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Judicial Power in Latin America: a Short Survey

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Judicial Power in Latin America: a Short Survey

Abstract: This article, written by Teresa M. Miguel-Stearns, explores the vast differences in judicial authority not only between the common law and civil law traditions, but also among various countries steeped in the civil law tradition in Latin America. Judicial review, *certiorari*, precedent, and other functions and characteristics of the judiciaries of five distinctly different countries (Argentina, Bolivia, Brazil, Chile, and Mexico) are compared and contrasted with each other and with the common law tradition. This evaluation demonstrates that despite their, arguably, similar distant histories and legal foundations, each country has evolved into a unique legal system with significant differences in the treatment of the judiciary and its jurisprudence.

Keywords: legal systems; judiciary; Latin America

OVERVIEW

Latin American legal systems are often thought of collectively, but each country has a unique structure and each country's system has been influenced by a variety of legal traditions and international sources. The judiciary in Latin America is often minimalised and marginalised due to the notion that legal systems of the countries are based on civil law, which assumes that even high courts are weak.¹

Since inception, the judiciaries in many Latin American countries have undergone radical changes to both structure and importance, and have taken on a new identity and role in many societies. Judicial authority has been considered and reconsidered during judicial reforms throughout Latin America in the 20th and 21st centuries. Judicial reform encompasses: 1. the types of conflicts a particular court can resolve (judicial review); 2. who can bring certain actions before particular courts (standing); 3. the ability of a court to control its docket (*certiorari*);² and 4. the nature and effect of court decision on future matters (*stare decisis*,³ *erga omnes*,⁴ *inter partes*,⁵ and the like).⁶ All of these factors directly affect the power held by a court. A court that has the authority to control its docket and issue binding decisions, for example, is more powerful than one that must hear every petition before it and whose decisions only apply to the parties involved.⁷

The nature of judicial review varies among courts in the region. For example, whereas in common law jurisdictions, courts are limited to hearing *a posteriori* cases, i.e. controversies brought by parties challenging enacted laws, many courts in Latin America have both *a posteriori* jurisdiction as well as *a priori* jurisdiction, which are challenges to laws before they are enacted, often referred to as abstract cases.⁸

Further, several countries, like Mexico, Argentina, and Brazil, rely on their supreme courts to decide matters of

constitutional law as well as other questions of legal importance. Other countries, such as Bolivia, Colombia, and Chile, have created separate constitutional courts exclusively to hear cases of a constitutional nature, thus relieving their supreme courts of this power and duty.

Also unique to Latin America is the concept of *amparo*.⁹ The Mexican Constitution of 1857 introduced *amparo* to Latin America, various versions of which have been adopted by every country in the region (except Cuba). *Amparo* in its many forms allows citizens to bring an action in court against the government for a violation of fundamental or constitutional rights. It is meant to be restorative as opposed to compensatory, and is a means of providing relatively immediate relief in otherwise overloaded and slow judicial systems.¹⁰

A significant question confronting Latin American countries and their judiciaries is how much importance to give to the decisions, constitutional and non-constitutional, of their highest courts. In common law jurisdictions, the legal rationale in a decision by a higher court binds all lower courts answerable to that higher court. A decision on a point of law by the highest court of the land binds all courts and establishes the law of the land.¹¹

In civil law jurisdictions, such as those in Latin America, courts traditionally are limited to applying the laws that have been created by the legislature or by executive decree. Jurisprudence has not historically been a source of law. In fact, most court decisions are *inter partes*, binding only the parties to the case before the court; they do not even have *erga omnes* effect, which would allow courts to issue decisions that could then be applied to cases stemming from the same event or with similar circumstances. Thus, many tribunals are deciding the same case and controversy hundreds of times.¹²

The concept of *stare decisis*, which creates a rule of law requiring binding precedent for other courts to follow, is not part of the legal tradition of Latin American countries. However, the common law notion of persuasive or binding jurisprudence is no longer completely non-existent in the region.¹³ In the table below, Antonio Canova González divides Latin American national courts into three categories based on the nature of their decisions pertaining specifically to constitutional jurisprudence: binding, followed, and orientating.¹⁴

This paper uses the below chart as a starting point to explore the current state of judicial authority in several countries. It also directs readers to electronic resources for the jurisprudence of these countries.

ESTADOS UNIDOS MEXICANOS / UNITED MEXICAN STATES

The *Suprema Corte de Justicia de la Nación (SCJN)*, the highest court in Mexico, has two chambers: one for civil and penal cases, and the other for administrative and labour cases. Each chamber has five justices with the Chief Justice weighing in only during plenary sessions for certain cases, such as *amparo* matters, conflicts between the two chambers, and constitutional questions.¹⁸ The SCJN has original jurisdiction in two types of cases: Constitutional Controversies (involving disputes among political powers such as the judiciary, executive, legislature, states, and federal government), and Actions of Unconstitutionality (pertaining to the constitutionality of laws). The bulk of its cases come from appeals by the district and appellate courts.¹⁹

Mexico is one of the few countries in Latin America that expressly binds its lower courts to the decisions of the highest court under very specific circumstances. For example, according to Article 192 of the *Ley de Amparo*

of 1936, when eight justices of the SCJN decide a particular question of law and issue an opinion, and the decision is upheld five consecutive times by eight justices of the SCJN sitting *en banc* or 4 justices if sitting in *Sala* (Chamber), the interpretation becomes *jurisprudencia* which signifies binding precedent on all state and federal courts.²⁰ In April 2013, Mexico promulgated a new *Ley de Amparo* which provides the same guidelines in Articles 222–224: *jurisprudencia* is binding on all courts when no less than eight justices sitting in plenary session, or four justices sitting in *Sala*, decide the same point of law five times in five different and consecutive cases. Once established, *jurisprudencia* can only be overturned by a unanimous vote of the SCJN.²¹

Another grant of power to establish *jurisprudencia* is Article 232 of the Organic Law of the Federal Judicial Branch.²² The system of reiteration to form binding precedent from the Federal Electoral Tribunal is slightly more complicated under this law:

The Upper Chamber is required to issue three consecutive decisions upholding a different point of law regarding to the same issue. Regional Chambers are required to issue five consecutive decisions upholding a different point of law regarding the same issue, in addition to the ratification by the Upper Chamber. For these courts to establish a binding decision, they must meet these requirements, but must also obtain a formal declaration from the Upper Chamber, stating that a binding decision has actually been made.²³

In addition to reiteration as a form of creating binding precedent, the SCJN can create precedent when settling conflicts between the Chambers of the CSJN or the

Table 1 – What is the nature of jurisprudence of the court that decides constitutional questions?¹⁵

Constitutional jurisprudence that is expressly binding precedent for other courts	Constitutional jurisprudence is followed by courts though not officially binding	Constitutional jurisprudence that serves only to orient other judges
Bolivia ¹⁶	Argentina	Chile
Costa Rica	Brazil ¹⁷	Ecuador
Guatemala	Colombia	Honduras
Mexico	El Salvador	Nicaragua
Venezuela	Peru	Panama
		Paraguay
		Dominican Republic
		Uruguay

various Collegiate (appellate) courts. The CSJN sitting *en banc* must settle conflicts between the Chambers of the SCJN, whereas one of the two Chambers of the CSJN may settle conflicts among the Collegiate courts.²⁴

The 1994 judicial reforms that created the two actions challenging constitutionality, Constitutional Controversies and Actions of Unconstitutionality, also gave the SCJN the power to establish precedent-setting decisions in these matters, though with a high threshold. Actions of Unconstitutionality (*a priori* review which can only be brought by the Attorney General and other specific government officials) call for a supermajority of eight of the eleven justices. Constitutional Controversies (requiring an actual controversy between two government bodies) also requires the affirmation of eight of eleven justices for binding precedential effect, but allows for *inter partes* application with a simple majority.²⁵

Some scholars argue that the system of binding precedent in Mexico lends itself to a lower caseload for the courts, especially as compared to a country such as Brazil.²⁶ However, there are many other reasons why Brazil's court system has such a severe backlog of cases.

SCJN Decisions:

The SCJN (www.scjn.gob.mx/Paginas/Inicio.aspx) provides electronic access to the decisions of the courts through different means and publications: (1) a searchable database containing public versions of the judgments of the SCJN in full-text, Word format, 2003 to date; and (2) *Semanario Judicial de la Federación*, containing various texts to find cases including the *Gaceta* and *Tesis y Ejecutorias* from 1917.²⁷

REPÚBLICA FEDERATIVA DO BRASIL / FEDERATED REPUBLIC OF BRAZIL

Like Mexico, Brazil does not have a separate constitutional court. In fact, any court in Brazil may decide the constitutionality of any law or decree while deciding a controversy before that court. This determination has *inter partes* effect²⁸ except when declared to be a *sumula vinculante* (discussed in more detail below). Lower court decisions are normally appealable up to the highest court, the *Supremo Tribunal Federal* (STF) of Brazil. Composed of eleven justices, the STF generally sits in panels of five justices.²⁹

The 1988 Constitution of Brazil included significant judicial reform, broadening access to the courts in many respects. One example is the ability of the STF to hear *a priori* cases through Direct Actions of Unconstitutionality brought by certain political actors, such as the president, leaders of congress, state governors, attorneys general, and the federal bar association; and pertaining to the constitutionality of laws, such as those passed by Congress and the federal and state legislatures.³⁰ A minimum of

eight justices are required to hear a Direct Action of Unconstitutionality, and at least six are needed to declare the law or decree unconstitutional.³¹

Further, the Declaratory Action of Constitutionality, modified by Constitutional Amendment 3 in 1993 (*Emenda Constitucional 3/1993*), allows the STF to declare the constitutionality of a governmental policy upon the request of the President, Congress, or Attorney General. After a declaration of constitutionality, which carries with it *erga omnes* effect, the policy can no longer be contested in the lower courts.³²

The STF acts as the last court of appeal in *a posteriori* cases. The STF must accept all appeals; there is no practice of *certiorari*. STF decisions generally apply *inter partes* only; there is no *erga omnes* effect. Also, except in very limited instances, the decisions of the STF are not binding upon the lower courts.³³

The concept of precedent began infiltrating Brazilian jurisprudence in 1964 when the STF was given the means to declare *súmulas*. *Súmulas* are short, official restatements of the Court's recurrent position on a particular issue of the law which carry great persuasive force and tend to determine the outcome of similar cases.³⁴ Once a rule has been created by *súmula*, any argument to the contrary will be rejected by the court.³⁵ Beginning in 1964, there have been 736 *súmulas* declared and issued, the last of which was in 2003.³⁶

The declaration of binding precedent (*Súmula Vinculante* (SV)) for the STF was first approved in Constitutional Amendment 45 in 2004 (Art. 103-A, *Emenda Constitucional 45/2004*). This power allows the STF to declare an *a posteriori* case decision and rationale legally binding precedent for the lower courts. An SV can only be issued with an affirmative declaration and the support of eight of the eleven justices.³⁷ Since inception, there have been 37 *súmulas vinculantes* declared.³⁸

Constitutional reforms providing greater access to the courts, coupled with very little precedent-setting ability and the *inter partes* effect of decisions, led to the explosion of cases and the resulting backlog in the judiciary. Further, government agencies are known for appealing cases simply to avoid compensating litigants. From 2000–2009, over one million cases were filed with the STF.³⁹

STF Decisions

Prior to 1 January 2011, jurisprudence of Brazilian courts was published in the official judicial gazette, *Diário da Justiça*. This gazette has been discontinued and decisions are now published in the *Diário Oficial*.⁴⁰

The Federal Supreme Court (STF) website maintains a database where one can search for jurisprudence of the court, <http://www.stf.jus.br/portal/jurisprudencia/pesquisarJurisprudencia.asp>. There are pages dedicated to *súmulas*, <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumula>, and *súmulas vinculantes*, <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumulaVinculante>. Note the STF has also provided translations

for several cases in various languages, <http://www.stf.jus.br/portal/jurisprudenciaTraduzida/jurisprudenciaTraduzida.asp>.⁴¹

Please see the GlobaLex guide for Brazil for a thorough although somewhat outdated overview of the country's legal system: <http://www.nyulawglobal.org/globalex/Brazil.htm>.

LA REPÚBLICA DE ARGENTINA/ THE REPUBLIC OF ARGENTINA

The *Corte Suprema de Justicia de la Nación* (CSJN), Argentina's highest tribunal, has seven justices. The CSJN was created in 1853 by the Argentine Constitution and modeled after the Supreme Court of the United States of America.⁴² The decisions of the U.S. Supreme Court and scholarly treatises of North American jurists continued to influence Argentine jurisprudence throughout the 19th century.⁴³

As a result, the CSJN follows notions of judicial review similar to the U.S. Supreme Court. The CSJN will only hear *a posteriori* controversies where the parties have standing, the case is ripe, and the controversy is not moot.⁴⁴ Thus, the CSJN does not hear *a priori* (abstract) cases as do many other high courts in the region following civil law tradition.

One significant difference between the CSJN and the Supreme Court of the United States is that the decisions of the CSJN bind only the parties to the ruling of the Court; there is no express doctrine of *stare decisis*.⁴⁵ Over time, however, the CSJN has successfully persuaded the lower courts to follow the rulings of the CSJN by stating, for example, that it is the "moral duty" of the lower courts to follow the nation's supreme tribunal.⁴⁶ The CSJN subsequently scolded lower courts for not following CSJN decisions and declared that such behaviour undermines the judiciary as an institution.⁴⁷ Lower courts have generally been complicit such that although not expressly stated in the Constitution or elsewhere, the decisions of the CSJN have evolved into binding precedent in many regards,⁴⁸ though to what extent remains unclear.⁴⁹

CSJN Decisions

The website of the Supreme Court of the Nation (<http://www.csjn.gov.ar/jurisprudencia.html>) has scanned pdfs of the *Fallos de la Corte Suprema de Justicia de la Nación*, the official print court reporter, and official born-digital pdfs. One can search for jurisprudence of the court in several ways: by date for the recent decisions; by theme for summaries of all decisions dating back to the court's inception in 1863; by keyword (or more advanced search) for full-text decisions from 1994; and by browsing a list of cases organized chronologically.⁵⁰ Infojus (<http://www.saij.jus.gov.ar/>) also provides CSJN jurisprudence.⁵¹

Please see the GlobaLex guide on Argentina for an excellent overview of the country's legal system: <http://www.nyulawglobal.org/globalex/ArgentinaI.htm>.

ESTADO PLURINACIONAL DE BOLIVIA / PLURINATIONAL STATE OF BOLIVIA

Bolivia has a fascinating history of granting judicial power, pulling it away, and reinstating it. Judicial review was first granted to the *Tribunal Supremo de Justicia* (TSJ) in the Constitution in 1861. The 1878 Constitution went further and gave the TSJ the power to decide the constitutionality of law, decrees, and regulations. Like Argentina, the TSJ was modeled after the Supreme Court of the United States in many respects, but, also like Argentina, with some fundamental differences. For example, TSJ decisions were merely *inter partes* (as opposed to the *erga omnes* effect of U.S. Supreme Court decisions); yet the TSJ was the only court in the country with the authority to declare the unconstitutionality of laws (similar to the U.S. system). Also, there was no system of precedent in the Bolivian judiciary, as there is in the U.S. model. Thus, Bolivia's judiciary was unlike any in the region, combining traits of various judicial models in the Americas.⁵²

The late 19th and 20th centuries in Bolivia were turbulent, marked by a civil war, a change from conservative to liberal to military leaders, a geographic change in the country's capital (from Sucre to La Paz, except for the TSJ), and a return to democracy in 1982. During the early 20th century, judicial review expanded as did the power of the lower courts to hear constitutional matters such as writs of *habeas corpus* and *amparo*. The 12-member TSJ had the responsibility to review lower court decisions. By the 1990s, these constitutional matters were often delayed for more than one year in the lower courts and a further year in the TSJ; other constitutional matters were delayed for as many as three or four years. This inefficiency, which resulted in a lack of citizen protection combined with other political pressures of the fixed-term (10 years) justices of the TSJ, formed the impetus to establish the *Tribunal Constitucional de Bolivia* (TCB) and a return to a centralized model for constitutional review.⁵³

The TCB was created with the 1995 Bolivian Constitution and was given judicial review power well beyond what had been granted to the TSJ, including: 1) *erga omnes* decision-making power; 2) the power to create binding precedent; and 3) both *i priori* and *i posteriori* authority review of legislation. The TCB was conceptualized and created to be a body completely independent of any other branch of government; but compromise with an objecting TSJ placed the TCB within the judicial branch, yet independent of the TSJ.⁵⁴ The TCB had five magistrates who served 10-year terms,

elected by a 2/3 vote of all members present in a joint session of Congress.⁵⁵

With the establishment of the TCB, came the creation of nineteen different types of legal instruments, twelve of which were unique to the TCB, giving the TCB original and exclusive jurisdiction in these twelve matters. The various instruments specified who would have standing to use a particular type, and ensured direct access to the TCB for political entities and politicians as well as the general public. In the first decade of the court (1999–2009), the vast majority of complaints filed before the TCB were *amparo* actions (58%) and *habeas corpus* motions (26%).⁵⁶

Despite broad access to the TCB, surveys showed that the Bolivian public did not trust the neutrality of the TSJ or the TCB, which led to political attacks against the justices of the high courts.⁵⁷ The election of Evo Morales, the first indigenous president in a country that is 85% indigenous,⁵⁸ led to unprecedented political upheaval and reform. Within the judiciary, countless judges resigned or were impeached for many reasons. By December 2008, the TSJ operated with only eight of twelve members; and by late 2009, the TSJ lost its quorum with only six justices remaining.⁵⁹

The TCB suffered a similar fate. By late 2006, the TCB had lost three of its five magistrates following accusations of bribery from President Morales that were later withdrawn. The Court was forced to operate with only two principal magistrates and three alternates. The following year, however, the entire Court was subjected to impeachment proceedings initiated by the President and overseen by Congress. By the end of 2007, only two alternate justices remained following the resignation of the other three. Although the TCB could not hear cases without a quorum, individual justices could sign administrative decrees, which they did. Eventually, a fourth justice resigned when Congress initiated impeachment proceedings against her after she signed a highly controversial decree denying a recall election for President Morales. The TCB was paralyzed.⁶⁰ At the same time, a new Constitution went into effect in 2009, and the *Ley del Deslinde Jurisdiccional* established two parallel jurisdictions within the court system in Bolivia: ordinary and indigenous.⁶¹

In February 2010, Congress approved a law allowing the president to appoint interim justices and magistrates for both high courts. Congress also approved the country's first popular election for members of the high courts for December 2010.⁶² Nonetheless, the TCB was disbanded in 2011 and replaced in 2012 with the *Tribunal Constitucional Plurinacional* (TCP).

Decisions of the TCP constitute binding precedent. The Law of the Constitutional Tribunal, Article 8, states that decisions of the TCP are *vinculante* (binding) in nature. Additionally, the Code of Constitutional Procedure, Article 15, provides more specifically that sentences, declarations, and *autos* of the TCP bind the parties to the case except for Actions of Unconstitutionality, which have broader

application. Additionally, legal rationale in the decisions of the TCP constitutes binding precedent for all future decisions in all courts.⁶³ This law is clearly an effort to distinguish *ratio decidendi* from *obiter dicta* in order to make the TCPs' legal rationale precedential in nature in a way that has not before been established in Brazil or Latin America generally; it seems more akin to the common law notion of what is binding precedent and what is merely dicta. It will take time to see if this is the case, and to evaluate the true power and authority of the new TCP.

Finding Court Decisions:

Jurisprudence of TCB and the TCP can be found on the new website of the TCP: <http://buscador.tcpbolivia.bo/%28S%28bezaphqhzpzbjq2fvxqk25p%29%29/Default.aspx>. One can search for decisions by date, party, or number.

The Supreme Court of Justice also has a website, <http://tsj.bo/>, where one can search by keyword in an attempt to locate court decisions, <http://tsj.bo/buscador-autos-supremos/>.

Please see the GlobaLex guide on Bolivia for an excellent introduction to the country's legal framework: http://www.nyulawglobal.org/globalex/Bolivian_Legal_Framework.htm.

LA REPÚBLICA DE CHILE / THE REPUBLIC OF CHILE

The *Corte Suprema* (CS) and the *Tribunal Constitucional* (TC) are the highest courts in Chile. The CS is part of the *Poder Judicial* (Chilean federal judiciary) and acts as a court of cassation. It hears appeals from the appellate courts as well as other tribunals that are not part of the judiciary, such as the environmental courts, intellectual property court, and local police courts.⁶⁴ The TC is an independent body that reviews treaties, proposes reforms to the Constitution, and reviews certain laws for constitutionality *i priori* as well as *i posteriori*; and resolves constitutional questions arising from the country's highest courts, the *Corte Suprema*, the *Cortes de Apelaciones*, and the *Tribunal Calificador de Elecciones* (Electoral Tribunal).⁶⁵ Despite the lack of *stare decisis* in Chile, jurisprudence of these highest courts has evolved over many years and is often used in support of a decision or for illustrative purposes, or somewhere in between support and illustration.⁶⁶

Article 3 of *Código de Procedimiento Civil* (Code of Civil Procedure), combined with more than a century of tradition, dictates that court decisions are not a formal source of law in Chile.⁶⁷ In March 2012, the Chilean Congress was presented with a proposal for a new Code of Civil Procedure. This *proyecto* proposes to “unify” the jurisprudence in certain types of cases and remains under consideration.⁶⁸ Debate continues as to whether Chilean Supreme Court decisions should have any authority. Those in

opposition believe that awarding the power to establish binding precedent to Supreme Court decisions will diminish judicial independence. Those in favour point to common law countries as examples where judicial independence and a system of precedent and *stare decisis* reside side-by-side.⁶⁹

Court Decisions:

The website of the TC contains the decisions of the Court. Decisions can be examined by year (from 1972): http://www.tribunalconstitucional.cl/index.php/sentencias/busca_eras; or found through searching: http://www.tribunalconstitucional.cl/index.php/sentencias/busca_basico. The posting of decisions is current.

The *Poder Judicial* website contains the resolutions of matters heard before the CS as well as the appellate courts and others: <http://basejurisprudencial.poderjudicial.cl/>. There are advanced search options to guide one through this free but somewhat complex database.

Please see the GlobaLex guide on Chile for an overview of the country's legal system: <http://www.nyulawglobal.org/globalex/Chile1.htm>.

CONCLUSION

This short survey of judicial power in five Latin American countries demonstrates the many similarities as well as the vast differences among the judiciaries of the region. It is apparent that countries are experimenting with different models, creating new processes, and transplanting practices from other jurisdictions and traditions as they attempt to solve problematic issues while keeping true to their legal foundations. Thus, the modified and tailored principles of judicial authority, including judicial review, standing, *certiorari*, and precedent, continue to evolve, as do many other aspects of the judiciary and legal system generally, just as in all democratic societies.

Footnotes

¹ "This view of case law has its roots in the Code Napoleon and can be traced to the nineteenth century codes of civil law drafted for Chile and Colombia, for example." M.C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (University of Texas Press 2004) 197.

² [Latin "to be more fully informed"] (15c). In the United States, "The discretionary writ of certiorari has come to control access to almost all branches of Supreme Court jurisdiction. Appeal jurisdiction has been narrowly limited, and certification of questions from federal courts of appeals has fallen into almost complete desuetude. Certiorari control over the cases that come before the Court enables the Court to define its own institutional role." 'Certiorari' in Bryan A. Garner (ed) *Black's Law Dictionary* (10th edn Thomson Reuters 2014) citing Charles Alan Wright et al., *Federal Practice and Procedure* §4004 (2d edn Thomson Reuters 1996), 22.

³ [Latin "to stand by things decided"] (18c) The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation. 'Stare Decisis' in Bryan A. Garner (ed) *Black's Law Dictionary* (10th edn Thomson Reuters 2014).

⁴ [Latin "toward all"]. 'Erga omnes' in Bryan A. Garner (ed) *Black's Law Dictionary* (10th edn Thomson Reuters 2014).

⁵ [Latin "between parties"] (1816) Between two or more parties; with two or more parties in a transaction. 'Inter partes' in Bryan A. Garner (ed) *Black's Law Dictionary* (10th edn Thomson Reuters 2014).

⁶ Daniel M. Brinks, "'Faithful Servants of the Regime:' The Brazilian Constitutional Court's Role under the 1988 Constitution' in Gretchen Helmke and Julio Ríos-Figueroa (eds), *Courts in Latin America* (CUP 2011), 132.

⁷ *ibid* 133, "courts that can choose their own agenda through discretionary docket control are better able to focus and target their decisions, to choose their allies and their enemies, and to avoid cases that might be hazardous to their health."

⁸ Craig L. Arceneaux, *Democratic Latin America* (Pearson 2013) 192.

⁹ From the Spanish, *amparar*: to favor, protect, support, defend (this author's translation). 'Amparar' in Real Academia Española (ed) *Diccionario de Lengua Española* (22nd edn 2012) <<http://lema.rae.es/drae/?val=amparar>> accessed 31 March 2015.

¹⁰ Arceneaux (n 8) 191–2; see also, Gloria Orrego-Hoyos, 'The Amparo Context in Latin American Jurisdiction: An Approach to an Empowering Action' (*GlobaLex*, April 2013) <<http://www.nyulawglobal.org/globalex/Amparo.htm>> Accessed 27 March 2015. *Amparo* has been adopted by several other countries around the world.

¹¹ Robert Post (ed) *Global Constitutionalism: Constitutional Administration* (Yale Law School 2009) V-8, citing D. Neil MacCormick and Robert S. Summers, *Interpreting Precedents: A Comparative Study* (Ashgate 1997) 531, 532. In 2009, Yale Law School's Global Constitutionalism Seminar featured a section on precedent focusing on continental European civil law systems and the UK, Canada, and US common law traditions. As part of the seminar, preparatory readings were collated resulting in the above-cited, *Global Constitutionalism* publication.

¹² Arceneaux (n 8) 188–193.

¹³ "As a matter of civilian methodology, there is almost no tradition of differentiating systematically in regard to a precedent opinion between *ratio decidendi* and *obiter dicta* – between holding and dictum – as in the common law, and this is true of fields of law not closely controlled by code of statute..." in Post (n 11) V-11, citing MacCormick and Summers (n 11) 537 (this concluding chapter contains an excellent summary of the primary differences in the treatment of precedent between common law and civil law jurisdictions).

- ¹⁴ Antonio Canova González, *El Modelo Iberoamericano de Justicia Constitucional: Característica y Originalidad* (Ediciones Paredes 2012) 140 (this author's translation).
- ¹⁵ *ibid* 137 (emphasis added to indicate which countries are examined in this paper.)
- ¹⁶ At the time Canova González wrote his chapter, Bolivia had not yet created the country's current *Tribunal Constitucional Plurinacional* and had not yet passed complementing legislation which provides that the TCP's rationale constitutes binding precedent for future decisions. Therefore, Canova González placed Bolivia in the middle column; I have moved it to the first (this is a theoretical move since it is still too early in the TCP's life to accurately judge its true power).
- ¹⁷ Canova González (n 14) 137, admits that debate exists regarding the power of Brazil's highest court. Constitutional Amendments in the late 20th and early 21st centuries have provided for some express method of creating binding precedent in very limited circumstances. More details in the section on Brazil.
- ¹⁸ Arceneaux (n 8) 215.
- ¹⁹ Mariana Magaldi de Sousa, 'How Courts Engage in the Policymaking Process in Latin America' in Carlos Scartascini, Ernesto Stein, and Mariano Tommasi (eds), *How Democracy Works: Political Institutions, Actors, and Arenas in Latin American Policymaking* (Inter-American Development Bank and David Rockefeller Center for Latin American Studies, Harvard University 2010) 113.
- ²⁰ Ley de Amparo, Art. 192-3 (1936) as amended 24 June 2011 <http://www.diputados.gob.mx/LeyesBiblio/abro/lamp/LAmp_abro.pdf> accessed 18 March 2015. (This author's translation.) *Jurisprudencia* in Mexico is used only to describe decisions of binding precedent. The term is used more generically in other countries and refers to any and all opinions of the courts.
- ²¹ Ley de Amparo, Art. 222-4 (2013) <http://www.diputados.gob.mx/LeyesBiblio/pdf/LAmp_140714.pdf> accessed 18 March 2015. (This author's translation.)
- ²² Jose Maria Serna de la Garza, 'The Concept of *Jurisprudencia* in Mexican Law' (2009) 1 (2) *Mex.LR* citing Ley Orgánica del Poder Judicial de la Federación as amended 24 May 1995 <<http://biblio.juridicas.unam.mx/revista/MexicanLawReview/numero/2/nte/nte5.htm>> accessed 18 March 2015. This article provides a detailed explanation and analysis of both binding and non-binding decisions *jurisprudencia* in Mexico.
- ²³ *ibid*.
- ²⁴ *ibid*.
- ²⁵ Arceneaux (n 8) 215.
- ²⁶ Magaldi de Sousa (n 19) 113.
- ²⁷ Marisol Floren-Romero, 'Mapping the Digital Legal Information of Mexico, Central America, the Spanish Speaking Caribbean and Haiti' (2012) 40 *IJLI* 417, 428. Information updated by this author.
- ²⁸ Keith S. Rosenn, 'Judicial Review in Brazil: Developments under the 1988 Constitution' (2000) 7 *Sw.J.L. & Trade Am.* 291, 293-4.
- ²⁹ *ibid* 302.
- ³⁰ Rodrigo M. Nunes, 'Politic without Insurance: Democratic Competition and Judicial Reform in Brazil' (2010) 42 *Comp. Pol.* 313, 316.
- ³¹ Rosenn (n 28) 302.
- ³² Nunes (n 30) 318; see also, Diana Kapiszewski, *High Courts and Economic Governance in Argentina and Brazil* (CUP 2012), 99.
- ³³ Nunes (n 30) 318.
- ³⁴ Teresa Miguel, 'The Digital Legal Landscape in South America: Government Transparency and Access to Information' (2012) 40 *IJLI* 64-5.
- ³⁵ Rosenn (n 28) 296.
- ³⁶ STF, 'Súmulas' <<http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumula>> accessed 17 March 2015
- ³⁷ Nunes (n 30) 318, 326-7.
- ³⁸ STF, 'Súmulas Vinculantes' <<http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumulaVinculante>> accessed 17 March 2015.
- ³⁹ Kapiszewski (n 32) 96-7; Brinks (n 6) 136.
- ⁴⁰ Miguel (n 34) 65.
- ⁴¹ *ibid* 65-6. Updated and accessed by this author on 17 March 2015.
- ⁴² Christopher Walker, 'Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law' (2008) 4 *HCQR* 54, 70.
- ⁴³ *ibid* 71.
- ⁴⁴ *ibid* 72.
- ⁴⁵ *ibid*.
- ⁴⁶ German J. Bidart Campos, *La Corte Suprema: El Tribunal de las Garantías Constitucionales* (Ediar 2010) 21, citing *Pastorino v. Ronillon* (1883) [1884] 25 *Fallos de La Corte Suprema de Justicia de La Nación* 364, 368; Carlos Tribiño, *La Corte Suprema: Competencia y Vías de Acceso* (Abeledo Perrot 2010) 36, citing *Ceramica San Lorenzo* [1985] 307 *Fallos* 1094, 1096-7. The 1883 CSJN decisión admonishes, "...hay un deber moral para los jueces inferiores en conformar sus decisiones como las misma corte lo tiene decidido en casos análogos..." (there is a moral duty for the lower court judges to conform their decisions to those of this court in analogous cases) (this author's translation).

- ⁴⁷ Bidart Campos (n 46) 21, citing *García Rams y Herrera* [1948] 212 Fallos 251, 253–4.
- ⁴⁸ Ibid 21, “the decisions of the Court are assigned the highest importance, and are habitually automatically followed” (this author’s translation); Walker (n 42) 72. Not all scholars agree that decisions of the CSJN are in fact binding; see Tribiño (n 46) 36–9.
- ⁴⁹ Kapiszewski (n 32) 70.
- ⁵⁰ Miguel (n 34) 47–8 (this database works best with an Internet Explorer browser).
- ⁵¹ Ibid 48; Infojus is now free (information updated by this author).
- ⁵² Andrea Castagnola and Anibal Pérez-Liñán, ‘Bolivia: The Rise (and Fall) of Judicial Review’ in Gretchen Helmke and Julio Ríos-Figueroa (eds), *Courts in Latin America* (CUP 2011), 279–80 (this chapter provides an excellent history of the Bolivian judiciary which is much more detailed and interesting than the summary presented in this article).
- ⁵³ Ibid 280–1; see ibid 285–6 for the complex and evolutionary TSJ appointment process.
- ⁵⁴ Ibid 286–7.
- ⁵⁵ Ibid 292.
- ⁵⁶ Ibid 287–8.
- ⁵⁷ Ibid 293 citing Mitchell A. Seligson, Daniel Moreno Morales, Vivian Schwarz Blum, ‘Democracy Audit: Bolivia 2004 Report’ (LAPOP 2004) 108–9 <<http://www.vanderbilt.edu/lapop/ab2004.php>> accessed 31 March 2015.
- ⁵⁸ Central Intelligence Agency, ‘Bolivia’ (*The World Factbook* 23 June 2014) <<https://www.cia.gov/library/publications/the-world-factbook/geos/bl.html>> accessed 28 March 2015.
- ⁵⁹ Castagnola and Pérez-Liñán (n 52) 296–9.
- ⁶⁰ Ibid 299–301.
- ⁶¹ Miguel (n 34) 56; see also, ‘Ley del Deslinde Jurisdiccional’ (Ley 73) 29 December 2010 <http://bolivia.infoleyes.com/show_norm.php?id=2769> accessed 28 March, 2015.
- ⁶² Ibid 302.
- ⁶³ *Ley del Tribunal Constitucional Plurinacional*, Law 27, 6 July 2010 and *Código Procesal Constitucional*, Law 254, 5 July 2012 <<http://www.tcpbolivia.bo/tcp/content/leyes>> accessed 28 March 2015
- ⁶⁴ ‘Institucional’ (Poder Judicial) <<http://www.pjud.cl/tribunales-del-pais>> accessed 26 March 2015.
- ⁶⁵ ‘Competencias’ (*Tribunal Constitucional de Chile*) <<http://www.tribunalconstitucional.cl/index.php/noticias/atribuciones>> accessed 26 March 2015.
- ⁶⁶ Pablo Bravo-Hurtado, ‘Hacia los Precedentes en Chile: Reforma Procesal Civil y Fuentes del Derecho’ (2013) 40 (2) *Revista Chilena de Derecho* 549, 573.
- ⁶⁷ Ibid 562.
- ⁶⁸ Ibid 550.
- ⁶⁹ Pablo Bravo-Hurtado, ‘Precedente Vinculante versus Independencia Judicial en Chile’ (*Reforma Procesal Civil*, 1 March 2015) <<http://www.reformaprocesalcivil.cl/>> accessed 26 March 2015.

Biography

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