmula vinculante* confers binding effect on selected issues that have multiple lawsuits on the same question and only after reiterated decisions of the Brazilian Supreme Court. Once approved, the *súmula vinculante* has immediate effect. The Supreme Court may, however, restrict the binding effect or decide that the effects take place at some other time based on exceptional public interest and legal certainty considerations. So far, the Supreme Court has issued thirty-two *súmulas vinculantes* which are easily available online to the general public.[14] Table two summarizes the publication date of the current *súmulas vinculantes.*

Table Two: *Súmulas Vinculantes*

Súmulas Vinculantes	Publication Date
1 to 3	June 6, 2007
4 to 6	May 9, 2008
7 and 8	June 20, 2008
9	June 20, 2008 (republished June 26, 2008)
10	June 27, 2008
11 and 12	August 22, 2008
13	August 29, 2008
14	February 9, 2009
15 and 16	July 1, 2009
17 to 21	November 10, 2009
22 to 24	December 11, 2009
25 to 27	December 23, 2009

represented in the Brazilian Congress; a confederation of labor unions; a professional association of a nationwide nature; a state governor; superior courts; federal and state appellate courts and, finally, municipalities when litigating concrete cases.

[13] Law 11417 (December 2006), Article 3, paragraph 2.

[14] For detailed information on the text of each *súmula vinculante*, see the Supreme Court website (in Portuguese) at http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumulaVinculante (last visited Dec. 29, 2010).

28 to 31	February 17, 2010
32	February 24, 2011

The binding effect of the *súmula vinculante* may seem to have, at first glance, a narrower span than the U.S. doctrine of precedent, because it applies only to selected constitutional questions brought before the Brazilian Supreme Court. Nevertheless, the potential scope of the *súmula vinculante* may be much broader than the U.S. Supreme Court *stare decisis* doctrine. To illustrate, consider *súmula vinculante* number two. It stipulates that any state law or regulation on drawing lots or sweepstakes, including bingos and lotteries, is unconstitutional. The text of *súmula vinculante* number two does not refer to any specific legislation, so it can be applied to in relation to any existing or future regulation on bingos or lotteries in all states. The Brazilian *súmula vinculante* is different from the American *stare decisis* doctrine as the enouncement is a general statement in abstract, which gives much more flexibility and leeway in terms of application since the U.S. *stare decisis* doctrine implies that a similar set of facts or circumstances have to be met.

Precedents established by the U.S. Supreme Court bind other states even when they are not part to a lawsuit.[15] However, these precedents are decided in the context of concrete review. In Brazil, the Supreme Court exercises both concrete and abstract review. In an abstract enouncement, the *súmula vinculante* theoretically indicates that the Supreme Court has a broader opening in deciding on alleged violations of its content, because the Brazilian judge does not have to assess whether the facts of the case are distinguishable from those of the cases that originated the *súmula vinculante*. Therefore, the abstraction of the *súmula vinculante* enouncement, in principle, makes it easier for a judge to apply the enouncement without a thorough and detailed assessment if all facts of the cases are alike. However, whether this possible broader interpretation will actually turn into practice remains to be seen.[16] Abstract review is much broader than concrete review since it

[15] States that are not before the United States Supreme Court are also bound by its decisions. In particular, *Cooper v. Aaron* (1958) held that states (in the case, Arkansas) were bound by the decisions of the Court (in the case, *Brown v. Board of Education* (1954)) and could not choose to ignore them.

[16] Whether the Brazilian Supreme Court eventually applies restrictively or loosely the *súmula vinculante* depends on the complaints of violation that reaches the Court in the future. Only after the Court is seized with a significant number of complaints, any concrete assessment on this topic will be possible.

refers to all possible applications of a law in all possible imaginable situations, whereas concrete review refers to one possible application in one given situation (the one before the Court).[17]

Another distinctive feature of the Brazilian system is that the *súmula vinculante* not only applies to Brazilian lower federal and state courts, but also to federal, state and municipal administrations.[18] Therefore, a party in an administrative proceeding before a governmental agency may invoke the application of a *súmula vinculante* and the administration must explain the reasons on whether it applies or not to the plaintiff's case. In case of denial, after the exhaustion of administrative proceedings, the plaintiff may file a direct request to the Supreme Court which, if a violation of the *súmula vinculante* is found, will order the public authority to adjust its decisions to similar cases, under penalty of civil, administrative and criminal liability. Indeed, this system provides individuals with direct access to the Supreme Court for redress of violations of the *súmula vinculante* by governmental agencies.

(B) REQUISITO DA REPERCUSSÃO GERAL

The new requirement of "general interest for admission of extraordinary appeals" (*requisito da repercussão geral*) that emulates the *writ of certiorari* was created by Constitutional Amendment 45 (December 2004). This new mechanism seems to finally provide the necessary tools to make the Brazilian Supreme Court more efficient and available to focus on meritorious cases in order to accomplish its institutional mission to safeguard the Constitution.

Before elaborating on this new mechanism, we should not give the impression that this was the first time that a similar mechanism to

[17] We do accept that the United States Supreme Court could, in principle, extend the *ratio decidendi* to a point that concrete review turns into abstract review and these differences are blurred. However, we do not share the view that such possibility has been effectively followed by the Court.

[18] The impact on federal, state and municipal administrations is particularly important and economically relevant since a significant percentage of the cases entertained by the Brazilian Supreme Court involve the state as either defendant or plaintiff.

the *writ of certiorari* was envisioned. Historically, there have been previous attempts to restrict the admissibility of extraordinary appeals to the Brazilian Supreme Court. During the military dictatorial regime (1964-1985), Constitutional Amendment number 1 (October 1969) allowed the Supreme Court to prescribe in its internal rules the requirements for extraordinary appeals (Article 119, III). As a result, in 1975 the Supreme Court introduced in its internal rules the "relevant federal issue" requirement,[19] which was later explicitly included in the Constitution by Amendment number 7 (April 1977). Inspired by the *writ of certiorari*, this requirement introduced the Supreme Court's discretion in adjudicating cases, whereby extraordinary appeals were only admissible if the Court considered relevant the federal question at issue. Although a salutary advancement in controlling the Court's docket and limiting procrastinatory appeals, this innovation was perceived as authoritarian and non-democratic, due to the subjectivity and imprecision as to what could be considered relevant. This mechanism was later eliminated when the new Constitution of 1988 created a separate court of last resort for federal questions as an attempt to address the burdensome caseload of the Supreme Court.[20]

Nevertheless, the Supreme Court caseload kept gradually increasing after 1988. The Supreme Court received 21,328 fillings in 1988, which climbed to 127,535 fillings in 2006, with a peak of 160,453 fillings in 2002 (see table three for more details). The Supreme Court tried to cope with the increasing number of fillings by imposing strict formal requirements through jurisprudential construction as a means to avoid frivolous and proscratinatory appeals (a standard approach in civil law jurisdictions). An example of this defensive case law was the Court's interpretation that extraordinary appeals would only be admissible if the alleged constitutional violation had already been brought at the appellate

[19] Amendment number 3 to the Internal Rules of the Supreme Court, of June 12, 1975. For detailed information on the development of this requirement, see Fátima Nancy Andrighi, Speech at the Superior Court of Justice with Arruda Alvin on October 16, 2000, available (in Portuguese) at http://bdjur.stj.gov.br/xmlui/bitstream/handle/2011/633/Arguiçao_Relevancia.pdf?sequence=4 (last visited Dec. 30, 2010).

[20] The creation of the *SuperiorTribunal de Justiça* (with thirty-three justices) in 1988. *See* Oliveira and Garoupa (2011) for more details.

court level.[21] Regardless of such attempts, the number of cases brought before the Supreme Court kept increasing. The caseload of the Supreme Court was inundated with multiple cases on similar questions, overburdening the Court and demanding longer waiting periods for litigating parties.

With such astonishing caseload, reforming the Supreme Court was paramount. During judicial reform talks, the idea of having a mechanism like the *writ of certiorari* grew stronger as a technique to achieve a more efficient and steadfast judiciary in Brazil by reducing the cases that would reach the Supreme Court and strengthening lower courts' decisions.

In such context, Constitutional Amendment 45 (December 2004) enacted the new requirement of *repercussão geral* whereby the Supreme Court may find extraordinary appeals inadmissible by a two-third vote of its members.[22] In response to previous criticism against discretionary jurisdiction, Constitutional Amendment 45 deferred to statutory law the definition of what can be considered relevant. Therefore, Federal Law 11,418 (December 2006) clarified that the Supreme Court will consider whether a constitutional question is relevant from an economic, politic, social or legal viewpoint, if the importance transcends the parties' subjective interests in the litigation.

By itself, such innovation of a general importance test should not expedite proceedings because this procedure does not impact directly on the number of cases reaching the Supreme Court. The Court still needs to analyze each individual case to declare whether or not the issues are relevant. Nevertheless, a very interesting aspect of this new requirement pertains to the use of technology in courts. In deciding whether a constitutional issue is of general importance, the Supreme Court uses an electronic voting system, named "virtual plenary." Once the rapporteur electronically votes whether a case has general importance or not, the remaining justices will have twenty days to also electronically vote on this preliminary requirement.[23] The vote is "yes" or "no," without

[21] This interpretation is commonly known as "previous questioning" requirement (*requisito do prequestionamento*).
[22] Braz. Code of Civil Procedure, Article 543-A (inserted by Federal Law 11418, of Dec. 19, 2006).
[23] Internal Rules of the Supreme Court, Article 324.

providing further reasoning, and is available for public visualization on the Court's website.[24] This electronic voting system facilitates the decision-making process, and responds to previous concerns raised during the judicial reform talks that this new test would burden the Court's proceedings and provoke delays.

The most interesting feature of this new mechanism, however, is that it impacts the functioning of multiple individual cases with similar claims. In these cases, the lower courts, instead of sending all extraordinary appeals to the Supreme Court, will select one or more cases, which are representative of the constitutional controversy and stay with the remaining ones until the Supreme Court decides on the issue.[25] If the Supreme Court finds that the constitutional issue is not relevant, this decision will be applied to all appeals with an identical question and the remaining related appeals in both the lower courts and the Supreme Court will be automatically considered as non-admissible.[26] On the other hand, if the Supreme Court resolves that the constitutional question is relevant and decides the case on the merits, the lower courts will themselves apply the Supreme Court ruling to the related appeals.[27] The Supreme Court may, in deciding a relevant constitutional question, admit third parties to express their views on the case, as spontaneous *amicus curiae* submissions.[28]

This general importance test, along with the particular proceedings of identical cases in lower courts, has strongly impacted the Supreme Court docket from 2007, when this mechanism was first implemented. The highest percentage of the docket of the Supreme

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[24] *See* the *Plenário Virtual* (virtual plenary) available at: http://stf.jus.br/portal/jurisprudenciaRepercussaoGeral/listarProcessosJulgamento.asp? (last visited Feb. 7, 2011).

[25] Braz. Code of Civil Procedure, Article 543-B (inserted by Federal Law 11418, of Dec. 19, 2006).

[26] Braz. Code of Civil Procedure, Article 543-B, para. 2 (inserted by Federal Law 11418, of Dec. 19, 2006).

[27] Braz. Code of Civil Procedure, Article 543-B, para. 3 (inserted by Federal Law 11418, of Dec. 19, 2006).

[28] For more detailed on the role of amici curiae before the Brazilian Supreme Court, *see* André Pires Gontijo & Christine Oliveira Peter da Silva, *The Role of Amicus Curiae on Constitutional State: Mechanism of Transdisciplinary Access on Constitutional Decision-Making Process* (in Portuguese), available at http://www.conpedi.org.br/manaus/arquivos/anais/fortaleza/3299.pdf (last visited April 17, 2011)

Court relates to its extraordinary appellate jurisdiction. This concrete judicial review attribution encompasses extraordinary appeals (*recursos extraordinários*) and interlocutory appeals against the denial of admissibility of extraordinary appeals (*agravos de instrumento*), both of which amount to 95.3% of the Court's docket in 2006, 88.7% in 2008, and 76.9% in 2010.[29] Table three shows a sharp decline in the Court's docket since the mechanisms of *súmula vinculante* and *repercussão geral* entered into force in 2007. From 2007 to 2008, there was a 40.8% decrease in the number of cases accepted by the Supreme Court, followed by a 36.1% falloff in 2009. In 2010, the variation in relation to 2009 was only 4.0%, which may indicate a stabilization in the number of cases accepted, after the initial impact of these new mechanisms.

Table Three: Statistics of the Supreme Court docket since 1988[30]

Year	Number of filings	Number of cases accepted	Number of judgments
1988	21,328	18,674	16,313
1989	14,721	6,622	17,432
1990	18,564	116,226	16,449
1991	18,438	17,567	14,366
1992	27,447	26,325	18,236
1993	24,377	23,525	21,737
1994	24,295	25,868	28,221
1995	27,743	25,385	34,125
1996	28,134	23,883	30,829
1997	36,490	36,490	39,994
1998	52,636	50,273	51,307
1999	68,369	54,437	56,307
2000	105,307	90,839	86,138
2001	110,771	89,574	109,692
2002	160,453	87,313	83,097
2003[31]	87,186	109,965	107,867

[29] STF, Portal de Informações Gerenciais, Percentagem de RE e AI em relação aos processos distribuídos. 1990 a 2010 (STF, Managerial Information Portal, Percentage of RE and AI in relation to the distribution of cases), available at: http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=REAIProcessoDistribuido (last visited Feb. 7, 2011).

[30] STF, Portal de Informações Gerenciais, Movimento Processual nos Anos de 1940 a 2010 (STF, Managerial Information Portal, Procedural Movement in the years of 1940 to 2010), available at: http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=movimentoProcessual (last visited Feb. 7, 2011).

[31] The decline of lawsuits from 2002 to 2003 was due to thousands requests of desistance of appeals (all discussing similar questions on the severance-pay fund) after an agreement was reached. For detailed information on this event, see Oliveira (2006), at 113-114.

2004	83,667	69,171	101,690
2005	95,212	79,577	103,700
2006	127,535	116,216	110,284
2007	119,324	112,938	159,522
2008	100,781	66,873	130,747
2009	84,369	42,729	121,316
2010	71,670	41,014	103,869

Table four summarizes the Court's statistics concerning the application of the *requisito da repercussão geral.* The figures are remarkably stable in the period 2008-2010.

Table Four: *Requisito da Repercussão Geral*[32]

	2007	2008	2009	2010	Total
Cases filed with a preliminary request for *repercussão geral*	4,787	25,891	21,336	22,526	74,540
Cases the Court admitted under a standard of *repercussão geral*	19	125	97	118	363
Cases with *repercussão geral* the Court decided on the merits	0	26	29	22	81

III. COMPARATIVE ANALYSIS OF PRECEDENTS AND CERTIORARI

(A) GENERAL OVERVIEW

The simplest definition of legal precedent is that future judges are bound by the decisions of prior cases, vertically (lower courts are bound by superior courts) and horizontally (higher courts are bound by their previous decisions).[33] Furthermore, courts are obliged to follow precedent even when they think the outcome is not correct. In other words, the obligation to follow precedent

[32] STF, Portal de Informações Gerenciais, Números da Repercussão (STF, Managerial Information Portal, Numbers of the Repercussão), available at: http://stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaRepercussaoGeral&pagina=numeroRepercussao (last visited Feb. 7, 2011).

[33] *See* general introduction by Schauer (2009) and discussion by Wise (1975), Schauer (1987), Cooper (1988), Alexander (1989), Caminker (1994), Lee (1999), and Barrett (2003).

applies even if it instructs a judge to reach what it is not commonly understood as the right decision.

There are several important consequences of establishing a legal system bound by precedent. Precedent applies to similar cases. Hence, courts need to develop rules to distinguish cases (if precedent applies to a "similar" case, a court needs to define "similarity" in a consistent way) and to determine reasoning (*ratio decidendi*) to be applied in similar cases by all judges.[34] At the same time, there must be legal rules to frame and regulate possible departures from precedent. The standard approach is that the judge who wants to depart from a previous precedent carries the burden of proof. When the rules of departure are extremely limited and heavily constrained, we have an absolute precedent. Conversely, when those rules are more generous and flexible, precedent is no longer strictly binding; it is merely indicative or persuasive.

The interaction of precedent and the rules regulating departure and distinguishing cases allows for a more complex contour of the legal implications. Three possible approaches to precedent are usually considered. The strictest form is absolute precedent, formally binding, and with few possibilities for departure. The next form is flexible precedent, not formally binding but having the force of persuasion that effectively constraints courts. Finally, the weakest form is a merely supportive statement that courts should consider when deciding a case. Whereas the strictest form is usually associated with Anglo-American *stare decisis*, the weakest form is more common in civil law jurisdictions. For example, in France, it is known that a judgment based on a precedent but lacking a code source is not lawful.[35]

The legal understanding of *stare decisis* has evolved in the common law world.[36] Precedent did not exist before the seventeenth century due to lack of information and knowledge about case law decided by other courts. Slowly the binding force of the case law developed by the higher courts was recognized.[37]

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[34] *See* discussion by MacCormick and Summers (1997).
[35] *See* Peczenik (1997).
[36] *See* Murphy and Rueter (1981).
[37] *See* Algero (2005).

In the United States, *stare decisis* follows the hierarchical structure of courts. The U.S. Supreme Court as well as state supreme courts have expressed their power to overrule precedent. Courts also tend to depart when they consider precedent outdated, if it produces undesirable results or if based on poor legal reasoning.[38]

In Britain, before *Beamish*[39] and *London Tramways*,[40] a court was influenced but not strictly bound by precedent. After those landmark decisions, the absolutism of *stare decisis* was set and imposed accordingly. This was reaffirmed at *Admiralty Commissioners*.[41] Notwithstanding, the courts were faced with a significant question concerning if a fundamental principle should prevail over precedent. This legal issue was addressed inconclusively in *London Transport*[42] and later in *Myers*.[43] The famous statement by the House of Lords in 1966 abolished the rigid adherence to precedent and introduced the possibility of departing from previous precedent when it is correct to do so (an important conceptualization developed by later case law).[44] However, the English Court of Appeal is subject to absolute *stare decisis* with few exceptions as explained by *Young*.[45] Few times such principle has been under discussion but it has been generally upheld as in *Farrell*.[46]

In Canada, departure from precedent was considered exceptional under *Stuart*.[47] The principle remained unchanged until *Binus*[48], when it was allowed under "compelling reasons" (although precedents established by the Privy Council have not been formally binding since 1957). Since then it has been clarified that the Supreme Court is not bound by *stare decisis*.[49] Provincial

[38] Id. *See also* Spriggs II and Hansford (2002).
[39] *Beamish v. Beamish* (1861), 9 H. L. Cas. 374.
[40] *London Tramways Co. v. London County Council* (1898), A. C. 375.
[41] *Admiralty Commissioners v. Valderva* (1938), A. C. 173.
[42] *London Transport Executive v. Betts* (1959), A. C. 213, at 232.
[43] *Myers v. D.P.P.* (1965), A. C. 1001, at 1021.
[44] Practice Statement (Judicial Precedent) (1966).
[45] *Young v. Bristol Airport Co. Limited* (1944), 1 K. B. 718.
[46] *Farrell v. Alexander* [1976] 1 All E. R. 129, reversed (1976), 2 All E. R. 721 (H. L.).
[47] *Stuart v. The Bank of Montreal* (1909), 41 S. C. R. 516, aff'd (1911) A. C. 120.
[48] *Binus v. The Queen* (1967), S. C. R. 594.
[49] *See* Murphy and Rueter (1981).

supreme courts have evolved into similar flexible models, possibly with the late exception of the Ontario Court of Appeal.[50]

In Australia, there have been questions about the binding use of English precedents since the 1940s.[51] Australian courts are now formally not bounded by English precedents, although as a matter of practice they frequently use English decisions.[52] A similar position has been taken by the New Zealand Court of Appeal.[53] Both the Australian High Court and the New Zealand Court of Appeal struggle to foster uniformity of common law and statutory concepts, therefore drawing in many occasions from decisions of the Privy Council, the House of Lords and the Supreme Court of Canada.[54]

Another relevant example is Singapore. The Singaporean Court of Appeal decided that the decisions of the Privy Council no longer bind in 1992.[55] However, English law tends to be followed *de facto*.[56]

Some mixed jurisdictions do not seem to depart from the English understanding of *stare decisis.* In Scotland, the judicial practices were developed in analogous ways to the English after the 18th century. There is judicial precedent binding in all Scottish courts in manners not very different from English courts.[57] Although there has been controversy in South Africa, the predominant view seems to be that English precedent is dominant.[58] In other mixed jurisdictions such as Louisiana or Quebec the common law doctrine of *stare decisis* does not apply.[59] Judicial precedents are merely a persuasive source of law, a binding authority weaker than *stare decisis*.[60] However, some legal scholars point out that it

[50] Id.
[51] Id.
[52] Id.
[53] Id.
[54] *See* Bronitt (2011).
[55] Practice Statement on Judicial Precedent (1994) 2 SLR 689.
[56] *See* Tan (2000 & 2002).
[57] *See* Walker (1974).
[58] *See* Kahn (1974).
[59] *See* Valck (1996) and Venturatos Lorio (2002).
[60] According to Barham (1974), because civil law is useful to overcome some weaknesses of the common law. The declaratory value of precedent has been driven in Louisiana by the self-interest of legal academics, but also by judges who seem to favor the return to primary sources.

makes little practical difference.[61] Other legal scholars refer to a systemic response to jurisprudence.[62]

The Commonwealth literature points to the unsolved issues in *stare decisis.* In particular, it is unclear the precedent hierarchy of decisions of different-sized panels and the precedential effect of "split court" decisions.[63] The same literature reflects the advantages and disadvantages of the current interpretation of *stare decisis*. On the plus side, legal scholars mention legal certainty and predictability generated by precedent, acknowledgment that change of law should be done by the Parliament and not by the courts, and that potential correction of errors should be allocated to the highest court and not to the lower courts. On the minus side, the standard arguments include absurdity and lack of justice in many decisions, and the significant costs due to the legal charade of identifying differences across cases to avoid precedent. Finally, legal scholars have recognized that the progressive development and application of fundamental principles requires a weaker precedent which is inconsistent with strict adherence to *stare decisis*.[64]

Case law is a primary source of law in the common law while in the civil law world, codes provide the fundamental law, statutes further develop the codes, and courts merely provide interpretation.[65] In such context, it is traditionally said there is no precedent in civil law. It is true that there is no absolute precedent in the common law sense. It would be unthinkable and inconsistent in a civil law system that precedents could be used to undermine the code law. However, legal precedents are reasonable because it is argued that the courts have arrived at the correct interpretation of a particular aspect of code law. Other courts should be expected to

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[61] *See* Baudouin (1974). His thesis is that anyway courts in Quebec and Louisiana pass judgments using a common law format; they develop interpretation of the civil code with the same rules applied to the interpretation of an ordinary statute; they use precedents established by common law; they make reference to foreign common law interpretations of civil law (for example, provisions of Quebec Civil Code based on English statutes); they rely on the importation of common law doctrines in the application of civil law (for example, in property law).
[62] *See* Algero (2005).
[63] *See* Murphy and Rueter (1981).
[64] Id.
[65] *See* Tetley (2000).

follow such precedent not because the precedent is case law but rather it declares the adequate interpretation of code law. Hence precedents cannot exist without a clear code source. Furthermore, they are declaratory in the sense that they do not create law, but clarify the correct interpretation of the law.[66]

It is in this framework that we can understand the active development of the general principles of law by many civil law courts.[67] Codes are abstract; they require understanding in particular circumstances.[68] It is well-known that tort law has been systematically developed in France by case law given the absence of specific codification in the 1804 civil code. Similarly, in Germany, important legal developments such as *culpa in contrahendo* were pursued by courts before codification in 2002. The significant development of tort law by French and German courts has to be framed in the setting of declaratory precedents.

The French doctrine of precedent is known as *jurisprudence constante.* Strictly speaking, precedent is not and cannot be a source of law. Article 5 of the French Civil Code prohibits judge-made law (*arrêt de règlement*). Courts are denied the power of making law. Therefore judges are never and cannot be bound by precedent. Exclusive reference to precedent is in fact illegal (Article 455 of the French Code of Civil Procedure). However, legislation commands lower courts to follow decisions of all the chambers of the *Cour de Cassation* sitting *en banc*, or of the plenary of the Civil Law Chamber, when a case is remanded for determination according to instructions (Law of April 1, 1837 and Law of July 23, 1947).[69]

Jurisprudence constante is established by (i) a sequence of cases that have been appealed to the *Cour de Cassation*, (ii) repetition of reasoning and interpretation (exceptionally it can be established by one decisive case at the *Cour de Cassation*), (iii) the question to be clarified by precedent is merely related to a point of law (*pourvoi en cassation*).[70] Therefore, precedent under French law has four main attributes. It must reflect a continuous and permanent practice

[66] *See* Dennis (1993).
[67] *See* MacCormick and Summers (1997).
[68] *See* Germain (2003).
[69] *See* Yiannopoulos (1974).
[70] *See* Carbonnier (1974).

of the courts. There is no obligation to follow it, although decisions will be reversed by higher courts if violated. It focuses on jurisprudential activity of the *Cour de Cassation* (*arrêt de principe*). Finally, there is no horizontal effect, implying that if conflicts occur, there is no formal solution.[71]

According to legal scholars, precedent is *de facto* law in France due to important practical reasons, in particular (i) there is a need for continuity and stability of law, independent of individual judges coming and going; (ii) it provides for a significant economy of effort in establishing authoritative legal interpretation; (iii) the collegial organization of higher courts is likely to promote accuracy on applying the law; (iv) it reinforces the needed judicial hierarchy for a functional legal system.[72] Still, the formal discourse in French law is that judicially created norms are not law even when they function as such.[73]

The Italian (*dottrina giuridica*) and Spanish (*doctrina juridica*) versions are not significantly different from the French *jurisprudence constante*. In Italy, judicial precedent focuses on general principles of law (*massima*). It does not have to be followed. Nevertheless, Italian lower courts regularly cite and apply general principles as interpreted by the highest court, especially in important legal issues.[74] Precedents have an interpretative value towards establishing "decision-rules" that assure uniformity in the law.[75] However, they cannot be applied at the exclusion of code law since courts are expected to decide every case accordingly. The decisions of the Constitutional Court and the Council of State have *erga omnes* effects and, in that sense, they constitute binding precedents.[76] In Spain, the Constitutional Court has clarified that judges are bound by statutory law and not by precedent.[77] However, for example, although courts cannot refuse to pass judgment, they can dismiss an appeal if a precedent exists that provides legal ground.[78] At the same time, the rulings of the

[71] *See* Troper and Grzegorczyk (1997).
[72] *See* Yiannopoulos (1974).
[73] *See* Lasser (1995).
[74] *See* Taruffo and La Torre (1997) and Mazzotta (2000).
[75] *See* Merryman (1974).
[76] Id.
[77] *See* Ruiz Miguel and Laporta (1997) discussing TC 49/1985 of March 28, 1985.
[78] Id.

Supreme Court provide guidance to lower courts.[79] The Spanish civil code recognizes that case law can be used in interpretation of statutes and general principles of law. In Portugal, the Constitutional Court has established that decisions by the Supreme Court are not binding; however, lower courts can use them to clarify statutory law.[80]

The German *ständige Rechtsprechung* is developed in the same context. Precedent is valid in the sense of sociologically influencing courts, but not in the normative sense.[81] Constitutional Court decisions have the force of statute (*Gesetzeskraft*). All others are not formally binding. However they are *de facto* valid (*faktische Geltung*). Lower courts usually look at the Federal Court of Appeals and state courts of appeals for guidance.[82] As with the French doctrine, precedent must be established by permanent and continuous interpretation (*ständige Rechtsprechung*). It focuses on leading rules (*Leitentscheidungen*). There is no general rule of horizontal formal binding effect (except for decisions by the Constitutional Court).[83] The argument by German legal scholars is that extracting a leading theory from a particular answer to a controversial question could be problematic. Therefore the court needs to be allowed to frequently deviate from its own theory by introducing or qualifying distinctions and therefore actually developing law.[84]

The Asian civil law jurisdictions follow closely the German approach, even Japan which has been influenced by the U.S. constitutional design. There is no formal mechanism of precedent used by Japanese courts but, in practice, the Supreme Court's decisions are given significant weight and the lower courts rarely render rulings that are inconsistent with existing Supreme Court decisions. Furthermore, the existing statute law does not clarify the role of case law, although the prevailing legal doctrine is that precedents set by the Supreme Court are merely persuasive, and not law. Furthermore, decisions by the highest prewar court (*Taishin'in*) are also accorded deference although not formal

[79] *See* Gómez-Jara and Chiesa (2011).
[80] TC 810/1993 of March 2, 1993.
[81] *See* Lorenz (1974).
[82] *See* Weigend (2011).
[83] *See* Alexy and Dreier (1997).
[84] *See* Lorenz (1974)

precedent.[85] Violations of precedent are a reason for appeal.[86] Supreme Court precedents can only be modified by decisions *en banc*.[87]

A similar pattern is followed by Taiwan. However, each year, the Taiwanese Supreme Court's Precedent Editing Committee selects "important precedents" from the Court's decisions. The selected decisions are then edited by the Committee. By the time a "precedent report" is published, there will be no facts left in the decisions, but only interpretations of abstract legal concepts. Although there are legal bases for this method, some justices of the Judicial Yuan have criticized the constitutionality of the method. Lower courts statutorily do not have the obligation to follow precedents. Nevertheless in practice, decisions by lower courts which are contradictory to the interpretations provided by "precedent reports" will normally be withdrawn or dismissed. Therefore, the majority of lower courts follow the interpretations of the "precedent reports."

In South Korea, court decisions do not have general binding effect over the lower courts. Judges in South Korea are not entitled to make case law by their decisions under a constitutional principle of power separation which implies that judges are not obliged to follow prior decisions by the superior courts.[88] However, higher court decisions have strong influence upon the lower court judges and administrative entities. In South Korea, legal doctrines refer to a practical binding effect of court decisions. Decisions by the Constitutional Court of Korea, however, have binding force and it is a unique power to the Constitutional Court, which distinguishes it from other ordinary courts. [89]

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[85] *See* Haley (2011).

[86] Articles 318.1 of the Civil Procedure Code (民事訴訟法) and 405 of the Criminal Procedure Code (刑事訴訟法).

[87] Article 10.3 of the Court Act (裁判所法).

[88] Article 103 of the Korean Constitution and Article 8 of the Korean Court Organization Act. The Constitution grants judges a power to independently decide according to their conscience conforming to the Constitution and statute laws. The Court Organization Act stipulates that a court decision by a superior court only binds the lower court of the same case from which the appeal was raised.

[89] *See* Healy (2001). In particular, articles 47 and 75 of the Korean Constitutional Court Act.

As a matter of systematization, legal scholars see two main differences about the role and conceptualization of precedent in common and in civil law jurisdictions, namely intensity and approach.[90] First, we must consider the degree of persuasion higher courts have on cases decided upon lower courts. In civil law courts, lower courts only follow precedent if it is *jurisprudence constante*, if it does not contradict legislation, and if it is consistent with the context of their legal system. The civil law lower courts feel that the precedent is intense if it satisfies these conditions, but not that it is binding *per se*. For example, while one single decision by the higher courts could establish a precedent in common law, it cannot in civil law (with some minor exceptions). Second, the civil law judge looks first at legislation and only uses precedent to supplement it; on the contrary, the common law judge will look at precedent as a primary source of law.[91]

As to the admission of an appeal by the highest courts, there is no formal civil law *writ of certiorari.* However, most jurisdictions rely on procedural rules that can be used to exercise some control and limit access. For example, in German law, access is subject to fundamental importance in principle (*grundsätzliche Bedeutung*), with some variation in constitutional law appeals. At the same a recent reform of the German Code of Civil Procedure has limited appeals in civil cases to disputes exceeding a certain amount aiming at cleaning backlogs.[92] Italy and Spain accept appeals to their constitutional courts but conditioning admission on merits. Evidently a heavier workload tends to be correlated with a stricter interpretation of merits or fundamental importance. A lighter workload provides an appropriate background to broader assessment of merit.

Another example is Japan where a discretionary appeal system is adopted. Based on the reasons for appeal, civil cases are divided into two categories: those that automatically have the right to appeal and those that must obtain the Supreme Court's permission

[90] *See* Baudouin (1974).
[91] Id.
[92] In 2002, a reform of the Code of Civil Procedure limited appeals in civil cases to disputes exceeding 20,000 Euros effective up to December 2011 (EGZPO [Act to Introduce the Code of Civil Procedure], section 26, paragraph 8). The number of appeals has dropped significantly as a consequence.

in order to appeal.[93] Similarly in criminal actions, a distinction is made between cases that are automatically appealable and those that are subject to the Supreme Court's discretion.[94] The Supreme Court decides whether or not to hear an appeal in all discretionary cases, such as those seeking unification of the interpretations of law, those without precedents interpreting the law, and those causing changes in the interpretations which have already been established by precedents. Like the *certiorari* system in the U.S., this mechanism is designed to give the Japanese Supreme Court the power to adjust its own caseload, and therefore to prevent the flooding of cases into the Court. Nevertheless, the system has not been very successful in deterring congestion.[95]

South Korea has faced the same challenge. In the past, all appeals to the Supreme Court would have acquired permission to be reviewed at the Supreme Court. This system, being criticized for invading the constitutional right to trial, was abolished in 1990. However, to reduce the burden of the Supreme Court from unreasonable or unnecessary appeals, in 1994 the congress adopted a new system which limits appeals to the Supreme Court. It allows the Supreme Court to dismiss an appeal without trial when the cause of appeal does not include significant violation of law (Constitution, acts, regulations, and orders), and, even though violation of law is a cause for appeal, when the cause itself is unreasonable, when it is irrelevant to the original verdict, or it does not have any influence on the original verdict. Furthermore, under this system, the Supreme Court is allowed to not provide reasons in the decision when the appeal is dismissed for the grounds above. Having been challenged, the Constitutional Court of Korea concluded in 1997 that this new system is constitutional because the right to trial under the Constitution does not require the Supreme Court to hear and review every appeal. The Court further explained that one of the important roles of the appeals system is to reasonably distribute the limited legal resource and this decision

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[93] *See* Articles 312 and 318 of the Civil Procedure Code (民事訴訟法).

[94] If the reason for appeal is listed in Article 405 of the Criminal Procedure Code (刑事訴訟法), the appellant only needs to file a "Petition for Appeal," whereas if the reason for appeal is not listed in Article 405, the appellate must file a "Petition for *Acceptance of* Appeal" under Article 406. Article 405 only allows the appeal of decisions which are violations of the Constitution or contradictory to higher courts' precedents.

[95] *See* Law (1989).

belongs to legislature. At the same time, this system is meeting the purpose by respecting the dignity of the Supreme Court as the highest court and by providing an objective and consistent standard over legal interpretation.[96] Furthermore, the Trial of Small Claims Act limits appeals to the Supreme Court of claims smaller than a certain amount.[97] The Constitutional Court of Korea unanimously concluded in 2009 that the act does not unconstitutionally invade the petitioners' right to trial. [98] The court said that, in the absence of special circumstances, it is within the legislative's discretion whether to allow all claims to appeal to the Supreme Court. Also, the Court explained that the limited legal resources of the Supreme Court should be invested for more serious and complicate cases and, therefore, the act aims to resolve small claims efficiently. It does not treat the petitioners unreasonably or unconstitutionally.[99] However, despite these devices to limit appeals to the Supreme Court, huge amounts of appeals are presented and reviewed by the Korean justices.

(B) THE CONTEXT IN LATIN AMERICA

The problems encountered by the Brazilian Supreme Court are not unique to the Latin American context. The absence of formal *stare decisis* and a mechanism of *certiorari* induced creative approaches in the region much the same way as in Brazil. To some extent, *súmula vinculante* and *requisito da repercussão geral* are Brazilian legal inventions, but they can be understood better in the context of other similar developments in Latin America.

The doctrine of "attenuated obligation" (*obligatoriedad atenuada*) or "presumption *juris tantum* of obligation" (*presunción juris tantum de obligatoriedad*) was developed in Argentina. Formally speaking there is no vertical mechanism of precedent.[100] However, through an evolving process of interpretation, the Supreme Court of Argentina has created a doctrine of effective vertical precedent. Beginning in 1948, the Court asserted its authority as authoritative interpreter of the Constitution, and announced that departures from

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[96] Constitutional Court (Const. Ct.), 1997 Hun-Ba37, Oct. 30, 1997 (S. Kor.)
[97] Article 3 of the Korean Trial of Small Claims Act. The amount is 10,000,000 Won (approximately USD 9,000).
[98] Constitutional Court (Const. Ct.), 2007 Hun-Ma1433, Feb. 28, 2009 (S. Kor.)
[99] Id.
[100] *See* general discussion by Legarre and Rivera (2009).

its interpretation without contesting its foundations amount to contempt of that authority.[101] Later, the Court stated that for a deviation or departure to be valid, the lower court should provide the new legal arguments that justify such action.[102] In 1985, the Supreme Court eventually consolidated its current doctrine and held that although the Court's judgments are not strictly legally binding in analogous cases, inferior courts have the duty to abide by these judgments, unless the departure is justified by a new legal argument.[103] As a result, although the Argentinean approach differs from the strict binding obligation established by the doctrine of *stare decisis*, the Supreme Court was more successful in imposing its vertical hierarchical power absent for so long in Brazil. More recently, the Court expressed that compliance with binding precedent assures "equality before the law, which mandates that analogous cases are given an equal solution" even if there is no formal law establishing such binding precedent.[104]

A similar pattern can be found in Colombia. While the Constitutional Court creates precedent through its authoritative and binding constitutional interpretation *erga omnes*, the Supreme Court faces the standard problem of an absence of a formal *stare decisis* doctrine.[105] The Supreme Court uses the "probable doctrine" (*doctrina probable*) as a flexible method to unify its jurisprudence and therefore create some effective precedent. An 1887 law stated that "in doubtful cases, the judges will apply the most probable doctrine. Three uniform decisions of the Supreme Court, as a cassation tribunal, on the same point of law, constitute the most probable doctrine."[106] This statement was further developed by new laws in 1889, 1890 and 1896.[107] Recently, the

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[101] *Santin, Jacinto c. Impuestos Internos* (1948).
[102] *Cesar Balbuena* (1981).
[103] *Ceramica San Lorenzo* (1985).
[104] *Bussi* (2007).
[105] *See* general discussion by Bernal Pulido (2008).
[106] Article 10, Law 153 (1887).
[107] Article 4, Law 169 (1889) set forth that "three uniform decisions of the Supreme court, as a cassation tribunal, on the same point of law, constitute the probable doctrine, and the judges could apply it to analogous cases, which did not prevent the court from varying de doctrine in case it determines that the previous decisions are erroneous." In this last modification, judges were provided with the discretion whether to apply or not the probable doctrine. Later, Article 371, Law 105 (1890) modified the case number requirement stating that "it is legal doctrine the Court's interpretation of the same point of law in two uniform decisions. It also constitutes legal doctrine the

Constitutional Court has confirmed the "probable doctrine" and reiterated the binding nature of the precedents of the Supreme Court established under such doctrine; it also held that judges of lower courts, when departing from the "probable doctrine" established by the Supreme Court, must "clearly and reasonably explain the legal basis to justify such decision."[108]

Equally in Chile, only the Constitutional Court creates formal precedents given the authoritative and binding *erga omnes* constitutional interpretation. The Supreme Court engages in concrete constitutional review (while the Constitutional Court exercises abstract review), but the decisions are only binding *inter partes*. This division of labor in constitutional review has raised serious concerns and diluted the strength of precedent in Chilean law.[109]

In Venezuela, the Constitutional Chamber of the Supreme Court has the power to issue a binding precedent *erga omnes* in the context of abstract and concrete (*amparo*) constitutional review. Lately, the Chamber extended such power to judicial decisions by other courts when in contradiction with the Constitution. Such significant power is not shared by the Cassation Chambers of the Supreme Court.[110]

In Mexico, decisions of the Mexican Supreme Court are regularly cited by lower courts.[111] Consistent rulings that have precedential weight are known as *jurisprudencia obligatoria*. There are also Mexican Supreme Court decisions that do not have full precedent value, named *tesis aisladas*, but they have persuasive authority.[112] The precedent established by *jurisprudencia* is accepted once there are five consecutive and consistent decisions on a point of law by the Supreme Federal Court or federal collegiate courts. Before 1951, following the civil law tradition, *jurisprudencia* had no

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pronouncements that the Court itself makes in two uniform decisions to fill the gaps that occur, forced by the necessity that the issue given does not remain unsolved for the lack of appropriate laws for the case." Following this, Article 4, Law 169 (1896) endorsed the 1889 approach, turning the "most probable doctrine" into what today is known as "probable doctrine."

[108] Sentence C-836, Constitutional Court of Colombia (2001).

[109] *See* Friedler (2000).

[110] *See* Brewer- Carías (2006).

[111] *See* Butte (1974).

[112] For more on the Mexican system, see Zamora et. al. (2004).

constitutional basis. However, several constitutional amendments changed the situation.[113] The legal implications are that only federal courts can issue binding decisions and these binding decisions refer to the interpretation of the Constitution, federal and state statutes, and rulings and international treaties. Finally, statute laws passed by Federal Congress are the instruments that define the terms under which binding legal decisions can be produced. These three aspects are part of the current constitutional system of binding legal decisions in Mexican law.[114]

Supreme Courts in Latin America have developed legal doctrines to decline appeal in the absence of formal *certiorari*. The Supreme Court of Argentina declines extraordinary appeals if the cases lack sufficient federal grievance or the issues raised prove to be unsubstantial or devoid of significance. The decision to invoke this refusal must be supported by the majority of justices. However, such doctrine is not immune to criticism even after its constitutionality has been explicitly recognized by the Court.[115] This doctrine has been a method used by the Court to control the

[113] Article 107-XIII of the Constitution was amended in 1955 to establish that "statute law shall determine the terms and cases in which the *jurisprudencia* from Federal Judicial Branch Courts is binding, as well as the requirements for its modification." In 1967, this rule was subsequently transferred to Article 94 of the Constitution with an amendment that sought to clarify the kind of norms that could be the object of *jurisprudencia*: "Statute law shall determine the terms in which the *jurisprudencia* from Federal Judicial Branch Courts on the interpretation of the Constitution, federal and local statutes and rulings, and international treaties entered into by the Mexican State is binding, as well as the requirements for its interruption and modification."

[114] *See* Serna de la Garza (2009).

[115] Critics emphasize the conflict that exists between the "doctrine of arbitrariness" (*doctrina de arbitrariedad*) and the "doctrine of institutional gravity" (*doctrina de gravedad institucional*) and the Supreme Court's denial mechanism. Through the "doctrine of institutional gravity," the Court made up for the lack of any admissibility requirement in an extraordinary case. The base of the argument is that extraordinary appeal deals with the Constitution, hence it is of extreme institutional gravity. Likewise, the Court under the "doctrine of arbitrariness" reviews sentences of lower courts that might lack sufficient legal basis. Critics of the denial mechanism suggest that Court now declines cases without having to base its decision on sufficient legal grounds, and therefore violates the doctrines previously recognized. The Supreme Court has recently recognized the constitutional validity of the denial mechanism (through Articles 280 and 285 of the Civil and Commercial Procedure Code) because it allows the Court to perform more effectively its mission of safeguarding the Constitution by exercising its extraordinary jurisdiction more successfully in cases of transcendental importance. *See* general discussion by Sbdar (2008).

large amount of appeals that are filed every year. The Argentinean *certiorari* has been compared to the U.S. *certiorari*; despite the fact that both procedural mechanisms are grounded on the sound discretion of the Court, the American version is a mechanism that grants access to the Court, while the Argentinean version is a mechanism used to deny access to the Court.[116]

A Colombian *certiorari* has also recently been developed. Until 1996, appeals could only be rejected by the Supreme Court if they failed with some procedural rules. There was no procedural discretionary mechanism that allowed the Court to refuse admission of appeals once the cases met all the formal requirements. After 1996, discretion in selecting cases has been progressively granted with the aim of reducing congestion and delays.[117] A similar approach has been largely taken by the Constitutional Court.[118]

Mexico, Chile and Venezuela have developed their own procedural rules to regulate admissibility of appeals to the Supreme Court or the Constitutional Court (for Chile). For example, in Mexico, appeals to the Supreme Court have to be of general interest and relevant (*criterio de importancia y transcendencia*). These rules of extraordinary appeal are usually less generous than for other appeals, but they have largely failed in containing the dockets of these courts.[119]

IV. LAW AND ECONOMICS OF PRECEDENT AND CERTIORARI

[116] *See* Bianchi and Legarre (1993), Egües (1993), Gelli (1994) and Rojas (2008).

[117] Article 16, Law 270 (1996). Article 7, Law 1285 (2009) added "the cassation chambers [of the Supreme Court] will act according to their specialty as cassation tribunal, being able to select the decisions that are going to be subject to a judgment, for the purpose of unifying the jurisprudence, protecting constitutional rights and controlling legal decisions." As a result, this addition provides the three specialized chambers of the Court (civil, criminal, and labor) with the option of selecting the sentences upon which they decide to cast judgment; thus, rejecting the admission of sentences not selected for review. The constitutionality of these provisions was confirmed by Sentence C-713 (2008) of the Colombia Constitutional Court.

[118] *See* general discussion by Guayacan (2010).

[119] *See* Zamora et. al. (2004) as well as Friedler (2000) and Brewer-Carías (2006).

(A) THE ECONOMICS OF PRECEDENT

Legal economists have provided for a rational theory of precedent. An earlier literature assessed the extent to which precedent improves the overall efficiency of the legal system. This approach is known as the efficiency hypothesis of the common law. The controversial thesis is associated with Judge Posner who defended that the doctrines in common law provide a coherent and consistent system of incentives which induce efficient behavior.[120] In this context, precedent is instrumental in guaranteeing and achieving efficiency. The efficiency of the common law generated discussion among legal economists quite early in the law and economics literature. According to some, efficiency is promoted by the prevalence of precedent (more efficient rules are more likely to survive through a mechanism of precedent).[121] However, this argument has faced serious challenges. For example, even if judges are ultimately efficiency-seeking, precedent and overruling must be balanced in an appropriate way. A judicial bias might distort the law in the short run but at the same time provide the mechanism to improve the law in the long run, depending on critical elements of the evolution of the common law.[122]

Precedents therefore constitute a fundamental aspect in explaining the evolution of a legal system. They have a public good nature which is likely to imply that they are not produced in the most efficient manner (since courts do not internalize future gains derived from a particular precedent much the same way judges do not internalize external gains from producing judicial opinions).[123] Presumably it is true that bad rules are challenged more often than good rules, so naturally court intervention through a mechanism of precedent could improve the overall quality of the law. However, this line of reasoning is not without problematic shortcomings.[124] In certain contexts, precedent could bias legal rules against efficiency.[125] Precedent certainly generates path dependence that could undermine the process of evolutionary efficiency.[126] Strong

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[120] *See* Posner (1972).
[121] *See* Rubin (1977), Priest (1977), Goodman (1978) and Terrebone (1981).
[122] *See* Gennaioli and Shleifer (2007a & 2007b).
[123] *See* Landes and Posner (1979).
[124] *See* general discussion by Garoupa and Gómez (2011 & 2012).
[125] *See* Hadfield (1992).
[126] *See* Hathaway (2001).

precedent could be socially valuable if lower court judges are significantly biased.[127]

Not surprisingly, legal economists have turned their attention to the establishment and evolution of precedent.[128] There are significant economic advantages and disadvantages to adhering to a principle of absolute precedent that have been recognized by legal economists.

The advantages of absolute precedent listed by the economic literature are the following:

(i) It provides for a substantial reduction of legal uncertainty since the outcomes are predictable, hence reinforcing the stability of the law. Legal certainty is important for business transactions and social interactions since it reduces transaction costs. By making law enforcement easier to predict and understand, it enhances legal compliance since it reduces the incidence of behavioral mistakes;

(ii) It promotes equality under the law since "like cases are treated alike" (legal fairness). The outcome of a particular litigation no longer depends on the individual judge or on a particular court. It reduces risk exposure and asymmetric treatment of identical business transactions or social interactions;

(iii) It favors competent adjudication for different reasons. First, an absolute precedent enhances cognitive effectiveness for lower court judges. Second, it reduces error when judges are not experts in a particular area of the law. Third, due to the fact that accurate decisions are less likely to be made in isolation, judicial quality is enhanced;

(iv) It induces a substantial reduction of workload for the court system (by helping the formation of convergent expectations across parties) and time consumed in adjudication (decisional effectiveness). Therefore, it reduces frivolous lawsuits and favors higher settlement rates.[129]

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[127] *See* Miceli (2009) and Anderlini et. al. (2011).
[128] *See* Landes and Posner (1976), Heiner (1986), Kornhauser (1989), von Wagenheim (1993), Fon and Parisi (2003), Deporter et. al. (2005), Fernandez and Ponzetto (2011), and Baker and Mezzetti (2010).
[129] *See* Che and Yi (1993).

At the same time, the economic literature has focused on noteworthy disadvantages, namely:

(i) Absolute precedent can be the source of systematic judicial error, in particular when change in values and in context are significant. Improvements in legal technology are frequently disregarded in a system with absolute precedent, therefore precluding the courts from benefiting from new advances. When courts have imperfect decision-making due to complex fact-finding and specificity, they are subject to less external monitoring if precedents cannot be challenged;

(ii) It reduces flexibility to correct wrong decisions or internalize specific biases;

(iii) It promotes and helps the ossification of case law, hence reducing the possibility of legal developments and enlarging the gap between law and society;

(iv) It induces serious costs borne by lower court judges when trying to justify departure from precedent. These costs are more significant when the style of reasoning (*ratio decidendi*) is unclear or less transparent.

An economic analysis that recognizes important benefits and costs associated with absolute precedent indicates that a more flexible approach is closer to an optimal institutional design. In fact, if we ponder the advantages and disadvantages identified by legal economists, it is likely that the current legal understanding of *stare decisis* is more efficient than the notion of absolute precedent.

There is no comprehensive economic analysis of precedent in civil law jurisdictions.[130] An immediate observation is that judicial precedents in civil law systems are less likely to satisfy the conditions for efficiency than a flexible *stare decisis* given the need for the highest court to persuade lower courts. However, a more systematic analysis reveals the complexity of the problem.[131] The rate of litigation, the repetition of cases, and the preferences of the higher and lower courts shape the process of establishing

[130] A notable and significant exception is Fon and Parisi (2006).
[131] Id.

judicial precedents that could be efficient under certain circumstances. Unfortunately, it is difficult to assess the extent to which such circumstances are actually satisfied.

(B) ECONOMICS OF CERTIORARI

Legal economists have provided for an economic analysis of the *writ of certiorari* in the context of regulating appeals.[132] The literature seems to conclude that some form of procedural rules to limit access to the highest court is economically justified.

The arguments favorable to such institution include

(i) The court can focus on the relevant cases rather than wasting time on weak cases since there is an earlier sorting out of merit which is less costly in nature;

(ii) It reduces waste of resources on frivolous appeals since parties anticipate they are unlikely to pass the merit threshold to be admitted;

(iii) It promotes expediency in case law in two ways. For those cases that are not admitted into court, it clarifies the obligations of each party at an earlier stage. For those cases that are admitted into court, the backlog is minimal and so they can be decided in due time.

At the same time, the economic arguments against *certiorari* are:

(i) Some legal errors might not ever be corrected because the court does not reflect on them sufficiently when sorting out admission. However, the appealing parties are under pressure to expose legal errors in a more transparent and consistent way in order to convince the court that their case passes the merit threshold for admission;

(ii) It increases group pressure costs to persuade the acceptance of the appeal. Such effect is likely to make the earlier stage of an appeals process more costly;

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[132] *See* Shavell (1995, 2006 & 2010).

(iii) It enhances strategic judicial behavior on case selection to mold decision-making in the court. Judges could use case selection to forge coalitions, reveal preferences or avoid difficult situations.

Evidently some form of *certiorari* is efficient for the reasons explained convincingly by legal economists. The assessment however cannot escape the details. One needs to understand the behavioral incentives provided by the court's internal bargaining with respect to admission of an appeal. Inevitably it will depend on the extent to which lower courts do a good job in avoiding gross legal errors. At the same time, the court will be more exposed to external pressures which could potentially create some waste of resources in lobbying and persuasion. Therefore the mechanisms by which a court deals with external pressure are relevant in this context. It is likely that a court largely made of "recognition" judges (such as in the common law world and in Brazil) reacts in a different way than a court largely relying on career judges (as in most civil law courts). Consequently we cannot understand economically a particular form of *certiorari* without recognizing the institutional context.

V. DISCUSSION OF THE BRAZILIAN CASE

Both precedent and *certiorari* generate costs and benefits as the law and economics literature has recognized. Generally speaking, we have seen how a flexible precedent is more adequate than absolute precedent and no precedent rules. A mechanism of *certiorari* is efficient if it allows the court to focus on the more meritorious cases without imposing a burden in terms of legal errors by lower courts.

The Brazilian form of precedent, the mechanism of *súmula vinculante,* has some particular distinctive characteristics. In a direct comparison with the American *stare decisis*, it is enforced in a more abstract context. Thus we can say it provides for a more flexible mechanism of precedent, but is potentially applicable to a larger set of situations (for example, even when state laws are not directly being litigated). It has also a broad enforcement, not just upon lower courts, but also in reference to the federal, state and municipal administrations.

The advantages from an economic perspective are quite standard: enhancement of rule of law, reduction of frivolous claims, and improvement of judicial decision-making. Two aspects deserve specific attention; court creativity and reinforcement of court hierarchy.

When lower courts are creative and want to depart from precedent, there is a cost in terms of developing legal argumentation. For each individual case, an abstract approach presumably generates a less costly method of departure from precedent than a concrete approach since it should be easier to establish the necessary differences under the latter than under the former. However, an abstract approach potentially applies to a more diverse set of situations and cases. Therefore, it is not clear which system generates more costs.

The reinforcement of court hierarchy has structural legal properties that are attractive from a law and economics perspective. The Supreme Court is the appropriate venue for the complex legal discussions without damaging legal certainty. The political dimension of judicial lawmaking is more effective if supervised by the Supreme Court, rather than left to confusing and opposing decisions by the lower courts, particularly in relation to multiple claims filed by different parties but similar in challenging the same substantive law. Nevertheless, the cost of "verticalizing" the court system increases if lower courts or if the administration rebel against the Supreme Court. Such cost is not significant when a legal system is already reasonably "verticalized" as in the U.S., but could be important in a legal system more "horizontalized" as in Brazil.[133] The response of the lower courts and of the administration to the *súmula vinculante* should determine the extent to which the process of reinforcement of court hierarchy is excessively costly. The evidence of the last four years confirms a significant collaboration by lower courts beyond the standard rhetoric.[134] The implementation of these new mechanisms has required much dialogue between the lower courts and the Supreme Court. Such dialogue included meetings[135] and the creation of a

[133] In reference to absence of rigid precedent constraining lower courts.

[134] *See* Arantes (2005) for the argument against limiting the creativity of the lower courts..

[135] Representatives of the federal and state appellate courts, as well as higher courts, gathered in the seminar *Repercussão Geral em Evolução*, organized by

virtual forum on the internet[136] to directly connect courts to talk about the practical management problems in the implementation of the general relevance test. This interaction is particularly useful to solve common problems and to inform the Supreme Court about multiple claims on the same subject matter on the lower courts' docket. As explained before, when a case passes the relevance test, lower courts must hold similar cases while waiting the Supreme Court decision. Therefore, it is important to map the most numerous similar cases so that the Supreme Court can list the case for hearing with priority to disburden lower courts' dockets from the most pressing cases. Indeed, lower courts apparently have incentives to participate and dialogue in the implementation process of the relevance test. One incentive is to influence how to achieve the most efficient proceedings to manage this new mechanism. Most importantly, however, seems to be that a potential lack of cooperation would end up in basically shifting the burden of heavy caseload of repetitive cases from the Supreme Court to lower courts, without addressing a common goal, which is to expedite justice and address long delays in case disposal before the judiciary.

As with the *writ of certiorari,* the mechanism of *requisito da repercussão geral* restricts appeals, but the management by lower courts (in terms of defining the criteria to establish "similar" claims) reduces the probability of significant legal errors. The Brazilian system seems more appropriate in order to minimize the potential costs of not reviewing all appeals since the lower courts have an active role in choosing relevant cases to be presented to the Court for the *requisito da repercussão geral*; every "modal" case has more chance to be addressed by the Supreme Court under the Brazilian system than under *certiorari.*

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the Supreme Court and the Ministry of Justice in November 2010. *See* STF Press Release *Evolução da repercussão geral foi tema de seminári*o [Evolution of the general repercussion was seminar theme], available at http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=168521 (last visited, April 17, 2011).

[136] *See* STF Press Release *Repercussão Geral*: *Fórum na internet coloca a Corte Suprema em contato permanente com tribunais* [General Repercussion: Internet Forum puts the Supreme Court in permanent contact with tribunals], available at http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=173944 (last visited, April 17, 2011).

At the same time, the introduction of the *requisito da repercussão geral* has not apparently changed political bargaining dramatically. Due to the accumulated backlog from the years before the reform, the Supreme Court decided to admit the *repercussão geral* mechanism in relation to multiple cases even when the Court had already consistently decided the controversy at issue. During the current transition from the previous system to the new general interest mechanism, the Court's choice has been to augment the number of cases with general interest in order to dispose of similar old cases more efficiently. Since the implementation of the general interest mechanism in 2007 (Table four above), the Supreme Court analyzed 363 requests of general importance. Out of these 363 cases, 255 (or 70.2%) were admitted, and only 104 (28.7%) were found inadmissible for lack of general interest.[137] This policy can also be explained by the legal culture embedded in civil law traditions, where there is no practice of political bargaining in the admissibility of cases.

In theory, it is yet unclear how the Brazilian design will affect strategic judicial behavior in the Supreme Court. It could be used to force preference revelation as in the U.S., but at the same time since the "modal" cases are decided by lower courts, there is less ability of the Brazilian Supreme Court justices to actually influence the substance of their dockets than the U.S. Supreme Court justices. The general perception seems to be that not much has changed in terms of behavior in the Brazilian Supreme Court, confirming that the mechanism of *requisito da repercussão geral* has not provided for the ideal framework to develop the standard political bargaining we observe in the U.S. Supreme Court for now. Such perception however can only be confirmed, if so, in years to come. More precisely, when the backlog becomes minimal, and the practice of this new requirement is consolidated.

VI. CONCLUSION

We have discussed two recent fundamental developments in Brazilian constitutional law, the introduction of precedent in concrete review (*súmula vinculante*) and the possibility of rejecting

[137] STF, Portal de Informações Gerenciais, Números da Repercussão (STF, Managerial Information Portal, Numbers of the *Repercussão*), available at: http://stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaRepercussaoGeral&pagina=numeroRepercussao (last visited Feb. 7, 2011).

appeals if they do not satisfy a standard of general interest (*requisito da repercussão geral*). They are significantly different from the American principle of *stare decisis* and *writ of certiorari*. At the same time, they are definitely more substantive than the civil law equivalent institutions. We have argued that, from a law and economics perspective, both mechanisms are likely to enhance the benefits of such institutions (rule of law, legal certainty, reduction of frivolous litigation and of court delays) without significantly incurring the standard costs (legal errors).

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