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Civil Law Versus Binding Judicial Precedent: Dialogues with Academics from (Latin) America and Europe*

El *civil law* frente al precedente judicial vinculante: diálogos con académicos de América Latina y Europa

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Abstract: This paper addresses the binding judicial precedent. The methodology used for this purpose was the semi structured interview, and a total of thirty-two academics, from ten countries in Latin America and Europe, participated therein. The results are structured around arguments for and against case law as a theoretical standpoint; to describe the behavior of apex courts and lower courts in relation to precedents; and finally, to know the roadblocks that prevent a proper application of binging precedents.

Keywords: Judicial precedent, precedent application, precedent in civil law, precedent in common law

Resumen: El presente trabajo aborda el tema del precedente judicial vinculante. Para su ejecución, se usó como metodología la entrevista semiestructurada, participando de ella un total de treinta y dos académicos de diez países de América Latina y Europa. Los resultados se estructuran en torno a los argumentos a favor y en contra del precedente como posición teórica; a narrar cómo se comportan los tribunales vértice y el resto frente a los precedentes; y, finalmente, a conocer los obstáculos que impiden seguir correctamente los precedentes.

Palabras clave: Precedente judicial, seguimiento del precedente, precedente en el derecho civil, precedente en el *common law*

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It is surprising the that the civil law tradition refrains from adopting a precedent system, given that -in practice- it simply reflects the civil law tradition from a dynamic point of view. The civil law system appears to uphold core legal values at the moment of creating the law, but fails to maintain them when it comes to its application.

Alberto Garay

It is vitally important that judges are independent and uphold the law. But what is the law? From a civil law perspective, the law is created by the legislature, not by judges. Judges are bound by what the legislature enacts —not by what other judges have decided.

Morritz Brinkmann

I. INTRODUCTION

Traditionally, comparative studies have emphasized the distinctions between *common law* and *civil law* systems (Taruffo, 2009), particularly regarding the central role of court decisions in the former and legislation in the latter (Dainow, 1966-1967, pp. 423-427). Appeals systems clearly reflect such differences. In *common law* jurisdictions, it is about ensuring compliance with judicial precedents; while in *civil law* systems, under the French[1] model, the cassation appeal aims at ensuring that statutory law is duly enforced through political control over the judiciary (Mosquera & Maturana, 2012, p. 289). The Spanish version of the cassation appeal, later adopted by Chile, was originally designed with the dual purpose of protecting both the *ius constitutionis* and *ius litigatoris* (Delgado, 2009, p. 351).

Notwithstanding the above, the idea of a convergence between the two major Western legal traditions has—for some time now—become

1 A model that, in contrast, has been deeply questioned in terms of its purity under Professor Nieva's innovative approach (2020, pp. 1-17), who proves the British influence on the French model and, finally, claims for a more uniform model that breaks away from that traditional distinction, in pursuit of a new and fairer mechanism.

mainstream (Chase & Walker, 2010; Romero, 2004). What matters for the purposes of this research is that, due to such convergence, case law is playing an increasingly significant role in the continental European tradition. (Legare & Rivera, 2006, p. 110). This means, specifically, that this tradition is incorporating binding precedents to a certain degree. Available literature confirms that this is actually happening in some *civil law* countries, and this is supported by already classic studies, *e.g.* the investigation led by MacCormick y Summers (1997).

However, despite the considerations outlined above, the debate over the incorporation of binding judicial precedents remains unresolved within the continental European context. Clear evidence of this is that the authors of the current study hold different views on the matter. For this reason, this study seeks to gather opinions and experiences from legal experts from around the world. In this context, we chose to engage in dialogues with academics, as they are typically the ones who produce the scientific inputs to accurately distinguish the features of each legal system. Thus, we decided it would be best to further work with the opinions of other operators independently.

Now that the problem has been raised, the objective of this study can be presented. It aims at presenting the points of view and experiences of thirty-two scholars from ten countries in Latin America and Europe in relation with the binding judicial precedent. A non-probability and purposive sampling method was used in this study (Rodríguez & García, 1996, pp. 135-140) selecting participants from Germany, Argentina, Chile, Colombia, El Salvador, Spain, Italy, Peru, Dominican Republic and Venezuela. It goes without saying that these opinions not necessarily represent the full range of opinions within their local legal communities; however, they represent particularly authoritative voices, as those interviewed are recognized experts on these issues in their respective countries (Patton, 2015).

The participants were asked to share both their opinions and experiences[2]. Concerning their opinions, the dialogue focused on their personal views on the binding judicial precent. The dialogue on their experiences focused on two aspects: first, the degree of compliance with the judicial precedents by the apex court(s) who established them in the first place; and, second, the degree of compliance with such precedents by all other courts in the corresponding country.

The results of this study are presented in the next four sections. The first section clarifies the meaning of two fundamental concepts of this study. The second one gives further details on some research methodology

2 Using the method proposed by Litchman (2006, p. 112), who recommends that the interviewed persons should be listened using their own language.

aspects. The third one systematizes the results of the dialogues, *i.e.* the views and experiences of the participants. The last section offers some conclusions.

II. TWO ESSENTIAL DEFINITIONS

To better understand the current paper, it is necessary to clarify the meaning of two concepts that have been essential for this research: one of them is "binding judicial precedent", the other one is "apex courts".

II.1. Binding judicial precedent

Overall, a judicial precedent refers to the legal reasoning that has been used to decide a previous case, which may serve as a guide for adjudicating present cases (Duxbury, 2008; Llewellyng, 1989).

A judicial precedent is considered binding, when the courts adhere to it even in cases where they believe it does not produce the most correct outcome[3]. When this situation is achieved, it is possible to affirm that judges are acting "precedential" manner, as opposed to a "preferential" one (Couso, 2007, pp. 147-172).

To elaborate on these ideas, it is necessary to pay attention to the several degrees of adherence to precedents identified by Peczenik (1997), which were considered for research organization purposes, when writing this paper. According to his study, the following degrees of adherence are identified, from the strongest to the weakest: a) formal bindingness: a ruling that deviates from a precedent is illegal and, thus, may be overturned through an appeal process; b) *prima facie* bindingness: it is legal for a ruling to deviate from the precedent under good legal grounds, but it may be reversed through an appeal; c) additional supportive bindingness: the precedent provides solid argumentative weights; and d) merely illustrative bindingness: the precedent is merely referential (pp. 461-479).

The first two degrees refer to a strong adherence to the judicial precedent, and only under these two approaches precedents are considered to be binding.

The last two degrees suggest a weak adherence to judicial precedents; therefore, they are not binding.

In this context, it is worth mentioning that this study understands the concept of judicial precedent as a form of legal reasoning issued by an

3 Pulido (2018) offers a similar formula to explain the concept of binding judicial precedents. In this regard, he argues that, for a precedent to be considered binding, legal actors "must enforce the decisions or act in accordance with JP [judicial precedents], regardless of whether they believe it is the correct course of action" (pp. 109-110).

apex court, which may or may not be followed by the judiciary, without considering the perspective of other stakeholders, *e.g.* administrative authorities or even the citizens (Ferney, 2016, pp. 165-168; Gascón, 1993, pp. 30-38; Waldron, 2012, pp. 3-26).

II.2. Apex Courts

Apex courts are the highest bodies within a given country's judicial system. In other words, they are the judicial entities with the final say in interpreting the law. A legal system may have either one or multiple apex courts. A single apex court exists, when only one court has the final decision on the interpretation of all legal provisions. In contrast, multiple apex courts exist when each of them has the final interpretative authority of a specific area of the law within the legal system.

Five of the ten countries included in the current study have two apex courts. It is the case of Chile[4], Spain[5], Italy[6], Peru[7] and Dominican Republic[8]. One of these apex courts is the Constitutional Court or Tribunal, the highest constitutional body; the other one is the Supreme Court of Justice, the highest judicial authority.

Argentina, El Salvador and Venezuela have a single apex court. In Argentina, the Supreme Court of Justice exercises constitutional and federal jurisdiction, and through the application of the doctrine of arbitrary rulings, it also assumes jurisdiction over matters of ordinary law (Oteíza, 2011, p. 381). In El Salvador, the Supreme Court is the highest judicial authority, with jurisdiction across all legal areas: constitutional, civil, criminal, commercial, labor, agrarian and contentious administrative law[9]. In Venezuela, the Supreme Court is divided into specialized chambers to handle different areas of law[10], where the Constitutional Chamber plays a role similar to the one played by the constitutional courts[11].

4 Article 93 of the Political Constitution of the Republic of Chile and article 97 of the Organic Code of Courts. It is necessary to state that the Supreme Court of Chile has also constitutional Powers. It hears amparo actions and habeas corpus petitions (which in Chile are known as protection and amparo actions, respectively), and its rulings cannot be appealed to the Constitutional Court. Therefore, the Supreme Court is the apex court for constitutional matters.

5 Article 123.1 of the Spanish Constitution states that the Supreme Court "has jurisdiction over the entire Spanish territory and is the highest judicial authority for all matters, except for the provisions on constitutional guarantees". Article 161.1, on its part, defines the jurisdiction of the Constitutional Court, the highest authority on constitutional interpretation.

6 Articles 134 and 137, final paragraph, of the Constitution of the Republic of Italy; and article 65 of Royal Decree N.° 12, of January 30 of 1941.

7 Articles 140, 201 and 202 of the Political Constitution of Peru.

8 Article 152 of the Constitution of Dominican Republic provides that the Supreme Court of Justice "is the highest judicial authority". Article 184, establishes that the Constitutional Court's duty is "to ensure the supremacy of the Constitution, the defense of the constitutional order and the protection of fundamental rights".

9 Articles 172 and 174 of the Constitution of the Republic of El Salvador.

10 The Supreme Court is divided into six Chambers: Constitutional, Political-Administrative, Electoral, Civil, Criminal and Social, according to the Organic Law of the Supreme Court of Venezuela.

11 Article 336 of the Constitution of Venezuela.

Colombia is a special case, as it is the only country with three apex courts. The Constitutional Court, the Supreme Court of Justice and the Council of State. Such entities are located at the top of the constitutional, judicial and contentious-administrative jurisdiction, respectively (Sarmiento, 2012, p. 67).

Finally, Germany has six apex courts: the Federal Constitutional Court, Federal Court of Justice, Federal Administrative Court, Federal Fiscal Court, Federal Labor Court and Federal Social Court. They are the highest authorities for constitutional, ordinary (civil and criminal), administrative, financial, labor and social maters, respectively[12].

Despite differences in their composition, form, number of judges, methods to inform their decisions and other aspects, the key point to emphasize is that, ultimately, there is a court that delivers a final decision in each specific case. From there, we may observe whether other courts treat that decision as a precedent to be followed (Núñez, 2018, pp. 53-55).

III. METHODOLOGICAL ASPECTS

The current research used a three-stage methodology (Valles, 2007, pp. 53-58). The first stage aimed at preparing the dialogues. At the second one, the dialogues with the scholars took place. At the third stage the authors focused on systematizing the views and experiences previously gathered. Further details of each stage are given below.

III.1. Dialogue preparation stage

The dialogue preparation stage was conducted in three steps. The first one was defining the questions to be asked to the scholars. A draft was prepared, and it was then reviewed by experts. The final version was written considering their feedback and proposals.

The method chosen was the semi-structured interview (Flick, 2007, pp. 101-110). The questionnaire had eleven questions, grouped in four items.

The second step involved preparing the informed consent document to be signed by the participating scholars (Troncoso-Pantoja & Amaya-Placencia, 2017, p. 330). The document contained three key questions that had to be answered by the participants. First, whether they agreed to take part in the study; second, whether they consented to anonymity; and third, whether they allowed the conversation to be audio recorded (Robles, 2011, p. 44). Only one participant declined to be recorded,

12 Articles 92, 93 and 95 of the Basic Law for the Federal Republic of Germany.

and—in that case—notes were taken instead. All the other participants consented to audio recording.

The third step involved selecting and contacting the participating scholars. Considering the resources allocated to the project, it was determined that interviewing three to four experts per country was the most viable approach (Hernández *et al.*, 2010, pp. 176-182). The selection criteria were: first, participants were required to have published work on judicial precedents. If such information was not available, their teaching experience had to be closely related to the subject. The selection process followed the criteria recommended by Cortazo and Schettini (2016).

III.2. Dialogue implementation stage

The financing for the project that resulted in this paper was allocated in 2017 and its implementation had to start in April 2018. Within this framework, the participants were interviewed between September 17, 2018 and July 27, 2020. It was decided that the interviews had to be conducted in person, which was possible except in the case of Venezuela.

As indicated above, it was determined that interviewing three to four academics per country was viable, and this objective was met in most of the cases (Argentina, Chile, Colombia, El Salvador, Spain, Italy, Peru and Dominican Republic). However, it was not possible in Germany and Venezuela, where only two academics could be interviewed.

Last but not least, the participants could indicate whether they preferred to be anonymous and could decline to be recorded.

The name of the participants, their nationality and the date of interview are detailed in the table below.

Table N.° 1. Participating academic experts

Name of participants	Nationality of participants	Date of interview
Alberto Garay	Argentina	September 17, 2018
Alberto Bianchi	Argentina	September 18, 2018
Julio César Rivera	Argentina	September 19, 2018
Pedro Grandez Castro	Peru	January 24, 2019
Christian Delgado Suárez	Peru	January 25, 2019
Abdón Rojas Marroquín	Colombia	February 6, 2019

Mario Cajas Sarría	Colombia	February 6, 2019
Juan Carlos Lancheros Gámez	Colombia	February 7, 2019
Fabio Pulido Ortiz	Colombia	February 8, 2019
César Landa Arroyo	Peru	February 12, 2019
Giovanni Priori Posada	Peru	February 12, 2019
Emilio Urbina Mendoza	Venezuela	May 17, 2019
José Máximo Palacios Bonilla	El Salvador	July 17, 2019
Wilfredo Jovel González	El Salvador	July 19, 2019
Junior Zelaya Flores	El Salvador	July 19, 2019
Rodrigo Hernández Granados	El Salvador	July 19, 2019
Eduardo Jorge Prats	Dominican Republic	July 22, 2019
Alejandro Moscoso Segarra	Dominican Republic	July 23, 2019
José Cruceta Almánzar	Dominican Republic	July 24, 2019
Pablo Bravo Hurtado	Chile	November 20, 2019
Alejandro Vergara Blanco	Chile	December 3, 2019
Jaime Couso Salas	Chile	December 3, 2019
Luca Passanante	Italy	January 21, 2020
Jordi Nieva Fenoll	Spain	January 22, 2020
Javier López Sánchez	Spain	January 23, 2020
Lorenzo Bujosa Vadell	Spain	January 24, 2020
Sergio Chiarloni	Italy	February 11, 2020
Pierluigi Chiassoni	Italy	February 12, 2020
Moritz Brinkmann	Germany	February 17, 2020
Reinhard Bork	Germany	February 19, 2020
Alejandro Romero Seguel	Chile	July 27, 2020
Ronald Chacín Fuenmayor	Venezuela	October 12, 2020

Source: Self-made.

Finally, it is worth noting that the participants reviewed the excerpts containing their statements as included in this paper. To that end, the relevant paragraphs were sent to them via email. This fulfilled the requirement established in the informed consent they had signed and ensured that such lines accurately reflected their views and experiences.

IV. SYSTEMATIZATION OF RESULTS

Results of the dialogues are systematized in this section, *i.e.*, the views and experiences of the participants. As it is known, these opinions were expressed while answering the eleven questions of the semi-structured interview. Both questions and answers are organized, as follows, around five subjects: a) theoretical position *vis-a-vis* the binding judicial precedent, b) apex courts and their own precedents, c) other courts in the country and the precedents issued by apex court(s), d) the mission of apex courts with regard to the legal system and e) the horizon of possibilities for the *stare decisis* doctrine in the corresponding country.

Before presenting the systematized results, it is important to clarify that: this section is limited to reporting the results and, thus, it is essentially descriptive. This means, that the experts' views and experiences are presented without analyzing them or taking a stance on the subject (Valles, 2007, pp. 135-141). They are typically reported literally (text between quotes) or summarizing the participants' words (without suing quotes or italics). The authors only systematized the participants' contributions.

IV.1. Theoretical approaches on the binding judicial precedent

The interview started with three questions concerning binding judicial precedents in general. First, participants were more specifically asked whether they supported or opposed it (Question 1). Afterwards, and regardless of their opinion, they were asked to identify its advantages (arguments in favor) and disadvantages (arguments against) (Questions 2 and 3).

As expected, the academics expressed diverse positions on the subject. In general, Europeans were against it and Latin Americans were in favor. Regardless of their opinion, it is worth noting that the majority of them acknowledged both the positive and negative aspects of the binding precedent. A detailed account of these arguments is provided below.

IV.1.1. Arguments that support binding judicial precedents

One of the most frequently cited arguments supporting the binding judicial precedent is legal certainty (Bianchi, Chacín, Couso, Cruceta, Delgado, Garay, Hernández, Jovel, Lancheros, Landa, López, Moscoso, Palacios, Prats, Priori, Rojas, Urbina). As Bianchi explains, "adherence to a precedent means being able to reasonably anticipate the decision that a Court would uphold in any given similar case". Delgado suggests that there are "plenty of legal actors interpreting the law, the judges, in Peru, Chile, Brazil. This may result in infinite meanings". And he adds: "Due to this interpretive diversity, it is necessary to have Courts that make final decisions, that have the last word, and that establish

the principles that will guide our life in society". Garay connects this idea to the notion of legal predictability, stating: "When the civil law tradition defends the supremacy of the law, it does so based on the exact same reasons or principles" that support the doctrine of case law. Then he adds:

> In our legal tradition, the supremacy of law means that we are not subject to the erratic will of a ruler, judge or legislator, but rather to general norms that are uniformly applied to all citizens or to all classes of citizens referred to in that law.

Jovel applies the same principle to the criminal field, indicating that a behavior "A" classified as a crime in El Salvador should not be treater differently elsewhere. López acknowledges that the legal certainty provided by judicial precedents is good in many ways, since it "enables legal actors to make decisions in the future, and the courts […] know the criteria to be followed". This promotes stability, safety and economic development. In the same line, Rojas suggests that "the legal system or the legal regime may improve if legal actors have—in some way—some certainty concerning the standards attributed to the legal provisions they work with on a regular basis".

A second argument in favor of the judicial precedent is formal equality or justice, based on which similar cases shall be handled in the same way (Bravo, Cajas, Chacín, Couso, Cruceta, Garay, Hernández, Lancheros, Landa, Moscoso, Palacios, Prats, Rivera, Romero). Bravo connects this advantage to a moral duty: "Adherence to judicial precedents is the result of an ethical duty that is common to all justice systems, that is deciding similar cases in a similar way". And he adds: "It is hard to me to think that this principle of 'deciding similar cases in a similar way' could be ignored". Hernández conveys this idea, as follows: "If there is no justice within the judicial decision-making framework, the purpose of the judiciary would be reduced to arbitrarily deciding each specific case, as it pleases". Landa makes an analogy with the role of equality in government law enforcement:

> Enforcing the law is a duty of both the government and the courts. And the courts, in this regard, should ensure that the law is interpreted consistently across individual cases.

Moscoso understands equality in the following terms: "A judge, once he/she has made a decision in a specific case, must apply the same criteria to similar cases". Palacios supports the idea of equality as a principle not only for the drafting of legal rules, but also for their enforcement. Therefore, those responsible for applying the law shall make the same decisions for similar situations.

Predictability of judicial decisions stands in close agreement with the arguments above (Couso, Cruceta, Delgado, Grandez, Hernández, Passanante, Rivera, Romero). In this regard, Cruceta points out that the precedent "makes judicial decision-making more predictable, providing legal certainty and effectiveness to the equality principle". Grandez links this argument to the rule of law: "the rule of law works as a system of rules that must be predictable for citizens […] [the precedent] serves a practical purpose; namely, providing the normativity or predictability that citizens require". Hernández is more emphatic, as he indicates: "You cannot live in a country, where in any situation […] even under similar circumstances […] you cannot predict what is going to be decided". Passanante points out that "it is certainly convenient to follow judicial precedents, as that provides stability to the legal system". Rivera follows the same reasoning to apply the binding precedent to the commercial and fiscal fields, where predictability is essential, even for the proper functioning of the market.

Furthermore, adherence to case law can be seen as a requirement for upholding the rule of law, or even widely, the democratic system (Pulido, Vergara). In this regard, Pulido states:

> The normative or justificatory arguments to establish *stare decisis* are grounded in the *rule of law* […] If anything justifies the existence of public authority, it is its capacity to coordinate individual behaviors. And, in order to coordinate individual behavior, it must ensure a system that produces comprehensible, understandable and enforceable laws for individuals and legal actors. Thus, if anything justifies *stare decisis*, that is the *rule of law*.

Vergara argues that shifting case law or the absence of precedents are the result of anti—democratic practices, as they hinder the consistent application of democratic norms. He adds that if both the rules and the facts remain unchanged, there is no democratic reason for a judge, under a misguided notion of independence, to change what was already decided in a previous case.

The fifth argument in favor of binding judicial precedent is economic in nature (Chiarloni, Couso, Cruceta, Delgado, Priori). In this regard, Chiarloni argues that is good to adhere to judicial precedents "because it helps preventing—in my opinion—unnecessary appeals". Along the same line, Couso observes that, from an economic point of view "the non-observance of precedents is an unnecessary waste of resources". Delgado takes this point further, acknowledging that adherence to binding precedent "discourages bad faith lawsuits". Similarly, Priori suggests that the binding precedent "may discourage lawsuits in cases where the Supreme Court's position is already known", because a

greater legal uncertainty creates more incentives to litigate, even in good faith. Cruceta agrees with this perspective, stating that adherence to case law "would reduce the number of cases that would reach the Supreme Court".

Another argument in favor of binding precedent is that it enhances the quality of the law (Couso, Cajas, Lancheros, Landa, Rojas, Urbina). According to Couso, Lancheros, Landa and Urbina, this occurs because the precedent clarifies the meaning of written law. In this regard, Couso observes that it allows for "the development of thicker and richer case law, which provides the law with a more specific meaning, reducing its level of abstraction in comparison to statutory law". Along the same line, Lancheros indicates that: "Considering the vagueness and ambiguity of [legal provisions], it is necessary for the judiciary to determine the scope of each of these laws". Landa concurs, arguing that: "what we have is a form reasoning that fills any legal gap in the disputed law, and this task is not of mere application, but rather one of creation and complementation".

According to Urbina, the binding precedent "enables an organic set of criteria, allowing judges who serve far from the capital—where federal agencies are typically based—to access the same argumentative tools". Rojas makes a connection between the quality of law and the development of legal science, stating: "The legal field greatly benefits from the judicial interpretation of statutory law, as it gives rise to new studies, methodologies and efforts to systematize the practices lawyers engage in every day".

The seventh argument found is that the binding judicial precedent prevents arbitrary decisions. In this regard, Landa argues that at least some judicial decisions must be binding "to ensure that such [judicial] decisions are not discriminatory or arbitrary".

The last argument considers that the binding precedent is politically appropriate. Priori indicates that "it empowers the Judiciary in a country where—historically speaking—it has not been empowered"[13].

IV.1.2. Arguments against binding judicial precedents

One of the most common arguments against binding judicial precedents is judicial independence (Brinkmann, Delgado, Jovel, Nieva). According, to Brinkmann, "in the *civil law* tradition, laws are created by the legislature and not by judges. Therefore, courts are bound by what lawmakers enact, and not by other judges' opinions". Jovel suggests that the judges "felt that all their efforts to become well trained and to better understand the law could be undermined, when a higher court—one

13 Emphasis added by the authors.

they believed was more likely to be subject to political influences—could overturn their decisions". Nieva indicates that the precedent "could jeopardize judicial independence of lower courts, making them subject to a hierarchical structure that, in my opinion, is incompatible with judicial independence".

Another argument against the binding precedent is the petrification of case law (Brinkmann, Bujosa, Cajas, Garay, Grandez, López, Nieva, Priori, Romero). In this regard, Brinkmann observes that the absence of precedents "ensures a degree of flexibility to judicial decisions, in the sense that the lower courts have always an opportunity to question or disagreeing with the higher courts". This also provides the higher courts with "an opportunity to rethink their decisions". Along this line, Cajas considers that the binding precedent "could kill or maim the creativity of the judges of first instance". Similarly, Garay points out that a caselaw system that does not allow departing from precedent could result in courts that are always lagging behind the progress of society. Grandez agrees with this argument, but tempers it as follows:

> «Some courts may close the discussion and permanently prevent its development. This is always a risk in any legislation—or precedent—based system". López affirms that "no court—whether lower or higher—should be prevented from reconsidering the criteria priorly used for a specific situation".

The third argument refers to the separation of powers, specially between the legislature and the judiciary (Bork, Bujosa, Delgado, Grandez, Landa, López, Priori). Bork refers such idea as follows: "Countries that have written statutory laws, do not need to abide by precedent, because […] the law is already codified in such texts". More directly, Bujosa states that incorporating binding precedent "would mean allowing a non-legitimized entity to intervene in the lawmaking process". Delgado agrees that it would enable the judge to produce norms similar to statutory laws. Grandez brings this argument to the constitutional field, indicating that: "Some courts end up having too much power. This would be a critic to the legitimacy of the stare decisis […]. Important issues——and the Constitution is an important issue—should be decided democratically, which means they should be decided by a representative Parliament".

Landa refines the scope of this argument, stating that: "The fact that judges create law is no longer debated. The real issue now is to what extent they do so and what are their limits", which creates a problem with the separation of powers principle. López supports this argument, indicating that it is not possible "to identify an entity that—at least in the *civil law* countries—has not been democratically elected as a

law-making source". Priori agrees with this argument, but he thinks this is a disadvantage for the judiciary, since it "burdens the Supreme Court with a very high political cost, as it must provide a general solution it was not meant to offer, one that should fall exclusively within the powers of a democratically elected entity".

Another argument refers to the difficulties to apply precedents (Bianchi, Passanante). According to Bianchi, if the judges follow a precedent mechanically, without considering the circumstances of the case, they might end up applying a precedent that is not relevant to the concerning case. Along the same line, Passanante indicates that "an issue may arise when selecting the decision, since this is not a judicial matter, and it is difficult to supervise it".

Another argument against binding precedent is that it can perpetuate incorrect decisions (Garay, Delgado, Rivera, Romero). Garay suggests this only occurs when applying rigid precedent, i.e. precedent that does not allow for justified deviation. Delgado refers to this risk as follows: "It may be the case that a precedent stems from an unfair decision, i.e. the issue should not have been decided with the theory used; or it may originate from an invalid decision". Rivera states that—when it is required to adhere to the precedent, "correcting them becomes much more difficult". Romero offers a more moderate stance: "That does not mean that court decisions are always right. Case law may be absurd, unfair and even arbitrary". However, he understands there is an exit that can serve a democratic purpose: "whenever social tension arises in relation to a precedent, this -in my opinion- facilitates the democratic system, as it opens the door for parliamentary action".

The sixth argument against binding precedent is that it increases the judiciary workload. In this regard, Couso explains that following established case law "means taking judicial activity seriously, i.e. judicial decisions. [Thus, the judges] must seriously consider the legal outcomes of the courts. And that definitely requires harder efforts".

Last but not least, binding judicial precedent is challenged because it increases the power of the judiciary (Cajas, Priori). In this regard, Cajas indicates that "some scholars point out that the discretionary powers [of judges] have increased". From another point of view, Priori considers this increasing power as a disadvantage for the Supreme Court, as "it would become another desirable source of power for politicians, which could undermine its independence".

V. APEX COURTS VIS-A-VIS THEIR OWN CASE LAW

The following questions in the interview focused on the relationship between apex courts and their own caselaw. In particular, we asked

if apex courts followed it (question 4); and then, we asked about the reasons why they followed it (question 5) or why they did not consider it in their subsequent decisions (question 6).

Some academics acknowledged they did not have the studies that would allow them answering accurately. Others mentioned having partial studies, so they had to limit their response to their respective fields. Almost all of them practice law or are members of the Judiciary, whether as judges or as court legal advisors, so they could contribute their experiences. Due to their different backgrounds, their answers were mixed. Most participants indicated that, in general, apex courts follow their own precedents. In contrast, the others stated that they typically decide their cases without considering them. It is clear that such contributions were made regardless of the personal views on caselaw.

In this section, we provide two significant clarifications: the first one addresses the objective of this section. It is not relevant to present the degree of consistency of civil law apex courts when applying their own precedents, as that would require field research, beyond the scope of this study. Instead, our aim is to identify the legal and institutional mechanisms, as well as the reasons that enable or prevent that apex courts from following their own precedents.

The second clarification is a conceptual one. When we refer to apex courts adhering to their own precedent, we mean that they are abiding by *stare decisis*. Abiding by *stare decisis* means applying caselaw except in two circumstances. First, when the circumstances of the present case differ from those of the previous one (*distinguishing*)[14]. Second, when the court deems it necessary to replace an existing precedent with a new one (*overruling*)[15]. These two scenarios justify departing from or withdrawing a precedent, while stare decisis continues being enforced. Therefore, when referring to apex court who fail to follow their own precedents, we mean that they are deciding the cases without adhering to caselaw, and not to situations where they make distinguishing or overruling decisions.

VI. FACTORS THAT CONTRIBUTE TO ADHERENCE TO STARE DECISIS DOCTRINE

One reason apex courts tend to remain consistent with *stare decicis* is that judges are aware of their institutional role (Brinkmann, Rojas, Zelaya, López, Bujosa, Romero, Priori). In this regard, Brinkmann suggest that

14 When using the distinguishing technique, the Court accepts the precedent, but limits its scope of application, establishing a new rule for the circumstances to which such precedent no longer applies (Gennaioli & Shleifer, 2007, pp. 309-328).

15 When overruling a precedent, the court replaces it with a new one (Gennaioli & Shleifer, 2007, pp. 309-328).

shifts in the Federal Court of Justice's opinions are typically not related to personal changes in the judges' views. They "usually see themselves as a body organ". Along this line, Rojas states: "I think this happens, because they talk as a collegial body; that is, they are institutional entities that must adhere to their organizational structure". Referring to the Criminal Chamber, Zelaya indicates there is an awareness that "citizens must have a sense of certainty concerning the case law of the Criminal Chamber of Supreme Court". The Spanish Supreme Tribunal provides an example of awareness of its institutional role. López explains it as follows: "Whenever [the judges] notice there has been contradictions, they meet to establish the case law criteria to be followed".

Bujosa confirms this judicial practice in the following terms: "Over the past fifteen to twenty years [the Supreme Tribunal] has not only ruled on cases, but also approving non-adjudicatory agreements" to overcome contradictions in its interpretation of the law. Similarly, Romero points out: Internal documents of the Supreme Court establish procedures to standardize caselaw, providing evidence of the deliberation undertaken to maintain consistency in rulings on specific matters.

The second reason is to ensure consistent interpretation of the law by all other courts in the country (Pulido, Priori, Lancheros, Cajas). In Pulido's words: "Adherence to its own precedent consolidates caselaw authority. If [the Constitutional Court] abides by its own decisions, those precedents gain greater weight". Priori uses almost the same words, as he observes that "the [Constitutional] Court knows, is aware that it holds significant power […]. If the Court itself does not consider its precedents as binding, they will not be deemed as binding by other court". Likewise, Cajas points out that the Supreme Court and the Council of State consider adherence to precedent "as a tool to ensure their decisions hierarchically". Lancheros understands that apex courts fulfill their mission as follows:

> The existence of an apex court makes adherence to precedent a mandatory requirement. Otherwise, it would be allowed to interpret the law differently in each case, and instead of having a single legal system, we would have as many legal systems as there are judges.

Apex courts also adhere to the stare decisis doctrine for efficiency purposes (Rivera, Bujosa, Bravo). Rivera observes that "from a work-efficiency point of view, it is reasonable to assume that prior decisions—that were consistently decided the same way—were correct, and the same reasoning should continue to be applied". Along the same line, Bujosa points out that the Supreme Court abides by its non-jurisdictional agreements "mainly for convenience". Bravo has the same approach: "It seems to me that in routine cases the Supreme Court maintains uniform

criteria because it basically wants to quickly get rid of cases that do not concern it".

The fourth reason for apex courts to adhere to stare decisis is a normative one (Palacios, Passanante, Chiassoni, Delgado). In the civil field, Palacios explains that article 522 of the Civil and Commercial Procedure Code of El Salvador, establishes that a cassation appeal may be filed against a decision that deviates from three consecutive, uninterrupted decisions that have set a precedent.

In addition, article 524 of the abovementioned Code provides that the rules shall be interpreted in a way that best promotes consistency in judicial decisions, thereby fulfilling the purpose of the cassation appeal. According to Passanante:

> The legislator has artificially strengthened the precedent, in a rather contrived manner. The legislator incorporated into the Civil Procedure Code a rule […] that prevents any *Sezioni Semplici* of the Court of Cassation from deviating from a legal principle established as a precedent by the *Sezioni Unite* of this Court.

Chiassoni confirms the abovementioned statement: "the plenary session is the mechanism that allows standardizing judicial decisions".

Adherence to case law is also supported by specialized professional assistance available to apex court judges (Rojas, López). In this regard, Rojas explains that the Constitutional Court is supported by assistant judges who have been working at the Constitutional Court since its inception, or for the last sixteen or twenty years. These assistant judges collaborate with the permanent magistrates, helping to draft decisions. López reported a similar experience, explaining that the judges of the Supreme Court rely on a team of scholars for advice and information.

Adherence to *stare decicis* is possible thanks to an appropriate technology support (Cajas, Jovel). Cajas explains that the Constitutional Court has launched an artificial intelligence system that allows sorting the decisions on protection of fundamental rights matters. It enhances judicial management, since it allows identifying established precedents on several matters. Likewise, Jovel explains that "there is an office called the Center for Judicial Documentation, which has made a compilation […]. Since the late 90s or early 2000s we have a program called Master Lex", which is managed by this Office and systematizes judicial precedents.

The seventh reason for apex courts to adhere to precedent lies in lawyers' culture (Palacios, Jovel). In this regard, Palacios argues that law students are taught that three consistent and uninterrupted Supreme Court decisions constitute "legal doctrine". They are also taught that even a single ruling

upholding fundamental rights, equality or legal certainty may establish binding precedent. Likewise, Jovel emphasizes that "lawyers tend to invoke precedents. The court must then assess whether they are applicable or not". He concludes that the legal community is increasingly aware of this dynamic and is now demanding the enforcement of caselaw.

Another factor promoting adherence to precedent is the assignment of cases by subject to the corresponding chambers of the apex court. Romero highlights that the Supreme Court has decided in 2019 that the cases will be assigned by subject across its different chambers, aiming at ensuring consistent caselaw.

The ninth factor enabling apex courts to abide by stare decisis is the alignment of precedents with the values of society (Landa, Grandez). In this regard, Landa suggests that it is easier to uphold precedents that are well rooted in society, that have social legitimacy. Similarly, Grandez observes: "I would say that the main reason to uphold precedent is that it is consistent and coherent with the value system".

Apex courts are more likely to adhere to their own precedents when their composition remains stable with judges serving longer tenures. Moscoso indicates that the Constitutional Court adheres to its own precedents because it has been recently established. The same judges have remained in office, and it is hard for a person to change his/her mind in such a short span of time.

VII. FACTORS HINDERING ADHERENCE TO STARE DECISIS DOCTRINE

A reason to depart from the stare decisis is the excessive workload of apex courts (Couso, Hernández, Chiassoni, Prats). Couso emphasizes that it is impossible to select the cases the Supreme Court will hear:

> When there is no ability to filter cases, there is no *certiorari*, the court must decide countless cases […] By contrast, if the court declines to resolve the great majority of cases it receives, then the aim to deliver justice in individual cases becomes meaningless, because all the cases it refuses to hear will be decided by the courts that already heard them.

Emphasizing the multiple tasks of Supreme Court justices, Hernández points out they lack the capacity to follow their own precedents. Furthermore, many of them have also academic duties, thus their workload increases. The purely judicial tasks do not receive enough attention. According to Chiassoni, it is difficult to standardize case law, because the Italian Cassation Court issues around two hundred thousand decisions every year. He adds: "What makes it difficult to handle, is that there are almost no filters, no barriers for appeals that are

filed before the Cassation court. Therefore, we have those huge numbers […] that is the problem". And he concludes that the current judicial system is supported by "the underlying Enlightenment ideal that every individual should have access to the highest judicial level: the cassation appeal". He finishes by stating: "That is a little bit the idea. It remains a powerful idea and, thus, the legal culture […] refrains" to limit access to cassation appeal. Similarly, Prats observes that, "as the number of cases increases, we find more contradictions in the interpretation of the by the different the chambers […] And even one of the chambers has departed form its own precedents".

Another factor hindering or impeding adherence to stare decisis is the number of judges in the apex courts (Chiassoni, Chiarloni). Chiassoni recognizes that it is difficult to deliver consistent decisions because the Italian Casssation Court is comprised by almost four hundred judges with different views. Likewise, Chiarloni notes that court fails to adhere to its own precedent, because there are too many judges in the Cassation Court and each one of them has a different opinion.

The third factor contributing to departures from precedent is related to changes in the composition of the apex court, or in the judges of the chamber or section responsible for deciding a case (Bork, Bianchi, Rojas, Moscoso, Rivera). Bianchi considers this to be the most common reason within the Supreme Court of Argentina. In Bork words, shifts in caselaw often occur because "the composition of the chamber that decided a case has changed: new judges have new opinions". Likewise, Rojas indicates that "Of course, a change of judges plays a role in this situation. Although these changes are gradual, rather than sudden or *en bloc*; it is possible to then feel the influence of the incorporation of political appointees in the Court". Referring to the Supreme Court, Moscoso points out that "the appointment of new judges may, in some way, impact the shift in judicial precedents". Likewise, Rivera observes that the Supreme Court judges don´t feel compelled to follow precedent when they disagree with it.

According to Couso, departure from precedent depends on how the apex court judges understand their role. He states:

> In my opinion, the main factor probably lies in the supreme Court's retrospective—rather than prospective—approach. That is, the Court does not consider the impact its decision will have on future cases when upholding a particular doctrine; and, instead, it focuses on delivering justice in the individual case.

The fifth factor contributing to the apex courts' departure from precedent is the lawyers' culture (Romero, Couso, Prats). Romero points out that lawyers in Chile "were trained for decades without any regard

for case law". He then adds that this explains certain legal practices, such as a lawyer advocating for one interpretation of the law in one case and then supporting the opposite interpretation in another one, depending on the interests of their client. Along this line, Couso argues that "this is related to the lawyers' role, who should be the guardians of the *stare decisis* system", though this responsibility does not appear to be embedded in the culture of legal practitioners. Similarly, Prats observes there is a problem in legal education. He suggests that the current textbook-based training should be replaced with a caselaw-centered approach, focusing more on the distinction between *obiter dicta* and *ratio decidendi*.

Departure from precedent also responds to flaws in the regulatory framework. As Chiarloni explains, the Court of Cassation has six civil sections. Whenever a contradiction arises, the President of the united civil sections may propose that the sections convene jointly to unify their interpretation, and the resulting decision becomes binding (article 374 of the Civil Procedure Code). However, individual sections can still depart from the decision of the plenary session of sections without referring the case to the unified sections, without being required to refer the case back for reconsideration.

Sixth, apex courts depart from their own precedent due to political interference (Landa, Urbina, Chacín). In this regard, Landa argues that governments change the Constitutional Court's composition in order to secure rulings that align with their interests, which hinders adherence to its precedents. Urbina supports this view, stating that the Constitutional Chamber of the Supreme Court departs from its own precedent without further reasoning when under political pressure. He adds that he has authored a paper concluding that the Constitutional Chamber fails to adhere to its own precedent largely due to the power of the prevailing political regime. Chacín supports this view, indicating that "if the cases have no political significance, the precedent is followed. In other words, if adhering to precedent does not conflict with the government's interests, the court respects it". He adds that, "in all other cases—those without political implications, even at the social level—the Supreme Court of Justice, and specially its Constitutional Chamber, generally adheres to precedent".

Apex courts depart from their own precedent because they lack an appropriate information system (Romero, Prats).

Romero specifically highlights the absence of an effective information technology system. Prats, on the other hand, points to "the lack of a publication compiling the Court's decisions" and "the unsystematic compilation and analysis of case law".

An eighth reason for apex courts not to follow their own precedent is that they are inadequately articulated. In this regard, Priori explains that the Constitutional Court does not adhere to its own precedent

> because, unlike the Supreme Court, many of the Constitutional Court's rulings are too focused on regulatory details. As a consequence, the Court itself is establishing rules that are too rigid to follow [… and] then it realizes that such rulings limit its own discretionary power.

This is not the right way to draft a precedent.

There is also an ideological reason to depart from its own precedents. Rivera argues that the Supreme Court tends to disregard its own precedent "in institutional cases, or where ideological considerations play significant role in the outcome. These are political cases in the positive sense of term, as opposed to purely technical ones".

Last but not least, precedent may not be followed when the judge lacks sufficient knowledge of legal doctrine. Vergara hypothetically suggests that a judge who lack the required doctrinal knowledge may resort to intuition when deciding a case.

VIII. LOWER COURTS VIS-A-VIS APEX COURTS` CASE LAW

VIII.1. Factors that enable adherence to the *stare decisis* doctrine

Lower courts in the country generally adhere to the apex court's precedent to avoid having their decisions overturned (Brinkmann, Rojas, López, Nieva, Bujosa, Chiarloni). Brinkmann argues that lower courts follow the Supreme Court's precedent in 95% of cases.

> The main reasons is that judges do not want their decisions to be challenged […]. They know that if their decisions are appealed, they are likely to be overturned. Judges track statistics on the percentage of their rulings that are overturned every year. The lower the reversal rate, the happier the judge, because they often measure their professional success by the proportion of decisions are upheld versus those overturned.

Similarly, Rojas observes that judges do not want their decisions to be reversed, and also they want to avoid the reputational damage of being seen as unaware of relevant precedent. López shares this view suggesting that "no lower court want to have a decision annulled. That is why courts usually adhere to it […]. It is not formally required, but no one wants their decisions to be annulled". Nieva agrees with this argument, noting that following a precedent "is much less risky from the perspective of lower courts. No judge wants their decisions overturned". Bujosa points

out that most judges tend to follow Supreme Court rulings, "because it is better to have your decisions upheld, and that is more likely if you align with the higher courts". Chiarloni also explains that judges who adhere to precedent, do so as to avoid having their decisions overturned.

A second reason, closely related to the one explained above, is that judges follow the precedents of apex courts to support their prospects for promotion within the judicial career (Brinkmann, Bork, Bravo, Romero, Rojas, Chiarloni). Bork suggest that "if a judge wants to be promoted, departing from Supreme Court precedents is not good for his or her career". Bravo, who specifically studied this issue, explains that in civil law systems, where the judiciary tends to be much more hierarchical,

> Lower court judges are particularly concerned about having their decisions overturned, as this can harm their reputation with higher courts, which will determine if they will be promoted or not. Thus, basically out of concern for being poorly evaluated by their superiors, lower courts tend to follow the criteria of higher courts.

In this regard, it is possible to understand Romero's words: "Based on my professional experience, I can say that higher court judges […] and lower judges are not reactionary to the Supreme Court's rulings. This is largely due to the hierarchical structure of our judicial system". This perspective is shared by Rojas: "the courts tend to follow their hierarchical superiors particularly those who will ultimately assess, grade and decide on their promotion". Along this line, Bujosa refers: Someone who wants to be promoted […] if perceived as too willing to challenge superiors, it will be noticed, and maybe the person responsible for advancing his/her career decides not to do it.

Chiarloni acknowledges that there are no formal rules, but in practice the judge who follows the precedents is more likely to be promoted than the one who does not. A decision that goes unchallenged is regarded as a well-made decision, it suggests that the judge knows the law and is perceived as more competent than a judge whose decisions are always overturned.

The third reason for lower courts to adhere to apex courts' precedents is a regulatory one (Rojas, Pulido, Lancheros, Cruceta, Palacios, Passanante, Landa, Priori, Moscoso, Urbina, Chacín). Rojas explains that the Constitutional Court has established that a judge who departs from precedent without providing justification may be indicted for prevarication. Pulido agrees with this, and adds:

> The Constitutional Court has held that failure to adhere to precedent constitutes prevarication, and one of my studies demonstrates that

> this offense is, in fact, sanctioned in practice. Within the scope of the State Council, a law has been enacted establishing that the Council's precedents are also binding.

Lancheros concurs and provides further details: "The Constitutional Court has established that the decisions of the State Council […] and of the Constitutional Court […] have a directly binding effect". Cruceta highlights that, within the scope of criminal law,

> Criminal Appeal Courts are bound both by their own precedents and by those of the Supreme Court of Justice. Failure to adhere to them constitutes ground for a cassation appeal, pursuant to article 426.2 of the Criminal Procedure Code.

Palacios indicates that decisions are monitored, as non-adherence to precedent can lead to the filing of a complaint within the constitutional jurisdiction. Passanante affirms that "a limit to the right to appeal was incorporated by law for those cases where the judge has followed the precedents of the Court of Cassation". It is an admissibility requirement. As a result, "it is very difficult to appeal a decision that follows precedent, and easier to appeal one that has failed to do so". Landa recalls that after a dispute over interpretation between the Constitutional Court and the Supreme Court, the latter conceded and issued and administrative order establishing that judges who failed to follow binding precedent from the Constitutional Court may face administrative penalties. Priori concurs with Landa, noting that lower courts adhere to precedents of both Constitutional Court and Supreme Court "because, otherwise, they incur administrative liability". Furthermore, "there are several cases […] where judges have been dismissed" for deviating from precedent.

The reason to follow precedent "is fear". Moscoso argues that constitutional case law is followed in compliance with article 184 of the Constitution; *i.e.*, due to the "normative force of the Constitution". Urbina considers that the main reason to follow Supreme Court's precedent is a normative one:

> Lower judged are bound to the precedent, under penalty of dismissal. Since 2010, a provision requiring all judges to follow precedent has been included in the Venezuelan judicial disciplinary laws, more specifically in Code of Ethics for Venezuelan judges.

Chacïn agrees with Urbina, explaining that

> Most judges of lower courts are temporary and the disciplinary chamber belongs to the Supreme Court of Just. Thus, it is very important that they adhere to the precedent of the highest court to ensure they remain in office.

Precedents are also followed when legitimacy of apex courts is recognized (Brinkmann, Rivera, Rojas, Zelaya, Cruceta). In this regard, Brinkmann explains that judges think: "a higher court has already considered this issue. They are excellent lawyer, they are trained, they have experience, they have already decided ten similar cases on this matter. This is my first case on this matter. I should probably adhere to what they already decide". Likewise, Rivera indicates that "federal judges recognize the Court's legitimacy to interpret federal matters, because it is the highest federal court". Along the same line, Rojas mentions that in his classes -attended by judges and court officials-, "it seems to me that there is a strong respect for hierarchical superiors […] that is, judges and court officials tend to trust more higher-ranked judges when it comes to matters within their specific jurisdiction". In this regard, Zelaya indicates: "The chambers provide comprehensive reasoning in their precedents […]. When decisions are properly substantiated, lower courts consider them binding or mandatory". Similarly, Cruceta observes that "it is true that, due to the Supreme Court's reputation, most lower courts follow the criteria established in its decisions".

Fifth, apex court's precedents are followed for efficiency purposes, which some considers positive and others negative (Garay, Nieva, Cruceta). In this regard, Garay comments:

> Let's move on, we have already decided this matter. This practical mindset, which underpins the common law tradition, stands in stark contrast to the Catholic-influenced Latin American tradition […] they hate pragmatism […] despite being overwhelmed with work, judges often reject practical solutions.

Nieva agrees with the motive, but he suggest there is another justification: according to him, the lower courts tend to follow the doctrine established by the Supreme Court "because it is easier to copy and paste, than to innovate". Cruceta concurs with Nieva:

> For no criminal matters, we may say that judges take the easy way out and follow the precedent of higher courts, since it is as simple as searching in the Supreme Court's collections of case law the criteria that applies to the case they are hearing.

Following the precedents of apex courts is made possible through the dissemination of case law (Palacios, López, Garay). In this regard, Palacios observes that the Supreme Court of El Salvador publishes an annual a compilation of decisions from each of its chambers, which includes the legal doctrine developed by them during that year. The situation in Spain is less formal. As López explains, a group of scholars who advise the judges of the Supreme Court, publishes from time to time a non-official compilation of the established case law. Garay points out that the entire

body of case law from the Supreme Court of Argentina is in a database that is available for the judges' specialized assistants. Technology is playing an increasingly significant role, while the traditional practice of consulting books to find an author's opinion on a specific subject is becoming less common.

There are four additional reasons, each mentioned by only one of the participating scholars. One is that judges themselves understand they are part of a unified judicial body. Bork explains that lower courts follow the precedents of the Federal Court of Justice "because they believe—on the one hand—that Germany has a unified system, and—on the other hand—that each judge must follow the Court's guidelines".

Another reason lower courts adhere to apex courts' precedents is out of consideration for the parties and the broader judicial system. In this regard, Brinkmann suggests that "most judges are aware of their responsibility to society and the parties involved". Furthermore, he adds that judges "assume they must provide a quick and final decision, and it is not very helpful if the parties have to spend more money in pursuit of a different or better outcome".

Moreover, apex court precedents are often followed because of specialized assistants who closely collaborate with judges. In this regard, Garay explains that decisions are often drafted by these assistants, who may feel more compelled to adhere to precedent than the judges who ultimately signs the ruling.

Finally, lower courts adhere to apex court precedent thanks to legal education. In Palacios' words, another reason to follow the Supreme Court precedents is the legal education received by undergraduate and graduate law students.

VIII.2. Factors that hinder adherence to the stare decisis doctrine

Lower courts sometimes fail to follow apex courts' precedents because they disagree with them(Bianchi, Hernández, Bujosa, Chiassoni, Grandez, Prats, Cruceta). According to Bianchi, judges may depart from precedent because they do not agree with the higher court's decision. Hernández concurs but adopts a more critical stance, stating: "Indeed, very few people have the will to train themselves, and that applies to the judiciary as well […]. There is too much arrogance". Bujosa suggests that lower courts occasionally depart from the decisions of the Supreme Court because "some judges have their own vision, their own personality […] and they dare to say "this should be different"". He adds that judges may also do it "for material justice purposes. I believe they understand that the decision for that specific case needs to be different". Chiassoni presents a slightly different view, stating: "It seems to me that [lower

courts] follow precedents when they believe it is legally appropriate, or when it is easier to do so. And they fail to do so when that is not the case". Grandez has a similar perspective, mentioning that judges may rely on Constitutional Court's precedents to support outcomes they already want to uphold. If a precedent does not help supporting their decision, they choose to disregard it. Prats observes that judges depart from precedent "due to conceptual differences. Thus, there are always courts that disagree with the Supreme Court's criteria". The same idea is mentioned by Cruceta. He explains that, in non-criminal cases, "there are several courts and judges—who are what we might call rebels—, who are a minority, and who fail to adhere to the Supreme Court case law, deciding the cases according to their own criteria".

A second argument, closely related to the one explained above: lower courts may fail to follow precedents for ideological or political reasons (Romero, Chacín). In this regard, Romero suggests that "tensions within the Chilean judiciary are quite evident" and they stem from ideological reasons. Chacín points out that the Supreme Court precedents are generally followed, "provided they do not conflict with the political interests of the government and its party".

Another reason why the apex court's precedents are not followed is judicial independence (Vergara, Hernández, Jovel). In this regard, Vergara points out that many judges believe their independence grants them the discretion to depart from higher court rulings. As a result, they start drafting their own rulings, behaving under the belief that such independence implies that decisions of higher courts are not binding. Similarly, Hernández explains that caselaw is often disregarded due to "an idea deeply rooted in judges' anthropological vision of independence", which in fact "is a cultural aspect". Jovel explains that precedents are often not followed because lower courts are very protective of their own independence.

A fourth reason for departing from case law is the existence of contradictory precedents (Cajas, Zelaya). Cajas explains that judges sometimes find conflicts between precedents from the Constitutional Court and those from the Supreme Court. Zelaya emphasizes that sometimes contradictions arise with precedents established by the judge responsible for hearing the case: "Sure, in exceptional cases, they [lower courts] apply their own precedents because they consider these are well-grounded decisions".

Fifth, lower court judges fail to follow apex court's precedents because they are not aware of them (Lancheros, Pulido, Hernández). Lancheros indicates that—in many cases—lower court judges unfamiliar with the case law of apex courts. The Constitutional Court has issues between 25,000 and 30,000 decisions, and it is impossible to keep track of all of

them. Pulido also refers to this factor, explaining that such unawareness is a result of insufficient dissemination. Hernández further adds that "there is an issue of judicial education […]. Judges are not being trained, they fail to continue studying, they don't take the time to study case law".

Five additional factors were added to those mentioned above, but each of them was mentioned for only one scholar. For instance, difficulties to find the *ratio decidendi* in a decision, was considered a reason to depart from apex court precedent. Lancheros points out, it is a practical problem how to find the binding part of a ruling, when reading decisions of forty, fifty or even hundreds of pages.

> We have agreed that apex courts may establish binding precedents, and methodologies have been developed to identify the binding elements within a ruling. However, the decisions themselves often fail to clearly indicate which parts are intended to be binding.

There are also regulatory reasons to depart form apex court precedent. Jovel indicates that a single decision does not constitute "legal doctrine"; but rather, for a precedent to be binding, there must be three consecutive and uninterrupted decisions on the same subject. Thus, he notes that "it seems that some courts are aware that, since certain decisions have not yet been declared legal doctrine, they are not bound to apply them".

Another reasons to depart from apex court precedent is the excessive workload of judges. Hernández suggests that it is complicated for judges to follow the precedents "considering their current workload".

Apex court precedents are also frequently disregarded due to cultural reasons. According to Chiassoni, unawareness of case law is often due to the fact that "the culture of precedent and of binding precedent, in a strong argumentative sense, has not been widely disseminated".

Lower courts do not follow the precedents because ápex courts themselves fail to do so. In this regard, Vergara observes that judges from the Supreme Court give a terrible example to lower court judges, since many of them depart from their own case law.

IX. CONCLUSIONS

Overall, *civil law* countries are discussing the—either formal or informal—incorporation of binding precedent. However, this debate is pointless if the necessary conditions to make it feasible are missing. This study has identified and compiled these conditions, which are systematized in this section aiming at presenting the key issues at the center of the debate, as well as the critical issues that must be considered in the decision-making process of any given judicial system.

There are well-founded arguments both in favor and against the use of case law. Overall, participating experts mentioned key factors such as legal certainty, consistency in outcomes, legal equality or substantial justice, and even a sense of moral obligation. In addition, other aspects more closely related to the legal practice were also emphasized; for instance, predictability of decisions and their impact on preventing unnecessary appeals, which definitely help enhancing the quality of the rule of law and of the legal system as a whole.

Nonetheless, it is worth taking into consideration that this last feature, though not particularly controversial, is not undisputed. Indeed, sometimes experts argue that following precedent makes judicial work easier and faster (probably, because such precedents are well-known and have already been identified). However, it is also mentioned that this practice often requires more work and time (particularly when they are not well-known or judges are not used to working with them).

Similarly, the main arguments against the adoption of binding judicial precedent are significantly persuasive. While the most widely mentioned concern is its potential impact on judicial independence, the risk of case law petrification has also been emphasized. In terms of what causes the most problems, a commonly raised issue was that incorporating binding precedent may affect the current system of legal sources, or it may cause difficulties between the legislative and the judiciary roles. Judges may not assume duties they were not elected for, and this may lead to a non-intended expand of the judicial power. From a daily practice point of view, a difficult in precedent application and the inconvenience of maintaining wrong decisions over time have been detected. Finally, an increased workload for judges was noted, as they have to observe decisions through the lens of binding case law.

Adherence to precedents issued by apex courts is generally perceived as a common feature of the judiciary in the countries under study. Most likely, this responds to a culture deeply rooted in the legal system, which proves that judges tend to follow the interpretation of apex courts, especially when such decisions are consistently upheld over time. Remarkably, some practices that support this adherence —often developed outside formal procedure regulations—, include the adoption of agreements among judicial associations to follow certain interpretation in relation to specific matters. Other reasons to adhere to precedent are related to the organization of judicial bodies into specialized chambers, and hopefully with members who operate in a stable manner. The main reason for this phenomenon seems to be the greater strength that judicial decisions gain when they are repeated over time. However, some experts think they do so out of efficiency, or even convenience. Several facts merit attention, *e.g.* the need for support teams to assist in the application of

precedent, and the potential use to use technology supports. Both have to be addressed as challenges and must be regulated to enhance the quality of justice services.

However, apex courts do not always adhere to their own precedents. The most commonly cited reason this phenomenon is the heavy workload of these courts. Another key factor is the large number of judges or changes in the composition of apex courts' chambers. In addition, cultural reasons are also mentioned, such as the lack of awareness of the precedent rule, a lack of consideration for case law, and excessive zeal of some lawyers to defend any position, simply because it serves their clients' interests. In terms of the judicial procedure, there are sometimes political influences that, ultimately, determine shifts in the way certain matters are addressed, altering the precedents on specific issues; and, some other times, we find ideologically driven decisions, incorrect application of precedent, or a departure from precedents due to a lack of awareness among some members of the judiciary.

Regarding adherence to precedent by lower courts, the general perception is that they tend to follow it. The main reason is that judges do not want their decisions to be overturned, particularly when such reversal negatively impacts (or could negatively impact) their professional careers. It is also true that judges are often familiar with consolidated case law, and apply it accordingly, and it is unusual for them to question the legitimacy of apex courts. Furthermore, in some cases, judges could be subject to prevarication charges. Besides, though harder to prove, following apex court precedents often require less time and effort, than departing from them.

Nevertheless, sometimes lower courts depart from precedent. The main reason to do so is a matter of judicial conviction. When judges are not persuaded that a precedent applies to a specific case, they may choose to depart from it. Some other times, though, this responds to political or ideological reasons. A strong attachment to judicial independence has also been cited as a reason not to follow precedent. In addition to these factors, we may find some other issues related to the legal practice, such as the lack of appropriate dissemination of rulings; difficulties to identify the *ratio decidendi*; absence of a judicial culture grounded in case law; and inconsistency in apex courts' own adherence to their precedents, which influences lower court behavior; and finally excessive workload which makes it impossible to hear a case, and consider all relevant prior decisions.

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