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The Diffuse Borders of Judicial Law[1]

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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.*

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 existence. The first implies that a rule is valid or, what is the same, that it belongs

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[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.

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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 order rests on the ability to secure and extend rights[11]. The explanation lies in the

[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.
[11]Arnaud & Fariñas (2006) at 50 et seq.

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 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

[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).

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 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

[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.

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].

[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.

Special Considerations Regarding Adapting Legal Rules to Cases in Dispute

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

[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.

foundation of statements establishing conditioned preferences between rights or 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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