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Articles

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The current issue is the second of the sixth volume of the *Athens Journal of Law (AJL)*, published by the published by the *Business and Law Division of ATINER*.

Gregory T. Papanikos
President
ATINER

Athens Institute for Education and Research

A World Association of Academics and Researchers

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13-16 July 2020, Athens, Greece

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Important Dates

- Abstract Submission: **1 June 2020**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **15 June 2020**

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- Submission of Paper: **6 April 2020**

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- **Dr. Gregory T. Papanikos**, President, ATINER.
- **Dr. Michael P. Malloy**, Director, Business, Economics and Law Division, ATINER & Distinguished Professor & Scholar, University of the Pacific, USA.
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The Diffuse Borders of Judicial Law[1]

By M. Isabel Garrido Gómez[*]

This article gives an account of the importance of judicial activity, observing that the clarity or obscurity of a text is relative to its context of enunciation and context of application. Materially, we move in the debate between those theses contemplating the Law from power and those contemplating it from freedom. In order to determine if we can really speak of a judicial Law and, where appropriate, what the borders of the same are, we analyse what the activity of the judges really consists of, the adequacy of legal rules to the cases in dispute and the types of normative production. In conclusion, judges are required to be aware of the primacy of their responsibility in view of the social role they represent.

Keywords: *Judges, judicial activity, judicial Law, borders, responsibility.*

1. Introduction

In order to analyse the role that judges really play and the degree of participation they have in creating Law, it is necessary to reflect on whether the intelligibility of a system is linked to the discovery of its rationality and on whether the legal reasoning assisting it can coexist, bringing both responses together in the dynamics of normative production[2].

At present, jurisdiction has become a phenomenon with a special status that places it between the State and society. Pluralism and cultural awareness of the judicial sphere have influenced this change, the idea of legal certainty has been modified and has made it more permeable[3]. The application of rules requires a correspondence between legal precepts and real-life cases, judicial discretion determining specific application[4]. What clarifies the meaning of a regulation is the criterion of an order of rules because establishing a social order through Law requires regulatory delimitation, there being a diversity of ends and social relationships and a hierarchy between them.

The performance of judges is so important that, following on from one of the first problems arising in the study of Law, there is the question of the conditions that a rule must meet so that it can be said to be valid. Having arrived at this point, it is convenient to distinguish between validity as belonging and validity as

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[1]Research Project "Diversidad y convivencia. Los derechos humanos como guía de acción" (DER 2015-65840-R), Spanish Ministry of Economy and Competitiveness.
[2]Reale (1993) at 249 ff.; Soriano (1993) at 71-72.
[3]Andrés Ibáñez (2003) at 27 et seq..; López Ayllón (2004) at 122-128.
[4]Quintana (2001) at 241.

existence. The first implies that a rule is valid or, what is the same, that it belongs to a normative system in the event that it meets the conditions of having been created by a competent authority, that in the course of its creation, certain procedures established in advance were observed, that it has not been subsequently repealed and that it does not contradict any superior rule[5].

A second concept assumes that a rule is valid when, in fact or by the force of the facts, it is applied or is applicable. This is what López Calera[6] calls the real validity of rules, with the criterion of effectiveness prevailing here as the criterion for assessment. The problem, Bobbio[7] recalls, is whether a rule is obeyed by those to whom it is addressed and, whether, if it is disobeyed, the coercive measures foreseen to enforce it are applied. Thus, effectiveness is understood as meaning the correspondence between the normatively expected behaviour model and the actual behaviour of its recipients[8].

However, accepting the theory of judicial decisionism presupposes that the object of legal knowledge is formed by what the judges have decided and by what they will probably decide in the future. Therefore, anyone subscribing to a decisionist position will be interested in clearly establishing the answer given to the case but will not be interested in what the correct answer might be. Judges will be political protagonists in that they create Law, so it must be understood that when appointing them representative criteria must be taken into account and not qualities such as prudence, experience or the ability to discern the correct decision in each case[9].

In this context, we can establish the judicial role according to the rules of duty, without resorting to rules assigning powers. Hence, it is argued that judges: "a) Have the duty to pass judgement on any claim, disputed or disputable, of incorrect action that is presented before them, with or without limits as to the matter; b) they have the duty to formulate their judgment by reference to standards of correct or incorrect conduct, whose validity is not determined by their own choice or present decision, except insofar as, in order to justify their decision, they must interpret or expand existing standards; and c) they have a monopoly over the justified use of force in human society, by virtue of the standards prevailing in that society"[10].

However, we must continue moving forward because jurisdiction has undergone great changes: it has been internationalised, in the case of international courts, and supranational zed, in the case of the Luxembourg Court. Similarly, alternative ways have been devised to better and more quickly satisfy legitimate rights and interests, the case in point being, among others, arbitration and mediation. This is thanks to the emergence of some critical theories in the countercultural field for which the emancipatory social value surrounding the legal

[5]Hart (2004) at 2201 et seq.; Kelsen (2007) at 201 et seq.
[6]López Calera (2004) at 88.
[7]Bobbio (1995) at 35.
[8]For a more precise concept of effectiveness see Navarro (1990); and on the subject of validity, see Zapatero, Garrido & Arcos (2010) at 24-27.
[9]Atienza (2010) at 63-65; Whitehead (2014).
[10]MacCormick (1981) at 113, cit. by Ruiz Manero (1990) at 126.

order rests on the ability to secure and extend rights[11]. The explanation lies in the fact that the multitude of purposes to which positive Law is called limits action in various ways and demonstrates a very high degree of contradictions and gaps. This is evidenced in the behaviour of the subjects regulated by ordinances, many of them incompatible with each other and resolvable by unique rules, causing certain groups to self-regulate[12]. In that sense, the work of experts in the social field to decide issues that the judges themselves do not assess, is urgent. Their participation in the implementation of regulatory Law would relax and strengthen the sensitivity of institutions in some risk sectors[13].

Aspects that help us clarify if we can Really Talk about a Judicial Law

The Activity of Judges

It should be noted that the activity performed by judges is framed within a line of indetermination in which it is often difficult to discern with any certainty if it falls within a production or application of the legal function. This idea is identified with the questions of legal indetermination and with the defeasibility of rules within a diversity of meanings, with a series of consequences relating to the tasks of interpretation and the discretionary creation of Law[14]. Specifically, the legal phenomenon, in regard to its structure, is presented as a normative order enabling the judge to solve the legally relevant problems that arise, opening the way to a certain production of Law and a certain political nature of their activity[15].

But, in addition, there are other relevant issues that are ignored by the purely applicative theory of Law on the part of judges. Indeed, with respect to the sociological substratum of a legal system, it is necessary to take into account that the real forces and the infra and supra-structural factors of the birth, conservation, transformation, destruction and annihilation of Law are addressed, giving rise to the appearance of the problems of their sociological genesis and determining currents, as is also the case with the relationships present in social and legal changes. The questions arising are, then, what kind and degree of synchronisation is there? When does the Law lag behind or move ahead of a society's interests, values or aspirations? Or what are the real factors determining that the Law will lag behind in certain circumstances? Therefore, any influence on social reality has as its starting point that through legality it is possible to produce and prevent, or at least detain, alterations, in line with what emerges from the relevance of the control exercised by positive rules and the role of judges[16].

Continuing with the other possibility that exists in the field of the activity of judges, that is to say, with the judicial creation of Law, the thesis that they produce Law means upholding a different position. Laporta tells us that, when we talk

[11]Arnaud & Fariñas (2006) at 50 et seq.
[12]Ferrari (2000) at 273 et seq..
[13]On the subject discussed in this work, Garrido (2014) at 15 et seq.; Picontó (2000) at 155 et seq.
[14]Ródenas (2012) at 14 et seq.
[15]Ara (1996) at 469; Bayón (2000) at 87-117; and Bayón (2001) at 35-62.
[16]Díaz (1993) at 201 et seq.; Duxbury (2001).

about creating Law, we are referring to production in several ways: a) we deliver a descriptive affirmation or make a descriptive judgment about judicial reality, about what happens in a country, in a certain time, district or jurisdictional order. These are contingent facts that depend on circumstances that may change or be altered; b) we make a prescriptive statement or an evaluative judgment as to whether judges must or should create Law, whether it is good that they do so or not; and c) we make a conceptual affirmation that indicates that it is conceptually necessary and empirically inevitable that the judge creates Law when he performs this activity. The third version being the one allowing us to become aware of the most relevant meaning[17].

In general, these theses began with the anti-formalism format, which emphasises that the individualisation of Law is not a mechanical operation. So that American legal realism was correct when conceptualizing Law as a reality undergoing incessant change supported by creative judicial activity. It is aimed at fulfilling social purposes, not temporarily confusing being with the duty to be and agreeing the separation of the rules pertaining to conduct or precepts, the rules of procedure or judicial practice.

Therefore, prescriptive formulations would not be the determining factor in court decisions, having to overcome the conviction that it is worth grouping cases and legal situations in fixed categories as practiced in the past. Similarly, it must be emphasised that any assessment of a part or sector of the Law must be done according to its effects[18]. It involves the actual functioning of the courts, those aspects affecting their decisions and the weight of extralegal factors. In this order of ideas, rules are a relevant factor, but, of course, not exclusive nor decisive, given that the Law enjoys a high degree of uncertainty due to the ambiguity of regulations, the difficulty of verifying the facts alleged in the process and that, almost always, different regulations can be applied without the Law saying which one should be selected[19].

The problem is, however, that legal realism reduces the validity of rules to their effectiveness by adopting the approach that genuine legal rules are those that are actually applied and extended. For that reason, it is affirmed that a genuine Law is one created by the judge when intervening in a specific case. This contributes a concept referred exclusively to what could be considered situations of pathology of the Law, which are those in which judges intervene, an extremely limited definition. To this must be added the argument that a judge's jurisdiction is due to the existence of enabling legal rules allowing him to carry out his role, given that he has met certain requirements established in some regulations and, furthermore, a judicial decision is the outcome of a process that is born of and developed from certain standards[20].

Judicial activity, following on from what has been said, has a mission to fulfil within the framework of Law in general and requires a series of instruments to enable it to reach its final goal that is, achieving the application or production of

[17]Laporta (2007) at 209-210; Laporta (2002a) at 133-151.
[18]Zapatero, Garrido & Arcos (2010) at 66 et seq..
[19]Llewellyn (2000) at 55-57; Llewellyn (1960).
[20]Peces-Barba, Fernández & Asís (2000) at 36.

Law depending on the position held by each one. In turn, these tools have an intimate relationship with each other, they are the interpretation, integration and resolution of antinomies where there are gaps and contradictions, and argumentation. This is because the Law is constructed according to a normative process composed of a diversity of planes whose central core is the rationality underpinning them, based on the superior values of the legal system. All these instruments constitute moments of a process governed by the idea of rationality based on the superior values of the legal system, which manage to back up the ethical content striving to achieve power. To this end, theories of justice help us understand the justification and criticism of the idea of Law being upheld.

Now, there are times when the boundaries between one instrument and another are difficult to establish, and issues arising about the nature of normative language are included more in the field of interpretation. For example, vagueness means that there is a relative indetermination of the limits of a concept that does not allow us to see accurately if an object falls inside or outside of its denotation. When we perceive that there is a potential vagueness that cannot be eliminated from class names, then we say that language has an open texture[21]. The ambiguity is that the same linguistic statement can come to express several meanings that diverge and are mutually incompatible. And it can be contextual or extra-contextual[22], considering a variety of meanings alternatively and simultaneously. The emotional charge consists of an expression in the valuative or evaluative dimension associated with the descriptive meaning of the expression. This means that when something is described it is also valued positively or negatively[23].

In line with the previous notions, the interpretation and a distinction can be made between the activities of interpreting and applying, a difference that is parallel to that between provisions and rules when interpreting the former and applying the latter. So, when a normative provision is used, one of its possible meanings is used and the judge must interpret and argue his decisions in favour of the interpretation that has been made and the meaning that has been chosen[24].

Within this framework, judicial interpretation establishes the discrepancy for which a solution is sought, with judges asking themselves if a case falls or not within the ambit of application of a specific rule. In this regard Guastini says that the application of Law requires concurrence between the interpretation of the sources and the classification of the case in fact, which presupposes verifying the facts of the case[25]. It also shows that the application of legal rules requires assessing the case being prosecuted in accordance with them, a distinction being made between requiring an assessment and the value judgment dependent on a specific rule. Those cases that are not included in the considerations we have just made are listed[26].

Special Considerations Regarding Adapting Legal Rules to Cases in Dispute

[21]Martínez Zorrilla (2010) at 205; Stone Sweet (2002).
[22]Martínez Zorrilla (2010) at 205-206.
[23]Martínez Zorrilla (2010) at 206.
[24]Guastini (1993) at 327 et seq..
[25]Guastini (2011) at 20- 21.
[26]Larenz (1994) at 203-204. Cf. Gascón (2010) at 125 et seq.; Wröblewski (2008) at 286.

In correspondence with this section, we must bear in mind that there are several aspects to be taken into account. To this end, a judge's impartiality plays a very important role in this field and refers to the equal respect and dignity of all people[27]. As Laporta makes clear, it prevents biased decisions being made in favour of one of the parties and we can distinguish an objectified partiality, within "assessed causes enabling the parties to question the suitability of the judge", and a more subjective partiality, which emphasises that the judge "is conditioned by facts or beliefs prior to the case that will determine his judgment". In order to overcome these obstacles, there is a desire to make it transparent and legal impediments are put in place to prevent corruption. From this perspective, the achievement of impartiality also manifests itself in the attitude of the judge towards the parties, listening to them and ensuring their rights are exercised[28].

Thus, it is advisable to take into account what type of State is the one representing judges' actions: a reactive State or an active one? In the first case, we are facing a situation in which the absolute equality of the judicial process is the maximum expression of its neutrality for several reasons: if the judicial process is considered as a space that the State offers so that the parties can resolve their litigation, total neutrality in conducting trials and rules of process is required.

The State would have problems identifying any asymmetries that should be corrected. It being fundamental that potential users be aware of the absence of valuations of their life plans by the State, an intervention to correct equality in relative terms could be perceived as taking sides. On the other hand, the judge must consider the parties in abstract, because correcting any asymmetries would produce a different judicial view of the actors. But relative and absolute equality in active States are not of great significance because everything depends on whether the asymmetries respond to an estimated life plan as defensible by them[29].

As for weighting, it leads us to the consideration that the limits of practical rationality are not established a priori nor are they permanent, absolute and immutable. A rational legal procedure requires rules aimed at governing the behaviour of a social group from the point of view of providing consistent standards to carry out a critical evaluation. However, the fact that the formal rationality of a legal system is enough to produce a rational legal system gives rise to significant issues. If we look closely, one part of the doctrine alleges that reasons of principle have primacy over reasoning supported by rules, and that, in the legal discourse, substantive reasons have primacy over those of authority or force[30].

Therefore, taking into account the above, the exercise of fundamental rights under the equality regime can raise conflicts. The solutions are diverse, even though it is the weighting technique which I believe is most satisfactory. Certainly, it leads us from the question of rationality to the possibility of the rational foundation of statements establishing conditioned preferences between rights or

[27]Fernández (2005); Rawls (2002) at 113 et seq..
[28]Laporta (2002b) at 117 et seq. Cf. also Malem (2002) at 145-171.
[29]Calvo (2006) at 151-155. See also Asís (1994) at 913-928; Spohn (2009).
[30]For MacCormick (1990) at 20, 22.

opposing benefits. Overall, the technique of weighting benefits is inextricably linked to the recognition of judicial discretion, so that constitutional benefits that act as limits or clauses limiting the content of rights require an interpretation that is not independent of the content of the rights thus delimited[31].

Deriving from this, the problem points to the limits of the public powers when they must perform some action on rights according to their competences, that is, to how the actions of said powers referring to fundamental rights are to be treated. Thus, the limit is set externally to the Law, previously the weighting was open, and following that it is closed. If the law that limits does not exceed the weighting, the final content of the right will coincide with the *prima facie* attribute, although if the Law and the limit are justified, the final content will have to be slighter than the apparent or *prima facie* content[32].

On the other hand, it must be observed that in contemporary Rule of Law reasoning in judgments is an imposition to prevent arbitrariness, to control the activity of judges and to legally guarantee the rights and liberties of citizens. A judgment is a public act representing the exercise of a power. Internal judicial justification is that the judge's decision is obtained from its premises in correspondence to the lines of inference that have been accepted, providing a logical reasoning directing the conclusion provided in the ruling. However, an external justification is required when the factual and normative premises, or both simultaneously, require new arguments. Any reasoning will be complete, then, when it contains both aspects[33]. In this sense, Gascón says that "reasoning requires giving reasons strong enough to rule out arbitrariness and, therefore, also (or above all) the evidence that does not support the reconstruction of the facts being justified: no justification will be complete if it cannot also justify why such evidence has not been taken into account"[34].

With this in mind, positive Law must respond to a systematic that builds a security mechanism referring to values such as freedom and equality[35]. Since it is not possible to guarantee rationality, this is the cause on which the reasonableness of judicial decisions is based, which comes naturally to a Rule of Law to exclude the decision maker's arbitrariness[36]. By means of reasoned judgments it is intended that the one who judges state the reasons for his decision based on the rights of the defendant and the legitimate interest of the community in recognizing them. To verify that the judicial decision adopted is a consequence of a rational exegesis of the regulation; that the parties or the community have the necessary information to appeal, if necessary, the decision; and that the competent courts have the information to monitor the correct interpretation and application of the Law[37].

[31]Moreso (2003) at 215 et seq.; Prieto (2000) at 433-434.
[32]Prieto (2014) at 220-221. See also Brage (2004) at 251 et seq.
[33]Gascón (2010) at 193-194; Ortells (1977) at 899 et seq.
[34]Gascón (2010) at 227-228.
[35]Atienza (1997) at 32; Colomer (2003) at 325 et seq.
[36]García Herrera (1996) at 74.
[37]Asís (1995) at 111.

But, going further, the reasons for this precept are due to the fact that it is essential to guarantee the rights of those who are part of a process and the dominance of a social and democratic Rule of Law. The first group of reasons is well explained because sufficient reasoning is first and foremost an essential guarantee for the defendant by which, without prejudice to the judge's freedom in the interpretation of rules, it can be proven that the solution given to the case is a consequence of a rationally ordered exegesis. Regarding the second kind of reasoning, it seems obvious that the Rule of Law implies that the public powers are subject to the Law and that the jurisdictional bodies exercise control them, control that is only legitimised the by applying Law and hence the need for their resolutions to be reasoned. A democratic State, seeks to convince the parties and public opinion, so, if the judicial power emanates from the people, they must know the way in which it is exercised to control its titleholders[38].

The Types of Standard Production

According to what has been said, we must clarify what we understand as being general and particular rules. General rules are expressions correlating generic cases with generic solutions; and individual rules are expressions correlating a certain individual case description with an individual solution[39]. The Kelsenian model advocates that judicial sentences should go beyond mere declaration, and should not restrict themselves to uncovering what has been dictated by the legislator. Judges *create* Law by setting individual rules. Another question is whether they create general rules, to which Kelsen responds in the affirmative in two cases: in the case of precedents and in cases where higher rules expressly allow them to do so. In the former, the solution of a litigation becomes mandatory for resolving equal cases. Note that this is imputed to a judgement when "the content of the individual rule is not predetermined by a general rule produced by legislation or custom, or it is not univocally determined, different interpretations being admissible"[40].

In the latter, the outcome obtained is that of a new substantive right, while in the former we achieve a general rule. But not everything is so simple. If precedents serve to solve *equal* cases, the question is when do we appreciate the existence of that equality? This leads us back to the general rule that creates the settling sentence. Its formulation, Kelsen says, "is the assumption under which the solution adopted in the precedent may be mandatory for the resolution of 'equal' cases." The power granted to the judge by the legal order of issuing general rules is harshly criticised, since its point of departure is that there are legislative and customary gaps, and it conceals the real issue[41].

In turn, Kelsen states that "the application of general legal rules by the courts consists of establishing individual rules whose content is determined by the

[38]Gómez Montoro (1998) at 492 et seq..
[39]Bulygin (2003) at 25.
[40]Kelsen (2007) at 258-259; Moreso (2004) at 45-62.
[41]Kelsen (2007) at 258-263; Lifante (1999) at 85-86.

general rules, and which pronounce a specific sanction [...]". Considering, thus, that any judgment constitutes individual rules, although this thesis presents some problems. We see this because judgments are complex entities consisting of two parts, the recitals and the operative or dispositive part. The operative part would constitute an individual rule which is preceded by the recitals on which the judge justifies or bases the decision that he grants. The recitals are a specific part of the judgment, and it is doubtful that we can call these individual standards rules. In addition, the term *rule* seems to require generality, at least as regards the person to whom that rule is applied, this being a strong reason that would, according to Bulygin, imply that we are speaking more of the operative part of a dispositive judgment or order.

On the other hand, to argue that the judge always creates Law, Kelsen relies on the judge's decision being the outcome of an act of will and not of mere knowledge and on the fact that in the judgment items are specified that in the generally applicable rule are only mentioned in the abstract. The general rule indicates a framework of possibilities that the judge fills when selecting one of them at the moment of creating the individual rule[42].

Now, it is important to emphasise that the judge's operability is creative when he has gaps before him and values the existence of a legal vacuum. Subsequently, the rules for filling them may be contradictory and the judge must decide in each case for one or the other. Hence, in accordance with Alchourrón and Bulygin, we have to discern between normative gaps that present problems of a logical nature, and those that are gaps in knowledge or recognition that present empirical or empirical-conceptual obstacles. Simultaneously, it is possible for antinomies to arise when in a legal system a behaviour is deontically qualified in two incompatible ways in two rules that are part of the system, and there is an assumption of fact to which two inconsistent consequences are assigned, collected in two different normative formulations[43].

The classic criteria to address this situation are chronological, hierarchical and the specialty. But they are not always sufficient if the antinomy is caused between contemporaneous rules placed at the same level and both are general. This normative conflict induces the judge to use any possible interpretation criteria without exclusion, making it clear that deontic logic is insufficient to recognise contradictions that are characteristic of the structure of the Law and which derive from the indeterminacy of rules[44]. This problem is enhanced in the field of principles and values. The production of Law is due here to the fact that the individual case cannot be resolved by the judge without modifying the existing rules linking a generic case to two or more others with incompatible solutions[45].

However, from Kelsen's Pure Theory it turns out that if a legal rule is valid given that it has been produced in a certain way by the basic founding standard, any content produced this way may be Law. There is a connection between the creation and the application of the same, and between the interpretation and the

[42]Kelsen (2007) at 258-259. On this issue see Bulygin (2003) at 24-26.
[43]Alchourrón & Bulygin (1993) at 63-65; Guastini (2011) at 71-72; Prieto (1993) at 90-92.
[44]Bobbio (1995) at 207-208; Ruiz (2002) at 100-101.
[45]Bulygin (2003) at 35-36.

normative application as two combined functions. The interpretation of a law does not necessarily lead to a single correct decision, but possibly to several, "all of which, to the extent that they fit within the framework of possibilities of interpretation of the law in question, have the same value". The law does not give a final decision for each individual case, but a form of provision that the judge has to fill in, converting judicial application into legal production. Thus, any act producing Law in relation to the higher Standard is partly indeterminate, intentionally or unintentionally, and this field will vary depending on the presumptions used[46].

From what we have explained it can be inferred that legality contributes to an orderly institutional functioning, creating certainty in the awareness and expectations about the legality of the performance of the conducts and the consequences they entail. A judgment has, pre-eminently, the rank of a singular rule that develops and prolongs the legal system[47]. One of the best-known legal techniques is to resolve conflicts by pointing out problems that must be addressed. To which Atria adds that the Law does not constrain the judge to decide if there is a transparent agreement of wills between A and B: not every agreement of wills will be sufficient reason to force A to deliver the thing to B. The Law does not require you to examine all the circumstances of A and his agreement with B to determine whether both were properly free when entering into the contract. Positive Law displaces the problems so that they are solved by people, places or moments. The arranged displacements are protected by exclusions reducing the scope of contingency when determining personal relationships[48].

Between the decisionist and the applicative positions, Kelsen maintains a point of balance to explain the jurisdictional function because, for him, the judge creates the rule, the individual rule, there being a prior decision between them, due to one of the possible meanings of the general rule to be applied, without forgetting that the determination of these meanings is cognitivist[49]. So, given the diversity of options, we need a guideline that helps us find a more accurate solution.

Hence, it is convenient to emphasise that the Constitutional Court lacks jurisdiction to prosecute judicial decisions, so that the specification that they be duly motivated based on constitutionally correct interpretive criteria is overturned. And, therefore, the only control that can be implemented is that of the legality of the criteria to be executed by the ordinary jurisdiction, although the fact that there is no abstract control means that the activity of the higher jurisdictions is reduced to imposing the criterion they choose.

In this way, the goal to be achieved is to reduce those of an interpretive nature that are legally correct, which runs parallel to the reduction of jurisdictional bodies that can definitively determine the criterion that has finally been selected. It being apparent that the unification of jurisdictional interpretations comes from the competence of the Supreme Court to determine the most appropriate

[46]Kelsen (2007) at 246 et seq. and 349 et seq.
[47]Ezquiaga (2000) at 213 et seq.; Peces-Barba (1983) at 20.
[48]Atria (2000) at 112 et seq..
[49]See the comments of Ruiz Manero (1990) at 93-94.

interpretation. It seems obvious from the fact that the resolutions of that body can oversee, correct and unify the interpretive criteria used, plus the binding force that jurisprudence contains is that which in every case each judgment of the Supreme Court wishes to attribute to it[50].

Some Final Reflections

Rules are promulgated taking into account certain facts, behaviours and social needs that must be regulated. Specification presupposes a body regulating the reality occupying us, and legislative technique must include ways to implement normative content. This means that the judicial bodies must enforce them by assessing the great variety of circumstances included within their generic and abstract traits, which denote an attempt to claim validity in the cases included within their content through a series of instruments[51]. Thus, if all juridical rules are formulated generally and abstractly, they must always be individualised, it being necessary to begin by delimiting the meaning they contain. This investigation of the scope of legal precepts, in relation to the cases they regulate, is commonly called interpretation. Although an interpretative approach can be used in different ways, thus allowing for different outcomes[52].

From the above it must be concluded that the judge operates on the basis of interpretive approaches, obtaining one outcome or another according to which he applies. Within these coordinates, assuming that what we intend is simply to justify the judicial application of rules, we will settle for a judicial syllogism. But, if the aim is to justify the resolutions of discretionary powers, it is necessary to establish what criteria are being used to produce the assessment of the instruments which must determine the optimum means to effect or maximise the end pursued. This operation must be carried out taking into account the purposes and values that are contained in the legal system and keeping an eye on the consequences arising. It does not reduce itself to allowing the balance of interests implemented by the legal system to prevail[53].

From this perspective, positive Law must respond to a constructive systematisation of a security mechanism that refers to values, such as freedom, security, equality and solidarity[54]. Congruently, argumentative models are conceived to obtain the most coherent and comprehensive theory of Law. This comes into play with great complexity when interpreting and integrating the rules in order to obtain solutions, evidenced over four levels: Those judicial precedents that implant a proven tradition over time; dogmatic or legal logic; the proper management of interpretive instruments; and the reasonableness that any sentence must show, referring to real life justice and specific cases[55].

[50]Requejo (1993) at 251-252.
[51]Mendonça (2000) at 269 et seq.
[52]Ezquiaga (1984); Villar (1975) at 9.
[53]Lifante (2003) at 123-126. About this issue, cf. Guastini (1995).
[54]Atienza (1997) at 32.
[55]Haba (1999) at 55.

In line with this assertion, jurisdiction represents a rationalizing activity addressed to the holders of the right to jurisdiction, the person responsible for saying the last word in matters of Law being of special importance, in connection with sovereignty and the origin of the legal system[56]. Therefore, it must be borne in mind that, when considering whether judicial decisions are predictable, complexity grows, and some confusion arises because the connection models are very diverse, resulting in equally different responses depending on the relationship between judges and the socio-political sphere.

Hence, it is noted that, in each model, judicial discretion acts more or less intensively. This raises problems in relation to legal certainty and, more broadly, in relation to security. Actually, security has increasingly ceased to be considered as a value at odds with justice, to be seen as a set of ethical dimensions that would become part of formal justice[57]. There is no doubt, then, that the requirements of the security of Law constitute an ideal means to guarantee respect for some values whose performance is considered essential for achieving a just social order. In this way, demands for legal security allow us to create some of the presumptions for freedom. A legal order structured in accordance with these requirements introduces certain fixed and predictable parameters in the public and private relations environment, allowing for a confident exercise of personal initiative and freedom.

Finally, we need judges who are responsible for judging and enforcing judgments, and who must be, in turn, technicians bringing together, in addition to good theoretical training, a set of qualities to uphold a balance between authority, understanding and restraint, worthy of being a good instrument for pacification. This follows from the fact that, whether it is based on the idea of exchange or equality, legality, proportion, peace and order, the final decision must objectively harmonise the aspects of the litigation, resolving a conflict and restoring the disturbed legal order. Consequently, the judge is more than an official in the sense of having only a burden of physical presence, more or less routinely disinterestedly fulfilling their duties. On the other hand, an endorsed figure with a statute of competence and suitability, permanence, social esteem and impartiality is required, one that is aware of the primacy of his responsibility in view of the social function he represents[58].

The figure we are discussing must act in accordance with the idea of independence and responsibility, a judicial power administering justice implies that it does not encounter ties or interference when exercising its task. Independence is constituted by assuming responsibility for the acts themselves, whether criminal, civil, disciplinary or patrimonial, because this stance can never ensure functional perfection, or even infallibility[59]. From which we suggest that non-arbitrariness and the reasoning of the judicial decisions are inseparable: they guarantee that conducting the same is rational[60]. The meaning of this rationality

[56]Ciuro (1998) at 77; Del Real (2011).
[57]Rodríguez-Toubes 2000 at 112-114. See also Bandinterand & Breyer (2012); Toader (2012).
[58]Barcellona (1979) at 19 et seq.; Garrido (1991) at 109-143.
[59]See Montero (1988).
[60]Gascón (2010) at 200 et seq.; Igartua (2003) at 33.

indicates that often judges must make decisions about issues such as what is dignity, responsibility or causality and what they imply, having to make a choice between principles defended with rational arguments involving a certain fusion between the Law, Morality and Politics[61].

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[61]Lifante (2013) at 130-131; Posner (2011).

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Comparative Procedural Law in the Contemporary World[1]

By Aluisio Gonçalves de Castro Mendes[*]

This article points to the internalisation of the diverse fields of knowledge, as a growing phenomenon interconnected with many sectors. Therefore, the article analyses the functions and aims of the law, in the national, foreign and comparative context, with brief considerations about the difficulties, particularities, and challenges.

Keywords: *Comparative Procedural Law; Comparative studies; International Procedural Law; Unification and standardisation of law.*

Introduction: The Internationalisation of the Branches of Knowledge

The contemporary world experiments increasingly frequent changes in the most different areas, especially technology innovations and social changes. It can be said that, with the population increase, the scientific progress, and the communication and transportation improvements, the information and experience exchanges were geometrically boosted. The internationalisation, or globalisation, has become increasingly remarkable, without prejudice to concern for local reality and cultures. The dichotomy between the preservation of regional values and expressions and contact with other cultures considered dominant continues to provoke debates in various spheres. In the political and economic perspective, conflicts between nationalists and internationalists have been giving the emphasis in several countries.

However, from a scientific point of view, the search for the improvement of knowledge usually crosses borders, even if they serve for possible difficulties or competitiveness. The purely local or national parameter for studies has been giving rise to broader research and studies involving some or several countries. It is difficult to conceive that a scientific branch is limited to the national level. On the contrary, we seek the affirmation of discoveries, the elucidation of issues, the

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formulation of theses that find support, usefulness, and viability of a universal character, without prejudice to solutions and peculiar innovations.

In law, this situation could not be, and it is not, different. On the contrary, legal norms try to follow this movement and flow of people and goods circulating across borders. The study of other national laws becomes a necessity for trade, tourism, immigration or for projects involving people or companies in more than one country.

In this context, this article intends to analyse the Comparative Procedural Law as a methodological tool for the studies of procedural law institutes. To this end, the approach begins with the demonstration of the relevance of comparative law and its possibility of application to Procedural Law. After the main functions and objectives of Comparative Procedural Law are analysed, emphasizing micro and macro comparison approaches, the study compared as a legislative reform tool and mechanism for unification and standardisation of law. Finally, some difficulties and challenges related to Comparative Procedural Law are examined.

The Relevance of Comparative Law and its Application in Procedural Law

The reality of the 21st century has been pointing to the combination of elements that converge for the progressive transformation of the classical structures of the institutions of justice. This is because the phenomenon of globalisation, associated with the emergence of new technologies, directly influences the way individuals relate to state power structures and ultimately impacts the forms of social conflict resolution.

Already in the 1990s, Cândido Rangel Dinamarco identified four factors relevant to legal transformations: (i) the need for collectivisation of judicial protection in a mass society; (ii) the legitimacy crisis by which the judiciary passes and consequent proposals for its external control; (iii) the assimilation of new institutes by the law of the process itself (especially the techniques of collective redress, the enforcement proceedings and the urgent measures in the cognitive process); and (iv) the growing rapprochement between sovereign cultures and nations (the Mercosur phenomenon). According to him "such pressure factors make legal comparisons that have always been useful to the institutional improvement of a country's law and now prove to be a real need."[63]

These circumstances form a fertile field for the development and improvement of comparative law, which allows not only the best knowledge of foreign law but also the internationalisation of legal institutes. Observing what has been done beyond its own borders, the analysis from Comparative Law offers a number of models on how to solve a problem that has developed within national limits.

It should be noted that the theme of Comparative Law was treated by the author of this article in the Aula Magna of the Faculty of Law of the State University of Rio de Janeiro (UERJ), given on August 19, 2019. As stated in the following excerpt:

[63]Dinamarco (1998).

> Moving towards the end, we must record the aspect of universalisation. Today there is no purely national law. At law school, in all branches of law, and even outside it, knowledge is exchanged between professionals and academies around the world and, therefore, it is very important to study comparative law. In a way, in some countries, there is a trend of uniformity and harmonisation between applicable standards. See the European Union and, in a way, to a lesser extent, Mercosur. There are also international court and arbitration courts. Moreover, the so-called international precedents, because there are universal issues, such as gender and discrimination, that exist today around the world and that often the judicial decision of one country will serve as a reference for another. The academy can improve when studying neighbouring countries or other countries, to compare, exchange experiences and evolve in its own law.64

In fact, if a single judge can be creative in the construction of legal solutions, teachers, lawyers, judges and professionals of the world law acting together are significantly more inventive in formulating solutions to the same problem[65]. In this scenario, the jurisprudence cannot be understood only as the science of the interpretation of national norms, on the contrary, should cover the search for models of prevention and resolution of social conflicts in the context of a globalised society. Thus, Comparative Law becomes a true "power plant of ideas", rich in a range of possible solutions, to the extent that it enhances greater chances of building better instruments for a specific country, being certain that there is no more reason for restrict research at the national level.

It is a notorious fact that legal systems have increasingly merged legal institutes from various backgrounds and countries. This occurs, for example, in most national legal codes and statutes, which end up being a combination of influences and institutes from different legal systems, even when the legislator does not expressly declare the foreign sources of the respective institutes[66].

Within comparative law, it is necessary to pay attention to the possibility – and, more than that, to the need – of its application under procedural law. As it will try to demonstrate throughout this text, comparative procedural law has peculiarities in relation to comparative law. Firstly, because procedural rules generally follow national or local rules (*lex fori*)[67], while in the branches of substantive law, it is admitted, within the rules of law or regulating the applicable law, the use of rules of the foreign law, as can be seen in the Law of Introduction to the Norms of Brazilian Law. However, despite some peculiarities and difficulties, there is no reason to step aside or diminish the importance of Comparative Law in the sphere of Procedural Law, considering that also here the exchange of ideas and experiences has become increasingly more frequent and important in the sphere of instruments relevant to solutions of conflicts.

At the turn of this century, José Carlos Barbosa Moreira gave a lecture entitled "*The Brazilian civil process between two worlds*", an opportunity in which he addressed the influences exerted by the legal system of *common law* on civil

[64]Mendes (2019) at 30.
[65]Gottwald (2005).
[66]*Idem*.
[67]Mendes (2009).

procedural law Brazilian. The exhibition – whose content was published by the Journal of the School of the Judiciary of the State of Rio de Janeiro[68] and later selected to integrate the Eighth Series of "*Temas de Direito Processual*"[69] - addresses the dissimilarities between the Brazilian civil procedure and the American, but it does not fail to observe that "the weight of the Anglo-Saxon universe has increased in Brazilian law"[70]. It could be complementary that *common law* has also been changing by influence and in the direction of characteristics traditionally linked to the countries of civil law. In this sense, it is worth mentioning the edition of legal statutes, increasingly present in common law countries, such as the *Civil Procedure Rules of English law*, and even today's practice of replacing oral statements and procedural acts by written statements. This is an illustrative effort of the reflections provided by the Comparative Procedural Law.

In fact, the intense exchange of information that the doctrine of civil procedural law has been providing to scholars today is a factor of much appreciation of legal comparisons in this area[71].

These factors indicate that the importance of comparative analysis does not go unnoticed by procedural law, whose main tendency is characterised by the enormous interest of its scholars in knowing what is happening in other countries and other regions of the emerging needs of intensified international relations and the increasing appreciation of the principles of Procedural Law.

Comparative Law has a huge significance in terms of oxygenation of ideas and can be mentioned even that it represents an exciting intellectual activity, capable of transporting its precursors and directors to distant realities and initially unimaginable. It can thus mean a theoretical and practical investigation capable of moving amorphous realities and awakening great dreams and fantasies, in the best sense, as drivers of great transformations. However, in order for comparative law to be carried out at satisfaction, it is mandatory, with its discipline, because good comparison demands appropriate methodologies, uniform questions, the study of norms, structures, culture, practical results and not just loose and disconnected elements.

Functions and Objectives

It is possible to identify some specific functions and objectives performed in the Comparative Procedural Law.

[68]Barbosa Moreira (2001).
[69]Barbosa Moreira (2004).
[70]Barbosa Moreira (2004) at 54.
[71]In the words of José Carlos Barbosa Moreira: "No one is lawful to doubt, in the days that run, the importance of comparative studies, indispensable, among other purposes, so that legal systems can benefit reciprocally from experiences carried out outside national borders" (Barbosa Moreira (2004) at 7).

Deepening Knowledge of Own National Law

In order to better understand its own national law, comparison with other systems is essential.

First, when research and comparison are developed in the sphere of procedural systems, it is frequent that common and specific precepts have been found in their national systems. As a consequence, it can be identified whether the norms considered as principles or structuring in certain countries have a universal character, whether or not the certainty about the general or peculiar character of their precepts is strengthened. The question has, of course, great theoretical importance, especially for the classification, conceptualisation, and determination of the content of principles and rules, with practical developments. The General Theory of the Process, in particular, and the various branches of Procedural Law need to deepen this debate so that the study of procedural principles can be strengthened in its pillars.

The differences are reasonable between national structures. For example, the principle of due process of law has had a broad meaning in common law countries, while the values added in this principle end up fractionating in other principles, or subprinciples, such as that of the natural judge or impartiality, in countries of civil law. In Germany, the notion of reasonable duration of the case is also found in the principle of access to justice, which has been extended under a specific constitutional guarantee in Brazilian procedural law, in accordance with art. 5th, item LXXVIII, of the Constitution of the Republic.

On the other hand, institutes with completely different characteristics and functioning can be found, indicating, clearly, what is peculiar. As a result, it is possible to identify the common and peculiar aspects between the systems, which is elementary for the knowledge of the national legal system itself, based on rational bases.

The comparative studies help to expand the knowledge of national legal institutes, as they allow the analysis of their historical equivalents in foreign law. Thus, it is possible to deepen the understanding of the national law itself in order to reflect, defend or improve the national position or the reasons for that position. This is what Michele Taruffo says: "the best way to know the planning itself is to know other systems"[72].

Contribution to the Interpretation of the Law

As mentioned earlier, national legal systems have common and peculiar characteristics with other systems. Sometimes the separation itself from what is identical, similar or diverse, is not so simple, considering that miscegenation and combination of cultures and legal institutes end up providing a great profusion of combinations. However, when there is the incorporation of new alien institutes into national law, the modifications tend to raise doubts of interpretation about previously unknown practices of local law. Therefore, comparative law can be

[72]Taruffo (2013) at 12.

very important for the location of the origin of innovation as well as the knowledge and study of the institute in the country, or countries, in which there was already the legal provision or use of the respective legal entity.

Comparative Law can thus represent an economic measure, as it will allow the use of the accumulation of knowledge already exhausted in the countries that originated from the new incorporated institute. In this respect, national characteristics and peculiarities should not be disregarded. However, in what is common or applicable, foreign experience, from the rules, doctrinal writings and interpretation of the courts, it may be useful the expertise of other countries to dispel doubts arising from the lack of practice related to the innovation introduced.

Thus, national courts may use foreign precedents, alien doctrine or even existing rules in other countries in the interpretative activity of legal institutes that have been extracted from those external systems.

Comparative Studies as a Basis for the Improvement of National Law

Comparative Law is of great importance so that it can evaluate and improve national law. The lack of efficiency or the need for better results can lead to the search for new solutions and legal instruments, which can be analysed from the experience of other countries. The comparative studies are a valuable and increasingly frequent practice for the improvement of national law. The method comprises not only the formal law, that is, provided for in the codes, statutes, and rules in general, but also their practical use, with the collection of data, reports, and elements that enable an assessment of problems and results, in order to recommend or not the foreign experience.

The incorporation of institutes in other countries may represent a more radical attempt at a rupture with worn practices or even intermediate solutions. They may or may not lead to solutions to problems, but in any case, represent a window or the opening of new perspectives, which could only be viewed from comparative law. The introduction should not be mechanical, but rather accompanied by reflections on compatibility and need for adjustments, in order to allow a more useful and efficient use for the foreign institute introduced into national law.

Often, the reason for comparative research is not merely academic. Legislators realise that their country's legal rules, in certain fields, are insufficient and research solutions from other legal systems adaptable to their social, cultural and legal reality around the world. In this sense, the comparative study can serve as material for the legislator to develop proposals for reform and improvement of the legal system itself.

In fact, many coding and contemporary statutes are a combination of different legal systems, even if the legislator has not revealed how and where he found his ideas. The Brazilian Code of Civil Procedure of 1973, for example, received Italian, Portuguese and German contributions[73]. Similarly, the Brazilian Civil Code of 1916 was intensely influenced by the Napoleonic Code (Code Civil des Français) of 1804[74].

[73]Barbosa Moreira (2001) at 13.
[74]Souza (2004).

In addition to a source of inspiration for legal statutes development, Comparative Law also motivates the construction of new legal institutes. In Brazil, an example of this is the introduction of art. 103-A in the Constitution of the Federative Republic of Brazil, which created the summary statements with binding effect, thus evidencing the source of inspiration in the mechanism of American binding precedents, but with some changes. Most recent example of this phenomenon is the repetitive demands resolution incident (IRDR), an institute created by the Code of Civil Procedure 2015 and which has as sources of inspiration several experiences of foreign law: the American and Britain test claims; the two Musterverfahren systems in Germany; the Group Litigation Order (GLO) of England and Wales; and even in international courts, such as the Pilot-judgment procedure of the European Court of Human Rights[75], not to mention also the European and Brazilian incidental system of constitutionality control, as well as repetitive appeals introduced in 2006 and 2008 in the former Brazilian Civil Procedural Code.

Comparative Law and the Unification, Standardisation or Harmonisation of Rules

The phenomenon of internationalisation and globalisation has been demanding an increase in legal certainty for the countries, people and companies involved. The frequent problem stems from the diverse regulations found in each country, either in the context of material or procedural law. Several solutions have been used for the elimination or mitigation of difficulties arising from varied regulations, including the unification or harmonisation of rules. Unification as well as harmonisation may come from the establishment of commonwealths, such as the European Union or Mercosur, but also multilateral or bilateral treaties between countries. Examples are rich, especially in the European Union, where unification or harmonisation reaches rules, in the material, and procedural law, in terms of consumer, environment, etc.

The comparative study serves as a means of transnational unification or harmonisation of law. In this respect, Peter Gottwald[76] identifies three forms of action of Comparative Procedural Law: (i) driving force for integration; (ii) instrument for drafting international conventions and regulations; and (iii) model code-making instrument.

Treating Comparative Procedural Law as a driving force for integration, Peter Gottwald says that European experience demonstrates that the first steps towards procedural unification have consequently led to the need for unification or harmonisation of the substantive law[77]. Thus, in Germany, the Code of Civil Procedure was enacted in 1877, approximately 25 years earlier than the Civil Code. Similarly, the 1968 Brussels Convention far preceded any harmonisation of civil law.

In addition, Comparative Procedural Law also plays an important role in the process of drawing up international regulations. This is the case with European

[75]Mendes (2017) at 27.
[76]Gottwald (2005).
[77]Gottwald (2005).

Regulations on civil procedure, which are generally based on comparative studies on the legal situation in their respective countries with the aim of crystallizing the need for new regulations or the necessary points of harmonisation or unification. In this context, in its 2017 recommendation, the European Parliament urged the European Commission to "present a legislative proposal establishing a harmonised system of collective protection of EU consumers on the basis of best practices adopted both within the EU"[78], which culminated in the presentation of the Proposal for a Directive of the European Parliament and the Council on collective actions to protect the collective interests of consumers.

Another technique, which can contribute to the standardisation or harmonisation between procedural rules in several countries, is the development of Model or Type Codes. As an example of this phenomenon, it is possible to mention the Model Code of Ibero-American Civil Procedure, approved in the Congress of the Ibero-American Institute of Procedural Law, held in 1988, in Rio de Janeiro, Brazil, and the Model Code of Collective Processes of the Ibero-America, approved in the Congress of the Ibero-American Institute of Procedural Law, held in 2004 in Caracas, Venezuela79.

Macrocomparison and Microcomparison

The comparing approach varies according to the amplitude of its object and can be performed at a macro or micro perspective.

Traditionally, there are two legal families: a family considered common law, which is based on the custom, and a family of Civil Law, in which there is the primacy of the statutory law. Despite the tendency to approach the two legal families[80], a fact is that the characteristics of a legal system belonging to one of these families tend to be historically and traditionally distinct from those of the systems of another legal tradition. Comparing, therefore, the system of precedents of English law and Brazilian law is a task that requires the scholar more than a mere juxtaposition of rules, being certain that the analysis presupposes a profound study of the legal culture of each country. This is exactly the concern of macrocomparison, which the object has is the study of the differences between the various legal systems, according to their more general classifications. It is, therefore, a broad comparing analysis of procedural systems or procedural codes.

Microcomparison, on the other hand, studies better-defined aspects, such as a specific problem, a legal institute or any other element or aspect that can be analysed in isolation. Thus, while the Brazilian and American procedural systems could be the subject of macrocomparison, because it involves not only an institute but a complex of procedural standards, the study of the class actions in both countries could be the subject of a micro comparison, given that its historical roots find corresponding institutes in foreign law.

[78]Excerpt from the Explanatory Memorandum of the Proposal for a Directive.
[79]Mendes (2010).
[80]This separation, which might have been clearer in the past, is no longer as remarkable now.

Both macro and micro comparisons have their value, although the second is more viable to perform in a relatively short period of time because the first requires a broad and deep knowledge about the systems compared.

Foreign Law and Comparative Law: Difficulties and Challenges

When mentioning the branch of comparative law, not only is it intended for a mere incursion of foreign law from another country, but rather the comparison between two or more legal systems or institutes. Therefore, there is no need to confuse, first, a study of foreign law with the comparative law.

Facing the myth that *"the neighbour's chicken is always fatter than mine"*, Barbosa Moreira drew attention to the risks associated with the overvaluation of foreign models, specifically warning about the "naïve dazzle that impels the uncritical imitation of foreign models."[81] Taking this alert into account, it is necessary to examine some problems related to comparative studies.

General Problems of Comparative Law

It must be careful with the survey and study not only formal of the law, but also from the perspective of reality, using the adequate methodology and original sources.

In Comparative Law, it must be understood that one should not only compare texts of statutes but also praxis, and legal cultures. The problem concerns the need to perform also functional analysis. This means that the study should not be restricted to the dogmatic or literal study of rules. It consists of the comparison of living law. To understand the rules and assess their relevance or suitability to solve specific problems, sometimes sociological studies and practical information are necessary.

As mentioned, one should seek the original sources, direct, and not those of second or third hand, except when these are, in fact, connoisseurs of foreign law. This is because translations and comments can always add some of the subjective understanding, constituted from their own reality. Of course, in some situations, the full and deep concomitant knowledge of two or more legal systems can even facilitate exposure, highlighting the similarities and distinctions, in a didactic and enlightening way. However, if accomplished by those who do not know, broadly and deeply, the alien legal system, there will be no lack of mischaracterizing simplifications of the context and meaning of foreign institutions.

The linguistic aspect should not be disregarded. In legal studies, it is not mandatory, although it is recommended, historical or comparative analysis. Better, perhaps, not to perform it, if the researcher lacks past or linguistic knowledge. And all the care of the language should be used. It means to say that both the translator and the comparatist need to stay attentive and avoid errors arising from the so-

[81]Barbosa Moreira (2004) at 7.

called false cognates – words from two languages formally equal to each other or very similar, but with different meanings in one and the other.

The fourth general problem of comparative law is the research and preparation of the necessary information. The comparative right consists of a comparison between at least two legal orders according to a specific model. This comparison requires correct preparation and searching of information in the material to be compared, based on uniform, coherent and logically chained questions. Therefore, standardised questions should be formulated for all countries surveyed. One cannot question, for example, one aspect of one country and another of the others. That way, you won't be comparing the same aspects and therefore you probably won't get a profitable result.

Specific Problems of Comparative Procedural Law

In addition to the general problems of Comparative Law, there are also specific problems of Comparative Procedural Law.

The *first problem* concerns the principle of *lex fori*. To solve a transnational case of substantive law, connection rules must be applied, when the rules of the international law point to foreign material law. In civil proceedings, national procedural rules are generally applicable. As a consequence, there is generally no need to consider and examine foreign procedural statutes in a forensic day-to-day basis. Therefore, law professionals do not work directly with foreign procedural rules in common practice, except in matters of jurisdiction, recognition, and enforcement of foreign judgments. Therefore, comparative procedural law would become, in a thesis, predominant object only of the academy. However, this reality, or apparent cause of disinterest in relation to Comparative Procedural Law, has been giving in to the phenomenon of globalisation, with the internationalisation of companies and joint ventures, with the hiring of offices or consultancies which end up carrying out not only an analysis of material law, but also of the Procedural Law of the related countries, with the aim of studying and verifying which would be the best country to host any controversies, from the point of view of the functioning of the judiciary and the procedural system. Therefore, the economic world and legal services end up conducting, increasingly, procedural comparative studies. This phenomenon has been further increased with the so-called jurimetrics, that is, through data analysis, usually with the help of powerful technological means, to predict favourable results in each court, being also subject to study to a comparison between countries.

In the financial area, another relatively recent innovation, at least in Brazil, are third party funds, that is, funds that invest in judicial causes. Like other investment funds, there are those who have a global character, that is, the channel resources into the acquisition of rights that are being the subject of disputes in cases filed in different countries. Thus, comparative procedural studies are carried out in parallel to economic surveys, thus forming the collection of elements constituting risks and options for the purchase and sale of "procedural" cases assets.

Finally, still related to contemporary legal practices, there is an increase in services focused on consensual solutions or the constitution of international arbitral tribunals, which take into account comparative procedural studies, side of the substantive rights.

The second problem related to the Comparative Procedural Law is that of the lack of uniformity in the jurisprudence of the courts, sometimes organised in specific branches or according to local standards. As already mentioned, comparative studies should not be subject only to the text of the legal standard and should investigate how that standard has been applied by the courts. Although necessary, the task becomes more challenging when practice in the courts is usually guided by regimental or local standards. Thus, the analysis of the comparatist becomes more difficult and complex, being more costly and should be even more accurate, to achieve conclusions from a very diverse reality. There are not a few countries that have these characteristics. For example, the United States has, alongside its Federal Courts, 50 States with their own structures and rules. In Germany, the Common Justice is composed of state judicial bodies, with only specialised bodies or higher courts in the federal sphere.

Finally, there is the "*political*" problem of the integration of the judiciary as part of the State and the diversity of conceptions about fundamental rights, justice itself and what constitutes due process. Therefore, the content of the minimum and fundamental guarantees relevant to the jurisdiction is also not a unanimous response.

Final Considerations

Comparative studies, besides being useful to the institutional improvement of a country's, regional or international law, reveal themselves, in the context of globalised contemporary society, a real need. The dissolution of national borders, promoted by technological advancement, has achieved the legal scope, causing the old national doctrinal debates to turn into cross-border dialogues. In this scenario, the use of comparing analysis under Procedural Law is a task that cannot be ignored by scholars and law enforcement operators.

To the guise of completion, Peter Gottwald's lesson is transcribed:

> *Comparative jurisprudence and civil procedure, in particular, is working like a wonderful mirror: It opens your mind. The comparison increases your knowledge and wisdom. And if you are lucky, it may help not just to improve your own national law but to find solutions for practical legal problems of transnational relations in our world of globalisation*.[82]

[82]Gottwald (2005) at 35.

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The "Non-favourite": Neo-tribal Sexualities on Celluloid

By Anna Chronopoulou[*]

Much academic ink has been spilt over the way in which female subjectivities and sexualities are constructed in the public domain. Issues of female sexuality form a huge part of queer studies and feminist accounts. Surprisingly enough, the construction of female sexualities and more specifically bisexuality has never been worth mentioning in the accounts of subcultures. The transition from subcultures to neo-tribes and neo-tribal sociality has paid scant attention to the construction of female sexualities. Even more importantly, most academic accounts deal with the construction of female sexuality as usually being strictly kept within the limitations of the familiar, familial and predominantly straight sexuality. This article examines the ways in which female subjectivities and sexualities are constructed on celluloid canvas through an examination of a recent movie called "Disobedience" by the Chilean director Sebastian Lelio as forming an integral part of neo-tribes. It takes a different view on the construction of female sexualities as it locates this construction within the transition from subcultures to neo-tribes. This paper puts forward the suggestion that female sexuality apart from being a product of a number of different socio-cultural relationships, norms and laws, it mainly exposes the dynamics of not just subcultures but also neo-tribes at play. The first part of the article places the formation of female sexuality within the transition from subcultures to neo-tribes. The second part of the paper discusses the way in which class informs female sexuality within the context of neo-tribes. The final part of the article places the discussion on the construction of female sexualities within the overall context of juxtaposing neo-tribal lifestyle choices.

Keywords: *Ethics of aesthetics; Neo-tribal sociality; Female sexualities; Subcultural Deviance.*

1. Introduction

This article examines how female subjectivities and sexualities are constructed on the celluloid canvas. It argues that the construction of women's sexualities forms an integral part of the rhetoric associated with neo-tribes. This will be seen through an examination of a recent movie called "Disobedience" by the Chilean director Sebastian Lelio. *Disobedience* narrates a story between two women falling in love with each other. The movie begins with the sudden homecoming of the successful New York City photographer Ronit to the Orthodox Jewish community in North London, more specifically, Hendon, where

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she had ran away from as a teenager, due to devastating news of her father's and the community's most beloved rabbi's death. Upon her return, Ronit discovers that her classmate, Esti, with whom she had a same-sex relationship is now married to her best friend and her father's protégé, Dovid. While old passions between Ronit and Esti rekindle, religious authority is being tested to its limits and the question of whether the support of a close-knit, insular community is worth more than the freedom of choice in love urgently resurfaces.

This article takes a different view on the construction of female sexualities as it locates this within the transition from subcultures to neo-tribes. It puts forward the suggestion that female sexuality apart from being a product of a number of different socio-cultural relationships, religious norms and laws, it mainly exposes the dynamics of neo-tribes at play. The first part of the article challenges the formation of female sexuality as part of the overall context that informs subcultures, deviance. It argues that the formation of female sexuality in Disobedience has been constructed as a form of escapism resembling more the neo-tribal rhetoric of the Mafessolian notion of neo-tribal sociality rather than being trapped within the rhetoric of deviance. The first part of the article also argues that it is the act of escapism and neo-tribal affiliations as to the construction of female sexuality that is perceived as an act of resistance. The second part of the paper discusses the way in which class informs the construction of female sexuality within neo-tribes. It puts forward the suggestion that the way in which female sexuality is constructed in the movie Disobedience constitutes a reconfirmation of the Mafessolian notion of neo-tribal sociality exposing the logic of identifications. More importantly, it exposes and challenges invisibilities by arguing that the formation of women's bisexuality could potentially be theorised as a product of neo-tribal affiliations to the middle class. The final part of the article places the discussion on the construction of female sexualities within the overall context of juxtaposing neo-tribal lifestyle choices. It also argues that the construction of bisexuality adheres to a certain "ethics of aesthetics" that comes across in Lelio's movie, which in turn alludes to a process of survival and sovereignty rather than resistance. The last point conceptualises the Maffesolian notion of puissance as an important component of the realisation of neo-tribal sociality and as such it relates to Lelio's take in Disobedience on neo-tribal sexualities.

From Subcultural Deviance to Neo-tribal Escapes of Bisexuality

Subcultures are commonly defined as distinct groups or communities of people who share common religious and other general beliefs, interests and characteristics, exhibiting similar patterns of behaviour that distinguish them from other groups and from the broader culture.

The prefix sub denotes a smaller culture confined within or outside the fringes of the greater culture. The main theme running throughout Lelio's movie is the Orthodox Jewish community and therefore subculture in relation to the greater and dominant culture and the relationship of the two female protagonists to it. In a

reversal of roles, the religious subculture, namely, the Orthodox Jewish community, in Hendon represents the dominant culture in relation to the way the two female protagonists identify with it or disassociate from it. rom this perspective, this section of the article exposes a close relationship between distinctions and identifications. More specifically, it situates these distinctions within subcultural theories and identifications with alternative lifestyles within the Maffesolian theory of neo-tribal sociality. In this sense the protagonists' sexual identity becomes an issue of transition from subcultures to neo-tribes.

Interpretations of subcultures seem trapped in biases describing debased, deviant and disenfranchised attitudes disassociated from female sexuality and the construction of femininities overall. Subcultural theorists have interpreted subcultures as comprising disenfranchised, deviant and debased people by comparison to the greater, dominant culture. This evokes a mode of operation; a certain lifestyle based on unofficial, often shadowy and subterranean, even chthonian values that directly oppose the official values and norms of the greater culture.

Ironically enough, however, the role of the two protagonists in the movie shares close affinities to the definition of subcultural theorists on the deviation from the norm and the dominant culture, in this case the Orthodox Jewish community. Ronit, one of the main female leads in the movie is ostracised due to her lifestyle choices that constitute deviation from the norm, the lifestyle and patterns of behaviour shared by the Orthodox Jewish community. The promiscuity of Ronit's sexual choices deeply situate the construction of her sexual identity within the theoretical framework of subcultures. With few exceptions, academic work on subcultures has predominantly ignored the construction of gender and sexuality in subcultures. Ronit's sexual identity and more specifically bisexuality, seems to be deeply embedded within resistance processes that are inextricably linked to theorisations of subcultural identity. Subcultural identities are formed on resistance to conformist values as expressed through the pressures and authoritative strategies demonstrated by the parent culture. For instance, Hall suggests that the term resistance in *Resistance through Rituals*[1] signalled non-conformity with practices of the dominant or parent culture. Moreover, Widdicombe and Woofitt remark that subcultures offer an identity different from the one ascribed to them by their parent culture[2]. Thornton also observes that the majority of the studies of subcultures treat their members as disenfranchised and deviant as challenging the norm and as evoking subterranean values, which exist underneath the surface of official values. 'Underpinning the ethos of the cultures of production'[3] also signals non-conformity. In fact, alluding to the accounts on bisexuality, Ronit's sexuality challenges heteronormativity that constitutes the modus operandi of the Orthodox Jewish community of which she is also a member. Both protagonists' bisexuality challenges the heteronormativity of the religious subculture which is portrayed as the parent and dominant culture. Reminiscent of portrayals of contemporary culture painting bisexuality as

[1]Hall & Jefferon (1990).
[2]Widdicombe & Wooffitt (1995).
[3]Thornton (1995).

promiscuous, greedy, indecisive, duplicitous, confused, fickle and attention-seeking, the two protagonists, Ronit and Esti become the target of a politics of delegitimisation. Their bisexuality is fundamentally unsettling to the hegemonic institution of heterosexuality and its family-oriented identity featuring as an integral component of the religious community of which they are part of. Yet again, their sexuality remains invisible. The only moments that it becomes visible is during the dialogues between the main characters. Bisexuality, following similar patterns of theorisation in queer as well as feminist studies, remains hidden and tucked away from public view. Bisexuality is silenced by the parent and dominant culture in the movie and instead is replaced by a presumed homosexual identity by the dominant culture, the Orthodox Jewish community. Nevertheless, bisexuality is constructed as a means of escape from the normative processes of the dominant world that surrounds both protagonists in Disobedience. From this perspective, sexuality is constructed not just by challenging the norm of the parent culture substantiating in this sense subcultural theoretical frameworks but also by demonstrating affiliations and identifications to other groups, in this instance, the bisexual culture. It is in this sense that the formation of sexuality can be traced into the transition from subcultural theorisation to a conceptualisation of neo-tribal sociality as evident through participation in other groups.

The stylistic requirements of subcultures signify membership and subcultural theorists regard style as an important element of the construction of group identity and of the homogeneity of the group. Although within the context of religious communities, stylistic traits signify membership and conformity to certain patterns of behaviour, the fixation with style in the theorisation of youth culture constitutes another form of disassociation from the dominant culture, simply another form of deviance. Youth culture accounts perceive eccentric clothing, hair-cuts and other traits of neo-tribalism as signifiers of membership and affiliation. The eccentricity required by neo-tribal affiliation directly challenges the normative aesthetic requirements of the dominant culture and in this instance for the purposes of Lelio's movie, religious community. It is constantly viewed and perceived in the film as deviation from the norm, as dissonance within the dominant culture, but most importantly as transgression. To the protagonists however, this is seen as not necessarily an act of resistance as it is seemingly the case in the accounts of subcultures but as a means of escape, even as a means of formation of sexuality and therefore sexual identity. It is in this sense that sexual identity is formed through the affiliation of temporary groupings and the sharing of similar traits. References to aesthetics and the protagonist's stylistic choice are replete throughout Lelio's movie. Ronit is constantly being subjected to criticism on her stylistic choices as means of not fitting in with the aesthetics required by the Orthodox Jewish community. In framing the argument within Bourdieu's concept of socio- cultural capital[4], "neo-tribal capital", as expressed through the stylistic requirements of the affiliation to neo-tribes, constitutes a challenge to the socio-cultural capital acquired by the dominant culture.

[4]Bourdieu (1984).

Similarly, the notion of "neo-tribal capital", as expressed through knowledge from participation in neo-tribes, constitutes a form of escapism from socio-cultural capital attributed to what has been termed traditional classical knowledge mandate in the religious community. If the notion of socio-cultural capital relies upon its use and ultimately the valorisation of knowledge as it is acquired through training and education, it seems that "neo-tribal capital" challenges the dominant culture's socio-cultural capital. Instead of reinforcing the limits of neo-tribal sociality, it realises its potential as to the formation of sexual identity throughout Lelio's movie. It is the very acquisition of the protagonists' "neo-tribal capital" that constitutes a form of escape as an act of resistance to the conservatism around them rather than deviance as it is perceived. Despite the Maffesolian notion of neo-tribal sociality seemingly discouraging individualisation, it seems that throughout Lelio's movie, matters of individualisation also reveal the uneasy juxtaposition of neo-tribal identities and parent culture. What becomes abundantly clear in Disobedience is the presence of forced disindividualisation as opposed to processes of individualisation through adopting a neo-tribal lifestyle. This is reminiscent of Muggleton's[5] argument breaking away from the subculturalist theorisation and approach by suggesting that neo-tribal associations reflect individuality and expose individual meanings. This exposes the significance of neo-tribal sociality to the construction of distinctive individual identity and challenges Maffesoli's notion of sociality on the issue of disindividualisation, echoing Miles's belief that standing out is as important to the construction of youth identity as is fitting in. Along similar lines, Bauman argues that there are complex interactions between sociality and individualism, since in seeking tribal membership, the individual is simultaneously reminded of the individual aloneness[6]. Bauman argues that 'the variegated, chequered and fluctuating tribal scene is engaged with the privatised individual in a subtle dialectical game of dependence and freedom'[7]. In the context of Lelio's movie, these complex interactions, Bauman refers to materialise as part of sexual identity issues.

Both protagonists experience aloneness and isolation due to their sexuality, which, in turn, becomes dialectic of interdependence and escapism between them for freedom to be achieved. For Esti, however, it seems that matters are way more complicated in comparison to Ronit's situation. Esti is part of the Orthodox Jewish community, she fits in, in the sense that she follows the customs, rituals, dress codes, ceremonies and the overall habitus that characterises the community. In addition, she is also married to a man. It is her sexuality that shares affinities with neo-tribal lifestyles and makes her stand out. It is in this sense that neo-tribal sociality apart from emphatically portraying disindividualisation, the loss of self in a group, in other words, also signals individualisation. This again breaks away from the subculturalist theorisations and fixed identities and exposes the potential of neo-tribal sociality in informing sexual identities. The process of dis-individualisation, in Esti's situation, can be rationalised as a process of invisibility of her sexual identity. It is forced disindividualisation and not voluntary as in the

[5]Muggleton (2000).
[6]Bauman (1992).
[7]Bauman (1992).

case of neo-tribal sociality. What becomes invisible is her bisexuality through marriage. In the process of neo-tribal sociality her bisexuality is realised and actually formed. This argument now turns into an examination of issues of class in relation to construction of sexual identities through neo-tribal sociality in the movie.

Neo-tribal Affiliations of Class as a Component of Formation of Female Bisexuality

Subcultural studies are mainly concerned with the working class and working class resistance as it is expressed through youth subcultural affiliations. Subcultural theory also refers to the subcultural practices of the middle class. Despite claims by some theorists that subcultures can only be produced by the working and not by the middle class, a number of theorists have examined middle-class subcultural practices. Brake suggests that middle class subcultures are diffuse, self-conscious and more international. He also suggests that they are more focused on individualism and self-growth and retain a distinct relationship with middle-class values. Muggleton [8]suggests that subcultures expose individualism based on an ethic of the middle classes. Like Brake[9], Muggleton argues that membership and composition of subcultures are not clear-cut issues[10]. Subcultures also comprise middle-class members even though subcultural theorists focus on working-class membership.

Middle-class subcultural practices of resistance were displayed in the adaptation of alternative lifestyles, exposing political and bohemian rebellion and often challenging traditional modes and concepts of education and morality. Subcultural theorists situated youth subcultural membership as a reflection of class position and parent culture. The interpretation of style was also formulated within the context of class. Apart from being perceived as a means of resistance, styles were interpreted as a response to class location. They were an embodiment of similar characteristics to their class identity and parent culture and conceived as reproductions of the social reality of class corresponding to the composition of subcultures. Hebdige's account exemplifies this. He borrowed the term bricolage to describe the ways in which subcultures express their resistance to authority using stylistic practices, and their expression of class identity[11]. These practices were mainly perceived as markers or representations of the subcultural group identity.

Forms of middle class consumer-based lifestyles on the other hand, were portraying cultural practices suggestive of indiscipline and thus contrary to the normalisation practices of religion-based subcultures/communities, rather constituting an offence to public morals mainly due to their association with recreational use. References to issues of alternative lifestyle choices are replete

[8]Muggleton (2000).
[9]Brake (1985).
[10]Muggleton (2000).
[11]Hebdige (1979); Hebdige (1996).

throughout Lelio's movie, and they are deeply embedded in a highly critical rhetoric by the equally middle class dominant/subculture/religious community. Similarly, these consumer-based lifestyles are viewed as closely associated with primal states as overthrowing the divine status of the dominant religious subculture by reducing it into a primal state. Participation in these kinds of practices is emphatically perceived as at best unacceptable and at worst, scandalous. Ronit's world is considered a world away from, and in most circumstances completely contradictory to, the values of the Orthodox Jewish community. Nevertheless, Ronit's world challenges but also shares certain affinities with the Maffesolian theory of neo-tribal sociality. The construction of her middle class Orthodox Jewish identity requires conformity to certain values, which directly oppose the formation of her equally middle class sexuality through participation in consumer-based alternative lifestyles. Thus, it follows that neo-tribal sociality is hindered. More specifically, participation in consumer-based alternative lifestyles constitutes a direct challenge to elements of religious identity, which Maffesoli ignores, simply because he disregards the notion of identity. However, the discussion above also challenges the notion of identification, which revolves around the presumption that a person is capable of wearing many masks and moving freely between tribes. It demonstrates that, with the random changing and discarding of masks, Ronit's identification to alternative lifestyles seems a rather difficult, if not impossible task. Nevertheless, Ronit's participation in consumer-based alternative lifestyles reinforces elements of the construction of her sexual as well as class identity. Along similar lines with the theorisation of youth studies accounts on consumer-based lifestyles, Ronit's alternative lifestyle exposes another state of disappearance that of breaking away from the expected affiliation to a religious identity. From this perspective, her middle class sexuality is based upon participation in consumer based alternative lifestyle signalling the disappearance of religious identity.

Neo-tribal accounts theorise the construction of dis- individualisation within forms of escape from everyday routine. Gilbert[12] argues that forms of alternative lifestyles constitute a form of disappearance into a communal ethos resisting modernity and individuality. Rietveld[13] also claims that alternative lifestyles induce states of disappearance from the everyday material realities. In a similar vein, Hemment[14] suggests that neo-tribal and nomadic cultural practices constitute forms of disappearance of the rational subject into the collective. In Maffesolian terms, this amounts to disindividualisation by liberating professionals from the forced individuality offered in the working environment but also a means of escape. In Lelio's movie, Esti is an educator in an Orthodox Jewish school.

When members of the community inform the school's Head teacher that Esti and Ronit were seen to be kissing in the park, she is clearly in an awkward position. Ronit picks up Esti from work and takes her for a day out in Central London as a means of escape from the everyday realities and rational, nevertheless, forced identity reproduced and imposed in the workplace. Neo-tribal

[12]Gilbert & Kahl (1993).
[13]Rietveld (1993).
[14]Hemment (1997).

accounts liberate women from the pressures of rationality entailed in the working environment. Rief argues that neo-tribal cultural practices could be seen as a celebration of femininity[15]. Although this seemingly challenges the Maffesolian aspects of neo-tribal sociality in terms of gender, in accordance with the Maffesolian aspects of realising the potential of individualism, neo-tribal conceptualisations of cultural practices were suggestive of attributing another dimension to new middle class femininity.

As a reaction to traditional feminist theories, "neo-tribal" feminists were suggesting that participation in alternative cultural practices of lifestyles created new femininities and subjectivities through a means of deconstructing forced individualised identities, which work environments imposed. Furthermore, neo-tribal accounts share a set of common characteristics that challenge neo-liberal individualism in favour of values associated with sociality and hedonism. In Lelio's Disobedience Ronit, symbolically takes Esti away from the traditional environment imposed on her through her membership to the Orthodox Jewish community. In this sense, the making of new femininities occurs through processes of de-traditionalisation that justifies Maffesoli's temporary neo-tribal sociality, irrespectively of the absence of a gender or class based neo-tribal theorisation in his writings. These characteristics have been identified by a range of theorists as having the potential to create new forms of identities. For example, in relation to gender and class, McRobbie[16] , drawing on Butler[17] , argues that the intense sociality that characterises the gay culture creates sites of resistance to the individualism of neo-liberal subjectivity since they allow participants 'to display and even celebrate their radical dependency on others'[18]. Although McRobbie's argument focuses on the manifestation of gay identity through practices of neo-tribal sociality, a similar claim can be made of the bisexual culture for the purposes of Lelio's movie, Disobedience. What is abundantly clear throughout the movie is that the protagonists have each other. They are socialised in each other's lifestyle by choice, which creates pockets and sites of resistance through the expression of their sexuality but also ultimately informs issues of creating new forms of femininities through the interplay of class as it is depicted through participation in cultural practices associated with middle class lifestyles.

One of the dominant issues in neo-tribal accounts is the logic of identifications. This is also viewed as another form of disappearance. It stresses the emergence of identifications within the collective. This shares affinities with the Maffesolian notion of neo-tribal sociality, which proposes the replacement of the logic of identity with the logic of identifications. Neo-tribal accounts were quick to notice the replacement of identities through the emergence of identifications. Malbon[19] argues that certain neo-tribal practices establish identifications rather than revealing distinctions or individualities. These identifications would emerge through the emotional experience of cultural practices creating dis-

[15]Rief (2009).
[16]McRobbie (2001).
[17]Butler (2011).
[18]McRobbie (2001).
[19]Malbon (1999).

individualisation reaffirming in this sense the Maffesolian notion of neo-tribal sociality. However, there have been studies that have used the notion of neo-tribal sociality as revealing notions of individualism and identity formation. These accounts place specific emphasis on a different interpretation of issues of neo-tribal sociality. For example, Bauman suggests that neo-tribal sociality expresses individualism because it rests upon choices made by the individual[20]. In Lelio's Disobedience, the choices made by the protagonists are conscious choices informing their identity through processes of dis-individualisation that are not necessarily forced. For example, bisexuality is a conscious choice informing processes of dis-individualisation and the loss of self in the Orthodox Jewish community. When forced dis-individualisation happens the protagonists rebel, resist and react in their own individual way which again accords to individualised processes of neo-tribalism alluding to the fact that sexualities can be theorised within the context of neo-tribalism. For example, while stressing the liberating qualities embedded in the notion of neo-tribal sociality, Bauman[21] also emphasises the possibility for emerging individualities and identities in these contexts. This signals a form of expression of differences, instead of a mere erosion of differences and distinctions. This is also reminiscent of a Bourdieusian approach on the creation of an individual habitus[22].

Nevertheless, neo-tribal sociality possesses the potential of a less static approach because it entails both aspects of individualisation and dis-individualisation. In alluding with Bauman's point on the potential of neo-tribalism, Lelio's protagonists in Disobedience exemplify these attributes of simultaneous and voluntary individualisation and dis-individualisation which encompasses the logic of identifications. For example, the constant portrayal and demonstration of sexuality and more specifically, bisexuality in the movie, amounts to issues of individualisation for the protagonists. However, it is through the processes of identifications even identifying with each other that bisexuality materialises in the movie. This is usually depicted in the movie through the loss of self in each other amounting in this sense to processes of dis-individualisation.

This in turn alludes to the stance that neo-tribalism provides a sense of realising and gaining identity. Rief[23] claims that, despite neo-tribal cultural practices deconstructing identity, it can also be regarded as constructing it, and that they can be perceived as an expression of differences. Jackson[24] also claims that neo-tribal contexts provide the atmosphere for the experience of differences and his analysis emphasises the creation of individualities and identities. Malbon[25] also asserts that there can be no conceptualisation of the importance of the notion of identification in these contexts without referring to issues of distinctions, which points to issues of individualisation. Bennett[26] has also emphasised issues of

[20]Bauman (1992),
[21]Bauman (1992).
[22]Bourdieu (1984).
[23]Rief (2009).
[24]Jackson (2004).
[25]Malbon (1999).
[26]Bennett, Savage, Sillva, Warde, Cayo-Cal & Wright (2010).

identities relating to neo-tribal theorisations of contexts associated with youth culture. This is reminiscent of Hetherington's[27] argument that issues of identities can be dealt alongside issues of identifications.

The construction of bisexuality and therefore sexual identity in Lelio's movie is deeply embedded in the exposure of the differences between the protagonists' roles, which again points to issues of individualisation but also dis-individualisation. These distinctions can be summarised in the dichotomy of liberal and conformist if one takes a closer look to the roles of the protagonists. Both terms, liberal and conformist entail practices and processes of individualisation as well as dis-individualisation in the movie. Esti could be characterised as conformist in the sense that she is married to the Rabbi's protégé, Ronit's best friend, she has conformed to the habitus of the Orthodox Jewish community, being Jewish, whereas Ronit is portrayed as the liberal, rebellious character that breaks away from the community. The interplay of practices of individualisation and dis-individualisation from and to the community could be summed up as practices of forming and forging class and sexual identity for both of the protagonists.

Neo-tribal Sexualities: Puissance and Sovereignty

In explicating his theory of neo-tribalism, Maffesoli argued that contemporary social organisation is comprised of small and potentially temporary groups, or 'neo-tribes', distinguished by shared lifestyles, values and understanding of what is appropriate behaviour[28]. What distinguishes neo-tribal social formation from traditional social groupings is that people belong to a variety of groups, many of them by choice, so that neo-tribal memberships are plural, temporary, fluid and often elective. Maffesoli's construction of social organisation challenges notions of society as alienated and individualistic. Daily life is characterised as a continuous shift through a kaleidoscope of social identities and group memberships, each creating a sense of solidarity and belonging that is often enacted in hedonistic cultural rituals. Similarly, in his theory of neo-tribalism, Maffesoli argues that many social groups that people belong to in their everyday lives can be understood as forms of political participation since they create (temporary) forms of community that orient around values of sociality, hedonism and sovereignty.[29]

Maffesoli constructs neo-tribal gatherings as political, since in creating local, informal and temporary spaces in which to live out one's own values, neo-tribes provide moments of sovereignty over one's own existence where 'it is possible to escape or at least relativise the institutions of power'[30]. Maffesoli's interpretation of contemporary social organisation is thus at odds with an understanding that neo-liberalism has led to an intensification of individualism, and his work has been

[27]Hetherington (1998).
[28] Maffesoli (1996a).
[29]Maffesoli (1996a).
[30]Maffesoli (1996a) at 44

critiqued for this. Evans[31], for example, has argued that in theorizing a shift away from modernist, rational institutions to neo-tribal emotional proxemics, Maffesoli failed to recognise the contradictory nature of social organisation in which both models exist.

Sweetman aims to find a place for the 'liberatory potential'[32] of reflexivity. He contrasts the reflexivity thesis, which he argues portrays identity as 'increasingly a matter of choice'[33] with Bourdieu's notion of the habitus, which, in emphasising an unconscious, pre-rational source of practices is, Sweetman argues, more concerned with deterministic social reproduction. McNay refers to 'emancipatory processes of refashioning'[34] which she finds in both the reflexive modernisation thesis as well as Foucault's later work, that she argues fails to distinguish properly between those aspects of identity relatively open to 'self-fashioning and those which are more ineluctable'[35]. This is contrasted with Bourdieu's emphasis on a 'pre-reflexive foundation for agency', which, she argues, 'provides a corrective to the voluntarist emphasis that hampers the idea of practices of the self'[36]. Adams suggests that Beck, Giddens and individualistic rational choice perspectives all form part of an 'extended reflexivity thesis' which views reflexive practices as allowing self-creation outside the bounds of culture [37]leading to a situation where 'we can increasingly determine the nature of our identity through conscious choices'[38] through an 'unbounded reflexivity' [39]. Adams also contrasts concept of reflexivity with the habitus in order to correct the 'voluntarism' of the reflexivity thesis.[40]

Maffesoli proposes that contemporary western social organisation has developed into a 'neo-tribal' structure in which people move between small and potentially temporary groups distinguished by shared lifestyles, values and understandings of what is appropriate behaviour. Like all tribes, these groups have an aesthetic ethic, a collective bond that involves shared values and understandings of what is appropriate behaviour. What makes this social formation 'neo' tribal, rather than traditionally tribal, is that neo-tribal memberships are plural, temporary and fluid[41].

The key way that neo-tribes may be regarded as political is that in having their own aesthetic ethic they have the potential to create moments in which to live out their own values, creating temporary pockets of sovereignty over their own existence.[42] In so doing, they may 'make it possible to escape or at least relativise

[31]Evans (1997).
[32]Sweetman (2003) at 544.
[33]Sweetman (2003) at 530.
[34]McNay (1999) at 95.
[35]McNay (1999) at 96.
[36]McNay (1999) at 102.
[37]Adams (2003) at 222.
[38]Adams (2003) at 223.
[39]Adams (2003) at 224.
[40]Adams (2006) at 516.
[41]Maffesoli (1997).
[42]Maffesoli (1996b)

the institutions of power'[43]. For Maffesoli, traditional politics are based on modernist institutions (such as national and regional government structures) that are formed on principles of rationality. He argues that human organisation is shifting away from these large institutions, but not through direct challenge. Instead, people employ a kind of power through being aloof, taking an avoidance stance by turning their back on modernist institutions and focusing instead on local, 'proxemic' groups, with which they have an emotional (rather than rational) affiliation. In these groups, cultural rituals are enacted that are characterised by, amongst other things, 'sociality and proxemics', 'solidarity and belonging', 'hedonism', 'vitality and puissance', and 'sovereignty over one's own existence'[44]. In applying the Maffesolian theory of neo-tribalism to Lelios' Disobedience, it seems that sovereignty has been played out in a number of ways through the identity politics of sexuality.

Neo-tribes let us experience belonging, pleasure in being sociable and a sense of vitality. These experiences are enabled through a living for the moment perspective, a Dionysian hedonism of taking 'pleasure in the good things in life'[45]. This hedonistic vitality is linked to Maffesoli's notion of puissance, the will or power to be agentic, and in this way hedonism, vitality and puissance are linked. A central aspect of neo-tribal puissance is sovereignty over one's own existence. The aim is therefore to survive in the world by deploying a politics of survival rather than resistance. Again this seems to be the main theme of Lelio's Disobedience. Neo-tribes create temporary spaces in which to participate in a set of shared practices, creating a common bond. In focusing on creating their own spaces neo-tribes are constituted as independent of official (modernist, institutional) governance. In this way members can have sovereignty over their own existence, if only at a temporary or local level: 'even if one feels alienated from the distant economic-political order, one can assert sovereignty over one's near existence'[46].

What makes neo-tribal social formations political is the emphasis on having sovereignty over one's own existence, which can be understood as the power, or puissance, to create social spaces defined by one's own aesthetic ethic. Everyday politics is thus understood in terms of its emphasis on creating (temporary pockets) of sovereignty; an 'aloof' stance towards official institutions of power; and a focus on social, hedonistic gatherings that celebrate vitality and belongingness[47]. Everyday politics are thus distinct from both traditional and alternative forms of 'identity' politics, which in one way or another engage with official institutions of power in order to effect social change or critique the status quo. Neo-tribalism therefore produces temporary pockets of freedom, not permanent utopias. However, Maffesoli sees the temporary and fluid nature of neo-tribal formations as their political strength, even if it does carry a tragic dimension[48]. Again, this is a replete theme in Lelio's Disobedience.

[43]Maffesoli (1996) at 44.
[44]Maffesoli (1996) at 44.
[45]Maffesoli (1996a) at 53.
[46]Maffesoli (1996a) at 44.
[47]Maffesoli (1996a) at 47.
[48]Maffesoli (1996a) at 53.

Neo-tribes avoid what Maffesoli calls 'domestication' through plurality and localism[49]. "Whatever the case, puissance is set against power, even if puissance can only advance in disguise, to avoid being crushed by power'[50] 'Everyday politics' is thus a politics of survival, in which pockets of autonomy that are potentially counter-hegemonic may flourish. Despite Maffesoli's emphasis on understanding political participation in terms of sovereignty, aloofness to official institutions and a celebration of hedonistic social gatherings, there is limited elaboration of neo-tribal theory in relation to how it might be used to theorise alternative forms of political participation.

Theorists have also paid less attention to other aspects of neo-tribal theory, namely issues around aloofness to traditional political structures and a focus on the practices of sociality in creating moments of sovereignty over one's own existence. However, the suggestion that is put forward here is that sovereignty over one's own existence can be interpreted as a political act and as the politics of sexuality and in the case of Lelio's movie as the politics of bisexuality that the erotic moment encapsulates.

Judith Butler writes that the erotic always grows out of a moment of unpredictability and unavailability[51]. Butler stresses that sexual desire is characterised precisely by something left over that eludes control. Sexual identities unfold their appealing authority precisely by taking pleasure in uncertainty and insecurity. From this perspective, the erotic constitutes an act of de-control in the Maffesolian sense. In Lelio's Disobedience this is translated as a form of dialectics of neo-tribalism and sexuality again as a political act through processes of de-control. As Bersani claims the erotic is always aimed at transgressing given everyday identities[52]. The Maffesolian notion of neo-tribal sociality transgresses in a sense the notion of the logic of identities by displacing them for the sake of the notion of the logic of identifications[53]. Nevertheless, the very transgression of identities, constitutes an element of neo-tribalism in the way bisexuality or at least the erotic in bisexuality is constructed. Lelio's Disobedience constituted a paradigm of that.

Conclusion

This article investigated the construction of female sexualities through an examination of Lelio's recent movie, Disobedience. In a way, it located female sexualities within the theoretical framework of neo-tribalism and neo-tribal sociality. It argued that female sexuality apart from being a product of a number of different socio-cultural relationships, religious norms and laws, it mainly exposes the dynamics of neo-tribes at play. This article challenged the association of the term deviance with a theorisation of subcultures and traced the formation of

[49]Riley, Griffin & Morey (2010).
[50]Maffesoli (1996a) at 47.
[51]Butler (1990) at 14.
[52]Bersani (1995) at 141.
[53]Maffesoli (2007).

female sexuality within the transition from subcultures to neo-tribes. It argued that the formation of female sexuality in Disobedience rests upon a rhetoric of escapism echoing the Mafessolian notion of neo-tribal sociality rather than being trapped within the rhetoric of deviance.

The first part of the article also argued that it is the act of escapism and neo-tribal affiliations as to the construction of female sexuality that is perceived as an act of resistance.

The second part of the paper discussed the way in which class informs the construction of female sexuality within neo-tribes. It put forward the suggestion that the way in which female sexuality is constructed in the movie Disobedience constitutes a reconfirmation of the Mafessolian notion of neo-tribal sociality exposing the logic of identifications. More importantly, it exposed and challenged invisibilities by arguing that the formation of women's bisexuality could potentially be theorised as a product of neo-tribal affiliations to the middle class.

The final part of the article placed the discussion on the construction of female sexualities within the overall context of juxtaposing neo-tribal lifestyle choices. It also argued that the construction of bisexuality adheres to a certain "ethics of aesthetics" that comes across in Lelio's movie, which in turn alludes to a process of survival and sovereignty rather than resistance. The last point conceptualised the Maffesolian notion of puissance as an important component of the realisation of neo-tribal sociality and as such it relates to Lelio's take in Disobedience on neo-tribal sexualities. To a great extent the article offered a critique of the absence of the construction of female sexualities from theoretical accounts of gender as well as accounts on queer theory. From this perspective, it exposed the absence of a theorisation of women's bisexuality from these accounts. Methodologically speaking this absence was traced in the celluloid canvas. Therefore, Disobedience, Lelio's recent movie was used as a methodological tool and a case study for the purposes of this article.

The aim of this article was to offer an alternative to the up to date theorisations of bisexuality through neo-tribal sociality. From this perspective, it challenged but also supplemented and contributed to the Maffesolian theory. It challenged the Maffesolian theory by revealing practices of individualisation and not just dis-individualisation of the self. It contributed but also challenged the Maffesolian theory through producing and forming a neo-tribal theorisation of sexual identity, recognising in this sense the existence of identity that Maffesoli and his writings ignore.

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Can Mexico Learn from the European Austerity? Legal Considerations about the *Ley Federal de Austeridad Republicana*

By Gerardo Centeno Garcia[*]

Throughout his campaign, the current President of Mexico, Andres Manuel Lopez Obrador, made two main promises (with its due adjacent topics) regarding the country's public administration: stop corruption and conduct his government with austerity. After months of debate on what the mandatary meant with the concept "Republican Austerity," the decree that enacts the Federal Law of Republican Austerity was published in the Official Gazette of the Federation. With it, the framework for the application of this thought materialises, allowing the public to raise legal debates on the matter. This paper aims at analysing the newly created Federal Law of Republic Austerity, pinpointing the main aspects of this juridical instrument. Looking at the most important austerity exercise in contemporary history (i.e., the Euro Crisis) and its most relevant legal devices (for example, Greece's Laws no. 3833/2010, no. 3845/2010 and no. 3847/2010); the author aims at identifying similarities between it and the Mexican Federal Law of Republic Austerity. Moreover, and taking the case of Koufaki and Adedy v. Greece, it is the mission of this article is to assess if the Federal Law of Republic Austerity might represent possible judicial controversies (including the presented by the judges of the Mexican National Supreme Court of Justice) or human rights violations (due to the heavy financial cuts made to the health and science sector in 2019). As a conclusion, the writer will determine if the Federal Law of Republic Austerity is in strict adherence to the Mexican Constitution and international human rights treaties to which the Mexican government is subscribed.

Keywords: *Austerity; Human Rights; Federal Law of Republic Austerity.*

2. Introduction

On 2 July 2018, Mexicans went to the polls to elect their new president. The results came in on that same night, declaring that the candidate Andres Manuel Lopez Obrador (AMLO) was the winner. The current mandatary assumed power on December 1st, 2018, and will be in office until 2024.

The political paradigm shift brought by President Lopez Obrador is an interesting one, composed by several policies and legal reforms that would have been unthinkable under previous presidential administrations. The most interesting one (at least for the purposes set by this paper) is called the *Austeridad*

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Republicana (in English, Republican Austerity); which comprises a handful of financial cuts on public spending.

However, austerity has been a controversial but popular solution among in-debated governments throughout the world. Whereas governments have decided that this is one of the best economical (nay, political) solutions possible to their financial deficits, academics all around the globe have pointed austerity out as a mischievous and dangerous idea. Nevertheless, it is important to define the type of austerity that the Mexican president is purporting and if it is similar to the ones criticised by academia. This paper is divided into three major parts. In the first part, the author presents a literature review on austerity, presenting the main arguments against and in favour of the idea. The second section of this article contains a legal analysis of the *Ley Federal de Austeridad Republicana* (Federal Law of Republican Austerity – hereinafter LFAR), pinpointing the main rules set up by it; comparing it with the legal framework used in the posterior years of the 2008's Euro Crisis. The last section will be dedicated to analyse the recent plaints presented before Mexico's National Supreme Court of Justice, contrasting it with the case of *Koufaki and Adedy v. Greece*; assessing their differences and similarities while applying Human Rights Law. The objective of this paper is to determine if the *Austeridad Republicana* holds similarities with the failed austerity policies of the Euro Crisis of 2008.

Literature Review

On Austerity

When it comes to austerity, there is no better researcher to read than Mark Blyth. He defines austerity as

> *"a form of voluntary deflation in which the economy adjusts through the reduction of wages, prices, and public spending to restore competitiveness, which is (supposedly) best achieved by cutting the state's budget, debts, and deficits."*[1]

Konzelman states that Austerity measures, therefore, include some combination of public expenditure reductions and increased taxes.[2] Andor is straight while asserting that the concept of austerity is unhelpful in the analysis of economic policy. He abounds by stating that

> *"one needs to decide whether austerity is (A) deficit reduction in general, or (B) deficit reduction by public expenditure cuts, or perhaps both (A and B). Similarly, we need to decide whether we call all deficit or expenditure reduction austerity (1), or only if it causes a fall in the GDP growth rate (2), or we reserve this word for situations when the cuts result in real economic contraction, i.e. negative growth."*[3]

[1]Blyth (2013) at 2.
[2]Konzelman (2012) at 2.
[3]Andor (2018).

It is worth to mention than the concept has existed for over 2000 years, but it was only until the 1950s that economists and historians started using the word to describe periods of restricted consumption and other spending, especially during periods of war.[4] Anderson and Minneman state that, in practice, the majority of OECD countries have applied austerity measures by cutting government expenditures and increasing taxes; aiming at reducing deficits.[5]

Austerity's History

Much of Blyth's book comprises ideas on why austerity is not the best solution to financial crisis. However, the most relevant part (at least for this paper's objective) resides in the historical analysis made in Part Two of the piece. Establishing Smith, Locke and Hume's ideas as the foundations of austerity, Blyth summarises the most relevant policies issued by countries from 1914 all the way to 2012. Here are the most important thoughts:

Hume postulated that governments are tempted to recur to public credit (government debt), which has no limits (until the interest rates arrive) and is easy to levy (due to its intergenerationality and hiding capability).[6] After the initiation of public debt, governments will enter into a vicious debt cycle, which will force them into *"mortgage* [...] *all its revenues, sink* [in] *into a state of languor, inactivity and impotence."*[7] However, and despite Hume's warnings, public credit is still a highly profitable solution in the field of politics.[8]

Differently from Hume, Adam Smith proposed the parsimony of the scots (in other words, austerity) to tackle public debt. The economist Adam Smith acknowledged the necessity of a State, for which he believed taxes were the best option to fund it. Under the principle of progressivity,[9] Smith proposed the taxation of consumption of luxuries, which Blyth deems insufficient to fund any state; leading him to public debt as the answer for this question.[10]

Blyth refers that, although none of the economists mentioned until now directly utters austerity as the solution to finance a state, the genesis of the concept resides in the deep fear of governments to issue public debt.[11] In the nineteenth century, the idea of public debt debilitating the state persisted, in the texts of David Ricardo and John Stuart Mill. However, the latter contested Hume's and Smith's ideas of the

[4]Anderson & Minneman (2014) at 110.
[5]Anderson & Minneman (2014) at 112.
[6]Blyth (2013) at 107-8.
[7]*Ibid.*
[8]Blyth (2013) at 110.
[9]"The subjects of every state ought to contribute […] in proportion to the revenue which they respectively enjoy under the protection of government."- Blyth (2013) at 114.
[10]*Ibid.*
[11]Blyth (2013) at 115.

> *"inevitable enfeeblement of the state through debt"* by stating that as *"long as government borrowing did not compete for capital and thus drive up the rate of interest, debt issuance was acceptable, even if taxes would be preferable."*[12]

Later on, Blyth identifies two types of austerity: the American and the Austrian. The American approach, which Blyth defines as Liquidationism,[13] was summarised in Hebert Hoover's treasury secretary Andrew Mellon's words:

> *"Liquidate labour, liquidate stocks, liquidate the farmers, and liquidate real estate."*[14]

This, Blyth argues, means:

> *"Liquidationism therefore argues for inevitability—the slump must happen—and also for intervention's unintended consequences —if you get in the way of that inevitability you will end up making it worse. The consequence of this line of thinking is austerity—purging the system and cutting spending—which becomes the essence of recovery. Austerity may be painful, but it is unavoidable since undergoing such emetic periods is the essence of capitalism's process of investment and discovery. There was, therefore, no alternative."*[15]

The Austrian strain of this theory purported the idea that government idea does nothing more than harming the free market.[16] Blyth states that this approach rejected mathematisation and preferred an historical lenses. Finding itself defeated in Europe, this doctrine flew all the way to the United States; in the voice of Joseph Schumpeter.[17]

Mexico's Austerity History

Mexico has an interesting history in terms of austerity. However, one may ask: Was the Mexican experience influenced by what Blyth stated in the previous paragraphs? Luckily, Moreno-Brid, Benitez & Villareal might have the answer. According to these authors, austerity in Mexico can be traced back to the 1970s. The austerity policies tend to reduce the size of the public sector to give the market a bigger decision-making action in resource allocation.[18] After the 2nd World War, Mexico had a period of stable public finances and bonanza. However, the country was not well prepared to receive external financial shocks, which led to a fiscal deficit that

[12]Blyth (2013) at 118.
[13]Blyth (2013) at 121-4.
[14]Blyth (2013) at 121.
[15]Blyth (2013) at 123.
[16]Blyth (2013) 147.
[17]*Ibid.*
[18]Moreno-Brid, Benitez & Villareal (2016) at 57.

> *"climbed from 0.5% to 6.4% of GDP between 1971 and 1975, and the financial deficit of the consolidated public sector soared from 2.5% to 10% of GDP."*[19]

In the coming years, two main measures were applied to face this situation: The depreciation of its nominal exchange against the dollar; the personal income tax was adjusted for inflation, and a value-added tax along with a new corporate income tax were established.[20] However, as Moreno, *et. al.*, point out, Mexico was still (and still is) highly dependent on oil revenues. Rivero Casas mention this characteristic as well.[21] After the discovery of the giant oil field of Cantarell, the last three years of the 1970s were kind to the nation's coffers. However, the oil industry suffered a debacle during the 1980s, causing a fiscal deficit of 14% of the GDP in 1981.[22] Moreno-Brid, Benitez & Villareal argue that since the oil bust, all of the Mexican public administrations established austerity as a *sine qua non* tool. As a result, Mexico attained, between 1991 and 1996, more revenues than expenditures; inverting scenarios again between 1997 and 2005, generating an average of 0.7% of the GDP in deficits.[23]

As summary, these authors state:

> *"*[T]*he evolution of the investment ratio and of the pace of economic expansion in 1960-2015 follow three, perhaps four, phases. From 1960 to 1981, the Mexican economy expanded rapidly (averaging an annual rate of growth of 6.6%) while the investment ratio climbed from 15.6% of GDP to 23%. Its surge was the product mainly of the dynamism of public investment, which jumped 5 points to reach 10.2% of GDP, as private investment rose merely two percentage points up to a level equivalent to 12.8% of GDP. By then 44% of total investment was carried out by the public sector, boosted in the last years of this period by the oil bonanza and the state-led industrialisation strategy. In 1982-87, the oil bust, the decline of economic activity and the macroeconomic stabilisation programs implemented were associated with a contraction of the investment ratio (in 9.1 percentage points of GDP). Its public component shrunk six percentage points of GDP, and its private one three points. A third phase, of recovery, began in 1988 and ran up to 2008. In these 20 years the Mexican economy finally left behind the years of stagnation. It managed to expand but at an annual average of 2.5%; much more slowly than in the 1960s or 1970s. The investment ratio increased nine points, and rose to 23.1% of GDP. This figure was similar to that of 1981, but the composition was drastically different: 24% public and 76% private, as the public investment ratio barely expanded by 1.7 percentage points of GDP. The international financial crisis of 2008 apparently opened a new phase of economic slowdown and contraction in the investment ratio due to the reduction of public investment in real terms in each of the last five years. Today, the public investment ratio is 3.7% of GDP; one of the lowest registered in many years."*[24]

[19]Moreno-Brid, Benitez & Villareal (2016) at 58.
[20]*Ibid.*
[21]Rivero Casas (2019) at 6.
[22]Moreno-Brid, Benitez & Villareal (2016) at 58-9.
[23]*Ibid.*
[24]Moreno-Brid, Benitez & Villareal (2016) at 59-60.

With this data, Moreno-Brid, Benitez & Villareal assure that

> *"that the decline in public investment – by itself and ignoring its impact on private investment through crowding-in effects – has had a major and most adverse impact on the rate of growth of GDP in Mexico."*[25]

With their investigation we can, therefore, state the idea of austerity is not new in the country.

The 2008's crisis affected Mexican finances severely, Moreno-Brid, Benitez & Villareal argue. Although the country faced this financial bump with a strong fiscal stance, it could not avoid a deficit high of 3.5% of the GDP in 2015. However, the data collected by these authors point that these deficits were caused by increases in spending, not by reductions in revenues.[26] Although the legislative initiative from which the LFAR originated does not explicitly mention it,[27] this disbursements pattern motivated AMLO's government to look at austerity as a viable policy.

On Republican Austerity

On paper, the concept of "Republican Austerity" is defined by the legislative initiative of the LFAR, which states the following points as the pillars of the concept:

- *The reduction of current expenditure regarding the salaries and benefits of senior public officials of the powers, autonomous bodies and their public entities;*
- *The incorporation of all civil servants to public social security systems and the consequent prohibition of establishing privileged retirement, pension or retirement benefits, as well as hiring public resources, private insurance of medical expenses, life or separation , whatever its denomination;*
- *Avoid the thickening of the bureaucratic apparatus, developing the functions of the State without creating more bureaucracy;*
- *Restrict the use of escorts, security elements, private secretaries and advisors, which may not be entrusted or commissioned to private activities or outside their function;*
- *Limit the use of vehicles owned by the State to the fulfilment of public utility purposes and direct service of the population, may only be used for various purposes in cases whose need is justified by being a direct means of fulfilling a public function;*
- *Restrict spending on official propaganda, reducing the hiring of commercial time to the minimum possible and concentrating its diffusion in a single unit;*

[25]Moreno-Brid, Benitez & Villareal (2016) at 61.
[26]Moreno-Brid, Benitez & Villareal (2016) at 62.
[27]Chamber of Congress people (2018a) Número 5111-II, martes 11 de septiembre at 3-7.

- *Set limits on the number of official trips abroad of each public entity, prohibiting the acquisition of transfers in first class service or equivalent;*
- *Establish limits so that the amounts paid in the previous fiscal year prior to the expenses for telephone, photocopying and electrical energy services; fuels, leases, per diem, fees, food, furniture, office remodelling, telecommunications equipment, computer goods; are not exceeded, once considered the increases in prices and official rates or inflation;*
- *The express ban on retirement pensions of former presidents of our country is established; and*
- *It is established that no trusts, funds, mandate or public or private analogues may be constituted, nor will contributions of any nature be made that are intended to alter the rules of discipline and honest exercise of expenditure.*[28]

Mentioning these pillars is quite important when it comes to differentiate the Mexican austerity from the other similar policies. Nevertheless, one might ask: What is the substance behind these specific cuts?

Rivero Casas states that AMLO's Republican Austerity is a *"slight return to Keynesian policies of the twentieth century,"* due to the generation of social programmes that foster consumption of poor citizens and accelerate economic development.[29] This point was mentioned by Blyth while discussing the foundations of Keynes' anti-austerity ideas.[30]

Rivero Casas points out that three legal instruments comprise the Mexican Republican Austerity: the aforementioned LFAR, the Federal Law on Compensation of Public Servants (hereinafter LFRSP) and the Federation Expenditure Budget for 2019 (PEF-2019). With these, this researcher points out the partial turn that the Mexican government does towards Keynesian policies of the 20th century, consisting in significant investments in public works and a "fast-track" wealth distribution through the creation of new social programmes.[31] Since the main focus of this paper resides in the legal devices contained in the LFAR, the author wishes to do a summarised explanation of the other two instruments:

The Federal Law on Compensation of Public Servants

The LFRSP is the result of several constitutional modifications (namely, to articles 75, 115, 116, 122, 123 and 127 of the Mexican Constitution). These adjustments forced the Federation, municipalities, states and Mexico City, to include in their expenditure budgets, the tabulators from the remuneration received by their public servants, subject to the provisions of article 127 of the Constitution.[32]

This later legal device establishes that:

[28]*Idem* at 4.
[29]Rivero Casas (2019) at 9, 15.
[30]Blyth (2013) at 40, 129-30.
[31]Blyth (2013) at 4.
[32]Chamber of Congress people (2018b) número 5106-IV, martes 4 de septiembre at 103.

> *"Article 127. The public servants of the Federation, of the federative entities, of the Municipalities and of the territorial demarcations of Mexico City, of their entities and dependencies, as well as of their parastatal and Para municipal administrations, public trusts, institutions and organisations Self-employed, and any other public entity, will receive adequate and inalienable remuneration for the performance of their function, employment, position or commission, which must be proportional to their responsibilities.*
> *Said remuneration shall be determined annually and equitably in the corresponding expenditure budgets, under the following bases:*
> *I. Any payment in cash or in kind, including allowances, bonuses, prizes, rewards, incentives, commissions, compensations and any other, is considered a remuneration, with the exception of supports and expenses subject to verification that are proper of a work development and travel expenses in official activities.*
> *II. No public servant may receive a remuneration, in terms of the previous section, for the performance of his function, employment, position or commission, greater than that established for the President of the Republic in the corresponding budget.*
> *III. No public servant may have a remuneration equal to or greater than his superior; unless the surplus is a consequence of the performance of several public jobs, that their remuneration is a product of the general working conditions, derived from a qualified technical work or by specialisation in their function, the sum of said remuneration should not exceed half of the remuneration established for the President of the Republic in the corresponding budget.*
> *IV. Retirements, pensions or retirement assets, or settlements for services rendered, as well as loans or credits, will not be granted or covered, without these being assigned by law, legislative decree, collective agreement or general working conditions.*
> *These concepts are not part of a remuneration. The security services required by public servants are excluded due to the position held.*
> *V. Remuneration and its tabulators will be public, and must specify and differentiate all of its fixed and variable elements both in cash and in kind.*
> *VI. The Congress of the Union and the Legislatures of the federative entities, within the scope of their powers, will issue the laws to enforce the content of this article and the relative constitutional provisions, and to penalise criminally and administratively the behaviours that imply the breach or the circumvention by simulation of what is established in this article."*[33]

The law that this article talks about is the LFRSP. This act gives legal life to everything established by articles 75 and 127 of the Mexican Constitution.[34] Its most important mandates are:

[33]Political Constitution of the United Mexican States. Article 127, 144-5.

[34]Article 75. The Chamber of Deputies, when approving the [PEF], should not fail to indicate the remuneration corresponding to a job that is established by law; and in case that for any circumstance it is omitted to fix said remuneration, it will be understood as indicated the one that had been fixed in the previous [PEF] or in the law that established the employment. In any case, said statement must respect the bases provided for in article 127 of this Constitution and in the laws issued by the General Congress on the matter. The federal Legislative, Executive and Judicial branches, as well as the agencies with autonomy recognised in this Constitution that exercise resources of the Federal Expenditure Budget, must include within their budget projects, the tabulators of the remunerations of their public servers. These proposals must observe the procedure for the approval of the budget of

- No public servant will receive a remuneration greater than that established for the President of the Republic in the PEF.[35]
- Retirements, pensions, retirement assets or payments of similar nature will not be granted or paid for services rendered in the performance of the public function without these being assigned by law, legislative decree, collective agreement or general working conditions.[36]
- In May 20th, 2019, the Mexican Supreme Court of Justice failed regarding the *Accion de Inconstitucionalidad*[37] trial presented by the National Human Rights Commission and 44 Senators of the Sixty-fourth legislature; which caused the nullification of the following articles:
- Article 6, first paragraph, sections II, III, and IV, subsections b) and c), and the last paragraph: This provision established the prohibition to any public servant to have a remuneration equal to or greater than their superior.[38-39] The Supreme Court deemed that the constraint violated Article 127 of the Mexican Constitution, since it allowed setting remuneration in a discretionary manner.[40]
- Article 7, first paragraph, section I, subsection a), sections II and IV: This provision frames how the determination of the public servants' wages will be made. The Supreme Court nullified these sections due to the same reason mentioned above.[41]

expenditures, provides for article 74 section IV of this Constitution and other applicable legal provisions.*"* See CPEUM, Article 75, 78-9.

[35]LFRSP, Article 6, section I, 3.

[36]LFRSP. Article 10, first paragraph, 7.

[37]Legal remedy that is processed exclusively before the Mexican Supreme Court by means of which the possible contradiction between the Constitution and some norm or provision of a general nature of lower hierarchy is denounced: law, international treaty, regulation or decree, in order to preserve or maintain the supremacy of the Magna Carta and void the rules declared unconstitutional. The actions of unconstitutionality may be promoted by federal or local legislators or legislators or, who form a parliamentary minority that represents at least 33% of the total of those who make up the body that issued the contested rule. They can also promote actions of unconstitutionality: the Attorney General of the Republic; political parties registered with the National Electoral Institute; or parties with local registration, in the case of electoral laws; as well as the National Human Rights Commission and local organisations in the same subject. Such actions may be exercised within thirty calendar days following the date of publication of the standard. In the case of deputies, they may stand against federal laws. For their part, senators may do so in violation of federal laws or international treaties concluded by the Mexican State. If the Supreme Court declares that a rule is contrary to the Supreme Law, it may not be effective again or applied to any person." See Legislative Information System 2019.

[38]LFRSP, Article 6, 6-7.

[39]National Supreme Court of Justice. 2019. Acción de Inconstitucionalidad 105/2018 y SU Acumulada 108/2018.

[40]National Supreme Court of Justice. 2019. *SENTENCIA dictada por el Tribunal Pleno de la Suprema Corte de Justicia de la Nación en la Acción de Inconstitucionalidad 105/2018 y su acumulada 108/2018.,*

[41]*Ibid.*

The Federation Expenditure Budget

In terms of the PEF-2019, Rivero Casas does a clear explanation on what the modifications were, in comparison with the PEF of 2018. He presents the data with the following table:[42]

Dependencia/organismo autónomos	2018	2019	Condición
Poder Legislativo	15,574,572,274	13,002,444,027	Disminuyó
Poder Judicial	71,366,389,337	63,656,725,000	Disminuyó
INE	24,215,327,986	15,363,037,745	Disminuyó
CNDH	2,033,004,229	1,809,405,805	Disminuyó
INAI	1,098,478,640	900,151,692	Disminuyó
INEGI	7,788,876,174	12,129,702,814	Aumentó
Presidencia	1,797,418,247	1,569,844,550	Disminuyó
SEGOB	64,288,166,419	60,783,083,252	Disminuyó
RELEX	9,003,192,028	8,532,283,876	Disminuyó

We can see that, as Rivero Casas mentions, that most of the federal agencies and autonomous constitutional bodies received a significant decrease in their budget. However, those related to the issues of security and social development increased. This is the case of Institute for Social Security and Services for State Workers, Mexican Institute of Social Security, Ministry of Health, Welfare, Labour and Social Welfare and Education.[43]

SHCP	26,458,200,665	22,575,933,039	Disminuyó
SEDENA	81,021,903,813	93,670,187,410	Aumentó
AGRICULTURA	72,125,383,47	65,434,880,164	Disminuyó
FUNCIÓN PÚBLICA	1,191,905,203	901,819,393	Disminuyó
SEP	280,969,302,366	308,000,434,721	Aumentó
SALUD	122,557,337,320	124,266,865,116	Aumentó
STPS	4,036,978,861	43,269,051,026	Aumentó
MARINA	31,305,775,196	32,083,375,192	Aumentó
MEDIO AMBIENTE	37,580,635,702	31,020,459,536	Disminuyó
SENER	2,470,265,318	27,229,831,829	Aumentó
BIENESTAR	106,645,504,028	150,606,037,651	Aumentó
TURISMO	3,916,225,884	8,785,888,223	Aumentó
CONACYT	27,225,876,510	24,764,719,64	Disminuyó
CULTURA	12,916,173,982	12,894,090,259	Disminuyó
ISSSTE	282,632,561,843	323,322,195,097	Aumentó
IMSS	679,284,281,924	746,738,895,682	Aumentó

[42]Rivero Casas (2019) at 12-13.
[43]Rivero Casas (2019) at 13.

The Federal Law of Republican Austerity

On May 4th, 2019, the Federal government published a memorandum with guidelines to decrease current expenditure from all the federal institutions. These instructions were enacted in the LFAR on July 2nd.[44]

This law provides us with the legal definition of "Republican Austerity." In its Article 4, section I, the act establishes:

> *"Republican Austerity: Republican conduct and State policy that public entities as well as the Legislative and Judicial Powers, government companies and subsidiaries, and autonomous constitutional bodies; are obliged to comply in accordance with their legal framework, to combat the social inequality, corruption, greed and waste of national assets and resources, managing resources with efficiency, effectiveness, economy, transparency and honesty to meet the objectives to which they are intended."*[45]

Later on, the LFAR makes clear that the only two types of expenses being reduced by the Republican Austerity are Current[46] and Capital Expenditures.[47-48] There is no mention of both functional and administrative expenditures. The austerity policy under which both types of disbursements should be done are explained in article 7, paragraph three. The provisions states:

> *"To apply the policy of republican austerity of the State, public entities must:*
> *I. Refrain from negatively affecting the social rights of Mexicans, provided for in the Political Constitution of the United Mexican States and International Treaties to which Mexico is a party;*
> *II. Focus the preferential republican austerity measures on non-priority current expenditure in the terms of this Law, and*
> *III. Avoid reducing investment in the attention to emergencies and natural disasters or from human activity."*[49]

During 2019, several public officers (primarily, from the Health sector) complained and denounced heavy financial cuttings that would prevent them to

[44]Rivero Casas (2019) at 11-12.
[45]LFAR, Article 4, section I, 2.
[46]*"*[A]*n expenditure that the public sector makes and that does not have as counterpart the creation of an asset, but rather constitutes an act of consumption; that is, the expenses that are destined to the hiring of the human resources and to the purchase of the goods and services necessary for the proper development of the administrative functions. This type of expense is used to carry out ordinary activities or to provide services on a regular and permanent nature, of conservation and minor maintenance. In addition, it includes expenditures destined to research and development, because they do not produce concrete benefits and are generally not incorporated in the physical assets of the agencies and entities."* See Anibal & Gutierrez (2015) at 16.
[47]*"*[A]*llocations for the creation of capital goods and conservation of existing ones, the acquisition of real estate and securities, as well as resources transferred to other sectors for the same purposes, which contribute to increasing and preserving the physical or financial assets of the nation."* See *Ibid.*
[48]LFAR. Article 6, 3.
[49]LFAR, Article 7, paragraph three, 3.

develop their activities. This situation went as far as provoking the resignation of German Garcia Cazares, AMLO's first President of the Mexican Social Security Institute.[50] However, as Rivero Casas stated, the case is totally the opposite since the Health sector received generous resources for that year's fiscal exercise. What was the point of the grievances? The answer might be in Article 16 and 17. The first states:

> *"Article 16. The following are measures of republican austerity, in an denunciative and non-limiting manner:*
> *I. The purchase or lease of luxury vehicles* (...)*;*
> *II. Official vehicles may only be used for activities that allow the fulfilment of the functions of the Federal Public Administration. Any private use of such vehicles is prohibited;*
> *III. Acquisitions and leases of computer equipment and systems will be carried out after justification, based on modernisation plans and prioritizing the use of free software, provided it meets the characteristics required for the exercise of public functions;*
> *IV. Savings insurance contracts for the benefit of public servants with state resources, such as Individual Separation Insurance, or special savings banks are prohibited;* (...)
> *V. Air vehicles owned by the Federal Executive Power, taking into account the particularities of the corresponding asset will be used for security, defines, marine, air force, civil protection, as well as the transfer of patients.* [...]
> *VI. No unnecessary office expenses will be incurred.* [...]*;*
> *VII. Remodelling offices for aesthetic reasons or buying luxury furniture is prohibited, and*
> *VIII. Waste of electricity, water, fixed and mobile telephone services, gasoline and supplies financed by the treasury is prohibited.*
> *The Secretariat and the Ministry of Finance and Public Credit will jointly prepare and issue the necessary guidelines to regulate the provisions of this article, in accordance with its powers and considering the provisions of the Law, and may extend the assumptions regulated in this article, in case it is considered convenient.*
> *It will be the responsibility of the Ministry of Finance and Public Credit within the scope of the Executive Power, to issue the provisions that, in matters of budgetary control, will govern the implementation of this Law."*[51]

In his resignation letter, former President of the Mexican Social Security Institute German Garcia Cazares stated an intense and pernicious interference in the institute's activities, carried out through a strict budget control.[52] The last paragraph of Article 16 might be the cause of this intervention which, remembering the *Accion de Inconstitucionalidad* against the LFRSP and attending to the text of the disposition brings the argument of discretion back on the table. Moreover, this was not the only article that caused controversy among the ranks of the Mexican public administration.

[50]Mexican Social Security Institute (2019).
[51]LFAR, Article 16, 5-6.
[52]Mexican Social Security Institute (2019).

On October 8th, 2019, the Chamber of Congress people approved the LFAR. However, 124 of the Congress people voted against it. Subsequently, most of these people expressed their wish to present an *Accion de Inconstitucionalidad* against articles 13, 16, 22 and 24. The first prohibits all duplication of functions in the units of the Federal Public Administration;[53] the second, as we have discussed, abolished the contracting, with the resources of the State, of insurance of saving for the civil servants;[54] the third rules out to hire retirement, pensions and life insurance or private medical expenses for officials;[55] and the last article sets that the officials cannot work 10 years after completing their functions, if they had supervised it, regulated their activity or had privileged information regarding the branch of government in which they were.[56] On January 3rd, 2020, under file number 139/2019, the Plenary of the National Supreme Court of Justice opened the trial against the latter constraint.[57] The sentence is still pending.

In sum, these are the rest of the prohibitions set by this new law:

- The nullification of public contracts awarded to private companies through the usage of influence peddling, corruption or that causes damage to the Public Treasury;[58]
- Expenses for telephony, cell phone, photocopying, fuels, leases, per diem, food, furniture, office remodelling, telecommunications equipment, computer goods, stationery, tickets, congresses, conventions, exhibitions and seminars, necessary to fulfil the function of each agency and agency, may not exceed the amounts disbursed in the immediately preceding budget year;[59]
- Only the heads of office or secretariat will get a particular assistant; only undersecretaries of State, and superiors, as well as holders of direct control entities; posts with the level of Deputy General Management that do not exercise powers expressly provided by law or regulation are prohibited; union representatives will only hold honorary positions, which means that they will not receive any remuneration; consulting services provided by private parties that the public administration can procure itself are forbidden;[60]
- Severe cuts and control on public propaganda resources;[61]
- The international representatives bodies that do not belong to the Foreign Relationships Secretariat are strictly banned;[62]

[53]LFAR, Article 13, 5.
[54]LFAR, Article 16, section IV, 5.
[55]LFAR, Article 22, 8.
[56]LFAR, Article 24, 8.
[57]National Supreme Court of Justice. 2020. *Lista Extraordinaria de Notificaciones Sección de Támite de Controversias Constitucionales y de Acciones de Tnconstitucionalidad,*
[58]LFAR, Article 9, 3.
[59]LFAR, Article 10, 4.
[60]LFAR, Article 12, 4-5.
[61]LFAR, Article 14, 5.
[62]LFAR, Article 15, 5.

- All trusts, funds, mandates or similar contracts that receive public resources in the Centralised Federal Public Administration, without exception must be approved by the Ministry of Finance and Public Credit. The existing ones have to be registered in the Ministry's register;[63]
- All the public servants will be subjected to the adequate and proportional remuneration that according to their responsibilities is determined in the budgets of expenditures, considering what is established in articles 75 and 127 of the Political Constitution of the United Mexican States and other applicable provisions;[64]
- No public servant may use institutional human, material or financial resources for purposes other than those related to their functions;[65] and
- It is prohibited to any natural or legal person to use their legal personality to avoid compliance with obligations and harm public or private interests.[66]

2008's Euro Crisis: The Main Legal Instruments applied in Greece

The causes of the Euro Crisis are, more or less, well-known. Same coin, but different fiscal policies. Sharing the currency allow countries like Spain and Greece to borrow money from the banks as the exact same interest rate as Germany, which allowed these countries to create programs that caused huge deficit spending; payable due to the enormous quantities available to them. Unfortunately, the American housing market crisis caused the banks all around the globe halted their borrowing; which provoked Greece to have no resources to finance its newly enacted programs. As a response, Germany recurred to a 500 billion euro bank-bailout in late 2008.[67] Moreover, the European Union, the European Central Bank and the International Monetary Fund (as well as other bilateral loans) lend Greece 110 billion euro loan in exchange for a 20 percent cut in public-sector pay, a 10 percent pension cut, and tax increases.[68] The most important laws (at least for the purposes of this paper) governing this austerity pack are Laws no. 3833/2010, no. 3845/2010 and no. 3847/2010.

Koufkaki and Adedy v. Greece

On August 31st, 2012, Ioanna Koufaki (who used to work as a part of the scientific staff of the Greek Ombudsman's Office) and the Confederation of Public-Sector Trade Unions (ADEDY) presented a complaint before the European Court of Human Rights,[69] arguing that the enactment of Laws no. 3833/2010, no.

[63]LFAR, Articles 18 and 19, 6-7.
[64]LFAR, Article 20, 7.
[65]LFAR, Article 23, 8.
[66]LFAR, Article 25, 8-9.
[67]Blyth (2018) at 53-67.
[68]Anibal & Gutierrez (2015) at 16.
[69]European Court of Human Rights. 2012. *Koufaki and ADEDY v. Greece* [hereinafter Koufaki and ADEDY v. Greece]

3845/2010 and no. 3847/2010, consisted in a violation of Article 1 of Protocol No. 1 of the European Convention on Human Rights. Said legal disposition establishes the protection of the Protection of Property.[70] What do these laws establish?

Law no. 3833/2010, entitled "Protection of the National Economy - Urgent Measures to respond to the Financial Crisis", reduced the wages of every person working in the public sector by a range between 12% and 30%; per its section 1. Moreover, in section 2, the new act set a new salary ceiling for all public servants.[71] This reduction is increased 8% more if we take into account Section 3 of Law no. 3845/2010.[72] Finally, Law no. 3847/2010 reduced the amount for public-sector retirees and abolished them altogether for those under the age of sixty.[73] These three laws were enforced in accordance with the Memorandum of Understanding of Greece with its lenders;[74] a document that establishes the economics "how-and-why" of the crisis and the conditions that Greece agreed to before receiving those funds.[75]All of these reductions, Koufaki and the Adedy stated, were done in clear violation of Article 1 of Protocol No. 1 of the European Convention on Human Rights; since the deprivation of possessions should be considered only as a measure of last resort.[76] However, the European Court of Human Rights deemed that these cuts were not a direct "deprivation of possessions," but rather as interference with the right to peaceful enjoyment of possessions for the purposes of the first sentence of the first paragraph of Article 1 of Protocol No. 1.[77] In sum, and after taking into consideration previous case law on the topic of public interest,[78] the Court estimated that Laws no. 3833/2010, no. 3845/2010 and no. 3847/2010; were not transgressive of Article 1 of Protocol No. 1 of the European Convention on Human Rights.[79]

Methodology

To the extent possible, the past pages were a summary of the main circumstances surrounding the austerity policies in both Mexico and Greece. The following section consists in a comparative exercise of both scenarios, aiming at identifying the following:

[70]Council of Europe. 2020. .
[71]Buffa (2017) at 454.
[72]Buffa (2017) at 455.
[73]Buffa (2017) at 456.
[74]Pervou (2016) at 115.
[75]Directorate-General for Economic and Financial Affairs. (2010).
[76]Koufaki and Adedy *v. Greece,* paragraph 23, 4.
[77]*Idem,* paragraph 34, 7.
[78]The Court cited the following cases to raise the argument that the laws in the Koufaki and Adedy v. Greece case were indeed in protection of "public interest": Jahn and Others v. Germany [GC], nos. 46720/99, § 91; Zvolský and Zvolská v. the Czech Republic, no. 46129/99, § 67; Mihaieş and Senteş v. Romania (dec.), nos. 44232/11 and 44605/11, § 19. See *Koufaki and Adedy v. Greece,* paragraph 39, 7-8.
[79]Koufaki and Adedy *v. Greece,* paragraphs 41-49, 8-10.

- Economic scenarios;
- Main legal instruments; and
- Judicial decisions.

Economic Scenarios

As discussed, Mexico is not a newbie when it comes to austerity policies. Moreover, the country implemented these types of measure both in crisis conditions and in non-crisis periods.

Currently, Mexico does not have a generalised insolvency problem.[80] Since this paper talks about the similarities between the Republican Austerity (that is, the current presidential administration policy) and the Euro Crisis' one, I will limit myself to talk about the economic scenario present since AMLO took power. This law aims at, as discussed, reduce Current and Capital Expenditures; whichever these might come from. However, as we saw, the LFAR chose 17 aspects of the public administration to reduce expenses.[81] In the explanatory statement of the LFAR, the Congress people of Morena (AMLO's political party) stated that austerity has to be inserted as a guiding principle of the Mexican public administration, and as a method that *"will allow to eradicate the set of excesses that the political class had been organised and to realise the constitutional principles of economy, rationality, honesty and transparency in the allocation and the exercise of public resources."*[82] In other words, the country was polluted by corruption and an abusive political class that exploited public resources as their own. Therefore, the LFAR aims at making public disbursements be made under the premises of good government.[83]

On the other hand, and as stated by the European Directorate-General for Economic and Financial Affairs, Greece had an unsustainable pension system which was running the risk of becoming insolvent.[84] Furthermore, public servants' wages and *"pension bills amounted to around three-quarters of total primary expenditure, and these were the most dynamic components of expenditure over the past decade."*[85] Therefore, Laws no. 3833/2010, no. 3845/2010 and no. 3847/ 2010 were directly intended to cut down funds from those two aspects, aiming to restore confidence and maintain financial stability (short-term programme); improve competitiveness and alter the economy's structure towards a more investment- and export-led growth model (mid-term); and restore Greece's credibility for private investors (overarching objective).[86]

[80]The Institute for Social Security and Services for State Workers "has yet to settle its debts with distributors, also, there is no budget to pay and hire contracted services." See, El Universal (2019).
[81]LFAR, Articles 9-10, 12, 14-15, 18-20, 23, and 25, 3-9.
[82]Chamber of Congress people (2018a) at 3.
[83]UNDP defines good governance as "the exercise of economic, political and administrative authority to handle the affairs of a country at all levels. Good governance is among many things, participatory, transparent, and responsible. It is also effective and equitable. Promotes the Rule of La*w."* See Instituto Interamericano de Derechos Humanos (2004).
[84]Directorate-General for Economic and Financial Affairs. (2010).
[85]Directorate-General for Economic and Financial Affairs. (2010) at 15.
[86]Directorate-General for Economic and Financial Affairs. (2010) at 10-11.

The economic scenarios that provoked austerity measures to be implemented in both Mexico and Greece are totally different, which led to different types of austerities. The Republican Austerity is a policy that aims at cutting unnecessary spending. The Greek Austerity was a set of conditions established by the European Central Bank to help Greece restore its financial stability. One responds to inner activities conducted by previous governments that created a perverted public spending tradition, and the other reacts at a chain of financial misadventures caused by international private actors and a devious monetary policy.

Main Legal Instruments

As stated, the motives behind each country's austerity policies are different. As a consequence, the drafting and the conditions established by their laws are quite disparate.

The Republican Austerity's Main Laws

Putting aside the PEF, the two main legislative outcomes regulating Republican Austerity are both the LFAR and the LFRSP. As I have discussed before, the explanatory statement of the LFAR mentions that one of its objectives is to cut down the excessive expenses incurred by the Mexican Federal Public Administration.[87] The LFRSP's explanatory statement indicates that the law is necessary since it is:

> *"unacceptable, when news are released every day that denounces the excessive income of public servants, in particular, the privileged one of the high bureaucracy of both the federal government and local governments, which allocate large portions of public resources that should be used for truly legitimate purposes, and not to sustain the privileges of public servants who have unduly become an elite."*[88]

Again, none of these laws purport the idea or declare a financial crisis in the country. In reality, both acts have the sole purpose of decreasing unnecessary disbursements and Current Expenditure by establishing a limit of what a public servant might receive. With the enactment of both laws, the Ministry of Public Function, Irma Erendira Sandoval, expects savings up to 11,000 million Mexican pesos.[89]

Another main characteristic of the Republic Austerity is its origin. Although we have commented that the excessive expenses of past administrations motivated the legislation of both the LFAR and the LFRSP, by origin I mean the body that created both acts: the Mexican Congress. This means that the austerity policies are

[87]Chamber of Congress people (2018a) at 3.
[88]Chamber of Congress people (2018b) at 103.
[89]Expansion (2019).

a sovereign decision made by Mexico; instead of a set of conditions imposed by external institutions.

Greek Austerity's Main Laws

The main laws regulating Greece's austerity policies are the Laws no. 3833/ 2010, no. 3845/2010 and no. 3847/2010. These acts were a response to the conditions imposed by the European Union, the European Central Bank and the International Monetary Fund, after lending 110 billion euros to the country.[90] In fact, as Blyth stated, the crisis was generated by the wrongdoings of external actors, which caused banks to stop the cash flow going into Greece's arks to finance their social programmes.[91] This austerity is everything but a sovereign decision.

The purposes of these laws are stated in the European Directorate-General for Economic and Financial Affairs' Economic Adjustment Programme for Greece, stating that the cuts on public servants' wages and pensions were more than necessary to stabilise the country's financial system. By accepting these considerations, Greece compromised itself to the objectives established in said document if it wanted to receive the 110 billion loan offered by the European Union, the European Central Bank and the International Monetary Fund. Therefore, there is not such a thing as an eruption of Greek's financial sovereignty, since the country agreed to the conditions purported by the aforementioned three institutions.

Main Judicial Decisions

Mexico

Since the *Accion de Inconstitucionalidad* of the LFAR was recently admitted by the National Supreme Court of Justice, this section is solely focused on analysing the outcomes of the *Accion de Inconstitucionalidad* against the LFRSP.

As we have discussed, the result of this judicial process was the declaration of unconstitutionality of the following articles under the following premises:

- Article 6, first paragraph, sections II, III, and IV, subsections b) and c), and the last paragraph: This provision established the prohibition to any public servant to have a remuneration equal to or greater than their superior.[92-93] The Supreme Court deemed that the constraint violated Article 127 of the

[90]Blyth (2013) at 74.
[91]Blyth (2013) at 53-67.
[92]LFRSP, Article 6, 6-7.
[93]National Supreme Court of Justice. 2019. *Acción de Inconstitucionalidad 105/2018 y Su Acumulada 108/2018.*

Mexican Constitution, since it allowed setting remunerations in a discretionary manner.[94]

- Article 7, first paragraph, section I, subsection a), sections II and IV: This provision frames how the determination of the public servants' wages will be made. The Supreme Court nullified these sections due to the same reason mentioned above.[95]

At the time of this paper being written, no *Amparo* trial[96] has been started before any constitutional tribunals in Mexico. Unlikely, we will not see any arguments stating human rights violations against any of the Republican Austerity's laws since, as it is stated in both acts' explanatory statements, they are intended to reduce the excesses incurred by the elite public servants.[97] The Supreme Court did not purport a position regarding this concept, which leaves the possibility to discuss the reach of the "excesses" in further trials; however, this would be in reason of the discretionarily used by the legislators while determining what is an excess and what is not, as it happened with the two nullified articles of the LFRSP.

Greece

In Koufaki and the Adedy, the plaintiffs adduced human rights violations caused by the enactment of Laws no. 3833/2010, no. 3845/2010 and no. 3847/ 2010, deemed unfounded by the European Court of Human Rights. As stated by the Court in its judgment:

> *"The first applicant submitted in particular that despite the fact that her pay had been reduced permanently she had received no compensation for that deprivation of possessions or any promise of compensation in another form, such as a reduction in working hours, a lowering of interest rates or a reduction in loan repayments. Nor had any measure been taken to allow her to compensate for the deprivation of her possessions, for instance by practising as a lawyer in addition to her duties in the Ombudsman's Office. On the contrary, her financial situation had been made worse by the imposition of intolerable taxation measures: a professional tax of EUR 753.43, a special property tax, and a supplementary tax of EUR 1,731 on 2012 income. These were compounded by the rise in the price of basic essentials, fuel and public service charges. All those measures taken together had led to a drastic fall in her standard of living."*[98]

[94]National Supreme Court of Justice. 2019. *Sentencia dictada por el Tribunal Pleno de la Suprema Corte de Justicia de la Nación en la Acción de Inconstitucionalidad 105/2018 y Su Acumulada 108/2018.*,
[95]*Ibid.*
[96]"The Amparo protects the fundamental rights of a person -holder of those rights- who urges the amparo court to restore him/her of the enjoyment of them when an authority has transgressed them." See Martinez Andreu (2011) at 685.
[97]Chamber of Congress people (2018a) at 3 and Chamber of Congress people (2018b) at 103.
[98]*Koufaki and Adedy v. Greece*, paragraph 26, 5.

As we remember, the European Court of Human Rights deemed that these cuts were not a direct "deprivation of possessions," but rather as interference with the right to peaceful enjoyment of possessions for the purposes of the first sentence of the first paragraph of Article 1 of Protocol No. 1.[99] This interference was justified under the following considerations:

> *"34. The Court considers that the restrictions introduced by the impugned legislation should not be considered as a "deprivation of possessions" as the applicants claim, but rather as interference with the right to the peaceful enjoyment of possessions for the purposes of the first sentence of the first paragraph of Article 1 of Protocol No. 1 35. The Court notes that the interference was provided for by law, namely Laws nos. 3833/2010 and 3845/2010. 36. In assessing the public interest of the measures in question, the Court attaches particular weight to the report accompanying Law no. 3833/2010 and to the reasoning of judgment no. 668/2012 of the Supreme Administrative Court. 37. The Court notes first of all that the adoption of the impugned measures was justified by the existence of an exceptional crisis without precedent in recent Greek history. As stressed by the report accompanying Law no. 3833/2010, this was "the worst crisis in the public finances for decades", which "[had] undermined the country's credibility, thwarted efforts to meet the country's lending needs and pose[d] a serious threat to the national economy". The report stated that finding a way out of the crisis represented "a historic responsibility and a national duty" and that Greece had undertaken to "achieve fiscal consolidation on the basis of precise targets and a precise timetable"... 38. The Supreme Administrative Court further noted, in judgment no. 668/2012, that the reduction in the salaries, allowances, bonuses and retirement pensions of persons working in the public service, as a result of the above-mentioned laws, formed part of a wider programme of public finance adjustment and structural reform of the Greek economy which, taken as a whole, was designed to meet the country's pressing financing needs and to improve its future economic and financial prospects. Those aims were in the general interest and also coincided with those of the euro area Member States, in view of the requirement under European Union legislation to ensure budgetary discipline and preserve the stability of the euro area. By their very nature, the measures in question therefore contributed to an immediate reduction in public spending ... 39. In that connection the Court reiterates that the notion of "public interest" is necessarily extensive. As it has already noted, the decision to enact laws to balance State expenditure and revenue will commonly involve consideration of political, economic and social issues, and the margin of appreciation available to the legislature in implementing social and economic policies is a wide one. The Court will thus respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation 40. The Court also notes that, in addition to the salary-related measures laid down in Laws nos. 3833/2010 and 3845/2010, other measures had been introduced under different legislation aimed, among other things, at restoring tax equity and tackling tax evasion, reforming the social-security system and the public servants' retirement scheme, reviewing the procedures for checking and auditing the public finances, opening up certain closed occupations and placing State-owned companies on a sounder footing. 41. In view of the above considerations, the Court has no reason to*

[99] *Idem*, paragraph 34, 7.

> *doubt that, in deciding to cut public servants' wages and pensions, the legislature was acting in the public interest."*[100]

In this case, we can see that the European Directorate-General for Economic and Financial Affairs' Economic Adjustment Programme for Greece serves as definite background information to clearly define how the cuts suffered by Mrs. Koufaki and the Adedy were of public interest, since Greece was going through *"the worst crisis in the public finances for decades."*[101] This case law is highly important to determine the legitimacy of Greece's austerity policies; and it should be assessed by any country interested in applying similar methods.

Conclusions

Although AMLO's Republican Austerity does not happen in the same economic conditions suffered by Greece during the Euro Crisis of 2008, we can extract certain lessons learned from what happened in the Hellenic country.

The case of Koufaki and the Adedy v. Greece is highly relevant to understand how to give legitimacy to the austerity measures applied. As we remember, in the "*Accion de Inconstitucionalidad"* filed against the LFRSP before the Supreme Court of Justice of the Nation, the court declared the invalidity of articles 6 and 7 of said norm, since they had a broad discretion for allocate austere remuneration for all public servants at the federal level. This was not the case of Laws no. 3833/2010, no. 3845/2010 and no. 3847/2010, because this legal triad was accompanied by the European Directorate-General for Economic and Financial Affairs' Economic Adjustment Programme for Greece; a document which stated the financial background, necessities and conditions for the austerity measures that affected Mrs. Koufaki and the Adedy.

At last, the austerity measures prevailed in Greece. Yes, the European Court of Human Rights deemed that there was an intrusion with the right to peaceful enjoyment of possessions for the purposes of the first sentence of the first paragraph of Article 1 of Protocol No. 1.[102] However, public interest was at stake if the financial cuts were not inserted by the enactment of Laws no. 3833/2010, no. 3845/2010 and no. 3847/2010. In Mexico, the lack of an explanation on how or why (and, if there were any, they were vague and highly discretional) the Republican Austerity would be applied. The difference lies there and it should be worth discussing next time the Mexican government plans to issue policies under the austerity wings.

[100] *Koufaki and Adedy v. Greece*, paragraphs 34-41, 7-8.
[101] *Idem*, paragraph 37, 7.
[102] *Koufaki and Adedy v. Greece*, paragraph 34, 7.

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Judges and Law-making Authority: The New Brazilian Civil Procedure Code and the Limits of How a Civil Law Judge Could Act Such as a Common Law Judge

By Rafael de Oliveira Rodrigues[*]

This paper intends to compare two different legal systems, by the perspective of the role of judges and how this officer of the court applies and interprets the law. The author focusses on how and when judges are allowed to create law within their judicial decisions. In this sense, he analyses how application and interpretation of the law fit within the legal concept of discretion and, in case of adopting the possibility in which the judicial authority carries out this prerogative and he taken into account how different judicial discretion comes from legislative and administrative discretion. By taking law application and interpretation as an exercise of judicial discretion is a key element to allow us to identify the way the judges create the law in civil law and common law systems. This reasoning will lead us to find elements to understand the purpose and length of a trend seen in countries in Latin America such as Brazil with its new Civil Procedure Code, which focusses on importing means from common law system to increase the efficiency of Judiciary Power, in order to attend social needs.

Keywords: *Jurisdiction; law making power; civil law; common law.*

Introduction

Jurisdiction and its Connection to the Law

Before studying the jurisdiction and its role in and for the state, it is elementary to reach a complete understanding of the subject, focused on the law and its function in society.

It is important, therefore, to understand that the connection between society and law exists for centuries and is understood by the Latin maxims: *ubi societas ibi jus* and *ubi jus ibi societas*. In this sense, by focusing sociability, it is one of the most important features in human race and it has been the fuel to carry out a complex and sophisticated society in which we exist. The necessity to look for fulfilling our needs using intersubjective relations has allowed us to reach many more issues that we could not be isolated.

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The idea of society as a group of people gathered to assist each other to fulfil the needs of their members has been possible mostly because of the existence of an external element which has allowed people to live together with some sense of organisation. Thus, that key tool which has turned the life in society possible has been recognised as the law.

That being said, the law has created patterns and behavioural objective expectations, so that it made relationships among people possible. The intersubjective connections have developed in accordance with a determined form and pattern set by this external parameter, along with being able to keep away the instability of illegitimate expectations from one side to the other.

However, despite the existence of law, it is worth pointing out what Cintra, Grinover & Dinamarco wrote that

> *"[…] the dissatisfaction is always an anti-social fact, independently of having the intended right. The undefinition of people situation is always a reason to anxiety and individual and social tension*."[1]

That means they affirm that the law itself creates mechanisms to resolve conflicts or as they name it -"social peacefulness". The law brings tools which would be used in such case of disobedience from any member of the society. In that sense, among several ways of enforcing the law, sweeping away conflicts among members of community, the most used tool around the globe is that in which the state holds so responsibility and duty of resolving social disputes. That public function is named *jurisdiction.*

In relation to this mechanism (or instrument), it must be said that the history of human society has built a myriad of models but the most significant one, is the state jurisdiction. By this, it is acknowledged that the state holds the powers to set and implement laws, in such a way of resolving conflicts. It is important to consider that the origin of the term *jurisdiction* is the Latin *jurisdictio*, which means, tells what the law is.

According to this, the social peacefulness is acknowledged by the state as a very important value, so that it is an essential element to social development. By adopting such model, state jurisdiction, the state brings upon itself the duty of setting the applicable law to a case once presented to said authority as a conflict (in terms of interpretation or application of law).

Regardless of the model adopted (which will be considered later), jurisdiction is the duty which has been incorporated by the state because of the values in which it carries, which means, the social peacefulness and the law enforcement.

Once adopting the state jurisdiction model, the conflict resolutions turn into a state manifestation of power. It is not, then, a simple accomplishment of its previously set, objective law (which seems to be), but a law making act, surely respected, by the bounds which are provided by the system which gave it birth.

In this sense, Derzi's view is that the Judgement is "an act of applying and creating law".[2] Jurisdiction, then, not only to accomplish a precedent act of

[1]Cintra, Grinover & Dinamarco (2012).
[2]Derzi (2009).

power but has itself authority to enact, by itself, acceptable social behavioural patterns.

With the premise jurisdiction is able to create law, it becomes necessary to consider the limits and the form in which this power is implemented by the authorities.

By doing so, it is important to delve deeper into the study of the forms of states and types of law systems. That being said, the way state jurisdictions are implemented and their unique features and peculiarities, calls for more dialogue about the kinds of law systems that exist. This is one way to reach the depth of the law making process of judges.

Thus, the common law system presents *prima facie* a law making process considerably different from the civil law system. So being, by historical or philosophical reasons, the society of countries which common law is adopted acknowledges to judges the capacity of creating social behavioural norms. Another aspect is in countries where civil law is applied, the law making process is bound by statutory law which judges are allowed to declare (by the means provided by the system) the sense and content of the rules already displayed in the statutory system.

However, because of the challenges regarded to efficiency and legal certainty, there is a trend coming from Latin American countries to look more closely at the common law system.

The present paper intends to seek some limits for this trend, in order to better link the influence of the common law system to the basis of the civil law system.

Law-making Power, Law Application and Interpretation

Before focusing on the role of the law making process, it must be distinguished from other forms by which the judges apply jurisdiction. They are acknowledged by law interpretation and application.

Countries which adopt the common law system or the civil law system present common features, i.e., a system full of determined values which give content to a normative basis. This normative basis is built by statutory rules, which is nothing more than symbols (words) that form, in theory, a system that targets social norms.

In this sense, to make it possible to implement this set of values and symbols, the proper authority must use tools, such as law interpretation and application (it is important mentioning law integration that, despite relevant, will not be considered on this paper). Thus, it is mandatory, in an appropriate moment, to link these means used by the authority in the law making power. So, what is the meaning of law interpretation and what is the function?

The legal doctrine has been searching for some time a way to provide authorities boundaries to interpretation and the application of law. That being said, interpretation tends to frame the content, sense and length of the expressions which form law, providing it, as far as possible, with logic and symmetry.

It is, as affirmed by Schoueri, "by interpretation, it would be possible to build a norm, drawing out the most powerful meaning of it".[3] In this sense, the law authority uses interpretative methods acknowledged by jurists to clarify the sense of expressions and signs which a simple subsumption to law is unable to do.

Arguments have a reason whether this tool presents features of subjectivity or objectivity. Actually, the adoption of one way or the other depends on the focus of the interpretation process, i.e., on the interpretation building process (subjective) or, on the other hand, in the result of the operation (objective).

However, what seems to matter in relation to interpretative process is that its starting point is the statutes already in existence. In that order, the freedom of the interpreter is bound inside the parameters previously set by legislation. So being as Grau has affirmed that "the norm pre-exists in its sense, stated in the text that the interpreter reveals it[4].

Whether, from a pre-existent law, the interpretation process could be a tool, as well, to implement the law making process as a subject which will be considered further

On the other hand, there is the application of law, i.e., a judicial phenomenon which makes the law (objective law) into the command that will rule out determined intersubjective relations.

It is relevant to consider that the law application is, mainly, a mental process named subsumption, which intends to frame social facts analysed inside the boundaries set by the legislation. To Schoueri, it seems the analysis over facts (made by the jurist) is called "qualification"[5]. By this procedure, it must take the most relevant elements from the facts and compare them to the abstract normative prescriptions.

Different from the interpretation process (which turns its eyes to the law, abstractly speaking, to give it some sense), the application divides its attention between abstract law and reality (facts, which it takes by the qualification).

The law application, as well, (though not on the same intensity as law interpretation) has a connection to law making power. In this sense, the jurists discuss whether or when a judge applies the law, they move forward and, in some cases, create law.

With that, all the questions previously brought up will be considered in detail herein, so that this subject must be linked to each judicial system separately. It is set in that way because the study of the possibility (and its length) of the law making process depends on the features of jurisdiction and judicial system, as well as the way of seeing the law application and interpretation.

[3]Schoueri (2011).
[4]Grau (2005).
[5] Schueri (201).

Law-making Power in Civil Law System

Basis of the System

Before focusing on the comments of the civil law system itself and its features, it is necessary, preliminarily, to give an ideological and philosophical analysis over the basis in which this judicial system has been built over history.

With this goal, it is relevant to mention that this legal system has been conceived mainly in Continental Europe, where the first ideas had been sparked and then spread to many other countries throughout the world.

In this sense, these countries, in response to the Dark Ages, started adopting a scientific process (which later was best known by Scientific Revolution), where the rationalism, or the pursuit of an abstract idea (pure reason) was the guided element that moulded history. The premise which uphold the thought has intended to break the connection between knowledge and experience. It would be possible to reach to the right conclusion to most things, starting from an abstract idea and developing it, through a deductive process of reasoning.

Also, a historical context (especially in France) explains the idea of keeping the Judiciary Power apart from political decisions and the law, suggesting the statutory law (or the law created by the Legislative Power) as the only legitimate source of law.

That being said, based on a positivistic conception of law, the civil law system acknowledges the statutory law (legislation) as the only authoritative way to produce law, setting behavioural norms to rule the society.

In this sense, the assessment on the suitability of some social behaviour belongs to the legislative branch. So, only after a statutory law is adopted and signed into law, it tends to regulate all of society. The law, based on these ideas, is objectively abstract and subjectively general.

It is important to mention, the civil law system (at least originally) provided with the statutory law the power to create, modify and extinguish any right whatsoever it may be and or belongs to. Thus, the judge has been put in a secondary role, out of the process.

About this subject and because of the preeminent role provided in the legislation, the civil law system is a law model in which the legal positivism has found a broad range and at the beginning, along with the Exegese School, that subscribed the idea of a judge applying the law without self-interpretation. The judge would be (for the greatest minds of that time) the mouth which pronounces the law.

However, the School´s rigid position which has been abandoned by some, requires more flexibility. Some seek the theory of interpretation in getting relevant results. So, what was seen at first was that the only tool displayed by the judges to apply the law was the subsumption, in other words, the framing of facts brought to them to some legislation which (by itself) would bring some judicial consequences.

As the theory of Interpretation has brought good results, since adopted, the judicial community has acknowledged that the authentic interpretation given by

the legislator was not enough to apply the law sufficiently, to respond to social needs. Then, it provided to those whom applied the law some sort of tools which would allow them to assess the legislation in a considerably more efficient way in order to give a logical answer to society. For instance, systematic and teleological interpretation and analogy are huge examples of these tools.

In this sense, Ramos, for whom:

> "*Within the positivist thought, it didn´t take long to the interpretation by simple reproduction or application of things already set inside the statutory law fall apart, acknowledging the creative vessel of jurisprudence. And whom did this in an unequivocal sense was nothing less than Hans Kallsen, perhaps the jurist whom the better symbolise the legal positivism, so as the wide acceptation of his work. So, the author of Pure Theory of law did critics against the thesis of automatic subsumption, when he said that " the idea brought by the traditional theory of interpretation, that the determination of an act could be reached by any kind of pre-existent law knowledge is a contradictory delusion, so as attempts the basis of the possibility of interpretation.*
> *Kallsen, although demystifying the purely reproductive application of the law haven´t had it to appreciate the role of the interpreter but to close him to legislator, keeping the questions about theory of interpretation and the use of juridical argument apart from Dogmatic".*[6]

However, as seen above, the classic legal positivism, which featured the civil law systems doesn´t incentivise judicial discretion to allow the judges broad analysis of the content of law.

Despite this fact, it is inevitable the presence of this kind of discretion, providing the judge the chance of presenting himself to the legal system not just as an authority who just applies the law without participating in any degree (with the decision taken by the state when the legislation was created).

In that sense, we consider separately which is judicial discretion and which is administrative and legislative discretion.

Administrative, Legislative and Judicial Discretion

This subject is studied in the field of administrative law. Despite knowing there are some differences of perspective about the subject in Anglo-American and Continental European legal systems, considering the focus at this subtopic is on framing the subject on the civil law legal systems, legal discretion will be analysed by the eyes of these countries.

Administrative discretion is studied as a special power given to the public administrator to evaluate a practical situation and, based on opportunity and convenient criteria make the best decision possible to defend the public interest.

It must be considered that, this assessment and, as well as, this room for manoeuvring is strictly under the statutory law, so that the public law demands on the public administrator a whole and complete obedience to statutes and their terms. That being said, the law provides, deliberately, this margin to the public

[6]Ramos (2010).

administrator. It is acknowledged, in some cases statutes themselves deliberately are not sufficient to provide the state decision.

On the other hand, with no need to state the obvious, state law doctrine provides discretion to the legislators as well, focusing to create new behavioural norms to guide society under the Constitution.

Although, legislative discretion is quite broader than that from the public administrator, they are not strictly bound by the existing statutory law. That is just the opposite. It is not rare for a new statute changing completely the existing patterns, i.e., any amendment attaches to that statute is intended to further clarify and improve it.

It should be considered that legislative discretion (such as administrative and judicial) are not arbitrary and, we should make the distinction between these terms. Situations are presented in which the authority acts despite and goes beyond the law and its limits. Some are indifferent to any aspects of law. The relevant is just the public authority will. It is typical of absolutist kings who do not find any institutional checks and balances in any plan. The discretion, on the other hand, is limited to preset boundaries. The will, then, is bound to the law (mainly the Constitution and its values).

In this sense, for legislative discretion, the legislators, although not bound to pre-established legislation, are limited to the law mainly constitutional which provides them with authority over the statutes produced by them. So, the legislators cannot conduct themselves with sole autonomy. In other words, they are bound mainly to the Constitution (in a formal and a material way). Although, having broad discretion, it is mandated by the law. Otherwise, it would be sole arbitrary.

This being said, discretion is attributed by judicial authorities as well. On one hand, it is not possible for the Judiciary Power to rule based on convenience and opportune criteria, which shows the principal differences between the administrative and its.

Judicial discretion is strictly connected to the statutory law, to the contrary from legislative discretion.

The crucial point is, we do not recognise a limitless power which is given to a judge to innovate in law so that unconstitutional and the consequence of it which has not been considered as a case regularly ruled. Therefore, the judge must set aside the legislation only with just reason. So, they are unable to decide without considering the law in its entirety.

Relevant in this context shows how judicial discretion should be applied. At that point, it is presented by the use of methods of interpretation and law integration. Having already been considered, the legislator does not have the legal wherewithal to create legislation which would be able to foresee all the facts to societal rule, especially in these modern times, where it is becoming more and more complex.

Besides, the statutes been displayed like symbols – words – which necessarily need to be decodified in a way to turn them from general orders (commands) into concrete ones that are able to fulfil the rule in society.

With this, it is mandatory to adopt these resources (interpretation and integration law methods) mentioned above in a particular way to extract from these general commands the best sense of the word, i.e., the one in which best enforces the existent values set forth in the law, as well as the sense that put statutes in a better position inside the law system, doing so by a systematic analysis.

Means acknowledged widening the Civil Law System: Concepts, Types, General Clauses, Principles and Undetermined Concepts

Mentioned in the earlier topics, the focus was based on civil law judicial system. With that, by the legal positivist influence, statutes are the prevalent source of law. It is the legislation with the only authorised way to create societal behavioural patterns and shared administrative competences.

With this, a judge is put in a secondary role, so to speak. From the beginning, the premise taken that the legal system is complete by itself, relegating the Judiciary Power to follow the statutes already set forth voiding any prejudices. However, the evolution of the theory of interpretation has led to a law system broadened by judicial influence in creating law patterns.

It is clear to see, the model changing to adopt a system in which does not recognise the statutory law as the only way to make law and, by doing so, with this been capable of resolving societal conflicts.

This idea provides a new concept of Montesquieu´s separation of powers theory, upholding the integration of judges as political agents who actively participate in the process of creating patterns of societal behavioural.

For that reason, the Legislative Power presents a dominant role, acknowledging the necessity for the presence of a more active Judiciary Power, in terms of creating law. In this sense, the legislator uses a group of legislative techniques, such as types, general clauses and undetermined judicial concepts which will allow the judges to perform in a positive way, complementing the sense of statutory law.

In this sense, Misabel Derzi:

> *Besides, this deeper comprehension of things, specially of the creative role of the judge, doesn´t allow a "all-in", limitless, which bring to the ground the principle of separation of powers and, as well as, the public order and the rule of law.*[7]
> *It must not take the eyes off the idea in which the use of these tools must not be taken into account without seeing where it will be used. In this sense, the legislator must get the values around that segment of law and, by doing so, display the convenient instruments to reach the expected goal. For instance, Civil Law, especially Contract Law, in which the free will and business proposals are values substantially more intense than in Tax Law and or Criminal Law that, on the other hand, present substantial restrictions to fundamental rights, such as property and freedom. There is no such way to use those tools indistinctively, but in a way to get the goals set by each segment of law.*

[7]Derzi (2009) at 123.

Important to be mentioned one of the greatest paper works about this subject, whose author, Misabel Derzi affirms:

> *Type is a descriptive abstraction of the reality, provided by the sense given by the Law. For that reason, it is considered the way of thought that, by its fullness in referential notes to the object, it is more concrete, determined and specific than an abstract concept. Where we find in law, types, it is given an opening – thought and wanted by the judicial system itself. This is in the case of contracts, comprehended by typical and atypical, in which the normative regulation, though rich in notes and features, accept other kinds of contracts, created in the daily law, in addiction too transitive forms, where the parties, respected the boundaries displayed by the system, mix up different notes between different species, with total approval of the law.*

And following in her doctrine:

> *The approach between types and reality and its richness in descriptive features puts it in between the individual and the conceptual abstract.*[8]

The incorporation of the typological method of organisation of thoughts (judicial thought), by nature and definition allows for a connection between abstract and real, is the acknowledgment of the normative abstract construction, since the absence of reality is not enough to provide the answers expected from the statutory law. There is the necessity of recognizing the importance and need for these tools which would allow a better link between these two worlds.

On the other hand, general clauses are legislative ways put out, that, by their vagueness, bring to judicial system principles traditionally at first considered over judicial[9].

In this sense, for instance, the Brazilian Civil Code brings to the judicial system the principle of objective of good faith, both, to conclude and execute the contracts. This is the article 422 of the Code. In this case, the judicial system sets a metaphysical judicial concept which allows a broaden chance of participating in public duty which is to resolve conflicts evolving contracts and their interpretation.

However, it is not enough to apply simple and automatic subsumption of the fact to the preset law. It demands an evaluative analysis that would provide to a judge a more intensive role that they had as a simple law applicator.

About principles, in brief, they are species of law which provides values to the judicial system. In that order, the positivism and its metaphysical conception of law in which the statutes is the only reliable source of law is considerably contested so that with this (for many people) it is seen as a theatrical instrument to consolidate dictatorial regimes such as Nazism and Fascism in Continental Europe, as well as presented as an obstacle to take the members of those regimes to trial (for a positivist perspective, they were just following orders).

Hence, based on its ambiguity, a new doctrine was born. This new ideological way of seeing law provides its features not just to statutes but to principles as well,

[8]Derzi (2009) at 125.
[9]Derzi (2009) at 159.

which, previously stated, carries on important values to the system and provides substance.

In this case, an identification of these values, their suitability to facts as well as their length, especially when there would be a collision between principles and or their values, is a special role given to a judge.

In the end, so by undetermined judicial concept it is understood to be opened to the legislators the intention of introducing into the judicial system vague and polysemic expressions[10], targeting enclosing reality and abstract prescription. Then, for instance, whether the legislator prescribes the expression "urgency" or "non-wealthy person", it gives to a judge an increasing role where one will fulfil those expressions based on factual circumstances presented to them in a case.

The Role of Jurisprudence. Steadiness

Considering aforementioned arguments, it has been tested to demonstrate that the civil law system starts from a judicial model in which a judge presents a secondary role, just applying the law, heading to another paradigm that holds to him a political role, allowing to participate actively on the state decision making process.

In that sense, it has been tested to demonstrate that the own normative system, so that recognizing its capacity of giving effective answers to all social conflicts, brings on a myriad of tools which provide to a judge broad judicial opinion. In that order, it has been set boundaries in which the judge would be limited into.

Therefore, it is possible to affirm that the civil law system acknowledges the law making authority of judges. The length or degrees, of course, depends on the particularities of each system, singularly considered.

In general, there is no comparison with the law making powers between judges and legislators, the latter being responsible for editing general and abstract rules, which means. Whereas with judges, judicial decision is considerably narrowed, since individual (with whom had taken part in a lawsuit) and are able to affirm a subjective right to someone.

The public decision pronounced by the Judiciary Branch, set inside the limits of some lawsuit as well as within the frame displayed by the law, is considered legitimate exercise of law making power.

However, the principle of legal certainty provides a higher complexity to the law making authority of a judge (of the Judiciary Branch, better saying), so that it acknowledges the judicial decision, as a state act and within the limits set by the law. This creates legitimate expectations of future social behaviours.

Furthermore, the jurisprudence presented as a key element to create patterns of social confidence which must be observed. In this sense, an introductory idea about jurisprudence. For a civil law system, it is understood as a product of several decisions in the same sense, promoted by the same judge or Court.

Based on the premise that these decisions are not just reproductions of pre-set normative content but, beyond that, an official decision which acts complementary

[10]Derzi (2009) at 145

to the statutes, it is prudent to conclude that, more than just a commitment to the case under analysis, and there is a commitment to social behaviours in general (as well as the statutes). Thus, the repetition with steadily generate confidence with citizens to follow the sense (interpretation) taken by the State.

Additionally, there is one more way of authoritative law making powers of judge which not only create the law in the sense which provide content to some legal norms or acts integrating the law by tools such as analogy, but make law in the sense in which this complementary act frames social behaviours in a desired sense.

This been demonstrated, despite the statutory law is prevalent in the civil law system, which in turn increases the judge's role, since framed with the statutory boundaries in mind.

Law-making power in Common Law System

Basis of the System

Some countries have adopted a law system in which the habits, traditions and customs are vital elements and head the production and application of rules. Thus define common law system.

This paper does not intend to bring this topic into detail but set general guidelines which will allow us to define the necessary basis for its purpose and enable us a better understanding of the law making process in such a system.

Some points deserve attention in regards to this system. Firstly, it is not possible to define what common law is without mentioning Oliver Wendell Holmes Jr.´s definition, which is quoted from his book "The Common Law". He said that:

> *A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries, the custom, belief or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received. The subject under consideration illustrates this course of events very* clearly.[11]

From his quote, there is a narrow connection between social practices and the law. In this sense, by repeating practices, society consolidates its values and its understanding about what is right or wrong. A common law system strengthens an empiric perspective of seeing what is lawful.

[11]Holmes (1963).

Therefore, the source of law is accepted as is by society (and implemented later by the state). This idea of law has been applicate for centuries and has reinforced by John Locke and David Hume.

Common law system is understood to be where the legal system is formed by repeated social actions throughout generations which are laden of values and principles to demonstrate the importance for the society for which deserves to be preserved by law.

It is important consider that sometimes, as affirmed by Holmes, habits or beliefs disappear, but not the social values which has come from them. Those values, in fact, give support to the law:

> *The law embodies the story of a nation´s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been*, and what it tends to become.[12]

Similarly, Roscoe Pound, following the doctrine of Friedrich Savigny (who was an influential figure from the Historical School in Germany and known by his teachings about *Volksgeist*), stated that common law "is habits of popular action recognised by courts or from habits of judicial decisions or from traditional modes of judicial thinking"[13].

Then, according to Pound, the customs could be presented under three different forms, which are: custom from popular action, from judicial decision and doctrine and academic discussion over principles. With that, it is possible to affirm that the full comprehension of common law demands the understanding of its two elements: tradition and enacted or imperative element.

In this order, the historical understanding about the law and society for common law is a relevant element. But there is something else, so that the common law demands accurate analysis of how this historical element connects to law (subject that the Anglo-American judicial doctrine has been studying for centuries).

Then, under an analytic perspective:

> *for a long time they conceived that the traditional element had an independent validity beyond and without respect to the state.*
> *It is considered that the jurist, the judge or legislator simply gives these habits of action the dress of doctrine, precedent or statute*.[14]

It is important to notice the intensity of this connection between tradition and the imperative element which makes it possible to understand what the law making power of common law judges is, we must think about the way (means) in which the legal system provides judges the authority to apply the law.

For this reason, the specialised doctrine has been progressing throughout the centuries. At first, the common law system provided the judges the power to

[12]Idem.
[13]Pound (1946).
[14]Pound (1946).

declare what law (common law) was. Although, after time the common law system evolved to demonstrate to them the power to create the law.

Though, this discussion has come from centuries old theories, as it is possible to verify in the iconic Dr. Bonham´s case, where Edward Coke, as the Chief Justice of the Court of Common Pleas set in 1610 that precedents should be submitted to common law.

All things considered, the precedent, such as the statutory rule, is able to not only acknowledge the principles already set by the common law and also, with the Pound's words, "gives the dress of precedent". The same thought was brought by Blackstone in his Commentaries. As Justin Zaremby affirms in his Commentaries, Blackstone said that "that the common law, if made in connection with certain natural principles, was fundamentally correct."[15]

However, jurists such as Bentham and Austin were pointed in affirming that by limiting the power of judges to such role of declaring the law which is already set minimises said powers. With this, it is relevant to recognise power to create law by judges. Precedents, equally, is tradition in action and in other words, the law in action.

In contrast, the ideological propositions which have been adopted by some countries, especially United States, such as legal realism and legal pragmatism uphold the idea of creating the law, so that the judge is not attached (just) to the past, but committed to the present and future.

The realism presents itself most significantly with Holmes and his metaphysical group, followed by Pound and his sociological perspective over jurisprudence and, in the end, consolidates with Llevelyn. mostly because of intense debate between the latter and Pound.

In this sense, Llevelyn focused on law effectiveness and permanent societal changes:

> *"[…] and in flux typically faster than the law, so that the probability is always given that any portion of law needs re-examination to determine how far it fits the society it purports to serve"*[16]

In that order, seen by the traditional perspective (declaratory) or by the perspective that provides to a judge a more active role (positivist), to common law, in theory, judges have more leeway in relation to civil law judges in terms of power to create law. The judicial discretion, then, is considerably wider.

That being said, the common law system allows, in general, the co-existence between precedents and statutes, with the same capacity of establishing behavioural patterns and to dictate what law is. It means that, both have legal authorisation to comprehend the values and principles of the society, based on a set of rules to be followed. It has been said in general so that whether decided to legislate, unless unconstitutional, the judicial interpretation must be framed by the limits of the statutes.

[15]Zaremby (2014).
[16]Llevellyn (1931) at 1236.

In these terms, it is important to acknowledge the difference between these two systems. Within the civil law system, the judicial decision must be necessarily bound to the statutory law. That provides less judicial discretion in comparison to a common law judge, as detailed in the precedent topic.

Therefore, as long as not limited by statutes, the common law legal system allows to judges a wide judicial discretion which finds its limits only on precedents, which means, the judicial decisions set by Superior Courts which bind the reasoning of lower Courts or singular judges.

Judicial Decision Elements: Ratio Decidendi e Obiter Dictum

Though it seems just a technicality, the correct identification of the elements which form a precedent in common law is important so that it is the starting point to seek the length of a binding precedent.

In this sense, considering the importance of the precedent in common law, it is necessary to look for its content and extensions. By doing so, Sir John Salmond affirmed that:

> *A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element or often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regard the world at lar*ge.[17]

The relevancy structure of a decision (considering it as a precedent), which includes two rules: in one instance the rule which will decide the case itself (it is restrained to the litigants) and on the other a rule which will overtake those and, in fact, will create law. The latter is known as *ratio decidendi.*

Therefore, the study which features the binding content of a precedent, the doctrine, especially in United States, presents several models, in which Eugene Wambaugh, Arthur L. Goodhart and Rupert Cross are iconic.

As for Wambaugh, the identification of *ratio decidendi* is given by looking for the legal reason in judgment (general rule) and test its fundamentals for deciding a case by setting aside one argument or another. By doing so, it is possible to verify if the outcome of case would have been decided differently.[18]

In contrast, for Goodhart "the principle of a case is found by taking into account (a) the facts treated by the judge as material, and (b) his decision as based on them".[19]

And finally, the most consistent of the three, as Rupert Cross affirms the *ratio decidendi* should be verified by taking into consideration both material facts and the legal reasoning which leads to a final decision[20].

[17]Goodhart (1930).
[18]Wambaugh (1892).
[19]Goodhart (1930).
[20] Cross & Harris (1991).

It is prudent to mention some words about *obiter dictum*. In this sense, the legal reasoning to reach a decision in many cases demands for previous judgments or presuppositions that, despite not being essential to uphold a final decision. Those arguments are considered "*obiter dicta*".

Obiter dicta arguments though could indicate the way of thinking of a judge in future cases are not able to bind other judges so that does not belong to the principle of the cause.

With the precedent considerations, though seemingly purely theoretic and academic, allows us to identify the principles in cause, comprehended, acknowledged and applied by the judge in his task of creating the precedent.

So, with the authority and binding force of precedents, the principle steps up to a new legal status, such as social behavioural patterns.

The Influence of Common Law System on Civil Law Systems and the Backlash on the Present Subject

As been set thus far, which sought to demonstrate general guidelines about both civil and common law systems, now it is time to verify whether in fact there is an influence on one or another.

In that order, it is known that it is not new a trend in common law countries by increasing its legal system with statutory law (law made by the Legislative Power). However existing, not being the so goal of this work, the political, legal and social reasoning which led the countries to do so will be set aside.

However, as expressed in this paper, there are countries which despite having adopted the civil law legal system, where the guideline is exclusively what the statutes set, are providing more and more authority to judicial decisions to do so.

Therefore, from a system in which, in the beginning considered a judge as "the mouth that pronounce the words of law", they started taking into consideration why and how the law is created by the Courts.

In this sense, at first the precedents have been entirely forgotten on the University benches. Moreover, they were not considered as arguments to convince public agents and their decision-making process (administrative or judicial).

However, over time, changes occurred. The reason for this was the social assessment which had been shown to be the less efficient for the justice system. Then, in order to fix the unreasonable delays of the Judiciary Courts and the lack of legal certainty they have demanded a series of measures in regards to improving the justice service as a way to enforce the law.

In that sense, a lot of research has been conducted and the results have shown a trend in several countries, especially in Latin America to take some judicial tools typical of common law legal system, in a way of bringing steadiness and agility to their judicial systems.

For instance, the World Justice Project, an independent and multidisciplinary organisation created to help to implement the rule of law throughout the world, launches annually an Index, with the assessment of governmental institutions in 196 countries, in order to seek whether or not they obey standard rules of law acknowledged worldwide.

It is possible for one to come away with the idea that among Latin American countries, such as Brazil, Colombia, Argentina, Mexico and Peru, it is a way of having a judicial system with considerably low levels of efficiency.

On the other hand, countries which have adopted the common law system, such as United States, United Kingdom, Australia, New Zealand or even South Africa have presented numbers much more convincing.

Such results have suggested that by the high rates of efficiency in common law, civil law countries (especially in Latin America) have incorporated common law tools in order to bring steadiness and legal certainty to their systems. In order to provide law making powers to their judges was one of these means.

It is not the goal of this paper to consider whether this political decision (of incorporating common law means in order to improve the legal system) is good or not, so that it seems sociological. The focus here is whether it or not compatible to take, by civil law countries, common law means considering their features.

To get into details, for instance, Brazil does not bring a different trend and has being grappling with this for decades. Its Supreme Court adopted, in 1963, the *Summula*, as a way to summarise its decisions in order to better apply them to the cases under judgment.

After the consolidation of this procedure, *Summula* were adopted in all Courts in the country and jurisprudence started being taken into consideration as a tool to set the judicial thought.

The success of this idea was seen as a starting point to change the weight of Brazilian jurisprudence. However, this changing obeyed the features of civil law, so that it was implemented not by tradition or customs but by statutes, which lifted the jurisprudence to another level. For example, the Constitutional Amendment 45, which acknowledged to the Supreme Court the competence to create Binding *Summulas*, or some ordinary laws, such as the new Civil Procedure Code which provided binding authority to the Supreme Court or Superior Court of Justice precedents.

The Brazilian Civil Procedure Code as defined in its article 926 a duty of all Courts to keep their jurisprudence steady, straightforward and coherent. This norm shows the intention of the Brazilian law system of improving the jurisprudence in order to make it applicable to other cases. Besides, the new code imposes to judges and Courts the duty of regarding the previous judicial decisions of the courts enlisted in article 927, as the underlying reason to decide. Another example of this attempt of importing means from common law is a rule which obliges judges to point out the facts and arguments by which they apply or not apply a precedent in discussion.

As already pointed, there are substantial differences in terms of origins of this increasing of precedents between the studied legal systems. Common law has created it by tradition and civil law by statutes.

Although, these facts have shown us the trend of admitting the power of creating the law, in a way of considering the precedent as a source of law, in order to set behavioural patterns.

In this sense, the civil law system can´t be considered a closed system (to other sources of law but the statutory) heading to be considered an open system, including the Judiciary Power in the relevant task of creating behavioural models.

However, this opening process should be understood in the length and limits admitted by the civil law system and its basic features.

That said, the authority of a precedent is given inside the boundaries admitted by the system to judicial discretion, which means, inside the frames in which the judges are bound to interpret the laws already set by statutes (including the most important one - the Constitution).

Conclusions

The discretion of common law judges has been providing to them the powers to create law by precedents with the same authority as statutes. Thus, the judicial decision has the authority as the source of said law and, because of it, it is able to lay down rules. On the other hand, the discretion of civil law judges, in the way it is currently understood (which presents Brazil as an iconic example) is being able to create precedents as well. Although, the length admitted by the system does not allow judges to rule as common law judges do.

As previously considered, civil law system legislator has started using several instruments to improve the law in order to address social expectations, such as types, principles, general clauses and undetermined judicial concepts. However, by doing so, they turned the legislation into limits considerably flexible. In that sense, the judges present an important role, as public agents capable of fulfilling statutes and setting a legal system more suitable to a societal environment.

However, despite reaching that underlying purpose of law, in order to better attend social needs, this measure has caused another problem, so that there has not been judicial uniformity in how to interpret statutes. The consequence was legal systems which have lacked legal certainty and extremely inefficient so that the litigant was allowed freely to file several appeals, including to Supreme and Superior Courts of Justice.

Keeping that issue in mind, it is been seen a trend especially in Latin American countries which intend to solve the problem by taking means from common law legal systems in order to establish efficiency and legal certainty. One of these instruments is the precedents and their theory of how they are applied in common law.

However, this political decision cannot be taken without any consideration. The suitability of such means must be analysed in advance, considering the substantial differences among the basis and perspectives of the evolved legal systems.

In that sense, it is not unknown civil law judges are able to use the judicial discretion primarily by using the interpretative process in order to provide more effectiveness to statutory law. Under these limits, they are able to bind social activities and create behavioural standards for the purpose of bringing more legal certainty to the legal system.

Therefore, judicial precedents in civil law legal system which is framed by statutes (mostly constitutionally) are lawful as long as bound by existing statutes.

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