THE EMERGENCE OF BINDING PRECEDENT IN BRAZIL, CHINA, FRANCE AND SWEDEN: A COMPARATIVE STUDY

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ABSTRACT

The doctrine of precedent has a very well-established base in common law jurisdiction legal systems. Conversely, in civil law jurisdictions, the value of judicial precedent is traditionally lower, generally having no more than persuasive effects. This perspective has been changing in the last decade as the pursuit of certainty and equality in judicial outcomes has pushed many civil law jurisdictions to acknowledge judicial precedent as a source of law, assigning them stronger force. This article analyzes the meaningful cultural and legal shift in four different civil law jurisdictions with distinct historical backgrounds: Brazil, China,

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France, and Sweden. The purposes of this article are to explain how these countries moved towards more deference to judicial precedent and to compare the path and characteristics adopted by each of them. Although all jurisdictions analyzed have the same interest in advancing certainty and equality through a system of precedent, there is not one formula to achieve this goal. This article concludes that precedent has a relevant role even in civil law jurisdictions, although there is an apparent necessity to enhance the methodological understanding of such a role by legal scholars, practitioners, and courts.

INTRODUCTION

It has long been claimed that judicial decisions ("precedents") in civil law systems are acquiring growing weight and force, whilst the rigidity of the common law doctrine of stare decisis is increasingly being relaxed, hence setting civil law systems on a converging course with common law systems like the United States of America.[1] One particular development evidencing such a converging course is a "migration" from *jurisprudence constante* to the enhanced recognition of single precedents that has been observed in some civil law systems.[2] Most existing studies have, however, been devoted to major "Western" civil law systems and their convergence with common law systems.[3] This leads to two inter-connected inquiries which thus far have been left open and which this article seeks to address.

First, it can be queried whether there is indeed a global movement, which goes beyond "Western" civil law systems and extends to major civil law systems in Asia and Latin America, towards granting precedent "legal significance," which simply means that precedent is sufficiently important to influence the outcome of future like cases. If the importance of precedent in civil law systems could be said to be "generally limited"

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1 D. NEIL MACCORMICK ET AL., INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 2, 12, 87, 99, 531–35 (D. Neil MacCormick & Robert S. Summers eds., 1997); KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 82–107, 140–49 (3d ed. 1998); UGO A. MATTEI ET AL., SCHLESINGER'S COMPARATIVE LAW: CASES TEXT MATERIALS 614–15 (7th ed. 2009); THOMAS LUNDMARK, CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW 406–07 (2012) (explaining that "vertical effect of precedents is strong" in all four jurisdictions examined: Germany, Sweden, England, and the United States); Allen Shoenberger, *Changes in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Precedent into the Civil Law System*, 55 LOY. L. REV. 5 (2009) (discussing precedents created by the European Court of Justice and the European Court of Human Rights); Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 812 (2005) (discussing from the perspective of countries with a mixed system: many civil law jurisdictions, including Louisiana, France, Spain, and Italy, are heading towards "systematic respect for jurisprudence", "with varying degrees of recognition of the actual value of precedent").

2 *See* MATTEI ET AL., *supra* note 1, at 620 n.25 for discussion on the changes in France. *See* Rodrigo Camarena González, *From Jurisprudence Constante to Stare Decisis: The Migration of the Doctrine of Precedent to Civil Law Constitutionalism*, 7:2 TRANSNAT'L LEGAL THEORY 257 (2016) for discussion of the changes in Mexico and Colombia. *See* Robert L. Henry, *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A. J. 11, 11–12 (1929) for explanation of the situation in early 19th century.

3 Most of the existing studies focus on continental European systems, which account for all nine civil law systems (including the EU system) falling to be surveyed under the Bielefelder project. MACCORMICK ET AL., *supra* note 1.

compared to precedent in common law systems,[4] is there any common pattern in which such limits manifest themselves? This article attempts, therefore, to offer a rare comparative analysis of precedent in a wider range of civil law systems.

Second, should such a global movement be identified and attested, a further inquiry can be made into the possible differences, both in the degree of significance of precedent and in the way in which such significance is acquired and manifested, between the comparators. It has been suggested that the so-called convergence between civil law systems and common law systems (at least as far as Europe is concerned) is a misnomer given their "irreducibly different" legal mentalités. [5] Presumably, the divergence amongst civil law systems with respect to precedent must be less fundamental, since they all seem to start from the same or similar initial position, that is, precedent is accorded with low or no significance.

Nevertheless, the above assertion against convergence serves as a useful reminder that apparent similarity in civil law systems might conceal differences in legal methodologies (such as judicial reasoning) and cultural or even political understructures. Therefore, by comparing how each system of precedent has been taking shape, and how it likely continues to do so, as well as the methodological standards by which each system has been operating, this article seeks to make a new contribution to the scholarship of comparative precedent.[6]

I. THE STUDY CONDUCTED IN THIS ARTICLE

This article is concerned with the exposition of both the commonalities and divergences of the system of precedent in the chosen comparators. It is distinguishable from prior studies of a similar nature, such as the one conducted by the so-called "The Bielefelder Kreis,"[7] in both the choice of comparators and methodology. Unlike the Bielefelder project, this article confines itself to a number of representative civil law

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[4] Ugo Mattei & Luca G. Pes, *Civil Law and Common Law: Toward Convergence? in* THE OXFORD HANDBOOK OF LAW AND POLITICS 273 (2008).

[5] Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMPAR. L.Q. 52, 63, 72–74 (1996).

[6] Portions of this article will consider a "promising" inquiry into the methodological standards. Stefan Vogenauer, *Sources of Law and Legal Method in Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 878–900 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019).

[7] MACCORMICK ET AL., *supra* note 1, at 87, 99.

systems. Two non-European jurisdictions, China and Brazil, have been chosen to represent Asia and Latin America respectively. In particular, China has a unique "non-Western" legal tradition. China and Brazil are both major developing economies with relatively new legal systems. The two European legal systems included in this article, France and Sweden, have been included in the Bielefelder project.[8] However, as two distinct variants within the continental European legal family, both the French and the Swedish system of precedent deserve a fresh and up-to-date review considering the developments in the last twenty-five years.

Put together, the four jurisdictions make a stimulating group of comparators since they are both sufficiently similar yet different enough for a comparative analysis. Such similarities and differences comprise, for example, the comparators' traditional and modern attitudes towards precedent, their court systems as well as their division of the roles of the judiciary and the legislature.

This article does not adopt the "country report" style of study featured in the Bielefelder project.[9] Given its relative short length, such a strategy is also hardly practical. Instead, our approach is to lay down two general hypotheses, namely (1) that precedent in the four comparators has been, and continues to be, given increasing weight; and (2) that there are crucial differences between the comparators which carry considerable implications for the future path of growth for precedent in each of them. These two hypotheses are then tested by way of a series of structured inquiries based on specific issues formulated with a view to bringing out the most salient and significant findings of the comparison. Throughout this process this article has continuously been subject to numerous rounds of examination and revision by each of the authors.

This collective work pursues specific issues grouped under four separate headings. Following the introduction and this brief description of the study conducted in this article, Part II attempts to define the scope of "precedent" to be investigated in the study by, particularly, outlining a hierarchy of all such precedents in each of the comparators for the purpose of filtering out less important precedents, which are excluded from the study. Part III examines the legal status of precedent in each jurisdiction and explores whether they are recognized as a source of law, either in a formal or informal sense. Part IV moves on to consider who creates precedent in each jurisdiction, with a particular focus on the role of

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[8] *See* MACCORMICK ET AL., *supra* note 1, at 103, 293.

[9] *See* MACCORMICK ET AL., *supra* note 1, at 13.

"Supreme Courts" and the suitability of judges as lawmakers. Part V covers a number of matters pertaining to the binding effect of precedent, including the meaning and scale of bindingness, reasons for giving a binding effect to precedent, deviation from precedent, as well as how precedent is utilized. Part VI concludes this article by synthesizing the key findings of the comparative exercise and determining the validity of the two hypotheses raised above.

II. WHAT CONSTITUTE PRECEDENT?

A precedent has been defined as "a past event – in law the event is nearly always a decision – which serves as a guide for present action"[10] or "any past constitutional opinions, decisions, or events which the Supreme Court or nonjudicial authorities invest with normative authority."[11] These broad definitions are given, primarily, with common law precedents in mind. In comparative works precedents have been defined as "prior decisions that function as models for later decision."[12]

It should be emphasized that this article is concerned only with a narrower sense of precedent. First, a precedent in this article is predicated on a court rendering an effective decision (or judgment) in the adjudication of a real-life dispute. Any other sense in which the term "precedent" is used, such as an example set by any other body or in any other process, however authoritative it might be, is not accommodated here. A precedent can, therefore, only be created out of an identifiable real case. However, it does not have to be in the full or original form of that case. As will be seen, it is possible that some jurisdictions choose to create a precedent in a derivative, such as summarized, form of the case. That a precedent is incontrovertibly connected with a real case sets it apart from an abstract norm created by either a legislative or (if appropriate) judicial body. Second, a precedent must, by definition, have influence on the judicial determination of a future like case. In the above definitions, such influence has been variously described as "guide," "normality authority," or "model." Indeed, there may be a broad spectrum of influence that a precedent is likely to exert on a future case. Some precedents with weak influence, such as those serving merely illustrative or educational purposes, may not aptly be regarded as "binding". We believe that for

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[10] NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 1 (2008).

[11] MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 3 (2008).

[12] MACCORMICK ET AL., *supra* note 1, at 2.

"precedent" to arise a certain level of bindingness or importance must be achieved. This brings about the issue as to the hierarchy of precedents, to which we shall turn.

All four comparators try to cope with the many court decisions in their jurisdictions and to overcome the problems of coherence and a viable overview of relevant case law. In China, the upper levels of the hierarchy of precedents are occupied by cases that have received formal post-adjudication recognition from the Supreme People's Court (hereafter "SPC"), whether the decision is rendered by the SPC or a lower court.[13] France and Sweden do not give decisions issued by the (non-final) lower courts any guiding function.[14] The lower court judges in China, France and Sweden do not perceive themselves as creating law or as providing guidance; they focus only on solving the individual case at hand.[15] Because of the Brazilian federative structure, the Brazilian appeals courts' decisions constitute precedent regarding state and local legislation. However, differently from the United States, the Brazilian legal system is based mainly on federal laws, giving the Supreme Court and the other superior courts the most influential role in creating precedent.

Different means have been employed to limit the number of cases with guiding or binding effect in the four legal systems: Brazil has introduced different types of cases with binding effect; China has developed a system of guiding cases;[16] Sweden effectively limits the number of precedents by allowing only very few cases to be referred to and decided by the supreme courts;[17] France, which does not effectively limit the number of cases brought to the *Cour de cassatio*n (30,000 a year) or to the *Conseil d'Etat* (10,000 a year), leaves it to the two supreme courts to deal, respectively, with private law and public law issues, have developed systems to indicate the importance, in terms of precedent, of the cases rendered.

There are also significant differences among the four compared states as to what kind of cases constitute precedent. In Sweden, all cases

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[13] Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo De Guiding, Fa Fa [2010] 51 Hao (最高人民法院关于案例指导工作的规定的通知, 法发 (2010) 51 号) [Notice of the Supreme People's Court on Issuing the Provisions on Case Guidance, Judicial Interpretation No. 51 [2010]] (promulgated by the Jud. Comm. Sup. People's Ct., Nov. 26, 2010, effective Nov. 26, 2010) [hereinafter SPC Provisions on Case Guidance].

[14] LARS WELAMBSON & JOHAN MUNCK, PROCESSEN I HOVRÄTT OCH HÖGSTA DOMSTOLEN (2016).

[15] For Sweden: Welambson and Munck, *supra* note 14.

[16] SPC Provisions on Case Guidance, *supra* note 13.

[17] WELAMBSON & MUNCK, *supra* note 14.

from the supreme courts are precedents, but in practice some are less important than others. Likewise, theoretically, France does not acknowledge any case as a precedent binding in any way, but in practice, some cases from the Cour de cassation and Conseil d'Etat have an important guiding function. In France and Sweden, the task to identify important cases is mainly attributed, after the case is rendered, to the supreme courts themselves, commentators, and lower courts.

In France, the importance of a case of the Cour de cassation depends on the "formation" which has rendered it (this "formation" may be restricted to three judges or extended to the full chamber made of nine to fifteen judges, or, for the most important cases, to the plenary assembly of the Court itself). Besides, by using the letters "P" and "B" the Cour de cassation gives a clear indication of the importance of the case, such as decided by the judges after the audience.[18] The Conseil d'Etat also has its own system to make the hierarchy apparent according both to the formation (restricted to one chamber, two chambers together, the full section or plenary assembly) and the indicators that accompany its publication. Further, it also attributes a specific letter to the case (A, B, C) in view of its importance and whether or not it is published in its official report. The cases that are published are accessible on the online database: Legifrance.[19] And it is important to be familiar with the signs, used by each Supreme Court to indicate the importance they have in terms of precedent. The websites of the Cour de Cassation and of the Conseil d'Etat provide for a selection of cases.[20] Both courts also publish Annual Reports with comments on the most significant cases delivered during the year. As of October 2021, France has endorsed a system of open data for judgements. This means that, progressively, all cases (including first instance and appeal cases) will be freely accessible to all.[21] This enhances the need to make clear and to hierachise the cases.

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[18] The "letter" system has recently been simplified. Since June 2021, the "B" or "B / R" letters prioritize the cases (before that four letters were used: P.B.R.I). These letters appear on the minutes of judgments and are accessible via the case law search engine on the website. Cour de Cassation [Court of Cassation], Hiérarchisation des arrêts [Prioritization of Stops], https://www.courdecassation.fr/jurisprudence_2/hierarchisation_arrets_p.b.r.i._22450.html [https://perma.cc/F9NK-WS8P]

[19] Legifrance, http://www.legifrance.gouv.fr (last visited Nov. 23, 2022).

[20] *See* Conseil D'Etat [Council of State], https://conseil-etat.fr/, (last visited Sep. 16, 2022) (offering more than 600 judgments translated into English, German, Spanish, Chinese and Arabic). [https://perma.cc/VA2N-USFQ].

[21] The "Loi de programmation 2018-2022 et de réforme pour la justice" has set the legal framework for the open data calendar. Loi 2020-797 du 29 juin 2020, and arrêté du 28 avril 2021 [Law 2020 of June 29th, 2020 and order April, 28th 2021] Journal Officiel de La Republique Française [J.O.]

In Sweden all cases by the two Supreme Courts—The Supreme Administrative Court and The Supreme Court—are published on the courts' websites, in yearbooks and in various legal databases. A few cases every year, that the Supreme Courts deem very uninteresting are only referred to in summary, and named "notisfall."[22] Apart from this, the Supreme Courts do not provide any indication as to the importance of their decisions. Due to the relatively few cases from the Swedish Supreme Courts, there is no pressing need to categorize them in terms of importance or theory; all cases from the Supreme Courts are equally important precedents. In practice, however, their importance differs but there is no official way of identifying important or unimportant precedents. Instead, the impact of a precedent is dependent on how it is received in the legal literature and in later Supreme Court cases.[23]

Contrary to France and Sweden, China and Brazil have special procedures whereby precedents are created. Not all decisions by the Brazilian Supreme Court are regarded as binding precedents. Only a few procedures are suitable to create binding precedents. The Brazilian Code of Civil Procedure defines specific procedures to create precedents in order to clarify which must be followed by the lower courts.[24] In those procedures, there is a significant openness to the amici curiae participation. The Court may also set up a public hearing—that is not the hearing for oral arguments—to collect relevant information and hear different points of view about the issue that will be decided.[25] The

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[Official Gazette of France] May 6, 2021, p. 189. https://www.vie-publique.fr/en-bref/279750-open-data-le-calendrier-de-lacces-en-ligne-aux-decisions-de-justice. [https://perma.cc/54AH-B86M]. The open data has started with the publication of all Cour de cassation and Conseil d'Etat cases, on their websites (Sept. 2021). It will gradually expand to all cases, until September 2025. The cases, which must be anonymised and pseudonimised, will be made public under the responsibility of the Ministry of justice.

22 WELAMBSON & MUNCK, *supra* note 14.

23 CHRISTINA RAMBERG, PREJUDIKAT SOM RÄTTSKÄLLA I FÖRMÖGENHETSRÄTTEN [Precedent as a Source of Jurisdiction in Property Law] 56 (2017).

24 CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CODE OF CIVIL PROCEDURE] art. 927 (Braz.).Judges and courts shall observe: I – the decisions of the Supreme Court in control of constitutionality; II – binding precedents ("súmula vinculante"); III – bench decisions in the incident of assunção de competência or in the incident of the resolution of multiple claims on the same point of law or in the decision of multiple appeals on the same point of law to the Supreme Court and to the Superior Court of Justice; IV – binding precedents of the Supreme Court on constitutional matters and of the Superior Court of Justice on infra-constitutional matters; V – the guidelines of the full bench or of the special body to which they are bound to.

25 The rapporteur may: I – request or allow the statements of persons, authorities or entities with an interest in the dispute, considering the relevance of the matter and in accordance with the provisions of the internal regulations; II – set a date to take the

decisions in such procedures are binding precedents for the court's internal bodies and all lower courts for all future disputes regarding the same legal matter, and are rather analogous to precedents in the common law jurisdiction.[26] After such a decision, the Supreme Court shall establish the "legal thesis" of the precedent.[27] The "legal thesis" is a written assertion by the court in which it tries to shape the scope of the precedent in order to simplify the interpretation and, consequently, its use in cases where the same matter of law is in dispute, mainly in repetitive cases.[28] Sometimes, the court issues a binding *súmula* for the purpose of simplifying the interpretation of the precedent.[29]

Turning to China, a hierarchy of precedents is provided for under Article 4 of the SPC's most recent judicial rules on the search for similar cases:

> Article 4 The scope of search for similar cases generally includes:
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> (1) Guiding Cases issued by the SPC;
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> (2) Typical cases issued or effective judgments rendered by the SPC;
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> (3) Referential cases issued or effective judgments rendered by provincial-level High People's Courts;
>
> (4) Effective judgments rendered by the immediate superior court or the adjudicating court.
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> With the exception of Guiding Cases, during the search, preference should be given to cases decided or judgments rendered in the last three

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testimonies of persons with experience and knowledge of the subject, at a public hearing, with the aim of producing evidence for the case.

CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CODE OF CIVIL PROCEDURE] art. 1.038 (Braz.).

[26] Rodrigo Barioni, *As unpublished opinions do direito norte-americano: contribuição para a assunção de competência* [*The unpublished opinions in the North American system: contributions to the assumption of competence*], 261 REVISTA DE PROCESSO 391 (2016) (Braz.).

[27] Rodrigo Barioni and Teresa Arruda Alvim, *Recursos repetitivos: tese jurídica e ratio decidendi*, 296 REVISTA DE PROCESSO 296 (2019) 183.

[28] However, the "legal thesis" does not prevent the lower courts from applying the ratio decidendi of the precedent. *See generally* Rodrigo Barioni & Teresa Arruda Alvim, *Recursos repetitivos: tese jurídica e ratio decidendi* [*Repetitive Appeals: Legal Thesis and Ratio Decidendi*], 296 REVISTA DE PROCESSO 183 (2019) (Braz.); Taís Schilling Ferraz, *Ratio decidendi x tese jurídica. A busca pelo elemento vinculante do precedente brasileiro* [*Ratio Decidendi x Legal Thesis. The Search for the Binding Element of the Brazilian Precedent*], 265 REVISTA DE PROCESSO 428 (2017) (Braz.).

[29] The Brazilian Superior Court of Justice can issue (non-binding) *súmulas* on infra-constitutional matters, such as civil and criminal law. *See infra* note 50.

> years. *Where a similar case is found within a category in prior order, no further search is required*.[30]

The italicized sentence quoted above indicates that the four categories of cases follow an order of decreasing importance. At the apex of this hierarchy sit a newly created body of cases known as "Guiding Cases."[31] Guiding Cases are case summaries produced by the Case Guidance Office of the SPC on the basis of selected legally effective judgments delivered by any Chinese court, whether the SPC or lower courts.[32] Guiding Cases are also the only category of cases formally recognized by the SPC as binding.[33] Any court or interested party may recommend that a court decision be elevated to a Guiding Case, provided that the case meets the criteria of social impact, generality, typicality, complexity, etc.[34] Within the SPC, the Office for the Work on Case Guidance reviews the recommended case and, if satisfied with the recommendation, requests the case to be submitted to the Judicial (or sometimes Adjudicative) Committee of the SPC ("SPCJC") for discussion and approval.[35] To the date of writing there are in total 178 Guiding Cases spanning over divergent fields of law, with the latest 31st batch being

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[30] Guanyu Tongyi Falü Shiyong Jiaqiang Lei'an Jiansuo De Zhidao Yijian (Shixing) (**关于统一法律适用加**强类**案**检**索的指**导**意**见（试**行**)) [Guiding Opinions Concerning Strengthening Search for Similar Cases to Unify the Application of Law (for Trial Implementation)] (promulgated by the Sup. People's Ct., July 15, 2020, effective July 31, 2020), art. 4, SUP. PEOPLE'S CT., https://www.court.gov.cn/fabu-xiangqing-243981.html (last visited Sep. 30, 2022) [hereinafter SPC Opinions on Search for Similar Cases].

[31] SPC Provisions on Case Guidance, *supra* note 13; Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo De Guiding Shishi Zize, Fa [2015]130 Hao (**最高人民法院关于案例指**导工作的规定实施细则, **法**[2015]130 **号**) [Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance, Law No. 130 [2015]] (promulgated by the Jud. Comm. Sup. People's Ct., May 13, 2015, effective May 13, 2015), 2015 Sup. People's Ct. Gaz. [hereinafter SPC Implementation Rules on Case Guidance].

[32] SPC Provisions on Case Guidance, *supra* note 13, at 1.

[33] Thus termed as "normative cases" by Shi Lei (**石磊**), Renmin Fayuan Sifa Anli Tixi Yu Leixing (**人民法院司法案例体系与**类**型**) [*The System and Categories of People's Court Judicial Cases*], 6 FALÜ SHIYONG (**法律适用**) [J.L. APPLICATION] 36, 38 (2018). *See infra* note 74 and accompanying text.

[34] SPC Provisions on Case Guidance, *supra* note 13, art. 2; *see also* Guo Feng (**郭锋**), Zhongguo Fayuan Zhidao Xing Anli De Bianxuan Yu Shiyong (**中国法院指导性案例的编选与适用**) [The Compilation and Application of China's Guiding Cases], Speech at Guiding Cases Seminar at the Stanford Center at Peking University (Nov. 22, 2016), *in* STAN. L.S. CHINA GUIDING CASES PROJECT, Jan. 27, 2017, at 1, 5, 9, https://dirittocinese.com/wp-content/uploads/2018/04/commentary-18-english.pdf (noting that the Guiding Cases selected are cases that convey good social values but not necessarily cases that are legally significant) [perma.cc/M7ZZ-8VH6].

[35] SPC Provisions on Case Guidance, *supra* note 13, art. 6.

issued on 1 December 2021.[36] As will be seen in more detail below, the legal character and effect of Guiding Cases are explicitly granted by the SPC's judicial interpretations, a type of legally binding quasi-legislative documents issued by the SPC. In comparison, the legal nature of other precedents sitting at lower levels of the hierarchy is less clear.

Non-guiding cases are published through different channels, including newspapers, websites, and collected volumes, according to the relevant regulations of the SPC.[37] Among precedents not strictly binding in China, it is generally agreed that cases published in the SPC Gazette ("Gazette cases") are, as a whole, the most influential.[38] Such Gazette cases are the most important type of "typical cases" under the above cited Article 4(2) and thus sit at the second highest level of China's hierarchy of precedents.[39] Normally, an adjudicating judge in a lower court submits the case to the Gazette and the editorial office of the Gazette decides whether the case should be published as "cases" (案例). The editorial office of the Gazette also selects and publishes effective judgments rendered by the SPC as "selected judgments" (裁判选登). Since 1999 Issue 12 of the Gazette, both "cases" and "selected judgments" in the Gazette have ceased to be submitted to the SPCJC for discussion or approval before publication.[40] Currently, therefore, the editorial office has a broad discretion over the selection of Gazette cases. From 2016 to 2020, the Gazette published on average 83 Selected Judgments and 187 Cases, in total 270 Gazette cases per year.[41] Compared to the astronomical

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[36] *Zuigao Renmin Fayuan Fabu Di 31 Pi Zhidao Xing Anli* (**最高人民法院**发布 **第** 31 **批指**导性案例) [*The Supreme People's Court Issued the 31st Batch of Guiding Cases*], Renmin Fayuan Bao (**人民法院**报) PEOPLE'S CT. DAILY, (Dec. 6, 2021), http://rmfyb.chinacourt.org/paper/html/2021-12/06/content_211830.htm?div=-1 (last visited Sept. 22, 2022).

[37] Zuigao Renmin Fayuan Caipan Wenshu Gongbu Guanli Banfa, FaBan, Fa (2000) 4 Hao (最高人民法院裁判文书公布管理办法, **法**办发 (2000) 4 **号**) [Supreme People's Court Regulatory Measures on the Publication of Judgments, Judicial Interpretation No. 4 [2000]], (promulgated by the Legal Off. Sup. People's Ct., June 15, 2000, effective June 15, 2000).

[38] Nanping Liu, *Legal Precedent with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court*, 5 J. CHINESE L. 107, 118–19 (1991); ZHONGGUO TESE ANLI ZHIDAO ZHIDU YANJIU (**中国特色案例指**导**制度研究**) [STUDIES ON THE GUIDING CASE SYSTEM WITH CHINESE CHARACTERISTICS] 50 (Zuo Weimin & Chen Mingguo eds., 2014); Susan Finder, *China's Evolving Case Law System in Practice*, 9 TSINGHUA CHINA L. REV. 245, 250 (2017).

[39] Qiao Liu, *Chinese 'Case Law' in Comparative Law Studies: Illusions and Complexities*, 14 AsJCL S97, S104 (2019).

[40] *See* Zuigao Renmin Fayuan Gongbao (**中**华人民共和国最高人民法院公报) [SUP. PEOPLE'S CT. GAZ.], http://gongbao.court.gov.cn/ (last visited Sept. 22, 2022). *see also* Liu, *supra* note 39, at S105.

[41] *See* Zuigao Renmin Fayuan Gongbao (**中**华人民共和国最高人民法院公报) [SUP. PEOPLE'S CT. GAZ.], http://gongbao.court.gov.cn/ (last visited Sept. 22, 2022).

number of court judgments published on the "China Judgment Online" website,[42] the combined number of Guiding Cases and Gazette cases is still extremely small. Nevertheless, this article confines itself to these two categories of cases since they represent the epitome of cases of national significance in China.

Therefore, there appears to be a small number of cases, selected pursuant to different standards and means in the compared states, that squarely fit our previous definition of "precedents." These comprise binding súmula in Brazil and Guiding Cases in China. Other less important cases, such as Gazette cases in China and supreme court cases in France and Sweden, may also be so characterized according to their particular circumstances and indicators. By and large, however, decisions of lower courts are excluded from "precedents" as defined above.

III. THE LEGAL STATUS OF PRECEDENTS

The question of whether a defined group of precedents constitute a source of law in a given jurisdiction hinges on what constitutes a source of law. For example, a broad notion of "source of law" may encompass "elements for justifying the judicial decisions," namely arguments.[43] Similarly, "source of law" is defined in Black's Law Dictionary as "authority for legislation and for judicial decisions," which refers, in "the literature of jurisprudence," to the source from which "the judge obtains the rules by which to decide cases."[44] Under such a notion there appears to be little difficulty in conceiving court decisions as a source of law. However, "source of law" has also been habitually used in a formalistic way to refer only to designations made in the constitution or otherwise by the top legislature in a civil law system. Historically, judicial decisions were excluded from the ambit of such designated "source of law" as a result of the reception of the Roman Law.[45] Thus, a general distinction is often drawn between the civil law tradition and the common law tradition:

> In the common law, judicial precedent plays a leading role, serving both as a source of law and as an example of a prior judge's

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[42] *See* Zhongguo caipan wenshu wang (中国裁判文书网) [CHINA JUDGMENTS ONLINE], http://wenshu.court.gov.cn/ (last visited Sept. 22, 2022).

[43] Leonor Moral Soriano, *The Use of Precedents as Arguments of Authority, Arguments* ab exemplo, *and Arguments of Reason in Civil Law Systems*, 11 RATIO JURIS 90, 101 (1998).

[44] LON L. FULLER, ANATOMY OF THE LAW 69 (1968) (quoted in Black's Dictionary).

[45] D. K. Lipstein, *The Doctrine of Precedent in Continental Law with Special Reference to French and German Law*, 28 J. COMPAR. LEGIS. & INT'L L. 34, 38–41 (1946).

> methodology in reasoning from the case-law materials. On the other hand, a civil-law judicial precedent plays only a supporting role. The Civil Code is the primary source of law, and precedent serves merely as an example of a prior judge's interpretation and application of legislated law.[46]

While this distinction highlights the difference in importance between code (statutes) and precedents in a civil law system, it does not deny the possible role of precedents in the courts' future adjudication of similar cases. An overview of the four compared states reveals their changing attitude towards the source of law issue.

Brazil has legislative provisions regarding the sources of law, which do not mention precedent as a source. In Brazil, statutory law establishes the sources of law that can be used by the courts in the absence of legislation:[47] "Whenever the law is silent, the judge can decide the case according to analogy, customary law and general principles of law." Precedent is not mentioned, and there is no agreement among scholars to accept precedent as a formal source of law.[48] The debate, however, does not preclude the Brazilian courts from using previous decisions as a justification for their conclusions on the dispute at hand. Since the promulgation of the new Code of Civil Procedure, many scholars have considered precedent a source of law.[49]

This change of view in Brazil resulted from several important reforms that strengthen the status of precedents. A constitutional amendment was introduced in 2004, creating the súmula vinculante (binding súmula) to enforce Brazilian Supreme Court decisions.[50] A

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[46] James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 3 (1993); *see* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION; AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 36 (1969).

[47] Law No 4.657 (1942) art. 4 (Decreto No. 4.657, de 4 de Setembro de 1942, Diário Oficial da União [D.O.U.] de 4.09.1942 (Braz.)).

[48] For a general overview of this topic, *see* FERNANDO PINTO, JURISPRUDÊNCIA, FONTE FORMAL DO DIREITO BRASILEIRO, 38 (1971). In more recent works, considering precedent as a source of law: ADA PELLEGRINI GRINOVER, ENSAIOS SOBRE A PROCESSUALIDADE: FUNDAMENTOS PARA UMA NOVA TEORIA GERAL DO PROCESSO, 91 (2016); JOSÉ ROGÉRIO CRUZ E TUCCI, PRECEDENTE JUDICIAL COMO FONTE DO DIREITO [JUDICIAL PRECEDENT AS A SOURCE OF LAW] 23 (2004); TERESA ARRUDA ALVIM WAMBIER, MODULAÇÃO NA ALTERAÇÃO DA JURISPRUDÊNCIA FIRME OU DE PRECEDENTES VINCULANTES [MODULATION IN THE ALTERATION OF FIRM JURISPRUDENCE OR BINDING PRECEDENT] 80 (2019).

[49] *See* CÂNDIDO RANGEL DINAMARCO, INSTITUIÇÕES DE DIREITO PROCESSUAL CIVIL [CIVIL PROCEDURE LAW INSTITUTIONS] 156 (8th ed. 2016); *see also infra* note 199 and accompanying text.

[50] The Federal Supreme Court may, ex-officio or upon request, upon decision of two thirds of its members, and following reiterated judicial decisions on constitutional

súmula is an abstract of the holding of the majority of the Supreme Court regarding certain constitutional issues.[51] It is written in a few lines that intend to concisely express the law, similar in layout to a statutory provision.[52] Although the súmula is not a genuine precedent, since its statement is disconnected from the facts of a particular case,[53] it can bring more certainty in the interpretation of the law.

In 2008, Brazil introduced a procedure for the "resolution of multiple appeals on the same legal issue" before the Superior Court of Justice and the Supreme Court.[54] The decisions should be followed in the pending cases that are stayed in lower courts until the Superior Court of Justice or the Supreme Court has decided in the test case(s).[55] For that purpose, the court set out the "legal thesis," which will apply to the pending or future cases in which the court shall decide the same legal issue[56]. The main goal of creating the "legal thesis" is to clarify to the lower courts and to the public how the courts have interpreted that point of law, avoiding new claims and appeals about that issue.[57] Consequently, the primary purpose of the multiple claim procedure was not to increase the status of precedent as a source of law.[58] The reform, however, has an

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> matter, issue a *súmula* which, as from publication in the official press, shall have a binding effect upon the lower bodies of the Judicial Power and the direct and indirect public administration, in the federal, state, and local levels, and which may also be reviewed or revoked, as set forth in law.

CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 103-A (Braz.).

51 The word *súmula* comes from a Latin word *summula*, which means summary or synthesis. *See* DURVAL DE NORONHA GOYOS JR., NORONHA'S LEGAL DICTIONARY, ENGLISH - PORTUGUESE, PORTUGUESE - ENGLISH 481 (1st ed. 1993).

52 *See, e.g.*, SÚMULA DA JURISPRUDÊNCIA PREDOMINANTE DO SUPREMO TRIBUNAL FEDERAL - ANEXO AO REGIMENTO INTERNO [SUMMARY OF THE PREDOMINANT JURISPRUDENCE OF THE FEDERAL SUPREME COURT - ANNEX TO THE INTERNAL REGULATIONS] 33 (1964) (Brazilian Supreme Court's Súmula 1: "The expulsion of a foreign citizen married to a Brazilian person, or who has a Brazilian child, dependent on the paternal economy, is forbidden"); *see also* SÚMULA DA JURISPRUDÊNCIA 736, Diário da Justiça [D.J.], 09.12.2003 (Brazilian Supreme Court's Súmula 736: "It is incumbent upon the Labor Court to judge actions that have as a cause for requesting non-compliance with labor standards related to the safety, hygiene and health of workers.").

53 LUCAS BURIL DE MACÊDO, PRECEDENTES JUDICIAIS E O DIREITO PROCESSUAL CIVIL, 87 (2017).

54 Lei No. 11.672, de 8 de Maio de 2008, Diário Oficial da União [D.O.U.] de 9.05.2008 (Braz.).

55 C.P.C. art. 543-C (added to revoked C.P.C. by Lei No. 11.672).

56 C.P.C. art. 543-C.

57 Rodrigo Barioni & Teresa Arruda Alvim, *supra* note 28.

58 Although the purpose of this procedure was not to develop the legal system, but merely to clarify an existing rule of law on which there is controversy, this was a significant occasion for legal scholars and the courts in general to re-evaluate the importance of the use of precedents.

indirect effect of reinforcing precedent, as the decision in the test case provides guidance to similar situations.

A more substantial reform was implemented in 2015 by the Brazilian Code of Civil Procedure.[59] The Brazilian Code of Civil Procedure strengthens the authority of Supreme Court precedent as a source of law, considering that precedent can bind all the lower courts.[60] It also enhances the authority of other courts' decisions as precedent in different matters such as civil, criminal, and labor law when they are made in accordance with certain procedures.[61] According to Article 927 of the Code of Civil Procedure, the Brazilian Supreme Court precedent is binding when they are created (1) in multiple claim appeals, (2) in a direct constitutional review, (3) in appeal, when the certiorari was granted, (4) in assunção de competência,[62] or (5) by a full court decision. The lower courts must follow such supreme court precedents. The Brazilian Code of Civil Procedure imposes an obligation upon the latter court to explain why a given precedent governs or does not govern the case.[63] If the lower courts fail to observe the Supreme Court precedent, without distinguishing by reason the case at hand or explaining that the given precedent was overruled, the decision may be declared void.[64] The Brazilian Supreme Court and all other courts must consider precedents raised by the parties or by the court, and analyze analogical arguments that support the application of the precedent in the case at hand.

In the case of China, the Chinese Constitution makes reference to three types of statutory laws only, including "Laws" made by National People's Congress ("NPC") and its Standing Committee ("NPCSC"), "administrative regulations" made by the State Council, and "local laws and regulations" made by local legislatures and administrative organs,[65]

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[59] Two of the most prominent provisions are Code of Civil Procedure Article 926, providing that the courts must standardize case law and keep it stable, intact, and consistent, and Article 927, which imposes a duty on judges and courts to observe precedents created in procedures designed for this purpose or made by some bodies of the courts. C.P.C. arts. 926, 927.

[60] *See* C.P.C. art. 927, § (I)–(IV).

[61] *Id.* (III), (V).

[62] C.P.C. art. 947 (The *assunção de competência* requires a particular case of social interest and it does not concern repetitive litigation matters. The procedure is simple: the rapporteur or the panel in the appeal propose that a higher body in the same court decides the case. This higher body's decision is binding for the internal court bodies and all lower courts for all future disputes regarding the same legal matter. The *assunção de competência* is equvialent to a precedent in the common law jurisdiction).

[63] C.P.C. art. 489, § 1.

[64] C.P.C. arts. 11, 489, § 1, VI.

[65] XIANFA art. 5 (2018) (China).

without any mention of decisions made by people's courts. Some of the "Laws" provide for the sources of law in a specific area of law. An example is article 10 of the Chinese Civil Code ("CCC"), which provides for only two sources of civil law (i.e., private law): statutory laws and customary laws.[66] Precedents are not recognized as a source of law in the Constitution or in any Chinese statutory law. Rather, the legal status of Guiding Cases is now aligned with that of "Judicial Interpretations" issued by the SPC. As a result of a 2019 amendment of the Organic Law enacted by the NPC, the SPC is explicitly given the power not only to "conduct interpretation on issues concerning the concrete application of law in adjudicative work," but also to "issue guiding cases."[67]

The former power to "conduct interpretation" was recognized as early as the 1979 Organic Law and a few other laws or resolutions made by the NPCSC.[68] The SPC has long taken such a power as a license to create binding norms in the form of Judicial Interpretations to guide lower courts in their adjudication of disputes.[69] Although Judicial Interpretations are not explicitly recognized by the NPC as a source of law, there is no doubt that they resemble statutory laws both in form and substance and operate similarly as statutory laws in judicial practice.[70] Judicial Interpretations can, therefore, be regarded as a judicial source of law consciously established by the SPC and consolidated in the many years practice of people's courts at all levels. The 2019 amendment of the Organic Law suggests that Guiding Cases are to be treated in the same

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[66] Zhonghua Renmin Gongheguo Minfa Dian (中华人民共和国民法典) [Civil Code of the People's Republic of China] (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021).

[67] Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa (中华人民共和国人民法院组织法) [Organic Law of People's Courts of the People's Republic of China] (promulgated by the Nat'l People's Cong., Oct. 26, 2018, effective Jan. 1, 2019).

[68] Zhonghua Renmin Gongheguo Ge Ji Renmin Daibiao Changwu Weiyuanhui Jiandu Fa (中华人民共和国各级人民代表大会常务委员会监督法) [Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels] (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 27, 2006, effective Jan. 1, 2007); *see also* Guanyu Jiaqiang Falu Jieshi Gongzuo De Jueyi (关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law] (promulgated by the Standing Comm. of the Nat'l People's Cong., June 10, 1981), CLI.1.1006(EN) (Lawinfochina).

[69] *See* Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo De Guiding, Fa Fa [2007] (最高人民法院关于司法解释工作的规定) [Provisions of the Supreme People's Court on the Judicial Interpretation Work, No.12 [2007]] (promulgated by the Judicial Comm. Sup. People's Ct., Mar. 9, 2017, effective Apr. 1, 2007) (stating in Article 5 that Judicial Interpretations "have legal force").

[70] *See* generally, DONG HAO [董樗], ON JUDICIAL INTERPRETATION [司法解释论], (1999 China University of Political Science and Law Press); *see also* Wang Cheng, *A Study on the Effect of SPC Judicial Interpretations*, 28 PEKING UNIV. L.J. 263 (2016).

way as Judicial Interpretations.[71] The core of a Guiding Case consist in the Essential Points of Adjudication, which comprise one or more standalone statements of legal rules. Contrary to common understandings,[72] the rules pronounced in a Guiding Case resemble provisions of a Judicial Interpretation in that they are intended to operate in a forward-looking manner and are not, in practice, by necessity anchored on any provision made by the legislature.[73] Such Essential Points differ from provisions of a Judicial Interpretation in that the former can only be cited in the reasoning part of a future decision,[74] whereas the latter should be cited as "applicable law" (or legal ground) in the decision.[75] However, if a broader view of a "source of law" is adopted, this is better seen as a technical difference rather than a difference in substance.[76]

Precedents, other than Guiding Cases are not recognized as a "source of law" either by the NPC or the SPC, even though some of them may as a matter of fact be the source of legal rules applied to subsequent cases. It was pointed out earlier that the SPC imposed a requirement on the judges in charge of deciding important or difficult cases to search prior "similar cases."[77] Cases included in the scope of such "similar cases" are in one sense all potential sources of rule for future adjudication. However, even Gazette cases cannot be said to constitute a stable source of law since the legal effect of Gazette cases varies from case to case and has to be assessed on an individual basis. It is thus hard to regard those non-guiding cases as captured by even the broadest sense of "source of law."

In France, for a long time, it was considered that Article 5 of the French Civil Code (1804) excluded case law as a source of law, due to the prohibition it sets forth: "In the cases that are referred to them, judges are

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71 Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa (中华人民共和国人民法院组织法) [Organic Law of People's Courts of the People's Republic of China] (promulgated by the Nat'l People's Cong., Oct. 26, 2018, effective Jan. 1, 2019).

72 *E.g.*, Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2232–33 (2016).

73 Liu, *supra* note 39, S116.

74 SPC Implementation Rules on Case Guidance, *supra* note 31, arts. 10–11.

75 Zuigao Renmin Fayuan Guanyu Caipan Wenshu Yinyong Fali, Fagui Deng Guifan Xing Falu Wenjian De Guiding, [2009] (最高人民法院关于裁判文书引用法律、法规等规范性法律文件的规定, [2009]) [Provisions of the Supreme People's Court on Citation of Such Normative Legal Documents as Laws and Regulations in the Judgments, No. 14 [2009]] (promulgated by the Judicial Comm. Sup. People's Ct., Oct. 26, 2009, effective Nov. 4, 2009), arts. 1–2.

76 Lei Lei, *Rethinking the Source of Law Status of Guiding Cases*, 1 CHINA LEGAL SCI. 275 (2015) (suggesting that Guiding Cases constitute a quasi-source of law with a relatively weak normative bindingness).

77 SPC Opinions on Search for Similar Cases, *supra* note 30, at arts. II, VI.

forbidden to pronounce judgment by way of general and regulatory dispositions." The French theory, that case law (jurisprudence) could not be a legal source of law, and that it is merely an authority in fact, prevailed during the nineteenth century and for some time during the twentieth century. This theory is no longer maintained. While case law can only develop as and when problems come to light in respect of the pleas submitted, the range of questions submitted enables the *Conseil constitutionnel*, the Court de cassation, and the Conseil d'Etat to provide a balanced and consistent reply to the majority of questions raised and leaves ample scope to fill a legal vacuum in substantive law or give a meaning to the law, in line with changes in society and the way they are perceived.

Developments which took place during the 19th century have enabled the Court of cassation and the Conseil d'Etat to establish and extend their widely recognized powers. The Court of cassation plays a fundamental role in harmonizing case law. It never rules on the facts of a case but is exclusively required to interpret a rule of law whether the said rule is substantive or procedural, or part of old or new legislation. The court exercises legislative control through the replies it gives to grounds that there has been a violation of (civil or criminal) law or to grounds that the lower court's decision lacked a legal basis (in civil cases). The legal and moral role played by this judicial body has led the legislator to entrust it with a variety of other tasks, notably with the power to give opinions before the lower courts have rendered their decision.[78] This power to give opinions enables the lower courts to anticipate the position the court will take with respect to a specific rule which the courts are having difficulty applying. The procedure is strictly regulated and must comply with a certain number of conditions. The Court of Cassation delivers approximately ten opinions per year.[79] If the lower courts fail to observe the Court of Cassation precedent without explaining why, the decision will be quashed ("cassée") by the Cour de cassation since courts must consider precedents raised by the parties and analyze analogical arguments that support the application of the precedent in the case at hand.[80] However,

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[78] Loi 91-491 du 15 mai 1991 modifiant le code de l'organisation judiciaire et instituant la saisine pour avis de la Cour de cassation [Law 91-491 of May 15, 1991 Amending the Code of Judicial Organization and instituting Referral for an Opinion to the Court of Cassation], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 18, 1991, p. 115.

[79] *See* COUR DE CASSATION, https://www.courdecassation.fr (last visited Sept. 21, 2022).

[80] Loi 91-491 du 15 mai 1991 modifiant le code de l'organisation judiciaire et instituant la saisine pour avis de la Cour de cassation [Law 91-491 of May 15, 1991 Amending the Code of Judicial

contrary to Brazil where the decision may be "declared void," this cannot be done without making an appeal (if it is a first instance decision) or bringing the case to the Cour de cassation. Besides, and this may appear as a French oddity, after a Court of Appeal decision has been "quashed," it must be sent back to the Court of Appeal (this is due to the fact that the Cour de cassation does not judge the facts). At this stage, this court may decide to resist and maintain its previous solution, in which case the Cour de cassation, if seized again, will sit in a plenary formation and decide whether or not to break the lower court's resistance (such a system does not exist in the administrative order where the binding force of the Conseil d'Etat's decision is very strong).[81]

Sweden lacks legislation on the sources of law. Legal scholars and courts perceive precedents from the supreme courts as a source of law and there is a common understanding that the importance of precedents has gradually increased in the last century.[82] A special feature of Swedish law is the great importance of preparatory works. Such works are often extensive and explain the legal context within which a statute is proposed and how the proposed statute is to be understood. Legal literature has for a long time debated the pros and cons of preparatory works as a source of law. The Supreme Court has lately clarified that it is not bound by statements in preparatory works.[83] There is general agreement that precedent is a superior source of law than preparatory works.[84]

Although there are formal obstacles and uncertainties around attributing the label "source of law" to all precedents, all four compared states have resiled from their earlier positions and now acknowledge that at least some precedents are important and even indispensable grounds of judicial decision, thus in effect functioning as a source of law. The states made such a shift via different means and channels. In France and Sweden, the change has been gradual without any legislative reform. Brazil has adopted legislative reforms that strengthen case law. In China, the SPC has played a pivotal role by paralleling Guiding Cases with statute-style laws called Judicial Interpretations.

Organization and instituting Referral for an Opinion to the Court of Cassation], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 18, 1991, p. 115.

81 COUR DE CASSATION, RAPPORT DE LA COMMISSION DE REFLEXION SUR LA COUR DE CASSATION 2030, at 57 (2021) (suggesting to get rid of this oddity).

82 RAMBERG, *supra* note 23, 54.

83 Nytt Juridiskt [NJA] [Supreme Court Reports] 2010 p. 467 T 4904-08 (Swed.).

84 RAMBERG, *supra* note 23, 330–31.

IV. THE CREATOR(S) OF PRECEDENTS

A. JUDGES AS LAWMAKERS

1. Do Judges Make Law In Reality?

The adoption of a broad notion of "source of law" means that the judiciary could generate legal rules applicable to future concrete disputes. The fundamental and "irreducible" difference between the common law and the civil law has been said to reside in a power structure where common law judges have the "inherent power" to make or develop law while civil law judges require "a statutory grant of power" to do the same.[85] Thus, it is first necessary to assess the current status in the four compared states.

All four compared states come from a history where judges were not seen as making law, but as simply applying already existing law. France has a rule in its civil code expressly prohibiting judges from making law.[86] Although the French prohibition against judge-made law remains, there has been a major change in practice. The French courts have power to create rules, which is indirectly permitted by the requirement that courts must explain the reasons (motifs) for their decisions (while before the French revolution, the old courts did not give any reasons). Brazil, China, and Sweden do not have any statutory law directly addressing the judges' powers as lawmakers.

The Brazilian Supreme Court is quite an activist.[87] In fact, it creates and quite often changes the law.[88] Some of the justices are of the opinion that the Supreme Court has a responsibility to accommodate social needs that are not regulated by statutory law, such as civil rights.[89]

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[85] Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L. Q. 52, 74–75 (1996) (citing Otto Kahn-Freund, *Common Law and Civil Law — Imaginary and Real Obstacles to Assimilation*, *in* NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 137, 160 (Mauro Cappelletti ed., 1978)).

[86] Code civil [C. civ.] [Civil Code] art. 5 (Fr.).

[87] *Cf.* ELIVAL DA SILVA RAMOS, ATIVISMO JUDICIAL: PARÂMETROS DOGMÁTICOS [JUDICIAL ACTIVISM: DOGMATIC PARAMETERS] 25 (2d ed. 2015).

[88] For instance, one can mention the ruling that recognized the right of union to same gender partners. *See* S.T.F.J., Pleno, ADI 4277, Relator: Min. Ayres Britto, 05.05.2011, Diário da Justiça Eletrônico [D.J.e.] 14.10.2011 (Braz.) and S.T.F.J., Pleno, ADPF 132, Relator: Min. Ayres Britto, 05.05.2011, Diário da Justiça Eletrônico [D.J.e.] 14.10.2011(Braz.).

[89] *See* S.T.F., ADI 4277, Relator: Min. Ayres Britto, 05.05.2011, 198 Diário da Justiça Eletrônico [D.J.e], 14.10.2011, 611, 868 (Celso de Mello, J. concurring) ("Practices of judicial activism, although moderately performed by the Supreme Court in exceptional moments, become an

Sometimes, the Brazilian Supreme Court and other Brazilian courts exceed their powers when shaping the boundaries of vague and undefined legal concepts in statutory law.[90] Judicial activism has been growing in Brazil's Supreme Court, mainly because of the inefficiency and lack of confidence in the parliament in some matters.[91] For this reason, it is not infrequent to see the Supreme Court striking out conservative legislation (such as legislation not allowing gay marriage).[92] However, the legitimacy of the Brazilian Supreme Court doing so has been challenged in the last years for its (over-)activism, mainly in cases involving politically sensitive matters.[93]

China stands out as the SPC has a distinct power to make law through issuing legally binding Judicial Interpretations.[94] Thus far, this has been the SPC's most powerful and most frequently used mechanism of law-making. The SPC's newly self-conferred power to issue Guiding Cases stems from the same source that mandates its power to issue Judicial Interpretations and this form of law-making has a greater practical importance than the abstract and ambiguous legislative provisions.[95] As noted above, the *Essential Points of Adjudication* in Guiding Cases resemble provisions in Judicial Interpretations.[96] In practice, in almost half of the subsequent cases referring to a Guiding Case, the reference was made only to the latter's *Essential Points of Adjudication*.[97] These were

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institutional necessity, when the bodies of the Public Power omit or excessively delay the fulfillment of the obligations to which they are subject, even more if one is aware that the Judiciary, in the case of state behavior that is offensive to the Constitution, cannot be reduced to a position of pure passivity").

90 One example is the Supreme Court's decision allowing a party to file a new lawsuit without a limit of time and despite the *res iudicata*, in cases involving paternity suit. S.T.F., RE 363.889, Relator: Min. Dias Toffoli, 02.06.2011, Diário da Justiça Eletrônico [D.J.e.], 16/12/2011, 1 (Braz.); *But see* C.P.C. arts. 966, 975 (providing that there are provisions that allow only a motion for a new trial in very narrow situations after the *res judicata* and that such claims must be brought within two years).

91 *See generally* Luis Roberto Barroso, *Judicialização, ativismo judicial e legitimidade democrática*, v.5, n.8 SUFFRAGIUM - REVISTA DO TRIBUNAL REGIONAL ELEITORAL DO CEARÁ 11, 11–22 (2009).

92 *See supra* note 88 and accompanying text.

93 *See, e.g.*, GEORGES ABBOUD, PROCESSO CONSTITUCIONAL BRASILEIRO 1188 (2018).

94 *See supra* note 68 and accompanying text.

95 Ping Yu & Seth Gurgel, *Stare Decisis in China? The Newly Enacted Guiding Case System*, *in* READING THE LEGAL CASE – CROSS-CURRENTS BETWEEN LAW AND THE HUMANITIES 142, 149–50, 155 (Marco Wan ed., 1st ed. 2012).

96 *See supra* note 73 and accompanying text.

97 *See* RSCH REP. ON THE APPLICATION IN JUDICIAL PROCEEDINGS OF GUIDING CASES ISSUED BY THE SUP. PEOPLE'S CT. (2017), 21–22, www.chinalawinfo.com(ed) (hereafter 2017 Guiding Case Report).

applied as if they were a pre-existing rule provided only that the subsequent case was "similar" to the Guiding Case.[98] Consequently, there is little doubt that, at least in so far as Guiding Cases are concerned, the SPC is engaging in law-making activities. This is despite the fact that Chinese judges do not openly speak of themselves as lawmakers, and generally do not consciously regard their role as creating legal norms. By contrast, it is more difficult to see the production of precedents other than Guiding Cases as necessarily a lawmaking activity. Legal rules or reasoning derived from such precedents do not have the same legal status as the *Essential Points of Adjudication* in Guiding Cases, even though conceivably the law-making mentality may sometimes be carried forward, notably by SPC judges, to the formulation of reasoning and decision in adjudicating individual cases.

Notwithstanding the above-mentioned prohibition against judge-made law, the French Cour de cassation itself officially recognizes that there is "ample scope for the Court to give another meaning to the law over time in line with changes in society and the way they are perceived".[99] The Court further explains that, since Article Four of the Civil Code prohibits a court from declining to hear a case on the grounds that the act does not cover a specific aspect of the case, or is ambiguous or inadequate, the Court has to fill a legal vacuum in substantive law.[100]

Swedish Supreme Court judges acknowledge that their decisions create law, and they do not seem afraid of jeopardizing their legitimacy by expressly declaring that they create law.[101] We do not find similar express declarations by supreme court judges in Brazil, China, or France.

Nowadays, there is general agreement among lawyers in all four compared states that judges in effect make law (even though the courts do not openly state that they make law). The role of judges is often perceived as being not only to declare or to expose the meaning of the law, but also

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[98] SPC Implementation Rules on Case Guidance, *supra* note 31, art 9; s*ee also*, Peng Zhongli [彭中礼], "Guiding Cases in Judicial Decisions" [司法判决中的指导性案例], *China Law Science*, 2017, Vol. 6, 129, at 140, 147.

[99] COUR DE CASSATION, *Case Law of the Court of Cassation*, 15, https://docslib.org/doc/4552704/the-role-of-the-court-of-cassation-the-court-of (last visited Dec. 1, 2022).

[100] COUR DE CASSATION, *About the Court*, https://www.courdecassation.fr/en/about-court (last visited Sep. 30, 2022).

[101] *See* Nytt Juridiskt [NJA] [Supreme Court Reports] 1994 p. 194 T 32791 (Swed.); Nytt Juridiskt [NJA] [Supreme Court Reports] 2009 p. 16 T 413306 (Swed.); Nytt Juridiskt [NJA] [Supreme Court Reports] 2011 p. 843 Z 4049-10 (Swed.); Nytt Juridiskt [NJA] [Supreme Court Reports] 2012 p. 535 B 1018-12 (Swed.) (opinion of Lindskog, J.).

to supplement it and to create rules for situations not governed by any specific statutory law.[102] It is uncontroversial that judges are lawmakers in the sense of conducting creative interpretation in the light of new situations and creating recurring norms applicable to future similar situations.[103] Judge-made law may often later become codified. Tort law is an example of judge-made law which legislators have partly turned into statutory law.[104] Similar examples are found in all four compared states.

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[102] Regarding Brazil, *see, e.g.*, Alexandre Freire, *Precedentes judiciais: conceito, categorias e funcionalidade* [Judicial Precedents: Concepts, Categories and Functionality], *in* 2 PANORAMA ATUAL DO NOVO CPC [CURRENT OVERVIEW OF THE NEW CPC] 55 (Paulo Henriques dos Santos Lucon & Pedro Miranda de Oliveira eds., 2016); Alexandre Freitas Câmara, *Superação da jurisprudência sumulada e modulação de efeitos no novo Código de Processo Civil* [Overcoming Summarized Jurisprudence and Modulation of Effects in the New Civil Procedure Code], *in* A NOVA APLICAÇÃO DA JURISPRUDÊNCIA E PRECEDENTES NO CPC/2015 [THE NEW APPLICATION OF JURISPRUDENCE AND PRECEDENTS IN THE CPC/2015] 83 (Dierle Nunes et al. eds., 2017); *see also* Teresa Arrude Alvim Wambier & Cassio Scarpinella Bueno, Civil Justice in Brazil, 3 BRICS L.J. 6, 22 (2016); Regarding China, Zhiyu Li, *Innovation through Interpretation: How Judges Make Policy in China*, 26 Tul. J. Int'l & Comp. L. 327, 342–43 (2018); Mo Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China*, 26 WASH. INT'L L. J. 269, 277-279; cf. Chenguang Wang, *Law-making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Changes*, 4 Frontiers L. China 524, 525–26 (2006) (explaining that judicial activism is bound to take place in China due to changes in China's social environement). Regarding Sweden, *see* Mattias Derlén & Johan Lindholm, *Judiciell aktivism eller prejudikatbildning?* [Judicial Activism or Precedent Setting?], SVENSK JURISTTIDNING [SvJT] [SWEDISH LAW JOURNAL] 143, 144–45 (2016); Jan Kleineman, *Från prejudikatinstans till lagstiftare? Högsta domstolens ökade activism* [From Precedent to Legislator? The Supreme Court's Increased Activism], JURIDISK TIDSKRIFT [JT] [LEGAL JOURNAL] 495 (2014–15); *see* Joakim Nergelius, *Domstolar och demokrati – Är det dags för maktdelning?* [Courts and Democracy – Is it Time for Power Sharing?], SvJT 545, 545–46 (2000); RAMBERG, *supra* note 23, 127; Ola Wiklund, *Om Högsta domstolens rättsskapande verksamhet – löper domstolen amok?* [About the Supreme Court's Law Making Activities – Does the Court Run Amok?], SvJT 335, 340 (2014); Mauro Zamboni, '*Makers' vs. 'Markers': Are Constitutional Courts Political or Legal Actors?*, *in* ON JUDICIAL AND QUASI-JUDICIAL INDEPENDENCE 69, 71 (Suzanne Comtois & K.J. De Graaf eds., 7th ed. 2013). Regarding Germany, *see* Zenon Bankowski et al., *Rationales For Precedent*, in INTERPRETING PRECEDENTS 481, 484–85 (D. Neil MacCormick & Robert S. Summers eds., 1997); Robert Alexy et al., *Precedent in the Federal Republic of Germany*, *in* INTERPRETING PRECEDENTS 17, 21, 33 (D. Neil MacCormick & Robert S. Summers eds., 1997). Regarding Finland, *see* A. Aarnio, *Precedent in Finland*, *in* INTERPRETING PRECEDENTS, 65, 80, 84 (D. Neil MacCormick & Robert S. Summers eds., 1997). Regarding Norway, *see* Svein Eng, *Precedent in Norway*, *in* INTERPRETING PRECEDENTS 189, 214 (D. Neil MacCormick & Robert S. Summers eds., 1997).

[103] *Cf.* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921) (explaining that judges should be willing to abandon precedents that are inconsistent with society's prevailing sense of justice); *see also* Eva Steiner, *Judicial Rulings with Prospective Effect – from Comparison to Systematisation*, *in* 3 COMPARING THE PROSPECTIVE EFFECT OF JUDICIAL RULINGS ACROSS JURISDICTIONS 1, 12–16 (Eva Steiner et al. eds., 1st ed. 2015) (arguing that courts necessarily create law by applying statues to new legal questions not contemplated by legislatures).

[104] *See* CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 422 (Braz.); Skadeståndslag [Tort Act] (Svensk författningssamling [SFS] 1972:207) (Swed.).

2. Are Judges Suitable Lawmakers?

Next, we shall revisit the debate concerning the propriety of allowing judges to assume the role of "lawmakers." As will become clear in the following passages, all four compared states, Brazil, China, France and Sweden, have hesitations about judges' suitability as lawmakers. Judges are generally not well equipped to make law. The reasons are manifold. First, the facts of cases in the supreme courts are often strange and do not always represent "normal" problems. Second, the judges are often restrained by how the counsel have structured their arguments. Third, the courts do not have the ability to foresee the economic effects for society as a whole and lack national budgetary powers. Fourth, the courts need to make a decision rather fast and lack the legislator's possibilities to carefully investigate and evaluate various solutions.[105] It is natural to see debates in all four compared states about judges gaining too much power as all the states rely mainly on statutory law and are historically unaccustomed to acknowledging judge-made law. There are concerns that the supreme courts abuse their powers to an extent that amounts to unacceptable judicial activism. Generally, all four compared states demonstrate skepticism against judges as lawmakers and have greater confidence that politicians in the parliaments are better equipped to provide adequate law.

For example, two sorts of constraints over judicial law-making present themselves in China. The first is the fact that Chinese courts must in general be "submissive to the CCP [Chinese Communist Party] and compliant to its political demand."[106] In particular, the Party will not tolerate the SPC grabbing too much law-making power and sidelining the NPC.[107] The NPC has long been wary of the SPC's unfettered power to issue Judicial Interpretations and the broad discretion that the Chinese judiciary generally enjoy in adjudication.[108] There are lately signs that the NPC has slowed down its approval process for Judicial Interpretations and consequently this has promoted the SPC to resort to the less formal judicial documents (司法文件) for the purpose of creating norms.[109] This might

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[105] RAMBERG, *supra* note 23, 137–39.

[106] Fu Hualing, *Building Judicial Integrity in China*, 39 HASTINGS INT'L & COMP. L. REV. 167, 181 (2016).

[107] Jia, *supra* note 72, at 2228.

[108] Wang, *supra* note 70, at 530–31.

[109] For example, in the year of 2021, a total of 24 Judicial Interpretations were issued by the SPC: Zhou Qiang (President of the SPC), the SPC Working Report, presented on 8 March 2022 to the

be an opportunity for Guiding Cases to grow, given that their issuance does not require intervention by the NPC but equally empowers the SPC.[110] The second constraint is the public distrust in Chinese judges' professionalism, self-restraint, and integrity.[111] The dissatisfaction arises more from a distrust in judges' competence to make good law than a breach of the principle of separation of powers. It has been argued that Guiding Cases have "proved most successful" in improving Chinese judges' professional competence by "shielding against extra-legal influence."[112]

"Judge-made government" and the concept of judge-made law are both viewed with suspicion in France.[113] There is French concern that judge-made law interferes with the legislator's powers and that it is anti-democratic to allow judges to act as lawmakers. This is due to the prevailing strict French conception of the separation of powers. However, this fear of judicial power has been gradually decreasing. One sign of this was that the 2016 and 2018 contract law reforms of the French Civil Code were prompted more by the desire to make the law accessible than to avoid judge-made law in a field (contracts) where the general legal rules still dated from 1804, to the effect that case law had gained great importance. In France, the existence of an administrative judicial order allows for a fast, efficient and free access to the judge. The COVID-19 crisis has shown, to an unprecedented extent, the importance of the judges' role during a state of emergency, to counterbalance the effects of the government's power to promote measures and policies linked to the crisis.[114] For instance, in France, after the lockdown was implemented by the French government, many claims were brought to the administrative judge for lifting bans or restrictions on fundamental freedoms such as freedom to circulate, freedom of worship, freedom to protest in public places. The *Conseil d'État*, which acts as a first instance jurisdiction when it exercises its judicial review upon administrative acts with a national

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13th NPC 5th Meeting. This compares strikingly to hundreds of judicial documents issued by the SPC during the same period.

[110] Björn Ahl, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court*, 217 CHINA Q. 121, 136–37 (2014). More (31 in total) Guiding Cases than Judicial Interpretations were issued by the SPC in the year of 2021: SPC Working Report, id.

[111] *See, e.g.*, YUWEN LI, THE JUDICIAL SYSTEM AND REFORM IN POST-MAO CHINA 65–85 (2014).

[112] Ahl, *supra* note 110, at 135.

[113] Baron de Montesquieu, The Spirit of the Laws 185 (Thomas Nugent trans., D. Appleton and Company 1900) (1748).

[114] Bapiste Bonnet, *Le Conseil d'État et le covid 19; Quand le Conseil d'État porte l'État de droit sur ses épaules*, JCPG, 2020, at 656; C. Malverti and C. Beaufils, *Le référé en liberté*, AJDA, 2020, at 1154.

dimension (such as acts adopted within the various ministries), played a crucial role in exercising, via a specific procedure for urgent cases ("*procedure de référé*"), its judicial review over the health state of emergency measures.[115] As detailed as legal norms are, these norms can never provide for precise answers to all the practical questions that are posed, particularly in a state of emergency situation. In such times, the divide between politics and judicial activity is more easily blurred. Notably, in the field of climate change, judges play an important role in policymaking and forcing the state to comply with its duty to instigate emission limits, which role is nourished by citizens' activism, who use the courts as a last resort when faced with governmental measures (or government's refusal to take actions) and legislative silence.[116]

There is intense debate in Sweden as to the distribution of powers between supreme court judges and the Parliament. The general understanding in Sweden is that rules emanating from court decisions suffer from a shortage of democracy.[117] This worry is naturally less prominent within the area of private commercial law as compared to more politically controversial areas of law. The Swedish supreme courts do not rule against statutory law (unless it violates the Constitution, EU-Law or the Convention on Human Rights) and there are no obvious examples of the supreme courts abusing their powers.[118] However, lately the supreme courts have in several cases openly deviated from statements in the statutory preparatory works.[119] This is controversial as the preparatory works used to be an important way to establish the "legislator's intention" and to achieve predictable and coherent application of the law. Apart from the trend that precedents are reducing the importance of preparatory works, most debates conclude that the legislator always has the upper hand because of the power to change unwanted precedents through new legislation which the courts must and will follow.[120] Consequently, there is no substantial fear that the increasing importance of precedent provides Swedish judges with excessive powers.

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[115] Bénédicte Fauvarque-Cosson, *How Did French Administrative Judges Handle Covid-19?*, *in* CORONAVIRUS AND THE LAW IN EUROPE, (Hondius et al. eds., 2021).

[116] *See generally* U. N. Env't Programme, *Global Climate Litigation Report: 2020 Status Review*, U.N. Doc. DEL/233/NA (2020).

[117] *See* Wiklund, *supra* note 102, at 339, for an introduction to the debate; *see also* RAMBERG, *supra* note 23, 137.

[118] Kleineman, *supra* note 102, at 527.

[119] *See* Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2012 p. 535 B1018-12 (Swed.) (Lindskog, J., concurring); *see also* Zamboni, *supra* note 102, at 74–79.

[120] Zamboni, *supra* note 102, at 74–79.

To address the above stated concerns, some measures have been adopted by the compared states. Apart from the SPC's efforts to build more professional courts in China, Brazil has introduced procedures to ensure that precedents are based on comprehensive knowledge by inputs from persons, authorities, or entities with an interest in the dispute through public hearings and expert testimonies.[121] These procedures enable judges to fully understand the consequences of their legal interpretation outside the individual case.[122] France has adopted measures similar to Brazil. Besides, the legislator gave the Cour de cassation, the power to decide the case itself ("*statuer au fond*") in civil law matters when it is in the interest of the good administration of justice. Although this is a rather unfamiliar task for this court which, traditionally, deals with pure legal questions (by contrast, the Conseil d'Etat regularly uses this power), the Cour de cassation is ready to make a wider use of this power in two types of situations: where a rapid solution should be given to the case (for instance, for family issues) and where it intends to show, through a concrete application, the impact of its decision.[123]

The rather new attention in all four compared states about judges' suitability as lawmakers and the distribution of powers between legislators and judges does not derogate from the general trend that precedents become increasingly important. All four compared states are searching for the proper balance between statutory law and judge-made law. The general sentiment seems to be similar: it is not judge-made law per se, but the proper limits of the judicial power to make law that must be carefully scrutinized. In this regard, it is important to bear in mind that judicial activity has certain common distinctive features, including its operation on a case-by-case basis and via a process of application of law that is not meant to be mechanical but flexible, adaptive, and even (to some extent) discretionary. All four compared states seem to acknowledge that judicial law-making should in general supplement and not supersede legislative law-making.

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[121] *See* C.P.C. art. 927 (Braz.).

[122] Lei No. 13.655 art. 20, de 25 de Abril de 2018, Diário Oficial da União [D.O.U.] de 26.04.2018 (Braz.) (requiring judges to consider the practical consequences of an adjudication).

[123] Code de l'organisation judiciaire [C. org. jud.] [Judicial Organization Code] art. L411-13 (Fr.); *see* COMMISSION DE REFLEXION SUR LA COUR DE CASSATION 2030, COUR DE CASSATION 2030 57–58 (2021) ("Faire que le pourvoi en cassation soit pleinement une voie d'achèvement en renforçant, dans l'intérêt du justiciable, l'autorité des arrêts de cassation et en étendant le champ de la cassation sans renvoi.").

B. THE ROLE OF SUPREME COURTS

1. Introduction

At this juncture, it is useful to sample the roles and practices of supreme courts in the four compared states in creating binding precedent. When speaking of "supreme courts" we refer to the highest courts for various matters. In Brazil, the Supreme Court mainly deals with constitutional matters; the other four courts are supreme courts for civil, administrative, and criminal law matters; labor law; electoral law; and military law.[124] In China there is no law confining the jurisdiction of the SPC to certain legal fields and consequently the SPC hears cases involving all legal matters, including constitutional law, civil law, criminal law, and administrative law. In France, the *Conseil constitutionnel* deals with constitutional matters (its role and methods, which are specific, will not be presented in this paper), the Cour de cassation is the Supreme Court for private law (including criminal matters), and the Conseil d'Etat is the Supreme Court for administrative law (it settles disputes between a public body and a private entity or between two public bodies).[125] Sweden is similar to France in having a Supreme Court for private and criminal law and a Supreme Administrative Court for administrative law. Sweden, however, does not have a special constitutional court. Specialist courts in some jurisdictions deal with certain areas or matters of law. For example, labor law disputes are resolved by a Swedish special court.[126]

Except for Brazil, none of the compared states' supreme courts have made any general proclamation about the binding nature of their decisions.[127] However, an express statement that accorded a certain

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[124] The judicial branch consists of the following bodies: I – the Federal Supreme Court; I-A – the National Council of Justice (CA 45, 2004); II – the Superior Court of Justice; II-A – the Superior Labor Court (CA 92, 2016); III – the Regional Federal Courts and federal judges; IV – the Labour Courts of Appeals and labor judges; V – the Electoral Courts and judges; VI – the Military Courts and judges; VII – the Courts of Appeals and judges of the states and of the Federal District and Territories. Constituição Federal [C.F.] [Constitution] art. 92 (Braz.).

[125] *Judging*, Conseil d'État, https://www.conseil-etat.fr/en/judging [https://perma.cc/9KFE-VBXS].

[126] Lag om rättegången i arbetstvister (Svensk författningssamling [SFS] 1974:371) (Swed.).

[127] In decisions after the enactment of the new Code of Civil Procedure the Supreme Court has expressly stated that precedents of the Supreme Court are binding for all lower courts. *E.g.*, S.T.F., Agravo Regimental na Reclamação No. 23.529, Relator: Min. Dias Toffoli, 09.06.2017, 143, Diário da Justiça Eletrônico [D.J.e], 30.06.2017, 80, 80 (Braz.). The English and Finnish supreme courts have also made statements on the binding nature of their decisions. Practice Statement [1966] 3 All ER 77, 77 (HL) (Eng.). In Finland, the statement was later implemented as statutory law. Aarnio, *supra* note 102, at 87, 99.

precedent, including their own decisions, with particularly high significance has been made by the Brazilian[128], Chinese,[129] and Swedish[130] supreme courts. Further details are given below.

2. Brazil

It used to be that the Brazilian Supreme Court followed its own prior decisions but never felt constrained by them.[131] However, the Brazilian Supreme Court has stated in a remarkable recent decision that it must follow its own precedent, even when the precedent is against the justice's personal interpretation of the law.[132] The citation of precedent as a justification for rulings, including Supreme Court opinions, is a widespread practice in Brazilian courts.[133] This practice is an indication of the strong influence of precedent in Brazil.

3. China

In recent years, the SPC has campaigned for giving court decisions at all levels greater prominence, and legal reasonings in court judgments have become more transparent.[134] The aim is to enable litigants to better understand why the court's decisions are just and adequate.[135] Where litigants or prosecutors cite a Chinese Guiding Case, the court is obliged

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[128] *E.g.*, S.T.F., Agravo Interno no Recurso Especial No. 1.477.320-PR, Relator: Min. Napoleão Nunes Maia Filho, 28.08.2018, 2523, Diário da Justiça Eletrônico [D.J.e], 27.09.2018 1, 1 (Braz.).

[129] SPC Opinions on Search for Similar Cases, *supra* note 30, art. 4(2).

[130] *Compare* Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 1994 p. 194 T327-91 (Swed.), *with* Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2009 p. 16 T4133-06 (Swed.), *and* Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2011 p. 843 Ö4049-10 (Swed.).

[131] *See* S.T.F., Recurso Extraordinário com Agravo No. 1.099.095, Relator: Min. Edson Fachin, 12.12.2017, 20, Diário da Justiça Eletrônico [D.J.e], 02.02.2018 (Braz.) (Justice Edson Fachin did not follow a previous Supreme Court's ruling).

[132] S.T.F., Habeas Corpus No. 152.752, Relator: Min. Edson Fachin, 04.04.2018, 127, Diário da Justiça Eletrônico [D.J.e], 27.06.2018, 90, 90 (Braz.) (Weber, J., concurring).

[133] *See* S.T.F., Ação Direta de Inconstitucionalidade No. 6490/PI, Relator: Min. Cármen Lúcia, 23.02.2022, 37, Diário da Justiça Eletrônico [D.J.e], 24.02.2022 (Braz.).

[134] Rén mín fǎ yuàn dì sì gè gǎi gé gang yào (人民法院第四个五年改革纲要) [The Forth Five-Year Outline Plan for Reform of the People's Courts (2014-2018)] (promulgated by Sup. People's Ct. effective Feb. 4, 2015), No. 3, art. 34 [hereinafter Forth Five-Year Outline Plan]; In the ensuing Fifth Five-Year Outline Plan for Reform of the People's Courts, the SPC further calls for the "amelioration" of the Guiding Case System. Rén mín fǎ yuàn dì wǔ gè wǔ nián gǎi gé gāng yào (人民法院第五个五年改革纲要) [Fifth Five-Year Outline Plan for Reform of the People's Courts (2019-2023)], (promulgated by Sup. People's Court effective February 27, 2019) Sup. People's Ct., No 8, art 26.

[135] Forth Five-Year Outline Plan, *supra* note 134.

to respond and explain in its legal reasoning whether it has followed by analogy (参照) the Guiding Case, and if not, why it has not done so[136]—this duty of the court is similar to the Brazilian provision.[137] A prior decision of the SPC ranks lower than a Guiding Case, which is very often derived from a decision of a lower court.[138] Therefore, the SPC is generally not bound by its own previous decision, except to the extent that such a decision has been elevated to a Guiding Case and has had the applicable rule of law crystallized in the form of the Essential Points of Adjudication. Notably in this regard, it is not common for the SPC to cite any precedent (including Guiding Cases) in its decisions, as Guiding Cases have so far mostly been referred to by basic-level or intermediate people's courts.[139]

4. France

Historically, the French Cour de cassation (the Supreme court for private law) never referred to precedent. Judges were not allowed to cite previous decisions as a justification for their decisions. Recently, however, the Cour de cassation has in some important cases referred to precedent.[140] The Cour de cassation exposed its willingness to further elaborate its reasoning in a Guide it published in 2019.[141] This was influenced by the need to explain reasoning in more detail in requests to the European Court of Justice for preliminary rulings.[142] Its reasonings have become more

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[136] Guo Feng, *supra* note 34.

[137] C.P.C. art. 489, § 1, IV–V (Braz.).

[138] A quick calculation shows that a great majority of the 185 Guiding Cases so far issued by the SPC are decisions of a lower court. *See* 中华人民共和国最高人民法院 [THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA], https://www.court.gov.cn/fabu-gengduo-77.html (last visited Dec. 3, 2022).

[139] Peng Zhongli, *supra* note 98, at 138–139.

[140] A prime example of this evolution is a decision by the mixed division of the Cour de cassation in which judges quoted their own previous decisions as well as other sources of law. *See* Cour de cassation [Cass.] [supreme court for judicial matters] ch. mixte, Feb. 24, 2017, 1520.411 (Fr.).

[141] *Guide Des Nouvelles Règles Relatives À La Structure Et À La Rédaction des Arrêts* [*Guide To The New Rules Relating To The Structure And Drafting Of Judgments*], COUR DE CASSATION [COURT OF CASSATION] (June 5, 2019), https://www.courdecassation.fr/files/files/Décisions/Guide%20des%20nouvelles%20règles%20relatives%20à%20la%20structure%20et%20à%20la%20rédaction%20des%20arrêts.pdf (last vistited Dec. 3, 2022).

[142] As soon as 2016, the commercial chamber of the Cour de cassation adopted a detailed reasoning to explain why European law was not clear enough to exempt the judges in this particular case from referring to the European Court of Justice for a preliminary ruling. *See* Cour de cassation [Cass.] [supreme court for judicial matters] com., Mar. 8, 2016, 14-13.540 (Fr.).

extensive and easier to understand. The *Conseil d'État* does not refer, in its decisions, to its own previous cases, which is partly due to the fact that it does not want to be bound by its own cases. However, such references are made explicit in the "rapporteur public's conclusions," which are made public, at least for the most important cases and, when not made public, can be specifically requested by e-mail.[143]

Developments in case law naturally undergo distinctions from earlier case law, but they may also occasionally result in a precedent being overturned. However, French supreme courts are concerned with laying down a stable case law which serves as a yardstick for the lower courts, the litigants, and their counsel.

5. Sweden

The Swedish supreme courts have demonstrated that their decisions are increasingly important. The supreme courts have for instance, to a larger degree, made statements in their reasonings on the relevance of previous cases, more often cited previous cases and also made general statements about the law in their reasonings.[144]

V. THE BINDING EFFECT OF PRECEDENT

When assessing whether the four compared states follow a common trajectory in granting at least some precedents a binding effect, it is of critical importance to reach a consensus as to what "binding" means. It has been suggested that there is a continuing convergence between civil law jurisdictions, including France, Spain, Italy, and a mixed system like Louisiana, toward what has been termed "systematic respect for jurisprudence," albeit "with varying degrees of recognition of the actual value of precedent." [145] In order to identify the key elements of "bindingness" for the purpose of our comparison, the following passages

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[143] CONSEIL D'ÉTAT [COUNCIL OF STATE], https://www.conseil-etat.fr/decisions-de-justice/jurisprudence/rechercher-une-decision-arianeweb/se-procurer-une-decision-ou-des-conclusions-d-un-rapporteur-public#anchor2 (last visited Dec. 3, 2022) (The email address for requesting the references is: diffusion-jurisprudence@conseil-etat.fr).

[144] *See* RAMBERG, *supra* note 23, 219–22; Since 1989, approximately four out of five Supreme Civil Court cases have references to precedents. Derlén & Lindholm, *supra* note 102, at 149.

[145] Algero, *supra* note 1, 781–812. However, it has been suggested that the "influence" or persuasiveness of a prior judicial decision in Louisiana be assessed on a case-to-case basis according to its adherence to the Civil Code and "sound legal method." Dennis, *supra* note 46, at 15–17.

will examine a number of main aspects of the notion, including the difference between formal binding force and more subtle forms of influence (such as lower courts' de facto duty to follow), special importance attached to the decisions of the supreme court, lower courts' altitude toward deviation from, as well as their duty to explain, the precedent.

A. MEANINGS OF BINDINGNESS AND TERMINOLOGICAL CONFUSION

As shown above, precedent has legal effect and constitute a source of law in all four compared states. It is, however, difficult to quantify the extent of their legal effectiveness or bindingness, and whether they are binding, guiding, persuasive, or merely illustrative. The Anglo-American debate concerning the nature of precedent has been intense for quite some time.[146] The four compared states have had only limited discussions about the binding nature of precedent, but it is foreseeable that this subject will be explored in greater depth in the future.

One difficulty in comparing the extent of precedent's bindingness is that the terminology is quite chaotic. The terms used mean different things to different authors.[147] Since precedent is a fairly new source of law in the four compared states, not much analysis has been offered in order to clarify what is meant by the various terms used.

China's Guiding Case system is an example of confusing or ambiguous terminology. The Chinese Guiding Case System is a significant move towards separating a selected group of Chinese precedents from other precedents by giving the former stronger legal effect. While the title indicates a "guiding" effect on future adjudication, Guiding Cases are in effect more than merely guiding. The SPC states that "courts of all levels are obliged to follow by analogy [guiding cases] when

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[146] *See* Rauol C. Van Caenegem, Judges, Legislators and Professors: Chapters in European Legal History (1987), for an in-depth historic analysis.

[147] For a general discussion on precedents as "binding," "relevant," "gravitational," and "imperative." *See generally* Aulis Aarnio, *On the Predictability of Judicial Decisions, in* MATTI HYVÄRINEN ET AL., THE INSTITUTES WE LIVE BY 207 (Univ. of Tampere Rsch. Inst. for Soc. Scis, 1997); Larry Alexander, *Precedential Constraint, its Scope and Strength: A Brief Survey of the Possibilities and Their Merits, in* ON THE PHILOSOPHY OF PRECEDENT: PROCEEDINGS OF THE 24TH WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION FOR PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY 79 (Thomas da Rosa de Bustamante & Carlos Bernal Pulido eds., 3rd vol. 2009); Jan Kleineman, *Förutsättningsläran och Jura Novit Curia*, JT 1993–94 881, 883.

deciding similar cases."[148] What must be 'followed by analogy' are the Essential Points of Adjudication, which, while resembling a provision of Judicial Interpretation in form, must be applied on the premise of ascertained similarity between the Guiding Case and the case being adjudicated.[149] Coupled with the proviso that such Essential Points may be cited in legal reasoning but not as a ground of decision, this suggests that Guiding Cases have a weaker effect than Judicial Interpretations.[150] However, like Judicial Interpretations, Guiding Cases are the product of a top-down, centralized process involving the SPC's heavy editing and simplifying, and even sometimes "manufacturing" of legal rules rather detached from the factual circumstances of the original case.[151] The expectation seems to be, therefore, that lower courts are not allowed to interpret the Essential Points.[152]

In Brazil, before the 2015 reforms, precedent had only persuasive force and were not binding. After the reform, statutory law provides that the courts must consider precedent raised by the parties and analyze analogical arguments that support the application of the precedent in the case at hand.[153] Generic justifications to apply or to reject the precedent can lead the courts of appeal or other higher courts to set aside the decision.[154] The reform indicates that precedent is more than merely persuasive, as they must be considered and analyzed, and the courts must justify any deviation from them. The technique of the Chinese Guiding Cases—n which the SPC lays down the rule of the precedent in the form of a general provision, unattached to the facts of the case adjudicated—is shared by the Brazilian Courts.[155] As in China, when adjudicating a case

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[148] SPC Provisions on Case Guidance, *supra* note 13, art. 7; SPC Implementation Rules on Case Guidance, *supra* note 31, art. 9.

[149] As a form of "concrete judicial interpretation" as opposed to the normal "abstract judicial interpretation." Kui Shen, *"Democratization" of Judicial Interpretation and the Supreme Court's Political Function*, 29 Social Sciences in China 4, 33-47 (2008); *see also* Chen Kui, *How to Apply the Guiding Cases of the Supreme People's Court in Judicial Practice*, CHINA GUIDING CASES PROJECT, Apr. 22, 2012.

[150] Lei Lei, *supra* note 76.

[151] Liu, *supra* note 39, 116.

[152] This expectation is not always fulfilled in terms of lower courts' practice. *See* Liu, *supra* note 39, 116.

[153] *Cf.* WAMBIER, *supra* note 48, at 435.

[154] Código de Processo Civil, art. 489, §1º, V (Braz.)("The reasons are not considered to have been given in any judicial ruling, be it an interlocutory decision, a judgment or a decision of the bench, if it: (…) V - limits itself to making reference to precedents without identifying the determining grounds nor demonstrating that the case at hand fits that reasoning").

[155] Fabiano Carvalho, XIX COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL 28–29 (2022).

that will become a binding precedent, the Brazilian Supreme Court issues a general text, which facilitates the understanding of the rule of the precedent, named "legal thesis."[156] (The Brazilian scholars debate if the binding force of the precedent lies in the "legal thesis" or in the ratio decidendi of the case adjudicated.[157]

In France, the decisions of the Cour de cassation and Conseil d'Etat are binding on lower courts. They are followed by these supreme courts themselves, unless they want to adjust the precedent or overrule it, which they may freely do. First instance and appeal court judges only deviate from these precedents in exceptional circumstances (apart from very exceptional situations of "resistance").[158]

It is said in Sweden that precedent is only persuasive, but their status is in practice stronger.[159] Some argue that precedent is not dictating but guiding the courts and others argue that precedent, although not formally binding, is in practice followed.[160] The exact meanings of these terms and descriptions are unclear.

Unlike Brazil and China, Sweden does not have statutory provisions prescribing which decision is a potential binding precedent, nor do their courts summarize the rule of precedent in a statement similar to a legal provision to establish more certainty of the core of the precedent that shall govern the following cases. This means that in Sweden, the interpretation of the force of precedent must be made exclusively by the courts that later decide similar cases, a process in which the power to interpret and apply precedent is decentralized. In France, the Cour de cassation and the Conseil d'Etat have its own system to hierarchize their most important precedents.[161]

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[156] *See* part III

[157] See Barioni & Alvim, *supra* note 28, for discussion about the binding element of the precedent in the Brazilian legal system; Ferraz, *supra* note 28.

[158] COUR DE CASSATION, *supra* note 81, at 56–57.

[159] RAMBERG, *supra* note 23, 54; Folke Schmidt, *Domaren som lagtolkare*, *in* FESTSKRIFT FOR NILS HERLITZ, 263, 272 (Norstedt publ., 1955); Karl Schlyter, *Från dagens discussion* [*From today's discussion*], SvJT, 278, 285–87 (1947) (Swed.); LARS HJERNER, OM RÄTTSFALLSTOLKNING [ON LEGAL CASE INTERPRETATION] 23 (2d ed. 1981); BERT LEHRBERG, PRAKTISK JURIDISK METOD [PRACTICAL LEGAL METHOD] 102 (4th ed. 2001).

[160] Torkel Gregow, *Något att uppmuntra eller motarbeta?*, JURIDISK TIDSKRIFT 36 (2015–16); Johan Lind, *Högsta domstolen och frågan om doktrin och motiv som rättskälla*, JURIDISK TIDSKRIFT 35 (1996–97); Stig Strömholm, *En svensk prejudikatlära: behov och möjligheter*, SVENSK JURISTTIDNING 923 (1984).

[161] *See supra* part III (using specific letters to hierarchize).

B. METHODS OF CITING AND INTERPRETING PRECEDENT

1. Use of Precedent by Courts

A first step towards developing methods is making references to precedent in court decisions. We have seen that the French Cour de cassation may now refer to its important precedent.[162] The Conseil d'Etat refers to "external" case law—cases from the ECJ, the ECHR, *Conseil constitutionnel* and sometimes from other jurisdictions—but does not quote its own cases.[163]

Chinese courts do not usually quote prior decisions or explain why they are or are not relevant.[164] The situation is different regarding Guiding Cases. According to the SPC mandate, where a Chinese case is similar to a Guiding Case, the court deciding the case shall follow by analogy the Essential Points of Adjudication of the Guiding Case and cite both the number of the Guiding Case (such as Guiding Case No x) and the Essential Points in the legal reasoning (but not as a legal ground of its decision).[165] In practice, however, Guiding Cases have not been referred to by courts as regularly as desired, but this appears to be improving according to a recent survey.[166] One difficulty related to the citation of a Guiding Case may arise from the fact that there is no clear criterion as to how to ascertain whether a given case is "similar," in the sense of both fact and law, to the Guiding Case. It has thus been suggested that, in the context of Belt and Road Initiative, the Guiding Case system be integrated with the common law doctrine of stare decisis to form a hybrid case reference system for greater stability.[167] To make this possible, the process of interpreting and applying the Essential Points of Adjudication must be decentralized so that lower

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[162] *See supra* note 144; an example is a decision handed down on February 24 2017 (Ch. mixte, 24 févr. 2017) by the mixed division of the Cour de cassation in which judges quoted their own previous decisions as well as other sources of law.

[163] Although this is allowed since 2012, in the context of the reform of the drafting of its own decisions.

[164] This does not mean that Chinese judges do not consider prior cases – a recent study found that Chinese judges do routinely and habitually consult precedents. John Zhuang Liu et al., *Precedents and Chinese Judges: An Experiment*, 69 AM. J. COMPAR. L. 93, 93 (2021).

[165] SPC Implementation Rules on Case Guidance, *supra* note 31, arts. 10 and 11.

[166] There have been 1571 cases citing Guiding Cases in 2017, a sharp increase from only 549 cases in 2016: 2017 Guiding Case Report, *supra* note 97, 1.

[167] Justice Chong, *Dispute Settlement in the Belt and Road Initiative: Lessons from the Singapore Experience*, 8 CHINESE J. COMPAR. L. 30, 37–38 (2020).

courts are allowed to contribute to a common endeavor of building up individual (as opposed to general) "canonical norms."[168]

Regarding the use of prior decisions to justify the outcome of a case at hand, the current practice in Brazil is to mention what is known as jurisprudência, which means the set of judicial decisions pronounced by the courts about some legal issue in the same way.[169] The new Brazilian Code of Civil Procedure states that the courts are obliged to justify and carefully examine precedent.[170] Despite these rules, the Brazilian Supreme Court maintains the practice of making only brief comparisons of the facts in the precedent and in the case at hand.[171]

In Sweden, it has become more common for the courts to analyze precedent and to explain how precedent differs from the present case, although it is still rare to see any deep analysis. The Swedish supreme courts do not have any consistent method of interpreting precedent, although there seems to be a growing awareness of the need to develop a coherent approach to precedent.[172]

Thus, in Brazil and Sweden, we often find references to precedent in the supreme courts' reasonings, but only rarely do the Brazilian and Swedish supreme courts make an in-depth analysis of the facts in the precedent for the purpose of comparing it with the present case. Only in a few scattered cases do the supreme courts in Brazil and Sweden give specific considerations about the factual and legal issues for the purpose of comparing precedent with the case under examination. Supreme court judges in Brazil and Sweden sometimes make statements clarifying their

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[168] Liu, *supra* note 39, 109, 116–17.

[169] *See, e.g.*, R. Limongi França, *Da Jurisprudência como Direito Positivo*, 66 RFDUSP 204 (1971); Teresa Arruda Alvim, *comments to the article 489 of the Code of Civil Procedure*, 435, in COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL, VOL. 2 (Cassio Scarpinella Bueno ed., 2016). When there is a *jurisprudência* on certain *quaestio iuris*, it does not mean that it is supported by the majority. Actually, the term *jurisprudência* only implies that there is a set of judgments interpreting a legal provision in the same way, but it does not prevent having a set of decisions in different ways. Thus, for example, there might be decisions which forbid enforcing a promise of donation, because the will of a donor must be contemporary to the act of disposal and, at the same time, there are other judgments in the opposing direction, to claim the possibility of enforcing the promise of donation. When there are sets of judgments with different interpretations of the same legal device, it is named *jurisprudência divergente* (diverging *jurisprudência*).

[170] Liu, *supra* note 39, 117.

[171] José Carlos Barbosa Moreira, TEMAS DE DIREITO PROCESSUAL CIVIL (OITAVA SÉRIE), 121-122 (2004).

[172] RAMBERG, *supra* note 23, Ch. 10.1.

opinions of the holding of the case.[173] Chinese and French judges do not usually make such clarifying statements.

Nevertheless, a common feature seems to be detectable from all four compared states. We have seen that the Essential Points of Adjudication in Chinese Guiding Cases represent a form of generally formulated rules detached from the factual context of the original case. Likewise, the Brazilian *súmulas* contain general statements detached from their factual context. Chinese Guiding Cases and Brazilian *súmulas* are not genuine precedents, since they are general statements resembling statutory provisions formulated not by the court deciding the case, but by the highest court in the country. It must be noted that the independence of the stated rule from the facts of the case is only relative. Thus, when parties or judges in Brazil make a reference to a súmula, they must describe the material facts considered in the decisions that led to the creation of the súmula.[174] In China, the application of a Guiding Case is also premised on a finding of similarity between the Guiding Case and the case at hand.

The Swedish supreme courts' modern reasonings often have a paragraph where the relevant legal situation is generally described and is detached from the facts in the individual case, although a close connection is still required. Very often, the descriptions refer to non-statutory law and establish "new" law.[175] Such general descriptions are sometimes broad enough to be obiter dicta and can be ignored or distinguished in later cases.[176] In theory, the binding nature of general statements by the supreme courts is not clear. In practice, however, many practitioners and scholars seem to treat the supreme courts' general statements as binding law.[177] Hence, where statements of law are too general and go beyond the court's mandate to decide the individual case, they may not be given any binding effect, at least not theoretically. If the rules expressed in precedent are very general and disconnected from the facts of the case, it is argued in Brazil that the rules created by the Supreme Court and the Superior Court of

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[173] Regarding Brazil, *see, e.g.*, the Supreme Court decision in the S.T.F., Pleno, RE 590.415, Relator: Min. Roberto Barroso, 30.04.2015, D.J.e., 29.05.2015. Regarding Sweden, *see* RAMBERG, *supra* note 23, Ch. 11.5.

[174] C.P.C. art. 489, § 1, V–VI (Braz.).

[175] RAMBERG, *supra* note 23, Ch. 10.

[176] Bertil Bengtsson, *Domare och lagstiftare i samverkan och konflikt*, *in* FESTSKRIFT TILL STIG STROMHOLM 109 (Ulf Göransson, Torgny Håstad & Åke Frändberg eds., 1997); RAMBERG, *supra* note 23, 286; Peter Westberg, *Prejudikattolkningens ABC*, *in* FESTSKRIFT TILL ANNA CHRISTENSEN 583 (Ann Numhauser-Henning ed., 2000).

[177] RAMBERG, *supra* note 23, 286.

Justice are unconstitutional.[178] A similar concern is expressed in Sweden.[179]

General statements of law, detached from their factual context, are also often found in Cour de cassation and Conseil d'Etat decisions. As a result, French lawyers do not seem to have the same problem as those in Brazil, China, and Sweden in terms of understanding to what extent broad, general statements of law in precedent are binding. This may have something to do with the traditional judicial style of French courts' reasoning, which is very concise and difficult to seize for the layman. This, as we have seen, is changing as there is a growing concern of the necessity for judicial decisions, now easily available, to be understood, not only within judicial and legal circles, but by citizens themselves. Not only the Cour de cassation, but also the Conseil d'Etat, which already had a more discursive style—yet even more concise compared to supreme court reasonings in Brazil, China, and Sweden—have moved in that direction. These were driven by a reforming spirit within both courts as well as by ECJ cases.[180]

2. Use of Precedent by Legal Scholars

Legal scholars in all the four compared states used to somewhat ignore judicial decisions as an aid to establish the content of law and referred to them merely for the purpose of providing illustrations. Presently, legal scholars in all compared states are paying growing attention to precedent as a source of law.

The focus of legal scholars' analysis of precedent in all four compared states is generally on the substantive issues and the outcome of the case in question. It is less common to see in-depth analysis of precedent as a phenomenon in itself or its methodological use. In Brazil, China, and

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[178] Some scholars go further and argue that the Code of Civil Procedure provisions about the binding effect of precedents are unconstitutional. *See, e.g.*, José Rogério Cruz e Tucci, *O regime do precedente judicial no novo CPC*, *in* PRECEDENTES 454 (Fredie Didier Jr. et al. eds., 2015); NELSON NERY JR. & ROSA MARIA DE ANDRADE NERY, COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL 2052 (2018).

[179] HJERNER, *supra* note 159, at 46.

[180] In its annual Report for 2015, Conseil d'Etat explains that,

> [g]iven the on-going and sustained growth in litigation, administrative justice must be resilient, adaptable and driven by a reforming spirit. Reform proposals have been drawn up as part of an overall strategy to regulate the demand for justice and to address this demand effectively and appropriately in a tight budgetary context.

The Year 2015, CONSEIL D'ETAT (2015), https://www.conseil-etat.fr/bilan2015_EN/index.html.

Sweden there is, however, a general awareness among scholars of the increased importance of precedent and also an increase in the studies of precedent, with efforts to devise methods on how to use precedent.[181] More importantly, systematic treatment of precedent has arisen from French commentaries on significant cases. Such commentaries are published in weekly law reviews dedicated to private law or administrative law (an important case may be commented by twenty different authors)[182] and the most important precedents are commented at length in a series of books published by Dalloz in each important field of the law, titled "Les grands arrêts de la jurisprudence."[183] . With the recent changes in the Cour de cassation and Conseil d'Etat which have extended their reasonings, legal scholars are showing an increasing interest in the methods the courts use to reach their conclusions.

All four compared states have easily accessible records of all supreme court decisions. The problems for legal scholars are not in accessing the precedents, but rather the opposite: precedent inflation, i.e., how to identify which are the important precedents and understand how to deal with incompatible precedents.[184] The problem with precedent inflation is least acute in Sweden. The Swedish supreme courts report between 250–300 cases each year. France and Brazil have introduced systems to distinguish important decisions in order to cope with the many decisions.[185] Yet, it remains difficult to find the important and significant

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[181] Regarding Brazil: ALEXANDRE FREITAS CÂMARA, LEVANDO OS PADRÕES DECISÓRIOS A SÉRIO: FORMAÇÃO E APLICAÇÃO DE PRECEDENTES E ENUNCIADOS DE SÚMULA [TAKING DECISION STANDARDS SERIOUSLY: FORMATION AND APPLICATION OF PRECEDENT AND PRECEDENT STATEMENTS] (2018); DANIEL MITIDIERO, PRECEDENTES: DA PERSUAÇÃO À VINCULAÇÃO [PRECEDENTS. FROM PERSUASION TO ATTACHMENT] (2018); LÊNIO STRECK & GEORGES ABBOUD, O QUE É ISTO – O PRECEDENTE JUDICIAL E AS SÚMULAS VINCULANTES? [WHAT IS IT – JUDICIAL PRECEDENT AND BINDING PRECEDENTS?] (2014); LUCAS BURIL DE MACÊDO, PRECEDENTES JUDICIAIS E O DIREITO PROCESSUAL CIVIL [JUDICIAL PRECEDENTS AND CIVIL PROCEDURAL LAW] (2017); RONALDO CRAMER, PRECEDENTES JUDICIAIS: TEORIA E DINÂMICA [JUDICIAL PRECEDENTS: THEORY AND DYNAMICS] (2016); WAMBIER, *supra* note 48; Regarding China, *see, e.g.*, Qiao Liu & Xiang Ren, *CISG in Chinese Courts: The Issue of Applicability*, 65(4) AM. J. OF COMPAR. L. 873 (2018). Regarding Sweden, RAMBERG, *supra* note 23, 773; *See* Joakim Nergelius, *Prejudikat(o)bundenhet inom den konstitutionella rätten* [*Precedent (un)binding in constitutional law*], SVJT 783 (2017); Kerstin Calissendorff, *Plenum och skiljaktigheter* [*Plenary and differences*], SVJT 795 (2017); Mikael Mellqvist, *Förmögenhetsrättsliga prejudikat – en nödvändig rättskälla* [*Property law precedent – a necessary source of law*], SVJT 805 (2017).

[182] *See, e.g.*, The Recueil Dalloz, a weekly law review created in 1845.

[183] *See, e.g.*, MARCEAU LONG, PROSPER WEIL, GUY BRAIBANT, PIERRE DELVOLVÉ, & BRUNO GENEVOIS, LES GRANDS ARRETS DE LA JURISPRUDENCE ADMINISTRATIVE [The Major Judgments of Administrative Case Law] (23d ed. 2021).

[184] SUSAN W. BRENNER, PRECEDENT INFLATION (1992).

[185] S*ee supra* part III.

decisions among the many decisions of the supreme courts—thousands each year.[186] The most significant Brazilian precedents are published by the Supreme Court in the Revista Trimestral de Jurisprudência, in a bulletin, and in its website. The French supreme courts also publish the cases they consider the most important in official reports and on their websites. Additionally, legal scholars fulfill an essential function as they identify important decisions and analyze them, as explained above. This is helpful for students, practitioners, judges, and the legislator.

The most challenging problem concerning precedent inflation arises in China. The Chinese system clearly identifies Guiding Cases, with respect to which there is no problem of precedent inflation. The Chinese Gazette cases total several hundreds to date and pose no major issues. However, under the SPC Fourth Five-Year Outline Plan, all decisions by the four levels of courts are in principle to be published on a unified official online platform—the China Judgment Online website.[187] A search of court judgments on any topic often returns tens of thousands of entries and the processing of a dataset of such an astronomical size is expected to require assistance from computure softwares.[188] Computational technology, including artificial intelligence ("AI"), has not as yet, however, achieved much success when it comes to such complicated tasks as extracting ratio from a court judgment or applying a general rule to a particular case.

C. DEVIATIONS FROM PRECEDENT

One major aspect of the binding nature of precedent is to what extent deviations are allowed and how deviations are made. All four compared states allow deviations from binding supreme court decisions. As explained earlier, 'bindingness' is never an absolute concept and it is defined and limited by the permissible range of deviations in each legal system.[189] Generally speaking, existing rules in China and Sweden allow deviations in limited circumstances only and the reasons for such deviations must normally be given in the courts' reasonings.

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[186] The Brazilian Supreme Court issued more than 47,000 decisions in 2021, of which around 7,320 were issued by a panel of Justices and, therefore, capable of constitute a precedent.

[187] Fourth Five-Year Outline Plan, *supra* note 134, art. 39. *See also* China Judgements Online (CJO), the official platform for publishing court judgments (http://wenshu.court.gov.cn).

[188] *E.g.*, Benjamin L. Liebman, Margaret E. Roberts, Rachel E. Stern & Alice Z. Wang, *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law*, 8 J.L. & CTS. 177 (2020).

[189] *See supra* note 145 and accompanying text.

It is unclear whether failure to follow a Chinese Guiding Case in a similar case constitutes grounds for appeal or retrial.[190] Some suggest that a court may choose not to follow a Chinese Guiding Case as long as it states the reasons for not doing so.[191] But the better view seems to be that a court may only deviate from a Guiding Case if it distinguishes the case and clearly explains how the case at hand is not "similar" to the Guiding Case. For example, Guiding Case No. 1 was distinguished in a lower court's decision in which the judge listed four factual points diverging from the facts of Guiding Case No. 1.[192]

There are many reasons why the Swedish supreme courts may deviate from a precedent, the most common reason being that the precedent is outdated due to later legislation or societal change.[193] The supreme courts have sometimes pointed to the need for legal change, but refrained from making the change as it would be more suitable for the legislator to deal with the problem.[194] We also find situations where the Swedish supreme courts in fact deviate from precedent without transparently admitting it.[195]

By comparison, rules concerning deviations are more relaxed in the other two jurisdictions, but control may be tightened in the future. In

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[190] Is it possible to say that such a failure amounts to an 'erroneous application of law', a ground for succeeding in an appeal, under the Civil Procedure Law [民事诉讼法] of the PRC (adopted at the 4th Session of the Seventh National People's Congress on 9 April 1991, last amended at the 32nd Session of the Standing Committee of the Thirteenth National People's Congress on 24 December 2021) Art. 177(2)? A negative answer was given by Judge Guo Feng. Guo Feng, *supra* note 34, app. Notably, however, the High People's Court ("HPC") of Liaoning Province ordered a retrial in a recent case on the ground that the courts below gave no response to one party's citation of Guiding Case No 24. zài shěn shēn qǐng rén liú ā lì móu jū fēn lǐ yàn yàn yīn yǔ bèi shēn qǐng rén liú qí huá tài cái chǎn bǎo xiǎn gǔ fèn yǒu xiàn gōng sī běn xī zhōng xīn zhī gōng sī jī dòng chē jiāo tōng shì gù zé rèn jiū fēn àn (再审申请人刘阿立、牟居芬、李艳艳因与被申请人刘祺、华泰财产保险股份有限公司本溪中心支公司机动车交通事故责任纠纷案) [Liu et al v. Liu and Huatai Prop. Ins. Co. Ltd.], (2021) Liao Min Shen No. 5273 Civil Ruling (Liaoning Higher People's Ct. Dec. 17, 2021) (China).

[191] Guo Feng, *supra* note 34; HU YUNTENG, UNDERSTANDING AND APPLYING SUPREME PEOPLE'S COURT GUIDING CASES [最高人民法院指导案例理解与适用] (Sup. People's Court Guiding Case Office eds., 2012).

[192] *See* Liu, *supra* note 39 (discussing Píng dù shì bǎi shùn fángwū jīngyíng bù yǔ wángyùgāng jūjiān hétóng jiūfēn àn [平度市百顺房屋经营部与王玉刚居间合同纠纷案] [Pingdu City Baishun Properties Operation Division v. Wang Yugang] 2015 Ping Shang Chu Zi No. 2460 Civil Judgment, (Shandong Pingdu City People's Court, 31 Oct 2015) (China)).

[193] *See* Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2006 p. 662 Ö 2006-12 (Swed.); Nytt uridiskt Arkiv [NJA] [Supreme Court Reports] 2013 p. 314 Ö 2013-04 (Swed.).

[194] *See, e.g.*, Nytt uridiskt Arkiv [NJA] [Supreme Court Reports] 1994 p. 194 Ö 1994-05 (Swed.); Nytt uridiskt Arkiv [NJA] [Supreme Court Reports] 2009 p. 16 Ö 2009-03 (Swed.); Nytt uridiskt Arkiv [NJA] [Supreme Court Reports] 2011 p. 843. Ö 2011-07 (Swed.).

[195] RAMBERG, *supra* note 23, 777.

France, judges deviating from previous case law do not explicitly quote the case, nor do they state that they are deviating from it. This may change since the Cour de cassation now sometimes refers to its own cases. However, the general rule is that French judges do not have to justify why they are deviating from previous case law, the reason being that a court decision only has effect on the individual parties to the proceedings.[196]

Brazil seems to have the least restrictions against deviating from precedent. Although the Brazilian Code of Civil Procedure requires a "proper and specific reasoning, taking into consideration the principles of legal certainty, of the protection of legitimate expectations and equality" to overrule a precedent, deviations from Brazilian precedent due to a change of members of the court are not uncommon.[197] It is also fairly common that the courts apply the law differently by stating that the precedent does not correspond to the best interpretation of the law.[198] It is presently unclear whether the Brazilian reforms requiring respect for precedent[199] and the Brazilian Supreme Court's recent statement that it

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[196] This can be related to *l'effet relatif* de l'autorité de chose jugée, provided in Article 1355 of the Civil Code: "The authority of res judicata applies only to what was the object of a judgment." Code civil [C. civ.] [Civil Code] art. 1355 (Fr.).

[197] In the interpretation of a particular tax on imported products, the Superior Court of Justice in 2014 decided one way. *See, e.g.,* S.T.J., EREsp 1.411.749, Relator: Min. Sérgio Kukina, 11.06.2014, [D.J.e.], 18/12/2014 (Braz.); And only two years later, with a different composition of judges, the direction of the interpretation has completely changed. *See* S.T.J., EREsp 1.403.532, Relator: Min. Napoleão Nunes Maia Filho, 06.05.2015, [D.J.e.], 18.02.2015 (Braz.).

[198] One remarkable example concerns the Supreme Court's interpretation of the presumption of innocence in criminal trials laid down under Article 5, n. LVII, of the Federal Constitution ("no one shall be considered guilty before the issuing of a final and unappealable penal sentence"). CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5, LVII (Braz.); From 1988 to 2009, the Supreme Court deemed that the arrestment order could be granted after the Court of Appeal conviction decision. *See, e.g.,* S.T.F.J., Pleno, Habeas Corpus 68.726, Relator: Min. Néri da Silveira, 28.06.1991, Diário da Justiça Eletrônico [D.J.e.], 20.11.1992 (Braz.); S.T.F.J., Pleno, Habeas Corpus 74.983, Relator: Min. Carlos Velloso, 30.6.1997, Diário da Justiça Eletrônico [D.J.e.], 29.08.1997 (Braz.); In 2009, the Supreme Court, with a new composition, ruled that the order of detention before the *res judicata* is incompatible with the Federal Constitution. S.T.F.J., Pleno, Habeas Corpus 84.078, Relator: Min. Eros Grau, 05.02. 2009, Diário da Justiça Eletrônico, [D.J.e.], 26.02.2010. In 2016, the Court overruled this latter precedent, to return to its original interpretation, allowing the conviction's enforcement after the Court of Appeal's decision, whether or not it is the final decision. S.T.F.J., Pleno, Habeas Corpus 126.292, Relator: Min. Teori Zavascki, 17.02.2016, Diário da Justiça Eletrônico, [D.J.e.], 17.05.2016 (Braz.). This topic returned to the Court, but this time the precedent was retained. S.T.F.J., Pleno, Habeas Corpus 152.752, Relator: Min. Edson Fachin, 04.04.2018, Diário da Justiça Eletrônico, [D.J.e.], 27.06.2018 (Braz.). This issue was submitted to the Supreme Court again few months later, when the Supreme Court returned to old interpretation of the Constitution. *See* S.T.F.J., Pleno, Declaratory Constitutiona Action 43, Relator: Min. Marco Aurélio, 07.11.2019, Diário da Justiça Eletrônico [D.J.e.], 25.11.2019 (Braz.).

[199] C.P.C. art. 927 § 4, V.

must follow its own precedent[200] will prevail over the tradition to rely on the Supreme Court members' personal beliefs rather than precedent.

D. THE BINDINGNESS OF PRECEDENT ON A SCALE

Notwithstanding the ambiguity associated with the term "bindingness" and the fact that it might not be susceptible to precise measurement, we will make an attempt to place the precedents in the four compared states on a scale according to the strength of their respective "bindingness."

It appears that decisions by the French Cour de cassation have the least binding effect compared to supreme court decisions in Brazil, China and Sweden. French court of appeals (for private law matters) may even deviate from the "jurisprudence" of the Cour de cassation, although they will only do so with great caution, as an act of "resistance." French lower court judges are inspired by decisions from the supreme courts and normally adhere to them as there is otherwise a risk that their decisions will not be approved by a higher court. This is particularly true for administrative judges. The Cour de cassation and Conseil d'Etat follow their own precedents unless there is a strong reason to depart from them.

The binding effect of Chinese SPC decisions that are not transformed to Guiding Cases or publicly proclaimed in the SPC Gazette, is parallel to that of decisions of the French Cour de cassation.

The second least important precedents are probably Chinese "Gazette cases," namely cases published in the SPC Gazette. Generally, such Gazette cases, as a whole, can be said to be influential on judicial decision making.[201] The fact that cases are published in the Gazette along with legally binding materials such as Judicial Interpretations gives them the appearance of authority. However, although Gazette cases are generally held in high regard, the influence of any specific Gazette case, particularly whether it reaches a level of "bindingness," depends ultimately on factors peculiar to that case and must be assessed on a case-by-case basis.

The Brazilian supreme courts' decisions, which do not motivate the approval of binding *súmulas* and do not meet specific procedures

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[200] S.T.F.J, Pleno, HC 152.752, Relator: Min. Edson Fachin, 04.04.2018, Diário da Justiça Electrônico [D.J.e], 27.06.2018 (Braz.) (Weber, J., concurring).

[201] There are about 1000 cases published on the Gazette. All Gazette cases are available at the official website of the Gazette. http://gongbao.court.gov.cn/.

established in the Code of Civil Procedure, are the third least binding precedents.

Swedish precedent is not formally binding, there is no statutory law regarding the binding nature of precedent, and there are no sanctions against judges who deviate from precedent.[202] The Swedish supreme court judges, however, perceive themselves bound by precedent. This is inter alia demonstrated by dissenting judges in later cases agreeing with the former majority, although they still believe that the former majority made an incorrect interpretation of the law.[203] Even though precedent is not formally binding, they have a strong de facto influence. A Swedish judge is expected to note relevant precedent, to analyze precedent, and to relate to the precedent by either following it, distinguishing it or actively deviating from it. Furthermore, judges are expected to explain in their reasoning which rule a precedent entails and provide an explanation for deviations from that rule (comply or explain).

It is likely that the Chinese Guiding Cases have a stronger influence than cases from the Swedish supreme courts. The legal status of Chinese Guiding Cases seems to resemble that of Judicial Interpretations, despite ongoing controversy over the precise nature of their bindingness.[204] For example, the question remains whether a Guiding Case inconsistent with an existing Administrative Regulation (made by the State Council or its authorized organs) or statutory law made by local people's congresses has any legal effect. The Essential Points of Adjudication, the supposedly binding part of a Guiding Case, might have the same legal effect as a provision in a Judicial Interpretation issued by the SPC. The SPC intends Guiding Cases to be binding. The future status of the Guiding Case System depends on whether the SPC can provide effective incentives for local judges to follow and consider the Guiding Cases. Since provincial courts in China are funded by and responsible to local governments, there is no strong mechanism by which the SPC can easily implement such incentives.

The Brazilian binding *súmulas* have a strong binding effect equal to the Chinese Judicial Interpretations. The Brazilian *súmulas* resemble

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[202] *See* RAMBERG, *supra* note 23, 44–46.

[203] *Compare* Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 1978 s.992 (Swed.), *with* Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 1988 s. 521 (Swed.), *and* Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 1986 s.579 (Swed.); *and* Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 1987 s.777 (Swed.); *See supra* part IV).

[204] There remain debates among Chinese scholars about whether Guiding Cases are/should be binding de jure or de facto, or even not binding at all. *See generally* Mo Zhang, *supra* note 102, at 299–300.

statutory law, and lower courts must comply with the Supreme Court's binding *súmulas* on constitutional matters.[205] On the same force level are the Brazilian Supreme Court's precedent created in one of the procedures mentioned in Article 927 of the Code of Civil Procedure and their "legal thesis."

E. REASONS FOR THE INCREASED IMPORTANCE OF PRECEDENT

1. Inadequacy of Statutory Law and Vague Statutes

The main reason for the increasing importance of precedent in all four compared states is the need for certainty and predictability in legal matters that are not solved by statutory law. In some cases, there is a lack of statutory law (a gap). In other cases, the statute is of general nature, resorting to elastic concepts such as "fair," "fundamental," "reasonable," "negligence," "gross," etc., or is dated. For instance, in France, general contract law was regulated by 1804 provisions of the Code civil to the effect that, until the 2016 reform, the judges constantly adapted and completed these texts.[206] Therefore, in reality, there is a lot of judge-made law even though this is not always formally acknowledged.

Besides these grounds, the binding precedents in Brazil and China also serve the purpose of striving for uniform application of law in mass litigation cases, given, for example, the judicial inability shown in Brazil to deal with cases involving class action.[207] Therefore, the answer to the problems caused by crowded dockets in Brazilian courts was to establish procedures to create binding precedents so as to avoid repetitive discussions in multiple cases about the interpretation of the same law provision.[208] Further, in Brazil and China, much statutory law is relatively new.[209] Such new statutory law often consists of broad and vague legal principles and undefined legal concepts which require the courts to provide urgent concrete interpretations.[210] There is thus a greater need for

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[205] C.P.C. art. 927, IV.

[206] Ulf Bernitz, *Bättre rättskällor: Reflexioner över lagboken, rättsfallssamlingarna, betänkandena och departementspromemoriorna* [*Better Sources of Law: Reflections on the Statute Book, the Collection of Legal Cases, Reports and the Ministerial Memorandum*], SVJT 81 (1976) (Swed.).

[207] CARVALHO, *supra* note 155, 395.

[208] CARVALHO, *supra* note 155, 69–70.

[209] *E.g.*, Brazil issued a new Civil Procedure Code in 2015 and, in the past two years (since 2020), the Congress approved 20 constitutional amendments.

[210] Jinting Deng, *The Guiding Case System in China's Mainland*, 10 FRONTIERS L. CHINA 449, 454–455 (2015).

precedent to supplement and ameliorate the initial broad-brush statutory law that seeks to introduce changes.

2. Efficiency and Certainty

Precedent, as a source of law, contributes to both efficiency and certainty.[211] Once a legal uncertainty is clarified by a precedent, it needs not be considered again. Efficiency is promoted when judges rely on prior decisions instead of making a new independent analysis in ensuing similar cases.[212] Furthermore, precedent facilitates amicable settlements and decrease the inclination to take disputes to court.[213] The interests of efficiency and certainty seem to be common grounds in all four compared states for the increasing importance of precedent.

The Brazilian reforms to promote precedent expressly aim at ensuring legal certainty and predictability.[214] The astonishing number of pending Brazilian court cases (about eighty million pending lawsuits)[215] has driven efforts to limit the number of court cases through uniform interpretation of the law.[216] For a long time, Brazil has had problems of multiple interpretations of the same legal provision due to the lower courts' constant disregard of the Brazilian Supreme Court's interpretation;[217] there is an expectation that precedent will address this problem and increase efficiency.

The key drive for the establishment of the Guiding Case System in China is the SPC's conviction that this will provide, in a more efficient manner, better guidance to lower courts. The quality of judgments in lower

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[211] *Cf.* Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 102 (1989); Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 813 (2002).

[212] *Cf.* FREDERICK SCHAUER, THINKING LIKE A LAWYER 43 (2009); Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 465 (2010); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 645, 652 (1999).

[213] *Cf.* Frederick Schauer, *Stare Decisis and the Selection Effect*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 121, 126 (Christopher J. Peters ed., 2013).

[214] *See* C.P.C. art. 927 § 4, V; Teresa Arruda Alvim Wambier, *Estabilidade e adaptabilidade como objetivos do direito: civil law* e *common law* [*Stability and Adaptability as Objectives of Law: Civil Law and Common law*], 172 REVISTA DE PROCESSO 121, 171 (2009) (Braz.).

[215] *Cf.* Conselho Nacional de Justiça [CNJ] [National Council of Justice], *Justiça em Números* [*Justice in Numbers*] 2017, https://www.cnj.jus.br/wp-content/uploads/2019/08/b60a659e5d5cb79337945c1dd137496c.pdf.

[216] CARVALHO, *supra* note 155, 46–53.

[217] *See* Luiz Guilherme Marinoni, *Cultura e previsibilidade do direito* [*Culture and Predictability of Law*], 1 REVISTA DE PROCESSO COMPARADO [RPC] 271 (2015) (Braz.).

courts has been a major concern in China for the past few decades.[218] The Guiding Case System aims to promote uniform application and interpretation of the law, keep judicial discretion in check and facilitate the centralization of interpretative power and adjudicative standards.[219]

France has always been protective of legal certainty, and this is one of the reasons it gives such preeminence to statutory law and codification. In France, where ignorance of the law is no excuse (this principle is based on the idea that the statutory law is easy to find, although not always easy to understand) case law used to be seen as less accessible, with a risk for diverging interpretations and for reverse decisions. However, concerns are emerging as some areas of law have become increasingly sophisticated. Furthermore, provisions in statutory law are subject to divergent interpretations by judges. For this reason, the Cour de cassation's and Conseil d'Etat's function to ensure uniformity have become more and more important.

The main challenge in relation to precedent in Sweden is how to balance, on the one hand, the interest of coherence and predictability and, on the other hand, the interest of flexibility and materially fair outcomes.[220] Many argue that precedent does not create predictability in the same way as statutory law. Against this, some argue that statutory law does not provide any real predictability due to the language either being too general or too casuistic. The conclusion is that predictability is best achieved through a combination of statutory law and precedent.[221]

VI. CONCLUSION

The above comparative analysis of Brazil, China, France and Sweden rendered answers to the two inquiries raised at the outset of this article: there is a clear common trend in all the four systems that case law, or precedent, is gaining importance and influence; while important differences persist, they do not as a rule alter the fundamental decision and trajectory that all the four systems adopt in moving forward.

A core group of court cases can be identified in each of the four jurisdictions, which satisfy the requirements of "precedent," including particularly the requirement for a binding (as opposed to merely

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[218] Deng, *supra* note 203.

[219] Mo Zhang, *supra* note 102, at 286–287, 290.

[220] RAMBERG, *supra* note 23.

[221] RAMBERG, *supra* note 23, 142.

persuasive) legal effect. In essence, judges are not allowed to choose whether to *consider* such cases and their freedom in deciding whether to *follow* them is not always unfettered. Within this category of "precedent" fall at least some supreme court cases in Brazil, China, France and Sweden, as well as some Chinese Gazette cases not decided by the SPC. Some of them, including súmula in Brazil and Guiding Cases in China, form categories of their own and may be seen as genuine "sources of law," even though no such explicit proclamation has been made by the constitution or statutory law. For the rest of the "precedent," they are generally not to be identified categorically, but according to the particular circumstances of individual cases.

Therefore, while all the four legal systems come from a similar starting point and still refrain from openly and officially recognizing "precedent" as a formal "source of law," they have all made the shift, whether through legislative means or not, towards embracing at least the strongest of the precedent as substantive grounds for future court decisions. In line with this, in all the four jurisdictions, for both similar and different reasons, the idea of judges making law remains something not to be publicly proclaimed or countenanced and to place judges in the seat of law-makers tends to attract wide and heavy criticism. Yet, a shared reality in all the four jurisdictions is that judges do routinely make law, albeit not necessarily in the same manner as legislators. Another common feature is that supreme courts play the pre-dominant role in shaping the system of precedent in each comparator.

The rise of precedent in all the four jurisdictions may be attributable to common aspirations for gap-filling, certainty and efficiency. The courts and scholars, in general, acknowledge that the best approach to reach those aims is through the use of judicial precedent along with legal statutes. The formal obstacles and uncertainties relating to the use of precedent are gradually replaced by an understanding on how various precedents enrich the legal system and how they operate as a supplement to statutory law.

The importance of the fact that all the four jurisdictions commit to a common cause should never be understated. For example, despite the many expressions of the legal effect of precedent, all the four jurisdictions seem to accentuate precedent's role in shaping and forming the judicial reasoning leading to the final decision. In this regard a direct reference to a precedent as a ground of decision is generally averted so as to avoid any debate over the clash with the formal "sources of law" prescribed under the constitution or statutory law. Even though Brazil and China seem to

place greater emphasis on statutory-style general statements of law and conceive them as at the core of binding precedent, this cannot be described as emanating a non-Western model since it has an origin in the "Western" civil law tradition.

Having said that, differences have surfaced among the four jurisdictions over such issues as whether it is the essential reasoning in the original case or the supreme court's restatement of that reasoning that is being followed or considered by a later court and to what extent the facts of a precedent should be compared to those of the case at hand in order to apply the precedent. Such differences may have profound implications for the future development of the system of precedent. For example, the supreme courts in China and Brazil intervene to impose a top-down structure by formulating general statements law akin to statutory provisions—Essential Points of Adjudication in Guiding Cases (China) and binding *súmulas* and "legal theses" (Brazil). In comparison, the French and Swedish supreme courts seem to adopt a more decentralized approach to the extraction and interpretation of such general statements of law. If developed further, this difference might create two distinct models.

However, the future of precedent in the surveyed jurisdictions must depend on how they tackle their own challenges (such as precedent inflation) and how new methodology is devised by their scholars, practitioners, and courts in that process. As shown in this article, legal scholars in all the four jurisdictions have undergone a shift in thinking and now pay closer attention to precedent, with a particular focus on the proper balance between statutory and judge-made law, as well as the limits of judicial power. It is important to understand that the methods of interpreting and applying legal statutes are substantially different from those applied to precedent. Legal scholars are expected to play a critical role in chiseling out the distinctive methodology for precedent, in close collaboration with the supreme courts.

The difficult tasks confronting legal scholars, practitioners and courts should not discourage them from moving towards a legal system that can take full advantage of the benefits of precedent as a source of law.